RESCUING COMPANIES OR THEIR CREDITORS:

Understanding the role of the Company Voluntary Arrangement as a rescue procedure in the UK

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Abstract

This study analyses and discusses the interaction of the key elements contributing to the current use of the Company Voluntary Arrangement (CVA) and the role it plays as part of the rescue culture.[1] The areas discussed include potential issues with the current statutory and regulatory framework;[2] the role of the Insolvency Practitioner;[3] the control exercised by the different classes of creditors;[4] and the impact of company characteristics on the use of the CVA.[5]

The CVA is the only UK insolvency procedure that encourages a 'debtor in possession' solution while also remaining flexible enough to be used for 'distributions' and 'managed wind-ups'.[6] A distribution CVA is invariably used in conjunction with other insolvency procedures, while managed wind-ups frequently replace the use of a formal liquidation procedure,[7] particularly where the business is not being sold as a going concern.[8] The data from the longitudinal study is used to focus on the perceived impediments to the routine use of the CVA as a first choice option for business rescue.[9]

The study discusses the rescue ideology and external influences on the statutory framework[10] together with the wider rescue outcomes post the legal outcome of a completed CVA.[11] This broader discussion includes the impact of the use of the 'pre-pack'

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1 The methodology is explained in the introduction.
2 See Chapter 2 *The statutory and regulatory framework of the CVA*.
3 See Chapter 4 *The influence of the IP on the use of the CVA*.
4 See Chapter 5 *Creditor participation in the CVA*.
5 See Chapter 6 *The role of the company in the CVA*.
6 See Chapter 3 *The CVA: identifying characteristics and measuring outcomes.*
7 For insolvent companies this includes creditors; voluntary liquidations and winding up by court.
8 See Chapter 2 *The statutory and regulatory framework of the CVA* and Chapter 3 *The CVA: measuring the use and outcomes.*
9 See Chapter 5 *Creditor participation in the CVA*.
10 See The World Bank Doing Business project reports and their rankings alongside the impact of the EU Directives and UNCITRAL model law.
11 See Chapter 1 *The rescue culture* and Chapter 3 *The CVA: identifying characteristics and measuring outcomes*.

in the rescue hierarchy where the CVA is terminated by an administration order or in cases where a CVA becomes the exit route from an administration.

The study uses the findings from the data analysis to identify ways in which the use of the CVA can be recalibrated for increased use by micro businesses.[12] The recommendations promote increased satisfaction and participation of the creditors with more efficient use of the procedure and improved distribution levels. The conclusion discusses the cost of rescue with the maximisation of returns to creditors together with how that can be accomplished from the suggested recommendations.

12 See section 1161 CA2006 for the definition of the type of undertakings.

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Glossary of terms and abbreviations

In line with many professions the world of insolvency makes extensive use of technical terms and abbreviations that are used throughout this study and in some cases have more than one definition. These have been summarised in the glossary below with reminders included at relevant points in each chapter.

Term	Abbreviation	Definition
A		
Accountant in Bankruptcy	**AiB**	The Accountant in Bankruptcy performs a similar role to the Official Receiver in Scotland.
Actant		A term used in Actor-network theory. An actant is any element of a network being analysed and can be either human or non-human.
(The) Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021	**Connected Party Regs**	These regulations are to be retrospective and will come into force from 20 April 2021. See below for a summary of the multiple definitions of connected party.
Association of Certified Chartered Accountants	**ACCA**	The Association of Chartered Certified Accountants is a global body for professional accountants established in 1904. It was granted a Royal Charter in 1974 which commits it to acting in and upholding the public interest. It is a member of IFAC and is represented on key regional forums including the ASEAN Federation of Accountants (AFA), the Confederation of Asian and Pacific Accountants (CAPA), Accountancy Europe, the Institute of Chartered Accountants of the Caribbean (ICAC), the Pan African Federation of Accountants (PAFA), and is a member of CCAB in the UK and Ireland.
Actant		A term used in ANT to indicate human and non-human parties in the relevant network.
Actor		A term used in a social sciences context to indicate any person who is involved in any specific action being studied.
Actor-network Theory	**ANT**	ANT is a research method which focuses on the connections between both human and non-human entities.
Administration	**ADM**	One of the corporate insolvency procedures introduced by IA86.

Term	Abbreviation	Definition
Administrative Receivership	**ADR**	A non-court insolvency procedure whereby the charge-holder appoints an IP as office-holder to take control of the whole of the company's assets to realise the funds to repay the outstanding debt.
Articles of Association		These are the rules setting out the way in which the company should be run and agreed by the shareholders or guarantors, and all the company officers. There are standard formats available.
Associate		The definition of associate under the insolvency Act is set out in s 435 in Part XVIII and includes any person with a either a business or personal relationship with the person concerned. SIP9 also includes a wider definition of associate in paragraph 2 for the purposes of reporting costs and expenses.
Authorising Body		A professional body declared to be a recognised professional body or a competent authority under any legislation governing the administration of insolvency in the United Kingdom. For insolvency see Recognised Professional Body (RPB).

B

Term	Abbreviation	Definition
Department for Business, Energy and Industrial Strategy	**BEIS**	BEIS was formed on 14 July 2016 from the amalgamation of The Department for Business, Innovation and Skills (BIS) and the Department of Energy and Climate Change (DECC).
Bonding		Insurance cover required by office-holders. It consists of two parts: the general enabling bond which must be in place before an IP accepts an appointment and the specific penalty element which is calculated on the net assets of each entity subject to an insolvency procedure. This must be put in place during the first month after appointment. Late notification to insurers or RPB attracts a fine.

C

Term	Abbreviation	Definition
Charge		The acknowledgment of a legal debt registered by a lender which evidences the security over the assets of a borrower. Can also be described as a debenture. CH retains copies of all the charges registered together with the data of satisfaction.
Chartered Accountants Ireland	**CAI**	The Chartered Accountants Ireland was founded on 14 May 1888 and established by Royal Charter. It is Ireland's largest accountancy body. It represents members globally.

Term	Abbreviation	Definition
Chartered Accountants Regulatory Board	**CARB**	CARB is responsible for overseeing the fairness, impartiality, rigour and integrity of the regulatory and disciplinary responsibilities of Chartered Accountants Ireland as well as supervising their regulatory and disciplinary functions.
Companies Act 2006	**CA2006**	Companies Act 2006
Companies House	**CH**	All documents filed with the registrar of companies are filed at Companies House. Summary data is displayed online in two formats.
Companies House: access to documents		Two services provided access to CH information and both were used. The first 'WebCheck' which provides all the basic company data free of charge with access to individual documents requiring payment. WebCheck is planned to be a discontinued service. The second option is the 'Beta Service' which provides the same basic data in a slightly different format and also free access to the majority of filed documents. It should be noted that dissolved companies were deleted from the Beta service after 6 years however they are now being reinstated as the WebCheck service is discontinued.
Companies House Beta service	**CHB**	Companies House online service providing free access to filed documents. However this service does not cover all dissolved companies and some documents are restricted and only available for an additional fee. CH have advised that in January 2021 all deleted dissolved companies will start to be reinstated. Eventually further data will hopefully become available.
Companies House WebCheck service	**CHW**	Companies House online information service providing free basic data however copies of the actual filed documents can only be obtained for a fee.
Company Voluntary Arrangement	**CVA**	An arrangement proposed by the directors to rectify a financial issue. The terms can be either a scheme of arrangement or a composition of the outstanding debts.
Composition		One of the two types of CVA (see s 1 IA86) allowing less than payment in full to be made to the creditors bound by the agreement in full and final settlement of the debt. On completion the supervisor is required to issue a certificate that confirms the effective date of the agreed composition to trigger bad debt relief provisions.

Term	Abbreviation	Definition
		See rule 2.44(2) IR2016 and equivalents in other UK jurisdictions scheduled in Appendix B.
Compulsory Liquidation also Winding Up by Court	**WUC**	A compulsory liquidation or winding up by court refers to court controlled liquidation as opposed to a voluntary liquidation. This is a liquidation commenced when a petition is filed in court by a creditor, director, member or supervisor.
Compulsory Strike-Off	**CSO**	The Registrar of Companies has the power to instigate strike off proceedings where a company has failed to file the relevant return and accounts.
Connected party		This term has multiple definitions and these are set out below with the relevant application.
Connected party (1) See s 249 IA86		For the purposes of the Insolvency Act 1986, persons connected with the company are directors, shadow directors, associates of such directors or shadow directors and associates of the company. See above for the definition of associates under the IA86 and which includes employees.
Connected party (2) See para 60A Schedule B1 IA86		The statutory power contained in paragraph 60A Schedule B1 IA86 the term 'connected person' excludes employees (who are not also directors or shadow directors).
Connected party (3) Per SIP 16		Where reference is made to 'connected party' in the Insolvency Service's analysis of SIP16 statements this excludes secure lenders with voting rights in the normal course of business of a third or more (as set out in SIP16).
Connected party (4) Other uses of the term		Where reference is made to the Graham Review a 'connected party' again excludes employees (who are not directors or shadow directors) and secure lenders with voting rights of a third or more used in the normal course of business.
Connected party (5) See s 252, CA2006		For the purposes of the CA2006, a person is connected with a director if they are a member of the director's family (that is, the director's spouse, civil partner, any person with whom the director lives as a partner in an enduring family relationship, a child or stepchild of the director, a child or stepchild of a director's partner (if living with the director and under the age of 18), or the director's parents).
Connected party (6) See section 252, CA2006		A company is connected with a director if the director (and persons connected with him) is interested in 20% or more of the equity share capital of the company, or can exercise more than

Term	Abbreviation	Definition
		20% of the voting power at a general meeting of the company. There are similar provisions which serve to connect persons to a director in relation to trusts set up for the benefit of that director or his family, and in relation to partners of a director.
Connected party (7)		There is frequently reference to secured lenders who are also ex directors who have been provided with security after retiring from a business. They formally fall outside the above definitions (except where they are a relative of a current director) but where the relationship (especially in relation to a prepack sale of business) is noted, it is usually disclosed.
Corporate Insolvency and Governance Act 2020	**CIGA**	Introduced a range of new provisions inti both the IA86 and CA2006 including a free standing Moratorium procedure (IA86) and a new Restructuring procedure (CA2006).
Creditor		A person owed money. There are different classes of creditor including secured, preferential and unsecured. Other terms used to describe other categories include priority creditors and super priority creditors. The definitions of these latter groups are defined when used.
Creditors' Voluntary Liquidation (para 83 follow-on appointment)	**CVL FO**	This is a liquidation following the administration of a company with the liquidator named in the proposals. This type of appointment is made under Schedule B1 IA86, para 83
Creditors' Voluntary Liquidation (s98 / s100 separate appointment)	**CVL**	This is a liquidation previously commenced under section 98 IA86 outside the jurisdiction of the court. The same process is now commenced under section 100 IA86. The creditors have the right at the outset to approve or appoint a new liquidator to manage the winding up procedure.
Crystallisation		The term used to describe the process whereby a floating charge attaches to specifically identified assets thus becoming a fixed charge with the attached security and enforcement rights. An insolvency or the appointment of a receiver usually triggers this event.
CVA Group		These are groups designated as such by the virtue they are placed into a CVA on the same day. In some cases these groups include terms that allow the supervisor to provide a single report and distribution. In other cases reporting has been maintained for each separate entity. It should be noted that in some cases the CVA Group does not include all of the accounting group and in other

Term	Abbreviation	Definition
		cases although the businesses have the same owners they have processed individually without any consolidation.

D

Term	Abbreviation	Definition
Dear IP		A newsletter to keep IPs updated on changes in legislation and guidance. It is issued by the Insolvency Service for England, Wales and Scotland and separately for Northern Ireland. Note that the Insolvency Service in Northern Ireland is part of the Department for the Economy.
Debenture		The acknowledgment of a legal debt registered by a lender which evidences the security over the assets of a borrower. The security is also described as a charge and they are separately recorded at CH.
Dissolution		There are four routes to dissolution of a company.
Dissolution (1) Post liquidation		Automatic dissolution post a liquidation
Dissolution (2) Post administration on request		A request for early dissolution post an administration where the purpose has been fulfilled and the company is not being returned to the existing management.
Dissolution (3) Application for VSO		A request for Voluntary Strike-Off on the application of a director.
Dissolution (4) Action for CSO		Compulsory Strike-off action is instigated by the Registrar in the absence of any relevant documents having not been filed for a period of at least 6 months.
Doing Business Reports	**DBR**	The World Bank Group program issues annual reports summarising the findings of a research team. They have been published annually since 2004.

E

Term	Abbreviation	Definition
European Commission	**EC**	This is an institution of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.
(The) European Economic Community	**EEC**	This is the organisation created by the Treaty of Rome of 1957. It brought about economic integration for a group of initial member states.

Term	Abbreviation	Definition
European Union	**EU**	The EU is a political and economic union with currently 27 member states that are located primarily across Europe.
European Regulation on Insolvency Proceedings	**ERIP**	The rules that regulate cross border insolvency proceedings and apply to all companies whose centre of main interest is in the EU (other than Denmark).
Evaluator		An independent person required to provide a qualifying report on a proposed prepack sale of business. The role was introduced as a mandatory requirement for all connected party prepack sale of businesses made after 20 April 2021. The legislation is being enacted retrospectively as The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 has not been passed.

F

Term	Abbreviation	Definition
Fixed Charge		Indicates when security is held over specific assets such as property or intangible assets such as intellectual property or goodwill. In Scotland a fixed charge can only be held on property and this is called Standard Security.
Fixed Charge Receiver		A person who is appointed to act on behalf of the charge-holder to realise the secured asset(s) on behalf of the secured creditor.
Floating Charge		An equitable charge on property that may change from time to time in the ordinary course of business e.g. stock. This type of charge can crystallise or be converted into a fixed charge on the same assets at specific times.

G

Term	Abbreviation	Definition
Groups (1)		Groups of companies can be linked in a variety of ways. Linked ownership indicates vertical control and ownership which can vary by percentage of shares owned. Common ownership indicates a group of companies with the same owners but may not operate as a formal group.
Groups (2)		For the purposes of this study CVAs approved for a group of companies with common or linked ownership have been given a title of CVA designated group. In some cases the companies have been administered as separate entities but in other cases the creditors have agreed that assets and administration of the funds should be pooled with a single receipts and payments

Term	Abbreviation	Definition
		account. Where applicable the nature of these CVAs has been identified in the text.

H

Term	Abbreviation	Definition
Her Majesty's Revenue and Customs	**HMRC**	HMRC was formed by act of parliament in early 2005. Prior to that HM Customs and Excise and the Inland Revenue were separate government departments charged with overseeing and collecting respectively Value Added Tax (VAT), corporation tax as well as PAYE and NI for any employees. For the purposes of this study they have been treated throughout as one department and a single creditor even though it took some time for this amalgamation to be completed.

I

Term	Abbreviation	Definition
(The) Institute of Chartered Accountants in England and Wales	**ICAEW**	The Institute of Chartered Accountants in England and Wales is a professional membership organisation that was founded on 11 May 1880. It promotes, develops and supports chartered accountants and students around the world.
(The) Institute of Chartered Accountants of Scotland	**ICAS**	The Institute of Chartered Accountants of Scotland was founded on 11 December 1854 and is a professional membership organisation that promotes, develops and supports chartered accountants and students across the world.
INSOL International	**INSOL**	INSOL International is a federation of world-wide national associations of accountants and lawyers who specialise in turnaround and insolvency.
(The) Insolvency Act 1986	**IA86**	Effective date: 29 December 1986
(The) Insolvency Act 2000	**IA2000**	Effective date: 1 January 2003
Insolvency Code of Ethics	**ICE**	The insolvency code of ethics was issued by the Joint Insolvency Committee (JIC) and is intended to assist insolvency practitioners to meet the obligations expected of them by providing professional and ethical guidance.
Insolvency Ethical Guide	**IEG**	Prior versions of ICE were agreed and issued by the RPBs as a joint ethical code for insolvency practitioners. The latest version of that document was published in January 2004 and entitled "the Insolvency Ethical Guide". It was agreed the Insolvency Ethical Guide should be reviewed and redrafted to align it more closely to the IFAC Code. It was updated in January 2009 by the JIC

Term	Abbreviation	Definition
		and was subsequently published as a new document as the changes made it impossible to highlight the areas changed from the old version.
Insolvency Appointment		Includes any formal appointment made under the Insolvency Act 1986. These can only be taken by a licensed Insolvency Practitioner. This includes appointments as a nominee or supervisor of a voluntary arrangement.
Insolvency Practitioner	**IP**	An individual who is authorised and licensed to act as an Insolvency Practitioner in the United Kingdom by an authorising body. The role of the IP as an office-holder under the IA86 includes the role of nominee and supervisor of a voluntary arrangement. It is also now extended to the role of Regulator for a free standing moratorium inserted into IA86 by CIGA.
Insolvency Service	**IS**	The Insolvency Service is an executive agency of the Department for Business, Energy and Industrial Strategy (BEIS).
Insolvency Service Statistics	**ISS**	The Insolvency Service Statistics are published by the ISS department. They kindly provided the initial list of company numbers used to extract the core data.
Interim Liquidator		A replacement for the official receiver appointed in Scotland by the court on the making of a winding up order and tasked with the role of safeguarding the company's assets until the role of permanent liquidator is confirmed. A similar role to a Provisional Liquidator in England and Wales.
Insolvency Practitioners Association	**IPA**	One of the five currently recognised professional organisations (RPB) allowed to issue insolvency licences. The number of RPBs has been reduced since 1986 when they were first authorised.

L

Term	Abbreviation	Definition
Large undertaking / company		This description applies to companies where two or more of the following conditions apply: • Turnover is greater than £36 million • Gross balance sheet assets exceed £18 million • The company has more than 250 employees
Limited Liability Partnership	**LLP**	The limited liability partnership is a legal structure that is a hybrid between a partnership with unlimited liability and a company limited by shares. The LLP can consist of a range of personal and corporate partners with limited or unlimited lability.

Term	Abbreviation	Definition
Liquidator		The title given to an IP appointed as office-holder in a liquidation. This title applies to all types of liquidation.
Liquidation	**LIQ**	The general term given to the winding up of an undertaking.

M

Term	Abbreviation	Definition
Medium undertaking Also referred to as: ▪ entity ▪ enterprise ▪ company ▪ limited liability partnership		Sections 465 CA2006 set out the definition of the medium company. The designation allows the medium company status as part of the SME business group. The status is subject to at least two of the following restrictions applying: • Turnover of less than £36 million • Gross balance sheet assets of less than £18 million • 50 or more but less than 250 employees
Member or Shareholder		In relation to an insolvent company, a member is a shareholder or subscriber to its ownership. In England and Wales in relation to partnerships, a member is also any partner in a limited liability partnership.
Memorandum of association		This is a legal statement agreed to by all the initial shareholders or guarantors agreeing to form the company. A standard version is available and can be used.
Members' Voluntary Liquidation or Solvent Liquidation	**MVL**	This is the procedure for the winding up of a solvent company i.e. can pay all its debts in full including any statutory interest due within 12 months of the resolution being passed.
Micro businesses Also referred to as ▪ undertaking (CA2006) ▪ entity (Regs 2013) ▪ enterprise ▪ company		There is no single definition and different organisations use different parameters. Micro undertakings are defined in sections 384A-384B CA2006. These sections were inserted by The Small Companies (Micro-Entities' Accounts) Regulations 2013 (S.I. 2013/3008), regulations 2(1), 4(4) (with reg.3) for reduced filing requirements. This status includes undertakings where two or more of the following conditions apply: • Turnover not more than £632,000 • Gross balance sheet assets not more than £316,000 • Less than 10 employees (i.e. 9 or fewer)
Moratorium		Describes the process and period during which there is a suspension of creditors' legal rights to take action or enforce a judgement. In relation to

Term	Abbreviation	Definition
		the CVA there is a small company moratorium (SCM) introduced by the IA2000. In addition there is a newly created free standing moratorium procedure monitored by a "regulator" and introduced by CIGA 2020.
Moratorium procedure (new)		A new general moratorium procedure was introduced by CIGA 2020. It replaces the Small Company Moratorium with similar provisions but allows the procedure to be used as a standalone option to assist in restructuring undertakings.

N

Term	Abbreviation	Definition
Nominee		The title of the role given to the office-holder who has been requested to act on behalf of the directors (in the case of a CVA) during the pre-approval process.
Nominee (role)		The nominee is required to report to the court on the efficacy of the proposed arrangement. It is also used in some circumstances to identify a nominated office-holder in other insolvency procedures e.g. nominated as administrator, liquidator, receiver etc.

O

Term	Abbreviation	Definition
Office-holder	**OH**	All insolvency procedures are led by one or more office-holders. Each one must be a qualified and licenced insolvency practitioner. See the Insolvency Practitioner Regulations for the detailed qualifying requirements.
Official Receiver (England and Wales)	**OR**	An employee of the IS (civil servant and officer of the court) who takes control of the estates of companies in WUC and individuals in BKY in England and Wales.
Official Receiver's role (England and Wales)		In England and Wales the Official Receiver (OR) takes control initially in all cases to safeguard the assets unless overridden by the court order. The OR can appoint on request a replacement liquidator which is made either by the SoS, or a creditor can request a meeting or decision to consider an alternative office-holder.
Official Receiver's role (Scotland) See also Accountant in Bankruptcy		There is no equivalent role for the Official Receiver in Scotland and appointments are taken direct by IPs via various funding arrangements. In Scotland the judiciary makes full use of the appointment of interim and provisional liquidators at the petition application stage to safeguard any potential disposition of assets. This process is also often used as a shortcut enforcement process.

Term	Abbreviation	Definition
		While the Accountant in Bankruptcy is the key person responsible for reporting purposes.
Official Receiver's role (Northern Ireland)		There is no equivalent role in Northern Ireland and appointments are taken direct by IPs via various funding arrangements. The process is similar to Secretary of State appointments in England and Wales.
Organisation for Economic Cooperation and Development	**OECD**	This is an intergovernmental economic organisation founded in 1961 to stimulate economic progress and world trade. The organisation now includes 35 member countries.

P

Term	Abbreviation	Definition
p in £	**PIP**	Distribution levels are described as p in £ and this has been abbreviated to PIP.
Parent company		A company that owns a controlling share of another company. The parent maybe the beneficial owner (OBO). However the UBO can be another entity further up the chain.
Path Dependence Analysis	**PDA**	A theory used to analyse organisational structures and behaviour over time.
Pension Protection Fund	**PPF**	The Government department that provides compensation to members of eligible defined benefit pension schemes where there is an insolvency event.
Pensions Regulator		The role of the regulator is to protect pension schemes and monitor the PPF. The role was created by the Pensions Act 2004.
Petition		A document presented to the court to instigate insolvency proceedings. In the case of a winding up, it is called a WU petition. The petition can be presented by a range of different people including the supervisor of a failed CVA.
Practice or Firm		The organisation in which an Insolvency Practitioner practises. The number of IPs varies between firms.
Preferential creditor		A creditor that is given special rights by virtue of Schedule 6 IA86 as is paid ahead of the unsecured creditors. Changes to the HMRC status was made by the EA2002 and partially reinstated on 1 December 2020.
Prepack sale of business	**Prepack**	Describes a sale of business or assets negotiated prior to the appointment of an administrator and concluded shortly after the appointment has been made.

Term	Abbreviation	Definition
Prepack Pool	**PPP**	The prepack pool is an independent body of experienced business people (Evaluators) who are paid by a potential purchaser to offer an opinion on the purchase of a business and/or its assets by connected parties to a company where a pre-packaged sale is to be proposed by an administrator.
Prescribed Part	**PP**	Describes the fund set aside out of the floating charge assets to be paid to unsecured creditors rather than Government departments. The PP was introduced by EA2000. It only applies where there is a floating charge created on or after 15 September 2003.
Prescribed Part Regulations		These regulations set out the rules to follow when calculating the PP. Implementation date: 15 September 2003
Protected Trust Deed		The Protected Trust Deed is a similar procedure to the IVA available for individuals in Scotland. The application for a Trust Deed is presented in a standard form and becomes protected from ongoing creditor action once it has been approved by the creditors.

Q

Term	Abbreviation	Definition
Qualifying Floating Charge Holder	**QFCH**	A secured creditor holding a valid floating charge over assets owned by a company. They are entitled to appoint an administrator and must be put on notice if directors or shareholders intend to appoint an administrator.

R

Term	Abbreviation	Definition
R3 or The Association of Business Recovery Professionals	**R3**	R3 stands for Rescue, Recovery and Renewal and is the trade body who represents the interests of IPs and their advisors to the Government and media. Its formal name is The Association of Business Recovery Professionals. It was previously known as SPI or the Society of Professionals in Insolvency.
Receivership	**REC**	A non-court insolvency procedure, (not an IA86 procedure) which can be under of the law of property Act or power of the debenture, whereby the charge-holder appoints an office-holder to take control of the specified assets to realise the funds to repay the outstanding debt.
Recognised Professional Body	**RPB**	These are the organisations with authority to issue licences for Insolvency Practitioners. There are currently five as the two legal bodies originally

Term	Abbreviation	Definition
		authorised to issue licences have since passed their role to the accountancy bodies. • ACCA • ICAEW • ICAI (CARB is the regulatory body) • ICAS • IPA
(A) regulator (1)		A general term used in the insolvency profession to indicate any of the regulatory licensing bodies as well as the regulatory bodies of other professions. For insolvency the term also included the Insolvency Service until it gave up its role as an issuer of licences.
(The) Regulator (2) IA86		An IP and office-holder who is instructed to monitor the use of the new free standing moratorium procedure introduced by CIGA. See Part 1A and Schedule ZA1.
Release (1)		The term release relates to the personal liability of an office-holder under the terms of the bonding arrangements and the notification under the specific penalty bond confirms the date of release as approved (administration) or at least not challenged by the relevant creditors (liquidation). The latter requires a vote against as opposed to a vote for. In cases where the same OH takes a formally recognised follow-on procedure the bond is transferred to the new procedure and therefore formal release becomes superfluous as regards insurance. This notification does not apply to sequential procedures involving a CVA and cover may well overlap.
Release (2) from office		An office-holder appointed under the IA86 requires release from office as a separate event post the date of vacation of office although they can be synonymous. It recognises that certain administrative actions need to be taken after an estate has been reported as closed and the office vacated by the IP. Release is only normally granted on the date of filing of all the final formal documentation.
Restructuring		The term used to identify a range of mechanisms that identify a reorganisation of a business operation and includes informal and formal procedures.
Restructuring procedure Part 26A CA2006	**RPlan**	The new procedure inserted into the CA2006 and came into effect in June 2020. The RPlan is similar to a Scheme. It can only be used if insolvency is likely in contrast to the Scheme.

Term	Abbreviation	Definition
S		
Scheme of Arrangement (1)	**Scheme**	A procedure available under Part 26 Companies Act 2006. The Scheme allows a company to restructure under the supervision of the court by effectively re-arranging the rights of one or more of its members or creditors to facilitate the planned restructuring process. The company does not have to be insolvent.
Scheme of Arrangement (2)	**Scheme**	Also one of the two types of CVA (see section 1 IA86). The other being a composition.
Secured creditor		A creditor holding security on any assets owned by a business. The security or charge can be fixed or floating. A charge gives the secured creditor the right to appoint a receiver in order to recover the debt.
Secured claim		A claim supported by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default.
Small company		Sections 382-384 CA2006 set out the definition of the small company. The designation allows the small company to benefit from limited disclosure and regulatory scrutiny and also to benefit from the use of the small company moratorium pre CVA approval. The status is subject to at least two of the following restrictions applying: • Turnover less than £6.5 million • Gross balance sheet assets less than £3.26 million • Less than 50 employees
Small Company Moratorium	**SCM**	A moratorium pre approval of a CVA available for small companies only. See Schedule A1 IA86 for the statutory framework. Revoked by CIGA 26 June 2020.
Small and medium size enterprise	**SME**	Defined by Commission Recommendation 2003/361/EC of 6 May 2003. Extract from Article 2 as follows: 'The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro.'
SMART Regulation		SMART regulation stands for: Streamlined; Meaningful; Adaptable; Relevant; and

Term	Abbreviation	Definition
		Transparent. See the Doing Business Report 2013, figure 2.1, 16.
Special Manager		A special manager can be appointed to run a business in liquidation when special knowledge or skills are required in respect of the industry or circumstances involved. The special manager will be paid from the estate funds.
Statement of Insolvency Practise	**SIP**	The original versions of these guidance notes were issued first by the IPA and subsequently by SPI and now known as R3. They were later renamed Statements of Insolvency Practice. They were originally issued as 'Best Practice' guidance but became mandatory by all RPBs from 1st July 2004 following the mandatory version of SIP 3 issued in October 2003.
Statement of Insolvency Practise No 1	**SIP 1**	SIP 1 is entitled: ***Insolvency Practice – Fundamental principles***. Current version (v1) was issued on 2 May 2011.
Statement of Insolvency Practise No 2	**SIP 2**	SIP 2 is entitled: ***Investigations by office-holders in administrations and insolvent liquidations and the submission of conduct reports by office-holders***. The latter element was previously included in an older SIP 4 now repealed. Current version of new combined guidance (v1) was issued on 6 April 2016.
Statement of Insolvency Practise No 3	**SIP 3** **SIP 3.2**	SIP 3 was initially entitled: ***Voluntary Arrangements*** and included both Individual and Company Voluntary Arrangements. First issued as IP guidance only in July 1990. Versions 1 and 2 were issued in September 1991 and March 1998. Two revisions were issued in March 2002 and August 2003. The first mandatory version (v3) was issued on 1 October 2003. Version 4 was issued on 1 April 2007. The guidance was split in 2014. A new version entitled ***Company Voluntary Arrangements*** (no 3.2) was issued on 1 July 2014 and the latest update was issued with effect from 1 April 2021.
Statement of Insolvency Practise No 6	**SIP 6**	SIP 6 is entitled: ***Deemed consent and decision making in insolvency proceedings***. Version 1 was issued 6 April 2017. Current version (no 2) was issued on 1 January 2018.

Term	Abbreviation	Definition
Statement of Insolvency Practise No 7	**SIP 7**	SIP 7 is entitled: ***Presentation of financial information in insolvency proceedings***. First issued February 1992. The latest update (v4) was issued with effect from 1 April 2021.
Statement of Insolvency Practise No 8	**SIP 8**	SIP 8 is entitled: ***Summoning and holding meetings of creditors convened pursuant to section 98 Insolvency Act 1986***. First issued July 1998. Now superseded post 2016 changes in the rules for England and Wales and similar update for Scotland in 2018. Current version relevant to the study data was version 3 issued in January 2002.
Statement of Insolvency Practise No 9	**SIP 9**	SIP 9 is entitled: ***Payments to insolvency office-holders and their associates***. First issued in June 1996. The current update (version 9) was issued with effect from 1 April 2021.
Statement of Insolvency Practise No 11	**SIP 11**	SIP 11 is entitled: ***The handling of funds in formal insolvency proceedings***. It was first issued in June 1996. The current update (version 2) was issued on 1 June 2007.
Statement of Insolvency Practise No 13	**SIP 13**	SIP 13 is entitled: ***Acquisition of assets of insolvent company by directors***. Version 1 was issued in November 1997. Version 2 was issued in December 2016. The latest version was issued 30 April 2021.
Statement of Insolvency Practise No 16	**SIP 16**	SIP 16 is entitled: ***Pre-packaged sales in administration***. Version 1 was issued in January 2009. Version 3 was issued on 1 November 2015. The latest version was issued 30 April 2021.
Stay of proceedings	**Stay**	A measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate. Also known as a moratorium.
Subsidiary		See section 1159 CA2006. An enterprise where the parent holds a majority of the voting rights and control of the board of directors.
Supervisor		The title given to an IP appointed as office-holder in a voluntary arrangement. This term applies to

Term	Abbreviation	Definition
		voluntary arrangements (VA) used by companies, individuals, or partnerships.

T

Term	Abbreviation	Definition
The Association of Business Recovery Professionals	**R3**	R3 stands for Rescue, Recovery and Renewal and is the trade body who represents the interests of IPs and their advisors to the Government and media. Its formal name is The Association of Business Recovery Professionals. It was previously known as SPI or the Society of Professionals in Insolvency.
Trust Deed		See the explanation for the Protected Trust Deed. A Trust Deed if not approved remains unprotected which allows creditors to continue separate legal actions against the individual in Scotland.

U

Term	Abbreviation	Definition
United Nations Commission on International Trade Law	UNCITRAL	UNCITRAL is the core legal body of the United Nations specialising in the field of international trade law. The core purpose of UNCITRAL's business is the modernization and harmonization of rules on international business.
UNCITRAL Legislative Guide on Insolvency Law	The Guide	The Guide, Version 10, was approved by a UN resolution in 2005, New York. Attached to the Guide was a copy of the model law and an additional guide to the process of enactment.
Undertaking		See section 1161 CA2006. For the purposes of the Companies Act provisions this description includes all entities registered at CH including: limited liability companies, unlimited companies, companies limited by guarantee and limited liability partnerships.
Unsecured creditor		A person or business owed money by an insolvent business or individual who holds no security. Some creditors may hold dual status in respect of ranking for distribution purposes and also for security. For example unsecured creditors can also hold preferential status.

V

Term	Abbreviation	Definition
Vacation of office (1)		This is the term used when an office-holder confirms that all the assets of an estate have been dealt with and announces a final reporting date for creditors which is effectively the date the office-holder (OH) officially vacates office for the purposes of legal responsibility.
Vacation of office (2)		The OH will be required to subsequently file the final receipts and payments accounts to the

Term	Abbreviation	Definition
		vacation of office date, upon which the office-holder will normally be granted formal release from liability. This is the date required by bond providers in respect of the specific penalty bond insurance. Note that the procedure to obtain formal release can be either positive or negative depending on the procedure involved. Note creditors always have a right to object to the release of an office-holder if they feel matters have not been dealt with appropriately. Additionally claims can be made on the specific penalty bond for up to two years post vacation of office.
Viability Statement		A viability statement in relation to a pre-pack is required by SIP16. Viability statements were introduced by the UK Corporate Governance Code ("the Code") in 2014 as a means of requiring directors to report annually in relation to the going concern status of the business.
Voluntary Arrangement	**VA**	This term includes both company and individual voluntary arrangements.
Voluntary Liquidation		A liquidation commenced by the company and not registered with or controlled by the court. It includes both solvent (MVL) and insolvent liquidation (CVL) procedures.

W

Term	Abbreviation	Definition
Wholly owned subsidiary		See section 1159(2) CA2006. An enterprise or undertaking where there is only one shareholder or member.
Winding Up	**WU**	The description given to all three types of liquidation under IA86 and the process by which a company is terminated by liquidation prior to dissolution.
Winding Up by Court or Compulsory Liquidation	**WUC**	Also known as a court or compulsory liquidation. This is a liquidation commenced when a petition is filed in court by a creditor, director, member or supervisor.
Winding-up order	**WUO**	The order made by the court for a company to be placed in compulsory liquidation or a winding-up by court.

Introduction

Background and Methodology

1. The introduction of the Company Voluntary Arrangement

The Company Voluntary Arrangement (CVA) procedure was introduced in 1986 as a new insolvency procedure by the Insolvency Act (IA86).[13] The CVA was based on the recommendation of the Cork Committee,[14] with the proposed purpose of providing a cheap alternative to the scheme of arrangement procedure[15] for the small company.[16] Prior to the IA86 there were only two options for insolvent companies, namely receivership[17] or liquidation.[18] This made the choice between the procedures straightforward, with receivership being an enforcement procedure controlled by the secured creditor,[19] while liquidation procedures were collective and designed to treat unsecured creditors equally while paying expenses and distributions in a pre-ordered sequence.

The IA86 took a combination of the insolvency solutions extracted from the Companies Act 1948 and combined them, producing a series of new options in a single piece of

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13 See also Part 1 Insolvency Rules 1986 (IR86) which sets out the detailed rules relating to the CVA during the study period. The equivalent rules in the different UK jurisdictions together with later amendments are summarised in Appendix C.

14 See *Insolvency Law and Practice, The Report of the Review Committee* ('The Cork Report') (1982) para 422 and 1980, headings 2 and 4, HMSO, London. The Review Committee was headed by Sir Kenneth Cork and was established in 1977 while the report was not published until June 1982. Cork identified that the scheme of arrangement was mainly used by large companies because of the legal costs involved and that a simplified preferably non-court version was required for smaller businesses.

15 See Part 26 Companies Act 2006.

16 n 2.

17 Pre IA86 receivership was the only alternative to liquidation and was principally an enforcement procedure with no powers for the receiver to distribute any surplus funds to unsecured creditors. See Part VI Receivers and Managers, Companies Act 1948.

18 There remain two types of insolvent liquidation: creditors' voluntary liquidation which is a non-court option and winding up by court. The liquidation options were previously set out in Part V Companies Act 1948. Section 211 set out the different types of liquidation which has remained essentially unchanged.

19 Notably administrative receivership was seen as an enforcement action although often resulting in some forms of rescue whereas liquidation was the collective creditor solution.

legislation.[20] This increase in available insolvency solutions post-1986 resulted in less clarity between the circumstances in which the different procedures should be used. As a result, the proposed purpose for each procedure should be used has become an intrinsic part of completing an options review. The use of different procedures in the same or very similar circumstances has increased the complexity of choice.[21] Further, the multiple use of different options has increased the potential of ethical issues causing difficulties for individual insolvency practitioners (IP), particularly when taking the role of consecutive insolvency office-holder. The requirement for an IP to maintain independence is discussed further in Chapter 2.[22]

The framework of the CVA[23] procedure allows creditors to approve, amend, or decline a proposed set of terms, designed to alleviate either cashflow or balance sheet insolvency, by compromising or deferring debts due.[24] Under a CVA proposal the terms must clearly state the intention for the arrangement to be either a composition of the existing debts,[25] or a scheme of arrangement whereby amounts due can have the payment terms renegotiated but not compromised.[26] The proposal must include all the required detail of the directors' offer and the specific terms that apply.[27] The proposal should also demonstrate that the outcome of the CVA will benefit the creditors more than a winding-

20 The combined set of procedures was originally published as the Insolvency Act 1985 which was subsequently amended and republished coming into effect on 29 December 1986.

21 An example being the managed sale of a business which can be completed in a CVA, an ADM or a CVL. In such a scenario the best returns are likely in the CVA with the supervisor using a light touch approach. Returns to creditors using the ADM or CVL are usually substantially less.

22 See Chapter 2 for a fuller discussion of independence and in particular self-review threats for an insolvency office-holder.

23 In respect of CVAs generally see Geoffrey Weisgard, Michael Griffiths and Louis Doyle (2013) *Company Voluntary Arrangements & Administrations*, 3rd Ed Jordan Publishing, London.

24 These are the two tests for insolvency and consider the asset base review and separately the impact of cashflow.

25 A composition is an agreement by creditors to accept less than payment in full for final settlement of the debt whereas a scheme of arrangement is essentially a reordering and restructuring of the debt repayments.

26 See s 1(1) IA86.

27 CVA proposals can be made by either the directors or an existing insolvency office-holder (administrator or liquidator). See s 1 IA86.

up of the company.[28] The intended supervisor (acting in the role of nominee) is required to comment on the veracity and potential for success of the proposed terms.[29] The nominee's report is presented to the court with the proposal, prior to circulation to the creditors for approval.[30] The CVA thus has three clear stages for an IP where the role, duties and statutory requirements vary and change over a short period of time requiring the IP to remind the participants of those changes in real time:[31] pre-appointment advisor, followed by the roles of nominee and subsequently supervisor.[32] The milestones referred to throughout the thesis identify the points at which the role changes. The issue of independence is a key element in ensuring office-holders of all procedures are acting in the best interests of the creditors, and the continual need to consider and revisit the self-review threat to their independence.

The contractual nature of a CVA also requires a clear exit strategy for completion[33] and specific termination events for creditor clarity.[34] The exit route from the CVA is usually some form of rescue if successful, or liquidation in the event of a breach of the terms, resulting in termination of the CVA. The potential for saving the business often encourages unsecured creditors to continue trading with a company during an arrangement, because ongoing trading provides necessary sales income and any profits made subsequently will likely flow back to them via distributions from the CVA.[35] Any review of the use of the CVA

28 Ensuring that creditors are not worse off than in an insolvent liquidation is a key requirement for both the CVA and administration procedure.

29 The nominees report is discussed further in Chapter 2, Section 2.5 *The nominee's report to the court*.

30 See s 2 IA86.

31 The three stages of the CVA are explained in detail in Chapter 2, Section 2.3 *The three phases of the Company Voluntary Arrangement*. Best practise guidance is set out in various Statements of Insolvency Practise and this guidance has been mandatory since 2004. See SIP 3 and subsequently SIP 3.2 in relation to CVA guidance. Note the potential ethical issues for IPs taking appointments as nominee and supervisor.

32 See Chapter 2, sub-section 2.3.2 *The nominee phase* and 2.3.3 *The supervisor phase*.

33 See Chapter 2, sub-section 2.3.4 *Completion*.

34 See Chapter 2, Sections 2.9 *Proposal terms* and 2.10 *CVA terms: Modifications pre-approval and Variations post approval*.

35 See Chapter 1, Section 1.6 *Formal rescue procedures*.

procedure requires visibility and understanding of the triggers that prompted the initial choice of the procedure by the participants as well as the eventual outcome.

The impact of the changing use of the mix of insolvency procedures on the rescue culture is discussed in detail in Chapter 1,[36] in particular the impact of the reinvention of the administration procedure[37] by the Enterprise Act 2002 (EA). The EA fundamentally changed the use of the various procedures, particularly administrations, and this has also indirectly impacted on the use of the CVA.[38] The CVA was also given the additional role of distributing surplus funds from earlier procedures, providing a more cost-effective solution than a winding-up,[39] and this is one of the purposes discussed in more detail in Chapter 3. The CVA is also used as an interim solution to provide a moratorium, while allowing a company to continue to trade, and giving its advisers time to consider or develop other restructuring options (both formal and informal). The procedure is also suited for use by small and family run businesses as a managed wind-down option that may include a sale of the business.

36 ibid

37 The Pre EA ADM effectively allowed a secured creditor to take control of realisation of the assets in circumstances where there were potential issues preventing the appointment of an administrative receiver. As a result in both pre and post EA scenarios there was no ability for the administrator to make a distribution to the unsecured creditor except for preferential creditors where this was required before the balance of funds could be paid to the floating charge creditor. This restriction remained in place in the post EA ADM for similar reasons and as a result restricted the right of set-off which was only triggered at the point when the court sanctioned the administrator to make a distribution. Post EA the exclusions also included any distribution made as a consequence of the Prescribed Part calculation in a similar exemption to preferential creditors.

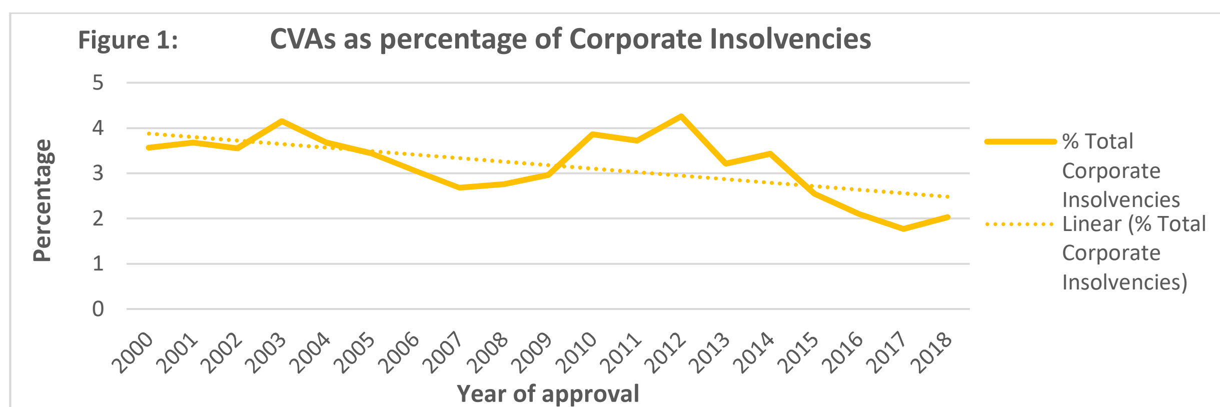
38 See Ian Fletcher's commentary on the role of the CVA and ADM in *UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002,* 131-132, European Business Organization Law Review 5: 119-151.

39 This may be either through a creditor's voluntary liquidation or a winding-up by court.

2. Use of the Company Voluntary Arrangement

There is currently no public visibility of either routes into or outcomes of CVAs. The usage and outcome data are not routinely available without reviewing the individual documents for each company. The only published empirical data on CVA outcomes are snapshots from 2006[40] and 2013[41] that contrast to this project, which is a longitudinal study based on CVA approvals commenced over a ten year period and tracked to conclusion.[42]

Figure 1 shows the number of CVAs as a percentage of the overall corporate insolvency procedures between 2000 and 2019. The data shows that the CVA only makes up between 2% and 5%[43] of the total corporate insolvency procedures each year. There is also a declining trend which indicates the UK government policy to increase the use of rescue procedures generally, and the CVA in particular, is not effective.



Source: Insolvency Service statistics

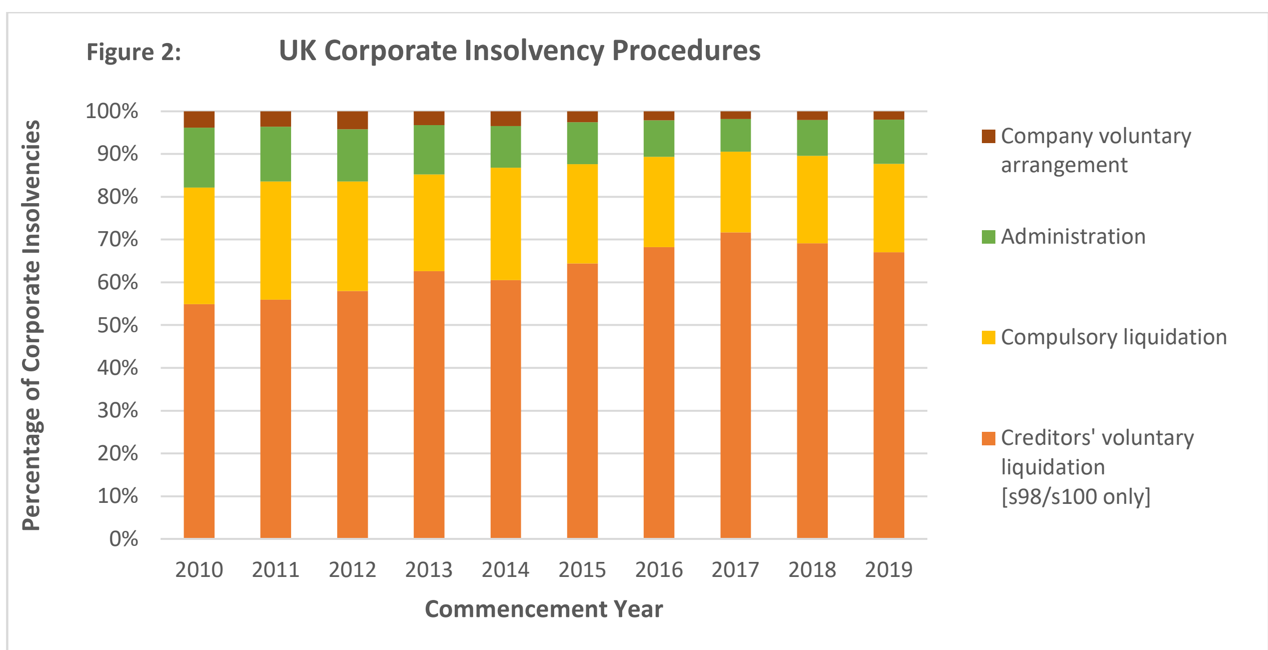
40 See Sandra Frisby & Adrian Walters (2011) *Outcomes in Company Voluntary Arrangements: An Empirical Investigation,* University of Nottingham and Nottingham Trent University Presentation. Also *Preliminary Report to the UK Insolvency Service into Outcomes in Company Voluntary Arrangements* (23 March 2011) Insolvency Service, London. Available online at SSRN: http://ssrn.com/abstract=1792402 or at http://dx.doi.org/10.2139/ssrn.1792402.

41 See Walton, P., Umfreville, C., & Jacobs L (2018) *Company Voluntary Arrangements: Evaluating Success and Failure,* (published May 2018) R3, London. See also Walton P, Umfreville C, and Jacobs L. *A snapshot of company voluntary arrangements: Success, failure and proposals for reform,* Int Insolv Rev. 2020; 29:267–284. Available online at https://doi.org/10.1002/iir.1381.

42 The review period including pre and post procedures effectively covers over twenty years.

43 The minimum and maximum approvals fall between 362 and 816. See the IS data tables and statistics available at statistics@insolvency.gsi.gov.uk.

Figure 2 shows the use of the CVA procedure in comparison to each of the other insolvency procedures. Both rescue procedures (CVAs and administrations) identified in Figure 2 show a slow long-term decline in use, in comparison to liquidation options, indicating a shrinking of the rescue market with liquidation becoming the preferred option. The creditors' voluntary liquidation (CVL) is the only specific procedure with a clear upward trend, while the winding-up by court (WUC)[44] is also in slow decline. Combined liquidations are increasing and are now hovering around 90 percent, having increased around 80% between 2000 and 2019.[45]



Source: Insolvency Service statistics[46]

The World Bank, in their *Doing Business* report in 2014, identified "that higher recovery rates are more likely in economies where reorganisation is the most common insolvency

44 The WUC is also referred to as a compulsory liquidation to differentiate from voluntary or non-court based liquidations.

45 The data for 2020 although available has not been included in this analysis due to the ban on winding up proceedings except were the cause can be demonstrated as relating to pre Pandemic events.

46 The IS statistics of insolvency appointments are posted online for each of the UK jurisdictions. Note that follow-on creditors' voluntary liquidations commenced under para 83 Sched B1 IA86 are excluded from the data to avoid double counting. They are available online at https://www.gov.uk/government/collections/insolvency-statistics.

proceeding",[47] and these findings prompted further consultations on ways to improve the use of rescue procedures in the UK.[48] The analysis of the outcomes from the changes made by the Enterprise Act (EA) 2002 indicated that the post EA administration procedure had started to take some of the CVL market which, while welcomed from a rescue culture perspective, resulted in an increase in costs from the pre EA version of the procedure alongside a reduction in returns to creditors.[49]

From a regulatory perspective this blurring between the use of the administration and the CVL was unwelcome, as it gave the impression that IPs were using the procedure because it allowed them to be appointed without challenge and to charge higher costs due to the increased reporting requirements. IPs were encouraged to make sure they evidenced clearly in the administration proposal the reason why the procedure was the best option and provided a better overall return to creditors than a liquidation, as unlike the CVA there is no automatic termination in the event the proposed strategy fails.

When reviewing the market data for business rescues, consideration also needs to be given to the effective double accounting where terminated CVAs subsequently enter administration. In cases where administration is the exit option this effectively means that a company is counted twice in the rescue market data, while follow-on CVLs are now reported separately and removed from the CVL data to similarly avoid duplication.[50]

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47 See World Bank (2014) *Doing Business 2014 report*, see figure 19.1, 115. The full report is available at https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Full-Report.pdf and was last accessed 13 November 2019.

48 See Chapter 3, Figure 3.5 for the comparative use of rescue procedures. The reference to higher recovery rates is also borne out by the study data.

49 See the discussion in Chapter 1, Section 1.10 *Evaluating Returns to Creditors.*

50 The impact on volumes for statistical purposes are discussed further in Chapters 1, 2 and 3.

3. Previous research into the Company Voluntary Arrangement

Previous research into the CVA concentrated on measuring outcomes over short periods of time in a variety of different ways. These measures included the testing of hypotheses,[51] by looking at company status,[52] or reviewing other criteria to identify success or failure immediately after completion or within a specified period.[53] In contrast, this project is using a staged approach to identify and analyse the issues and relationships controlling both the selection and use of the CVA, in addition to a range of different outcomes.[54]

The earliest documented research into the CVA was conducted in 1990[55] and used a survey method that was not targeted at a specific population of Insolvency Practitioners (IPs).[56] The survey was circulated to all IPs and the findings revealed that more than half of those who responded[57] had no experience of the CVA procedure.[58] A more recent report for the Association of Business Recovery Specialists (R3) included another survey conducted in 2017, which covered a broad range of questions relating to the conduct of CVAs. The 2017 survey was a self-selecting process with some different results.[59] In the latter survey, two thirds of the responders answered as office-holders involved in a CVA procedure during

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51 See Naresh R. Pandit, G, Cook, A.S., Milman, D, and Chittenden, F.C. (2000) *Corporate rescue: empirical evidence on company voluntary arrangements and small firms*, Journal of Small Business and Enterprise Development, Vol. 7 Issue: 3, 241-254.

52 n 28.

53 n 29.

54 See the different phases of the CVA identified and explained in Chapter 2, Sections 2.2 *The fundamental elements of the CVA* and 2.4 *The three phases of the CVA*.

55 n 39.

56 Throughout this study there are references to insolvency practitioners or IPS who are the individuals licensed to take insolvency appointments. There are other references to office-holders (the generic term for all IPs who are holding one a range of insolvency offices) and also references to the specific office-holder roles of each procedure such as nominee, supervisor, administrator or liquidator.

57 There was a 25% response rate, the respondents were self-selecting and the percentage of those without experience may have been higher.

58 n 39, 3, 243

59 n 29.

the previous three years.[60] The results also confirmed a perceived lack of support for CVAs by creditors, and HMRC in particular.[61] In the 2017 survey[62] HMRC was singled out as being the most likely creditor to reject a proposal (71%), followed by landlords (35%) and then secured creditors (20%).[63]

The influence of key creditors and their voting patterns is of particular interest, and new data was collected as part of this study to identify both the value and number of creditors voting in each CVA.[64] The views of the 2017 survey were taken into account when analysing this data. As regards the IP population for the ten-year period, the data indicates that less than a thousand IPs took CVA appointments between 2006 and 2015.[65] Of those, approximately 75% took less than ten appointments each during the study period, with the majority of appointments being taken by just over 2% of the total. Only five IPs took more than one hundred appointments each and an analysis of the market structure of insolvency firms revealed a complex range of individual and firm behaviours.[66] The market

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60 The total number of R3 members responding was 156 of which 117 stated they had acted as advisor or held nominee appointments with only 101 being recorded as appointment takers. There is clearly some discrepancy in this data and further questions should have been asked to identify this type of anomaly.

61 HMRC is the abbreviation for Her Majesty's Revenue and Customs. The government department responsible for collecting all types of tax.

62 n 29.

63 As secured creditors rights are not affected by a CVA and secured creditors can only vote in full for their debt during the extension of a small company moratorium, the context of these responses are not clear other than indicating failure to support ongoing trading. The level of survey response is interesting in that it is likely that a majority of IPs who take CVA appointments appear to have responded to this questionnaire in contrast to the earlier survey which was more representative of the IP population. The 2017 survey data was compared to the IP data that was collected for 2013 only. The IP data for this study demonstrates the changes in office-holder patterns over time. See Chapter 4 Figure 4.1 *CVA approvals of super-user firms*.

64 The effect of choices made by IPs is discussed further in Chapter 4.

65 See Data table 1.2.1. The total number of IPs holding licences varies from year to year and the number of those actively taking appointments reduces this number again and fluctuates around 1400 with annual movements of retirements, changes in status and new licenses being issued of around ten percent. There is no accurate annual data on the number of appointment taking office-holders as opposed to overall license holders. In addition there is a further pool of individuals who have passed their examinations without having applied for either a non-appointment taking, or appointment taking licence.

66 The Insolvency Service issue annual reports indicating the number of licence holders by RPB and from the RPB data it is possible to determine an overall market structure of the formal appointments being taken. See Chapter 4 Figure 4.1 *CVA approvals of super-user firms*.

structure of the CVA and IP firms is analysed in detail in Chapter 4. The intention of this research is to build on the snapshot data from 2006 and 2013,[67] and investigate further the way in which the CVA is being used and why it remains unpopular as a rescue procedure.[68]

4. Research questions and choice of research methods

Throughout this thesis there are a series of recurring themes which fall under the following headings: volume, ethics, costs, communication, duration and outcomes. During the search to identify how CVAs are actually being used, the analysis revealed the impact of these issues and their causations together with the links to the different CVA participants. Chapter 3 unpacks that question by drilling down into the various elements of the research question. The resulting series of additional questions guided the different levels of data collection from the documents available at Companies House (CH).

The data extraction process, together with additional coding and calculations produced from the documents, resulted in the recording of over three hundred separate data points for each company in the study.[69] The formulation of the main and subsidiary research

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67 n 28 and 29.

68 The low level of CVA use has been a topic raised in a range of consultations over many years. See the DTI report *CVAs and Administration Orders,* published in 1993 and other consultations issued by The Insolvency Service including *Company Voluntary Arrangements and Administration Orders: A Consultative Document,* published October 1993; the *Revised Proposals for a New Company Voluntary Arrangement Procedure,* published April 1995; *A Review of Company Rescue and Business Reconstruction Mechanisms: A Report by the Review Group*, published May 2000; *Company Voluntary Arrangements and Administration Orders:* and *Encouraging Company Rescue* published in 2009, London.

69 The number per case depends on the number of insolvency documents filed and is in excess of three million pieces of data across the six thousand plus companies whose documents have been reviewed. Of these around a half relate to the financial data extracted from the multiple receipts and payments accounts across the various procedures. Appendix C identifies the range of documents analysed and the core data extracted and set out in the separate data tables. References to the company throughout also includes Limited Liability Partnerships (LLP). The term undertaking is similarly used in line with the Companies Act definition. For the purposes of the Companies Act provisions the definition of undertaking includes all entities registered at CH including: limited liability companies, unlimited companies, companies limited by guarantee and limited liability partnerships. See s 1161 CA2006 for the full definition.

questions stem directly from the identified objectives, with further questions coming to the fore as the data collection and analysis proceeded. As an example, initially the CVA approval voting information was not extracted in detail; however it became apparent that this was a key issue in determining the level of creditor participation and the effect specific creditors have on limiting CVA volume. The filed documents were revisited to collect the additional information for analysis. In respect of creditor participation, the data collection was also partially extended to allow more accurate comparison with the voting data published by one key creditor (HMRC). As each element of the research question led to a specific objective the appropriate data, collection and method of analysis was identified. A similar process was used in each new area of investigation.

The core method used for this study is the analysis of the legal documents filed at Companies House (CH). The data extracted is comprehensive and includes approval, progression and completion of each CVA, together with profile information on each company.[70] An empirical based approach is used to present this data,[71] with further in-depth analysis being completed on the influences exerted by the different participants at each stage of the CVA procedure. Other data sources have been used to cross reference the CH data and highlight different aspects of its use. The milestone events[72] of each CVA provide a timeline of actions and reactions of the parties involved, which provided the framework used for the subsequent analysis.[73] The CH data was also cross referenced to Gazette publications, data from parliamentary questions, together with other creditor and

70 These include the annual returns or confirmation statements, the filed accounts and details of the charges registered. In particular floating charges are identified as affecting the calculation of the Prescribed Part. See Chapter 2 for a full explanation of the operation and calculation of the Prescribed Part.

71 The core data from the study is summarised in tables in Appendix B.

72 The CVA has three stages for the IP encompassing different roles and ethical issues: (1) pre nominee and acting as advisor; (2) nominee phase; and (3) supervisor phase.

73 Companies House beta service allows free access to the most recently filed documents. Some earlier documents where the company has been dissolved for some time have had to be purchased separately. An overview of the population data and research questions posed are discussed in Chapter 3.

IP registration data for verification purposes. All data used in this study is publicly available.

Both inductive and deductive methods have been used in the analysis, by reviewing both the data at regular intervals during collection and cross referring to the subsidiary research questions. This included drawing up separate hypotheses for the purposes of further verification in each area.[74] The data extracted from the documents has been used both in its original form for quantitative purposes and together with a series of research codes based on a combination of representational, anchored and hypothesis guided themes for the additional analysis.[75]

There are also a number of strands to the comparative elements of the data. The first includes identifying any differences between use across the three UK jurisdictions, and the second by looking at comparisons with other UK procedures. The data includes CVA procedures covering all of the UK jurisdictions, rather than just England and Wales as in previous studies.[76] Each UK jurisdiction has slightly different enforcement procedures and these impact on how the different insolvency procedures are used at a practical level, including the CVA and any concurrent or consecutive insolvency procedures.[77]

The second comparative aspect of the research is with other UK procedures. There is a comparison with both the administration procedure (ADM) as the alternative rescue

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74 See Sapsford and JUPP (1996) *Data Collection and Analysis,* SAGE, London, 35.

75 See Sapsford, 132-134 for discussion on the different types of coding systems used.

76 The Northern Ireland enactments generally run 2-3 years behind England, Wales and Scotland but this has been extended due to the lack of an executive being in place to approve updates.

77 As an example the provisional liquidation is widely in Scotland as an enforcement procedure as their system does not have an Official Receiver in the same way as England and Wales with the result that a creditor engages an IP to attend court on a winding-up petition with the request for an appointment of a provisional liquidator to prevent dissipation of assets and this invariably results in the company expeditiously settling the debt without further recourse to other enforcement processes.

procedure, and the common areas with the equivalent procedure for individuals, the Individual Voluntary Arrangement (IVA).

The IVA has undergone a transformation in both format and use since it was also introduced in 1986. The IVA was originally intended as a CVA equivalent for sole traders but the increasing levels of consumer debt, combined with the impact of marketing, has transformed its use into a remedy for unsustainable consumer debt. The change in use of the IVA and its resulting failure rate[78] adds a further dimension to the comparative review. Findings in respect of the quality of pre-appointment advice in the IVA market provide an indication of potential bias and behavioural issues by volume providers. The findings in IVA uses can also be applied to the CVA and the use of the new classification of IPs and firms as super-users. The complaints regarding the quality of pre-appointment advice in IVAs may also have deterred IPs who reportedly never use the CVA procedure.[79] In addition the equivalent procedure for individuals in Scotland, the Protected Trust Deed provides a further comparative element to the use of the CVA in Scotland but has some distinct differences in format which make direct comparison more complicated.

5. Theoretical models used in the data analysis

Each CVA is intended to be an aid to either rescuing the company or producing a more positive result for creditors than any alternative.[80] In previous research the CVA has been viewed as a single technical construct[81] without any attempt to analyse its component parts separately. For this study the CVA has been reviewed both by procedural phase and

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78 See Sue Morgan, (2009) *Causes of Early Failures in Individual Voluntary Arrangements*, Kingston Business School Occasional Paper No 63, ISBN 9781872058542.

79 See the IS report (2018) *Review of the monitoring and regulation of insolvency practitioners*, published 26 September 2018 and which can be found at https://www.gov.uk/government/publications/review-of-the-monitoring-and-regulation-of-insolvency-practitioners.

80 A comparison with alternative solutions is required in a CVA proposal.

81 The variable nature of the CVA indicated that the nature and purpose of each arrangement needed to be taken into account and broken down to analyse the usage in more detail.

the impact of participants on use, with the latter considered as part of a series of participant networks. For these purposes, network analysis[82] has used both path creation[83] and path dependence[84] theories to understand and illustrate how each CVA is unique but also contains common identifiable elements. Identifying these separate parts, and how the behaviour of the various participants affect their choices, were key goals in understanding the how, what and why of the CVA market.

Actor-network theory[85] (ANT) is a method that encourages the recognition of each element of a network, and how each element combines to produce a sum greater than the individual components.[86] This method can be applied at all levels and includes not only the individuals or organisations involved, but the other tools that are key in delivering the required outcome. On an individual level each IP uses their skills, knowledge and experience at each stage of a CVA, together with IT systems, reference materials, and legal support, all within the confines of the statutory framework.[87] This framework sets out the final parameters for delivery of the outcome. The same process can be applied at an organisational level and to each participant in the CVA. The use of path dependence adds a further level of analysis and provides an historical perspective to identify cause and effect.[88] Further path dependence is used to explain behaviours that can impact both the

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82 Social network analysis is a broad term for any method used to analyse or understand the relationships between individuals, organisations and technology and the impact on the outcome.

83 Path creation identifies actions where innovative behaviour can trigger a change and have the opposite effect to path dependence. See Marie-Andree Caron and Marie-France Turcotte (2009) *Path dependence and path creation: Framing the extra-financial information market for a sustainable trajectory,* Accounting Auditing & Accountability Journal, Vol 22 No 2, 272-297 Emerald Group Publishing. See Chapters 4-6 for the detailed analysis.

84 Path dependence analysis identifies historical behaviours that can influence relationships, behaviours and outcomes. See Chapters 4-6 for the detailed analysis.

85 Actor-network theory is described as a method for identifying the unique nature of each set of relationships. In this case the CVA has been split into three phases to better understand the changing relationships and control over outcomes. In addition it has been used to identify each of the characteristics of the company and the impact on CVA use. See Chapter 6 for the detailed analysis of the company.

86 See Chapter 6, Section 6.2 which explain the theory and application to the data.

87 See Chapter 2 for a full explanation of the statutory framework.

88 See Chapter 4, Section 4.2 and Chapter 5, Section 5.5.

use and the outcome of each CVA, while also applying to both individuals and organisations.

6. Core data and limitations

The starting point for this research was the Insolvency Service (IS) data of published volumes and the list of company identification numbers,[89] kindly provided by their statistics department.[90] Subsequent analysis during this research has resulted in some changes to the published analysis of this data. Both late registration (sometimes years after the deadline) together with missing documents and the incorrect filing of registrations has impacted on the previously reported volumes in this project.[91] The IS data for each jurisdiction is published separately[92] and not as a UK total, and the impact of this separately reported data is discussed further later.[93]

A review of the CVA procedure requires an understanding of the triggers that prompted the process, alongside the eventual types of outcome. There is also currently no easy visibility of the range of insolvency procedures interacting with the CVA. Even regulatory reviews rarely look beyond an individual procedure to understand the overall impact on or outcome for a company and its creditors. The additional procedural data for each company similarly only becomes available by reviewing the filed documents for each procedure in turn. For some of the data the study period was extended to aid in the comparison and

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89 Every undertaking registered at Companies House is given a registration number which appears on its registration certificate. The format of the number identifies the type of undertaking and the jurisdiction of registration. This number renames the same for the life of the undertaking and cannot be changed whereas the business name can be changed.

90 Enormous thanks to John Perrot and his colleagues at the Insolvency Service for providing this data.

91 The IS update their figures as and when changes come to light. See Chapter 3 for a detailed analysis of the impact of incorrect, missed and late filing of documents both for the small company moratorium and the CVA completion data.

92 There is no published unified UK data. The data is published separately for each jurisdiction: (1) England and Wales; (2) Scotland and (3) Northern Ireland.

93 The comparison between the different jurisdictions is analysed in detail in Chapter 5.

review of parts of the procedure.[94] Data collection was also extended through to the end of September 2021 for those CVAs ongoing, and also where subsequent insolvency procedures continued that potentially impacted further on the final outcome.[95] For example where a terminated CVA was followed by an administration involving a pre-pack sale of business, or even a second CVA followed again by a further series of procedures.[96]

The data extracted was limited by the quality of information included in each of the filed documents. The quality and accessibility varied by office-holder, alongside technical issues on format of the scanned documents. For instance, some documents were barely readable, others had missing pages or entire appendices had not been attached to the filed copy. In addition, some of the CVA procedures approved during the study period are ongoing so have key final outcome data missing, while others although showing as ongoing have not had any documents filed for many years. During the analysis in each chapter, the summarised data used refers to the number and elements used in each calculation. The final section of this introduction provides a chapter summary.

7. Chapter structure

The first two chapters set the scene for the four chapters of data analysis. Chapter 1 discusses the background to the rescue culture and the emergence of the new rescue mechanisms in the UK as a result of the Insolvency Act 1986. The link between increasing activity to encourage a rescue culture and unemployment is identified as a key driving

94 For the purposes of analysing the late registrations the data from 1 January 2000 to 31 December 2018 was accessed. For the HMRC voting comparisons the detailed analysis for that data was extended to 31 March 2016.

95 Problems with access to specific documents or pages were raised periodically with Companies House. In some cases access is no longer available as document access was initially restricted once a company had been dissolved for more than 6 years. This policy has been revisited and from January 2021 a large number of additional documents have become available and been reviewed were possible.

96 A pre-pack describes a sale of business negotiated prior to the appointment of an administrator and concluded shortly after the appointment has been made. The Statement of Insolvency 16 sets out the best practise process including the reporting and consultation required. In particular the use of the Pre-pack Pool on fairness and the requirement for a viability statement.

force in promoting the required change. The rescue chapter explains the evolution of the CVA and how its use has been affected by the legislative changes since 1986, as well as the impact of other changes made to the administration procedure by the Enterprise Act. The chapter also considers the concept of business viability and how that relates to the different methods of rescue or restructuring.

Chapter 2 sets out the statutory and regulatory framework and discusses the issue of fairness in relation to the proposed terms of a CVA. It also sets out the statutory and regulatory requirements for the procedure, with particular attention being paid to the ethical issues resulting from the transition of the IP role across the three stages of the CVA.

Chapter 3 sets out the core empirical data and provides a first level of analysis by identifying the characteristics of CVA businesses, together with the different ways that CVA outcome can be measured.[97] Chapters 4 to 6 concentrate separately on each of the three participants involved in the CVA: Chapter 4 *The impact of the Insolvency Practitioner on the Company Voluntary Arrangement*; Chapter *5 Creditor participation in the Company Voluntary Arrangement*; Chapter 6 *The role of the company in the Company Voluntary Arrangement*. Further in-depth data analysis is presented in each chapter with the focus on each participant in turn.[98]

Chapter 4 discusses the CVA market structure alongside IP and firm behaviour. The IP and their firms are analysed by size and experience, and it identifies the influence of the super-users and experts on how the CVA is used. It also similarly identifies IP behaviour that is

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97 See Chapter 3 *The Company Voluntary Arrangement: identifying characteristics and measuring outcomes*.

98 Throughout this study there are references to insolvency practitioners (the individuals licensed to take insolvency appointments), the office-holders (the generic term for all IPs who are holding one a range of insolvency offices) and the specific office-holder roles such as nominee, supervisor, administrator or liquidator.

likely to encourage the use of alternative procedures to the detriment of the CVA. The behavioural analysis of the IP uses path dependence theory.

Chapter 5 reviews the role of the creditor in the CVA procedure. It highlights specifically the behaviour of HMRC as the single largest and most frequent creditor who actively participates in the CVA procedure. The role of the creditor is discussed and the voting patterns of HMRC analysed in detail, identifying the impact on the use of the procedure, with particular emphasis on their requirements to support a proposal.[99]

Chapter 6 takes a very detailed look at each business. The analysis uses actor-network theory to identify the different aspect of each entity using a CVA. To complete this analysis the data on the business structure was collected to identify types of ownership, management team structures, level and type of financing used, as well as age, size and nature of trade. The data was analysed in turn, while also being combined to isolate and identify the characteristics that appear to influence the use of the CVA by using the characteristics identified in Chapter 3.

Chapter 7 combines the range of issues identified in the earlier analysis chapters and produces recommendations for increasing the use of the CVA procedure. The analysis identified that size and related characteristics were important to increasing CVA volumes. In particular, the micro business[100] was identified as less likely to choose and use a CVA despite being the largest percentage of active businesses in the UK. The chapter suggests a specific remedy to assist rescue for micro businesses, while also identifying a range of issues and options that could separately encourage more positive interaction and active participation in the CVA, and other insolvency procedures, by creditors.

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99 The use of standard terms is revisited in Chapter 7 as part of the recommendations to increase the use of the CVA.

100 A micro business must meet two of the three following criteria: (1) employs less than ten people, (2) turnover of less than £316,000, and (3) gross assets of under £632,000.

The conclusion returns to the research question and isolates the role of the CVA and the contribution it makes to the rescue culture. A key area considered is the requirement for any rescue procedure not to disenfranchise unsecured creditors by providing a lower return from the rescue than a liquidation.[101] Even though the administration proposal also technically requires the purpose and strategy to be approved by creditors, this process actually takes place retrospectively rather than before appointment as in a CVA.[102] Unravelling an already completed transaction is very unlikely even if subsequent doubts are raised on the veracity of the terms agreed, rendering creditor participation in the administration procedure less effective.

The empirical data from this study provides evidence that the procedure is being used effectively to save the corporate entity and, where that fails, to save all or part of the business itself. The rescue hierarchy is a waterfall of outcomes, with the rescue of the entity being the primary aim. If the entity cannot be saved then a rescue of all or part of the business is the next objective, and if that fails the last resort is the recycling of the business assets.

The data also shows that the CVA provides better returns than other procedures for creditors, even when arrangements are terminated early. In most cases the returns from CVAs are better than administrations, despite the low volume of fully implemented

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101 For the CVA this is a clear statutory requirement with the failure to comply resulting in termination of the procedure however the outcome is less clear for the administration procedure where the purpose chosen by the administrator often results in a less clear outcome and rarely a positive outcome for the unsecured creditors.

102 For example when the decision is made by an administrator to use a prepack sale of business the transaction will have been completed before the creditors receive notification and it will often be several weeks before they are given the opportunity to vote on approving the strategy set out in the proposal. The use of the deemed consent and deemed approval processes provides weight to the argument that approval of the proposal in an administration is a cosmetic requirement which gives little actual power to the creditors. If creditor participation was much more clearly focussed on costs and fees charged rather than strategy then creditors would more likely to actively participate especially if they were given the power to restrict both levels of fees and the other costs incurred.

arrangements. The next chapter discusses the rescue culture and looks at the role of the CVA as a rescue procedure in more detail.

Chapter 1

The Rescue Culture and Rescue Mechanisms

1.1 What is the rescue culture?

This chapter provides an overview of business rescue including the importance of the ideology of the rescue culture to the economy and society, while also indicating how rescues are potentially delivered. In addition, the chapter reviews the global influences on the UK rescue culture and their impact on the statutory framework of insolvency procedures. Although the term 'rescue culture' is used often,[1] it is important first to explore the actual meaning of the term and to understand what is implied by a 'rescue mechanism'.[2] The dictionary definition of a rescue is "to attempt removal from a dangerous or unpleasant situation"[3] and in business terms this usually means some form of imminent financial distress or collapse. The reference to culture includes the characteristics and knowledge of the group of people impacted by the activity, which in this case is all the parties impacted or involved in the rescue of distressed businesses. Business rescue can include any type of restructuring such as changes to location, property, debt, financing, liabilities or equity. The term is positive but not all rescues appear to have successful outcomes, although this depends entirely on the timing and

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1 Numerous articles and research projects refer to the 'rescue culture' as a strategy to minimise the economic strife of the 1970s, when rising unemployment, strikes and increasing prices highlighted the need to identify ways to improve the economic and social welfare of the UK. Latter articles concentrate on the Enterprise Act 2002 as the turning point for reinvigorating the rescue culture. See for example Mei Yang & Xiaobing Li, *History of Corporate Rescue in the UK*, The Asian Social Science; Vol. 8, No. 13; 2012 ISSN 1911-2017 E-ISSN 1911-2025, Canadian Center of Science and Education; see also John Armour and Rizwaan Jameel Mokal (2004) *Reforming the governance of corporate rescue: The Enterprise Act 2002,* ESRC Centre for Business Research, University of Cambridge Working Paper No. 289.

2 See Alice Belcher (1997) *Corporate Rescue: A conceptual approach to insolvency law,* Ch. 2.2*, The Problem of Defining Corporate Rescue,* Sweet & Maxwell, London

3 This is the definition in the Collins English Dictionary.

criteria used to judge the outcome or final position of the parties affected.[4] The rescue culture encompasses all types of rescue mechanisms, together with the related socio-economic factors, and those mechanisms include both informal processes and formal insolvency procedures, with the former less visible than the latter.[5]

1.2 The importance of business rescue

There is general agreement that a rescue culture is beneficial for the economy, with business rescue being promoted as a substantive government policy in the UK since the early 1970's. The Report of the Review Committee (hereafter the Cork Report)[6] argued for saving as many businesses as possible because of the devastating effect unemployment has on society.[7] Cork suggested that the wellbeing of employees and the wider social and economic impact of unemployment on communities is a key element of a stable and thriving economy.[8] This rationale explains why the level of political interest in business rescue often goes hand in hand with increased levels of domestic unemployment, alongside broader global influences on the economy.

The graph in figure 1.1 shows the general trend and peaks in unemployment over the last 40 years, together with the periods during which there was active promotion of business rescue mechanisms.[9] The green line on the graph indicates the date when the UK joined the European Economic Community (EEC) and the period between the orange lines covers

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4 The definition of success and the criteria used for determination is discussed further in Chapter 3, *Introduction*.

5 The definition of formal procedures includes the statutory rescue procedures of the company voluntary arrangement (CVA) and administration procedures under the Insolvency Act 1986 and the Scheme of arrangement (Scheme) under the Companies Act 2006.

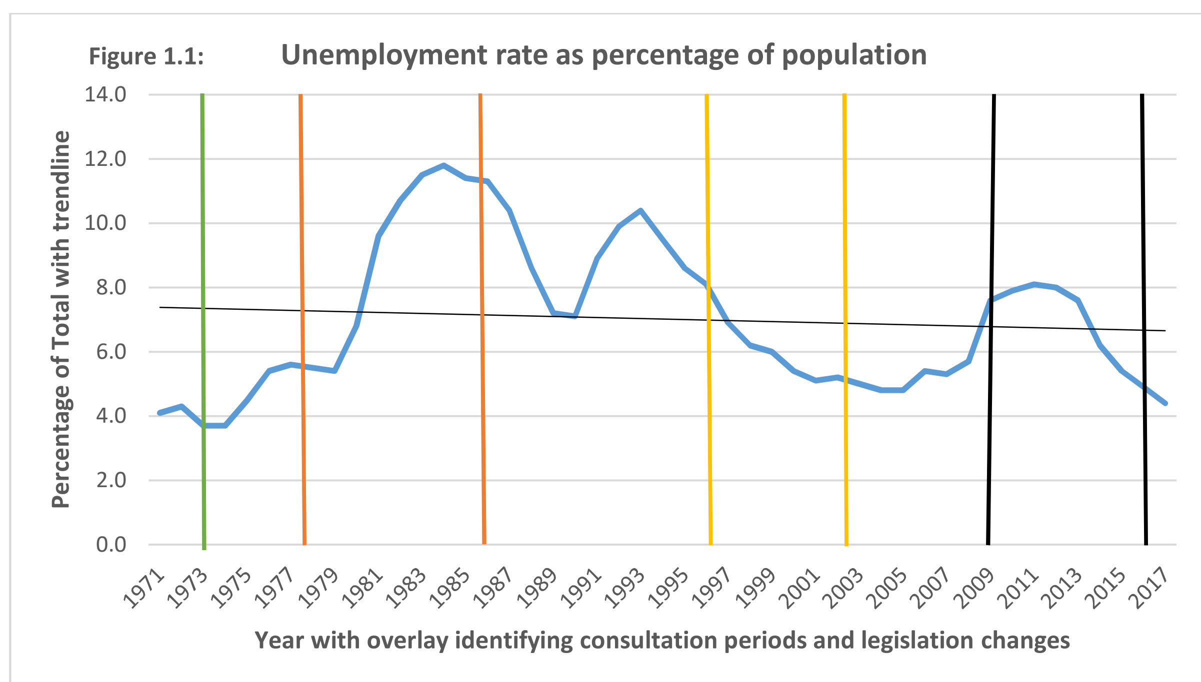
6 See thesis *Introduction* n 2, para 1980, headings 2 and 4. The Review Committee was headed by Sir Kenneth Cork and was established in 1977 while the report was published in June 1982.

7 ibid, 54-55 (para 200-204).

8 ibid, para 1980, headings 2 and 4.

9 See the Government statistics on employment. The data used relates specifically to people over the age of 18. See https://www.ons.gov.uk/employmentandlabourmarket/peoplenotinwork/unemployment. The Office for National Statistics website provides a fuller explanation and was last accessed 14 April 2018.

the work of the review committee which culminated in the Cork Report. The subsequent implementation of the Insolvency Act 1986 (IA86) was a benchmark for the implementation of rescue procedures. The period between the yellow lines on the graph encompasses the subsequent consultations and proposed changes including the Insolvency Act 2000 (IA2000), the Enterprise Act 2002 (EA) and the Corporate Insolvency and Governance Act 2020 (CIGA). Respectively they came into force on 1 January 2003, 15 September 2003 and 21 June 2020. Figure 1.1 illustrates the correlation between the periods of high unemployment and the active review of business rescue mechanisms. The period between the black lines was a very active time for review and consultations post the EA in 2002, during which unemployment was initially on the rise.



Source: Office of National Statistics (core data with the following data overlay indicating the relevant period)

Notes on Figure 1.1: The key milestone events identified

— (green) UK Joined European Economic Community (1973)

— (orange) Review Committee period (January 1977) to publication of Cork Report (1982) / Insolvency Act 1986

— (yellow) Review Group consultation period / Insolvency Act 2000 / Enterprise Act 2002 (15 September 2003)

— (black) Encouraging Company Rescue & related consultations / Consolidation of Insolvency Rules project

The consultation topics post the 2009 increase in unemployment included creditor engagement to facilitate better control of costs, and fairness of distributions to unsecured creditors. The review areas also covered specific rescue issues that had been continually

raised during a range of earlier consultations. These issues included the need for a moratorium;[10] the sale of business including the use of the Prepack;[11] the funding of ongoing trading;[12] and the supply of essential services.[13] Both the lack of funding for post appointment trading and the continued supply of essential services[14] impact directly on the feasibility of an Insolvency Practitioner (IP) being able to explore a range of rescue options, rather than having to resort to an expedited sale of the business. The lack of financial and commercial support from financial institutions following the EA changes,[15] and the legal implications caused by essential suppliers, encouraged the move to an increased use of expedited business sales post 2003, otherwise called Prepacks.[16] The

10 Six main drawbacks to the use of the CVA were identified in *Company Voluntary Arrangements and Administration Orders: A Consultative Document* (1993) para 21, DTI, London. The first being the lack of a moratorium. A moratorium provides a stay of any enforcement action during a short period to allow consideration of the options and negotiate support for the business rescue.

11 The Prepack describes the process where a nominated administrator negotiates a sale of all or part of the business prior to appointment with the sale being completed on appointment or within a short period thereafter. See the *Independent report on Pre-Pack Administrations:* Graham review (2014) including Prepack Empirical Research prepared by Peter Walton and Chris Umfreville with the assistance of Peter Wilson. The Prepack process has been under scrutiny for many years with SIP16 providing the framework for reporting transparency. The scrutiny has culminated in the introduction of the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021. The documents are all available online, Last accessed 30 December 2020 available at: https://wwwgovuk/government/publications/graham-review-into-pre-pack-administration.

12 The lack of available distressed business funding is mainly caused by the lack of priority for repayment in the event that the restructuring fails. The EA changes resulted in the dominance of the administration instead of administrative receivership. The consequence being a starvation of financial support for post insolvency trading by the banks who retained less control over the new ADM procedure.

13 See the *Consultation on the Continuity of Essential Supplies* (2014) published July 2014 and the *Summary of Responses: Consultation on the Continuity of Essential Supplies,* (2015) published February 2015, Insolvency Service, London.

14 Essential services include a wide range of services and not just basic utilities. Services such as internet access, accounting and other software packages as well as merchant services are key providers to many businesses. Such providers can control the provision of these services and obtain ransom payments and threaten the viability of any restructuring process.

15 Statutory Super Priority was proposed as a solution to the funding issue in October 1993 and subsequently dropped in 1995. See para 2.29 of The Insolvency Service, *Company Voluntary Arrangements and Administration Orders: A Consultative Document*, published October 1993. In April 1995 the concept was dropped as a safeguard against finance being provided without due consideration of business viability. See the Insolvency Service (1995) *Revised Proposals for a New Company Voluntary Arrangement Procedure,* para 2.2, 24.

16 The drive towards expedited business sales was principally driven by the lack of funding and creditor power to use essential services to obtain ransom payments. The part played by the sale of business option is discussed in more detail later especially in relation to Prepacks and the sale of assets to any connected parties.

wider opportunities offered by the availability of a general moratorium was discussed at length during a series of consultations[17], with the procedure belatedly being implemented in CIGA.[18] The concern of creditors over the use of Prepacks[19], especially to connected parties[20], has given rise to a series of attempts to make the reporting and approval of the process more transparent. This concern culminated recently in the introduction of The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021.[21]

1.3 Global influences on the UK rescue culture

Internationally the rescue ideology started to transform into a legislative framework in the US with the Bankruptcy Reform Act of 1978, which created what is now referred to as

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17 See the *Insolvency Service Framework Document* (1990), DTI, London, 10, 11 and Annex A - International Evidence; *Company Voluntary Arrangements and Administration Orders: A Consultative Document* (1993) DTI, London; *Revised Proposals for a New Company Voluntary Arrangement Procedure* (1995) Insolvency Service, London; *A Review of Company Rescue and Business Reconstruction Mechanisms*, Interim Report (1999) DTI, London; *A Review of Company Rescue and Business Reconstruction Mechanisms*, Report by the Review Group (2000) DTI, London*; Productivity and Enterprise: Insolvency – A Second Chance* (2001) Cm. 5234, London; *Regulatory Impact Assessment for Insolvency Provisions in the Enterprise Act 2002* (2002) Insolvency Service, London; *A Consultation Document on Changes to the Insolvency Act 1986 and the Company Directors' Disqualification Act 1986 to be made by a Legislative Reform Order for the Modernisation and Streamlining of Insolvency Procedures* (2007) Insolvency Service, London; Encouraging Company Rescue; *A Consultation (2009) Insolvency Service, London; Impact Assessment of Encouraging Company Rescue* (2009) Insolvency Service, London; *Support for the rescue of viable insolvent businesses* (2014) published July 2014, Insolvency Service London; *A Review of the Corporate Insolvency Framework* (2016) published 25 May 2016, Insolvency Service London; *Review of the monitoring and regulation of insolvency practitioners* (2018) published 26 September 2018, Insolvency Service London. Available online at: https://wwwgovuk/government/publications/review-of-the-monitoring-and-regulation-of-insolvency-practitioners.

18 The small company moratorium (SCM) was revoked at the same time. The role of the SCM is discussed further later. See Chapter 3, section 3.5 *The impact of using a moratorium*.

19 The use of a Prepack became the best option for administrators after the change in the role of the procedure by the enterprise Act 2003. The lack of funding available for post appointment trading on the demise of the administrative receivership left IPs with no other option where existing owners could not provide sufficient funds to trade on and restructure the business while in administration. This process is not new and mimicked the phoenixism of the 1970's and similarly the use of hive-downs to save substantial parts of distressed businesses.

20 Note there are six different definitions of connected parties covered in this research including two in the IA86 alongside the separate definition of associated persons plus separate use in the CA2006, SIP16 and its' use in the Graham review. These are explained in detail in the glossary of terms and how they were applied.

21 See also Chapter 2 for further discussion of the impact of Prepacks on the CVA and other regulatory issues.

Chapter 11 of the US Bankruptcy Code. Bankruptcy protection was little used in the US as a protective process prior to its enactment. Notably Chapter 11 proved a game changer, with multiple filings after its enactment allowing businesses to continue operating and saving jobs while paying their creditors off over time. Although the purpose of the rescue ideology was generally accepted globally, the difficulty in translating that into a practical statutory framework within each country's existing legislative and cultural environments remains a complex and difficult process.

In the UK the Cork report[22] similarly recognised the importance of rescue in the early 1980's, and yet even in 1990 similar recommendations were still being made to improve the insolvency framework.[23] The process of making legislative changes in the UK, and indeed in other countries, is often laborious.[24] Within the UK it is further complicated by the differences in enforcement processes across the three legal jurisdictions [England & Wales, Scotland, and Northern Ireland]. Both the EU and the World Bank have attempted to promote and speed the process of legislative change to insolvency frameworks around the world in different ways.[25] The EU has used directives[26] and regulations[27] to instigate change, while globally the World Bank launched a research programme[28] using annual

22 See Introduction *Background and Methodology,* n 2, The Cork Report, paras 200-204 on the social and financial implications of insolvency and paras 235-240 on Insolvency and society, HMSO, London.

23 See the *Insolvency Service Framework Document* (1990), DTI, London.

24 See the *Second Report* by the *Select Committee on Trade and Industry* published 20 December 1999 and the conclusion in referencing the *Rescue culture,* para (e) which stated *"*The Bill has been presented as part of an attempt to stimulate a 'rescue culture' in insolvency law and practice, filling what has long been perceived as a lacuna in the new arrangements introduced in the 1986 Insolvency Act.*"*

25 See also the UNCITRAL Legislative Guide on Insolvency Law and the latest final draft on principles for SMEs in working paper 171.

26 The focus of the 2019 directive being particularly relevant to the rescue culture by amending the 2017 directive to promote preventive restructuring mechanisms and the discharge of debt. EU directives set out goals that allow individual countries to formulate legislation to meet those goals within an extended timescale and can be implemented at different dates.

27 EU regulations have binding legal force and come into operation on the same date within the EU. In respect of insolvency the regulations concentrate on the mechanisms applicable for cross-border cooperation.

28 The *Doing Business* Reports (DBR) are published annually. The reports published between 2004 and 2020 are as follows: *DBR 2004 - Understanding regulation; DBR 2005: Removing Obstacles to Growth; DBR 2006 - Creating Jobs; DBR 2007 - How to Reform; DBR 2008 - Comparing Regulation in 178 economies; DBR 2009 - Comparing Regulation in 181 Economies; DBR 2010 - Reforming through difficult times; DBR 2011 - Making a*

Doing Business Reports (DBR) to encourage change with the use of a world ranking process. The DBRs have been published annually since 2004. Despite these efforts, in 2015 the 'Five Presidents' Report' on *'Completing Europe's Economic and Monetary Union*' listed insolvency law among the most important bottlenecks preventing the integration of capital markets in the euro area and beyond.[29] Similarly the DBR 2020 also confirmed that "the least reformed area *[... during the last eighteen years ...]* was resolving insolvency",[30] in contrast to the progress made in other areas of improving business mechanisms. It is clear that, although the rescue culture is alive and well promoted, there is still some way to go in improving the tools available to implement it at a practical level both in the UK and worldwide.

1.4 The UK 'rescue toolkit'

The term 'rescue toolkit' is used to cover the wide range of options available to rescue or regenerate businesses. The rescue options available to assist in the saving of business fall into two categories. The first principally reschedules or reorganises the debt or other contractual arrangements. The second option requires some form of compromise of the

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difference for Entrepreneurs; DBR 2012 - Doing business in a more transparent world; DBR 2013 - Smarter Regulations for Small and Medium-Size Enterprises; DBR 2014 - Understanding Regulations for Small and Medium-Size Enterprises; DBR 2015 - World Bank. 2014. Doing Business 2015: *Going Beyond Efficiency*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0351-2. License: Creative Commons Attribution CC BY 3.0 IGO*; DBR 2016* - World Bank. 2016. Doing Business 2016: *Measuring Regulatory Quality and Efficiency*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0667-4. License: Creative Commons Attribution CC BY 3.0 IGO*; DBR 2017* - World Bank. 2017. Doing Business 2017: *Equal Opportunity for All*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0948-4. License: Creative Commons Attribution CC BY 3.0 IGO*; DBR 2018 - Reforming to create jobs; DBR 2019 - Training for Reform; DBR 2020 - Comparing Business Regulation in 190 Economies.*

29 See *Completing Europe's Economic and Monetary Union* (the Five Presidents' Report) 10, published 22 June 2015. The Five Presidents' report was authored by Jean Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz.

30 See the *Foreword* of the 2020 report signed by David R. Malpass, President of The World Bank Group.

outstanding debt. In just about every scenario a business will also require a breathing space or period of grace during which enforcement action is suspended.[31]

The hierarchy of rescue options can be best described as a cascade of outcomes for the different stakeholders.[32] The best option is to save the undertaking[33] if possible, as this preserves value for all parties. The rescue of the undertaking can involve, either or both of, operational or financial restructuring elements. Where saving the undertaking is not possible the next best alternative is to save the business[34], or whatever parts of the business are profitable, together with any resulting employment opportunities. Saving all or part of the business preserves jobs and can still provide a return for the creditors. Where the earlier options fail, the final solution is to wind up the undertaking which is recognition that rescue at any level has not been achieved. Liquidation can still sometimes produce a small return for the creditors, although significantly lower than the alternatives.[35] The recycling of the assets via liquidation may on occasion allow some portion of the business to continue, especially for micro and small undertakings.

Business failure is sometimes inevitable and recognises a natural business lifecycle, which for many micro, small and medium sized entities (MSMEs) averages less than five years.[36] It is therefore important that once an undertaking does fail it is dealt with in an efficient and cost effective manner. The link between business rescue and the efficient use of the most appropriate insolvency procedure demonstrates the close and complex relationship

31 Suspension includes a stay on ongoing enforcement actions and a bar to commencing new legal action for enforcement without permission of the court.

32 See *Introduction* n 2, Cork Report, para 627 for the hierarchal framework of business rescue.

33 Undertaking refers to the corporate entity here as opposed to any business style. See section 1161 CA2006 for the definition of undertaking which includes a body corporate, partnership or unincorporated organisation carrying on a business with a view to making a profit.

34 The term business refers to the trading process being engaged in rather than the separate entity or undertaking under which the occupation is being carried on.

35 Schedule B1, para 3 IA86.

36 See Chapter 3 for a discussion on the empirical data on outcomes.

between rescue, recovery and insolvency which are key elements in the business lifecycle.[37]

Having determined that there is a viable business worth saving[38], the next step in any rescue plan is identifying the appropriate rescue mechanisms. Where there are multiple options the optimum is the one which provides the best chance of success. The selection process (or options review[39]) will take into account the weaknesses or areas of concern identified in the review process, including any external factors such as industry or other regulatory restrictions on the choice. An options review aims to provide the company management (or secured lender[40]) with an overview of the issues identified, together with a plan to remedy or deal with those problems. The resulting report will include the pros and cons of each of the different rescue procedures.

There has been criticism that the variety and complexity of the rescue options available in the UK (rather than a single-entry system[41]) means that the choice is over complicated and potentially biased. Thus, the suggested choice can be influenced by familiarity with a procedure rather than a purely objective choice based on the individual circumstances of the business in question.[42] The preferred option may also be dictated by a secured lender or financial institution wanting to retain control. The quality of the relationship between the parties and their advisers can have a material impact on the choice of rescue procedure, together with the particular IP chosen to assist and become the intended office-

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37 Also reinforces the need to recognise the point of business failure.

38 Viability is a key topic and the use of viability statements was introduced as a requirement in published accounts to justify the use of a going concern basis. The statement was also introduced as part of the best practise guide for the reporting of Prepacks under SIP 16.

39 An options review is a standard process completed by a potential office-holder to provide guidance on the potential solutions available. See also the later discussion on viability and the role of the Independent Business review in section 1.12.

40 This will depend on who has commissioned the review and whether it is being completed internally by the business, or externally by an adviser.

41 As suggested by Cork in his report, paras 147 and 627. See *Introduction* n 2.

42 See Chapter 5 which discusses the application of path dependence in more detail and looks at procedure usage against the backdrop of data from the study sample.

holder.[43] The selection of an appropriate IP is equally influenced by both the company's accountants and any legal advisers involved in the review process. The combination of these participants will impact directly on the proposed solutions, whether formal or informal.

1.5 Informal rescue mechanisms

To a large extent informal rescue processes are invisible.[44] Invisibility in the sense that creditors, customers and competitors will not be made aware of the core financial or structural issues. This allows the changes to be made away from media or creditor awareness, thus avoiding the stigma of being branded as a failing business prematurely. The changing shape of any business can include mergers, streamlining and financial restructuring generally. Many informal but visible restructurings are given a positive spin in press releases, for instance structural changes are often promoted as intended to drive an improvement to services rather than reduce costs to manage financial pressures. This type of informal option should be recognised as an ongoing evolutionary process. Every business must identify the need to change and develop in order to stay viable in their particular market. The London Approach[45] is an example of an informal approach that was used in large complicated financial restructurings during the 1990's financial and its principles were revived in 2008.[46] Other informal approaches to restructuring include mechanisms such as outsourcing, rationalisation, a review of supply chains with

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43 See Keith Pond (2004) *Banks and insolvent corporate customers: experience of the rescue culture,* in Gerbel, S., Kaufmann, H.R., Menichetti, M.J. & Wiesner, D.F. (Eds), *3rd Financial Services Industry Symposium* at the Fachhochschule Liechtenstein, Vaduz, 79-88, 5-6.

44 This includes refinancing, structural changes, supply chain review and cost reduction programmes.

45 The London Approach was developed in the late 1970's. For further background see Pen Kent (1993) *The London Approach* Bank of England Quarterly Bulletin, February 1993. See also John Armour and Simon Deakin (2000) *Norms in private insolvency procedures: The London Approach to the resolution of financial distress,* ESRC Centre for Business Research Working Paper Number 173 University of Cambridge.

46 See Michael Smith (1996) *The London Approach and Trading in Distressed Debt*, May 1996, Bank of England Quarterly Bulletin, 222-225. Also more recently Thomas Laryea (2010) *Approaches to Corporate Debt Restructuring in the Wake of Financial Crises,* IMF Staff Position Note 16 and see *Principles of the Approach* in 17-18, January 26, 2010 SPN/10/02.

refinancing options being considered from alternatives such as asset based lending, the factoring of book debts or new equity funding. From an operational perspective virtually every industry, especially manufacturing and retail, are very dependent on the reliability of their supply chain. For efficiency and cashflow purposes most businesses no longer maintain more than a few days stock, making supply chain sensitivity an important element of successful trading.[47] Disasters in supply chains can be manmade or natural and result from a range of operational issues, including physical delivery, untested software upgrades or cyber malware attacks.[48] Every business has to measure the cost of reliability against the risk of failure if a cheaper option is chosen. The rise of online trading and direct home delivery has to some extent provided an alternative to the local stocking issue, but is equally at the mercy of reliable delivery. When informal restructuring processes fail the next option is to identify an appropriate formal rescue procedure that will facilitate either additional breathing space to allow more drastic restructuring, or assist in the sale of all or part of the business.

The determination of the root cause of the financial distress and the resulting best solution will indicate the urgency of the situation. The earlier any potential issues are identified the sooner they can be rectified, more often without the use of a formal rescue procedure. For example, if the problem is cashflow rather than profitability this can be alleviated in a number of ways.[49] It is important that all aspects of a business are included in any viability review to ensure there are no hidden issues.[50] For instance, management may believe that a cash flow issue has been caused by a bad debt or series of bad debts, whereas there

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47 The current issues around the exit from the EU has highlighted this problem and the knock on effect even minor delays can have further down the supply chain.

48 Two examples are the Kentucky Fried Chicken (KFC) franchise and the TSB. KFC changed their distribution supplier in an attempt to reduce costs. The resulting chaos in the changeover period led them to move back to their existing supplier. TSB implemented software changes and continued to publicise that the issues had been resolved while they were still causing major problems. Both businesses made huge losses both in terms of profit and the impact of negative branding.

49 The options include factoring or other debt financing agreements; reviewing supplier and customer terms for payment to bridge the gap; checking costing and pricing processes.

50 See section 1.12 *Business viability*.

may also be underlying pricing or cost issues that have not been identified. A full review of all parts of the business may appear onerous but is necessary to identify all the problems to implement a successful rescue. Simply continuing to refinance debt as it gets larger and more expensive, while continuing to trade in the same way, is not a long term solution.

1.6 The formal rescue procedures

Formal rescue procedures can be found in both the Companies Act 2006 (CA2006) and the IA86. The former covers the scheme of arrangement (Scheme) and the new Restructuring Plan procedure (RPlan).[51] The latter covers the company voluntary arrangement (CVA)[52] alongside the administration procedure (ADM).[53] The remaining insolvency procedures in the Insolvency Act 1986 (IA86) include the different types of liquidation that are used to liquidate a company in either insolvent or solvent situations,[54] and lastly, the different types of receiver and manager roles used by secured creditors to realise or manage their secured assets.[55] The receiver and manager roles are designed as enforcement mechanisms, but can result in rescue when a business is sold as part of the process to maximise recoveries, or when the secured assets are not key to the business survival.[56]

The CVA is the first of the two rescue procedures in the IA86, and it has some distinct characteristics which sets it apart from the administration procedure (ADM) as an alternative.[57] A CVA can only be instigated by either the directors or an existing office-

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51 Part 16 (Scheme) and Part 16A (RPP) CA 2006.

52 Part 1 IA86 (CVA).

53 Part 2 (ADM pre & post EA) and Schedule B1 IA86 (post-EA ADM).

54 Part 4 IA86 (CVL, WUC (both insolvent), MVL (solvent).

55 Part 3 IA86.

56 See Chapter 3, Section 3.2 *The importance of purpose on CVA outcomes* for the data on measuring outcomes and a fuller explanation of distribution CVAs. The 'distribution' purpose is often based on the sale of unused or unwanted assets which provide cash to pay the compromised creditors or alternatively new funds being provided by existing or new owners; or secured creditors.

57 See Chapter 2, Section 2.2, *The fundamental elements of the Company Voluntary Arrangement.*

holder and not by creditors, although the creditors are pivotal in the approval process.[58] The legislation provides a very limited statutory framework for implementation of the CVA;[59] the purpose being to allow the terms to be set out in the proposal document. As a result the CVA proposal must include all the contractual detail being agreed by the creditors.[60] Consequently an approved proposal forms the basis of the CVA, which constitutes a statutory contract between the company and its creditors. Once approved the implementation of a CVA is overseen by a Supervisor, who must be a licensed IP.[61]

The CVA is the only formal insolvency procedure available in the UK that is characterised as encouraging the existing management to continue in control of the business while implementing an agreed plan. This is often described as the UK version of a 'debtor in possession' arrangement, and referred to as such in other country's procedures including the US under Chapter 11.[62] Together with the administration procedure, both are rescue procedures available under the IA86. The other formal rescue procedures are the Scheme and the RPlan.[63] These two procedures are included in the CA2006[64] and are discussed next, together with an overview of how they interact with, or can be compared to, the CVA.

1.7 Schemes of Arrangement and the Restructuring Plan

The Scheme of Arrangement and the new RPlan are both very flexible but are inevitably very expensive processes, due to the level of court involvement and the resulting legal

58 See s 1(1) and (3) IA86.

59 n 57.

60 The contents are listed in r 1.3 IR86 and comparatives in Appendix C.

61 Licensing of office-holders was introduced by ss388-391T Part 13 IA86.

62 Chapter 11 is the restructuring part of the US bankruptcy code and was inserted by the Bankruptcy Reform Act 1978.

63 Inserted by CIGA which came into force on 26 June 2020.

64 The Scheme of Arrangement is in Part 16 CA2006 and the Restructuring Plan in Part 16A CA2006.

costs.[65] A Scheme can be used in both solvent and insolvent situations, whereas the new RPlan can only be used where insolvency is likely. In the context of financial distress both procedures allow a company to restructure under the supervision of the court, by effectively re-arranging the rights of one or more of its members or creditors to facilitate a return to profitability, or deal with other imminent financial issues.[66] The Scheme was one of the earliest rescue mechanisms, pre-dating the IA86. The regulatory framework of the Scheme has remained within the various Companies Act regimes from as early as 1862.[67] The procedure provides a framework for compromises, with either the creditors or members/shareholders. The provisions allow any expedient arrangement to be proposed to court including the distribution of proceeds from the sale of the business under the terms being offered.[68] The RPlan is a very new procedure and is similarly found in the Companies Act.[69] Only time will tell if the procedure becomes as well received. The Scheme remains a popular procedure and is used in a wide range of scenarios, especially in cross border cases due to its current global recognition by the courts in most jurisdictions.[70]

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65 There is no intention to provide a detailed exposition of the legal structure of either the Scheme or the RPlan. There have been suggestions that a 'lite' version of the RPlan should be developed which ignores the fact that the CVA was intended to be the SME version of the Scheme. Trying to reinvent yet another version is counterproductive and makes the available options increasingly complex.

66 These issues include contingent liabilities such as claims for asbestos related illness. Schemes are also used for solvent restructuring and these are not included in these discussions.

67 See the Companies Act 1862 ss 159-161.

68 From the 1800's until 1986 the liquidator was the only recognised office-holder charged with the ability to manage the affairs of an insolvent company. The Companies (Consolidation) Act 1908 s 120 which incorporated the Joint Stock Companies Arrangement Act 1870 followed by the Companies Act 1929 s 153; Companies Act 1948 s 206; Companies Act 1985 s 425-427A; and currently the Companies Act 2006 Part 26.The Companies Act 1947 recognised the role of receiver and manager which was also transferred in part to the IA86. The Act introduced both the Supervisor and Administrator roles as part of the new corporate procedures to differentiate between their roles and duties.

69 The RPlan has been well received but at present has only been used for large companies.

70 See T Smith (2015) *Schemes – conferring jurisdiction by changing the governing law,* South Square Digest, August 2015, 12; also W Trower, (2015) *Consumer Redress and the scheme jurisdiction*, South Square Digest, August 2015, 6.

A Scheme is much less visible than the Insolvency Act rescue procedures[71], as there is no requirement to advertise or publish the terms being offered. The downside is that they are expensive to formulate and implement[72] and this was the drawback for small businesses highlighted in the Cork Report.[73] The lack of visibility stems from the Scheme being an exclusively court-led procedure, with no requirement to file any documents with the Registrar at Companies House (CH) or publish any formal notice of the terms or appointment of the scheme supervisor. The Cork Report identified the need for a similar, more flexible but cheaper rescue mechanism for small companies, including the potential for an out of court option.[74] The response to this recommendation was the introduction of the CVA procedure in the IA86. The rationale behind its flexible structure allows either a scheme or composition arrangement to be proposed, but with a more visible procedure than a Scheme.[75]

During the review of the corporate rescue framework in 2016 it was suggested that a further freestanding restructuring procedure was needed in addition to the CVA. As a result, the Corporate Insolvency and Governance Act 2020[76] (CIGA) introduced the new RPlan by inserting a new Part 26A into the Companies Act 2006 (CA2006). The new RPlan is based on the existing Scheme but can be differentiated in that, under the RPlan, there must be a likelihood of insolvency but is otherwise a similar procedure.[77] However, as a consequence of the court involvement, the RPlan is also unlikely to be an effective solution for the small and micro businesses due to the inherent legal costs of implementation.[78]

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71 A Scheme can sometimes be protected by a provisional liquidation or used in conjunction with other procedures.

72 The legal costs of court hearings and the need to submit frequent reports all add to the expenses incurred.

73 See Introduction *Background and Methodology,* n 2 (Cork Report) section II, paras 400-430, pp97-103.

74 ibid, section on *Our Proposals,* paras 419-422.

75 n 57.

76 n 63.

77 Note that the application requires conditions A and B to be met. See section 901A CA2006. Similar rules apply as in a CVA requiring the company to determine if the RPlan is to be a scheme or composition.

78 The currently reported RPlans to date have all been large companies.

This leaves few alternatives for smaller businesses, and the most popular option is currently the post Enterprise Act administration procedure.

1.8 The administration procedure pre and post the Enterprise Act

The role of the administration procedure (ADM) has changed since its introduction in 1986. The ADM has very different characteristics following the implementation of the EA, with changes coming into effect from the 15 September 2003 aiming to provide "a superior corporate rescue environment".[79] Significant changes to the ADM were introduced as part of a package of changes that sought to encourage better use of the procedure, and to make it a direct replacement for the administrative receivership (ADR). At the time the ADR was considered to be an overused procedure with a reputation for abuse.

The ADR had come under close scrutiny post its inception in IA86[80], and in some cases the overzealous use by some secured creditors was considered to be an abuse of process.[81] The ideal of the collective approach to procedures promoted by Cork[82] had been revisited, after a fifteen year period in which the banks and other secured creditors controlled which businesses were saved; mostly by hive downs (transfer of a business to a subsidiary) or other sales of business assets.

Following its initial introduction in 1986, the pre-EA ADM was rarely used often when there was doubt over the validity of the floating charge,[83] which would otherwise have allowed

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79 See Sandra Frisby, *In Search of Rescue Regime: The Enterprise Act 2002*, (2004) 67(2) MLR, 247.

80 See the White Paper, *Productivity and Enterprise - Insolvency: A Second Chance (2001)* London, HMSO, para 2.2. A lack of transparency for unsecured creditors was identified as a key issue.

81 For an alternative view see Mokal, R.J. (2004) *Administration and Administrative Receivership: An Analysis*, Oxford, SSRN-id466701.pdf. See specifically Part 3 Harm done by administrative receiverships, 6. Private debentures also allowed directors to hive down businesses into new companies on a serial basis, ditching the debts and transferring the core assets back to themselves on multiple occasions.

82 Introduction *Background and Methodology,* n 2, *Cork Report,* para 198.

83 A floating charge is an equitable charge on the assets of a company or business that will vary over time without the need for the charge to be specific or reregistered. The charge includes assets such as stock that are

an administrative receiver to be appointed.[84] In most cases there was still some potential to save the business.[85] The pre-EA ADM could also be used as a moratorium[86], during which a restructuring plan could be proposed either via a CVA, a Scheme[87] or within the ADM itself. However a key drawback was that prior to the EA changes there was no process to allow a distribution to be made to the unsecured creditors within either the ADR or ADM procedures.[88] Both procedures required either a CVA or liquidation to distribute any surplus funds to the unsecured creditors.[89] As a result there was an incentive to make sure all the funds were distributed to the secured creditors to avoid a new procedure being required with the consequential review of fees and actions by any following office-holder. The original wording of section 8(3) IA86 summarised the hierarchy for the pre-EA ADM and linked it to both the CVA and the Scheme:

> "*(3) The purposes for whose achievement an administration order may be made are—*
>
> > *(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;*
> >
> > *(b) the approval of a voluntary arrangement under Part 1;*
> >
> > *(c) the sanctioning under section 425 of the Companies Act of a compromise or arrangement between the company and any such persons as are mentioned in that section; and*

continually changing. This type of charge can crystallise or be converted into a fixed charge on the same assets on specific events occurring such as insolvency.

84 An administrative receivership is an enforcement mechanism that allows the secured creditor with a valid floating charge over the assets to appoint administrative receivers to dispose of the business to settle the outstanding debt.

85 This invariably included the need for ongoing trading while a sale was completed.

86 In insolvency procedures, the moratorium is a period during which any legal action cannot be commenced without court approval and, further, any enforcement procedures already instigated are stayed pending the outcome or ending of the moratorium period.

87 See the next section where Schemes are explained in more detail.

88 The EA implemented fundamental changes to the format of the original administration procedure where the only reporting required was a rule 2.2 report on the reasons for the procedure. After that there was no requirement to report on case progression to anyone other than the secured creditor in much the same way as in administrative receivership.

89 The period referred to was 29 December 1986 to 15 September 2003.

(d) a more advantageous realisation of the company's assets than would be effected on a winding up; and the order shall specify the purpose or purposes for which it is made."[90]

The graph in Figure 1.2 shows the use of the different insolvency procedures pre and post EA, which is indicated by the vertical black line.[91] In its original form the ADM (grey line) was little used, on par with the CVA (yellow line). Given that the CVA and ADM were introduced together as complementary rescue procedures[92], there was impetus to improve and streamline their combined usage by the EA changes. The revamped ADM was seen as potentially a better option than the ADR because, as a collective procedure, it provided creditors with more accountability for the actions of the office-holder, while still allowing the secured creditor some control over the process and the choice of IP.[93]

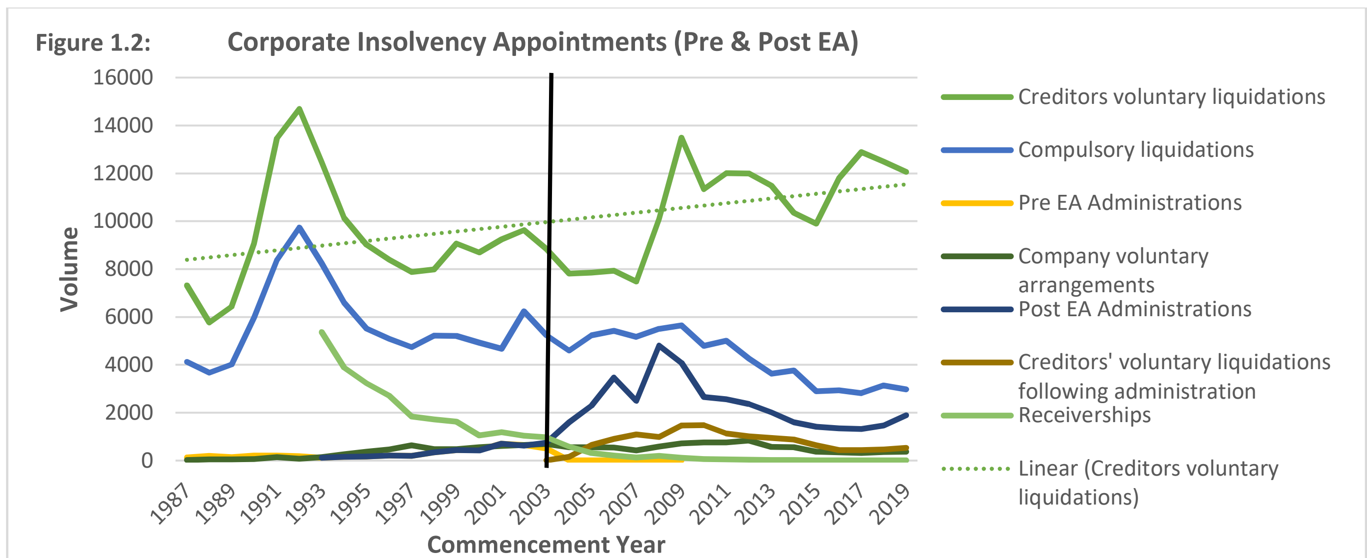

Figure 1.2: **Corporate Insolvency Appointments (Pre & Post EA)**

Source: Insolvency Service Data (England and Wales only

90 Section 3 IA86 (as originally enacted) was replaced by para 3 Schedule B1 IA86 from 15 September 2003. See para 3 for the hierarchy of purposes in its current format.

91 The data is for England and Wales only as the earlier data for Northern Ireland and Scotland was not published in the same format.

92 Introduction *Background and Methodology,* n 2, *Cork Report,* para 419-422, which sets out the combined proposal for the introduction of the ADM and CVA to provide an alternative to the Scheme of Arrangement for small businesses.

93 Collective procedures are also considered to be more acceptable options both within the EU and globally by the World Bank. The ADR procedure allowed the appointor to incentivise the sale of assets up to the point at which the debt was fully discharged but with no added benefit of optimising realisations beyond that point or to rescue the company.

Notes on Figure 1.2:

(1) The vertical line in 2003 indicates the implementation of the Enterprise Act (EA) in September 2003 with the changes to the administration procedure as well as the implementation of the Small Company Moratorium for the CVA in January 2003.

(2) The creditors' voluntary liquidations are shown separately by entry route from a new analysis of the data.

(3) The reanalysis of the receivership data is only currently available from 1993.

The implementation of the small company moratorium for the CVA[94] in January 2003 was similarly an attempt to bolster the use of the CVA as a standalone rescue mechanism, prior to the implementation of the transformed ADM later in that year. The outcome of that change disadvantaged the use of the CVA, with the ADM (black line in Figure 1.2) not only taking the ADR market but also appearing to steal an element of what previously would have been liquidations and potentially also CVAs.

What is clear from the movement between the corporate procedures is a blurring of the uses between the various procedures, giving IPs either more opportunity to find the best solution or the ability to stretch the boundaries of whichever procedure they are most familiar with using. The process and impact of this blurring by office-holders is discussed in more detail later.[95] The confusion over the available options commenced with the new procedures introduced by the IA86, and accelerated with the changes made by the EA. Prior to the IA86 the only two formal options for a company in financial distress were liquidation or receivership. Today, the options have doubled with the introduction of administrations and voluntary arrangements as well as the Companies Acts options. The blurring of the distinction between procedures is a side effect of the rescue culture attempting to provide a wider more complex range of available solutions.

94 Sections 1 to 4 IA2000. The Small Company Moratorium came into effect on 1 January 2003 and was revoked 21 June 2020.

95 See Chapter 4, Section 4.6 *Lock-in for other insolvency procedures*.

1.9 The challenge of potentially unviable businesses

One of the other issues that needs to be considered is the increasing rise of the 'zombie' company;[96] the term used to describe failing businesses kept alive with either bailouts or the forbearance of enforcement processes.[97] The rationale for propping up these businesses is almost exclusively to save jobs, with the perhaps forlorn hope of eventually returning the company to profitability.[98] Other descriptions of zombie companies include a variety of insolvent or potentially insolvent entities being allowed to continue operating with the tacit support of their banks and other financial institutions. The term 'zombie company' was first coined by the media in the 1990's during the Japanese price bubble when Japanese banks supported weak and failing firms. The term had a revival in 2008 when companies in the US similarly received bailouts,[99] and more recently was revived in the UK as a result of the combination of policy changes by the government[100] and low

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96 There are a number of different definitions of zombie companies but they all recognise that some companies being rescued have fundamental structural failings, either financial, operational or managerial, which cannot be fixed.

97 There are multiple news articles on Zombie companies and the link to loose monetary policy and low interest rates. For example see Huw Pym (2012) *Zombie Companies eating away at economic growth* (12 November 2012), http://www.bbc.co.uk/news/business-20262282 last accessed 11 March 2018; Sydney Finkelstein (2012) *How to spot a zombie company*, 14 February 2012, last accessed 11 March 2018. Link https://www.forbes.com/sites/sydneyfinkelstein/2012/02/14/how-to-spot-a-zombie-company/#5c639784174f

98 The current pandemic is creating a tsunami of this type of business.

99 See Daniel Lacalle (2017) *The Rise of Zombie Companies — And Why It Matters* (08/08/2017) Fedwatch, last accessed 11 March 2018; R3 (2012) *Are zombies really attacking the UK economy, issued* November 2012, London, R3; R3 (2018) *The 'zombie businesses' phenomenon: An update,* issued 28 December 2018, London, R3, based on research undertaken by BDRC.

100 See extract from Mandelson's speech in the House of Lords on 8 December 2008 confirming "We expect banks to play their part in ensuring that viable businesses do not fail for lack of credit". Available at https://www.theyworkforyou.com/lords/?id=2008-12-08a.155.2. At the same time the HMRC time to pay scheme was launched by Alistair Darling so that businesses unable to meet their tax bills were given time to pay in instalments or defer the payment entirely. Up to 28 March 2010 more than 310,000 arrangements had been set up, totalling £5.3bn, with £4.2bn repaid to that date. See commentary by Sarah Bridges for the *Mail on Sunday* 16 May 2010.

interest rates.[101] The advent of the rescue culture may not have directly caused zombie companies but has created a potential environment for them to persist for longer periods.

According to the 2017 Organisation for Economic Cooperation and Development (OECD) reports, zombie companies were on the increase, rising from 6% to 10.5% of listed companies in the fourteen developed countries included in that review.[102] In those reports the definition of a zombie company was stated as 'a business whose earnings before tax do not cover its interest expenses'. In simple terms this means the capital debt incurred is not being repaid, so refinancing simply allows the debt to be continually rolled over, thereby using up the banks' financial resources without any real growth. This stagnation has been exacerbated by the long period of extraordinarily low interest rates. However, regardless of the definition used, the result of this type of lending results in the finance that would otherwise be available for new businesses and genuine investment for growth being diverted to propping up failing businesses that will eventually likely die.

1.10 Evaluating the returns to creditors

Improving the return to creditors was one of a series of objectives of the EA, and part of the intention to enhance the rescue culture for businesses in financial difficulty.[103] The evaluation of this aim was a key element of the impact assessment, to be evidenced by a series of reviews commissioned post implementation to test the outcomes. The results of that evaluation process were published in January 2008.[104] The process used outcome-

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101 See Thomas Laryea (2010) *Approaches to Corporate Debt Restructuring in the Wake of Financial Crises*, IMF Staff Position Note, 5, January 26, 2010 SPN/10/02.

102 See OECD working papers 1372 and 1399: *The Walking Dead? Zombie Firms and Productivity Performance in OECD countries*, No 1372 and *Insolvency Regimes, Zombie Firms and Capital Reallocation,* No 1399. There are a wide range of other OECD reports and working papers also referring to the zombie company issue.

103 The same goal was also picked up as a key theme in the World Banks Group *Doing Business Reports* (DBR). See *DBR 2004, Section 6 Closing a Business,* p71 and Goal 1 on p72. Improving returns to creditors also remained a goal in the DBR reports up to and including the 2020 report.

104 Department of Trade and Industry (2002) *Enterprise Act 2002 – Corporate Insolvency provisions: Evaluation Report*, HMSO, London.

based measures[105] and the findings relied on three pieces of external research.[106] The report confirmed that the usage of the post-EA ADM had increased relative to administrative receivership (ADR), by making it a more viable procedure for small and medium sized enterprises (SME).[107] Similarly, there was an increase in the use of non-court order entry routes[108] and use of a wider range of exit routes.[109] It was also confirmed that the average duration of ADMs had shortened,[110] together with a reduction in some of the direct costs (primarily IP and legal fees) of administration.[111] However this was tempered by the findings of overall cost increases, in comparison to the previously more popular ADR.[112] The ADR allowed the secured creditor much tighter control over the costs than the ADM, with many banks forcing the use of lower blended hourly rates for IP fees rather than their published standard rates. This process was not visible as there was no requirement to publish outcomes. There were increased returns to secured and preferential creditors in relation to pre-EA ADM but less evidence of improved returns to

105 There has been much written on public policy evaluation and in summary there are two key ways in which substantive polices are evaluated. They can be reviewed by looking at the impact of the legislative reform using a summative process and measuring outcomes or using a formative process by identifying particular issues that are not working well and need change. See HM Treasury (2011) *The Green Book Appraisal and Evaluation in Central Government*, (2003) Edn updated 2011, London, TSO, Part 2. The Green Book is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685903/The_Green_Book.pdf.

106 See Dr Sandra Frisby *Report on Insolvency Outcomes* (two reports June 2006 and July 2007); Alan Katz and Michael Mumford's *Study of Administration Cases* (October 2006); John Armour, Audrey Hsu and Adrian Walters *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (December 2006).

107 n 80. See also Sections 3.2 *The importance of purpose on CVA outcomes*, and 3.4 *Interaction with the administration procedure*.

108 n 80. See also Section 3.3 *The CVA rescue hierarchy*. Non-court order entry routes refer to applications made by directors, shareholders and qualifying floating charge-holders without a formal court hearing.

109 n 80. See also Section 3.6 *The influence of the company profile on outcomes*. There are five potential exit route options: (1) automatic end (no automatic dissolution); (2) applications for termination and early dissolution; (3) move to a follow-on CVL; (4) exit via court winding up (WUC); (5) exit via CVA.

110 n 80. The shortened duration was encouraged by the 12 month automatic end requiring positive action to extend the procedure.

111 n 80. See also Section 3.9 *Creditor trust and the Insolvency Practitioner*. See also the Office of Fair Trading Report (2010) *The market for corporate insolvency practitioners,* paras 1-6-18, OFT1245*,* London.

112 n 80.

the unsecured creditors from the Prescribed Part (PP),[113] due to the inbuilt delay in applying the process to new charges only.[114] Before the EA the lack of transparency in the ADR reporting regime[115] also allowed instances where the secured creditor was paid in full, and then allowed to recoup additional monitoring charges plus approve higher rates for the office-holders than would otherwise have been approved and paid.[116]

1.11 The movement between insolvency procedures

The findings compiled by the Insolvency Service (IS) reinforced the impact of the EA on the changing use of the different insolvency procedures. The new streamlined ADM had absorbed both the ADR market and, unexpectedly, an element of the creditors' voluntary liquidation (CVL) market. This was demonstrated earlier graphically in Figure 1.2. Less convincing were the findings on the EA's impact as a rescue procedure.[117] The report entitled Productivity and Enterprise: Insolvency – A Second Chance contained a series of recommendations which included the

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113 The Prescribed Part (PP) is a ring fenced fund carved out of the floating charge assets of a company. It only applies if there is a relevant charge (registration post 15 September 2003) and there are sufficient funds remaining after the preferential creditors and expenses have been paid. The costs of calculating and making a PP distribution is paid out of the fund. See section 176A IA86 and the Insolvency Act 1986 (Prescribed Part) Order 2003.

114 n 80. See also Sections 3.2 *The importance of purpose on CVA outcomes*, 3.4 *Interaction with the administration procedure*, and 3.10 *Creditor trust and the receipts and payment account*. Note that because the PP only applies to post 15 September 2003 charges there are still a large number of existing charges in place which do not trigger the process.

115 The only communication with the unsecured creditors in the ADR was the s 48 report.

116 Any surplus available in an administrative receiverships required a separate liquidation or CVA to make the distribution.

117 n 80. See also Sections 3.2 *The importance of purpose on CVA outcomes*, 3.4 *Interaction with the administration procedure*, and 3.7 *Insolvency Practitioner influence on CVA use*. The data from this research into CVAs provides new evidence of its usage and highlights the CVAs interaction with both the administration and liquidation procedures alongside the use of a subsequent or concurrent sale of the business.

> "… continued monitoring of the impact of the EA and further evaluation, particularly to take account of insolvencies commencing after September 2004 and to assess the real impact of the "prescribed part". … [It further suggested that more] ... consideration should be given to a review of creditors' voluntary liquidation ("CVL") in light of administration apparently being substituted for CVL in some cases." [118]

A further consultation entitled Encouraging Company Rescue followed in 2009, resulting in the Government restating the economic background of the plans to assist company rescue and the return to a formative evaluation approach.[119] In the difficult economic environment created by the global recession of 2007-9, the UK Government's policy objective was to offer viable companies facing temporary difficulties the opportunity to turn themselves around, thereby preserving jobs whilst also protecting the interests of creditors.[120] This consultation set out a number of ways to further enhance business rescue, and specifically to try to increase the use of the CVA procedure.[121] Suggestions included further new options for the use of the small company moratorium (SCM), together with ways to encourage the availability of funding during rescues.[122] Proposals were made to extend the SCM for the CVA to medium and large companies,[123] and to introduce a new general court-sanctioned moratorium, which was finally included into the insolvency toolkit during 2020 by the Corporate Insolvency and Governance Act (CIGA).[124]

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118 n 80, 7.

119 A formative approach identifies particular issues that are not working well and need change. See HM Treasury (2011) *The Green Book Appraisal and Evaluation in Central Government*, (2003) Edn updated 2011, London, TSO, Part 2, The Green Book is available at
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685903/The_Green_Book.pdf.

120 See *Encouraging Company Rescue* (2009) 5, Insolvency Service, London.

121 ibid

122 These are also recurring themes in the later consultations.

123 This was introduced by the Insolvency Act 2000 but only applicable to small companies entering a CVA. See para 2 to 4I Schedule A1 IA86 for definitions and exclusions from the process. The small company definition used as stated in s 382(3) CA 2006.

124 A moratorium is the mechanism for keeping enforcement action at bay during the period of restructuring. A characteristic of all insolvency procedures is the automatic moratorium on appointment. For voluntary arrangements for some entities a court sanctioned moratorium can be applied for and extended until proposed arrangement has been approved or rejected. This proposal is an extension of that process and would allow a free standing moratorium to be applied for, providing breathing space for a restructuring plan (formal or informal) to be put in place. This general moratorium was finally introduced by CIGA 2020.

A further suggestion in the 2009 consultation was to improve the availability of new finance, including the implementing provisions to allow greater security for any new funding provided during periods of restructuring.[125] The responses to the 2009 consultation raised a number of points and concerns within the insolvency profession, both on the suggestions made and on rescue procedures generally.[126] The first point confirmed that informal restructuring completed outside the glare of formal procedures stood a much greater chance of success, by avoiding the stigma of insolvency and other punitive reactions of creditors, suppliers and financial institutions. This is reinforced from the study data analysis of terminated CVAs.[127] The media attention from entering a formal insolvency procedure can adversely affect ongoing sales resulting in failure of the rescue attempt.[128] It is impossible to determine whether this plays more than a minor role, due to the range of potential contributory termination factors in individual cases, however media attention of the process is only likely to have a negative impact on supplier and customer confidence.[129]

The opposite concern was also raised. Any measures that could be seen as artificially extending the life of unviable businesses was considered unwelcome, as effectively increasing the zombie population of businesses as discussed earlier. Indeed, it is often difficult to determine when the viability line has been being crossed, as there is neither a clear 'zombie line' nor a simple test to determine the threshold. However, the CVA procedure can be used to provide breathing space to consider both viability and the suitability of the available options, while allowing the business to continue to trade normally. In addition, termination of a CVA can be treated as an indication that the

125 The suggestion included a new super priority to be given to financial institutions providing new money to encourage the provision of funds for restructuring purposes.

126 See *Responses to Encouraging Company Rescue,* published November 2009, Insolvency Service, London

127 See Chapter 3 *The Company Voluntary Arrangement: Identifying characteristics and measuring outcomes*.

128 Ibid, specifically the data on termination factors.

129 Reporting on termination factors is often vague and invariably falls back on lack of available funds. In a few cases the final reports provide information on the root cause of termination. These vary between inability to maintain payments and new debts being accrued.

company may need a more hands-on restructuring procedure such as administration,[130] or that it has simply passed the rescue threshold and needs to be liquidated. The study data revealed that this chain of events is already happening.[131]

1.12 Business viability

The viability threshold is key to identifying if there is an underlying business worth saving. Business viability can be approached from economic, social or financial perspectives.[132] An accountant might look simply at the profitability of the entity, whereas economically and socially there are wider implications that might be more important and require consideration. These include issues such as: the number of employees affected;[133] the type of industry that, for national security reasons for example, might need to be maintained (examples include energy, defence, banks, and other financial institutions); or any business subject to unfair global competition.[134] More recently, even corporate social responsibility issues can have an impact on outcome. Viability must also be recognised as a transitory status, which is invariably based on a range of assumptions and forecasts at a point in time, any of which may ultimately prove to be incorrect. The use of sensitivity analysis in reviewing the assumptions used can provide a framework under which decisions are made on the expected outcomes, and these should be referred to in any viability statement.

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130 Company Watch data from research indicates that two thirds of administrations fail, taking into account those were the business has been sold as a pre-pack or other sale post appointment. See the data at https://www.companywatch.net/article/2016/10/two-thirds-businesses-going-administration-fail.

Last accessed 14 April 2018. See also the suggestions discussed in Chapter 7.

131 The nominee data from CH was compared to the published Gazette notices and this revealed both additional use of the small company moratorium where a CVA was not subsequently implemented and in some cases the company went into an alternative procedure but in isolated cases there was no record of any further documents being filed. More research is required into this area.

132 See Thomas Laryea (2010) *Approaches to Corporate Debt Restructuring in the Wake of Financial Crises*, IMF Staff Position Note, 7, January 26, 2010 SPN/10/02.

133 Virtually every news report of a saved business leads with, or highlights the number of jobs saved.

134 See *Global steel industry's 'zombie' rescue addiction* - The Barrel Blog and the later discussion on zombie companies. Last accessed 14 April 2018.

There are a series of review areas to consider when investigating imminent business failure. These include topics such as the analysis and monitoring of cash flow; the level of asset or working capital finance; a review of key operational issues often linked to base or overhead costs, which may or may not include pricing policy and transfer pricing in relation to connected parties; and the potential lack of management information and/or other management control issues affecting the viability of the business. These options are all potentially considered as part of an independent business review (IBR).[135] Such a process is often the first step in identifying the underlying issues for a business in stress or distress[136] situations.[137] An IBR should be completed in some form or other to determine if there is a viable business worth saving before an appropriate restructuring or rescue mechanism can be sought.[138]

This raises the question that, given not all businesses can and should be saved, what criteria should be used to identify those businesses that are worth saving and so avoid creating more zombies that stifle economic growth. The determination of business viability is key to determining the correct rescue mechanism and, as discussed above, the analysis of potential outcomes is fraught with difficulty. The success or failure of any proposed rescue will also rely on the criteria used to benchmark the eventual outcome. For instance at a procedural level, a CVA proposal must include an expected outcome comparison with a liquidation or administration to demonstrate that creditors will get a better outcome than in the relevant alternative.[139] Similar comparisons are used in all formal rescue procedures

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135 The Independent Business Review (IBR) has been used by banks to obtain an unbiased view of a business's strengths and weaknesses. They are offered by almost every accountancy and consulting firm as a standard product to assist with financing or investment decisions. It can be used to either report directly to an existing or proposed lender or direct to management.

136 The terms stress or distress in relation to a business refer to the state of urgency in relation to the need to refinance or restructure the business.

137 See Chapter 1, Section 1.4 *The rescue toolkit*.

138 A CVA proposal requires cash flow forecasts to demonstrate the viability of the arrangement.

139 This is particularly important in an administration when a para 3(b) Schedule B1 purpose is declared as the administrator must demonstrate that creditors will get a better result than in a winding up. Unlike the supervisor in a CVA the administrator is not subsequently judged on this outcome which frequently favours any secured creditors regardless of who instigated the appointment.

as a basis for identifying the best option and justifying the proposed solution.[140] For a business rescue to be effected either the whole or part of it should be saved and the creditors should expect to receive, at a minimum, more than they would have received in a forced sale scenario or liquidation. Other measures of outcome may be appropriate in different circumstances and need to relate to the identified root cause of the distress.[141] It is during this review process that a business is extremely vulnerable to pre-emptive enforcement action or ransom demands from key suppliers, resulting in the need for a stay of any ongoing or new enforcement proceedings.

1.13 The suspension of enforcement action

The suspension of enforcement action takes effect automatically in most insolvency procedures. A moratorium period results in the prevention of any legal action being commenced without court approval, and further any enforcement procedures already instigated are stayed pending the outcome or ending of the procedure, or an agreed period. The purpose of a moratorium is to provide a breathing space during which a review process can both determine the underlying issues and agree the best options, or simply end proceedings where the insolvency has superseded the action.[142]

In respect of free-standing moratoriums, the IA2000 introduced the SCM for CVAs with the intention that this would increase its use.[143] However the SCM was revoked by the

140 For administrations see Schedule B1, para 3 IA86 which sets out the options for the objective required in the Statement of Proposals.

141 The CVA study data outcomes are analysed in Chapters 3 to 6.

142 On a general note, once commenced all insolvency procedures effectively act as a moratorium by halting any existing enforcement actions and preventing any new action from being instigated while the procedure continues except with court approval. In some cases insolvency procedures such as administration are used as a moratorium in the absence of a general moratorium process being available. The Small Company Moratorium has been used effectively even when a CVA proposal has not been subsequently approved. In addition CIGA2020 has recently introduced a new general moratorium. See Chapter 2 for a more detailed discussion on the terms.

143 See Schedule A1 para 8(3) IA86. An application provides an automatic moratorium period of 28 days on the filing of the relevant documents in court which can be extended by using a similar process. See paras 32-35 Schedule A1 for the conditions.

CIGA2020, which replaced the process with a separately designated moratorium procedure set out on very similar lines. Both the 2010[144] and 2016[145] consultations proposed this new procedure to aid business recovery and this has now finally been implemented in 2020. Future analysis will be needed to determine if it has been any more effective than the use of the SCM.

The 2010 consultation[146] specifically identified that the credit boom between 2007 and 2008 was likely to result in an increased number of businesses finding themselves needing to refinance circa 2015, against the backdrop of a completely different debt refinancing market. The suggestion was that this type of court approved moratorium would provide 'a protected breathing space' to aid the refinancing process.[147] The emphasis was again to assist larger companies with their more complex financing requirements and the new moratorium now in place answers this requirement. However, the new moratorium fails to deal with the small and micro undertakings, which form the vast majority of UK businesses in distress by volume.[148] The 2010 consultation responses on the subject, published in May 2011, were mixed. Although the idea of a general moratorium was welcomed it highlighted the need for more detail in order to determine whether it would be useful for the majority of businesses in distress. The practical implementation was also in doubt given the lack of use made of the SCM.[149][150] The limiting factor of the new general

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144 See *Proposals for a Restructuring Moratorium,* Insolvency Service (2010) HMSO, London.

145 See *A Review of the Corporate Insolvency Framework,* Insolvency Service (2016) HMSO, London.

146 ibid

147 n 145, p9-10.

148 The costs of a separate moratorium procedure adds another financial cost to the restructuring process. See Chapter 7 for recommendations for the micro business.

149 The small company moratorium (SCM) was introduced by the Insolvency Act 2000 and came into effect from the 1 January 2003. It was enacted by inserting Schedule A1 into the IA86 and a new chapter into the rules. The SCM was revoked on 26 June 2020 by Corporate Insolvency and Governance Act 2020 and replaced by a new general moratorium introduced by the insertion of a new Part A1 and Schedule ZA1 into the IA86. See Chapter 3 section3.5. There is evidence that the SCM was used as a general moratorium without a subsequent CVA being approved for small companies prior to the new general moratorium being implemented.

150 See CIGA, Part A1, Moratorium, Schedules 1-7 which include temporary amendment rules for each jurisdiction. They should be separately implemented before 30 September 2020.

moratorium is the potential risk to the Monitor of any abuse of process [explain].[151] This is the issue that led to the low usage of the SCM.[152] The main difference between the new Moratorium and the SCM is the extension process; the new general moratorium requires court approval, whereas the SCM could be extended with creditor approval when additional time was required to negotiate terms.

The lack of moratorium became an easy excuse whenever a rescue was thwarted by creditors or a reason required in respect of the falling number of businesses being rescued. The better question is whether or not businesses that should be saved are being saved and, if not, was the lack of a general moratorium a real issue in those cases? The SCM mentioned above is a classic example. Most insolvency professionals when questioned would say they were never used and the safeguards against abuse made the process practically unworkable. Despite this a small number of IPs did use them both with and without a subsequent CVA appointment.[153] How useful they were in ensuring an appropriate breathing space was provided was difficult to determine.[154] The focus on moratorium regulatory safeguards above all else tends to ignore the fact that if a director is going to abuse that process, then they are likely to have already committed other transgressions that are probably more serious, making the safeguards onerous but ineffective. The transfer of regulatory risk from director to office-holder under the moratorium regime is difficult to justify especially when the office-holder[155] is not in full control of the day-to-day business operations. The regulatory oversight of the insolvency profession has instilled a risk averse culture into IPs, which is part of the cause of the unpopularity of the now revoked SCM.

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151 See Insolvency Service (2011) *Summary of Responses: Proposals for a restructuring moratorium* (published May 2011), 5-6, IS, London.

152 See Chapter 2, Section 2.2 *The fundamental elements of the CVA*.

153 See the data in Chapter 3, Section 3.5 *The impact of using a moratorium*.

154 ibid

155 For the CVA the SCM office-holder is the nominee and for the new Moratorium the office-holder is the Regulator.

1.14 Restrictions to trade during rescue

An integral part of formulating a rescue plan is to be able to continue trading during any review or moratorium period as well as during the ongoing restructuring process. A number of issues emerged during the 2009 IS consultations that were causing problems and preventing trading from being continued. The first concern was the continuity of essential supplies. The technological changes in business meant that suppliers of software and all types of communication and utility providers could hold distressed and potentially insolvent businesses to ransom. This included either refusing the continuation of services until all the old debts had been paid, or making uneconomical charges for any ongoing supply. Technological changes had widened the range of suppliers with the power to become 'ransom' creditors by preventing any continuation of trade during a rescue. Indeed, there are examples noted in the CVA study period where termination was as a direct result of this type of action.[156]

A targeted consultation was published in 2014[157] with a summary of the responses following in 2015.[158] As a hot topic the focus on essential supplies was generally well received. The suggestion was that, in exchange for ensuring continuity of service, office-holders would be required to guarantee ongoing payments would be met as an expense of the procedure. The consultation responses included a very detailed proposal from The Association of Business Recovery Specialists (R3)[159], together with a series of additional problems raised by the insurance industry in respect of credit insurance. The result was that suppliers would have to insist on prepayment during any moratorium trading period,

156 In one case the merchant services refused to continue to allow the use of credit cards effectively putting the company out of business.

157 See the wording of section 233 IA86 as amended by Insolvency (Protection of Essential Supplies) Order 2015.

158 See the Insolvency Service *Consultation on the Continuity of Essential Supplies* (published July 2014) and the *Summary of Responses* issued February 2015.

159 See the R3 response (2016) *A Moratorium for Businesses: Improving Business and Job Rescue in the UK,* issued May 2016, R3, London.

as no credit insurance would be made available to them because of the level of risk involved. However, the one positive element of the 2016 consultation was the widening of the definition of essential supplies following these representations. The wording of section 233 was amended by the Insolvency (Protection of Essential Supplies) Order 2015 which inserted an extension to include additional services and providers, such as IT contracts. This change came into effect from 1 October 2015 and so will not materially impact the sample in this study, but was a welcome aid in short term trading situations. The recent CIGA[160] introduced further restrictions on the use of *ipso facto* clauses[161] providing wider additional relief against supplier action.

1.15 Funding ongoing trading

A further theme raised in respect of ongoing trading was how to continue to fund the purchase of stock and work in progress. Funding issues can be split into two types, although they are interlinked. The first is short term funding required during a period of restructuring where time is required to restructure or look at refinancing generally, and secondly long term refinancing issues for businesses, where existing agreements have terminated or are due for renewal on less favourable terms, which may not be affordable for the business in the long term.

In the case of short term needs (prior to the EA changes), the banks appointing administrative receivers invariably provided funding for any ongoing trading in order to facilitate an orderly sale or wind down, thereby ensuring maximum return on their debt.[162] In some cases the same process provided a breathing space to facilitate a restructuring of

160 See the new ss 233B and 233C and Schedule 4ZZA of IA86. S 233B prohibits the use of termination and other insolvency related clauses in contracts for the supply of goods and services unless exempted under Schedule 4ZZA. S 233C includes powers to amend both 233B and the exemptions listed in Schedule 4ZZA by regulation. The changes were implemented with effect from 26 June 2020.

161 The '*ipso facto'* clauses include any term intended to terminate or restrict the operation of a contract in the event of insolvency.

162 The Enterprise Act 2002 implemented these changes with effect from 15 September 2003.

the debt, often with the same financial institution. After the EA, ADMs became the most used procedure for ongoing trading scenarios but, with more appointments being made by the company or its directors, less funding was made available by the banks for ongoing trading. As a result, expedited business sales became the popular alternative, so avoiding the headache of obtaining short term finance. The timing of any business sale can be either before the formal insolvency has commenced,[163] or immediately on appointment by way of a pre-pack sale of business.[164] Both of these scenarios avoided the need for working capital to be provided. In addition, when the business is sold back to a connected party, the transaction effectively provides the existing management with the opportunity to financially restructure the business at the same time.[165]

In respect of CVAs, most arrangements that include ongoing trading specifically exclude the trading assets of the company (including any cash at bank), while also leaving the management in control of implementation under the terms agreed with creditors.[166] Working capital finance is generally provided from the ongoing sales, with existing creditors being paid from the ongoing profits, new funding, or other third-party funding (depending on the agreed terms of the arrangement). The main risk in these

163 The CVA procedure has been used in a similar manner as an administration with the terms allowing for the distribution of the sale proceeds in full and final settlement thus avoiding an additional administration or liquidation.

164 A Prepack is the term used where a company has, before the administration appointment, pre marketed the business for sale, and often due to lack of funding, the sale is timed to take effect either on the day of appointment, or within a very short period of time thereafter. When used with an administration procedure it is subject to SIP16 disclosure requirements.

165 See Sarah Paterson, *The Rise of Covenant-lite Lending and Implications for the UK's Corporate Insolvency Law Toolbox*, *Oxford Journal of Legal Studies*, Volume 39, Issue 3, Autumn 2019, Pages 654–680, available at https://doi.org/10.1093/ojls/gqz020. See also Sarah Paterson (2018) *Why institutional change might explain the recent rise in covenant lite lending*, INSOL International Academic Conference, London.

166 The study data shows this usage mainly under contribution type CVAs but similar terms are frequently included in distribution CVAs except where an administrator or liquidator is already in office.

circumstances is for new debt to be incurred by non-payment of new suppliers in an attempt to maintain the contributions to pay the ring-fenced CVA creditors.[167]

Another aspect is that, for large businesses where replacement funding is the problem, similar issues arise requiring a breathing space for negotiations but this will not be assisted if the procedure, or moratorium requires formal evidence of funding during the restructuring or refinancing process. Further concerns were raised during the 2016 consultation that the significant changes in the financial markets had resulted in financial restructuring becoming more complex, and as a result more costly, again seriously disadvantaging the smaller business.

1.16 Rescue and the Company Voluntary Arrangement

The profession's initial rationale for the low usage of the CVA[168] included (1) the failure of the procedure to bind all creditors, and (2) a lack of a moratorium during the approval process. These two core issues were remedied by the IA2000 but unfortunately were not implemented[169] until three years later, shortly before the post-EA version of the ADM was introduced.[170] The new version of the ADM quickly became the popular choice of procedure among IPs. This popularity was partially as a result of the sheer volume of training and documentation rolled out by the profession before and during the initial introduction of the changes. In contrast the initial introduction of the CVA in 1986 was not accompanied by sufficient training for IPs, and practical experience remains limited for the majority of IPs

167 This is a particular issue if the proposal contains a trust clause ring fencing all funds received for distribution only to the CVA creditors and keeping the funds separate from any subsequent estate for general distribution in the event of termination. See Chapter 2, section 2.9.1 *Trust clauses.*

168 See the responses to the 1993 Consultation on Company Voluntary Arrangements and Administrations and the revised proposals for the Company Voluntary Arrangement issued in 1995.

169 Implemented on 1 January 2003.

170 Implemented on 15 September 2003.

even after thirty-five years.[171] In addition an impetus was created by the wholesale move from the ADR to what was seen as the only alternative procedure the post EA ADM.

In practical terms this means many insolvency firms had two distinct pools of expertise: those that had previously worked on receiverships and those that worked on liquidations. The like for like switch from receivership to administration was a key training strategy within the profession to ensure that bank-led work was maintained after the EA changes. Further, the new ADM was considered a less competitive appointment process than liquidation, as the only creditors with a real say in the commencement process are those with security,[172] while the company or the directors can also make an appointment without the need for creditor confirmation.[173] Under these favourable circumstances for the new administration procedure, the CVA was doomed to remain a Cinderella procedure even after the IA2000 changes. However the unpopularity of the CVA could still be reversed, especially for the micro company.[174]

This chapter has discussed the nature of business rescue and the driving forces behind the rescue ideology, alongside the structural issues for the CVA procedure. The need for underlying viability for business rescue has been emphasised, together with the alternative solutions available for rescue in the UK. The CVA was introduced by the Cork report with the original intention of it being used as a low-cost alternative to the Scheme (targeted at small businesses), which was a well-used national and international restructuring procedure relevant to both solvent and insolvent companies.[175] The recent introduction of the new RPlan has again widened the options available for IPs to utilise, together with the replacement of the SCM by a general moratorium.

171 See Chapter 4, Section 4.3 *The background and experience of IPs and their firms*.

172 See paragraphs 14 to 21 Schedule B1 IA86.

173 See paragraphs 22 to 34 Schedule B1 IA86.

174 See the company data in Chapter 6 and for suggestions Chapter 7 *The recalibration of the CVA*.

175 See Introduction *Background and Methodology,* n 2, para 430.

The increasing options in the rescue toolkit highlights the blurring of characteristics and roles between procedures, and the potential for IPs to stretch the boundaries of each procedure to remain in their comfort zone of experience rather than using an alternative. The hierarchy of the available UK options is set out in the next chapter,[176] and paves the way for identifying uses for the CVA across a wider range of options than was originally intended by Cork.[177] The flexible nature of the CVA has extended its use to providing a better return to creditors in addition to simply rescuing the company.[178] The study data has identified the wide use of the CVA and in particular the underuse of the procedure by micro undertakings.[179] As a result the findings have identified the opportunity to recalibrate the use of the CVA and fulfil a specific rescue need for micro businesses.[180]

176 See Chapter 2, *Introduction.*

177 See *Introduction* n 2, para 1980, headings 2 and 4.

178 See Chapter 3, Section 3.2 *The importance of purpose on legal outcome*.

179 See the recommendations in Chapter 7.

180 ibid

Chapter 2

The statutory and regulatory framework of the Company Voluntary Arrangement

2.1 Introduction

This chapter provides an overview of the legal and regulatory parameters under which a Company Voluntary Arrangement (CVA) is implemented. The explanation includes how the CVA is used in relation to other insolvency procedures, as well as the source of the statutory and regulatory provisions. The format of the CVA framework is explained in three parts, the first looking at the basic requirements as set out in the Insolvency Act 1986 (IA86).[1] The second part sets out the procedural requirements covered in a range of different rules and regulations that apply across the three UK jurisdictions.[2] The third part discusses the best practise guidance which is set out in the Statements of Insolvency Practice (SIPs), together with the ethical issues that impact on the practical implementation of the CVA. The key issues include the concept of fairness[3] and the use and impact of frequently used terms and conditions. The concluding remarks consider how the key issues impact on the use of the CVA.

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1 For Northern Ireland see Part II Insolvency (Northern Ireland) Order 1989 No 2405 (N.I. 19.) which was partly effective from 1 June 1990. See comparison of terms in Appendix A.

2 See Appendix B for a comparative schedule of the rules for the UK jurisdictions.

3 See the discussion on fairness in relation to un-notified creditors by Vanessa Finch and David Milman (3rd edition), Corporate Insolvency Law, Perspectives and principles, *Accountability and Fairness,* 433-436 Cambridge University Press, Cambridge.

The CVA is one of a suite of corporate insolvency procedures that were introduced in 1986 for England, Wales and Scotland[4] and slightly later for Northern Ireland.[5] The existing liquidation and receivership provisions were extracted from the Companies Act 1948[6], and amalgamated with the separate personal insolvency provisions into the IA86. The result provided a single piece of primary legislation dealing with all insolvency matters for England and Wales, with some parts including the CVA, also applying to Scotland. Separate legislation was required to bring the Northern Ireland procedures in line with the rest of the UK jurisdictions.[7]

The background to the implementation, and explanation of the changing nature of the CVA, highlights the flexible but potentially complex nature of the statutory framework. The brief legislative format of the CVA can be contrasted to the detailed frameworks of other insolvency procedures. In particular, both administration (ADM) and liquidation (LIQ) procedures are covered by a multitude of prescriptive rules on how they can be used and implemented.[8] The un-prescriptive nature of the CVA produces a range of circumstances in which it can be used, despite the relatively small number of specific legal requirements.

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4 The corporate insolvency procedures included in IA86 are the company voluntary arrangement, administration, administrative receivership (including elements applicable to other types of receivership), creditors voluntary liquidation, members' voluntary liquidation and winding up by court.

5 For Northern Ireland see The Insolvency (1989 Order) (Commencement No. 1) Order (Northern, Ireland) 1990, No. 177 (C. 7). Further provisions came into effect on 1 October 1991 under The Insolvency (1989 Order) (Commencement No. 4) Order (Northern Ireland) 1991, No. 411 (C. 20).

6 The winding up procedures were included under Part 5, ss 211 to 365 and the power to appoint receivers and managers under Part 6, ss 366 to 376. The winding up provisions were complemented by the Companies (Winding up) Rules 1949, SI 330, all of which were replaced by the IA86 and the Insolvency Rules 1986 (IR86).

7 n 1 and 3.

8 For example the administration procedure has over 130 additional rules as well as 116 paragraphs in Schedule B1. Further liquidation has over 230 rules whereas in comparison the CVA has less than 60 rules.

2.2 Fundamental elements of the Company Voluntary Arrangement

A CVA is a procedure that provides a contractual agreement between the company and its creditors that results in the two parties consenting to either vary the existing payment terms (a scheme), or to reducing the amounts to be paid (a composition).[9] The primary legislation governing the CVA procedure is set out in Part 1 Insolvency Act 1986 (IA86) for England and Wales, and Scotland.[10] Schedule A1 IA86 provides the framework for the small company moratorium (SCM)[11], which was introduced with effect from 1 January 2003 and revoked in June 2020. From 1 January 2003, the CVA terms were amended to bind creditors under the arrangement regardless of whether they received notification of the proposal terms.[12] The impact of the changes to the CVA introduced in 2003 was discussed in Chapter 1, against the backdrop of the more widespread changes made by the Enterprise Act 2002 (EA), together with the overarching influence of the rescue culture and the move towards a more collective culture.[13]

Part 1 of the IA86 has only twelve sections that set out the basis of the CVA framework. The first four sections set out the requirements for proposing an arrangement. Section 1

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9 A CVA can be either a statutory composition (full and final settlement for an amount less than 100 pence in pound (PIP)) or a scheme of arrangement (either payment in full with varied payments terms or some other agreement, such as a moratorium). The initial CVA decision process allows creditors to approve, amend, or decline the terms proposed; the terms can be tailored for any scenario. The intended type of the arrangement must be stated clearly at the start of the proposal to ensure clarity for creditors by setting out the consequences for them on completion i.e. payment in full or some lesser amount agreed with the remainder being written off.

10 n 1 and 3.

11 The SCM was inserted into the IA86 by section 1 and Schedule 1 of the Insolvency Act 2000 (IA2000). As the name suggests it was only available for use by small companies. The SCM provided a prohibition on enforcement action while the arrangement terms were being discussed prior to final approval. There is discussion later on the use of this process together with the definition of company size both in the UK, EU and for World Bank purposes. As early as 1993 the lack of a moratorium was identified as a drawback to the routine use of the CVA allowing creditors to commence enforcement procedures before the CVA terms could be agreed. The changes made by IA2000 was an attempt to rectify this problem along with the ability to bind all creditors into an arrangement regardless of whether they received notification of the proposal or not.

12 See s 5 IA86.

13 A collective culture refers to the transition from administrative receivership to the post EA administration procedure. See Chapter 1, Section 1.8 *The Administration procedure pre and post the Enterprise Act and* section 1.10 *Evaluating the returns to creditors.*

details the people who have the power to propose an arrangement, and the requirement to clearly state the type and nature of the arrangement being agreed by the creditors.[14] Note that creditors have no power to propose an arrangement. Section 1A refers to the small company moratorium requirements with the detailed requirements set out in Schedule 1A IA86.[15] The approach used in Schedule 1A is more prescriptive and contains 45 paragraphs, covering the process that must be followed in order to benefit from moratorium relief.[16] In cases where the nominee is not either an existing liquidator or administrator, sections 2 and 3 set out the pre-approval duties of the nominee.

The remaining eight sections in the IA86 cover the basic procedural requirements for implementation, from approval through to completion. Sections 4 and 4A IA86 deal with the approval process, while section 5 sets out the effect of approval and includes the amendments introduced by IA2000. The section 5 amendments bind all creditors to the proposed terms whether notified or not of the arrangement, while section 6 provides an opportunity for creditors who are not satisfied with the outcome of the voting process to make a challenge. There are further rights to challenge in section 7 for both the creditors and the supervisor, in relation to both implementation of the CVA or to seek directions from the court in the event of a dispute.[17] Where the SCM has been used, section 7A provides the power to prosecute the directors in the event of any misuse of the process. Similarly section 7B sets out the requirements for completion when an SCM is used, and confirms that when not fully implemented the CVA must be formally terminated by the

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14 The type of arrangement refers to the CVA being either a composition where the creditors will receive less than full payment of the original debt or a scheme where full payment of the original debt is expected but with the payment terms being extended or altered in some way. In both the CVA and the ADM the type of arrangement is linked to the rescue hierarchy. The difference being that for the CVA if that purpose is not achieved then the procedure has to be terminated, whereas for the ADM there is a much wider range of exit routes.

15 Inserted by IA2000 and revoked on 26 June 2020 by CIGA. The replacement is a general moratorium procedure based on similar requirements to the SCM.

16 Schedule A1 IA86 was divided into six chapters. The Small Company Moratorium was revoked on 26 June 2020 and was replaced by a general moratorium procedure with similar provisions.

17 Challenges can include the failure to receive notification or other material regularities in the procedural requirements.

supervisor. The SCM and related provisions have now been superseded by the new separate general moratorium procedure.[18]

The CVA secondary legislation covering the detailed procedural requirements are scheduled for each jurisdiction in Appendix B.[19] For England and Wales they can be found in the main in Part 1 of the Insolvency Rules 1986 (IR86) in relation to the CVAs in this study;[20] for Scotland the equivalent can be found in the Insolvency (Scotland) Rules 1986;[21] and for Northern Ireland in the Insolvency Rules (Northern Ireland) 1992.[22] In addition to the primary and secondary legislation, all insolvency procedures are subject to mandatory best practice guidance published in the form of SIPs.[23] The SIPs relevant to the CVA include SIP 1 *An introduction to the statements,*[24] which reinforces the mandatory

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18 The SCM and related sections were all revoked on 26 June 2020 by CIGA. Note that this chapter does not include a detailed analysis of the new moratorium procedure however the provisions are essentially based on the previous SCM requirements. Note that between 26 June 2020 and 30 September 2021, 14 companies obtained a moratorium and nine companies had a restructuring plan registered at Companies House. The two new procedures created by CIGA.

19 See Appendix B for the comparative rules.

20 These rules and the relevant amendments cover the majority of CVAs included in the study period. That is CVAs approved between 1 January 2006 and 31 December 2015. The recent changes made under the Insolvency (England and Wales) Rules 2016 (IR2016) SI 1925 that came into effect on 5 April 2017, will not materially affect the study data. The main effect of the recent rule changes for CVAs relate to the Companies House (CH) filing cover sheets and the rule numbers which are referred to and cross referenced. Under the 2016 rule update for England and Wales the CVA procedure is now covered in the main under Part 2 of the relevant rules. The generic areas have been moved into general parts of the new rules and these common parts are similar in format. The generic parts cover decision procedures (including creditor meetings when held), voting and reporting.

21 Similarly for Scotland the relevant new rules have been further divided but are jointly known as the Insolvency (Scotland) Rules 2018 (IR2018). For clarity the new and old rules for each jurisdiction are set out in Appendix B. For Scotland under the 2018 rule change the CVA procedure is now covered in the main under Part 2. The generic areas have been moved into general parts of both sets of the new rules and these common parts are similar in format.

22 Northern Ireland has yet to enact all the changes set out in the Small Business, Enterprise and Employment Act 2015 (SBEA2015).

23 Note that SIPs are published separately for each jurisdiction however the content is generally agreed between them before publication.

24 Paragraphs 6 to 9 of SIP 1 restate the regulatory status of all SIPs. Prior to this version of SIP 1 being issued the RPBs all agreed that the SIPs would be mandatory for all IPs with effect from 1 July 2004 which covers the entire study period. All of the documents filed with the Registrar of Companies during the study period must therefore be compliant with one or more versions of the relevant SIPs covering reporting content and the format of the receipts and payments accounts.

application of the Insolvency Code of Ethics (ICE) and the best practice guidance detailed in each SIP.[25] The most directly applicable to CVAs are SIP 3[26] or SIP 3.2,[27] which cover the specific conduct of each Insolvency Practitioner (IP) during the changing phases of the CVA procedure.[28] In respect of receipts and payments accounts, the relevant guidance is set out in SIP 7[29] and covers the format and content of any receipts and payments accounts circulated to interested parties or filed with the Registrar of Companies. In addition, SIPs 10 and 12 relate to the submission of proxies and the record of meetings,[30] including the detail to be collated of creditor participation.[31] SIPs 13 and 16 apply to the reporting of the sale of assets in creditor reports. SIP 13 applies specifically in relation to sales back to directors or connected parties, whereas SIP 16 only applies to ADMs and specifically any sale of business negotiated prior to the appointment of an administrator (Prepack).[32] In the case of many terminated CVAs that are followed by ADM, the Prepack option is invariably used to save the business once the option of saving the company has been discounted.[33] Additionally there are cases where the same sale of business process is used

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25 See SIP 1 para 2 issued 1 October 2015. There are equivalent versions for Scotland and Northern Ireland with the same designations and very similar formats. The Northern Ireland versions reflect the delay in applying outstanding amendments to the legislation.

26 See versions 3 and 4 issued 1 October 2003 and 1 April 2007 respectively.

27 Issued 1 July 2014 and covers the last 18 months of the study period.

28 During this period the IP will have a series of roles and office-holder titles including as advising member, nominee and supervisor.

29 See version 2 issued September 1998 and version 3 issued 2 May 2011. Version 3 takes into account the reporting changes introduced by the Insolvency (Amendment) Rules 2010.

30 Post 2016 amendments decision procedures replace meetings in most cases and these are covered in a new SIP 6.

31 Both SIPs 10 and 12 were replaced by a new SIP 6 on Decision Making issued 6 April 2017. The basic principles remain the same but reflect the changes in the procedural rules and the move from physical meetings to online and remote decision making processes.

32 SIP 16 was first introduced in 1 January 2009 with versions 2 and 3 being issued in November 2013 and 2015 respectively and the latest version coming into force on 30 April 2021 alongside The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021. The latter makes obtaining an independent opinion on the terms of a pre-pack sale of business to a connected party mandatory from 30 April 2021.

33 Schedule B1 IA86 para 3(1)(a) sets out the first purpose which is saving the company as a going concern. Given that this has invariably failed during the CVA the next best option is (b) "achieving a better result for the creditors as a whole". The best solution under purpose (b) for both the business and the creditors is often a pre-pack sale of the business. Effectively saving employment by retaining a viable element of the old business.

either before or on appointment of a liquidator.[34] A similar process is used prior to the appointment of a nominee or supervisor, where the purpose of the CVA is to distribute the proceeds of that sale without the need for a more expensive option being used, such as ADM. The sale of any assets or business to directors (extended to all connected parties in 2016) must be reported to creditors in accordance with SIP 13 in every type of insolvency procedure.[35] The SIP sets out the level of detail that must be disclosed to creditors to ensure transparency of the transaction, and that the best value has been obtained for the available assets.

2.3 The three phases of the Company Voluntary Arrangement

The three phases of the CVA procedure are complex as the roles, duties and responsibilities of the IP change at each stage. In order to understand the parts played by the different participants of the CVA the three distinct phases of the procedure need to be analysed separately. Each phase has distinct characteristics and encompasses a series of changing relationships. The change in relationship is based on the changing roles and duties of the IP. Figure 2.1 summarises each of the stages, and the following sections describe the changing role in each phase.[36]

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34 See Chapter 3, Figure 3.9 *Realisations in ADM post CVA*.

35 SIP 13 was first issued in November 1997 in relation to any asset sales to directors and version 2 was issued in December 2016 extending disclosure to any connected parties to bring it in line with the SIP 16 disclosure requirements in place at the time. The latter change covers some of the procedures instigated after CVAs during the study period.

36 SIP 3 provides clear guidance requiring the IP to explain the implications of these changing roles as shown in the diagram with the relevant participants.36

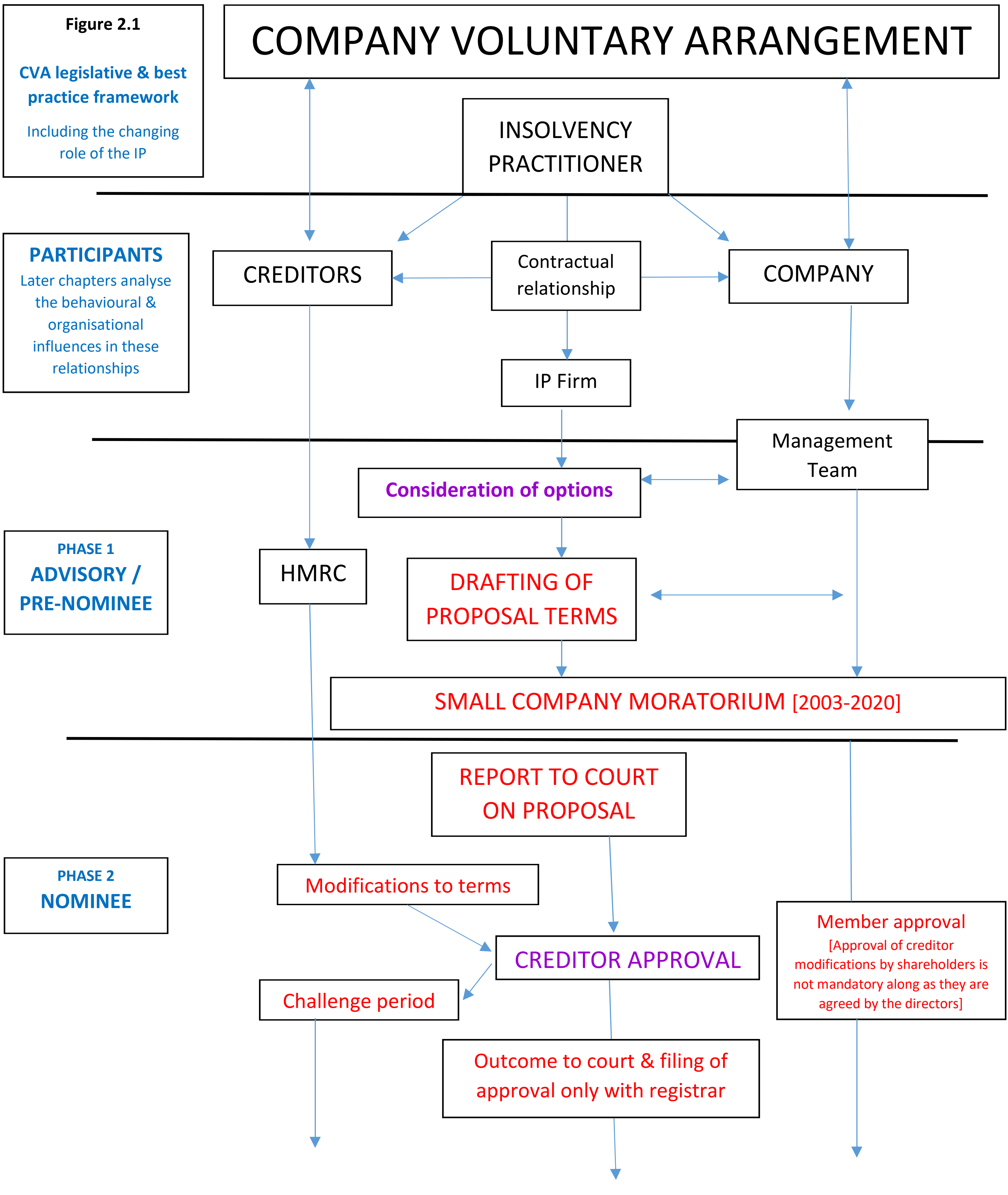
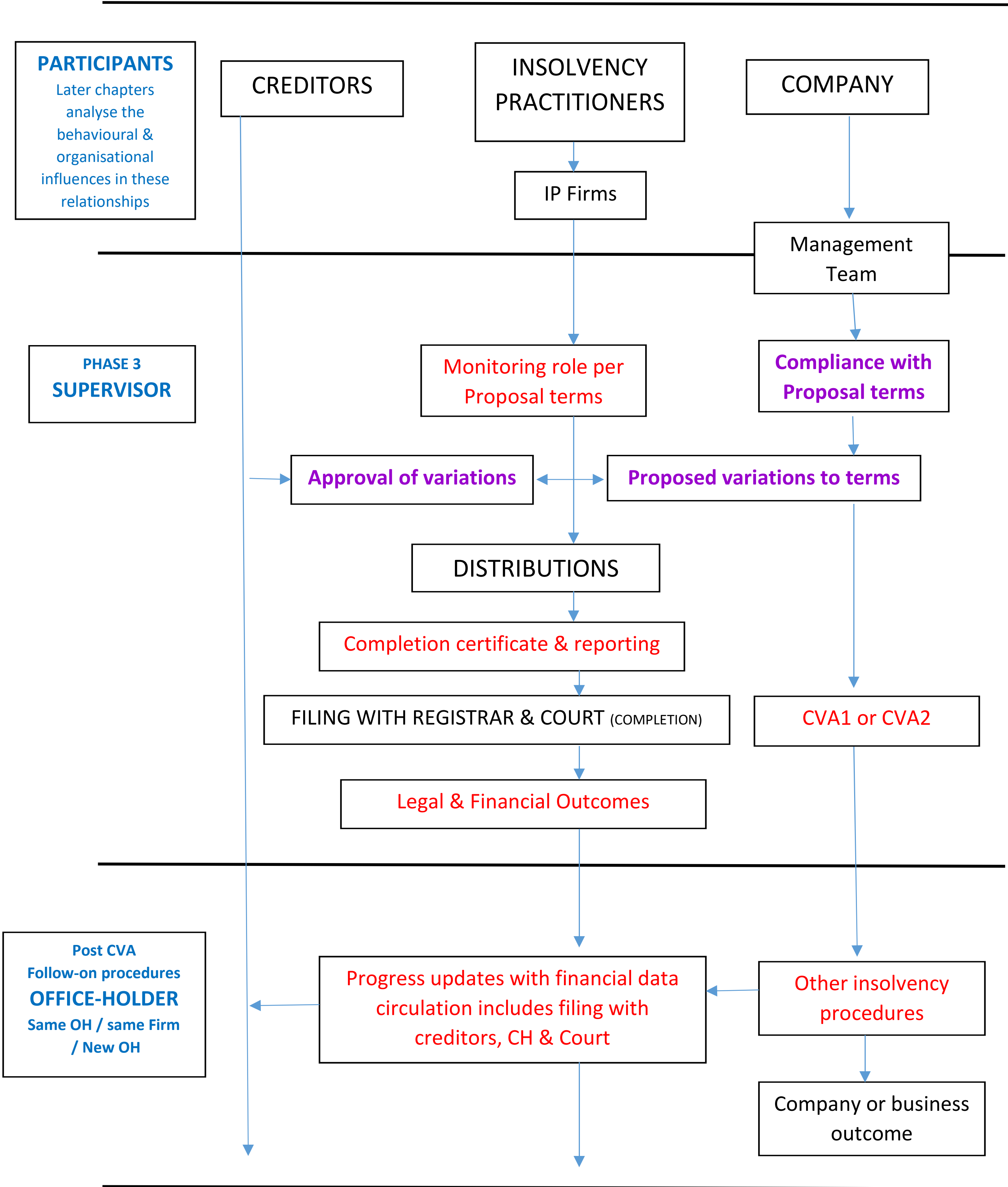


Figure 2.1
CVA legislative & best practice framework
Including the changing role of the IP
COMPANY VOLUNTARY ARRANGEMENT
INSOLVENCY PRACTITIONER
PARTICIPANTS
Later chapters analyse the behavioural & organisational influences in these relationships
CREDITORS
Contractual relationship
COMPANY
IP Firm
Management Team
Consideration of options
PHASE 1
ADVISORY / PRE-NOMINEE
HMRC
DRAFTING OF PROPOSAL TERMS
SMALL COMPANY MORATORIUM [2003-2020]
REPORT TO COURT ON PROPOSAL
PHASE 2
NOMINEE
Modifications to terms
CREDITOR APPROVAL
Member approval
[Approval of creditor modifications by shareholders is not mandatory along as they are agreed by the directors]
Challenge period
Outcome to court & filing of approval only with registrar



COMPANY VOLUNTARY ARRANGEMENT
PARTICIPANTS
Later chapters analyse the behavioural & organisational influences in these relationships
CREDITORS
INSOLVENCY PRACTITIONERS
COMPANY
IP Firms
Management Team
PHASE 3
SUPERVISOR
Monitoring role per Proposal terms
Compliance with Proposal terms
Approval of variations
Proposed variations to terms
DISTRIBUTIONS
Completion certificate & reporting
FILING WITH REGISTRAR & COURT (COMPLETION)
CVA1 or CVA2
Legal & Financial Outcomes
Post CVA
Follow-on procedures
OFFICE-HOLDER
Same OH / same Firm / New OH
Progress updates with financial data circulation includes filing with creditors, CH & Court
Other insolvency procedures
Company or business outcome

2.3.1 The initial pre-nominee phase

The initial phase of the CVA is the period prior to the appointment of the nominee, during which the company is being advised on its options by an IP. The options phase is heavily influenced by the recommendations of the advising IP, based primarily on the information provided by the company. The principal relationship in this phase is between the company and the IP, but with potentially significant creditors exerting some external influence on the relationship and outcome. The significant creditors can be both secured and unsecured depending on the funding structure employed by the company. Also, where most of the funding has been provided by shareholders,[37] there may also be shareholder pressure for a specific option, such as in some sports entities/organisations.[38] As a result every option should be carefully considered alongside an analysis of potential costs. SIP 3 reinforces the requirement to set out all options and guidance clearly for the directors, in particular the roles and duties of the IP and how these change during each phase of the CVA as it progresses.[39]

2.3.2 The nominee phase

Phase two commences on the formal appointment of the nominee. It is the period during which the IP becomes an independent adviser to the court. On paper this date is often recorded as almost immediately before the proposal is filed in court, but the transition process from advisor to the company to advisor to the court will invariably happen over a period of time. During the transition the data provided by the company will be validated and challenged for accuracy before the Nominee's final report to court is prepared.

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37 In the majority of small businesses the shareholders and management teams often include a majority of the same parties.

38 Examples noted included golf and football clubs.

39 See SIP 3 version 2 effective from November 1997, paras 8 to 12; version 3 effective from 1 April 2007, paras 3.2, 3.5 and 3.6; SIP 3.2 effective from 1 July 2014, paras 9 to 11.

The fees incurred by the advisor prior to the nominee appointment will not automatically be an expense of the arrangement, unless otherwise specifically approved by creditors as part of the CVA terms.[40] A separate resolution should be requested for any pre-appointment fees to be charged to the CVA funds for regulatory clarity.[41] The nominee's fee and the costs of the approval process are allowable under the statutory framework. Details with final estimates should be provided to creditors before the final approval process is completed, so that an accurate assessment can be made of the distribution level and outcome for the creditors. The nominee role also includes the responsibility for the procedural process of approval, together with the subsequent reporting of the outcome to the court, creditors and the subsequent registration at Companies House (CH) if approved. During this phase the creditors have the most influence over the CVA terms, with key creditors (those holding more than 25% of the voting value) effectively having sufficient majority to approve, modify or reject any of the proposed terms.[42]

2.3.3 The supervisor phase

On appointment, the implementation phase begins with the supervisor taking whatever role has been agreed under the terms of the arrangement. This is generally a less intrusive role than administrator or liquidator, allowing the directors to implement the changes required while contributing the agreed level of funds into the CVA estate fund. The supervisor is frequently required to undertake a simple monitoring process, comprising annual reviews of the accounts and reporting to the creditors on annual progress. The role can become more complicated if the terms are not being complied with, and/or the directors want to propose a variation of the terms. In essence, any variation can only be

40 See r 2.3(1)(g) IR206 in respect of the nominees fees and expenses and r 2.3(1)(h) to (j) in respect of the proposed supervisor's qualification to act, the scope of the role and duties, how the fees are to be calculated and the expenses to be charged.

41 See guidance in SIP 9 re pre-appointment fees and expenses. For instance in the event that the initial decision procedure is adjourned to a later date then there will be additional fees and expenses incurred by the nominee for the adjournment.

42 The influence and voting control is discussed further in Chapter 5.

proposed if the original proposal terms explicitly include a process to be followed. In most cases the approval of a variation is a re-run of the original decision but without the need to file a separate report on the outcome with the court or CH.[43] Any approved variations should be included in the following progress report and identified as a variation in the final report, together with the impact on the outcome for the creditors.

2.3.4 Completion

The completion of each CVA is marked by the issue of a certificate of completion, stating whether the terms have been fully implemented (taking into account any approved variations) or terminated.[44] The completion date also marks the supervisor's formal vacation of office. Any period of post completion work will usually be limited,[45] but should allow sufficient time for any final distributions to be made, alongside the commencement of any new insolvency procedure where this has been mandated in the CVA terms. In the case of terminated arrangements, the completion certificate should state the reasons why the arrangement has been terminated including which terms have not been complied with. Where there are funds in hand to be distributed after circulation of the termination notice, further receipts and payments accounts should be filed periodically until the CVA estate bank account has been reconciled to zero and closed.[46] The final reconciliation ensures that creditors have been made aware of all the costs and expenses incurred for transparency and clarity.

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43 See Chapter 6, Figure 6.16 for outcomes of variations. Note that as supervisor the estimate of fees will be based on a smooth running procedure however most IPs also provide an estimate of the likely costs should a variation be requested.

44 See r 2.44(1) IR2016 in respect of the requirement to issue a completion notice and Appendix B for comparative provisions.

45 HMRC usually include a term which specifically restricts the final post completion period to a maximum of six months to ensure funds or the move into a new procedure are expedited. The six month period recognises court delays for petitions and time to allow distribution cheques to be cleared through the estate account. HMRC have a special voluntary arrangement service (VAS) which deals with all proposals and claims for submission.

46 See r 2.44(2)(a) IR2016.

2.4 Ethics and the effect on the changing roles in a CVA

The mandatory application of the insolvency code of ethics in a CVA is covered by SIP 1, and is an integral element when considering the use of the CVA procedure. The ethical conduct for IPs is a fundamental principal of the IP licensing process. In line with many professions[47] every applicant for an insolvency licence must be considered to be a 'fit and proper person' for the purposes of holding office.[48] The regulatory requirements are enhanced by the mandatory application of the ethical guidance on the appropriate acceptance process of any insolvency appointment, together with the need to disclose prior professional relationships to the creditors and other appointing bodies.[49]

The five fundamental ethical principles have remained the same since 2004, and are based primarily on the fit and proper requirements originally set out in regulation 4(a) to (f) of the Insolvency Practitioners Regulations 1986.[50] Prior to the implementation of the IA86 and Company Directors Disqualification Act 1986 (CDDA), considerable concern had been raised about the conduct of some office-holders in both in turning a blind eye to director misconduct, and in some cases actively participating in what was described as 'sharp practice' as well as potential fraud on creditors. The rationale behind the two pronged implementation of IP licensing, and the mandatory reporting on director conduct in 1986, was to ensure that this behaviour was constrained and punished to improve trust in the system of handling insolvent businesses.[51] The Secretary of State (SoS) issued guidance

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47 For instance, professions such as lawyers who are regulated by SRA and bankers by the BBA.

48 See the Insolvency Practitioners Regulations 1990, regulation 4(1) which sets out the matters to be considered and covers the principles set out in more detail in the earlier versions of the ethical code.

49 The relevant bodies include the court, the Secretary of State and equivalents for Scotland. The Accountant in Bankruptcy in Scotland fulfils a similar but slightly different role to the Official Receiver in England and Wales. For Northern Ireland the equivalent being The Department for the Economy in Northern Ireland

50 SI 1986/1005. Regulation 4 sets out the matters to be considered when determining whether an applicant for an IP license is a fit and proper person. These regulations were subsequently replaced in 1990 see SI 1990/439.

51 See Jim Cousins, Austin Mitchell, Prem Sikka, Christine Cooper and Patricia Arnold (2000) *Insolvent Abuse; Regulating the Industry,* Association for Accountancy & Business Affairs, ISBN 1-902384-04-0, Basildon,

on the application of regulation 4, making it clear that the consideration of behaviour not only included the personal responsibility of the office-holder, but that this responsibility also extended to the organisation of the IP's firm.[52]

The five fundamental principles set out in the code of ethics are (1) integrity, (2) objectivity, (3) professional competence and due care, (4) confidentiality and (5) professional behaviour. The identified threats that stem from these principles require continual monitoring and risk assessment.[53] The potential threats to the IP's fundamental principles include behaviours such as self-interest,[54] self-review,[55] advocacy,[56] familiarity[57] and intimidation.[58] All five threats can potentially be an issue at any point during the CVA procedure, and this is emphasised by the changing nature of the different roles explained above. Every IP is required to abide by these principles, and to document their consideration of any potential risks and how any threats identified have been either dismissed or mitigated. Further, failure to comply with any aspects of these principles

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Essex. This paper drew attention to the abuse of the administrative receivership in a Channel 4 documentary by the *Dispatches* team.

52 See the Secretary of State guidance on the application of fit and proper status which includes the following statement: "*The performance of the practice, as well as its structure will be assessed. Evidence showing delays in dealing with cases, failure to answer correspondence and failures or delays in responding to enquiries from regulatory and revenue authorities will raise doubts as to the competence of the applicant and the adequacy of the arrangements for carrying on of the practice. The Secretary of State attaches considerable importance to the requirement that insolvency practitioners show a high standard of independence and integrity in carrying on their practices*."

53 The risk assessment process is ongoing and should be borne in mind throughout an appointment and not just visited once during the pre-appointment phase.

54 The self-interest threat can be financial or of another nature and includes the firm, the individuals within the firm and relatives of those individuals. The threat includes anything that can influence or affect judgment or behaviour, especially in relation to family members.

55 The self-review threat recognises the potential to fail to reassess judgments previously made in respect of earlier services provided or changes in relationships.

56 The advocacy threat requires recognition of the danger of promoting a position or opinion where objectivity may be impaired.

57 The familiarity threat needs to be recognised when there is a long standing relationship between parties in both a firm or on an individual level, resulting in a fixed position or unchallenged acceptance of the work performed.

58 The intimidation threat includes active or perceived threats intended to exercise undue influence over the actions of the office-holder.

should be reported to the relevant IPs authorising body as soon as any breach comes to their attention.[59] The ethical element of the statutory framework is one of the key complications that is discussed later,[60] alongside consideration of the issues that can affect that behaviour.

2.5 The nominee's report to the court

The main role of the nominee is to act as an impartial advisor to the court on the efficacy of the proposed CVA terms, and to form an opinion on the likelihood of the terms being agreed by the creditors. The nominee is required to answer three tests when considering the feasibility of the proposal in their report to court.[61] The first test relates to the statement of affairs. The nominee must be content that the company's true position, in relation to the assets and liabilities, is being reported to the creditors. For instance, overstating the value of the assets or understating the level of creditors can make a material difference to the expected distribution levels. SIP 3 additionally requires the nominee to comment on the level of investigation undertaken to confirm the figures provided by the directors.[62] The commentary should also include how any valuations have been calculated, the director's cooperation in answering queries on assets and liabilities together with the attitude of any secured or key creditors (especially ongoing suppliers) to the proposed terms.[63]

59 See SIP 1 para 4.

60 See SIP 1 para 5.

61 See *Re A Debtor* (No 140 IO of 1995), *Greystoke v Hamilton-Smith and Others* ([1996] 2 BCLC 429; [1997] BPIR 24) in relation to the three tests the nominee must pose.

62 See SIP 3 version 2 effective from November 1997, paras 8 to 12; version 3 effective from 1 April 2007, paras 3.2, 3.5 and 3.6; and SIP 3.2 effective from 1 July 2014, paras 9 to 11.

63 ibid

The second test relates to the implementation of the CVA and the probability that the proposed terms can be met by the company.[64] The nominee is required to consider the affordability of the terms being offered, by reviewing the cashflow forecasts and the assumptions being made by the directors in respect of future turnover and costs expected to be incurred. This test is synonymous with the question of viability,[65] and the assumptions being made in respect of future trading prospects are a key element in the nominee's commentary. Further, the SIP 3 guidance also specifically requires the IP to identify all key creditors or customers to determine if they are supportive of the proposed terms and if they agree to have a continued business relationship with the company on the terms identified in the proposal.[66] This process is intended to take place without the safety of an automatic or interim moratorium.

Identification of any prospective unfairness by the nominee is the final but most important test. A key element of the Nominee's report is commenting on the fairness of the proposal terms, to the extent that a majority of the creditors are likely to approve the CVA. Fairness is subjective and even where the same distribution is being offered, each creditor will be losing different amounts in absolute terms and for each creditor that bad debt will have a different knock-on impact. For example, a large unsecured debt to a bank will have less impact than a smaller debt to a small local business. Effectively the terms should represent a fair compromise that allows the company to continue to trade, while providing the prospect of a greater distribution to creditors than they would receive in a liquidation. This means that the terms can vary considerably from paying nothing to payment in full, depending on the level of available income and disposable assets.

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64 When proposed terms are modified at the request of a creditor the management team may well feel pressured to agree without full consideration of the impact on outcome. See Chapter 5, section 5.4 *The HMRC voting patterns.*

65 See discussion in relation to viability in Chapter 1, Section 1.12 *Business viability*.

66 One of the key causes in early terminations is the lack of credit offered post CVA causing a drain on the cashflow with some suppliers insisting on cash deposits before delivery.

2.6 The CVA approval process

A CVA proposal must be approved by both creditors and shareholders or members. For creditors, the voting is by value and the calculation of the approval process is in two stages but based on a single vote.[67] The first stage requires 75% or more of all the creditors voting to confirm approval.[68] In the event of any rejections a second review of the voting is required. All the connected creditors must be removed from the original total voting value and the recalculated total used for the second calculation. If the value of the rejections amount to more than 50% of the recalculated total then the proposal is treated as rejected.[69] The nominee or chair of the meeting can rely on the directors to identify all connected parties on the voting schedule.[70] Any failure by the directors to correctly identify connected parties can result in a challenge for material irregularity if the omission would have changed the outcome.[71]

For shareholders or members, the voting rights are in accordance with the shares held and any other voting rights set out in the company's articles of association.[72] The nominee by nature of the role is the intended supervisor and will have been chosen by the management team. However, an alternative IP can be proposed by the creditors as a modification. The final approval of any change will lay with the creditors and the consent of any replacement IP and similarly for other modifications.

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67 See r 15.34(1) IR2016 re value which was previously r 1.7(2) IR86 and comparatives in Appendix B.

68 See current r 15.34(3) IR2016 re majority required which was previously r 1.19(2) IR86. Comparative rules are scheduled in Appendix B.

69 Ibid, para (4).

70 ibid

71 There were several examples of second votes being omitted and challenges requiring a new vote at which the CVA proposal was rejected. In the study data see DZ169 which resulted in a rejection after a new meeting was ordered by court; also FW108 was rejected when taking into account the second vote. This was ignored by the nominee and the CVA continued with a form 1.4 subsequently being filed rather than a revocation notice. The key issue being that remuneration and other costs paid were effectively not approved.

72 See rr 2.35 - 2.36 IR2016 and comparatives in Appendix B.

2.7 Legal challenges

Legal challenges to the outcome of a CVA approval must be made under section 6 IA86. The challenge can be based on either or both of a claim of unfair prejudice or of material irregularity.[73] The evidence should identify any false representation or other procedural defect noted during the approval process. In the event of a successful challenge to the approval, the court has the power to revoke or suspend the arrangement,[74] or alternatively order a new meeting or decision procedure to take place.[75]

2.8 The concept of unfairness and retail landlords

Fairness is a subjective concept[76] and the resulting challenges based on unfairness in CVAs have produced mixed outcomes. The largest number of actions have been instigated by landlords of retail premises. As a general principle, Lord Hoffman stated that "although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used"[77] and this is particularly important for CVAs. The terms of a CVA may include the cram down[78] of specific types of creditors which may

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73 The claim must be lodged within 28 days of the filing of the reports on the outcome in court. For example a current case is being considered by the courts where the claim was lodged in time however the complaint was not listed for hearing until over 12 months later by which time the CVA had been terminated and the company placed in administration. An application to vacate the claim was denied by the court. The court still retains the power to revoke the CVA effectively disallowing all the costs and fees of the supervisor. See *Re Regis UK Ltd (in administration) Williams and another v Carraway Guildford (Nominee A) Ltd and others* [2019] EWHC 3073 (Ch).

74 The supervisor is required to file a copy of any order made with the registrar under rule 2.40, Insolvency (England and Wales) Rules 2016,

75 Examples from the data are listed in n 71.

76 See the abbreviated version of the Annual Lecture delivered to the Insolvency Practitioners Association on Wednesday 24 January 2018 entitled *The Notion of Fairness and Insolvency and Company Law* given by Chief Bankruptcy Registrar Briggs. Also see *Best Practices in European Restructuring*, section 1.3 Fairness of process and of outcome, 31.

77 See *O'Neill and another v Philllips and others* [1999} UKHL 24.

78 The term cram down refers to the forced restriction of a distribution to a particular class of creditor. In this instance retail landlords.

appear unfair. However, the overall result of the cram down could well be a better outcome for the creditors as a whole.

One of the current and most controversial uses of the CVA is to address the retail sector's structural problem with the combined impact of high rents and increasing business rates.[79] The use of the CVA as a tool to cram down[80] this single class of unsecured creditor has caused a lot of controversy. The Powerhouse challenge[81] was a high profile example of a successful action on the basis of unfairness. The claim revolved around the liability of a guarantor for the lease payments which the proposal sought to limit.[82] It was found that the guarantor to the liability was not a party to the CVA proposal, and therefore could not be released from the guarantee under the proposed terms. The finding of unfairness in the *Powerhouse* case did not deter other IPs from using a similar type of proposal, in respect of specifically targeting rents due to landlords. Powerhouse was followed by *Stylo Shoes*[83] which was also successfully challenged, alongside *Miss Sixty*.[84] The next attempt at disenfranchising landlords was in the *JJB Sports* proposal which was successfully approved without challenge. Despite the approval, the CVA in that case was not fully implemented and subsequently terminated early. The limited success of *JJB Sports* opened the floodgates, and was followed by a series of retail proposals similarly focussing on

79 See http://www.retailresearch.org/whosegonebust.php. This site monitors all the retail businesses subject to any type of insolvency procedure or restructuring / sale process together with the impact on employee numbers. The data runs from 2010 to date and is constantly being updated.

80 n 78.

81 See *Prudential Assurance Co Ltd & ors* (2) *Luctor Ltd & others v* (1) *PRG Powerhouse Ltd & ors* (2) Anthony Murphy & others [2007] EWHC 1002 (Ch).

82 ibid

83 Stylo Shoes was already in administration when the CVA was proposed and rejected by the creditors. No further challenge was made.

84 See *Mourant & Co. Trustees Limited and Anor. v Sixty UK Limited and others* [2010]

reducing the costs of the retail premises (excluding guarantor issues) including *Focus Do It All*,[85] *Discover Leisure*,[86] *Blacks*,[87] and *BHS*.[88]

The other aspect of a leasehold challenge revolves around the voting power of landlords, which in a CVA is important for control of the outcome. In most cases, where trading is continuing the rent will have been paid up to date. For CVA voting purposes, only debts outstanding at the date of approval can be accepted, often limiting landlord claims and the power they wield in rejecting terms they consider to be unfair. For CVAs, the value of unpaid future liabilities are treated as unliquidated sums and for voting purposes are usually valued as being worth one pound only.[89] This again limits the landlords' control; however, as a result of the judgment in *Park Air Services,*[90] most CVAs currently allow landlords to vote using a net present value estimate of their contingent claim to address this issue of fairness. It should be noted that the proposal terms used in respect of retail leases vary between CVAs. However other arrangement terms can be equally as important.

Challenges can also be made in respect of material irregularities, which encompass a range of procedural issues related to the creditor's capacity to vote, the calculation of the votes and the relevant percentages, as well as the correct identification of connected and associated parties.[91] There are a number of examples in the study data where challenges

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85 CVA court reference High Court No 17241 of 2009.

86 The properties of this Aim listed group were held in a company called *Sign Lease Ltd*, CVA court reference High Court No 9A-01718 of 2009.

87 *Blacks Leisure Group Plc*, CVA court reference High Court No 20427 of 2009.

88 *British Homes Stores Plc*, CVA court reference High Court No 001138 of 2016.

89 See r 15.31 IR16 in respect of voting rights and for CVAs rr 15.31(1)(d) and 15.31(3) regarding unliquidated sums. See also r 14.22 IR16 in respect of calculating the value of periodical payments and the decision in *Park Air Services* which is used as a benchmark for calculating the net present value of future rents.

90 *Park Air Services, Re* (Christopher Moran Holdings Ltd v. Bairstow and Ruddock) [1999] BCC 135, [1999] EGCS 17, [2000] AC 172 456 n 24.

91 For the most recent challenge action by landlords see *Lazari Properties 2 Limited and others v New Look Retailers Limited, Butters and another* [2021] EWHC 1209 (Ch). The challenge also encompassed a range of procedural issues including allowing a secured connected creditor to vote as an unsecured creditor to secure the vote. The challenge was rejected and the CVA remains in place.

proved successful and the CVA was subsequently revoked, as well as a number of instances where defects were ignored.[92]

2.9 The proposal terms

The CVA proposal consists of a series of contractual promises to the creditors based on an analysis of the causes of the insolvency, combined with the future ability to repay the creditors.[93] The agreed terms must contain events or dates that signpost completion, and conversely events that can trigger early termination of the arrangement.[94] The key elements of the proposal will be the total funds due to be paid into the estate, the level of creditors' claims, and the costs and expenses incurred. These elements directly affect the distribution level to creditors and, if one or more element is not met, the level of supervisor's discretion allowed by the creditors can be the difference between a CVA being fully implemented or terminated. Additionally, there will be procedural events that can

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92 There were six recorded cases of formal revocations: DX059; DY080; EX219 (note a form 1.4 was also filed in error); JX159; KX054; and KY105. There were five cases were the CVA was rejected according to the report to court but registered as approved at CH by mistake: CZ139; EW165; GZ078 (note form 1.4 was also filed); HZ009; and KW073. There were two other irregularities: DZ169 was rejected at a new meeting ordered by court and FW108 was rejected taking into account the volume of rejections once associated votes had been excluded. In the latter case the issue was not identified and the CVA continued with a form 1.4 subsequently being filed rather than a formal revocation. In one further case (HX124) the outcome was subsequently determined to be an invalid appointment but again a 1.4 was filed in error. The detailed review of the filed documents also demonstrated confusion over the treatment of abstentions in the voting process. In some cases the value had been incorrectly included in the final total used to calculate the 75% majority. In these latter cases there was no material impact on the outcome filed. The reporting of voting outcomes was inconsistent and often muddled in cases where large volumes of creditors participated.

93 See r 2.3 IR2016 for a schedule of the detailed contents of a proposal. These fall under twelve general headings. See Appendix B for the relevant rules in place in each jurisdiction. In broad terms they are very similar. During the study period the contents were detailed mainly in r 1.3 IR86.

94 Termination clauses and guidance on inclusion. The HMRC modifications routinely include a full range of termination clauses relating to both the substantive terms of the arrangement and the requirement to maintain an exemplary record in respect of ongoing tax affairs. The VAS help sheet on working with IPs sets out their expectations of required conduct in return for voting support. Available online at:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366661/vas-factsheet_1_.pdf

also trigger termination such as incurring any substantial new debt, and failing to file post CVA statutory tax returns on time.

2.9.1 Trust clauses

In most CVAs a trust clause is included in the proposal terms. The clause ensures that any funds remaining in the estate account are ring-fenced in the event of early termination. The term specifically requires surplus funds on termination to be retained by the supervisor, and paid as a distribution to the CVA creditors, rather than being passed to any subsequently appointed office-holder as an asset of the insolvent estate.[95] If a set of proposals do not already include a trust clause, Her Majesty's Revenue and Customs (HMRC) will insist on the clause being added as a modification. The downside of trust clauses is that ongoing suppliers can be more wary if they feel that by supplying credit they are effectively financing the ability of the company to repay the old debt from new credit. In the absence of any trust clause on termination, any funds held by the supervisor would automatically be paid into the estate of any follow-on procedure with outstanding expenses taken as a first charge.[96] The issue of trust clauses was considered in *Re N T Gallagher and Son Ltd* by the Court of Appeal.[97] Lawson noted that the court summarised its conclusion as follows:

> *"(1) Where a CVA … provides for monies or other assets to be paid or transferred or held for the benefit of CVA … creditors, this will create a trust of those monies or assets for those creditors.*
> *(2) The effect of the liquidation of the company on a trust created by a CVA … will depend on the provisions of the CVA … relating thereto.*
> *(3) If the CVA … provides what is to happen on liquidation … (or a failure of the CVA …) effect must be given thereto.*

95 The purpose being to avoid the CVA funds from being paid to any subsequently appointed office-holder for costs rather than paid as a distribution to the CVA creditors. HMRC insist on a trust clause being added to the CVA terms if not already included.

96 Note that r 4.21A IR86 which allowed outstanding CVA fees to be a first charge in any subsequent liquidation was repealed during the 2016 rules update. This revocation appears to have recognised that trust clauses are routinely used and without the flow of assets allowing outstanding fees to remain as a first charge was not equitable. No explanation was provided by the Insolvency Service for the amendment and the change was only acknowledged retrospectively.

97 [2002] EWCA Civ 404. [2002] BPIR 565.

(4) If the CVA … does not provide, the trust will continue notwithstanding the liquidation … or failure and must take effect according to its terms.

(5) The CVA … creditors can prove in the subsequent liquidation … for so much of their debt as remains after the payment of what has been or will be recovered under the trust."[98]

As discussed above, the key to understanding the trust term modification that applies relies on the original detailed wording used in each proposal.[99] The case summary envisages two different scenarios. In the first scenario, where the CVA is terminated there is no formal resolution to the disposition of the assets without a liquidation, as in most cases the assets will have been excluded under the terms. Therefore, the requirement by HMRC that funds must be retained to ensure a petition or subsequent winding up resolution is passed.[100] The second scenario relates to the terms under which the supervisor becomes the 'trustee' of the surplus funds post termination of the CVA and vacation of office as supervisor. For creditors to understand how the trust funds are to be applied the supervisor should provide full details of the relevant terms in the final report. The explanation should include how and why the surplus funds are both retained and to be subsequently distributed.

Where a new office-holder is appointed post CVA, this provides an opportunity for an independent review of the costs and expenses charged, and potentially a challenge to the interpretation of any trust terms relied upon. For example, the level of fees may appear excessive based on the original proposal estimate in comparison to the SIP 9 analysis of actual time spent. Many CVAs also include a ceiling on supervisor costs[101], which can

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98 See Lawson on *Individual Voluntary Arrangements*, 19[5] to 19[32] LexisNexis, Bristol. The same approach was followed in *Re Zebra Industrial projects Limited* [2004] EWHC 549 (Ch). [2005] BPIR 1022.

99 The standard wording for a HMRC modification trust clause is: "Upon termination of the arrangement, the arrangement trusts expressed or implied shall cease, save that assets already realised shall (after provision for supervisor's fees and disbursements) be distributed to arrangement creditors." However there is no requirement for the full proposal terms to be filed at CH so it is impossible to determine if the actions taken by supervisors during the study period have been correctly applied under the terms agreed

100 The standard HMRC modification for the provision of liquidations costs is usually worded as follows: "The supervisor shall set aside sufficient funds for winding up proceedings against the company and such funds will rank ahead of any expenses of the arrangement."

101 The maximum fee levels are either a specific amount or expressed as a percentage of the realisations.

sometimes be ignored on termination if there are sufficient funds available to meet the full costs incurred regardless of the original estimate. The study data identified numerous cases where the final funds held were not formally accounted for as trust expenses or distributions after the CVA completion certificate was filed.[102]

2.9.2 Comparison with liquidation and legal outcome

Every CVA proposal is required to demonstrate that the outcome (whatever the terms are) will benefit the creditors more than would be expected in a winding up. Logically, if the terms of the proposal consist solely of contributions (excluding assets) and a compromise is being offered, the contributions should exceed the forced sale value of any assets being excluded as part of the arrangement.[103] This demonstrates to the creditors that they are being treated fairly. Some CVAs simply extend the time to pay creditors in full, either while assets are being sold or a business is being wound up by existing management. Either of these options effectively provide an extended moratorium or, in some cases, the CVA is being used as a moratorium with no other agreement. Alternatively, where there are little or no assets available, third party funds may be offered as a compromise to sway the vote and save the company.

The legal outcome of the completion of the arrangement can only be reported as either fully implemented or terminated.[104] Variations from the formal wording and required contents were identified on completion notices and, where terminated, the completion

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102 See Chapter 3, Section 3.9 *Creditor trust and the Insolvency Practitioner* and Figure 3.16 *Allocation of CVA realisations [£millions]* for the data. An analysis of the final funds held at completion revealed over £23 million of trust funds that were unaccounted for according to documents filed at CH.

103 See SIP 3.2, principle 6, published 1 July 2014.

104 For the purposes of this research the type of completion reported to the court and filed at CH is described as the legal outcome. See s 7B IA86 and these options are discussed further in Chapter 3 together with the reporting and filing requirements under r 2.44 IR2016. Previously r 1.29 IR86 see Appendix B for the relevant and jurisdictional equivalents.

certificate often failed to include details of the specific termination factors.[105] In addition, some arrangements reported as fully implemented failed to comply with one or more of the agreed terms, without any recourse to a formal variation. Clarity on which terms are mandatory and which terms allow supervisor discretion is therefore extremely important. There is no statutory requirement to file a copy of the full set of proposals at CH, which makes the requirement to report the key terms and when these have been breached extremely important for creditors. Simply referring to clause numbers lacks transparency for the creditors.

2.10 CVA Terms: modifications pre-approval and variations post-approval

As already mentioned, the proposal terms can be modified during the approval process by agreement with the creditors, as well as post-approval by director request for a variation.[106] The shareholders are required to approve the initial proposal terms, usually after the creditors have voted but, in the event of any dispute, the creditor modifications agreed as acceptable by the management team will be the approved terms. For convenience the nominee can propose that the decisions of both creditors and members be made at the same time, especially as many small businesses have common directors and shareholders.[107] A report of the outcome of the initial decision on a CVA, including any

105 See r 1.29(2). There were examples were full receipts and payments were not provided in addition to the lack of termination factors.

106 During the review period they were negotiated during the meeting process allowing for suspensions and adjournments where additional negotiating time was required. Since the introduction of the 2016 rules there is now a formal modification process for England and Wales where the approval has been instigated by a qualifying decision procedure rather than a virtual or physical meeting.

107 See Chapters 3 and 6 for data on size and ownership.

agreed modifications, must be filed in court by the nominee or convenor.[108] Only the fact of approval is required to be subsequently filed at CH.[109]

The right to propose any subsequent variations to the approved terms is less straightforward. There is no automatic provision for variations, and the power to propose changes should be included in the proposal terms.[110] HMRC in particular insist that any variation term included in a proposal must reflect the same voting restrictions as required for their initial approval.[111] The intention of HMRC is to restrict later variations from being approved by a smaller majority or connected parties that could prejudice the rights of the unconnected creditors. However, variations play an important part in assisting companies to complete a rescue.[112]

In many proposals, connected creditors are excluded from or have reduced distribution levels compared to the unconnected creditors. However, the connected creditors continue to retain their voting rights and can assist with approving subsequent variations depending on how many other creditors continue to participate. Once a CVA is terminated and the company enters administration or liquidation any restriction on distributions to connected creditors is lifted, and so they will often benefit from early termination if they have agreed to defer their claims or reduce the distributions they can receive.

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108 See r 2.38(3) IR16 formerly r 1.24(3) IR86. R 2.38(4) requires the court to endorse a copy of the report with the filing date and this should be included in the copy filed with the Registrar. See Appendix B for the relevant rules in place in each jurisdiction.

109 See r 2.38(6) IR16 formerly r 1.24(5) IR86 [see Appendix B for comparatives]. Note that the majority of registration errors resulted from outcomes being filed for rejected proposals.

110 See r 2.3(1)(o) IR16 formerly r 1.3(2)(e) IR86 and Appendix B for comparatives.

111 HMRC also restrict use of any variations within the first twelve months that reduce the dividend level. Payment breaks can still be negotiated in the event of unforeseen events.

112 See Chapter 6, Figures 6.16 *Variations approved with the legal outcome* and 6.17 *Variation requests by management team size,* for data on variations in relation to legal outcome and management team characteristics.

2.11 The Company Voluntary Arrangement in action

The flexible nature of the CVA framework allows a wide range of uses and purposes to assist in all types of business rescue and restructuring. However, the flexibility also makes the use of the procedure complex and even daunting for some IPs.[113] In summary, the four main areas of challenge for IPs using a CVA are: (1) the application of the concept of fairness when assisting with drafting the proposals; (2) the need to provide clearer and more transparent use of modifications and variations; (3) the provision of better guidance and clearer application of trust clauses especially when modified by creditors;[114] and (4) the ranking of termination events, in particular where they are linked and can adversely impact each other. The study data revealed that the CVA procedure, although low in volume, has been used much more widely than previously identified, and for a wide range of purposes from complete rehabilitation of the company, to either solvent or insolvent distribution without the need for a costly liquidation.[115] In most CVAs this has resulted in much lower costs and so better outcomes for the creditors, across a wide range of scenarios that would otherwise have resulted in lower returns.[116]

The next chapter commences the analysis of the empirical data, and goes on to demonstrate the characteristics of the CVA as a flexible procedure that fulfils all the key criteria required for rescue and restructuring. Further, the data also demonstrates that the CVA keeps the costs of the procedure low, while also showing that creditor participation at the outset is an effective way of controlling a business rescue in a multitude of different ways.

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113 See Chapter 4 for analysis on IP behaviour.

114 Further research is needed into the operation of trust clauses based on the high number of cases where funds have not been full accounted for.

115 In some cases followed directly by dissolution without the assets being accounted for.

116 See Chapter 3, Section 3.9 *Costs and Distributions*.

Chapter 3

The Company Voluntary Arrangement: Identifying characteristics and measuring outcomes

3.1 An introduction to the empirical data

This chapter provides an overview of the Company Voluntary Arrangement (CVA) study data.[1] It identifies the key areas that indicate how the CVA is being used in practice, together with some of the key characteristics singled out for further analysis. The findings include outcome and impact of the use of the CVA on both company rescue and the creditors.[2] The outcome of each CVA has been measured in three different ways by looking at the legal outcome[3] for the CVA, the rescue outcome for the company and the business separately, while also identifying the returns to the creditors. Previous research has tackled the question of measuring CVA outcomes in different ways. These measures have included the testing of hypotheses,[4] by looking at company status,[5] or by reviewing other criteria to identify success or failure immediately after CVA completion, or within a

1 The main study period covers CVA approvals made between 1 January 2006 and 31 December 2015. More recent data is included as applicable. Many CVAs extend for at least five years and the ten year period from 2006 was chosen to ensure the majority of the CVAs would have been completed.

2 See also *Company Voluntary Arrangements and Administration Orders: A Consultative Document*, October 1993, Insolvency Service, London. The consultation identified the low usage of the CVA and it also highlighted the importance of the lack of a moratorium as being potentially one of the main reasons of under use.

3 Legal outcome is used to describe the type of completion that is either (1) full implementation or (2) termination. A completion certificate that indicates termination should include details of the events or actions that triggered the event and if fully implemented the date that any debt compromised is formally written off.

4 See Naresh Pandit, Gary Cook, David Milman, and Francis Chittenden, (2000) *Corporate rescue: empirical evidence on company voluntary arrangements and small firms*, Journal of Small Business and Enterprise Development, Vol. 7 Issue: 3, 241-254. Eight hypotheses were used to construct a questionnaire sent to all licensed IPs. The questions covered a range of areas related to the success and use of the CVA and based on firm size and business viability.

5 See Adrian Walters and Sandra Frisby (2011) *Preliminary Report to the UK Insolvency Service into Outcomes in Company Voluntary Arrangements* (23 March 2011).

specified period.[6] In contrast this study uses a staged approach.[7] The CVA outcome is considered in this study in light of the stated purpose of each case[8], and by using the terms of the rescue hierarchy originally coined by Cork.[9] The same hierarchy is also used as a basis for identifying the intended purpose in the administration procedure (ADM).[10] In simple terms, the hierarchy is a waterfall from the best outcome which is considered to be the retention of the original entity as an active undertaking. Then if that is not possible, the next best solution is the rescue of the business, or whatever part of the business is viable.[11] Rescue of the business includes the sale of the whole or part of the operation, including the retention of at least some of the employees when the undertaking itself cannot be saved as a going concern. In each of the scenarios the creditors should also benefit by receiving a greater dividend than if the undertaking had been placed immediately into liquidation.

3.2 The importance of purpose and the legal outcome

Previous research identified that the duration of a CVA was a key element in the successful completion of the arrangement.[12] The argument made was that limiting the duration of

6 See Peter Walton, Chris Umfreville and L Jacobs (2018) *Company Voluntary Arrangements: Evaluating Success and Failure*, May 2018, London, R3. See also the subsequent article - *A snapshot of company voluntary arrangements: Success, failure and proposals for reform*. Int Insolv Rev. 2020; 29:267–284. Available at: https://doi.org/10.1002/iir.1381

7 The initial analysis notes the legal outcome of each CVA procedure together with the stated purpose. The completion certificate circulated to creditors and filed at CH must state the legal outcome and the impact on the legal status of the creditor's debt. For a composition that has been fully implemented the completion certificate must advise creditors that they must write-off the balance of any outstanding debt included in the terms of the arrangement. For terminated arrangements creditors will be advised that enforcement can be re-instigated together with details of the terms not complied with and the causes of the termination. See section 1 IA86.

8 See later section 3.4 for a full explanation of how the purpose for each CVA has been identified and categorised for the purposes of this study.

9 A hierarchal framework of business rescue was set out in the Cork Report, para 627, p147.

10 See Schedule B1 IA86, paragraph 3(1) for the hierarchy of objectives. The rest of paragraph 3 sets out the parameters for each objective and the reminder that the interests of the creditors as a whole must not harmed in the delivery of the chosen rescue strategy.

11 See Chapter 1, Section 1.12 *Business viability*.

12 n 6, Section 9.3.

every CVA to three years would improve outcomes.[13] In order to identify why duration was considered important, and to isolate any other elements that might impact on outcomes, this study undertook to investigate duration further. The data indicated that duration was significant, especially in relation to single payment arrangements.[14] There was also a clear link between duration, outcome and the reliability of the source of funding. Each of these elements indicated that it was the overall purpose of each CVA which resulted in duration being a key characteristic in arrangements.

Effectively, ***purpose*** is influencing the outcome of the procedure rather than its duration, contrary to earlier research conducted by Walton and others.[15] Purpose was coded for in each CVA and is used across all the later analysis. This study identifies **purpose** as the ***overall intended strategy for the outcome***. In many cases the categorisation of purpose also included the relationship with other insolvency procedures, as well as the overall intended rescue strategy.[16] For instance a company in administration (ADM) may use a CVA simply to distribute surplus funds, or it may be an intended exit route to return the company to director management. Where procedures overlap chronologically (often with the same office-holder[17]), the intended duration of the CVA together with the source and type of funds have been used to determine the intended purpose. The detailed review of duration and funding revealed a number of different scenarios, and these were combined into two main types for use in this study. The purpose categories for each CVA are identified as either a 'contribution' or 'distribution' arrangement.

13 See Introduction *Background and Methodology* n 2. The restricted duration was originally suggested in the Cork Report for the Individual Voluntary Arrangement, para 387.

14 A single payment arrangement consists of either funds from a sale of an asset or new funds being provided and invariably has a distribution purpose.

15 See Introduction *Background and Methodology* n 29.

16 This includes the purpose identified in a preceding administration where a CVA is the distribution mechanism or exit route.

17 The ethics issues resulting from same office-holder in subsequent procedures for example the self-review threat.

Contribution is the first and main category, and is defined as relying almost exclusively on contributions from the profits of ongoing trading.[18] This is the most popular choice by most directors, and was identified in the study data as the main purpose in approximately 80% of the CVAs.[19] In this scenario, the creditors allow the assets of the company to be excluded from the terms of the arrangement in return for increased contributions from future profits. Duration is key in this category, with some creditors insisting on extending durations to improve their distributions to compensate for the sale of the assets being excluded, and which they would have received some element of in a liquidation.[20] The contribution arrangement can also include other realisations, such as the repayment of director loans or recovery of proceeds from other losses.

The second category is the ***distribution*** arrangement. This category includes a wider range of scenarios covering the remainder of the CVAs. The most common scenario for the distribution arrangement is a surplus from a previous or overlapping insolvency procedure. It also includes CVAs where a lump sum payment or new funding is provided by the company, group, directors, shareholders, secured creditors or other third parties. This type of fund is invariably provided for either a specific reason or event. The distribution can be targeted at either a single creditor, class of creditors, or for general distribution. As CVAs should be identified as either a scheme of arrangement or compromise, the distribution arrangement can be used in either circumstance.[21] In addition the distribution purpose also includes the ***managed wind-down arrangement***.

18 Note that even in contribution based arrangements they also invariably include the repayment of any director's loans and the handing over of any windfall gains from refunds or surplus profits.

19 The purpose was ascertainable in 6,043 cases with 1,256 coded as distribution and 4,787 as contribution. Indicating an approximate overall 80:20 split.

20 See Chapter 2, section 2.2 *Fundamental elements of the CVA* and the later discussion in section 2.10 on variations. In particular the popularity of full and final settlement variations and the resulting impact on the rate of full implementation. In many cases these result from a change in circumstances including the introduction of third party funds or the proceeds from the sale of business.

21 A CVA scheme is likely to include a specific fund arranged for the stated purpose. This can be pension scheme related. In respect of compromise agreements a fund can similarly be used for a single or class of creditors such landlords.

The managed wind-down is effectively used to replace a liquidation, where a forced sale of the assets would be counter-productive and leave the creditors worse off.[22] Over the study period the analysis indicates that the majority of CVAs are standard contribution arrangements as indicated above.[23] The remaining 20% are distribution arrangements of varying kinds. The majority of distribution arrangements are fully implemented.[24] The beneficiary group of creditors is varied in these arrangements with some remaining trade creditors being paid under their normal trading terms.[25]

Figure 3.1 summarises the outcomes for each purpose over the study period. Note the two peaks in 2006 and 2012 (yellow line) in respect of the fully implemented *distribution arrangements*. These relate to two large CVA groups[26] and these are adjusted for in some of the figures to avoid potentially skewing the overall trends. On average, 75% of the *distribution arrangements* are fully implemented, with the remainder being terminated. These results highlight the uncertain nature of *contribution arrangements*. They are invariably implemented over much longer periods than the *distribution arrangements,* which introduces more uncertainty and risk. Further analysis of the *distribution arrangements* in the next section provides more insight into their use and outcome by

22 For example contracts can be completed in an orderly manner and assets sold without the need for a forced sale.

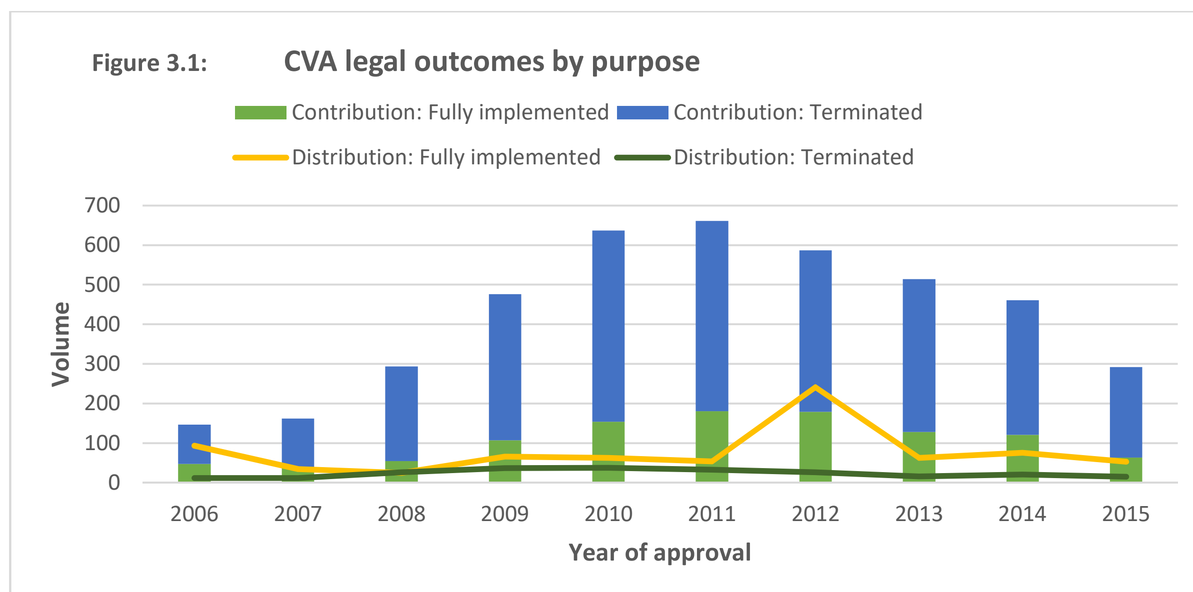
23 n 18. The purpose was subsequently varied in 18 cases of which six were fully implemented. Documentation was not available or did not provide sufficient information to make a reliable identification in 373 cases. In many of the older CVAs R&Ps were filed without any supporting reports or narrative. In the majority of *contribution* arrangements where there are director's loans (from as opposed to the company) these are invariably required to be repaid as part of the terms with director remuneration being paid using the PAYE system rather than receiving dividends in lieu of salary. Further, in some cases the non-associated or connected creditors will have to wait for any distribution until after all the unconnected creditors have been paid in full.

24 *Managed wind-downs* represent just under 10% of the *distribution* arrangements (133 of 1,256).

25 The specific creditors include the Pension Protection Fund (84) or other groups such as landlords (27) where terms or amounts need to be separately negotiated as part of a wider restructuring plan.

26 The two largest groups identified in the period are the Federal Mogul Group of 56 companies approved in 2006 (some are still in ongoing procedures due to asbestos claims) and the Southern Cross Group of 157 companies which were approved and substantially completed during 2012.

identifying those that also involve an administration procedure (ADM), either before or after the implementation of the CVA.



Source: Data tables 4.1.2 and 4.3.1, Appendix C

3.3 The CVA rescue hierarchy

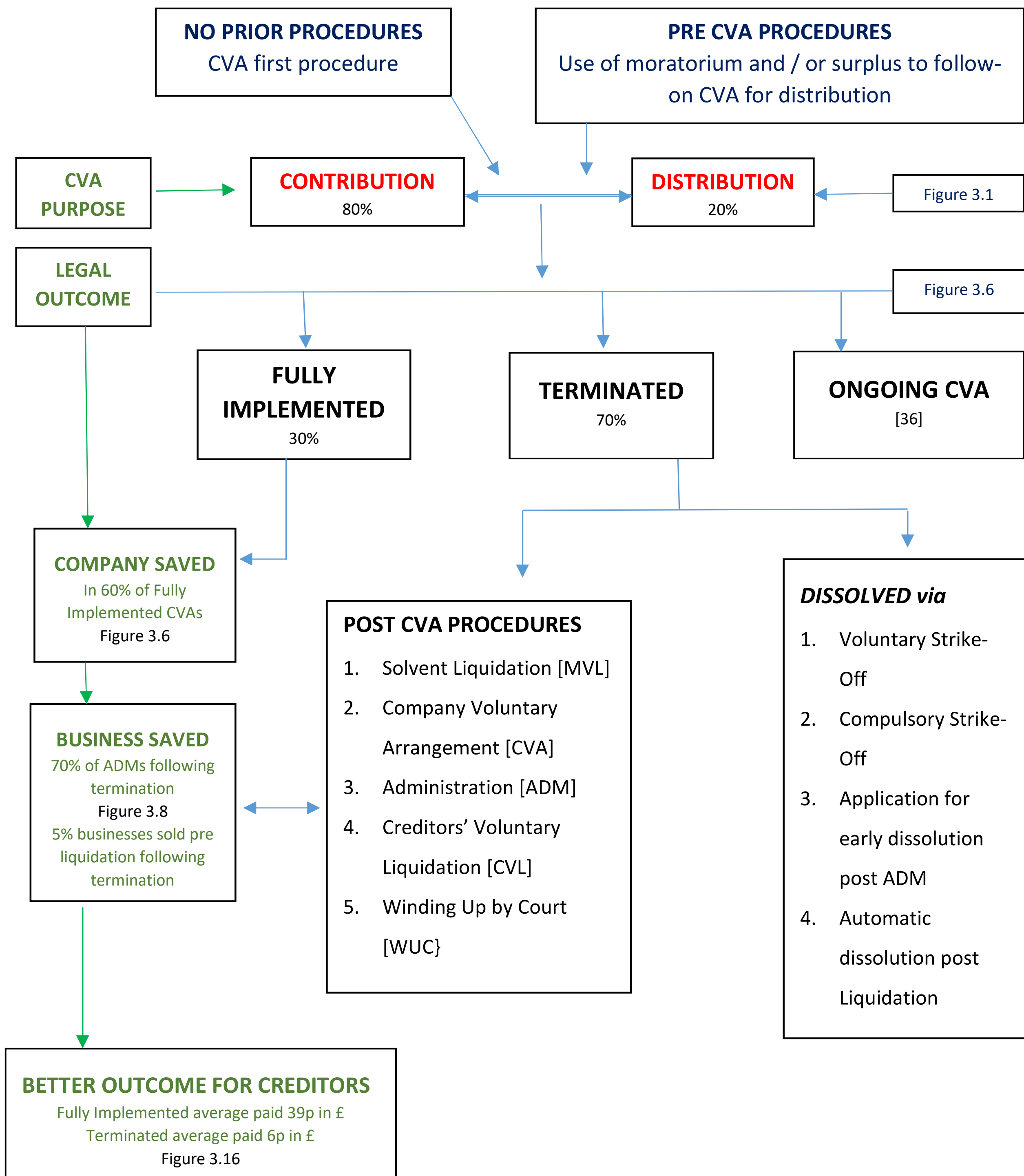
The CVA rescue hierarchy used in this study is illustrated in Figure 3.2. It identifies the range of potential outcomes and rescue options available to a company entering a CVA. The analysis includes the intended purpose[27] of the CVA, which directly impacts on the legal outcome of each arrangement, as well as the use of pre- and post-administrations or liquidations. A review of previous research indicated the need for a longitudinal study[28] to explore the use of the CVA over a longer period of time, rather than a brief snapshot of outcomes during a specific year.

27 The method of identifying the CVA purpose is explained in section 3.2.

28 See the Introduction, *Background and Methodology*, Section 2. The study period is based on CVAs approved between 1 January 2006 and 31 December 2015 however the period studied covers events up to 30 September 2021. The data is reported by year of approval and not by registration date as currently used in published data. The starting point for this research was the Insolvency Service data together with the list of company numbers kindly provided by their statistics department. Subsequent analysis during this research resulted in changes to this data to correct filing errors. Both late registration (sometimes years), missing data and filing of incorrect documents has impacted on the volume of the approvals. Further the data for each jurisdiction is currently published separately and has been combined for the purposes of this study.

Figure 3.2: **THE CVA RESCUE HIERARCHY**[29]

The CVA rescue hierarchy identifies purpose,[30] legal outcomes[31] and the ultimate outcome in relation to a sale of business before or during the use of follow-on procedures.[32]



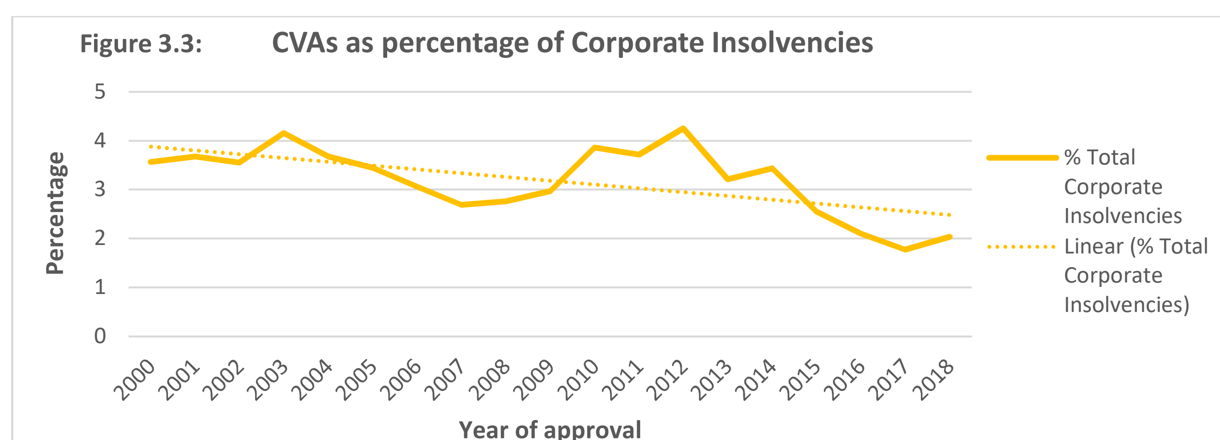
29 Note that the references are to figures appearing later in this chapter.

30 See section 3.2 *The importance of purpose.*

31 See Figure 3.6 *Interaction with the administration procedure.*

32 See Figure 3.4 *CVA legal outcomes.*

The rescue culture[33] was discussed in depth in Chapter 1 and identified the economic benefits of increasing the use of rescue procedures.[34] Figure 3.3 shows again the decline in use of the CVA as a percentage of the overall volume of corporate insolvency procedures.[35] The slight revival of the use of the CVA in 2003 coincided with the implementation of the changes made by the Insolvency Act 2000 (IA2000), which included the implementation of the Small Company Moratorium (SCM).[36] To put the current use of the CVA into perspective, as a rescue procedure it accounts for less than 5% of the total insolvency procedures registered each year.



Source: Insolvency Service Statistics[37]

The CVA is currently falling both in volume and percentage of corporate insolvency procedures. The creditors' voluntary liquidation (CVL) is the only exception to this trend.[38] The graph in Figure 3.4 shows the relative use of each type of insolvency procedure across the study period. The procedures are divided into two categories: (1) the rescue

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33 See the Second Report by the *Select Committee on Trade and Industry* published 20 December 1999 and the conclusion in referencing the *Rescue culture,* para (e) which stated that *"*the Bill has been presented as part of an attempt to stimulate a "rescue culture" in insolvency law and practice, filling what has long been perceived as a lacuna in the new arrangements introduced in the 1986 Insolvency Act.*"*

34 See Chapter 1, section 1.11 *The movement between insolvency procedures*.

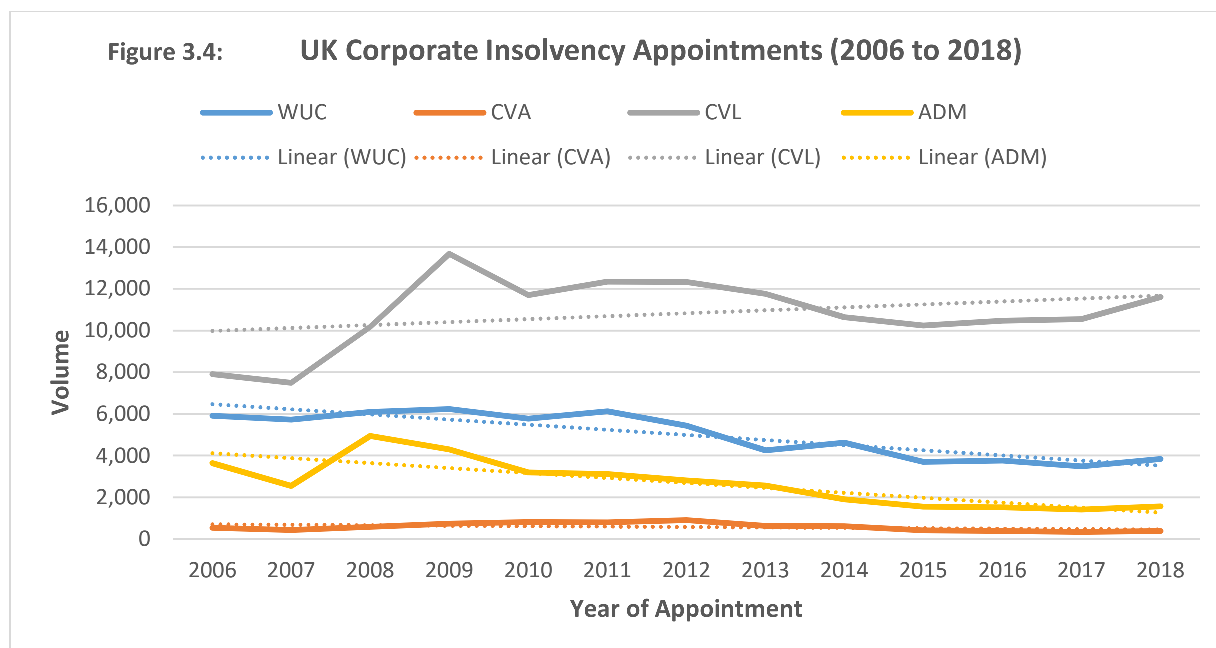
35 The same graph is used in the Introduction *Background and Methodology,* Figure 1.

36 The Small Company Moratorium was Implemented on 1 January 2003 and revoked on 26 June 2020.

37 The IS statistics of all insolvency appointments for each jurisdiction within the UK can be found at https://www.gov.uk/government/collections/insolvency-statistics.

38 n 30.

procedures including the CVA and ADM, and (2) the liquidation procedures including the winding up by court (WUC) and Creditors' Voluntary Liquidation (CVL).



Source: Insolvency Service statistics[39]

The graph emphasises that the CVL is the most frequently used procedure, with on average an upward trend, while the use of the two rescue procedures (CVA and ADM) make up less than a fifth of the total insolvency procedures. The Insolvency Service data from 2010 onwards provides more clarity on the overall volume of companies entering liquidation, by separating the follow-on CVL appointments made post ADM from the free standing use of the procedure, either as a single event or as a follow-on from a CVA without an ADM.[40] Since the introduction of the Enterprise Act,[41] the use of the CVA has been falling by

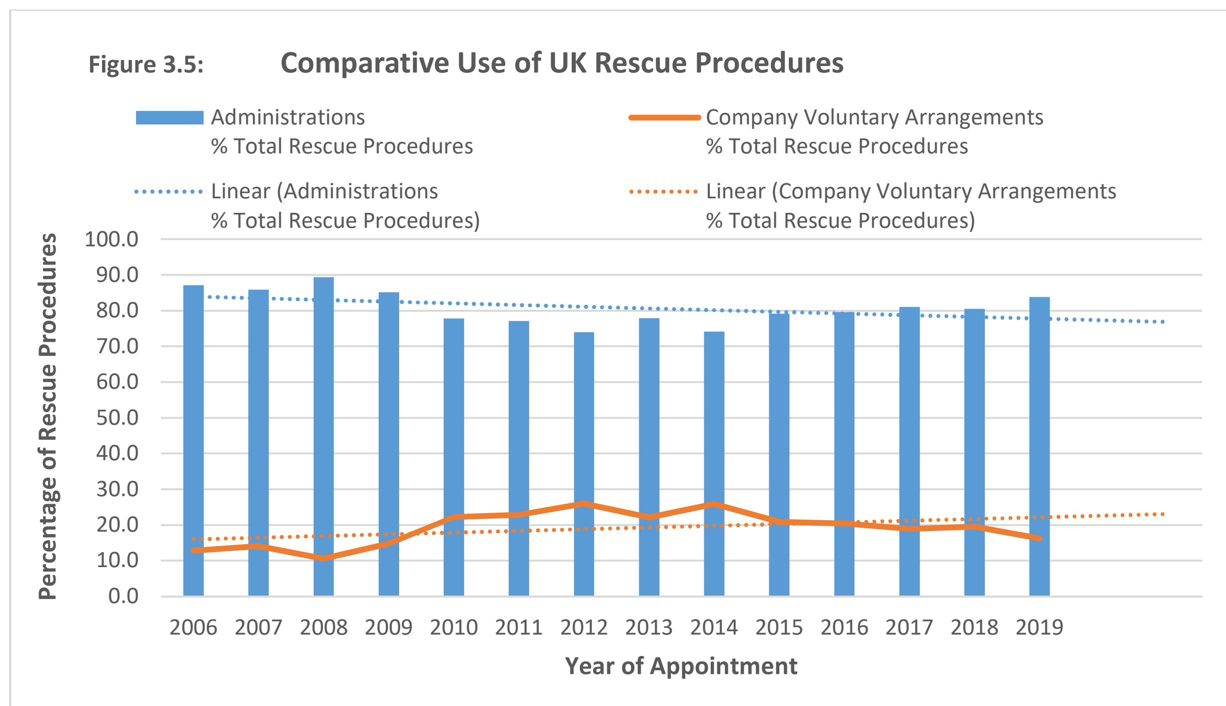
39 The abbreviations used in the figure are: WUC - winding up by court; CVL - creditors' voluntary liquidation; CVA - company voluntary arrangement; and ADM - administration. Note that follow-on CVLs post administration began to be reported separately after Quarter 4 of 2009 to eliminate the duplication in the data. See IS statistics at https://www.gov.uk/government/collections/insolvency-statistics.

40 CVL appointments made under section 98 IA86 (now section 100 IA86). There is effectively still some minor duplication at a company level in respect of terminated CVAs that are subsequently liquidated or go into ADM (or both) however from a legal perspective these appointments are different in nature and relate to different assets. They are also not easy to identify statistically. See para 83 schedule B1 IA IA86.

41 The Enterprise Act 2002 came into effect on 15 September 2003.

volume, however despite this decline, the CVA has been increasing its share of the rescue market in comparison to the ADM.

Figure 3.5 shows the comparative use of the two rescue procedures, with the higher volume of ADMs being shown in columns, and the lower use of CVAs as the orange line. The CVA increased its share of the rescue market from approximately 10% to 20%, with a very recent fall during 2018-19. The decline in 2018-19 could be linked to the public criticism of the CVA in a few high-profile retail cases. Effectively demonstrating a lowering of creditor confidence and trust in the procedure.[42] In comparison the ADM shows a downward trend throughout most of the study period, with a recent small increase.



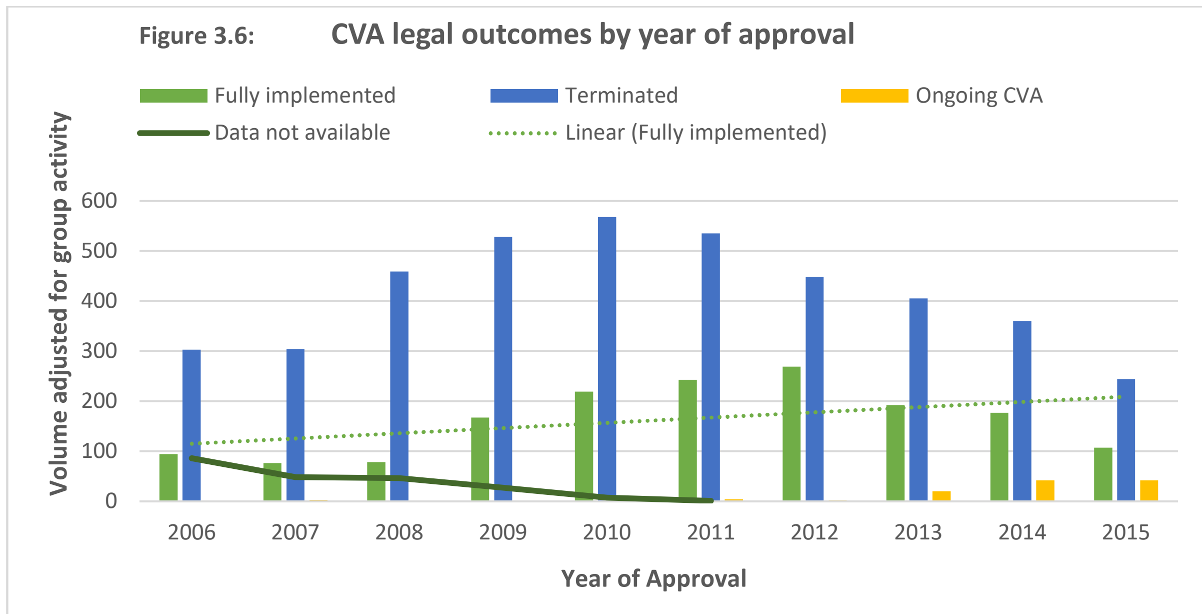
Source: Insolvency Service statistics[43]

The increasing share of potential rescue opportunities being used by the CVA is a positive finding in relation to the government targets to increase its use. An analysis of the implementation rate provides additional confirmation that the CVA is being used more

42 ADMs in 2008 reached a peak at 4,808 and in 2009 fell back to 4,019 continuing to fall to 1,349 in 2016. The volume increased slightly to 1,463 in 2018 with a more substantial increase to 1,886 in 2019.

43 n 38.

effectively as a rescue procedure. While the use of the CVA has been falling in volume, overall the trend of full implementation has been gradually improving, even after adjusting for group activity.[44] Figure 3.6 shows the CVA legal outcomes by year of approval, identifying the increasing trend of fully implemented arrangements.



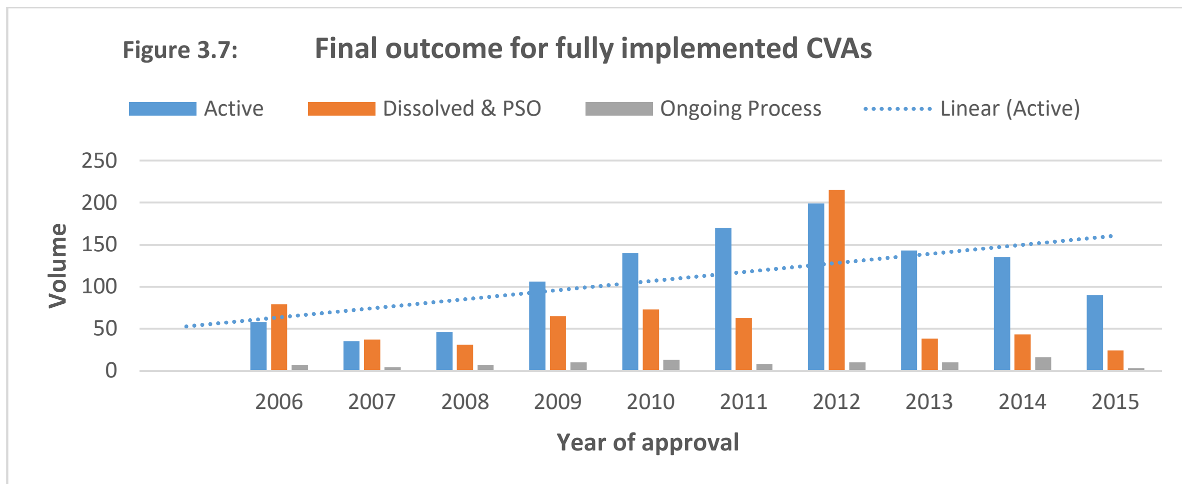
Source: Data table 4.1.2, Appendix C

In addition, a review of the fully implemented CVA outcomes shown in Figure 3.7[45] reveals an increasing trend of companies remaining active after completion.[46]

44 See Figure 3.6. The data in this chart has been adjusted for group activity by replacing the individual company outcomes with a single group outcome. Large groups can make a significant impact on usage data. The volume of CVAs approved has never exceeded 900 in any year and remains at less than 5% of the corporate insolvencies annually. Some of the peaks in volume in the non-adjusted data can be mostly explained by large group arrangements. Many of the smaller groups consist of less than five companies making little impact however all groups have been identified for this adjustment.

45 This data has also been adjusted for group activity to avoid and false trends being identified.

46 Note that the date on dissolutions also includes those Pending Strike-Off (PSO) which indicates those companies where the dissolution process has been commenced but not yet finally completed by the cut-off date. This data includes only the completed CVAs reported as being fully implemented on the completion certificate.



Source: Data tables 4.1.2 and 10.2.[47] [See footnote for explanation of PSO status]

In summary, although the volume of CVAs being approved is substantially less than ADMs, the CVA is being chosen in a higher percentage of rescue cases as an option.[48] In addition the arrangements being fully implemented are increasing, and the volume of companies remaining active post full implementation is also improving. The study data indicates a positive and improving outcome for companies attempting a business rescue via a CVA. The improving outcomes appears to contradict the negative reporting of CVA failure rates and other grievances of some disgruntled creditor groups.[49] The next section looks at the links between the CVA and ADM procedures.

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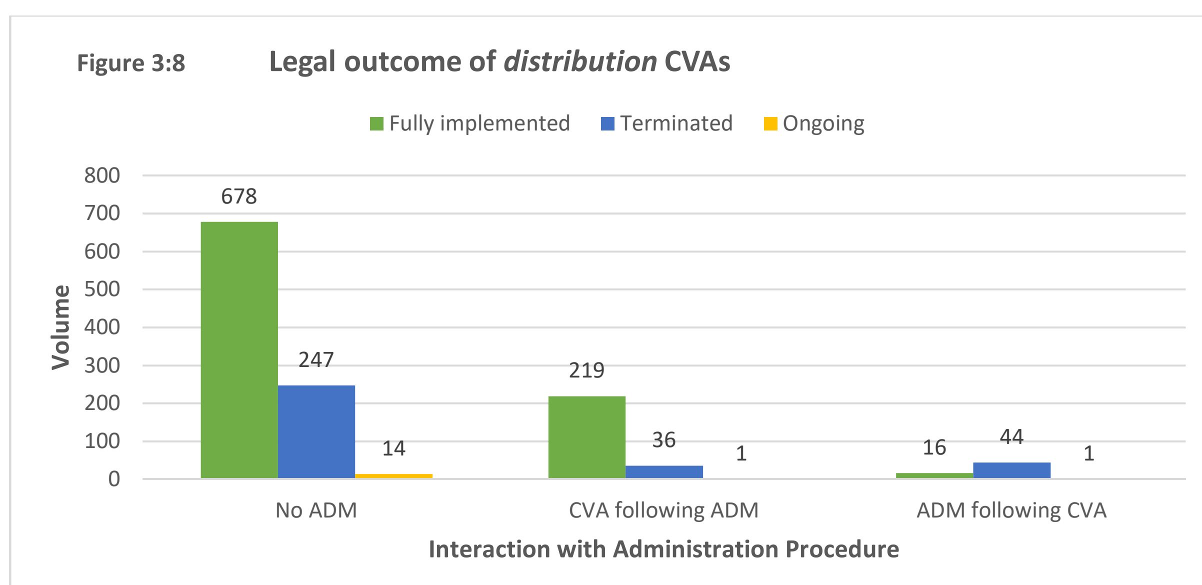
47 The PSO is the abbreviation for Pending Strike-Off and indicates those companies where the dissolution process has been commenced but not yet fully completed by the cut-off date. This data includes only the completed CVAs reported as being fully implemented on the completion certificate. The total volume analysed is 1,910 consisting of live and active companies of 1,134; dissolved companies of 672 of which 549 ended life in a solvent procedure (MVL) and 122 in an insolvent procedure. Other ongoing procedures accounted for 95 companies of which 22 remain solvent and 68 are insolvent. There are some queries outstanding with CH on current status due to unavailability of documents.

48 The subsequent analysis concentrated initially on the actual number of approved, registered and completed CVAs during the main study period. See the volumes in the data tables in Appendix C.

49 The complaints have argued that the way CVAs are being used in some circumstances are an abuse of process. See Jonathan Eley *Debate over company voluntary arrangements heats up ahead of Monsoon vote*, the Financial Times, on 17 June 2019, available at https://www.ft.com/content/df971510-8e8f-11e9-a24d-b42f641eca37. See also Ian King, 12 June 2019, *Green's creditor fight places use of controversial CVAs in peril*, Sky News, available at https://news.sky.com/story/greens-creditor-fight-places-use-of-controversial-cvas-in-peril-11740589.

3.4 Interaction with the administration procedure

The majority of *distribution* arrangements are free standing CVAs averaging a 75% full implementation rate. The short duration, certainty of terms and funding are the key elements to full implementation of distribution arrangements. The implementation rate improves further for *distribution* CVAs where it immediately follows an ADM. In these cases, over 85% are reported as fully implemented. The main study sample contained over one thousand approved CVAs where an ADM was used either before or after the CVA.[50] Figure 3.8 shows a breakdown of the *distribution* CVAs separating out those that interact with an ADM and the outcomes.



Source: Data tables 4.1.2 and 4.3.1, Appendix C

In respect of the ADM being used after the CVA was terminated, the majority resulted in a sale of business either immediately on appointment or very shortly afterwards.[51] Less

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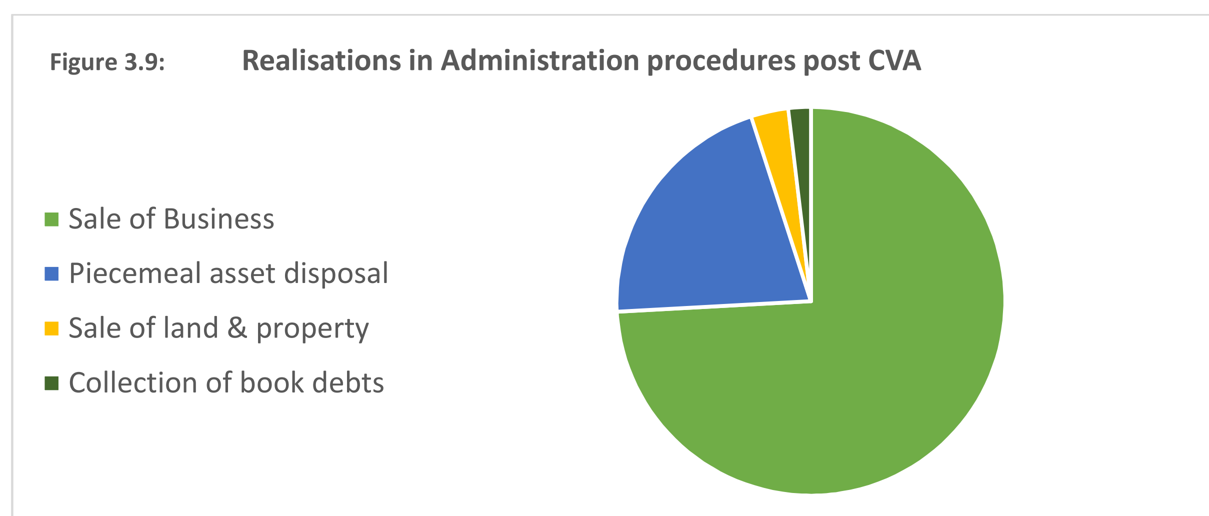
50 This represents 16.6% of the study sample. There were 1,254 CVAs designated as distribution CVAs including 316 companies who used the administration procedure. See Data table 4.3.1 and schedule of data tables in Appendix C.

51 When a business is sold immediately on or shortly after the appointment of an administrator this process is known as a 'Prepack' referring to the negotiations and marketing process that has been undertaken by the proposed administrator while not formally appointed. A Prepack sale can be either to a genuine third party purchaser or a connected party. The process and reporting of the sale must be done in compliance with SIP 16 and every purchaser should be encouraged to use the Prepack Pool (PPP) who provide an independent report on how the process has been conducted. See Chapter 2 for a fuller discussion.

than a quarter of post-CVA ADMs ended up with no disposal of assets.[52] From a rescue perspective, where the CVA has failed to save the company, the subsequent ADM saved the majority of businesses by a sale of all or the majority of the business. An analysis of the source of the realisations in the post CVA ADMs is summarised in figure 3.9. For creditors this may not be the best outcome, as creditors (particularly unsecured creditors) invariably get a better return from a fully implemented CVA rather than a follow-on ADM.[53]



Source: Data table 7.2.1, Appendix C

In many cases it was also noted that follow-on procedures were often led by an alternative firm of insolvency practitioners.[54] Figure 3.10 shows the current trend for office-holders taking a subsequent ADM appointment. Although the majority of ADMs post a CVA are taken by a new office-holder, that trend is slowly decreasing with more supervisors taking on the role of administrator post-CVA termination. The ten years of data confirmed that (despite reducing usage) the CVA has increased its share of the rescue market over the study period,[55] alongside an increasing percentage of fully implemented arrangements.[56]

52 In the case of post CVA administrations (761) 509 were reported as 'Prepacks' (66.89%). See Data tables 7.1.1 and 7.2.1 and schedule of tables in Appendix C. Note that nine prepacks reported were pre CVA transactions.

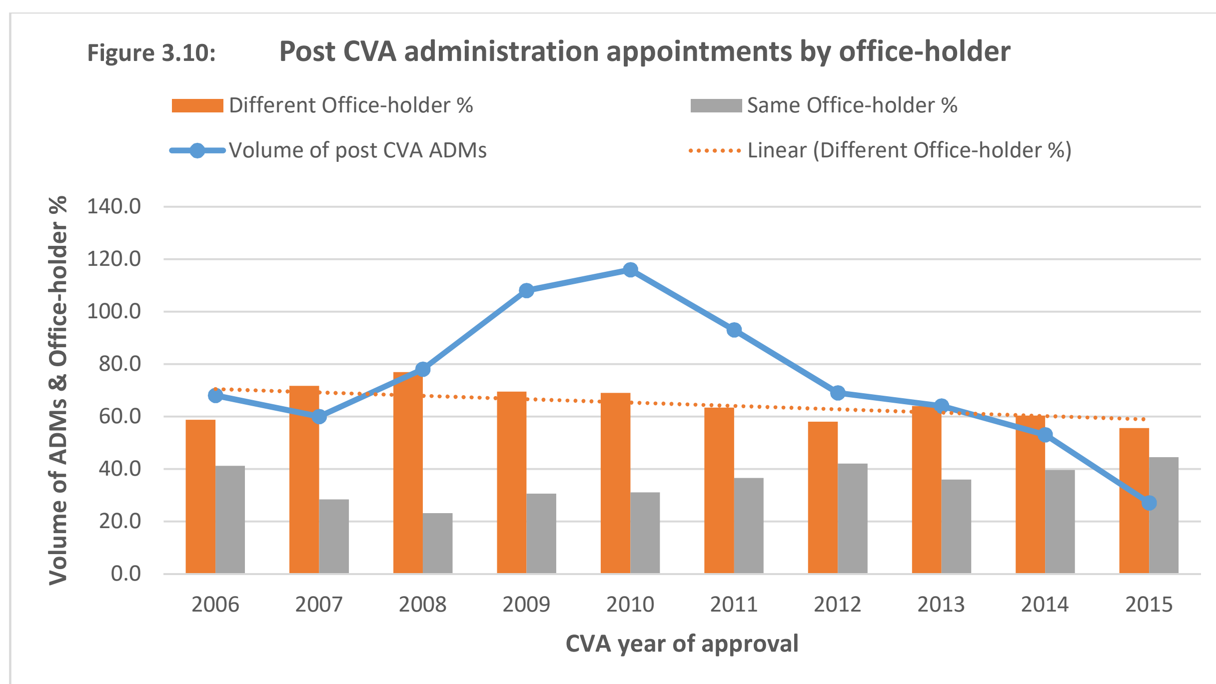
53 See section 3.10 *Costs and distributions*.

54 See Figure 3.10.

55 See Section 3.3 *The CVA rescue hierarchy,* Figure 3.5.

56 Ibid. See also Figure 3.7 *Final outcome for fully implemented CVAs*.

In addition, the identified purpose of each CVA was used to define its role, which assisted in the more detailed analysis of the outcomes by participant influence. In respect of impact on the use of the CVA the next element considered is the moratorium.



Source: Data table 7.1.2, Appendix C

3.5 The impact of using a moratorium

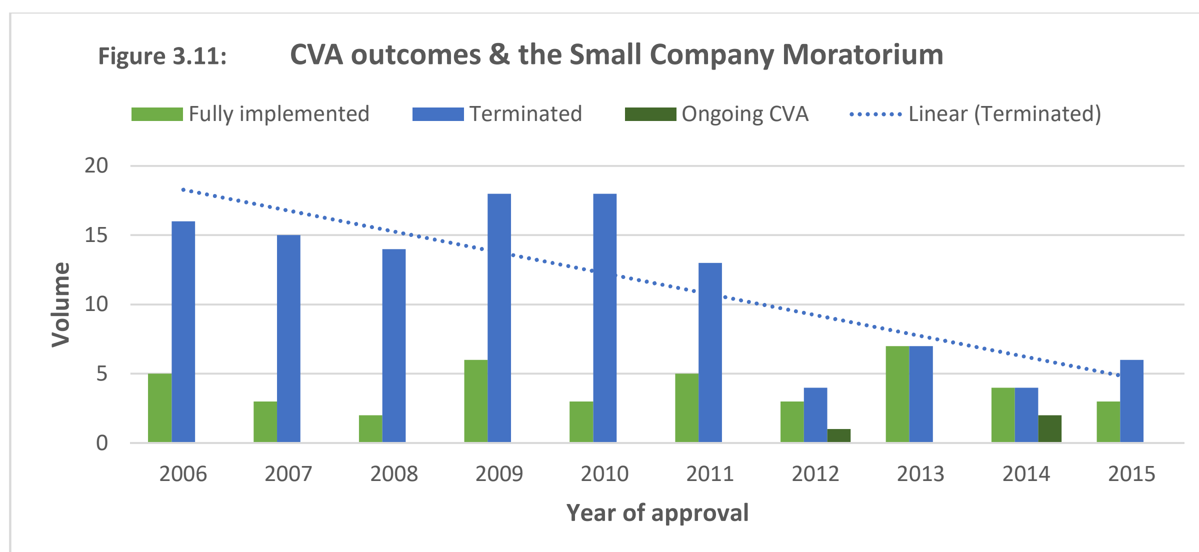
A moratorium provides protection against enforcement procedures and is a useful tool to restrain pre-emptive creditor action during a rescue review period.[57] Previous research indicated that the use of a moratorium appeared to increase the chances of the successful outcome for a CVA.[58] However, that research included both the use of the ADM as a moratorium for medium and large companies,[59] and the use of the small company

57 See Chapter 2, section 2.2, *Fundamental elements of the CVA*.

58 n 6. The findings in the Walton research were based solely on the 2013 CVA data which is identified in Figure 3.10. It should be noted that the outcomes for 2013 and 2014 were unusual in relation to the remainder of the study period with a higher rate of full implementation making the analysis less impelling. See also Chapter 4, section 4.1.2.

59 The use of the ADM as a moratorium was noted in 11 cases of which only one was identified as a large company. The remainder were small or micro businesses who could have used the SCM which would have been a cheaper option.

moratorium (SCM).[60] Figure 3.10 shows an analysis of CVAs that have used the SCM, identifying the volume and their outcomes. The analysis of the use of the SCM indicate a downward trend of terminating CVAs alongside a reduction in overall volume of use.[61]



Source: Data tables 4.1.2 and 6.1.1, Appendix C

The data could signal a more targeted use of the process, or be an indication that the statutory requirements of the SCM are perhaps considered too onerous on the appointed nominee.[62] The earlier analysis in section 3.5 on the use of the ADM indicated that the majority of CVAs following an ADM (as opposed to the CVA being followed by an ADM after termination) were categorised with a distribution purpose. The data confirms that these arrangements by their nature produce a higher implementation rate, which is more likely to be the main cause of the slightly improved outcome, rather than the use of a moratorium. However, a moratorium provides time to consider all the options without the

60 Only small companies have the opportunity to use the small company moratorium to provide an enforcement free period in which to perfect the proposal. See Chapter 2 for detail of the SCM process.

61 A total of 163 were identified during the study period by cross checking with the Gazette publication data. Of the total only 41 were identified as being fully implemented which equates to only 20% of the total completed, whereas 115 were terminated. The remainder lacked data or are ongoing.

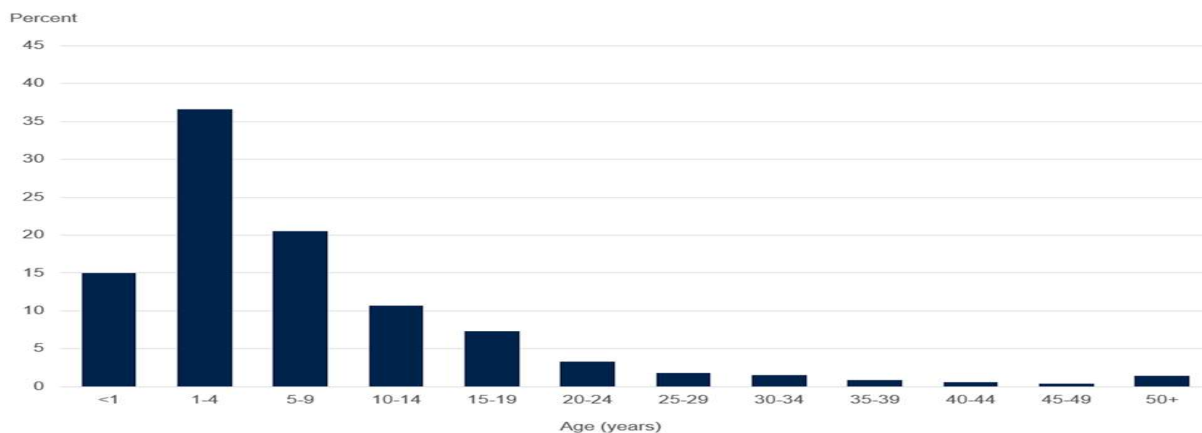
62 This is an important aspect which is considered further in Chapters 4 and 7.

additional threat of enforcement action, and was considered to be a useful addition to the procedure by IA2000.[63]

3.6 The influence of the company profile on legal outcome

The full range of the study data was analysed to determine if there were any other unusual trends in the CVA findings when compared to the overall UK population of companies. One element identified was the company age. Figure 3.12 illustrates the general company age profile for 2019.

Figure 3.12: Age profile of companies on the total UK register for 2019



Source: Official Statistics Companies House Register[64]©

The UK company data profile indicates a gradual decline in the average age of active UK companies since the start of the new millennium, from 10.7 years to 8.5 years in 2018. There have been fluctuations within that period, generally in line with the overall number of incorporations and dissolutions recorded each year. The total number of companies on the register has also declined during the same period and the average age of companies being dissolved has reduced from 5.7 years in 2013 to currently five years.[65] When the UK data is compared to the CVA approval data, the age profile is similar but with an average

63 Ibid. Note that CIGA revoked the SCM and replaced it with a separate moratorium procedure.

64 See Figure 3 on the Companies Register Activity (last accessed 11 November 2019) and online at: https://www.gov.uk/government/publications/companies-register-activities-statistical-release-2018-to-2019/companies-register-activities-2018-to-2019#age-of-companies-on-the-register.

65 ibid

age of just over eleven years. The data indicates that companies using the CVA are on average slightly more mature, but also reflects in part the average age during the study period between 2006 and 2015.[66]

Figure 3.13a shows the CVA outcomes by company age. The analysis of the data demonstrates that the older the company, the higher the likelihood the CVA will be fully implemented. The volume of terminated CVAs reduces up to the age of 40 years, when the number of fully implemented arrangements exceeds the early terminations. Further analysis of the fully completed CVAs revealed that the age of a company is an important factor in the outcome of the CVA.

In normal trading circumstances, reputation and status comes with age and a solid trading history. Sometimes status is handed down using a business or trade name, which is treated as a valuable asset which is transferred or sold by a company or a group. Similarly, the use of brand names for specific products can be valuable and are often used widely across a group, or even franchised to provide additional income. The time and cost invested in establishing a brand makes the company more valuable and provides a greater incentive to keep it alive. In many cases the trading name is sold as part of the sale of business,[67] confirming that reputation and market share is a valuable asset.[68]

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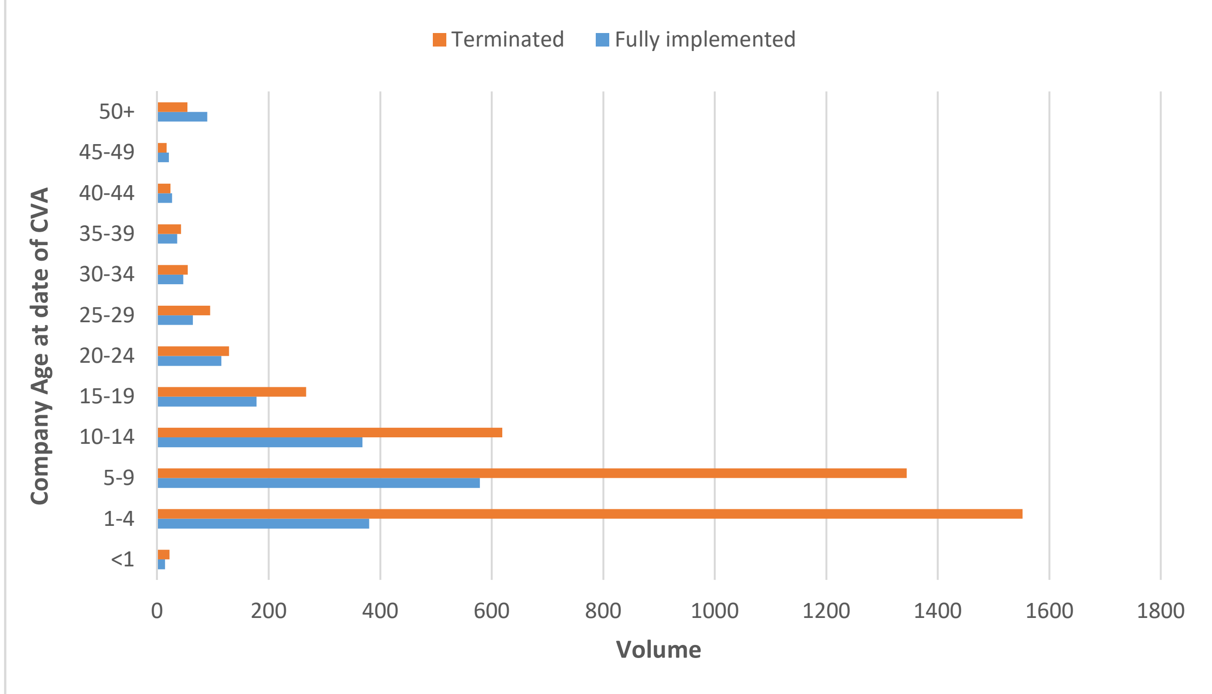
66 The age of each company has been collected at both the commencement of the CVA and where subsequently dissolved the age at dissolution or at the study cut-off date which was set at 31 December 2019. The date of 31 December 2019 was chosen to allow time for completion of as many of the CVAs as possible prior to the final analysis.

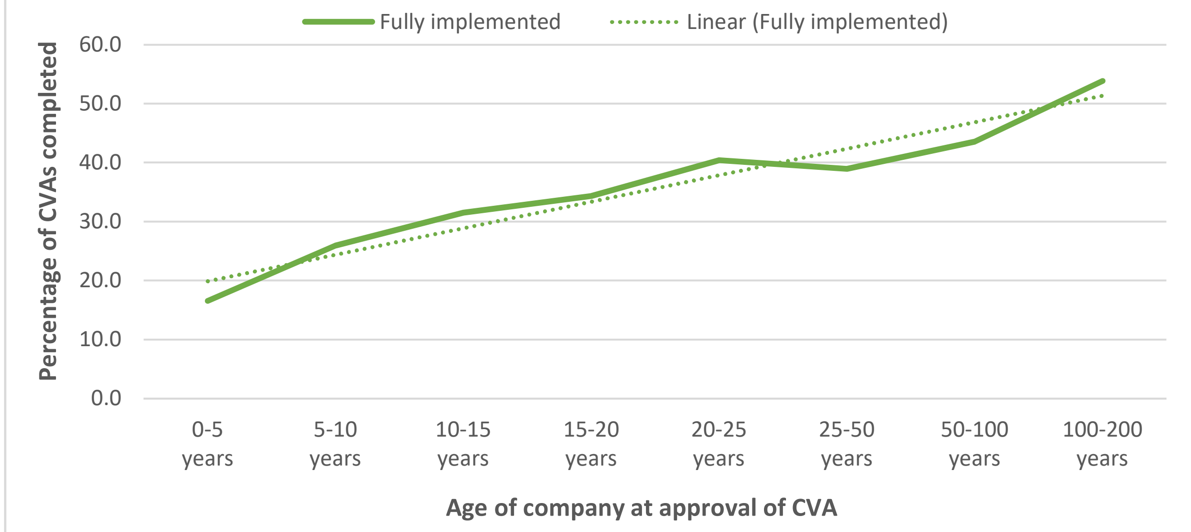
67 The value of a name or brand is often identified as goodwill in a sale of the business as opposed to a formal valuation of it as intellectual property.

68 See further analysis in Chapter 6, Section 6.12 *Comparison of average company age and size.*



Source: Data tables 9.1.1 and 4.1.2, Appendix C

Figure 3.13b shows the same outcome data by percentage of the CVA completions. The increasing trend of full implementation starts at less than 20% in companies under five years old, and increases to more than 50% in companies over 100 years old.



Source: Data tables 9.1.1 and 4.1.2, Appendix C

3.7 Insolvency Practitioner influence on CVA use

The next element that can impact on the use of the CVA is the initial selection process and the options suggested by IPs and their firms. The way in which choices are presented can be key to the decision whether to use a CVA. To analyse this data, both individual IPs and their firms were coded by frequency and profile. Initially the IP data was analysed by the number of appointments taken, which were split into bands together with details of the firm taking the appointment.[69] These bands were subsequently used to determine ***user*** categories. The categories used in the coding and analysis of each IP were based on the initial appointment holders only to avoid duplication. This excludes the distortions created where IPs are subsequently appointed under a block transfer or other court orders. Figure 3.14(a) shows the volume of CVAs completed by IPs (bands) and identifies that five IPs (less than 1% of those taking CVA appointments) completed over 18% of CVAs, with 20% of IPs only taking one appointment.[70] The categories used in the subsequent analysis of both IPs and the firms start with the single-user;[71] followed by the occasional user which was split into two tiers for further analysis;[72]next the frequent-user[73] and finally the super-user.[74] The same data is reanalysed in Figure 4.14(b) using the IP categories.

69 This data was based on the information recorded at CH and the firm details included in the filed documents.

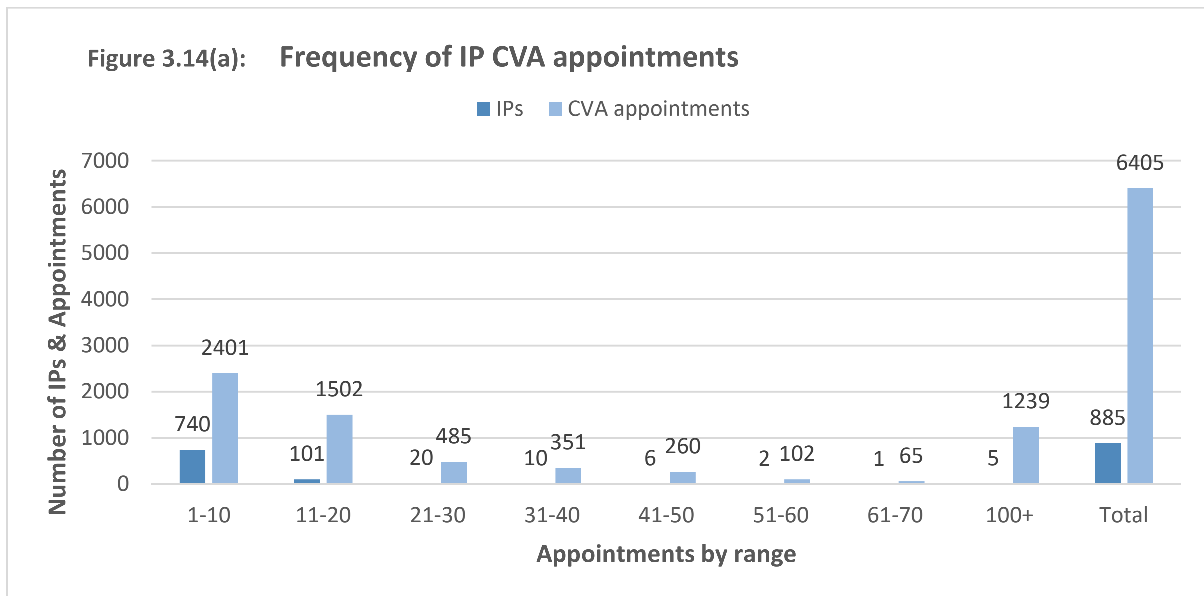
70 There are 252 IPs taking only one appointment as first office-holder which is just over 28% of IPs and only 4% of CVAs.

71 This represents one appointment only as the main supervisor appointed on approval and excludes any second appointments especially those made by block transfer orders. There are approximately 50 additional IPs who have only taken CVA appointments as a second office-holder, however the review revealed a range of inaccuracies in this data due to poor documentation. The effect of second appointees made no material difference to the firm user categories as in most cases they were from the same firm. It did however include approximately 50 additional IPs who only took single appointments as second appointee.

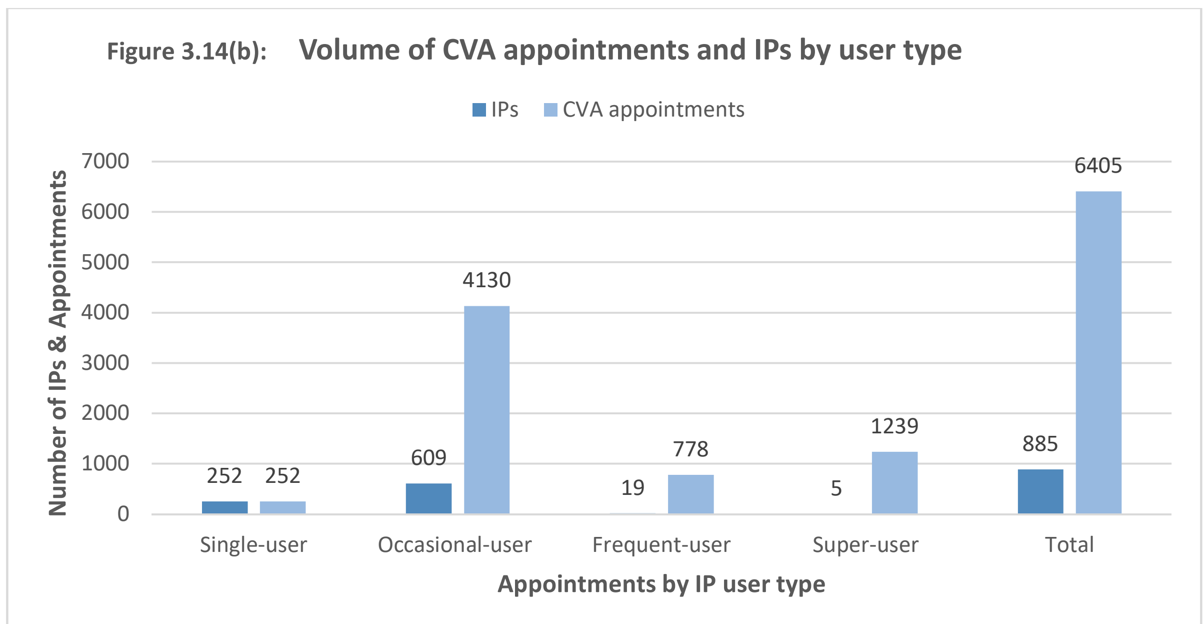
72 The two tiers of the occasional user are tier one between two and ten with tier two ranging between 11 and 30 appointments at approval.

73 The frequent-user category covers those supervisors who have taken between 31 and 100 appointments during the study period.

74 The super-user category includes all those IPs who have taken 100 or more CVA appointments during the ten year study period.



Source: Data table 1.2.1, Appendix C



Source: Data table 1.2.2, Appendix C

The majority of IPs are single or occasional-users[75] of the CVA, in contrast to what can be considered as experts, that is the frequent and super-users who total less than 100, with only five in the latter category.[76] Analysing and attempting to understand the patterns of

75 There are over 800 IPs who took ten or less appointments (occasional-user tier 1 plus single-user) during the study period which represents over 97% of IPs who took CVA appointments confirming that the majority are inexperienced in the use of the procedure.

76 Five super-users were identified during the study period each with different profiles. See Chapter 4 *The influence of the IP on CVA usage*.

behaviour is important if the prevailing objective is to increase the routine use of the CVA, and thereby increase the number of company or business rescues.

A consideration of the findings resulted in two hypotheses being formulated: (1) that the polarisation between the single and occasional-user and the super-user may be a consequence of ethical and regulatory pressure 'to specialise' in order to avoid targeted monitoring;[77] or (2) that it could indicate other not yet identified behavioural issues.[78] A single or occasional-user who has completed on average less than one CVA a year indicates limited practical experience, and a higher probability of technical or compliance errors.[79] The potential result is that IPs may avoid the use of the CVA as an option unless they can become specialists (frequent-users or super-users) due to the potentially complex nature of the procedure.

By comparison the Individual Voluntary Arrangement (IVA) market is similarly polarised into specialist firms and occasional users,[80] although with a much larger volume of appointments and fewer participating firms.[81] Chapter 4 discusses in detail the role of the IP and their firms, including how their behaviour impacts on the use of the CVA. The further analysis of the IP behaviour is based on the theory of path dependence, and this approach

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77 Routine monitoring of IPs will often target the less used insolvency procedures to test the third fundamental ethical principal; that is the requirement to demonstrate professional competence and due care when experience is limited.

78 See Chapter 4 for further analysis of IP behaviour.

79 See ICE, para 39 "The fundamental principle of professional competence and due care requires that an Insolvency Practitioner should only accept an insolvency appointment when the Insolvency Practitioner has sufficient expertise;" and para 40 "maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments, including: (a) Developments in insolvency legislation; (b) Statements of Insolvency Practice; (c) The regulations of their authorising body, including any continuing professional development requirements; (d) Guidance issued by their authorising body or the Insolvency Service; and (e) Technical issues being discussed within the profession."

80 The detailed split of volume between the different types of firm users is provided in Chapter 4, Figure 4.1.

81 See Michael Green (2002) *Individual Voluntary Arrangements, Over-indebtedness and the insolvency regime;* John Tribe and Leyanda Cocks (2007) *Personal Insolvency Law in England and Wales: Debtor Advice, Debtor Education and the Credit Environment,* Kingston Business School, Occasional Paper No 62; more recently Andrew Smith (2019) *Just who is supplying IVAs*, Recovery News, February 2019, R3, London.

adds to the empirical findings above by providing additional insight into why and how the CVA is initially being chosen as an option. The impact of the creditor on the use of the CVA is the next element analysed.

3.8 Creditor Control of the CVA

The level of creditor control of the CVA approval process sets it apart from all the other corporate insolvency procedures.[82] The CVA is the only insolvency procedure that cannot be instigated by a creditor, although creditors do have the power to prevent the appointment of the supervisor by simply rejecting the proposal. In the event a CVA is not approved by creditors, the company will usually enter either administration or liquidation. A creditor cannot prevent the appointment in either of these scenarios.

There are three elements of the creditor data collected in this study that are key to understanding the level of control held by creditors and the impact that has on the use of the CVA. These are: (1) the initial voting power, including the ability to impose modifications to the proposed terms, (2) the ability to allow any subsequent variations[83] and the terms being suggested and (3) the expected and actual distribution levels being suggested and reported, regardless of the legal outcomes of the arrangements. The total value of the reported creditors who voted in the CVA procedures approved during the study period exceeded £21 billion.[84] Included in this is HMRC[85] which, as a major creditor voted with just over £1 billion of that debt.[86] These amounts will be an underestimate of the

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82 See Chapter 2, Section 2.6 *The CVA approval process*.

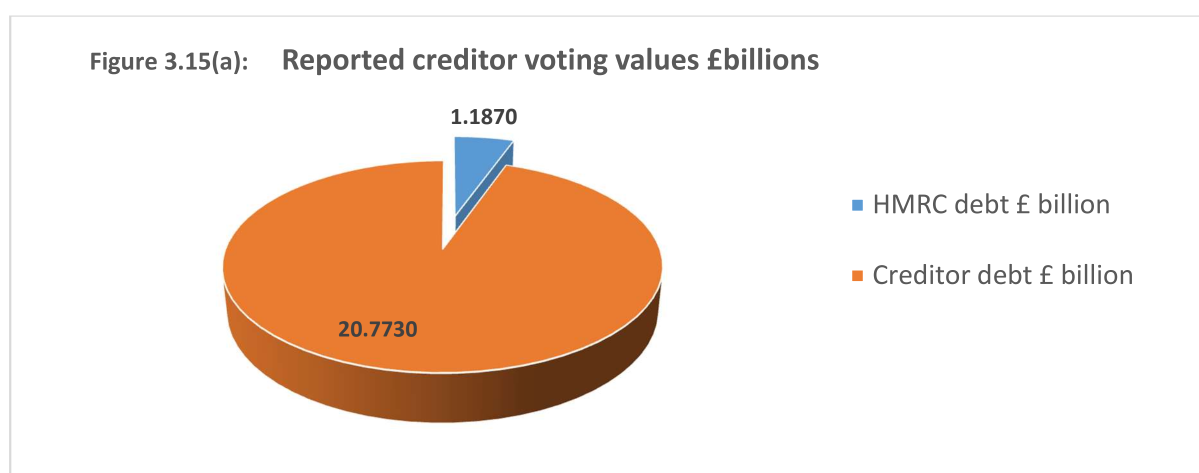
83 Variations used judiciously improve the chances of full implementation. See Chapter 6, Figures 16 and 17 on variations in relation to legal outcome and management team characteristics.

84 See Data table 1.4.6.

85 HMRC stands for Her Majesty's Revenue and Customs. It was formed from the alliance of the two bodies charged with overseeing and collecting tax revenues. They are: Value Added Tax by Customs & Excise, corporation tax as well as PAYE and NI for any employees by Inland Revenue.

86 This voting data was collated from over 5,000 CVAs. The detailed voting data was not available on some companies (documents were not filed, unreadable or otherwise not accessible due to IT issues) and as a result these totals will be an underestimate of the actual figures but give an indication of the amount of debt being processed during the study period. Conversely in some groups joint liability may have resulted in the same debt being accepted across multiple companies which will also have resulted in some double counting.

actual debt outstanding across all the arrangements, as not all creditors participate in the approval process, plus the HMRC debt was often noted as being lower than the final approved value. Further, voting data was not available in all cases due to a combination of missing documents, unreported data or unavailability from Companies House (CH). Figure 3.15(a) shows the voting values split between HMRC and the rest of the creditors over the study period. On average the HMRC debt represents over 5% of the total debt included for voting purposes.[87] No other single creditor is consistently represented and can exercise that amount of control over the voting outcome in the majority of CVAs.[88]

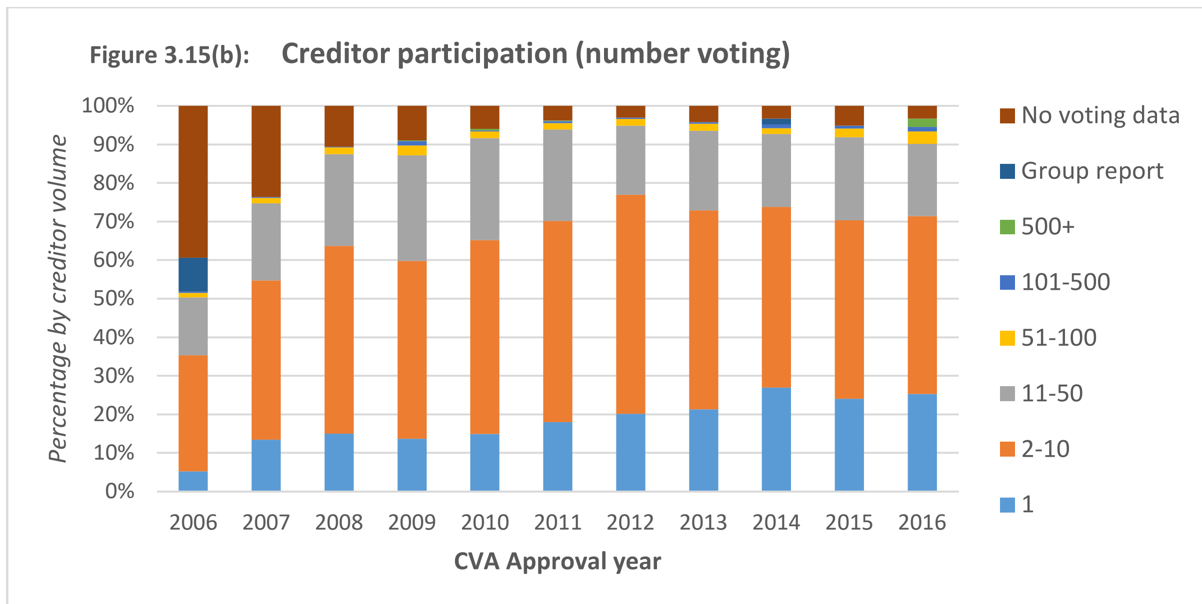


Source: Data table 1.4.6, Appendix C

Figure 3.15(b) shows the number of creditors participating in the approval process from the same data.

87 This represents approximately 95% of the CVAs registered as approved. It should be noted that some voting documents had not been filed, were not available or were not readable.

88 This does not represent the total debt incurred during the study period as many creditors did not take part in the voting process and there is no report submitted on the number and value of debts scheduled by the company in its statement of affairs. The statement of affairs (SoA) is appended to the proposal and filed in court with the nominees report but there is no requirement to file the CVA SoA at CH, not even when applying for a small company moratorium (SCM). See Chapter 8 for suggestions on improvements in this area.



Source: Data table 1.4.1, Appendix C

It should be noted that HMRC had effective control of over 65% of CVAs analysed during the study period,[89] and by default the terms and conditions agreed in those proposals. No other creditor has as much influence as HMRC on the use and outcome of the CVA procedure. As a result, the impact of the behaviour of HMRC is a key factor in the usage rate. The voting patterns, including the terms under which arrangements are approved by them, is further analysed and discussed in Chapter 5. The review of the CVA data moves next to the financial element specifically costs and distributions.

3.9 Costs and distributions

One of the key aspects of the CVA is that in the majority of cases the ongoing trading is conducted as a 'debtor in possession' (DIP) process. DIP means that the management team remain in control of the company during the procedure, with the proposal excluding the trading assets of the business under the agreed terms.[90] Contribution type CVAs use

89 Effective control is when HMRC vote with at least 25% of the value of the total debt or where voting for rejection they represent more than 50% of the unconnected creditors. Voting data was available in 5,815 CVAs of which HMRC had claims recorded in 4,884 and over 25% of the total value in 3,826 of those cases. In cases of a single creditor voting (1132) HMRC was that creditor in 984 cases which is over 86%.

90 Contribution arrangements are almost exclusively DIP procedures with the company assets being excluded and replaced by future contributions from profits.

this approach widely which, results in lower procedural and management costs allowing a greater percentage of the realisations to be paid to the creditors as distributions. This is the highest level of return to creditors of any type of insolvency procedure.

In most CVAs the proposal terms include a trust clause,[91] so that in the event of termination the remaining funds are ring-fenced for distribution to the pre-CVA creditors. The consequence is that funds held at completion cannot be distributed to post-CVA creditors. An analysis of CVA final reports highlighted a common practice of filing final returns while still retaining substantial sums reported as trust funds retained for distributions. In most cases, no final receipts and payment account were filed confirming the actual distribution level or final costs charged to the CVA estate funds.[92] This behaviour breaches a series of best practice requirements in relation to reporting office-holder fees and expenses, plus the fiduciary duty of accounting for all the funds received.

The total realisations recorded in the receipts and payments accounts during the study period exceeded £1.4 billion, and of that over £1.2 billion (circa 86%) was distributed to the creditors.[93] The majority of these funds were paid to the ordinary unsecured creditors, although lack of information in the distribution reporting means that this amount is likely to be understated. Figure 3.16 shows the allocation of the funds received across the CVA study period, including the distributions made to creditors and the amounts paid in costs and fees together with the retained funds. The latter funds retained for either distribution or additional costs exceeded £22 million during the study period.

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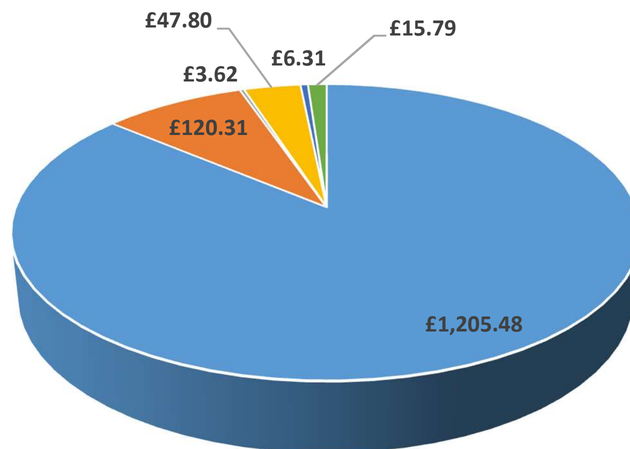
91 Trust clauses require that any funds collected prior to completion (including termination) must be held and distributed to the CVA creditors. The clause is routinely added by HMRC if not previously included. See Chapter 2, section 2.9 *Proposal terms*.

92 The retained funds potentially skew the data on both distribution levels and costs including office-holder fees. See Data table 5.4.2.

93 Just under £900 million of that money was distributed to the various unsecured creditors. See Data tables 5.2.1 and 5.3.3, and schedule of data tables in Appendix C.

Figure 3.16: Allocation of CVA Realisations [£millions]

- Distributions to creditors (86%)
- Office-holder fees paid through CVA (8.6%)
- Funds held in Ongoing CVAs (0.4%)
- Other costs & expenses (3.4%)
- Funds retained for costs (0.5%)
- Funds retained for distribution (1.1%)



Source: Data tables 5.2.1, 5.2.2 and 5.4.1 Appendix C

The retained funds for distribution is likely to have improved the calculated final outcome for the unsecured creditors but there was no confirmation of those payments being completed.

Figure 3.17 shows the unsecured creditors received circa 90% of the funds distributed,[94] with the remainder being paid to connected parties and the secured creditors.[95] Where the data was available, the amounts paid to HMRC have been shown as a separate figure.[96] The average distribution level for the CVAs during the study period was 18 pence in the pound (PIP). This excludes those amounts stated as being available for distribution but not paid to creditors by the time the final documents were filed at CH. The actual distributions varied between zero and payment in full, with the additional payment of statutory interest in some cases.[97] The average distributions for each of the terminated and fully implemented arrangements varied between six and 39 PIP, with the overall

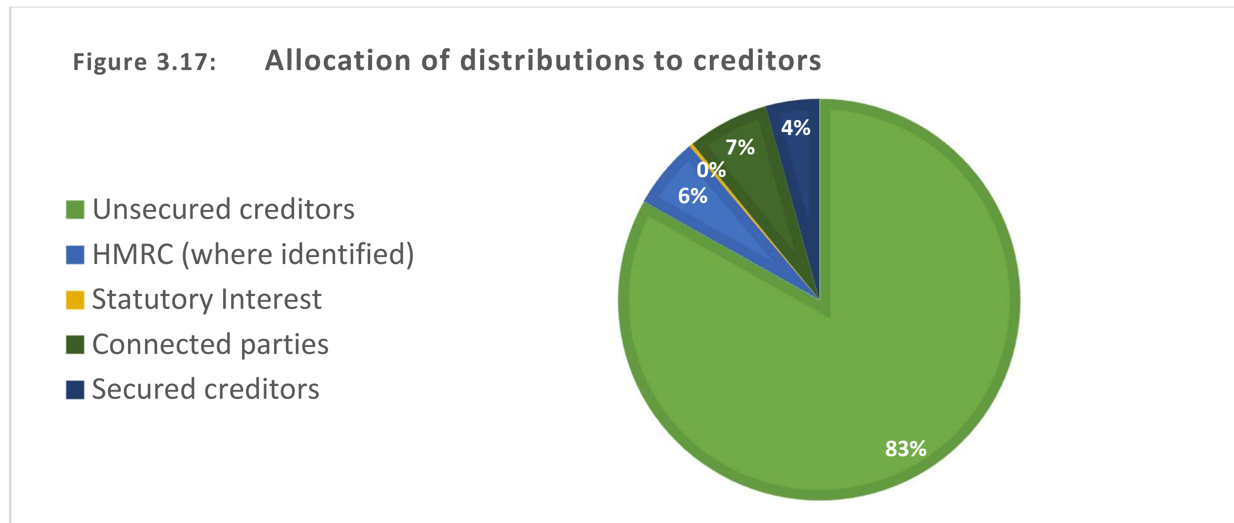
94 ibid

95 Secured creditors do not normally participate in a CVA but in some cases the equity from secured assets no longer required by the business are included in the arrangement terms.

96 Note that the HMRC preferential status was reinstated from 1 December 2020.

97 Some CVAs include a requirement to pay statutory interest in addition to the outstanding debt. Depending on the specific proposal terms this can be based on the statutory requirement for insolvency procedures of 8% per annum or an alternative rate included in the terms. In the study data six CVAs paid statutory interest to creditors.

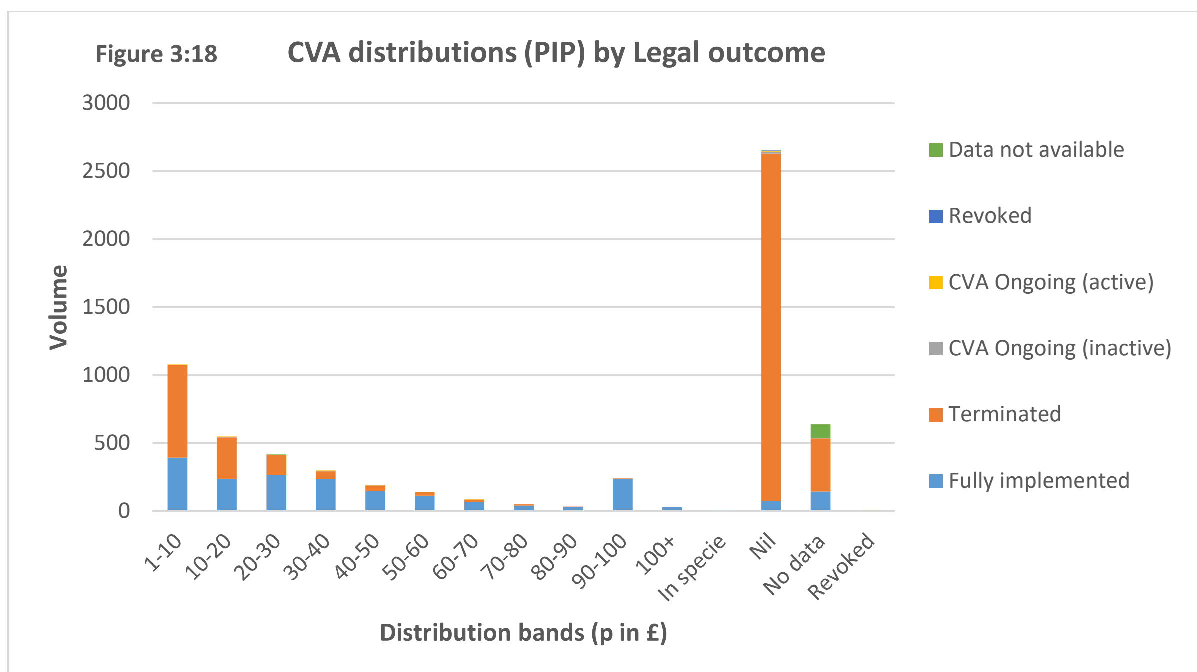
average being circa 18 PIP. Any relevant preferential creditors are usually paid in full on the fully implemented CVAs with an overall average of 97 PIP, including the amounts paid in terminated arrangements.



Source: Data table 5.3.3, Appendix C

From a creditor's perspective, statistically approving a CVA is clearly the best option, as the procedure generally provides a better return to them regardless of the final type of completion.

Figure 3.18 shows the legal outcome by distribution band, indicating the number of terminated arrangements where distributions are still paid. In particular, in the one to ten PIP distribution band more than half of the CVAs were terminated with distributions still being paid. However, disgruntled creditors do not always act rationally and may want to punish the directors rather then get the best return possible. Unfortunately, the result of rejection will often be an administration involving a Prepack, usually with no or a very low return to the unsecured creditors. This indicates that creditor trust is an important issue.



Source: Data tables 5.3.2 and 4.1.2

3.10 Creditor trust and the receipts and payments account

Recent research by Joyce[98] explored the role of the receipts and payments account in insolvency procedures, and identified their dual purpose as demonstrating both control of the procedure as well as a method of building trust with the creditors.[99] The data suggested that the level of trust varied across the different types of creditors. Further, the inherent trust of IPs provided by the licensing and monitoring regime was of limited long-term value,[100] in that the professionalisation of the role of the IP does assist at initial contact but that trust can be either improved or lost depending on the subsequent actions of the office-holder. In particular, it was the use and the way in which the receipts and payments accounts were presented that provided the evidence, alongside the IPs individual comments and explanations of the process, which they followed. The research clearly

98 See Yvonne Joyce (2019) *Building Trust in Crisis Management: A Study of Insolvency Practitioners and the Role of Accounting Information and Processes,* Contemporary Accounting Research, Vol 37, No 3 (Fall 2020), 1622-1657, and see also article by Yvonne Joyce and Eileen Maclean, *The quality of IP reporting: a cause of creditor confusion?* Recovery, January 2020, R3, London. Full research article available online at https:/onlinelibrary.wiley.com/doi/abs/10.1111/1911-2846.12577.

99 ibid, 1624-1625. The theory of trust is also discussed further, see 1626-1630.

100 ibid, 1652.

identified a differential treatment between the types of creditor, alongside the office-holder's perceived level of the creditors understanding of the procedure.[101]

The findings by Joyce were mirrored in the CVA study data, with identifiable deficiencies in many of the receipts and payments accounts filed at CH.[102] The formal requirements and mandatory application of SIP 7 on the contents of the receipts and payment were highlighted in Chapter 2. The general principles to be applied to every receipts and payments account include transparency, consistency and proportionality, while also ensuring sufficient detail to enable creditors and other interested parties to understand the nature and amounts of money passing through the estate.[103] Different categories of payments should be identified separately, including transactions relating to different types of creditors, alongside the related costs and expenses.[104] As an example, the different elements of an office-holders remuneration[105] can be difficult to identify. For the CVA in particular, the separate fees paid for the nominee[106] and supervisor role plus any additional elements, such as fees for variations, should be clearly reported. The different types of costs and expenses paid should mirror the original estimated outcome statement, and reported even when part of the payments may have been made either prior to the appointment or by a third party.

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101 ibid, 1635-1640 and 1646. See also discussion of the sale of business option 1640-1643 and the setting of professional fees 1643-1646. Further see Table 3, A Summary of the trust building mechanisms identified 1647-1648.

102 n 98. The article draws attention to "the 'information' and 'competence' gaps between IPs and creditors" resulting in best guess scenarios in relation to the allocation of transactions between fixed and floating charges.

103 See SIP 7, Principles, para 1-3.

104 In particular the split of transactions between fixed and floating charges can materially affect both the calculation of the Prescribed Part and the payment of dividends to preferential creditors.

105 See SIP 7, Key Compliance Standards, paras 4-7 and Payment to office-holders and their associates, paras 8-9 and Other Presentational Matters, paras 14-20.

106 See SIP 9, para 25 pre-appointment costs and para 28 re provision of information to successive office-holders. See also SIP 9, para 24(c) which prohibits the payment of overhead office costs as an expense of estate.

3.11 A new perspective on the CVA

The findings from the empirical data provide a new perspective on the use and outcomes of the CVA. Identifying the ***purpose*** of each of the CVAs provides an important tool in understanding the changes in usage and how this impacts on the completion rates and distribution levels. This initial review identified the three main parties who make an impact on the use of the CVA procedure.[107] These are the directors acting on behalf of the company, the creditors who are owed money and effectively control the approval process[108] and, more importantly, the IPs being consulted to act as nominee and supervisor of the CVA.[109] The pre-approval phase of the CVA is the most crucial period for making the decision on the type of rescue procedure, and therefore the IP's attitude and behaviour towards the procedure are key.[110] The next chapter discusses the IP's behaviour during the pre-approval phase of the CVA,[111] by further analysing the data using the theory of path dependence. The following chapters further analyse the impact of the creditor and company behaviour during the same phases of the CVA procedure. In particular Chapter 5 focuses on HMRC, as a major creditor in most cases, and how their voting behaviour is having a direct impact on CVA use.

The initial data highlighted some positive aspects of the use of CVAs despite the falling volume. In particular, the share of the rescue market for the CVA has been increasing, despite the total rescue market falling in volume.[112] In addition, the data identified an

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107 A CVA can only be instigated by the directors or an existing office-holder. See section 1 IA86. The majority of CVAs are based on director applications.

108 Any creditor or group of creditors with at least 25% of the voting power can effectively dictate the terms of a CVA by introducing modifications that must be accepted in return for approval.

109 Note that the nature of insolvency appointments require only natural persons to be authorised to act as insolvency practitioner and the relevant office-holder. This excludes firm appointments so that any irregularities cannot be blamed on systems or staff. See *The IAIR Principles, The Regulatory Regime for Insolvency Practitioners* (2018), IAIR, 11, para 2.1.

110 See Chapter 4, Section 4.4 *The causal factors of path dependency and IP choice*.

111 See Chapter 2, Section 2.4 *The three phases of the CVA*.

112 See Figure 3.4 on page 6.

increase in the number of CVAs being fully implemented.[113] This is in part linked to the increasing share of *distribution* CVAs being proposed, which have a higher implementation rate.[114] The *distribution* arrangements are also invariably shorter in duration, with the longer term *contribution* arrangements being more susceptible to changes in economic conditions and/or ongoing trading difficulties. For these CVAs the use of variations provides an important role in boosting full implementation.[115] The analysis of the fully implemented arrangements revealed an increasing trend of saved companies[116] and, alongside the rescue of companies, the data also showed that the majority of terminated CVAs followed by an administration resulted in a subsequent sale of the business.[117] The sale of business outcome adds to the rescue outcomes in the CVA rescue hierarchy. The hypothesis that the use of the small company moratorium might assist with reducing the volume of terminations was inconclusive, due to the very low use of the process.[118]

The final data considered in this chapter was the financial return to creditors from both fully implemented and terminated CVAs. The data confirms that over 75% of the realisations accounted for in CVAs are being distributed to creditors, with the majority going to the unsecured creditors.[119] This level of return from realisations exceeds every other type of insolvency procedure, including administrations where fees frequently consume a large percentage of any realisations not paid to the secured creditors.[120] The

113 See Figure 3.5.

114 See Figure 3.7.

115 See Chapter 6, Figure 6.15 *Variations and legal outcomes*.

116 See Figure 3.6.

117 See Figure 3.9.

118 See Figure 3.11.

119 See Figure 3.16.

120 The impact of the prescribed part and the study data is discussed in detail in Chapter 7. See table 1, OFT1245, p19 which provides an estimate of the average percentage of office-holders fees charged by type of insolvency procedure. In ADM the average was 50% realisations, in CVL 25%, in ADR and WUC 10% with the CVA at only 5%.

following chapters expand on this data and analyse further each of the elements identified, together with the impact on the use of the CVA.

Chapter 4

The influence of Insolvency Practitioners on the use of the Company Voluntary Arrangement

4.1 The role of the Insolvency Practitioner

Use of the Company Voluntary Arrangement (CVA) procedure can be influenced by both structural issues and the people involved.[1] Two of these sets of people are the contractual parties to the arrangement: the directors acting on behalf of the company, and the creditors who are owed money and control the approval process.[2] A third party is the insolvency practitioner (IP), who will potentially act as both the initial consultant and the proposed office-holder for any potential insolvency appointment.[3]

If chosen as the best option, the CVA procedure has three distinct phases: the pre-approval phase, the nominee phase and the post-approval supervision phase.[4] The pre-approval phase of the CVA[5] is the most crucial period for decision making, as it will determine whether the CVA is used, and this is the main period being analysed for the IP.[6] This chapter analyses the study data for the IP from a behavioural perspective by using path dependence theory.[7]

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1 A CVA can only be instigated by the directors or an existing office-holder, see s 1 IA86. The majority of CVAs are based on director applications (over 95% see Data table 1.1.8 for annualised data).

2 Creditors with at least 25% of the voting power can effectively dictate the terms of a CVA by introducing modifications that must be accepted in return for approval.

3 Note that the nature of insolvency appointments require only natural persons to be authorised to act as insolvency practitioners and the relevant office-holders. See *The IAIR Principles, The Regulatory Regime for Insolvency Practitioners* (2018), IAIR, 11, para 2.1. As a result a firm cannot be appointed as office-holder but can be appointed in an advisory capacity to assist the company in reviewing their available options.

4 See Chapter 2, Section 2.3 *The three Phases of the CVA* and the chronology illustrated in Figure 2.1.

5 ibid, sub-section 2.3.1 *The initial pre-nominee phase.*

6 See Chapter 3, Section 3.7 *Insolvency Practitioner influence on the CVA*, and Figure 3.14 which sets out the initial office-holder data.

7 ibid. The application of path dependence is explained in the next section.

4.2 Path dependence and its theoretical basis

There are differing views on whether path dependence should be considered as a social construct[8], or simply a theory to analyse organisational structures.[9] Path dependence has become a popular topic in the last twenty years, and its use has expanded exponentially from its initial application in explaining commercial advantage.[10] It is self-evident that events and actions influence how people behave but the actual process is less easy to identify. Alternative methods used for analysing behaviour include 'game theory', which looks at the decision making process and is used to explain rational choices (in simplified terms) where logical decision making is assumed.[11] In contrast to rational choice theories, path dependence looks at historical influences on current actions. It includes both internal and external influences on behaviour, rather than assuming the rational choice theory approach.[12] Path dependence has been described as a method of "improving our understanding of the way in which our choices are affected by cognitive biases, political ideologies, and historical accidents".[13] Some attempts have been made to use path dependence theory as a modelling framework, but in complicated scenarios where there are multiple internal and external influences to be considered it presents significant challenges.[14] This study will not attempt to use the theory to model these influences, but

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8 A concept that describes rather than explains a social process. This idea is expanded in Thomas Schelling *Micromotives and Macro behaviour,* New York: WW Norton 1978) 15.

9 See Jean-Philippe Vergne and Randolph Durand (2010) *The Missing Link between the Theory and Empirics of Path Dependence: Conceptual Clarification, Testability Issue, and Methodological Implications*, Journal of Management Studies 47:4 June 2010, 736-737.

10 ibid, 738-741. The article looks at applications of the path dependence at Macro, Mezo and Micro levels.

11 Game theory was originally conceived by John von Neumann and Oskar Morgenstern in 1944. It is a tool used by mathematicians and economists to identify the actions of individuals assuming they each act rationally. Developed in the 1950's a classic example is the Prisoner's Dilemma. The dilemma being in response to the situation where the same offer is made to two parties: the first person to confess while implicating the accomplice will be released. If neither party confesses they will eventually both be set free. The conflict arises for the individual from the uncertainty of the choice being made by the other party.

12 n 9

13 See Ronald J Mann and Curtis J Milhaupt*, Foreword: Path Dependence and Comparative Corporate Governance*, Washington University Law Review, 323 and 324.

14 See Jenna Bednar and Scott E Page *When Order Affects Performance: Behavioral Spillovers and Institutional Path Dependence*, University of Michigan.

rather to use path dependence as an aid in analysing the different variables, thereby identifying aspects of the role of the IP during the selection process for further discussion. The theory looks at how potentially historical causes can affect current behaviour in a wide range of situations.[15] Intuitively, we are all aware that our history plays a role in our choices, and path dependence provides a framework to analyse these effects by bringing clarity and transparency to the complex issues involved. The theory can be applied to both individuals and organisations.[16] A key element is the relationship between how individuals interact both within and with their own organisations as well as with external bodies.[17] In relation to the use of the CVA, the procedure involves a series of changing roles for IP's and their firms, and understanding how these influence each other may provide insight into the choices being made.[18]

4.3 The background and experience of IPs and their firms

The theory behind path dependence can be used at multiple levels, both in relation to individuals and at organisational level.[19] In the case of the IP, it can be applied to a series of causal factors that could influence both the individual's choices, and their firm's influence on the use of the CVA procedure. These causal factors are considered in turn.

At the pre-approval stage of a CVA the first factor to be considered is the impact of the IP's knowledge and experience on the advice given to directors. The IP's experience and

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15 See Paul David (1985) *Clio and the Economics of QWERTY* American Economic Review, 75(2), Papers and Proceedings of the Ninety-Seventh Annual Meeting of the American Economic Association, 332-37.

16 See Tom Ginsburgt, Jonathan Masurtt & Richard McAdams (2014) *Libertarian Paternalism, Path Dependence, and Temporary Law*, No 81, University of Chicago Law Review, 291.

17 See Greener (2004) *Theorising Path Dependence: how does history come to matter in organisations, and what can we do about it?* Department of Management Studies, University of York, York, 13.

18 n 5.

19 See Anna Azzurra Gigante (2016) *Reviewing Path Dependence Theory in Economics: Micro-Foundations of Endogenous Change Processes*, MPRA Paper No 75310, 18. The paper includes a summary of a range of economic theories and the application of path dependency elements. Further path dependency has been used to analyse the rhetorical language of politicians. See also Dr Dennis Grube, *Sticky Words? Towards a Theory of Rhetorical Path Dependency*, University of Cambridge.

background are likely to result in some level of unconscious bias over the use of the CVA. Those IPs with extensive experience are few,[20] which is potentially one of the key contributors to its infrequent use.

The combined knowledge and experience of IPs are usually shared within firms. Managing that pool of knowledge and how it is shared is another element that can be analysed using path dependency. Coombs and Hull proposed reviewing the three components of organisational practice separately, those being the hardware, the knowledge base and the systems being used.[21] The use of this type of analysis allows the knowledge base of a firm to be considered as a separate element from external sources and the systems used to assist with the firm's deliverables.[22] This concept, although artificial, is particularly helpful when looking at professional services organisations where the knowledge base of a firm, and how that knowledge is used and shared, is crucial in securing competitive advantage.[23]

In a similar manner, management-based literature uses a resource-based view (RBV) when analysing competitive advantage. In simple terms, RBV argues that the volume of knowledge held by individuals within a firm cannot easily be replicated, and is built over time and experience resulting in an improved reputation.[24] Consequently, increasing the knowledge and experience of the insolvency professionals involved in implementing the CVA procedure is an important factor in increasing its use within a firm. Staff who study in firms that do not routinely use the CVA are therefore at a disadvantage, having had minimal training and no practical experience of using the procedure.[25] The result is they

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20 n 6. See Figure 3.14 for CVA super-user IP data.

21 See R Coombs and R Hull (1998) *Knowledge management practices and path dependency in innovation*, Research Policy 27: 237-53.

22 A deliverable is any product provided to a client which includes either tangible documents or informal advice. External sources include reference materials such as online services or hard copy reference books.

23 n 17.

24 ibid 9. See also J Barney (1996) *The Resource-based Theory of the Firm*, Organizational Science 7:469.

25 It should be noted that the CVA procedure is very much the 'Cinderella' topic for the Joint Insolvency Examination Board training and examinations, resulting in many students never really engaging with the complexities and potential of using the procedure properly.

are less likely to opt for the CVA as a rescue procedure as they progress through their careers, unless they later join a firm where the CVA is an option that is actively encouraged. This lack of training and experience acts as an external influence and contributes to the unconscious bias of the IP as advisor to the business.[26]

4.4 The causal factors of path dependency and IP choice

Returning to the direct causal factors of path dependence, Page identified four types of events that are related but stem from slightly different aspects of similar behaviours,[27] and which can also influence the choices made. He describes the four factors as: increasing returns, self-reinforcement, positive feedback, and lock-in.[28] The first three of these factors can sometimes be identified as the process of path dependence, with lock-in as the eventual outcome.[29] These factors can again be applied to both individuals and organisations. The increasing returns and positive feedback elements can be used to explain the extensive use of the CVA by a very small number of IPs. By specialising in the CVA procedure, the individual members of this small group have become known as the IPs of choice for the procedure (positive feedback). At the same time they, and their firms, have become more efficient at the way the procedure is handled, and thus it becomes a more profitable offering (increasing returns for the IP), which should also lead to better outcomes for the creditors.[30] The likely result is that the CVA routinely becomes the option of choice (and also possibly part of the firm's marketing position or brand). The main

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26 The insolvency profession also appears to lack incentive to improve the quality of the training on the CVA procedure and at the same time to encourage firms to ensure staff get the opportunity to gain relevant experience. The use of training and experience passports would assist in ensuring potential licence holders gain wider experience.

27 See Scott E Page (2006) *Path Dependence*, Quarterly Journal of Political Science, 1: 87-115.

28 ibid

29 n 9.

30 As the procedure becomes more efficiently administered costs should also fall.

exception to promoting the use of the CVA being in cases where other external influences restrict that choice for other punitive rather than economic reasons.[31]

The initial starting point, or paradigm, is equally important in understanding which stage of the path dependency process has been reached. In the case of the CVA, both the type of firm and also the timing of their entry into the CVA market are important. The type of firm indicates whether it uses a wide selection of procedures or a more limited range. Those that specialise in the CVA can be termed 'niche' firms and, in respect of individual IPs, this can indicate an entrepreneurial element in the choice of market and procedure. For IVAs the market is noted for a much more prominent exclusivity of choice while in the CVA market the niche firms also continue to use other insolvency procedures.

As regards the timing element of entering the market, separately but just as important, is the advantage gained by being a first-mover, especially when there are limited opportunities. The first mover advantage is often used as a standalone theoretical explanation for market dominance.[32] In the case of path dependency, both elements become an important part of the initial paradigm, thereby making an additional impact on the subsequent events. There is an example of the failure to capitalise on first mover advantage in the study data (see firm ranked 6 in Figure 4.1).[33]

31 For example the company may have failed to comply with the HMRC requirements to be considered for a CVA. The behaviour of HMRC as a key creditor is discussed in detail in Chapter 5.

32 n 9. Also see MB Liebermann and DB Montgomery (1988*) First Mover Advantages*, Strategic Management Journal, 9, 41-58.

33 n 9. Also see D Mueller (1997) *First-mover advantages and path dependence*, International Journal of Industrial Organization 6: 429-50. This is discussed further in the next section and for example on early entrants see IP firm SU06 in Figure 4.1.

Figure 4.1 shows the volume and IP data for the super-user firms only. The figure includes annual totals of CVAs approved, but only for those firms that have registered at least 100 CVAs during the study period.[34]

Combined these firms have administered over a third of the total CVA appointments during the ten-year study period.[35] Figure 4.1 demonstrates elements of the path dependence process, and highlights the years with the highest number of approvals for each firm (yellow) together with those of zero approvals (red). The additional data in 2012 (orange) for one firm relates to a single large group of CVAs, with the majority of them being fully implemented within a few months of approval.[36] This single event resulted in this firm being included in the super-user table, with the remaining IPs at that firm only taking a small number of CVA appointments each during the study period. The top three super-user firms have, more or less, remained in that position over the whole study period indicating a reasonably consistent internal, but differing external, approach to using the CVA.

The overall number of firms taking CVA appointments reached a peak in 2011, thereafter decreasing in line with the falling volume of approvals nationally.[37] This also illustrates the changing shape of the industry: with smaller firms merging, firm names being changed and rebranding taking place, alongside the normal career progression of initial qualification, movement between firms and exit of individual IPs.[38] Figure 4.1 shows the differing patterns of firm use over time, with at least one firm disappearing completely.

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34 For this study these firms are classified as super-users and constitute the top ten firms in the market during the study period. The other classifications include the frequent-users (31 to 99 appointments); occasional-users (11 to 30 appointments); casual-users (2 to 10 appointments); and the single-user. The same classification is used for both firms and individual IPs but they are not synonymous.

35 See Data table 1.2.2 (34.32%).

36 In 2012 the Southern Cross Group (156 companies covering all three jurisdictions) entered a group CVA, the majority of which were fully implemented and completed within 2 months of approval.

37 See the study data in Chapter 3, Section 3.7 *IP influence on CVA use*, and Figure 3.14.

38 This dynamic process has been taken into account when coding each firm and IP.

Figure 4.1: **CVA approvals of super-user firms** (ranking by volume)

YEAR	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	No of IPs	*CVA Total*
Total CVA approvals	538	430	590	739	815	787	876	619	604	407		6405
No of Firms with CVAs approved in each year	***123***	***120***	***138***	***155***	***170***	***186***	***165***	***161***	***154***	***137***		***410***
Average no of CVA approvals per firm	4.4	3.6	4.3	4.8	4.8	4.2	5.3	3.8	3.9	3.0		15.6
1 [39]	3	**0**	92	90	77	56	70	46	50	42	**2**	**526**
2 [40]	32	20	32	27	43	36	38	37	34	24	**70**	**323**
3 [41]	4	2	4	31	34	44	43	31	27	20	**5**	**240**
4 [42]	11	6	1	9	10	11	164	7	11	3	**18**	**233**
5 [43]	15	10	21	23	42	33	28	22	6	5	**40**	**205**
6 [44]	51	70	18	14	20	20	**0**	**0**	**0**	**0**	**3**	**193**
7 [45]	4	3	11	21	20	30	21	23	21	16	**8**	**170**
8 [46]	4	4	10	23	27	8	12	10	4	4	**26**	**106**
9 [47]	9	3	1	10	10	13	13	14	21	10	**15**	**104**
10 [48]	7	10	10	20	20	10	10	8	2	7	**2**	**100**

Source: Data tables 1.2.3 and 1.2.4, Appendix C

39 Only two IPs are recorded as taking CVA appointments in this firm (SU01). During the study period each IP averaged over 263 appointments each and were in excess of that number between 2008 and 2010.

40 This firm (SU02) showed a much more even spread of appointment taking during the study period with supervision by a large number of IPs (70) across the firm. They average only five appointments each.

41 Only five IPs were recorded as taking appointments in this firm (SU03). There was an even spread of appointment taking during the study period with a marked increase from 2009 and a later decline in line with overall industry falling numbers.

42 This firm (SU04) showed a single large spike during the study period with one IP getting into the top ten IPs with otherwise low numbers of appointments held by a series of IPs at the firm.

43 Thirty nine IPs were recorded as taking CVA appointments at firm SU05 during the study period. This firm data includes a name change and merger. Their volume of CVAs peaked in 2010 and have since fallen back to very low numbers.

44 This firm (SU06) was an early entrant into the market and a leader in the early years between 2006 and 2007. The firm went out of business in 2012.

45 Eight IPs were recorded as taking CVA appointments at firm SU07 during the study period. Their volume peaked in 2011 but they have maintained a volume consistent with the overall numbers since 2009.

46 This firm (SU08) has had a series of name changes, mergers and demergers over the study period.

47 Seventeen IPs were recorded as taking CVA appointments at firm SU09 during the study period.

48 This firm (SU10) showed a low level of appointments taken by only two IPs with a marked peak in 2009 and a noticeable fall in 2014.

Figure 4.1 demonstrates the two types of management structure, the firms with large numbers of IPs offering a wide range of services including CVAs (the majority of IPs in these firms being occasional or single-users) and those with only a few IPs controlling a large number of CVA appointments. The latter are the firms that promote the CVA as the first choice option. There are roughly an equal number of each type of firm in the top ten shown in Figure 4.1. It is also noteworthy that there are ten super-user firms, as opposed to just five super-user IPs.

The number of IPs involved in each firm provides an indication of the different management structures used by each one.[49] The data has been combined for firms that have merged or rebranded but otherwise retained the same cadre of IPs.[50] The firm super-user data illustrates the different starting points for each firm, some are moving towards lock-in, while the others are either on a different path or at different points in the process. The 'niche' firms promoting the CVA as the option of first choice are demonstrating lock-in, by using the CVA procedure in the majority of their cases. Whereas the other firms demonstrate a much lower percentage of use by IPs, and only remain in the firm super-user category by virtue of the much larger number of IPs in the firm.

4.5 The mechanisms of path dependence

In a more detailed review of the path dependency process, Mahoney postulates that there are two distinct types of mechanism in operation. The self-reinforcing sequences, as described in the last section, and the reactive sequences.[51] Reactive sequences can be instigated by a single event or a series of events, in contrast to the self-reinforcing

49 More in depth analysis of these super-user firms is needed to determine the volume of other appointments and IPs not involved in the CVA market.

50 See Walters, A & Frisby, S, (2011) *Preliminary Report to the UK Insolvency Service into Outcomes in Company Voluntary Arrangements*, 14, and their analysis of firms by category: Independent; Regional; National; and Major which uses the location and the size of the firm rather than simply the use of the CVA.

51 See James Mahoney (2000) *Path dependence in historical sociology,* Theory and Society, 29: 507-548. Self-reinforcing sequences are self-explanatory. Reactive sequences include inherently sequentially linked events with the trigger being identifiable as a contingent occurrence such as technological or legislative change.

behaviour. These are effectively external influences which either trigger, or amend, the course of later behaviour. In the case of the CVA, its initial introduction in 1986 widened the available options for companies in financial distress, providing a baseline for its use. This event was followed 16 years later by the subsequent amendments to the administration procedure.[52] The latter change deliberately altered the balance of use between the insolvency procedures, impacting directly on the use of the CVA by encouraging the use of the new Administration procedure as the main rescue tool. The post-EA Administration (ADM) had been crafted as a direct replacement for the Administrative Receivership procedure, and this had a direct impact on the frequency of use of both CVAs and CVLs.[53]

The reactive sequence emphasises the importance of the initial starting point on the subsequent series of events, leading ultimately to lock-in.[54] The combination of the initial paradigm for each IP and firm, together with the events that follow, will ultimately lead to some form of lock-in. This could be the dominant use of the CVA procedure, or equally an alternative dominant procedure such as the ADM. Most IPs and firms will be at different points in this process, but with the eventual outcome being linked to both their starting point and the subsequent sequence of events. In positive CVA terms, this could be defined as being when every consultation commences with the CVA being the procedure of initial choice, having become the preferred option for both the IP and their firm. In either case for CVAs, the increasing returns and positive feedback can be used to explain the extensive use of the CVA by a small number of super-user IPs. Conversely, for those IPs and firms lacking CVA experience, a similar route will lead them to lock-in using the ADM, or even the Creditors' Voluntary Liquidation (CVL).

52 The Enterprise Act 2002 introduced Schedule B1 to replace old ss 8-27 IA86.

53 See Chapter 2 for a full discussion of the impact of the EA on the use of the ADM. See also the data on comparative use with the CVA set out in Chapter 3, Figure 3.4.

54 n 9, 742.

4.6 Lock-in for other insolvency procedures

The first alternative lock-in procedure considered is ADM. It is frequently used with the pre-pack sale of business option (Prepack).[55] The linked use of the Prepack has similarly become a routine pre-emptive process as part of most ADMs with a saleable business element,[56] and this duo of process and procedure can also be considered to be a lock-in solution.[57] A further external influence in respect of the ADM is its statutory framework, which allows the IP more scope to vary the strategy during the procedure, without requiring the same 75% majority approval of the creditors necessary in a CVA.[58] In addition, the proposal approval process is implemented post-appointment and is much simpler. Effectively this means that only those creditors who have an economic interest in the outcome will be required to participate, and only a simple majority vote is required. In addition, the use of the 'deemed approval process' negates the need for any vote in a lot of cases.[59] The unsecured creditors can challenge these exemptions, but they require sufficient voting power to be successful, plus they are also potentially liable to fund the

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55 The term 'Prepack' is used to describe a sale of business or assets negotiated in the period prior to the formal appointment of an administrator with the sale being concluded shortly after the appointment by the administrator. The justification for using the process stems from the lack of funding available for the administrator to continue trading post appointment while also marketing the business. In a lot of cases the business is sold to a connected party and this can be controversial. The use of a CVA avoids this issue by excluding the trading assets from the arrangement and leaving the management team in control of the trading in return for contributions from future profits. This reduces the office-holder costs and expenses and provides better returns for creditors.

56 See Chapter 3, Section 3.4 *Interaction with the administration procedure*.

57 Ibid. The discussions on the ethical issues resulted in the publication of SIP 16 *Pre-packaged Sales in Administrations*. SIP 16 was first issued January 2009 with subsequent versions being issued in November 2013 and 2016. The fourth version was issued in April 2021 alongside the introduction of the new regulations in Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 intended to regulate the formal approval of the connected party Prepacks and the low uptake on the services of the Prepack Pool (PPP).

58 The administration proposal setting out the intended strategy to realise the stated purpose also requires approval, however this process essentially happens after the event especially when a Prepack has already been completed. In addition administrators usually write the proposals in very broad terms with multiple options for future events including the planned exit route. The intention being to avoid having to vary the proposal and get additional approval.

59 See para 52 Schedule B1 IA86 which sets out the circumstances when formal approval of the proposals are not required.

cost of any challenge, making participation at any level less attractive.[60] In the administration procedure, the impact of creditor influence is thus reduced in comparison to the CVA, to the point where it could be considered almost non-existent.[61] The result is a lack of engagement, as the majority of unsecured creditors have no control or influence over the proposed strategy or the procedure costs.[62] Where IPs habitually use the ADM, this reinforces the theory that the ultimate outcome for each IP will depend on both the initial starting point and their personal professional experience. At a firm level, the influence of the knowledge base and status, together with the external influences of the creditors they represent, become very important. For those IPs that have successfully used the CVA there is an inbuilt incentive to continue using it in the same way.

The data in Chapter 3 identified that CVA outcomes are intrinsically linked to the identified purpose, with contribution arrangements making up approximately 80% of the CVAs and the majority of the terminated arrangements. For super-user firms that pattern varies by the organisational nature of the firm (see Figure 4.2 in graph form), and further analysis of the outcomes is set out in Figure 4.3. Figures 4.2 and 4.3 together show that four out of the ten super-user firms have used contribution arrangements in more than 95% of their CVAs (the firms ranked one, three, six and seven in both tables), and as a result had a lower volume of fully implemented arrangements.[63] One firm with a particularly low level of full implementation ceased to trade in 2011 (the firm ranked sixth). A further four firms have used contribution arrangements ranging between 57% and 80% of their CVAs, with increasing percentages of fully implemented arrangements. The one remaining firm (the firm ranked fourth) used contribution arrangements in less than 7% of their cases, with over 91% full implementation rate. Super-user firm four was highlighted earlier as being

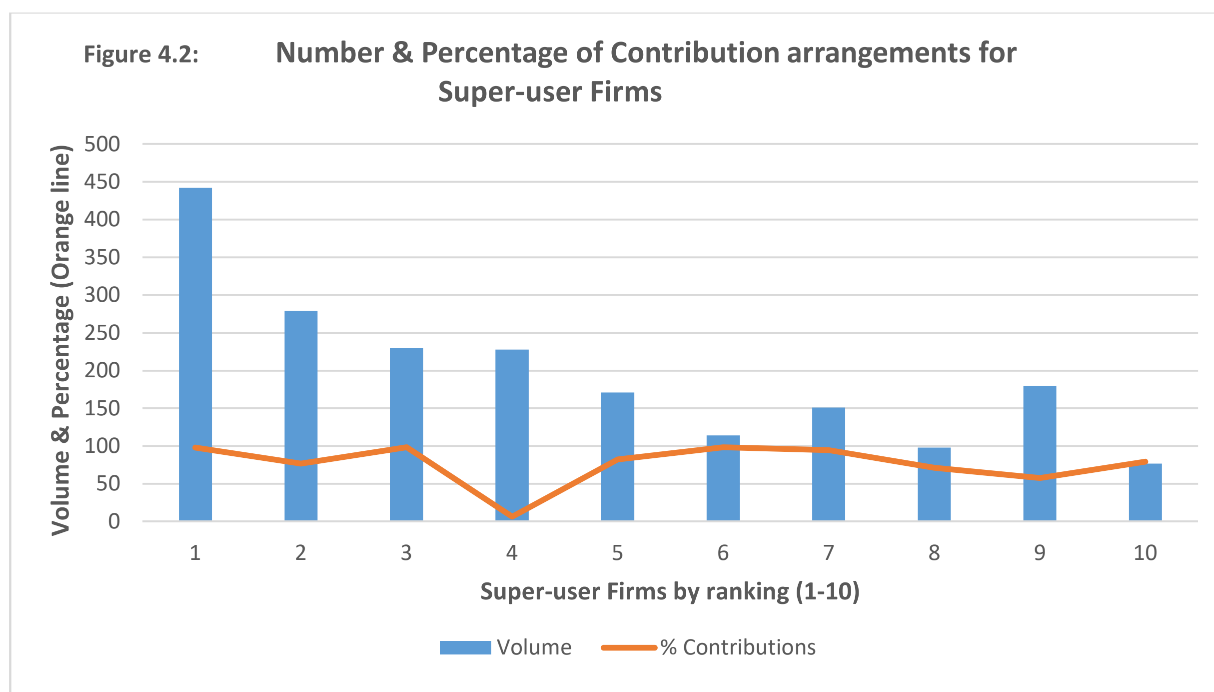
60 See para 51(2)(b) Sched B1 IA86.

61 Post approval variations in a CVA require the same 75% agreement as the initial terms. This should be contrasted to administration where if unsecured creditors will not benefit then deemed approval is allowed. Subsequent variations in administrations are less common due to the very broad terms and scope routinely used in the proposals.

62 See Chapter 3, Section 3.9 *Costs and distributions*.

63 See Chapter 3, Section 3.7 *Insolvency Practitioner influence on the CVA*, and Figure 3.14

appointed on one group of distribution CVAs, explaining the very high success rate. However, the variation in outcomes in each group indicates that there are still other factors at play in how the CVA is used, and these need to be explored further.[64]



Source: Data tables 1.2.4 and 4.3.1, Appendix C

Figure 4.3: Super-user Firms with Contribution Arrangements and Legal Outcomes

Super-user Firm ranking	Contribution Arrangements as % approved CVAs for each firm	Fully Implemented Arrangements as % legal outcomes	Number of IPs	CVA Firm Total CVAs
4 Note[65]	6.58	**91.27**	18	**233**
8	71.43	**55.34**	8	**170**
9	57.78	**40.00**	26	**106**
2	76.70	**35.16**	70	**323**
10	79.22	**31.31**	15	**104**
3	98.26	**28.50**	5	**240**
7	94.70	**20.25**	3	**193**

64 These two extremes do not take into account the IPs who completed between 2 and 100 CVAs during the study period.

65 The Southern Cross Group of 156 companies (covering all three jurisdictions) entered a group CVA in 2012, the majority of which were fully implemented and completed within 2 months of approval.

Figure 4.3: **Super-user Firms with Contribution Arrangements and Legal Outcomes**

Super-user Firm ranking	Contribution Arrangements as % approved CVAs for each firm	Fully Implemented Arrangements as % legal outcomes	Number of IPs	CVA Firm Total CVAs
1	97.96	**18.02**	2	**526**
6 Note[66]	98.25	**8.00**	40	**205**

Source: Data tables 1.2.4, 4.1.2 and 4.3.1, Appendix C

4.7 The nominee phase and the use of the small company moratorium

The next phase of the CVA procedure highlights the changing role for the IP as the nominee.[67] Once a formal decision has been made to propose a CVA, the nominee will be appointed.[68] The pre-appointment nominee phase is key in the eventual CVA approval process. In addition to the IP and director support, approval can be directly affected by the threat of pre-emptive enforcement action by creditors. For small companies, the use of the small company moratorium (SCM) used to be available to provide relief from this threat, prior to the final vote. Both historically and more recently, the lack of a moratorium was considered to be one of the key reasons for the pre 2003 underuse of the CVA.[69] The introduction of the SCM by the insolvency Act 2000[70] (IA2000) should have alleviated this issue, at least for small companies.

Data extracted from the Gazette was compared to the study data to identify use of the SCM process. In addition to those CVAs with the nominee appointment recorded at CH the gazette data revealed some additional use of the SCM; however the volumes have remained low and with a declining trend. Contrary to intentions, the introduction of the

66 This firm ceased trading in 2011.

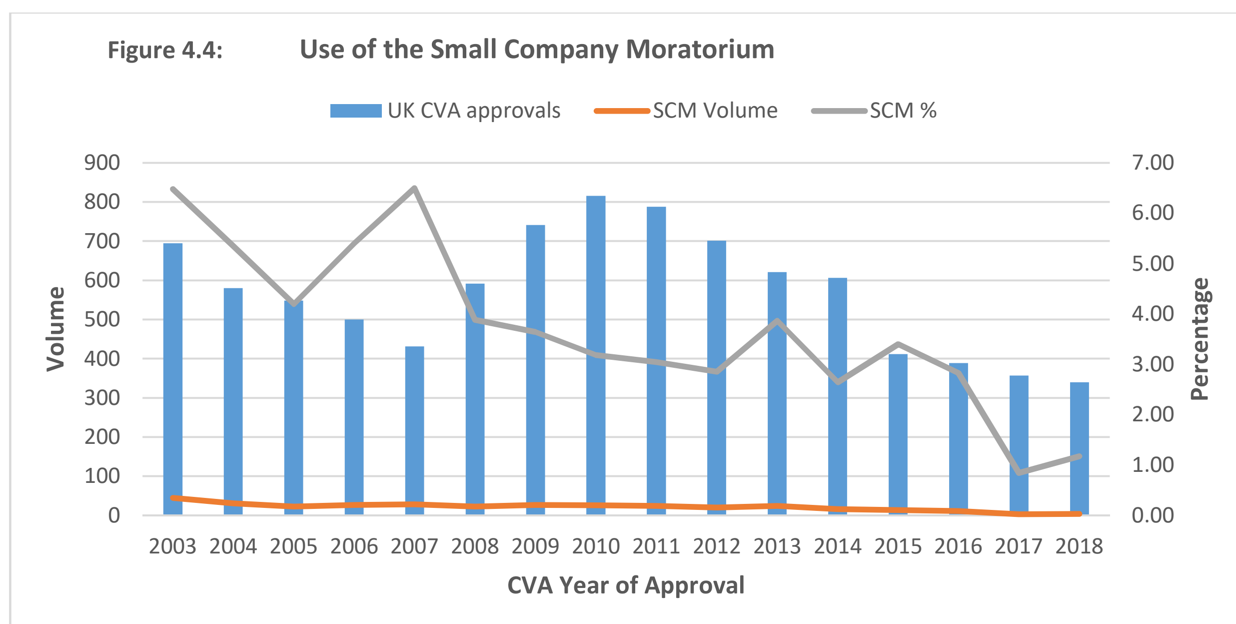
67 The role of the IP as the nominated supervisor (nominee) is explained in Chapter 2, Section 2.3 *The three phases of the CVA*, and sub-section 2.3.2 *The Nominee Phase.*

68 ibid

69 See the Insolvency Service (2010) *Proposals for a Restructuring Moratorium,* London, HMSO and the Insolvency Service (2016) *A Review of the Corporate Insolvency Framework,* London, HMSO

70 See the introduction, explanatory notes and background to Insolvency Act 2000, c39, para's 3-5.

SCM appears to have made virtually no impact on the use of the CVA.[71] Figure 4.4 shows the overall use of the SCM combined the percentage use across the CVA population with its low and falling popularity.



Source: Data table 6.1.1 and 6.1.2, Schedule B

The earlier discussion highlighted the general lack of CVA experience amongst IPs and this, combined with the onerous duties imposed on a nominee using the SCM, appears to have resulted in a continually low take up.[72] A review of the IP users revealed that the majority of IPs who have used the SCM are the occasional-users. No super-user IPs made use of the SCM, and only one frequent-user was identified. Single-user IPs (25) represented approximately one sixth of the total IPs making use of the process. Similarly, the majority of firm use also fell into the occasional-user category, but in contrast approximately 8% of the occasional-user IPs were members of super-user firms. There

71 The gazette published 211 applications for an SCM during the study period of which 162 related to pre CVA approvals. Approximately a third of these were not initially identified as CH had not registered the documents as insolvency events and marked them as miscellaneous filings with around a quarter never having been filed at CH at all. See Data tables 6.1.1 and 6.1.2.

72 The onerous duties imposed by Schedule A1 IA86 was considered in Chapter 2. Further Chapter 7 makes a series of suggestions for reform to simplify the process.

was no distinctive pattern of use between contribution and distribution CVAs, and equally the use of the SCM made no material impact on the legal outcome.

A review of the London Gazette data did identify the use of the SCM where a CVA was not subsequently approved, and therefore outside the main study data, however some additional SCMs were identified where the CH documentation had not been correctly identified in the original list of approvals.[73] The procedures that followed the SCM where a CVA was not approved included administration and a variety of liquidations plus, in a few cases, dissolution followed the moratorium without any further enforcement action being taken.

4.8 The impact of other parties on the use of the CVA

Having considered the impact of the IPs behaviour on the choice and use of the CVA, there remains the two contractual parties to the CVA which are considered next. These are the creditors and the company, and they are reviewed in the following two chapters. In respect of creditor control over CVA use, one creditor in particular emerged from the creditor group as wielding significant influence. This is HMRC,[74] and the role they play in the choice and implementation of CVAs is considered in detail during the next chapter.

73 The Gazette review identified 357 SCMs for the period 2003 to 2019. These were cross referenced for the study period data. The 357 included those followed by alternative procedures to the CVA and excluded those SCMs filed at CH but had not been published in the Gazette. Some SCM documents filed at CH had not been identified as the appointment of a nominee and noted in the insolvency section of the website.

74 n 63.

Chapter 5

Creditor Participation in the Company Voluntary Arrangement

5.1 The role of the CVA creditor

This chapter analyses the role and impact of the different types of creditors involved in the Company Voluntary Arrangement (CVA), in order to determine their impact on the level of its use.[1] Although a creditor cannot instigate a CVA,[2] the nature of their contractual relationship with the company[3] sets the CVA apart from other corporate insolvency procedures. The CVA is succinctly described by Pond[4] as "a private contract for the satisfaction of debts" and consequently it is not subject to any formal statutory terms, or a specific outcome except as agreed by the parties.[5] The completion of each CVA relies simply on whether the terms[6] have been complied with to the satisfaction of the supervisor. This flexibility allows the proposed terms to suit the circumstances and needs in each case.[7]

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1 See Chapter 2, Section 2.2 *Fundamental elements of the CVA* and Figure 2.3. See also Chapter 3, Section 3.8 *Creditor control of the CVA.*

2 See s 1 IA86.

3 In that the terms are agreed between the two parties. The proposed terms are subject to suggested modifications during the initial approval process.

4 See Pond (2004) *Banks and insolvent corporate customers: experience of the rescue culture,* Loughborough, 6.

5 For instance, there is no minimum distribution required in the statutory framework. However, a CVA must be demonstrated as being either a scheme of arrangement or a composition, and if neither apply the proposal becomes a nullity and unenforceable. See *Inland Revenue v Bland* [2003] BPIR 1274, where the proposal offered the creditors nothing and was also not capable of being saved by making modifications. Regardless of type, as long as the agreed terms are met then the arrangement can be reported as fully implemented; however in the event the terms are not being met as agreed then the arrangement must be terminated.

6 This reference includes any pre approval modification and any post approval variations.

7 For the purposes of this study each CVA has been coded as a contribution or distribution CVA. The contribution CVAs are identified as relying on contributions from future profits and the distribution CVAs are identified as mechanisms to distribute funds from a range of other sources. See a fuller explanation in Chapter 3, Section 3.2 *The importance of purpose and the legal outcome*.

A key question is 'Who are the creditors participating in a CVA'? A brief description of a CVA creditor would be a person or other legal entity who has provided goods, services or financial benefit to the company and has money still owed from that provision. The Insolvency Act 1986 (IA86) does not contain a formal definition of the term creditor. However, s 383 IA86 provides an explanation of creditor and security for the purposes of personal insolvency estates. Further, the Insolvency Service (IS) website[8] previously quoted the simple definition, provided in the *Mozley and Whiteley Law Dictionary,* as "one to whom another person owes money".[9] For the purposes of insolvency procedures, the term creditor is also clarified in IR86.[10] The IR86 includes not only debts where the amount is determinable and due at the date of the insolvency, but also unliquidated amounts which are debts with an uncertain value.[11] The insolvency framework further extends the definition of creditor to include disputed debts, together with future and contingent liabilities of all types,[12] such as future payment of rents.[13] The inclusive nature of this extended definition ensures that all potential creditors are notified and included in the procedure, with the office-holder (the supervisor in the case of a CVA) having the power to investigate, value and agree their claims as part of the procedure.

8 This definition was used in the IS technical manual which has now been superseded. It was available at https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch37-48/chapter40/part1/part1.htm. There is no definition in the new version of the guidance which is available at https://www.gov.uk/guidance/technical-guidance-for-official-receivers.

9 See Mozley & Whiteley's *Law Dictionary*, Tenth edition, 1988, Butterworths, London.

10 For the CVA see r 1.17(3) IR86 and Appendix B for equivalent provisions.

11 An unliquidated sum refers to the inability to determine the exact amount of the debt at the date of the insolvency. The specific date used varies by procedure but for a CVA it is the either the date of the start of the moratorium or the date of the approval of the arrangement. Rule 1.17(3) IR86 provides that a creditor voting in respect of an unliquidated amount or any debt whose whole value is not ascertained is only allowed to vote for £1 unless the chairman agrees to a higher value based on any evidence provided.

12 The decision in *Re Federal-Mogul Aftermarket UK Ltd* [2008] EWHC 1099 (Ch), [2008] BPIR 846 provides guidance on the 'hindsight principle' the process of valuing contingent debts using the principle set out in *Stein v Blake* [1996] 1 AC 243.

13 See Chapter 2 Section 2.8 *The concept of fairness and retail landlords.*

All insolvency procedures use the value of a creditor's claim[14] as a basis for both voting and distribution purposes.[15] Effectively, the level of debt owed determines the control exercisable by each creditor, or group of creditors, as well as the amount to be distributed to them. The level of a creditor's debt is often assessed more than once during insolvency proceedings. The first determination of value is used to determine the amount for initial voting purposes, and any subsequent approval is used to agree the debt level for distribution purposes. These amounts may differ, depending on the circumstances and status of each creditor. For instance, a debt that is objected to during any voting process must be marked as such, but should be allowed to vote for the amount claimed.[16] The same claim may subsequently be rejected in part or in whole, with voting amended accordingly if the outcome is material.[17] There are detailed procedural rules that must be followed for any rejection of a claim, whether in part or whole.[18] While these rules are not formally part of the statutory framework for the CVA, they are routinely included in the proposal terms. The inclusion of the claim approval process ensures that creditors are given a detailed explanation of the reasons for rejection together with their rights to appeal that decision.[19]

14 Submission of a claim usually requires details of how the debt was incurred and evidence that the debt remains unpaid. For instance, a copy of the original invoice and a recent statement showing the debt remains unpaid.

15 The one exception being the constitution of a committee when each member has a single vote regardless of value. Committees are rarely used in the CVA procedure except in large and complicated cases, however provision is made in para 35, Schedule A1 IA86 for the use of a committee during any moratorium period to approve an extension.

16 The approval, subject to any legal challenge, will depend on the evidence provided to support the claim.

17 For England and Wales see rule 15.33(3) IR2016 and previously rules 1.17A(4) and 1.50(4) IR86. For jurisdictional comparatives and post study period amendments see Appendix B.

18 See IR2016 Parts 14 *Claims*, and 16 *Proxies*. Previously Parts 8 *Proxies* and 11 *Distributions* IR86. For comparatives see Appendix B.

19 Although these detailed rules do not formally apply to the CVA, the majority of CVAs include reference to these standard procedural rules as part of their standard terms to control the agreement of claims and make distributions.

Chapter 4 considered the impact of the Insolvency Practitioner (IP) on the use of the CVA, including a detailed analysis using path dependence theory.[20] Following that discussion, this chapter analyses the role of the creditors in the use of the CVA. Also Chapter 3 identified the most frequent and largest single creditor involved in the majority of CVAs as Her Majesty's Revenue and Customs (HMRC).[21] HMRC are the single most important player in the CVA voting process and their voting protocol is analysed later in this chapter. The data used includes both the study data and their own published voting data.[22] HMRC have a central department to deal with the administrative requirement in the voting process, the Voluntary Arrangement Service (VAS).[23] VAS have delegated power to deal with any proposed voluntary arrangements. Since 2001 VAS have published a series of guidance notes setting out their approval protocol.[24] To set the scene for the voting analysis, the review of creditor participation first looks at the nature and role of the different types of creditor involved in the CVA.

20 See Jean-Philippe Vergne and Randolph Durand (2010) *The Missing Link between the Theory and Empirics of Path Dependence: Conceptual Clarification, Testability Issue, and Methodological Implications*, Journal of Management Studies 47:4 June 2010, 736-737.

21 HMRC was formed from the alliance of the two bodies charged with overseeing and collecting both Value Added Tax (VAT), corporation tax as well as PAYE and NI for any employees. HMRC was formed by act of parliament in 2005 prior to that HM Customs and Excise and the Inland Revenue were separate government departments. For the purposes of this study they have been treated throughout as one department and a single creditor.

22 See response by HMRC to a House of Commons written question re CVA support made on 7 November 2016, ref 51958. This question was asked in the run up to R3s '*Small Practice Group Forum'* held on 17 and 18 November 2016, at which HMRC presented on Voluntary Arrangements. The request was made by Helen Catherine Goodman MP who was at that time the Member of Parliament for Bishop Auckland.

23 See Section 5.3 *The development and goals of HMRC's Voluntary Arrangement Service* for details of the formation and history of the Voluntary Arrangement Service (VAS).

24 The VAS have issued guidance on their requirements in return for agreement to a CVA proposal. See the VAS help sheet (last accessed 29 May 2020) available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366661/vas-factsheet_1_.pdf

5.2 Creditor participation

The creditors participating in a CVA come in a variety of forms, and their status affects both their ability to vote and their ranking for distribution purposes. Each type of creditor is intrinsically linked with how any business operates. In respect of the CVA creditors, they have, in theory, considerable influence and power over the initial approval process, as well as providing continuing support for its implementation. A company's creditors fall into a range of categories including: financial bodies (banks and other financial institutions, of which the majority are usually secured creditors); trade and expense creditors that vary depending on the type and location of the business; connected party creditors (associated businesses and employees[25]); and finally the range of taxes due (including PAYE, National Insurance, VAT, corporation tax, other customs duties and other local authority taxes[26]). In general, trade creditors are very pragmatic when involved in insolvency procedures, and understand that future trade will invariably be more valuable to them than seeing a company liquidated with little chance of any substantial repayment.[27] The trade creditors rarely hold significant voting power in the majority of CVAs,[28] and the financial creditors often hold some form of security, ensuring they do not need to participate.[29] Overdue taxes are therefore usually the largest debt, often with more than 25% of the voting value,[30] thereby making HMRC the most influential single creditor.

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25 Employees also have preferential status for a limited range of potential claims. See Schedule 6 IA86.

26 Note the change to the HMRC preferential status which came into force on 1 December 2020.

27 See confirmation in the Office of Fair Trading Report 2010 report into the market for corporate insolvency practitioners, OFT1239, para's 5.11, 12, 17-18 and 19. The report summarises the results of creditor in-depth interviews and confirmed this view including examples where better returns were realised from CVAs due to lower fees being charged (last accessed on 13 August 2019)

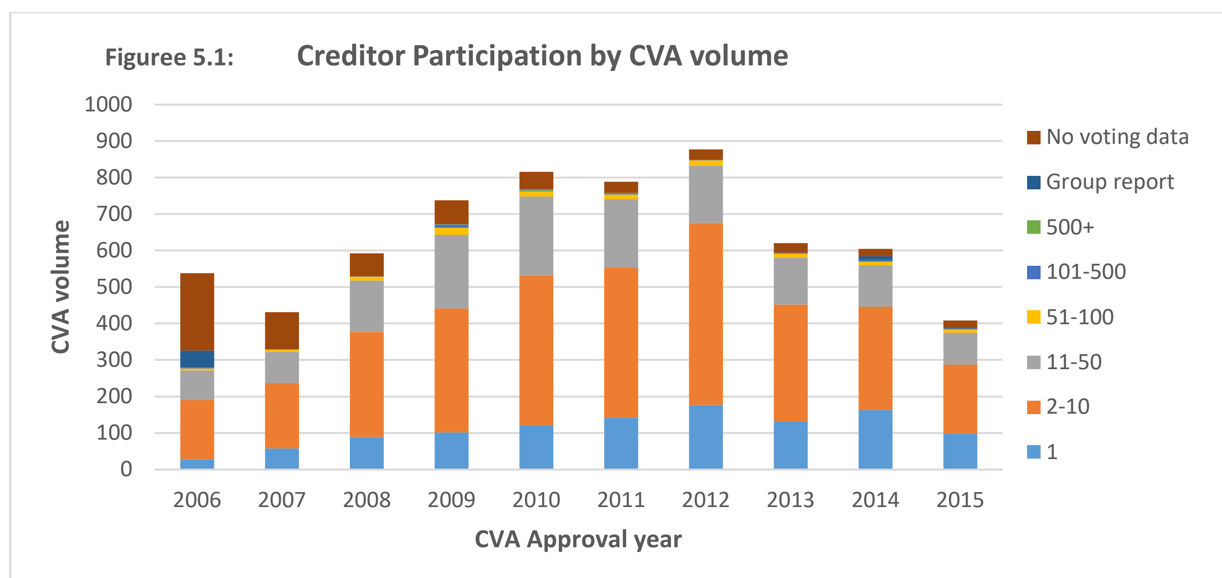
https://webarchive.nationalarchives.gov.uk/20140402172033/http://oft.gov.uk/shared_oft/reports/Insolvency/oft1245

28 See Figure 5.2 for the analysis of the creditor participation showing the split between HMRC and other voting creditors.

29 See Chapter 3, Section 3.8 *Creditor control of the CVA*.

30 As approval requires a majority of 75%. Any creditor who holds more than 25% of the voting value effectively controls the outcome regardless of whether other creditors are voting together.

The value of the creditors actively participating in the use of the CVA during the study period exceeds £20 billion, and of that debt HMRC voted with over £1 billion.[31] Creditor participation in the CVA was investigated by analysing the voting patterns during the study period. The levels of creditor engagement were reported as a percentage in Chapter 3 Figure 3.15b. The same data is reproduced below by volume.



Source: Data table 1.4.1, Appendix C.

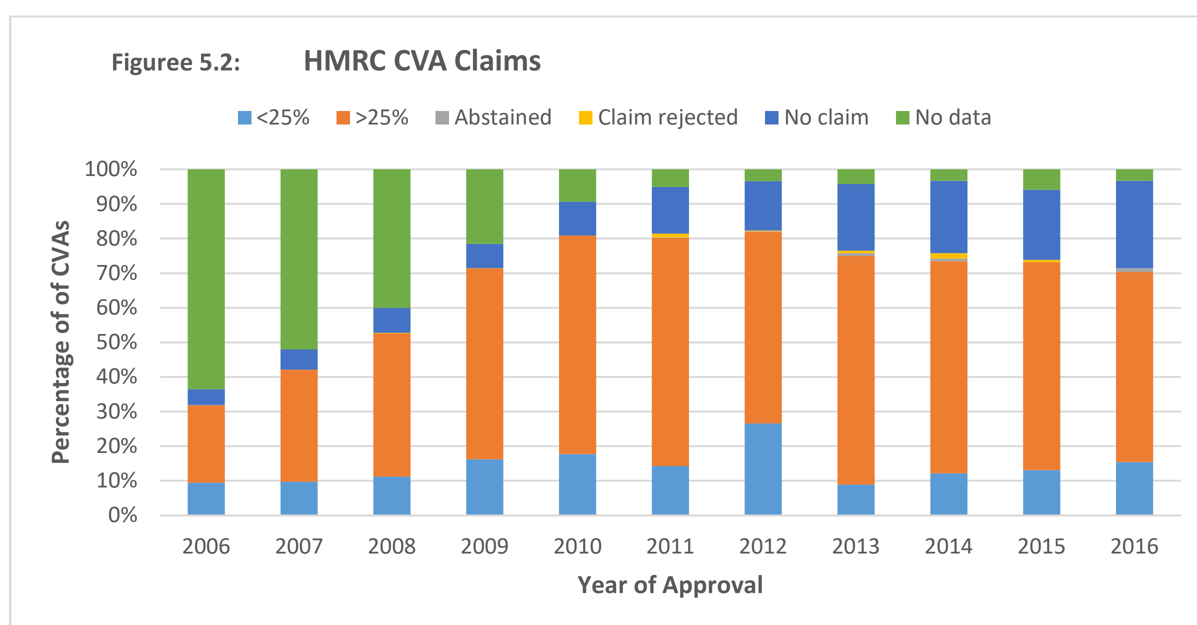
The average number of creditors participating in each CVA has fallen during the study period, from 15 creditors per case in 2006 to ten creditors per case in 2015. The data also showed that ten or fewer creditors participated in the CVA voting in the majority of cases, and that portion has been increasing over time.[32] The increasing share of CVAs with less than ten creditors is reflected in the falling average over the study period, and the increasing percentage of CVAs with a single creditor voting on approval.[33]

31 See Data table 1.4.6. The average total debt level per CVA is £3.5 million ranging from less a £1,000 to more than £6 billion and for HMRC the average is just over £200,000 similarly ranging from a few hundred pounds to over £37 million.

32 See Figure 3.15a. The first two bands combined have increased from less than 60% in 2006 to nearly 80% in 2014, with the higher volume bands decreasing in number.

33 There are 629 CVAs in which only a single creditor voted on approval and of those that creditor was HMRC in 558 cases (circa 89%).

The question that this data raises is whether the results provide conclusive evidence of a growing trend of creditor apathy, or simply recognition that the general trade creditor has little power or control in the CVA process. As already highlighted, by far the most influential and one of the largest unsecured creditors[34] is HMRC. The majority of smaller creditors are often disengaged with insolvency procedures, as they are aware that they have little to no influence on the voting outcome or on the terms being agreed. Furthermore, some trade creditors have been reported as stating that they lack the knowledge or information to make judgements themselves in insolvency matters, and so prefer to rely on professional expertise and advice.[35]



Source: Data table 1.4.3, Appendix C

In relation to most CVAs, creditors and IPs are both aware that the control of the procedure is usually held by HMRC, as is demonstrated by the orange blocks in Figure 5.2. The figure summarises the level of participation by HMRC with the amount of debt they voted with in each CVA. The bands have been split between 'less than' and 'more than' 25% of the

34 See Chapter 3, Section 3.8 *Creditor Control of the CVA*. HMRC are evidenced as creditors in nearly 90 % of CVAs registered as approved. This is based on the available voting schedules or approval documents of 5,649 CVAs of which 5060 noted a HMRC debt.

35 See also the Office of Fair Trading Report (2010) *Corporate Insolvency: In-depth interviews with creditors*, section 5, OFT1239, London.

voting value. A vote of more than 25% is the point at which any creditor has effective control over the approval process.[36] Figure 5.2 also identifies where no data was available, differentiating between cases where HMRC (1) had no claim, (2) the claim was rejected on the basis of an invalid proxy being received, (3) the information was not provided or (4) the document not available.[37]

HMRC are involuntary unsecured creditors in the majority of insolvency procedures, including CVAs.[38] During the study period HMRC were identified as the sole participating creditor in over 900 cases, and actively voted in over 5,500 CVAs; usually with more than 25% of the voting value.[39] As a result, HMRC controlled the approval and the terms to be agreed in each of those CVAs. As an organisation, they are very engaged with the CVA procedure, both in the voting process and the terms they require. This represents a significant exercise of power by a single creditor, and how this control is used is analysed further in section 5.4. HMRC impose strict protocols on when they will approve an arrangement and the terms it must include.[40] Their role in the approval of the use of the CVA is therefore crucial, and the organisational effect in path dependence terms is an important consideration when reviewing the outcomes.[41] The next section explains the HMRC voting protocol and why CVA approval has been centralised.

36 See Chapter 2, Section 2.6 *The CVA approval process.*

37 The voting data was missing for a number of reasons including the documents not being filed; the filed documents being unreadable; pages missing; or the relevant data not reported. Some early CVA documents are also not available on the CH Beta website.

38 See Chapter 3, Section 3.8 *Creditor Control of the CVA* and Data table 1.4.1, and schedule of data tables in Appendix C.

39 HMRC voted on average in over 86% of CVAs in the study period. See Data tables 1.4.1 and 1.4.3, and schedule of data tables in Appendix C.

40 See Figure 5.4 which demonstrates the frequency and volume of standard modifications imposed by HMRC during the study period.

41 See Anna Azzurra Gigante (2016) *Reviewing Path Dependence Theory in Economics: Micro-Foundations of Endogenous Change Processes*, MPRA Paper No 75310, 18. Also see Section 5.5 in this chapter for a detailed explanation and how path dependence analysis explains the HMRC voting behaviour.

5.3 The development and goals of HMRC's Voluntary Arrangement Service

The establishment of the Voluntary Arrangement Service (VAS) to handle the joint claims of both Customs & Excise and the Inland Revenue[42] was announced in late 2000[43], with operation commencing on 2 April 2001. The initial intention of the unit was to provide a single point of contact for IPs, while fulfilling the goals announced for the new HMRC department at the same time.[44] The key target was to ensure that VAS considered each proposal in the same way as other commercial creditors: individually on its merits and with a view to improving the recovery level of existing HMRC debts. The stated intention was to use private sector expertise and to build a closer relationship with business to improve outcomes. A second aim was to create a User Forum to bring all the stakeholders into the heart of this new operation. This latter goal included a range of targets: the development of a framework for "***good voluntary arrangement practice***";[45] assistance with development and dissemination of best practice;[46] enabling identification of the best ways to serve the stakeholders; and "***to provide information for target setting"*** together with "***developing ways to measure the effectiveness of performance"***.[47] From April 2001, the relevant government departments used their normal debt enforcement[48] processes while VAS dealt with all the voluntary arrangement proposals for

42 The formal administrative alliance between the two bodies Customs & Excise (VAT) and Inland Revenue (other personal and corporate taxes) did not take place until April 2005, having been announced in March 2004.

43 See Accountancy Age article (published on 2 November 2000) Revenue and Customs helping businesses in trouble, London (the article is no longer available online).

44 See *Dear IP* Chapter 8 Article 8 for details. The online version of *Dear IP* Chapter 8 can be found at https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/chapter8.htm (last accessed 28 June 2020).

45 Ibid*,* bullet point 3.

46 Dissemination included updates to SIP 3 and the use of the Dear IP newsletter published by the Insolvency Service. HMRC personnel also attended a series of R3 events to present their planned protocols.

47 The target setting and performance management via key performance indicators (KPIs) was aimed at the personal sector (IVAs in England and Wales and Trust Deeds in Scotland) rather than the company arrangements.

48 The enforcement offices of Customs & Excise and Inland Revenue did not have any power to compromise their debt, and the formation of the VAS department was the only way in which they could delegate power to compromise the combined debt of the various departments. However in many CVAs the VAS still insist

both individuals and companies.[49] The enforcement departments did not have the power to agree any compromise of outstanding debt, and the need to liaise between departments had previously delayed decisions on dealing with the terms of proposed arrangements. VAS was given the power to approve these compromises within agreed parameters.

Although a user forum was eventually set up to consider and make proposals for the Individual Voluntary Arrangement (IVA), the same input and consideration was not given to the CVA.[50] The best practice guidance issued by the insolvency profession, Statement of Insolvency Practice (SIP) on Voluntary Arrangements (no 3)[51] was subsequently revised in March 2002, with changes being made in August and October 2003 when adherence to all SIP best practice guidance became mandatory for regulatory reviews.[52] One of the main changes for the IVA was the introduction of the consumer debt IVA protocol, which involved the use of a proposal containing a simplified set of agreed terms and conditions. The best practice guidance published in SIP 3 version 4 encompassed this new IVA protocol, and came into effect on 1 April 2007. This allowed VAS to rubber stamp proposals

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100p in £ to be paid, effectively making the CVA an alternative 'time to pay' arrangement rather than a composition of the debt.

49 See Figure 5.5 for data on the volumes being processed for both IVAs and CVAs.

50 The initial forum meeting was held on 19 July 2004. See *Dear IP,* Chapter 24, Article 21 for details. The stakeholder group published a report *Improving Individual Voluntary Arrangements* in October 2005. See *Dear IP,* Chapter 24, Articles 25 to 28. The Insolvency Service and the British Bankers Association co-hosted a forum on IVAs on 17 January 2007. It was attended by representatives from the financial sector, IVA providers, debt advisers and regulators. The forum resulted in four working groups of interested parties being set up to examine relevant aspects of the IVA process. See *Dear IP,* Chapter 24, Article 32. On 8 May 2007 *A consultation document on proposed changes to the Individual Voluntary Arrangement (IVA) regime contained in the Insolvency Act 1986 and associated matters* was published for comment. The online version of *Dear IP,* Chapter 24 (last accessed 24 June 2020) can be found at

https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/chapter24.htm

51 The guidance on Voluntary Arrangements was originally issued by the Insolvency Practitioners Association in July 1990 to its members. The document was subsequently more widely accepted as best practice and re-issued in September 1991. The SIP was published by R3 on 18 May 1992 as accepted by all RPBs. A further update was issued in November 1997 and a guidance booklet was published in November 2001, with revisions in March 2002 and August 2003. The next version of SIP 3 was not published until April 2007. The next update was renamed SIP 3.2 and two versions have been issued July 2014 and April 2021.

52 In the main, the changes made to SIP 3 during 2002 and 2003 related to the IVA market, which was going through a transformational stage, with the volume of individual proposals increasing exponentially as a direct result of high levels of unsustainable consumer debt.

using this agreed format, saving time and resources while also ensuring the costs of implementation was minimised. In contrast the low volume of CVAs meant the procedure was given little or no attention during this period. It was not until July 2014 that the best practices guidance in SIP 3 was again updated and at this point two separate versions were issued, one for each of the IVA and CVA procedures. The separation provided additional clarity to both procedures. During the same period VAS published a series of guidelines to ensure IPs were also aware of the terms under which VAS could support voluntary arrangements.[53]

In 2016 the VAS record on how they support business rescue was questioned in Parliament. As a result, some limited data was provided by HMRC from the VAS voting records.[54] The data provided covered three periods between April 2011 and March 2016, and confirmed that around 60% of proposed CVAs were supported by HMRC during each of those periods. Where the HMRC debt exceeds 25% of the CVA vote, the rejections (circa 40%) automatically resulted in those proposals not being approved, regardless of the wishes of the other creditors.[55] In the event of a CVA rejection, the most popular alternative is administration (with or without a prepack sale of business).[56]

As creditor approval is not required for the appointment of an administrator, it becomes a preferable solution for both the company and the IP, and one that appears to be boosted

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53 See the most recent VAS guidance published in November 2011 (last accessed 15 August 2019) is at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/366661/vas-factsheet_1_.pdf

54 See response by HMRC to a House of Commons written question re CVA support made on 7 November 2016, ref 51958 to 51960. The data provided covered three period between April 2011 and March 2016. This question was asked in the run up to R3s '*Small Practice Group Forum*' held on 17 and 18 November 2016 at which HMRC presented on Voluntary Arrangements. The request was made by Helen Catherine Goodman MP a Member of Parliament for Bishop Auckland at that time.

55 As a result the majority of HMRC rejections do not appear in the study data as the CVA will not have been registered at CH. The volume of the potential additional usage has been calculated see Chapter 3.

56 A prepack sale of business is when the advising IP negotiates a potential sale of business pre ADM which is then completed either on appointment or within a short space of time. This sale is often to a connected party and all prepack sales are subject to full disclosure requirements set out in SIP 16. See Chapter 2 n 32 re the introduction of The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021.

by the CVA rejection policy of HMRC. In cases where there is no prospect of a sale of the business, liquidation is the only alternative and, in many such cases, the remaining assets are also sold back to connected parties.[57] In both of these scenarios considerably smaller dividends will be paid, and in the majority of cases there will be no distribution at all to the unsecured creditors. The level of the HMRC debt in CVAs is substantial. The VAS voted in the CVAs covered by the study period with over £1 billion of debt, making them a key creditor[58] with just under 6% of the total debt reported for voting purposes.[59] However, it should be noted that this voting value does not represent the total debt incurred by creditors in those cases, as many creditors simply do not take part in the voting process. Estimating the total debt is impossible as this data is not reported in the documents filed at Companies House (CH). The estimated total creditor debt is only reported in the company's statement of affairs, which is attached to the original proposal and that is also only filed in court.[60] As a result the documents are not freely available for review and so could not form part of the study data.[61] It was also noted that the final reports do not always confirm the final level of agreed claims with any consistency, and in many cases no work is undertaken to agree claims when no distribution is expected to be paid.

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57 In most cases the connected parties will pay a premium for assets which would otherwise realise a negligible sum at auction. These connected parties often continue to make a living from those assets in the same or similar trade retaining employment for themselves while creditors receive a better return than if they were sold at auction.

58 The total was collated from 5,269 CVAs. Detailed voting data was not available on some companies for reasons including documents not being filed, being unreadable from the scanned versions or otherwise not accessible. As a result, these totals will be an underestimate of the actual figures but do give an indication of the amount of debt being processed during the study period. Conversely in some groups joint liability may have resulted in the same debt being accepted across multiple companies, which resulted in some double counting and where this is material that data has been has been identified. See also Chapter 3 Figures 3.15(a) and (b).

59 See Data table 1.4.6 for voting values. It should be noted that some voting documents had not been filed, were not available or were not readable.

60 The proposal and statement of affairs are only filed in court together with the nominee's report. The only document filed at CH is the chairman's report on the outcome of the s 3 meeting but only where approval has been agreed. See r 2.38(3) IR2016 in relation to the documents filed in court and r 2.38(6) for those required to be filed at CH. Appendix C lists the comparative rules for each jurisdiction.

61 The statement of affairs (SoA) is appended to the proposal and filed in court with the nominees report but there is no requirement to file the CVA SoA at CH, not even when applying for a small company moratorium (SCM).

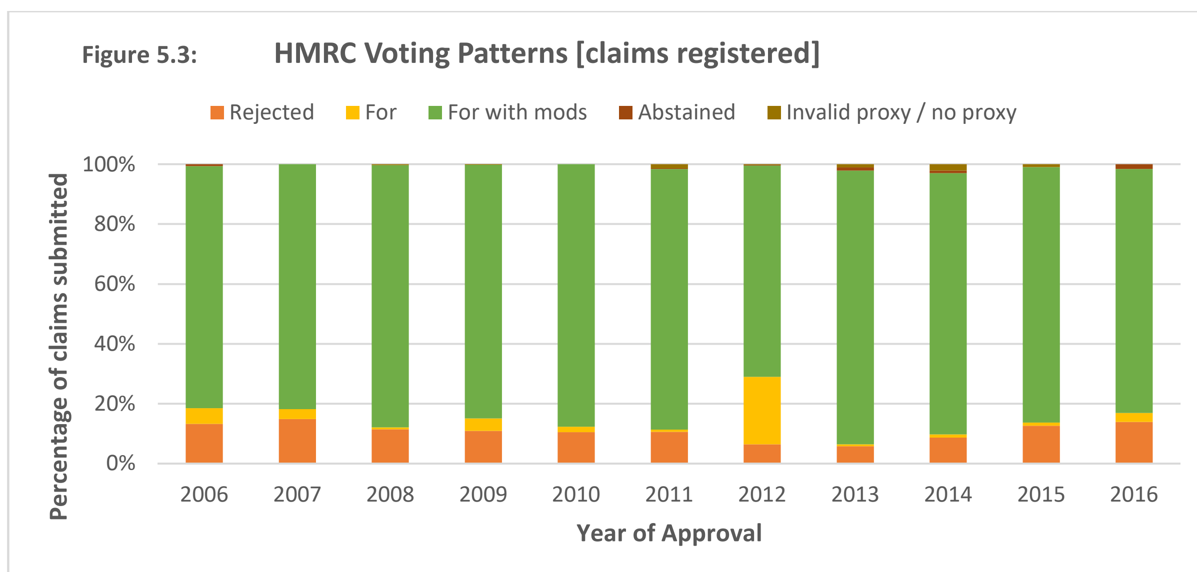
5.4 HMRC voting patterns

The level of debt held by HMRC emphasises the importance of how they vote on each CVA proposal. An analysis of HMRC voting records is summarised next in Figure 5.3. The Figure shows how HMRC voted and the volume of cases where it used each type of vote. The voting types identified included: an unqualified vote 'for' the proposal;[62] a vote for the proposal with all the modifications requested; a vote for rejection; or an abstention. The voting analysis also includes a record of the number of cases where a claim was made by HMRC, but was rejected or determined as ineligible for voting purposes.[63] The majority of HMRC votes are for CVA approval with the usual proviso that all their standard modifications are included in the terms of the proposal ('for with mods' in Figure 5.3). If any of those terms are rejected then the vote is required to be treated as a rejection.[64] The rejections recorded in Figure 5.3 relate only to those CVAs where the HMRC vote was less than 25% of the total, as in all other cases it would not be approved and consequently not recorded at CH. The invisibility of the rejection rate potentially skews the volume data on the use of the CVA. An estimate of this invisible usage is discussed in the next section and can be estimated at approximately 40% based on HMRC data.

62 Note that in 2012 there was a noticeable increase in the 'for' votes. This increase relates specifically to the Southern Cross group of 156 companies who were all subject to short duration distribution CVAs. To a lesser extent the Federal-Mogul group of companies in 2006 caused a similar but smaller increase. This latter group involved a concurrent scheme of arrangement with the CVAs being used as a distribution mechanism in relation to run-off asbestos claims being paid through the scheme. Further analysis of the of all the 'for' votes with no request for modifications revealed that the majority related to the CVAs set up as schemes of arrangement varying terms rather than making a distribution to the unsecured creditors. A few did relate to both contribution and distribution CVAs but across the whole of this group nearly 87% of the CVAs were fully implemented.

63 In most of these cases the meeting reports refer to the lack of a valid proxy being submitted against the HMRC claim.

64 This is a standard instruction included with the schedule of modifications. All modifications must be accepted or the vote must treated as a rejection.



Source: Data table 1.4.4, Appendix C

It should be noted that on average there was just less than one third[65] of cases where HMRC did not have effective control of the voting,[66] and so by default the terms and conditions of those proposals. An analysis of the HMRC published guidelines and its reported voting patterns provides some insight into its organisational behaviour. The VAS guidance emphasises the need for clarity and honesty in the explanations for how the debt was incurred, alongside both a feasible (and optimum[67]) plan to repay as much of the debt as possible within the proposed timescale. These guidelines are effectively a government policy statement on the approval process and, combined with the available data[68] confirming the 40% rejection rate, indicates that HMRC must perceive either a high level of dishonesty by directors or lack of clarity in many of the proposals being submitted to them. Even when support is provided by VAS, HMRC usually impose a detailed list of

65 This includes 1300 of 3998 arrangements where data was available.

66 Effective control is when HMRC vote with more than 25% of the value of the total debt and where voting against they are more than 50% of the unconnected creditors.

67 One of the main goals of HMRC is to maximise the recovery of the outstanding debt. Enforcement can be an expensive process and collection via a CVA is a cost-effective process.

68 See response by HMRC to a House of Commons written question re CVA support made on 7 November 2016, ref 51958. The data provided covered three period between April 2011 and March 2016.

standard terms that, although agreed to in most cases,[69] can end up forcing early termination of the procedure regardless of substantial distributions being made to creditors.

5.5 HMRC behaviour and path dependence theory

The behaviour of HMRC and VAS can be discussed further by using path dependence analysis. Path dependence attempts to explain the mechanisms by which past actions can influence future actions and outcomes.[70] Chapter 4 discussed the behaviour of IPs and how path dependence explains their self-reinforcing actions, effectively limiting their future choices and so how those choices impact on the use of the CVA.[71] In that discussion, two types of path dependence mechanisms were identified, the first being the self-reinforcing sequence used to explain the IPs behaviour, and the second being the reactive sequences mechanism.[72] The second can be used as a basis to explain the behaviour and outcomes for HMRC and VAS.[73] The end result of both path dependence mechanisms is lock-in, which is the point at which the behaviour or actions reach an equilibrium for the person or

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69 Not also that failure to agree to these terms results in automatic rejection and unexpectedly for CVAs rejected by HMRC the outcomes appear to be better, see Section 5.6 and Figure 5.6.

70 See Ronald Mann and Curtis Milhaupt (1996) *Foreword: Path Dependence and Comparative Corporate Governance*, Washington University Law Review, 320.

71 See Chapter 4, Section 4.5, *The mechanisms of path dependency*.

72 ibid

73 See James Mahoney (2000) *Path dependence in historical sociology,* Theory and Society, 29: 507-548. Reactive sequences include inherently sequentially linked events with the trigger being identifiable as a contingent occurrence. This type of event includes a legislative change or the economic impact of other changes. Self-reinforcing sequences are explained in full detail in Chapter 4.

organisation under consideration.[74] The final lock-in can result in either an optimum or sub-optimum level, depending on the outcome of the sequence of events.[75]

The reactive sequence mechanism in path dependence requires as evidence what Griffin and Ragan call 'inherently sequential events',[76] together with the evidence of related causal links.[77] To identify a causal link, three features of the relationship between the events need to be identified. The first feature of a causal link is a determination of the link between the series of events being considered and what might have happened if an alternative event had taken place.[78] The second is identification of the causal mechanism between those events. The final feature is a 'clean temporal ordering',[79] indicating that the events must follow in a chronological order, providing a clear narrative of the mechanism.[80] In order to set the scene for the VAS narrative, a comparison between the IVA and the CVA needs to be discussed first.

The difference between the use of the IVA and CVA by volume is illustrated in Figure 5.4. The Figure shows the exponentially increasing use of the IVA, driven principally by

74 See Paul A. David (2000) *Path dependence, its critics and the quest for 'historical economics'*, 10, All Souls College, Oxford & Stanford University. Earlier drafts were published in November 1998 and June 1999. The paper evolved from the author's 'Keynote Address' to the European Association for Evolutionary Political Economy, at their meetings held in Athens, 7-9 November 1997. A revised edition was published later *Evolution and Path Dependence in Economic Ideas: Past and Present*, edited by P. Garrouste and S. Ioannides, Edward. Elgar Publishing, Cheltenham, England.

75 This is particularly important for large organisations where key performance indicators (KPI) are often translated into simple event targets, which distort behaviours making the targets the key goal. An example is responding to queries within a specific time limit, so that when the response fails to answer the query but the response was sent within the turnaround time, the person meets the target but at the expense of actually providing the correct information. The complaints procedures for most businesses rely on this principle and that most complainants eventually go away.

76 See James Mahoney (2000) *Path dependence in historical sociology,* Theory and Society, 29: 530. See also Griffin and Ragin, *Some Observations*, 13. Quoted by Mahoney footnote 82.

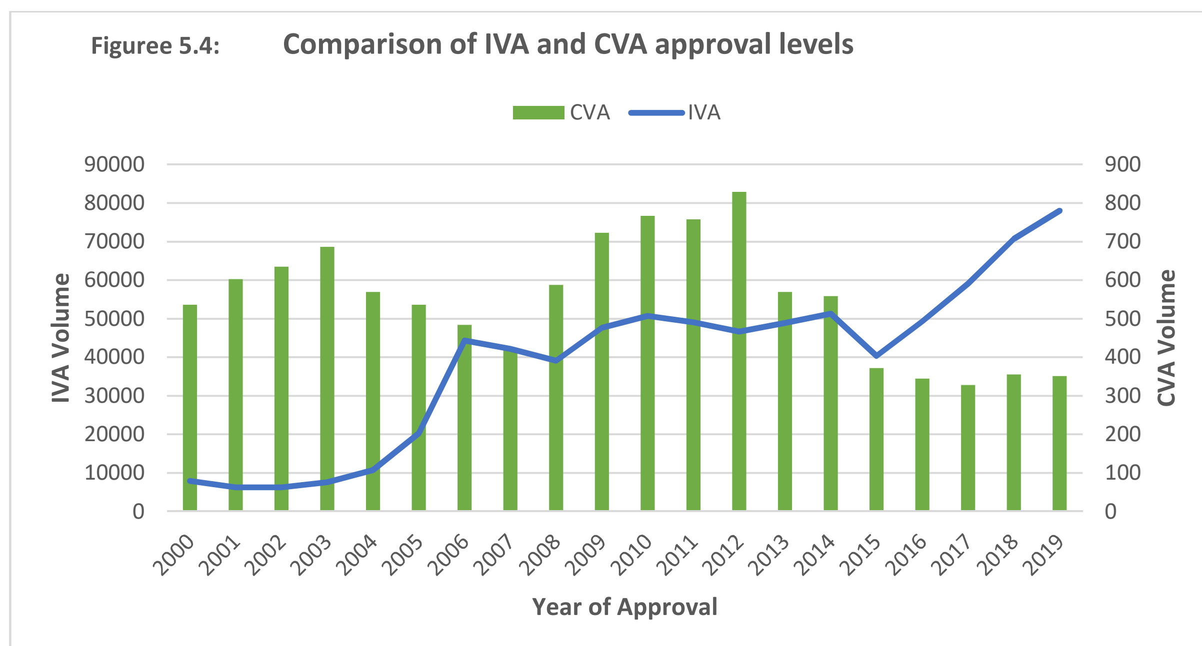
77 ibid, quoted by Mahoney in footnote 81.

78 See James Mahoney (2000) *Path dependence in historical sociology,* Theory and Society, 29: 530.

79 ibid, 531.

80 ibid, 532.

increasing levels of unsustainable consumer debt, against the falling use of the CVA whose main purpose is as a business rescue procedure.[81]



Source: Insolvency Service statistics

In Figure 5.4 the levelling off effect on the IVA numbers between 2006 and 2015 is due to a combination of the implementation of the consumer debt protocols and the introduction of 'debt relief orders' in 2009.[82] The history of the VAS was discussed earlier, and its combined role in decision-making for both IVAs and CVAs provides the narrative behind the sequence of events that have culminated in lock-in. In contrast to the underlying purpose of the IVA, the CVA is intended as a business rescue tool, and so logically its use should have been encouraged rather than restricted. The data suggests that the importance of the business rescue role appears to have been overlooked by VAS in the need to deal with the increasing volume of consumer debt IVAs. This is the point at which

81 See also the data in Chapter 3, Section 3.4 *Interaction with the administration procedure*.

82 Debt Relief Orders (DRO) were introduced with effect from 6 April 2009 and were intended to replace IVAs where there was little or no chance of them being completed and also remove an element of the bankruptcy market. The intended market for the new DRO was individuals who fell into the following criteria: a low level of debt (less than £20,000); assets valued at less than £1,000; and disposable income of less than £50 per month. The restriction on the costs that can be charged was intended to provide a more cost-effective alternative for the consumer debtor.

there is a causal link between subsequent events. If a dual approach had been taken by VAS, then it is likely that the outcome for the use of the CVA procedure could have been materially different. Further, the HMRC response to the Parliamentary Question in November 2016[83] confirmed that VAS does not retain any record of the CVA outcomes, nor do they follow-up on their voting directions to ensure that restrictions imposed have been followed.[84] The implication in the HMRC statement is that they do not consider the monitoring of the CVA process or the subsequent outcomes to be part of their role, despite it being one of their initial goals when VAS was established in 2001.[85] This lack of feedback or analysis indicates a missed opportunity to improve outcomes, and to potentially amend their voting protocol specifically for CVAs.[86] In path dependence terms the HMRC lock-in reached has been at a sub-optimal level.

5.6 HMRC modifications to the CVA terms

As explained in the last section, the support from HMRC usually requires an agreement to a set of modifications based on a list of standard requirements. These modifications are considered key to maximising full implementation, and when not accepted the HMRC vote is for automatic rejection. The study data confirms that the number of modifications being imposed by VAS on behalf of HMRC has been increasing over time, and now routinely exceeds 20 requirements according to documents filed at CH.

Figure 5.5 demonstrates the volume of modifications being requested, as reported and filed with the confirmation of approval document at CH. The data extracted from the

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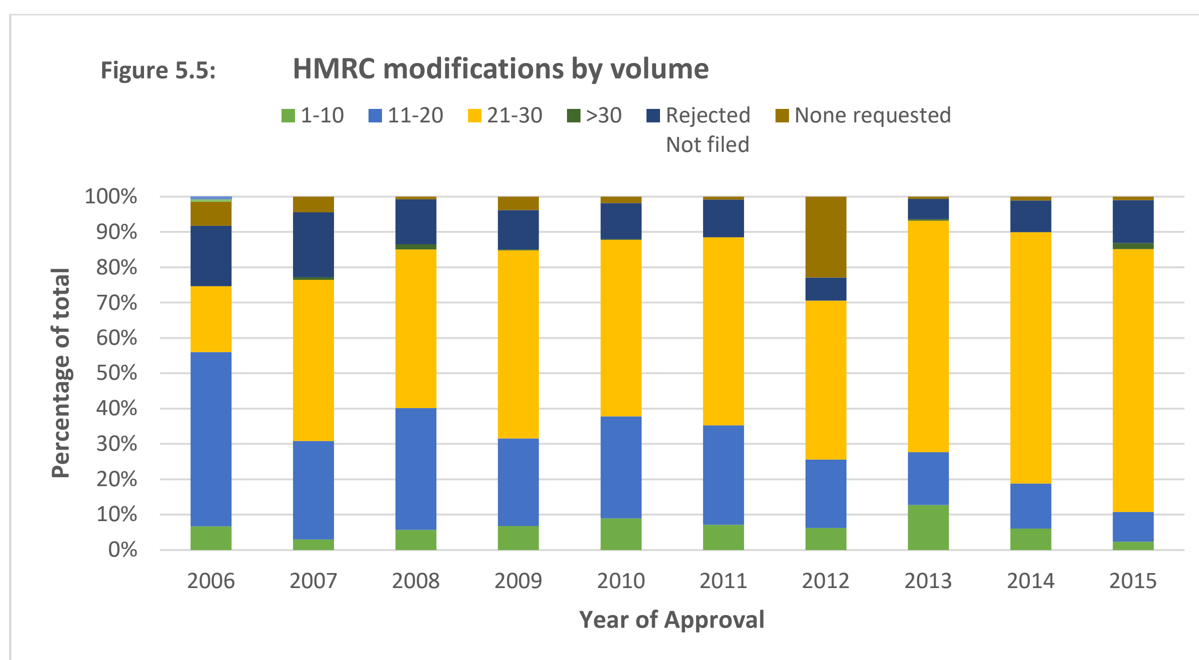
83 See response by HMRC to a House of Commons written question in respect of CVA support made on 7 November 2016, ref 51958-60.

84 There are a large number of terminated CVAs where the company has subsequently simply been struck off and, in many cases, without surplus funds being properly accounted for.

85 See Section 5.3 and the summary of the initial goals published for VAS. VAS also appears to consider that monitoring adherence to the agreed terms is the role of the monitoring bodies, with the only internal performance measure being the target for approvals.

86 See response by HMRC to a House of Commons written question re CVA support made on 7 November 2016, ref 51958.

schedule of modifications has been coded into six categories, four relating to the number of modifications being requested and two where no modifications were implemented. The latter two categories include (1) 'Rejected Not filed' – those where no modifications were made because they were all rejected by the directors and as a result not filed, and (2) 'None requested' - those where no modifications were requested by HMRC. The volume of modifications being requested during the study period has slowly increased with the annual average number increasing from 17 in 2006 to 25 in 2015.



Source: Data table 1.4.5, Appendix C[87]

Figure 5.5 shows the wide range of modifications required by HMRC in the CVA proposals.[88] As the original proposals are not filed at CH, it is impossible to determine how many of

87 Table 5.5 shows unusually high level of approvals with 'no modifications being requested' during 2006 and 2012 (brown bracket). These incidences relate to group CVAs implemented as part of wider restructurings which were accepted by HMRC without any modifications requested. It was the Federal-Mogul Group in 2006 and the Southern Cross Group of companies in 2012.

88 The areas covered in the standard list of modifications include (1) the restriction on any attempt to subsequently change any of the modifications. Also, a restriction on when any subsequent variations can be proposed i.e. not within the first twelve months unless the cause of the amendment was completely unforeseen; (2) the conduct of agreeing HMRCs claims that includes the requirement to ensure all outstanding returns are submitted urgently. Further a restriction on paying any non-preferential distribution until the HMRC claim has been agreed is also usually included; (3) an undertaking to ensure post approval returns and liabilities are

these clauses were already included in some form in the original terms proposed, and how many made a material difference to the terms being offered. These modifications can adversely affect the other creditors by allowing HMRC to extend the time in which their claim can be submitted, while also restricting the payment of any distributions until that claim has been agreed. The delay in distributions to the creditors can sometimes be years, resulting in any short duration arrangements being extended.

Reviewing the completion outcomes against the overall study data for CVAs rejected by HMRC (but where they did not have veto power) revealed that 46% were fully implemented, in contrast to only 30% of the CVAs across all the data. See Figure 5.6 which shows the comparative outcomes for HMRC rejections and approvals against the overall outcomes.

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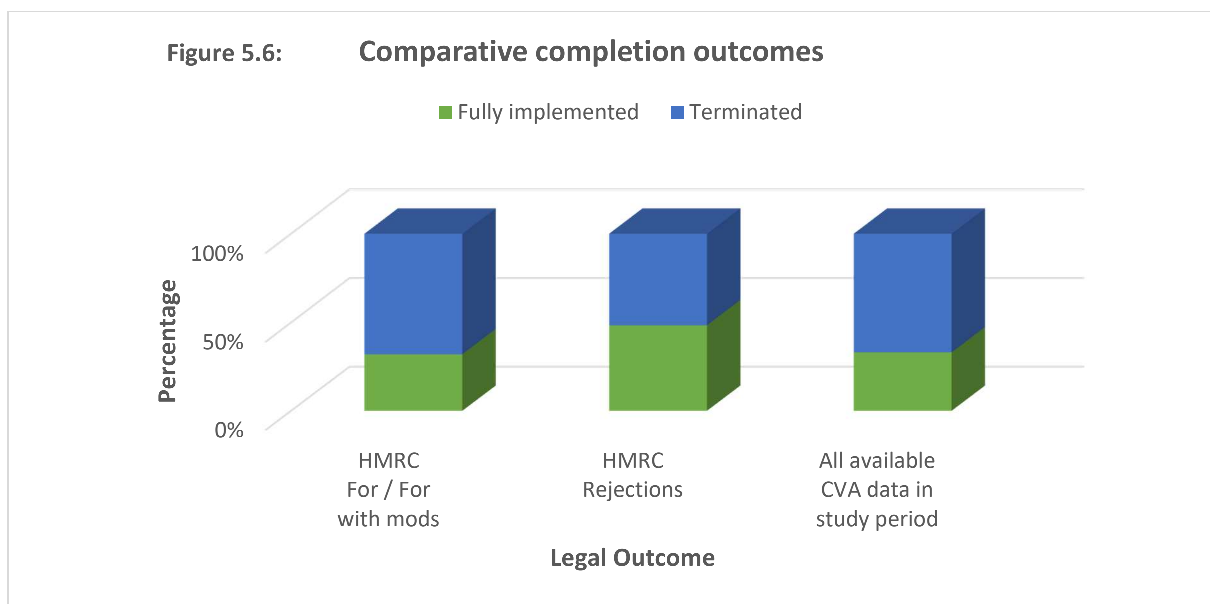
submitted and paid punctually. Also a reminder about crown set-off in regard to taxes due and those paid in the pre CVA period; (4) restrictions on the effects of the terms on third parties. These include a reminder that a CVA cannot restrict any third party liabilities. See *March Estates plc v Gunmark* [1996] 2 BCLC 1 and in relation to a CVA failed on the grounds of unfair prejudice see *Re Sixty UK Ltd (In Administration and Company Voluntary Arrangement); Mourant & Co Trustees Ltd and Mourant Property Trustees Ltd v Sixty UK Ltd (In Administration), Hollis and O'Reilly* [2010] EWHC 1890 (Ch) [2010] BPIR 1264; (5) the level, timing and review of contributions being offered and the automatic requirement to terminate the arrangement in the event of arrears or a formal variation proposal to be agreed by the creditors; (6) the restriction on all classes of payments to directors and shareholders. Excluding salaries paid under the PAYE scheme but often with restrictions on the total amounts; (7) a mandatory minimum distribution level in order for a full implementation to be certified; (8) a mandatory ceiling on the fees and expenses that can be charged by the office-holders without further and separate approval being obtained; (9) the implementation of arrangement trusts and windfall clauses to ensure that funds collected during the CVA period are distributed to those creditors rather than being paid into any post CVA procedure and used for remuneration or expenses; (10) a statement regarding the treatment of any ambiguities caused by modifications or later variations and the proposal of any unusual or specific terms such as debt for equity swaps which cannot be accepted by HMRC.



Source: Data tables 1.4.5 and 4.1.2, Appendix C

The data is suggesting that CVAs rejected by HMRC with less than 25% of the vote, but approved by the remaining creditors, have a higher 'success rate' than the CVAs approved by them using their voting protocols. This outcome raises doubts on whether the HMRC protocols are identifying the most feasible arrangements to be supported. It would appear from the data that the best financial and rescue outcomes are more likely to be obtained from potentially placing every insolvent company with any chance of rescue initially into a CVA; even if it is subsequently terminated and moved into an alternative procedure. The CVA would thereby have provided an opportunity to potentially save that business in the most cost effective way.[89]

If HMRC's main concern with the use of the CVA is director mismanagement,[90] then this could be dealt with in more efficient ways than forcing a substantial volume of businesses into administration or liquidation, which are the only alternatives.[91] Even terminated CVAs

89 See Chapter 3 Section 3.9 *Costs and distributions* and Chapter 7 for a more detailed discussion of the suggested improvements.

90 The CVA is the only corporate insolvency procedure not caught by the Company Director Disqualification Act 1986 and the requirement to report on the actions of the directors.

91 See Chapter 7 for some suggestions on dealing with this issue. The requirement to report on the conduct of directors of insolvent companies could be extended to include terminated CVAs, especially where

frequently pay better dividends than are received in either administrations or insolvent liquidations.[92] By supporting more CVAs HMRC would have received higher distributions than in any of the alternatives.[93] The only explanation for routine CVA rejections to continue in this manner is that the process is being used as a punishment for prior tax defaults and expected rather actual malpractice with the subsequent consequences being suffered by the other creditors.[94]

The increased use of a standard set of modifications over the study period reinforces the observation that the HMRC approval process is being driven by administrative targets rather than self-reinforcing outcomes. The fairly consistent approval level reported by HMRC indicate they have reached lock-in at a suboptimal level for collections.[95] The original

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there has been suggestions of mismanagement. This could also include revoked CVAs especially where there has been any material irregularity.

92 See Data table 7.1.4 for creditor's outcome from the administrations and table 8.1.3 for the same data from the different types of liquidations. Note that in just under a quarter of the administrations (24.15%) payments were only made to the secured creditors while payments to the unsecured creditors made under the Prescribed Part rules were only made in a very small number of cases (overall less than 1%). In over a third (36.79%) no payments were made to any creditors at all, with all funds used for fees and expenses and no surplus available any other procedure. Similarly more than 80% of liquidations paid no distributions to any class of creditor.

There was a single case reported of payment in full where the CVL and CVA procedures had been run in tandem. A combined receipts and payments accounts had been filed for both procedures making separation of the data impossible.

93 One super-user firm (using a different marketing name) identified in the study data currently advertises that the HMRC rejection rate is 30% and that their firm rejection rate is substantially lower at 20%. They provide no data to confirm this claim. See the company rescue guides (last accessed 27 June 2020) and available at https://www.companyrescue.co.uk/guides-knowledge/guides/hmrc-and-the-cva-process-3834/

94 See Chapter 3 Section 3.9 *Costs and distributions*. The data shows that circa 80% of the realisations received in CVAs are paid out in distributions to creditors. Other insolvency procedures involve substantially higher costs and expenses resulting in much lower distributions. See table 1, OFT1245, p19 which provides an estimate of the average percentage of office-holders fees charged by type of insolvency procedure. In ADM the average was 50% realisations, in CVL 25%, in ADR and WUC 10% with the CVA best at only 5%.

95 See Ronald Mann and Curtis Milhaupt*, Foreword: Path Dependence and Comparative Corporate Governance*, Washington University Law Review, 323 and 324. See also the fuller explanation of the lock-in process in Chapter 4, Section 4.5 *The mechanisms of path dependency* and how this outcome can be less than optimal when based solely on reactive events rather than through a self-reinforcing process. In this case there is no feedback mechanism in place to modify the behaviour and improve the outcomes. A further example is in Aleen N. Berger et al., (1995) *The Transformation of the U.S. Banking Industry: What a Long, Strange Trip It's Been*, 2, Brookings Papers on Econ. Activity, 55.

objective of VAS was to encourage a more commercial view of the proposals being presented.[96] However, based on the study data an overall loss of income for HMRC collections from the rejected CVAs can be approximated at nearly £60 million over the ten year study period.[97]

5.7 HMRC and the change in preferential status

Post the implementation of the Enterprise Act[98], HMRC no longer held any preferential status[99] in respect of distributions with the calculation of the Prescribed Part (PP)[100] potentially allowing those funds to be channelled back to the unsecured creditors. However, from 1 December 2020[101] HMRC regained a secondary preferential status. In order to determine the likely impact on the CVA from the HMRC change in status, a second review of the study data was undertaken to determine how many CVAs with HMRC debts existed, in cases where a distribution of less than payment in full was made.[102] Potentially a share of the distributions amounting to approximately £360 million could have been diverted to HMRC had the new status applied during the study period.[103] This represents

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96 In most cases a prepack administration is the obvious alternative procedure with very little chance of any distribution being made to the unsecured creditors. See Data table 7.1.4 which shows the outcome for unsecured creditors from administrations.

97 This estimate is based on a calculated 30% rejection / abstention rate of CVAs (see Data tables 11.1.1 and 11.1.2 which provides a comparison between CH data and HMRC disclosures for this calculation). The shortfall of potential CVAs is equivalent to over 1,875 additional procedures. The HMRC average debt level is just over £207,000 per CVA (i.e. £388 million of debt) with an overall average return for each CVA of 15.262 PIP produces potential additional distributions of £59,235,637.50

98 The effective implementation date was 15 September 2003.

99 The schedule of preferential creditors is set out in detail in Schedule 6 IA86.

100 See Chapter 1, n 13

101 The change in status for HMRC was delayed twice from 1 April 2020.

102 A total of 2,252 CVAs were identified where a distribution of less than 100 PIP was paid and HMRC was also identified as a creditor with an outstanding debt.

103 The total distributions paid to other unsecured in the cases identified totalled circa £400 million with £40 million recorded as paid to HMRC whereas the estimated HMRC debt per the voting schedule exceeded £694 million leaving an estimated £360 million that could potentially have been paid to HMRC. In some of these cases distributions to HMRC are likely to have been included which could potentially reduce the amount being diverted from trade creditors to HMRC. The two key unknowns in this estimate are the final HMRC approved

a potential shortfall of nearly 48% on potential future distributions for the unsecured creditors.[104]

5.8 Creditor control of the use of the CVA

The analysis of the creditor hierarchy and their institutions[105] involved in the CVA procedure revealed a series of outcomes. The behaviour of the largest and most influential creditor goes some way to explaining the current usage level of the CVA procedure. In particular, the analysis of HMRC decision-making using path dependence has identified them as being in institutional lock-in at a sub-optimal level for creditor returns. The VAS, who vote on behalf of HMRC, are potentially rejecting or restricting the use of a significant volume of CVAs. Creditor returns could be improved by giving every company an initial opportunity to be rescued even if that attempt fails.[106] Moreover, the key goal of VAS on establishment was to ensure that each proposal was considered by them in the same way as other commercial creditors.[107] This has clearly not become their routine practice, and instead they have used their position to impose advantageous terms, such as delaying distributions to creditors until they have a submitted and agreed claim.[108] The next chapter considers the wider implications for business rescue, by looking in more detail at the

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debt and a complete picture of the distribution levels actually distributed. The lack of data in this respect is discussed further in Chapter 7.

104 This calculation is based on the overall distributions over the same period to unsecured creditors of £751 million excluding HMRC (Data table 5.3.3). It should be noted that some distributions to HMRC were not separately reported which may this data and calculation.

105 Organisations include the firms that each of the IPs belong to, the company in relation to the directors and similarly for creditors in relation to the actions of HMRC.

106 Early termination can often be linked to the reaction of the creditors and customers to a company being in a CVA.

107 See Section 5.3 for the published list of VAS goals.

108 Many trade creditors have cash flow issues, and the delaying of distributions while HMRC take their time to finalise their claim, prejudices the small trade creditor who simply wants a distribution at the earliest possible date.

impact of the company profile on the use of the CVA, alongside the use of multiple sequential insolvency procedures on the costs borne by the creditors.

Chapter 6

The Role of the Company in a Company Voluntary Arrangement

6.1 Introduction

The two preceding chapters considered the behaviour of the IP and the control exercised by creditors, in relation to their impact on the use of the Company Voluntary Arrangement (CVA).[1] The other key participant in the CVA is the company itself, and this chapter reviews its role in the choice and implementation of the procedure. Each company is a unique combination of participants; at a basic level the constituents are the shareholders and the company officers, with their actions being governed by their articles of association.[2] However, there is a wide range of invisible elements influencing the actions of the company that, when analysed, provide further insight into the how, why and when affecting the use of the CVA.[3]

6.2 Actor-network Theory

This chapter reviews the constituent parts of the company participants by using actor-network theory (ANT). Dankert[4] described ANT as "a research method with a focus on the connections between both human and non-human entities". As a research method ANT is controversial because the process is not prescriptive, and the elements are not clearly

1 The analysis in Chapters 4 and 5 use path dependence theory.

2 See ss 8-10 Companies Act 2006 in respect of the requirement to file a Memorandum of Association and the details of the share capital. The detailed content of the Memorandum of Association can be found in the Companies (Model Articles) Regulations 2008.

3 Only a director or an existing office-holder can propose a CVA see s 1 IA86. Also see Chapter 2, Section 2.2 *Fundamental elements of the CVA*.

4 See R Dankert (2012) *Actor-Network Theory,* Delft University of Technology, Delft, Netherlands.

defined.[5] Guidance suggests that the process is best used for pilot studies due to its labour intensive nature of reviewing networks in detail.[6] This study employs an unusual application by considering each of the key elements of each company in turn to find any traceable connections between them. The qualitative aspect of ANT analysis provides insight into the role of companies participating in CVAs.[7] Effectively the ANT process is being used to attempt to make the invisible connections visible, by combining all the constituent parts and tracking the changes over time in the real-world activity of the CVA procedure.[8] A classic example of an ANT network is when a chemist combines more than one compound which results in a new compound with different properties. The two chemicals needed the action of the chemist to make the new substance, and without that event the outcome could not have been achieved. Using ANT allows the invisible component (the chemist) to be accounted for. It is easy to discount the actions of the chemist and just consider the two compounds, and this is why research using ANT principles can result in unexpected findings when actions and events are broken down into individual connections.[9]

Although ANT has been widely used in research into accounting reporting,[10] for this study it will be used to consider the relationships between the company size, ownership,

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5 See Michel Callon (1999) *Actor-network theory – the market test*, The Sociological Review, Blackwell, Oxford, 181-195; for an alternative view see Latour (1999) *On recalling ANT*, The Sociological Review, Blackwell, Oxford.

6 n 4.

7 See Marie-Andree Caron and Marie-France B. Turcotte (2009) *Path dependence and path creation, Framing the extra-financial information market for a sustainable trajectory*, Accounting, Auditing & Accountability Journal Vol. 22 No 2, 272-297, Emerald Group Publishing.

8 n 5. See also John Steen, Catelijne Coopmans, Jennifer Whyte (2006) *Structure and agency? Actor-network theory and strategic organization*, Strategic Organization, Vol 4 (3), 307, Sage, London; also John Steen *Actor-network theory and the dilemma of the resource concept in strategic management*, Scandinavian Journal of Management (2010) 26, 324-331.

9 n 4.

10 See Lise Justesen and Jan Mouritsen (2011) *Effects of actor-network theory in accounting research,* Accounting, Auditing & Accountability Journal, Vol.24, No 2, 161-198, Emerald Group Publishing; Antti Rautiainen and Robert W. Scapens (2013) *Path-dependencies, constrained transformations and dynamic agency: An accounting case study informed by both ANT and NIS*, Qualitative Research in Accounting & Management,

management and financial resources; all of which impact on the use of the CVA. ANT describes the elements being reviewed as actor-networks, or actants for short, as the networks can also include inanimate objects. The term differentiates its inclusive nature from the term 'actor'.[11] In the case of the CVA, this chapter demonstrates that company size is potentially the invisible but key element to the current level of use of the procedure.

6.3 The impact of company age

The essence of ANT is that it embraces change and recognises that the elements of each network are constantly moving, allowing each new network to combine in different ways to produce something greater and different from the original constituents.[12] The combining process is a continuous action, illustrating the point that ANT groups are not stable but continue to constantly be made and unmade.[13] For each business participating in a CVA this is the reality of mixing the expected and unpredictable elements on a daily basis. A starting point is required for ANT, and in Chapter 3 a clear link was identified between the age of the company at the date of approval of the CVA and the volume of fully implemented CVAs.[14]

The impact of age was therefore considered to be a good place to commence a more detailed analysis of the company actants, and to identify how each of the elements interact and impact on the use of the CVA. For a company or business age can be measured in a number of ways; the age of the specific enterprise, or in more complex situations, it can

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Vol 10 (2), 106-126, Emerald Group Publishing; Judith Lehosit (2014) *Breaking down the black box: How Actor Network Theory Can Help Librarians Better Train Law Students in Legal Research Techniques*, Law Library Journal, Vol 106(2) [2014-12].

11 n 4. Also see John Law (1999) *After ANT: complexity, naming and topology*, The Sociological Review, Blackwell, Oxford, 1-14.

12 n 8.

13 n 4.

14 See Chapter 3 Figures 3.11 and 3.12.

include the age of a trade name, a specific product or other intellectual property.[15] In this case the age of the company at the date of approval was the date used for the calculations. All businesses evolve over time, and in so doing those who exhibit good qualities can increase their value to customers and shareholders. The older and more respected a company becomes, the greater the value that accrues, with the name eventually becoming an asset in its own right. The behaviour of internal and external parties can also change in response to the increase in status, providing additional positive feedback unless an event occurs that breaks that cycle.

Following the initial age finding,[16] the study data was re-analysed to determine which other elements of the company profile could have a connection to age and that also might influence the use of the CVA. The most obvious and topical issue was company size, which itself plays a key role in influencing the type of financial data filed at CH, and is also used as an economic measure of activity. The measurement of size has also itself been the subject of changing parameters over time.[17]

6.4 The company size and related elements

The re-analysis of the study data commenced by allocating a new research size status to each CVA, as opposed to the size data reported in the accounts filed at CH.[18] The coding

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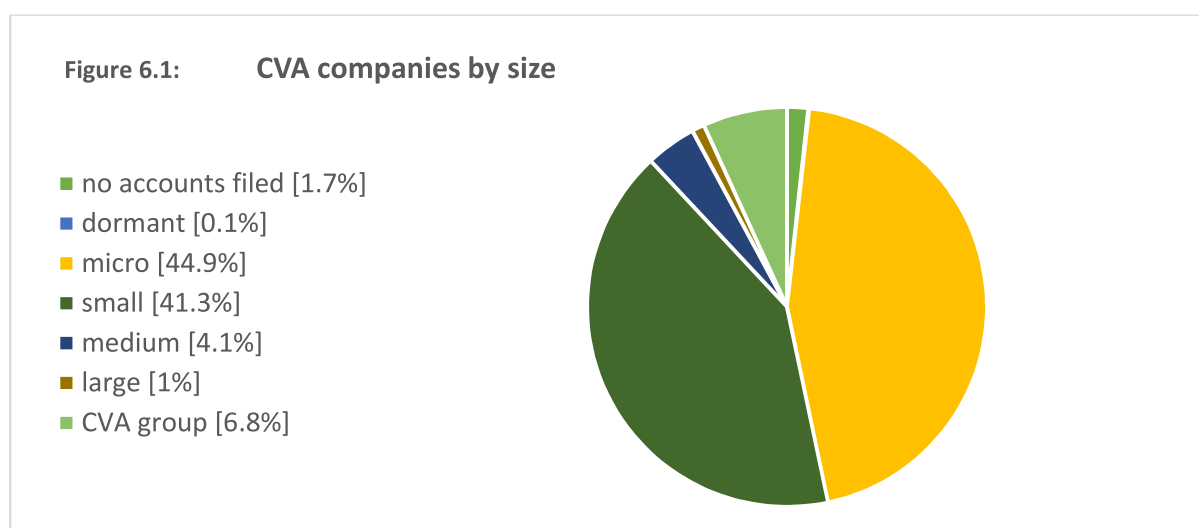
15 The intellectual property in these cases is likely to be registered and may well have been sold or otherwise transferred across companies or within groups.

16 See Chapter 3, Section 3.7 *IP influence on the CVA,* Figures 3.10-3.12.

17 Accounts filed at Companies House (CH) are given a size designation by the presenter based on the various disclosure regulations. The small company status was introduced in 2006 and the micro enterprise status was added later in 2013. For the relevant accounting requirements see: The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008; The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008; The Partnerships (Accounts) Regulations 2008; The Companies and Limited Liability Partnerships (Accounts and Audit Exemptions and Change of Accounting Framework) Regulations 2012; The Small Companies (Micro-Entities Accounts) Regulations 2013.

18 In the Companies Act 2006 for micro companies see ss384A-B introduced in 2013; for small size companies see ss381-384; and for medium size companies see s465 Companies Act 2006. Large companies are any that exceed the limit restrictions in two or more of the categories. Group sizes are dealt with separately but for the purposes of this study if the whole group are involved in the CVA then they are treated as a CVA group. In the case where only one group company is in a CVA then they are treated as individual companies and the

used for the study data analysis is based on the Companies Act 2006[19] requirements for micro, small, medium and large companies,[20] and was re-applied consistently across the study period.[21] The Cork report proposed the CVA specifically for small businesses as a cheaper option to the scheme of arrangement. Figure 6.1 shows the overall breakdown of the approved CVAs by study size, and reveals that micro companies average just under 45% of the CVAs in the study period, with small companies just over 41%.



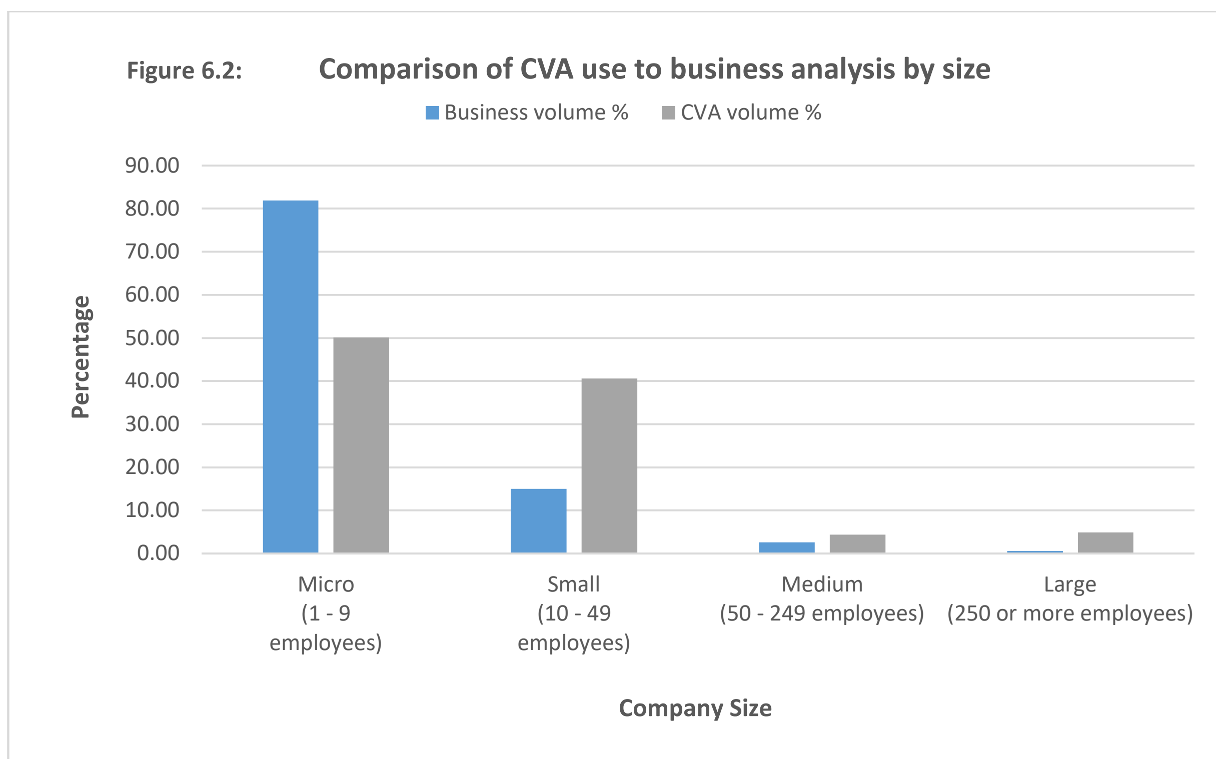
Source: Data table 9.3.1, Appendix C

relevant parameters applied. Companies with dormant accounts filed or no accounts filed are kept as separate categories.

19 The company size parameters require any two of the three criteria to be met: (1) a micro enterprise limits include less than 10 employees, gross assets of less than £316,000 and turnover of less than £632,000; (2) a small enterprise limits include less than 50 employees, gross assets of less than £3.26 million or turnover of less £6.5 million; (3) a medium enterprise limits include less than 250 employees, gross assets of less than £18 million or turnover of less than £36 million; (4) Large size includes all companies with two of the three criteria exceeding the medium size company limits. Turnover and gross asset thresholds for a small company changed on 1 January 2016 and increased to £10.2 million and £5.1 million respectively. The employee thresholds remain the same. For parent companies claiming the small group status the new thresholds from 1 January 2016 are £10.2 million and £5.1 million respectively. The latter changes will not impact on the research data analysis as a uniform measure has been used throughout the study period for comparative purposes.

20 For the purposes of this study reference to companies includes limited liability partnerships which are included in the study data.

21 The company size in the study data was based on the reported data in the last set of company accounts filed before the CVA was implemented. Where no accounts have been filed this has been recorded.



Source: Data table 9.3.1 and 9.3.2, Appendix C and Business data estimates for 2020[22]

The latest business statistics[23] indicate that over 95% of currently registered, privately owned businesses are micro enterprises. In comparison, the use of the CVA by micro companies is less than half the current national average. A comparison between the two sets of data indicates that higher than average use is being made of the CVA by the larger companies. It should be noted that the make-up of national data by size between 2006 and 2015 varies from the 2019 and 2020 data, as the micro size status was not introduced until 2013. However, a review of the study data over the ten year period indicated that the breakdown by company size was a consistent element, and the national data would did not vary significantly[24] (see Figure 6.2 for comparison purposes).

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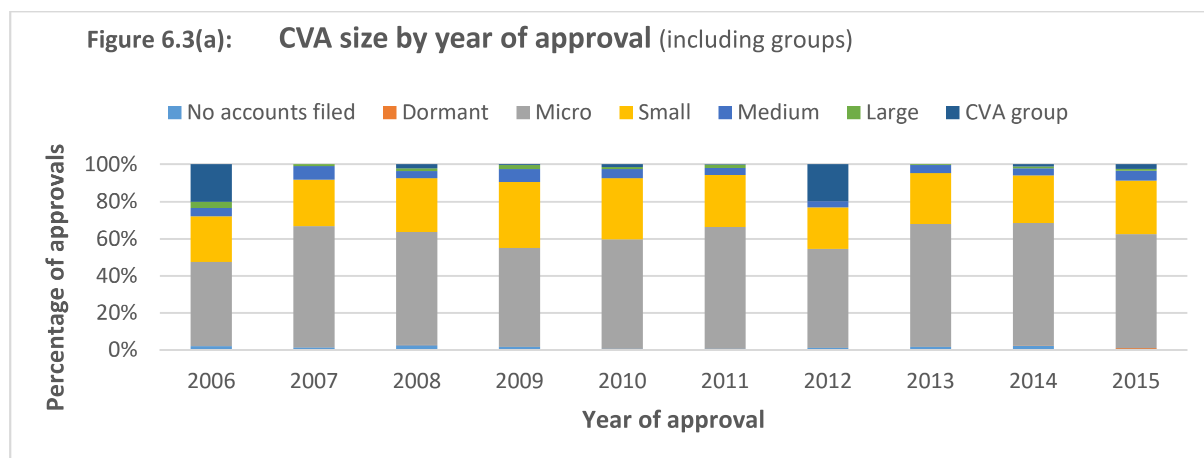
22 See https://www.gov.uk/government/statistics/business-population-estimates-2020

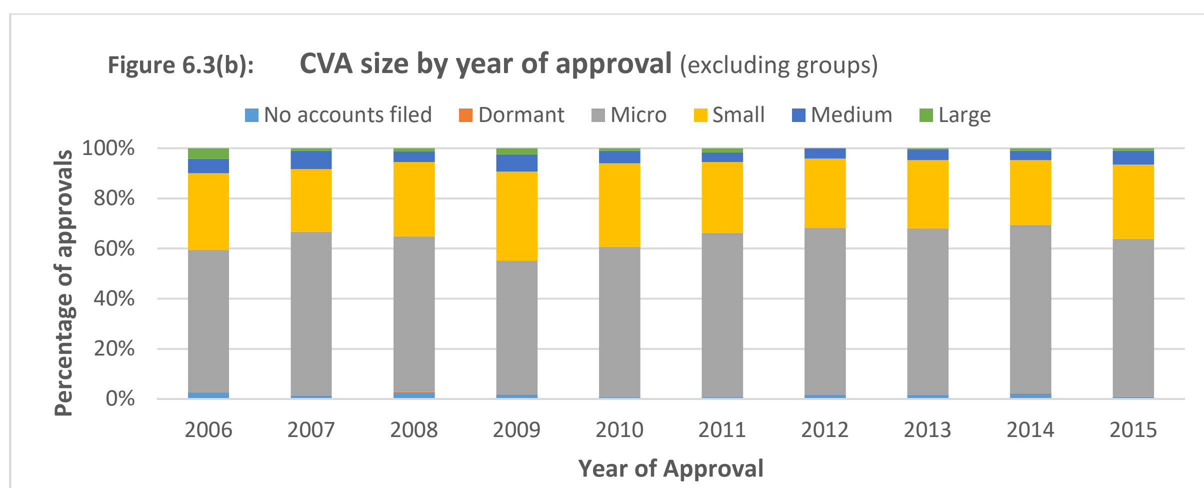
23 See *Business Statistics for UK Parliament*, House of Commons Library, Number 06152, published 31 July 2020. Last accessed on 26 August 2020 at https://www.gov.uk/government/publications/business-population-estimates-2019/business-population-estimates-for-the-uk-and-regions-2019-statistical-release-html. See also earlier publication *Small business and the UK economy*, House of Commons Library, Standard Note 6078, published 9 December 2014. Available at https://commonslibrary.parliament.uk/research-briefings/sn06078/.

24 In 2014 there were 5.2 million businesses in the UK (2013 4.9 million) and over 99% were small and medium enterprises employing 15.2 million people (2013 14.4 million). These businesses accounted for half of

Figures 6.3(a) and 6.3(b) show that the use of the CVA by company size first with, and subsequently without, the CVA groups to demonstrate the effect of activity without them.



Source: Data table 9.3.1, Appendix C



Source: Data tables 1.3.1 and 9.3.1, Appendix C

A comparison shows the impact of the two largest groups using the CVA.[25] Comparing the data by eliminating the impact of group activity in Figure 6.3(b), the use of the CVA by micro companies is relatively constant based on a percentage of annual use but still lower

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the value added to the economy in both years. Between 2013 and 2014 the number of micro businesses increased by 7% representing 95% and 96% of the total. By 2019 the small business population had increased to 5.9 million making up 99.3% of the total of which 1.1 million had less than ten employees plus 4.4 million with no employees other than the owners (i.e. 5.5 million of 5.6 million SMEs or 98% of SMEs are micro businesses). The difference in volume relates to sole proprietorship non-corporate businesses. For instance between 2019 and 2020 around 8,000 businesses moved between sole proprietorship and partnership to corporate businesses.

25 The CVA groups referred to include the Federal Mogul Group in 2006 (48 companies) and the Southern Cross Group in 2012 (156 companies).

than would be expected in relation to the overall population size. The question is whether there is some characteristic or element in the micro company that discourages the use of the CVA procedure. The disparity for the use of the CVA by the micro business indicates the key elements restricting use need to be identified and addressed. The specific impact on the micro company is revisited later as an important element in proposing ways to increase the use of the CVA.

6.5 The invisible influence of financial expertise

Widening the analysis of the company size to include other actants such as legal outcomes was the next step in the analysis. Figure 6.4 shows the legal outcome by size, and illustrates that the termination rate for CVAs is higher for micro companies and slowly improves as the business size increases. The termination rate could potentially be considered as a negative influence that is restricting the use of the CVA by micro companies, or it could be a symptom of another element or combination of actants.

Source: Data tables 9.3.1 and 4.1.2, Appendix C

Figure 6.4 also shows that arrangements with no filed accounts have the highest termination rate, at over 80%, and this provides some insight into a potential but invisible element. The lack of accounts indicates that the management team are likely to be struggling with the accounting elements of the business, with a consequent effect on management control. The termination rates also reduce from nearly 70% for the micro companies to around 50% for the large companies, while group arrangements perform best with less than 10% terminating early. Combined these factors indicate that accounting expertise is potentially a key actant. The chance of full implementation of a CVA clearly improves with both size (in particular group arrangements), and the age of the company as demonstrated earlier.[26]

The connection between these two elements is that with age the business is more likely to have developed good accounting protocols, and have a management team that understands the importance of financial data when making business decisions. The knock on effect of limited financial data can also be an adverse element in cost control, and potentially in the tendering for new work. However, a lack of financial management is not always limited to micro companies. A high profile and timely reminder of the basic but crucial concept of financial management was provided by the demise of the Carillion group, which was not considered a viable candidate even for an administration.[27]

6.6 The impact of the asset base, funding and costs on micro companies

The impact of size on the CVA outcome is also potentially linked to both the level of assets held at approval, and the accessibility of available funds to meet the arrangement terms.

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26 n 16.

27 See the House of Commons Briefing paper on the collapse of Carillion Plc and its 26 group companies. One key issue highlighted was its 'aggressive accounting' and declaring profits based on very optimistic forecasts (section 2.4, p17). Also the cash dividends being paid exceeded the cash generated in the last five years of its operations (section 2.5, p21). The paper is available online at https://commonslibrary.parliament.uk/research-briefings/cbp-8206/ (last accessed 7 September 2020).

A micro company by definition has fewer gross assets than the larger businesses[28] and this factor, combined with the potential link to accounting expertise, reinforces the connection between the first two actants identified. Associated with financial management is the reliability of funding for a CVA,[29] which is also an important element in the determination of the designated purpose.[30]

The purpose of each CVA identifies a link to the funding of arrangements and this in turn influences the duration, which was another element discussed earlier in Chapter 3.[31] Another financial issue and part of the funding dilemma of a CVA is the need to cover the professional costs of the supervision. The smaller the company, the larger the costs are as a percentage of the total funds being provided, and again this potentially disadvantages the micro business.[32] The amount and level of overhead expenses being charged are not consistent across firms, so the supervisor's fees were taken as a benchmark cost to identify whether fees are disproportionate for micro companies. The cost element is effectively immaterial in all other types of insolvency procedure, as the main loser in those

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28 See n 17 to 19 which comment on the statutory framework and regulations covering company size.

29 See the discussion on rescue funding in CVAs by Vanessa Finch and David Milman (3rd edition), *Corporate Insolvency Law, Perspectives and principles*, 429-430, Cambridge University Press, Cambridge.

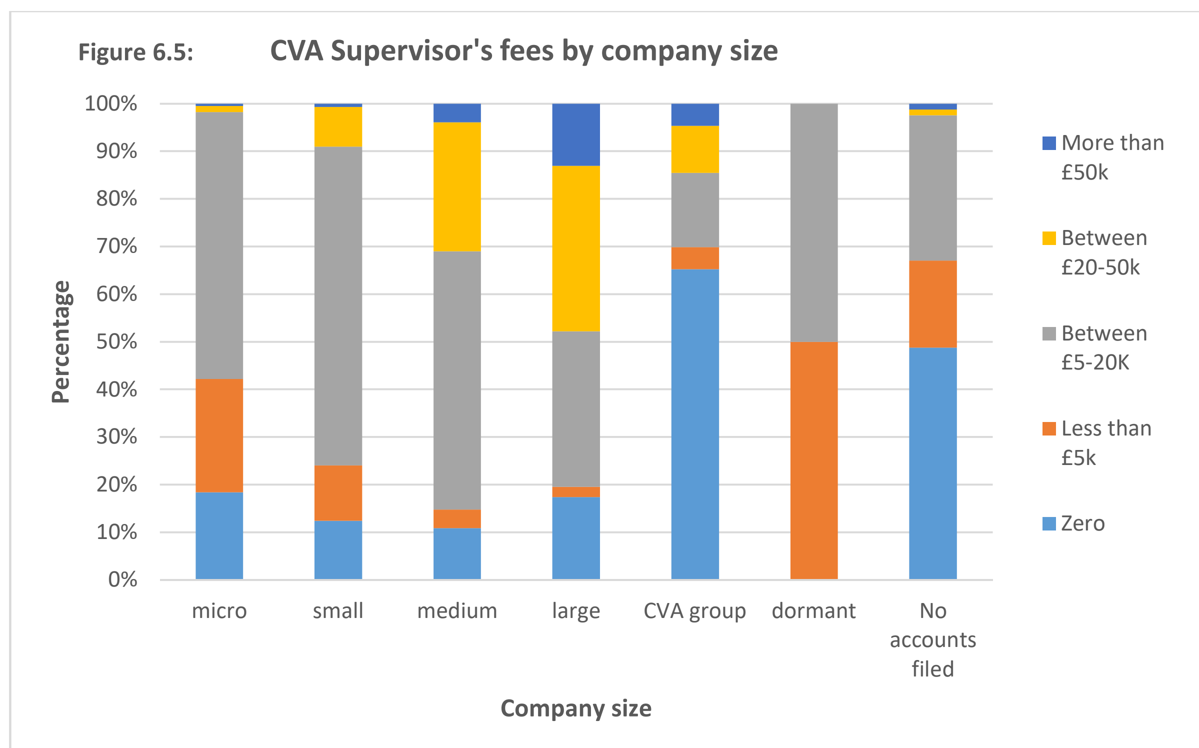
30 See Chapter 3, Section 3.2 *The importance of purpose and legal outcome*. The main characteristic of a contribution arrangement is future payments from profits. In return for a higher future return the business assets are excluded from the arrangement and should not appear in any receipts and payments account as a comparative. The distribution arrangement covers a series of scenarios from the provision of funds to make a single payment to one creditor, a class of creditors or equally to all creditors. The source of funds can be from an earlier procedure, new funds from shareholders or from the sale of the shares or business or particular assets. This group also includes managed wind ups which are effectively liquidations but where better returns are expected than in a formal liquidation. In the latter case the company assets are not excluded from the arrangement and all the asset realisations should be accounted for.

31 ibid. Just over 20% of contribution CVAs terminate within 12 months while over 40% of distribution CVAs complete (most are fully implemented) within the same period.

32 Over 90% micro companies have contribution levels of under £250,000. For small companies that drops to around 50%. For medium companies just under 40% have expected estate assets exceeding £1 million. For large companies the percentage of assets exceeding the £1 million increases to 50% however for group CVAs the majority fall within the £250,000 to £500,000 range.

circumstances will be the office-holder (who fails to recover them) or the creditors, and not the company itself and its potential rescue.

Figure 6.5 shows the fees reported as paid through the CVA estate account by company size. The remuneration paid from the estate accounts was coded by bands to determine the volume of CVAs falling into each category.



Source: Data tables 9.3.1 and 5.2.2, Appendix C

Over the study period over £92 million[33] was recorded as paid in supervisor's fees, at an average cost of nearly £15,000 per CVA.[34] However, it was noted that for some of the large and group distribution CVAs the fees were paid direct by the company, and not as an expense of the funds being made available for distribution. The data on external payments was separately collected, and a total of just over £4 million was identified as being reported as paid direct.[35] The external payment of fees and other costs impact

33 See Chapter 3, Section 3.9 *Costs and distributions*.

34 ibid, Figure 3.16 and Data table 5.2.2, and schedule of data tables in Appendix C.

35 See Data table 5.2.4 and schedule of data tables in Appendix C. Further costs were reported in some cases as being paid externally and these totalled in excess £132,000. There were clearly other instances of fees

directly on CVA outcome and increase the percentage of realisations paid to creditors. External payments are unique to the CVA procedure. All other insolvency procedures must account for all receipts and payments through the estate account. The external payment of fees and expenses were identified across a wide range of 60 companies; the range covered all sizes including small and micro companies.

The majority of external fee payments were made in distribution CVAs,[36] where the main asset was a central (often fixed) fund for direct distribution. In particular, fees were paid direct where the funds were limited or being provided specifically for distribution only as part of the terms of the arrangement.[37] The practice of making separate external payment for fees, particularly in distribution CVAs, improves certainty in the distribution level for creditors, confirming another explanation for the higher rates of full implementation. The process of direct payment also allows the company to retain control of the level of fees and expenses being charged.

Returning to the CVA purpose for micro companies, the analysis continued to determine if there was any connection to the issue of accounting expertise. Figure 6.6 shows the breakdown of the CVAs by size and purpose. The data confirms that as the company size increases, the purpose of the CVAs being approved moves progressively from contribution to distribution arrangements. The data also identifies that micro companies are more likely to use a contribution CVA.

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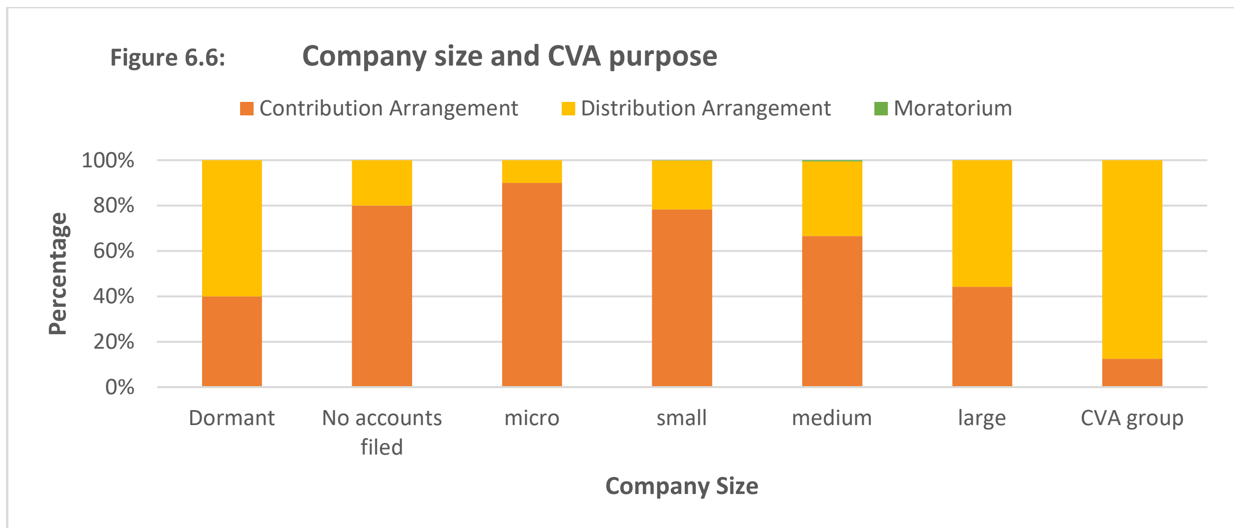
being paid direct but unreported. Further, in a lot of cases the reporting failed to identify the level of Nominees fees paid pre approval. The specific amounts should have been included in the proposal but were not restated in the final report.

36 n 31.

37 The composition by size of this selection was 13 micro companies; 17 small companies; 8 medium companies; 6 large companies and 14 group companies.



Source: Data tables 9.3.1 and 4.3.1, Appendix C

A contribution CVA relies on sufficient funds being available from future profits to repay the creditors.[38] Contributions for profits are by their nature less dependable than a single payment from a more reliable source. The potential risks for contribution CVAs include the ill health of key workers,[39] economic pressures from competitors as well as other natural disasters such as fire and flood, any of which can destroy a business in less than a day. A recent example of natural disasters includes the COVID 19 pandemic resulting in uncertainty in delivering the level of future profits estimated for the purposes of the CVA.[40]

Figure 6.6 shows that the majority of group arrangements are identifiable as distribution CVAs whereas the micro companies are nearly 90% contribution arrangements. A contribution CVA cannot succeed without the company continuing to trade profitably, whilst also providing sufficient funds to repay the existing debt. The business must consequently prevent falling into the same pre-CVA bad habits by accruing new debt in

38 n 31.

39 It was noted that 'Keyman policies' are being charged to banks in return for new funding which is also an additional cost for small businesses. These policies insure the micro and small business against interruption when a sole director is incapacitated.

40 At least one ongoing CVA in the study data has reported that an extension will be needed and has refrained from requesting a specific extension or terminating the CVA until there is a better understanding of the level of economic recovery.

order to repay the old debt.[41] In contrast, the distribution CVA is usually based on more reliably sourced funds; frequently a single lump sum received for distribution to the creditors. Effectively, the structural elements of the company are influencing the CVA purpose by the way in which the arrangements are structured and financed, with the source of finance being the invisible thread. The link between financial control and the source of funding is the next element considered in the search for connections and the use of the CVA.

6.7 Business funding and registered charges

Business funding is a huge topic, and the discussion here will be restricted to the funding required to meet the terms of the CVA. The type of funding required depends on the purpose of the CVA, and purpose has already been linked to size (see Figure 6.5). In order to identify the potential sources of existing funding at the date of each CVA, details of the unsatisfied charges were recorded from the CH documents. The initial collection of this data was intended to identify the nature of the charges registered for each CVA and where any Prescribed Part[42] (PP) element needed to be taken into consideration.

The PP fund is carved out of funds available to be paid to a floating charge holder and distributed to the unsecured creditors.[43] The fund was created in effect to allow funds previously paid to HMRC as a preferential creditor to be passed back to business creditors

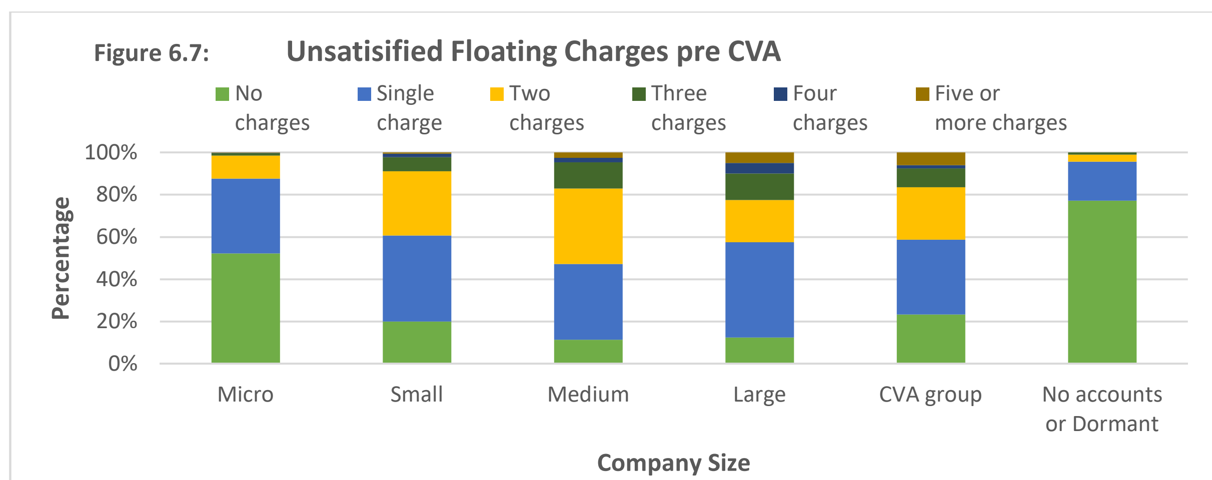
41 This is a standard modifications imposed by HMRC to ensure that a CVA can also be terminated if new debts are being incurred and tax returns are not being submitted in a timely manner, regardless of whether contributions have been paid as required.

42 The Prescribed Part (PP) is a ring-fenced fund set aside from floating charge assets for the unsecured creditors. It has to be paid prior to any funds being distributed back to the floating charge creditor but after the preferential creditors have been paid in full. See s 176A IA86 and The Insolvency Act 1986 (Prescribed Part) Order 2003 together with the latest amendment The Insolvency Act 1986 (Prescribed Part) Order 2020 which increases the maximum size of the PP from £600,000 to £800,000 from 6 April 2020. The calculation is based on the value of the net property available for distribution after all expenses, except for PP specific expenses, have been met and that this amount exceeds £5,000.

43 See Chapter 1 *The Rescue Culture and Rescue Mechanisms*, n 113, and s 176A IA86 and the Insolvency Act 1986 (Prescribed Part) Order 2003.

ahead of the secured creditor. For the purposes of the PP calculation, the existence of a valid floating charge is required and reporting must disclose any relevant charge details, together with the allocation of any available funds for distribution under the scheme. However the majority of contribution CVAs exclude the realisation of floating charge assets, resulting in a simple confirmation that the PP does not apply. As a result the data was re-purposed to give an indication of the level of funding being provided to micro companies. The charges registered were analysed into three categories: rent deposits, fixed charges on property and other assets,[44] and floating charges over the whole of the company's assets. The floating charge data was singled out and analysed by company size, as evidence of the level of formal borrowing for working capital purposes. The fixed asset charges have been purposely excluded from this data to avoid property companies of all types skewing the outcome.[45] Figure 6.7 shows the level of charges filed by company size. Half of the micro companies had no charges registered at all, with another 40% registering a single floating charge.[46]

Figure 6.7: Unsatisified Floating Charges pre CVA



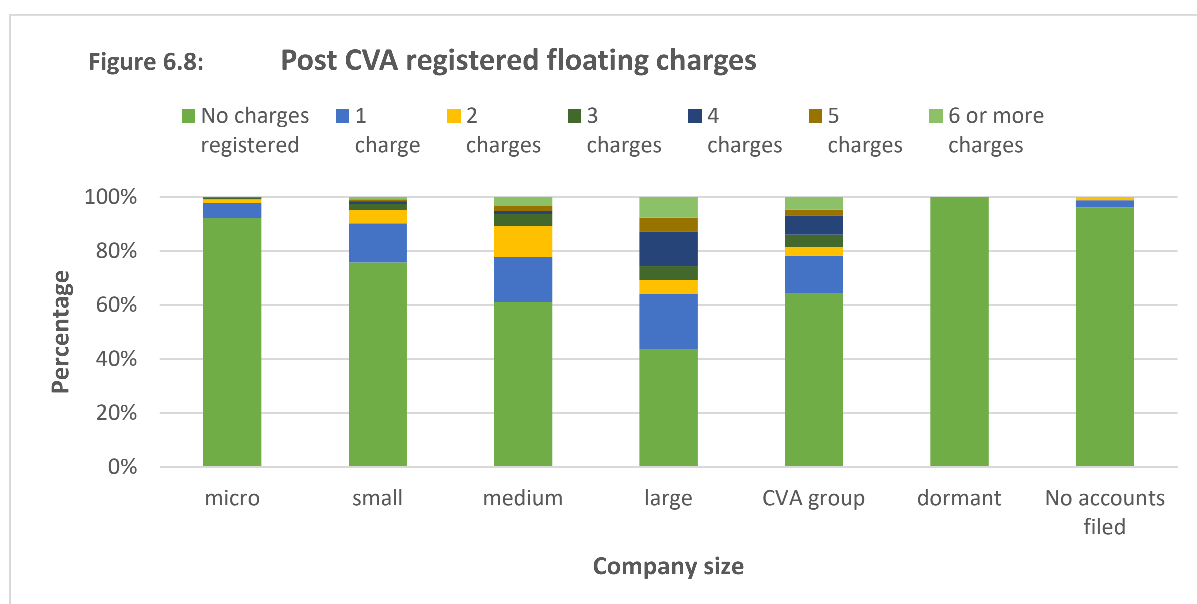
Source: Data table 9.4.1 and 9.3.1, Appendix C

44 The assets included a wide range such shares, cash deposits, specific accounts, book debts and other intellectual property in addition to standard mortgages and charges on land and property.

45 In general where the use of invoice financing has been identified the supplier has invariably required by a fixed and floating charge over the assets for additional security.

46 The floating charges consisted of a mixture of invoice discounters and mainstream banks.

The data indicates the volume of charges registered increases with the size of the company, with the biggest difference in number being between the micro and small sized companies. This confirms that micro companies are much less likely to have obtained external finance than the larger companies, including those with small company status. In micro companies the majority of the floating charges registered related specifically to invoice financing arrangements.[47] In addition, charges registered after CVA approval were recorded as an indication of new borrowing and the likely availability of new funds post CVA approval. Figure 6.8 shows the low level of post CVA registrations for floating charges. Less than 10% of the terminated cases have new registrations during the CVA period, while there is only a small difference between the company size and no material difference when analysing the same data by CVA purpose. Consideration was given to which company elements are potentially connected to financial resources and the next actant identified is company ownership.



Source: Data tables 9.4.3 and 9.3.1, Appendix C

47 See Data table 9.4.2 and schedule of data tables in Appendix C.

6.8 Company ownership

Ownership has a series of influences in its own right, and includes both the original share capital provided together with other funding provided by the shareholders. These two actants are reviewed next, alongside the level of involvement of the management team. Each element is also analysed against the earlier findings of size and age to identify any new combinations that might make a material impact on the use of the CVA.

The type and manner of ownership was reviewed by identifying the registered owners immediately prior to the CVA approval.[48] The analysis was split between corporate and individual ownership,[49] and also whether the individual owners were part of the management team. The ownership groups used identify the inclusion of the management team, associates, unrelated individuals and other corporates. For the purposes of this study the term 'wide personal ownership' is used, identifying any company with more than 50 registered shareholders listed on the last annual return available without formal public status.[50]

Figure 6.9 illustrates the make-up of the CVA population by ownership groups. It shows that more than 60% of the companies are owned exclusively by the registered management team, with another 30% of the total including one or more of the registered management team. Reviewing the same ownership data by legal outcome was the next step in the analysis to identify any additional link.

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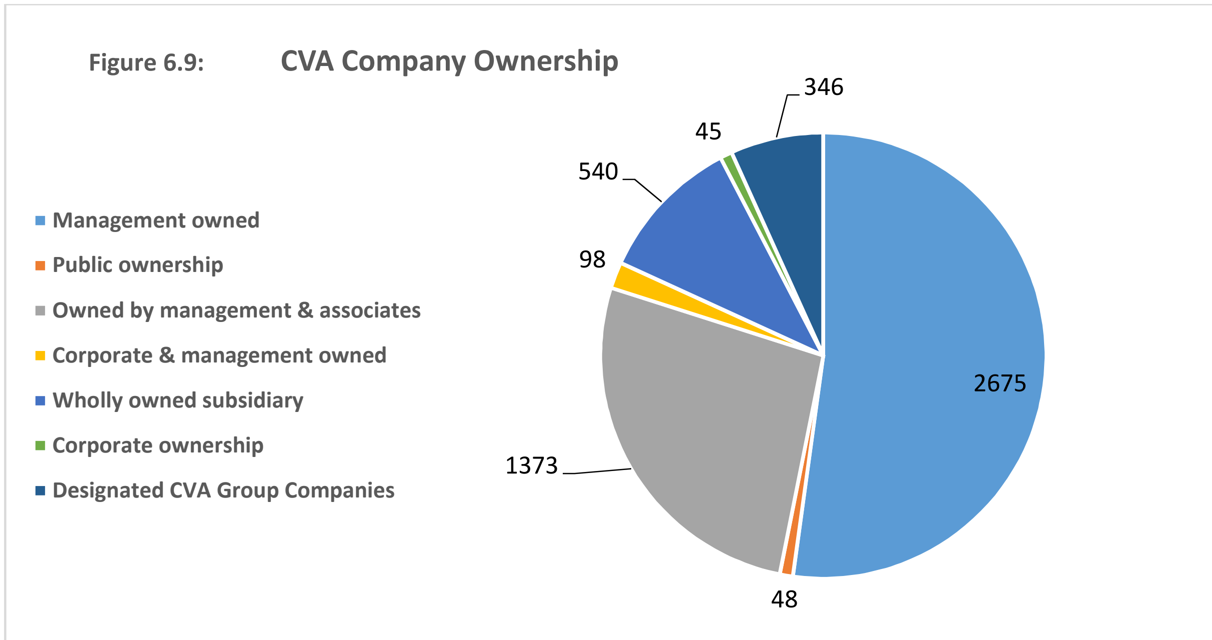
48 The data on the latest annual return prior to the CVA was used. In cases of new funds being raised the data was usually not included until after the CVA was approved.

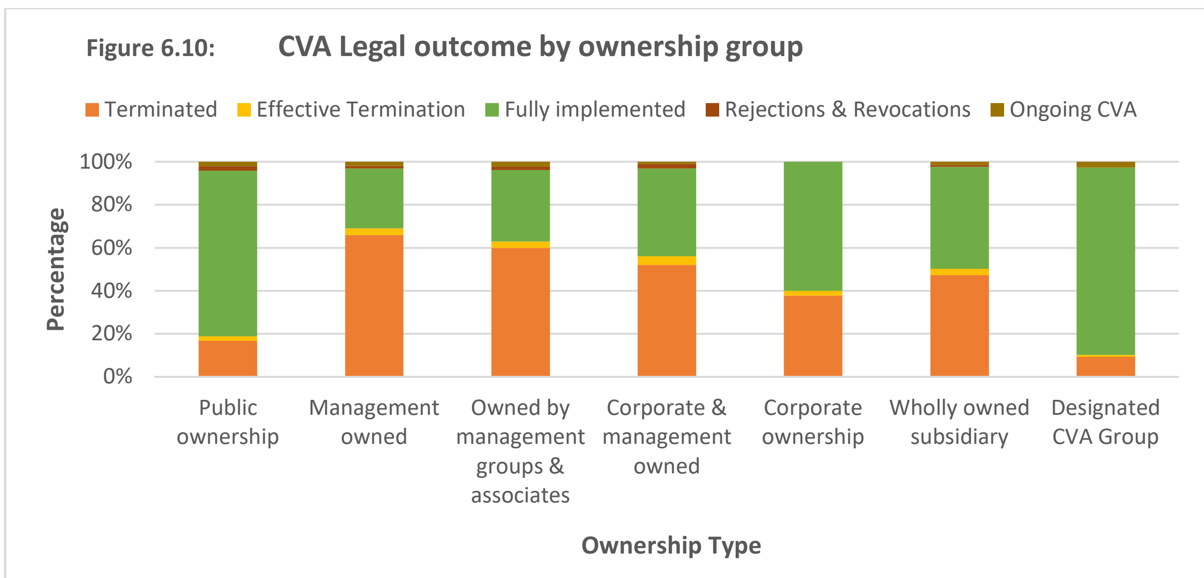
49 The classifications used are: (1) management owned which identifies when the shares are held exclusively with the management team; (2) wider management ownership indicates family and other individuals sharing ownership with the management team; (3) public ownership which for the purposes of the study data identified companies with more than 50 listed shareholders; (4) the mixed ownership of management and other corporates; (5) corporate ownership excluding wholly owned subsidiaries; (6) wholly owned subsidiaries excluding those included as part of a group arrangement.

50 Note that in some cases the annual return was more than a year prior to the CVA approval.



Source: Data table 9.2.3, Appendix C

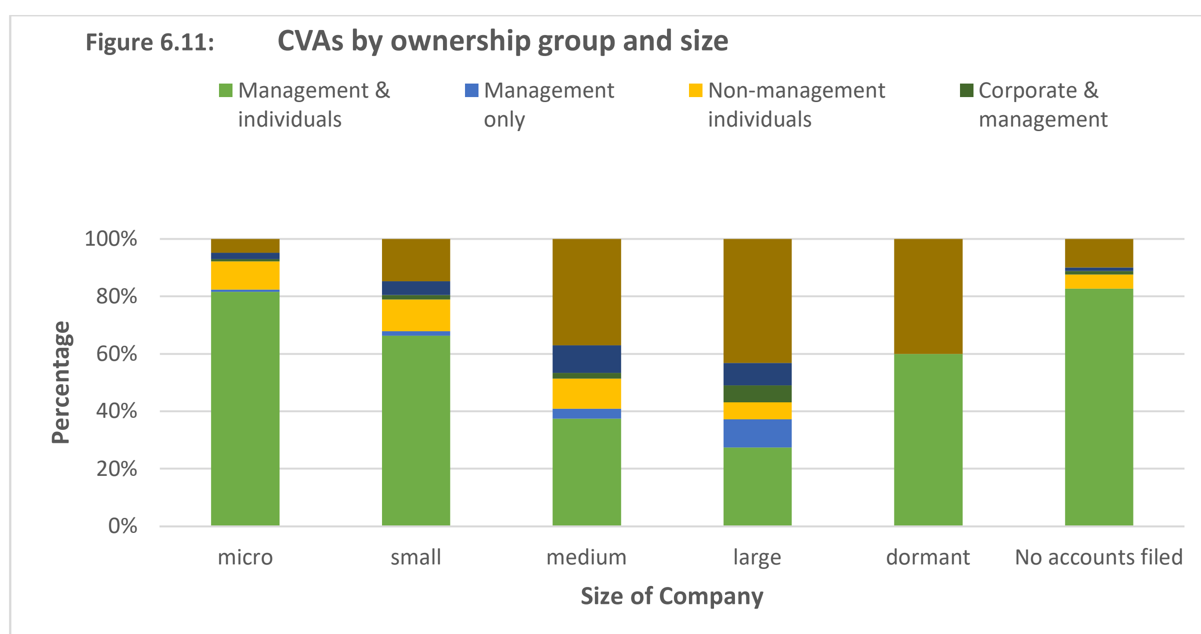
Figure 6.10 shows that the greater the corporate involvement in the ownership of a CVA, the more likely the arrangement is to be fully implemented. The additional level of any corporate involvement in ownership is likely to include a greater level of oversight and control (including accounting expertise), which may explain the higher percentage of fully implemented CVAs.



Source: Data tables 9.2.3 and 4.1.2, Appendix C

In addition, the companies with a wide ownership base, together with the designated CVA groups, are similarly identified as being more likely to be fully implemented. In both cases, the wider the ownership group the better the outcome. The wholly owned subsidiaries group fairs less well in outcome (Figure 6.9) than CVAs with multiple corporate owners.

Figure 6.11 shows the key management groups by percentage of company size. The results indicate a correlation between size and the larger and more complicated management structures.



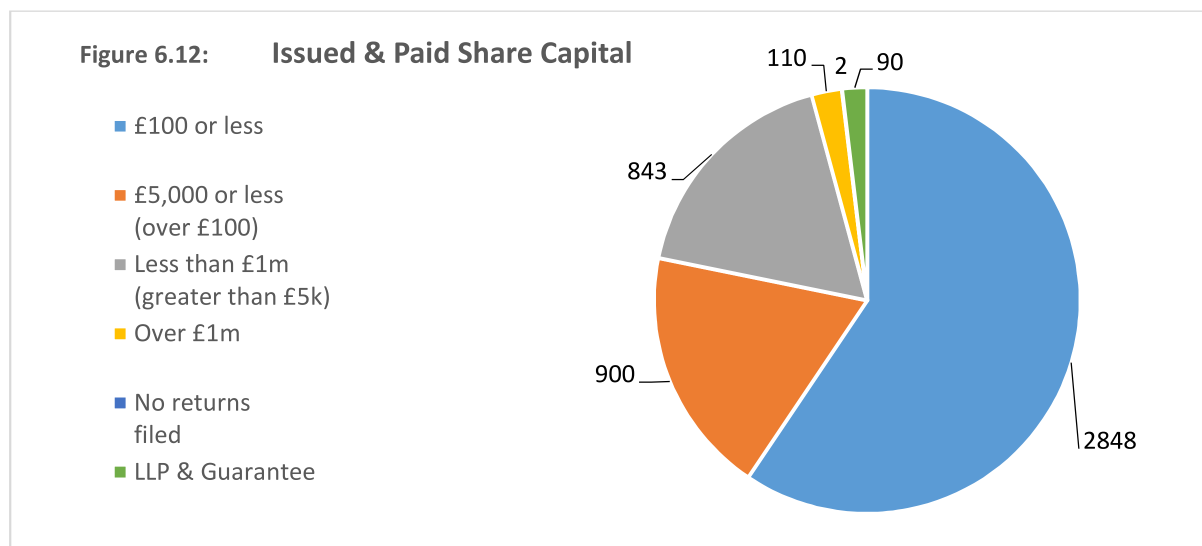
Source: Data table 9.2.3 and 9.3.1, Appendix C

The complexity of management structures logically increases with company size. In many of the latter cases, the corporate owners are also often recorded as active investors in the business; some of which also hold security in combination with their shareholding.[51] The other element of company ownership is the level of share capital provided. Although frequently the share capital is simply a nominal amount required to be paid on incorporation, the total paid up share capital for the CVA population exceeded £3 billion

51 See Data tables 9.2.3 and 9.4.2, Appendix B.

over the study period. The average share capital is over £657,000 per company,[52] and this data was then analysed by company size.[53]

Figure 6.12 shows the split of share capital by size. Just under 60% of the companies had share capital of less than £100, with a further 19% holding capital of between £100 and £5,000; and 18% between £5,000 and £1 million.

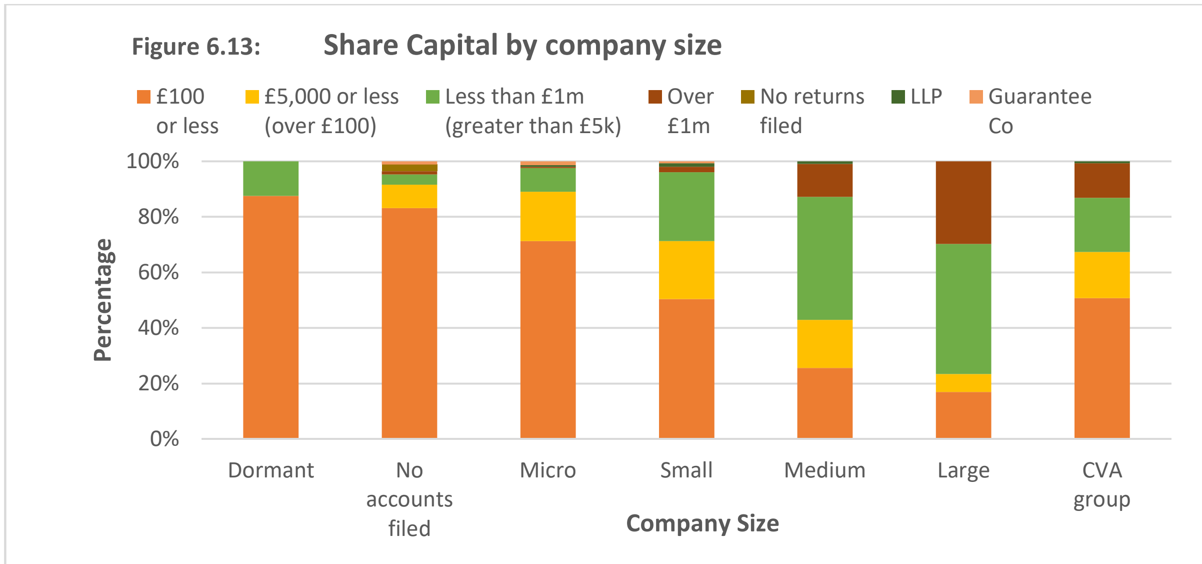


Source: Data table 9.2.2, Appendix C

At the top end, just over 2% had shareholder capital of over £1 million, and reviewing the same data by company size (Figure 6.13) shows an increasing level of share capital as the company size increases, as would be expected.

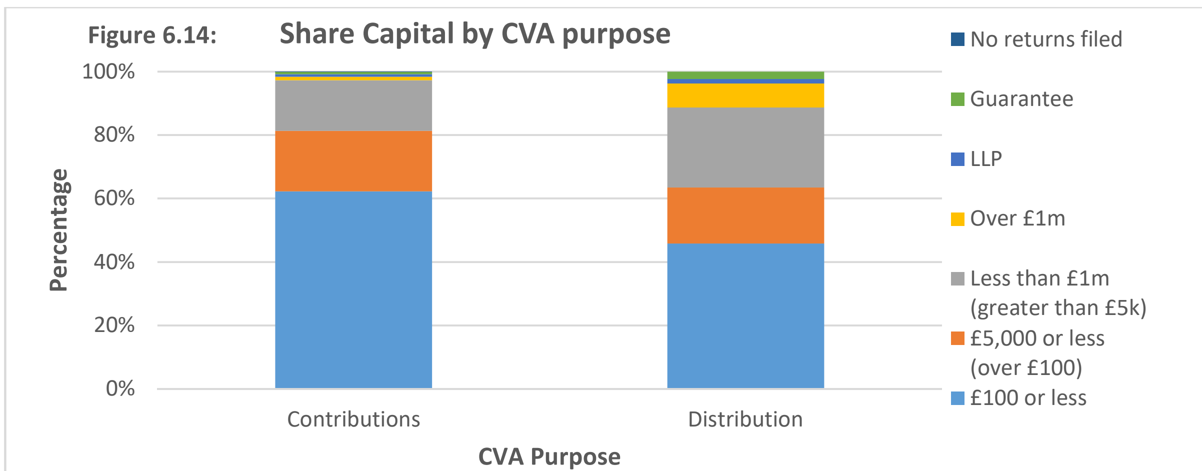
52 Also consider whether trade classification makes any impact on this data for instance the prevalence of football clubs on this data

53 This was the total for 6,218 companies which excluded limited liability partnerships and companies limited by guarantee in the study data.



Source: Data tables 9.2.2 and 9.3.1, Appendix C

Figure 6.14 shows the same share capital data but by CVA purpose, confirming that distribution CVAs have on average a larger capital base that provides increased opportunities to fund a distribution CVA.

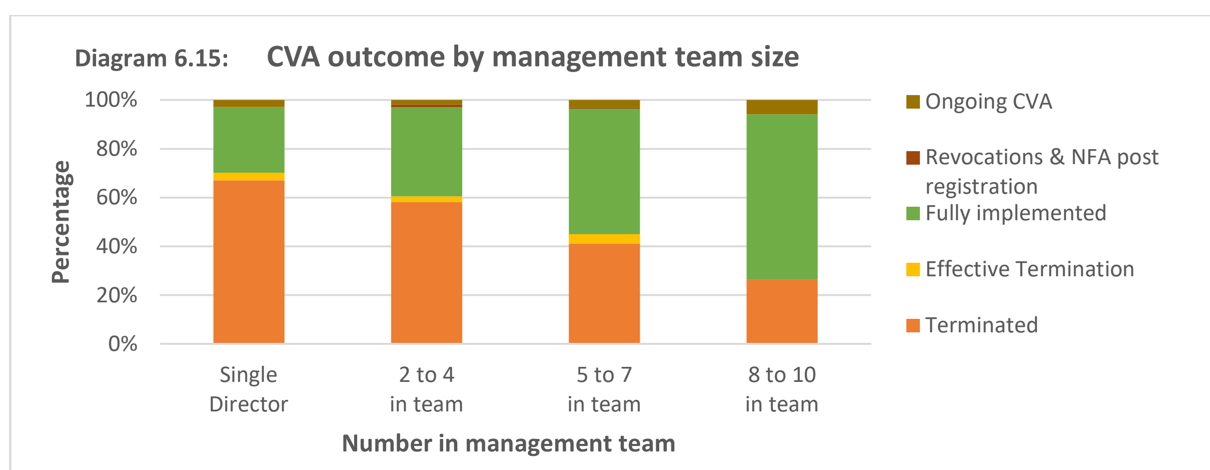


Source: Data tables 9.2.2 and 4.3.1, Appendix C

The combination of data indicates that ownership and share capital are contributory elements in the choices made by a company in respect of the purpose of the CVA. The management team structure also has an important role in the choice of the CVA, as well as the legal outcomes, and the role of the directors is analysed in more detail next.

6.9 The management team

In the previous section the discussion highlighted the impact of having access to reliable funding on both purpose and legal outcome of the CVA. Also, the connection between ownership and management was identified as a common element of micro companies in Figure 6.11. A relationship has also been identified between the accounting functions and the actions of the management team.[54] In the absence of any other qualitative measure of management ability, the number of individuals in the management group was analysed to determine if there was any link between the size of the team[55] and the legal outcomes and other actants. The hypothesis was that a sole director shareholder, would be overburdened when trying to continue to run a business whilst also ensuring the CVA terms were being met. In contrast, larger teams and more complex ownership structures should improve the expected outcome. Figure 6.15 shows the outcome of CVAs by management team size, with single director companies terminating early in more cases than larger management teams thus proving the hypothesis.



Source: Data tables 9.2.1 and 4.1.2, Appendix C

54 For the purpose of this study the management team includes all the registered company officers. The data was taken from the last annual return filed prior to each CVA being approved.

55 Company officers include both directors and company secretary however where the same individual held more than one office they were only included once and corporate officers were excluded from the count.

The termination rates fall by the size of the team, indicating that the better the oversight and control of a business the more likely the CVA will be fully implemented. The data indicates that team support is very important for CVA outcome.

The effectiveness of the management team is also an important element in any request for a variation of the CVA terms. The earlier analysis in Chapter 3 highlighted the potential of the positive impact of variations on the legal outcome. The relationship between the supervisor and the management team is particularly important in contribution CVAs, where the supervisor is required to monitor annual profitability as part of the terms of the arrangement. A good working relationship provides the opportunity for timely intervention when a variation of terms might be appropriate. Further, the supervisor's assistance will usually be required in formulating acceptable terms for the creditors to vote on. Consequently, the next actant to be considered is the use of variations by the management team.

The variation data was collected mainly from the final reports, but often some detective work was required to extract the type of request and the outcome.[56] The variation requests fell into three main categories: (1) full and final early settlements;[57] (2) extensions that allowed more time to meet the terms without materially affecting the final outcome;[58] and (3) variations to other terms in respect of termination events, funding issues and in particular minimum distribution levels where all the other arrangement terms have been complied with.

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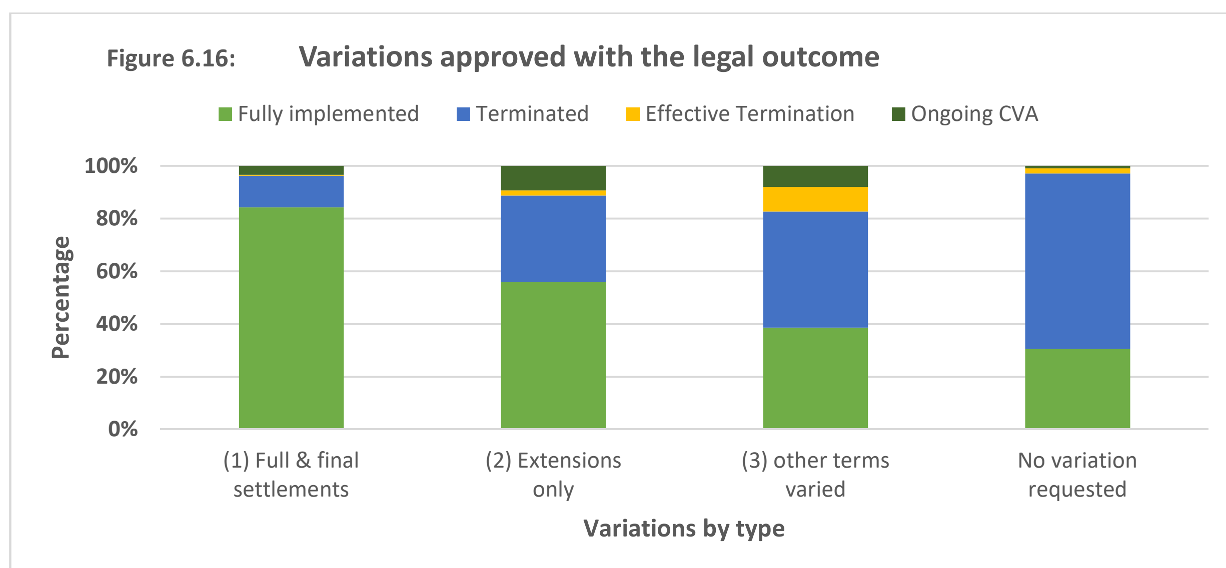
56 Final reports often failed to provide a comprehensive summary of the agreed terms together with the variations. The detail was sometimes only available in the annual reports or not reported in detail.

57 The full and final settlement category includes agreement to new sources of funds or accepting payments already made as being acceptable given the trading status of the business. All of these arrangements included a reduction in the final distribution level.

58 Extensions included payment holidays and similar arrangements without affecting the final distribution levels.

Figure 6.16 shows the use of variation requests and the outcome on each CVA. The most successful type of variation request is clearly the full and final settlement, while extensions and requests for changes to other terms do also marginally improve the CVA outcome. Requests for variations are made in circa 15% of the CVAs each year, with approximately 10% of those being requests for full and final settlements.[59]



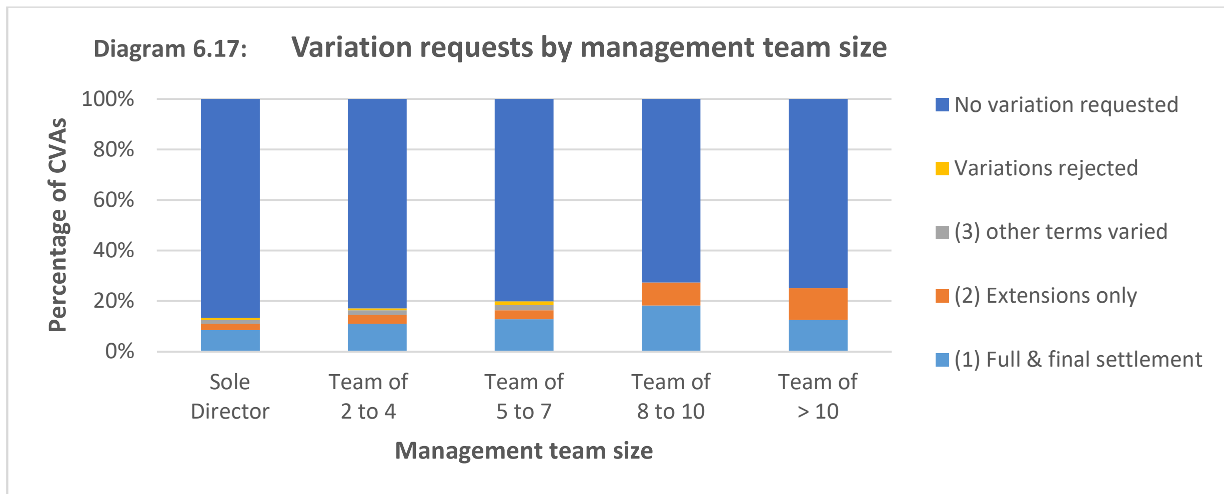
Source: Data tables 4.2.1 and 4.1.2, Appendix C

Figure 6.17 shows a further link to management team size, with variations being used progressively more by larger teams.[60] It should be noted that the use of arrangement extensions also increased at a greater rate among the largest management teams, which

59 The variation data was collected from 4,945 CVAs with the following being reported: 455 approved requests for full and final settlements; 160 requests for extensions; 75 requests for other term changes; and 39 requests which were rejected. The data was fairly consistent across the ten year study period.

60 The link to IP and firm is also interesting. The use across firm size is fairly evenly spread (super-user 30%; frequent-user 28%; occasional-user 41%) apart from single-user firms (1%). However the IP1 use is highest among the occasional-user (73%) which reflects the spread of occasional-users across the different firm types. See Data tables 4.2.2 and 4.2.3, Appendix B.

may confirm that larger teams are more aware of timing issues, without the need to also reduce the distribution level.[61]



Source: Data tables 4.2.1 and 9.2.3, Appendix C

The strategic use of variations to improve CVA outcomes is also a good indication of an effective relationship between the supervisor and the management team.

6.10 The supervisor-company relationship

Further evidence on the supervisor-company relationship[62] was obtained by reviewing the final progress reports of terminated CVAs and the chosen exit routes from the procedure. The final reports summarise the chronology and termination events. In many termination cases, the reports highlight a lack of communication between the company and the supervisor in the closing stages of the CVA.[63] The result of the strained communication leads to separate advice on options being sought by the company from an alternative firm of Insolvency Practitioners (IPs). A change in firm was noted in approximately 40% of the

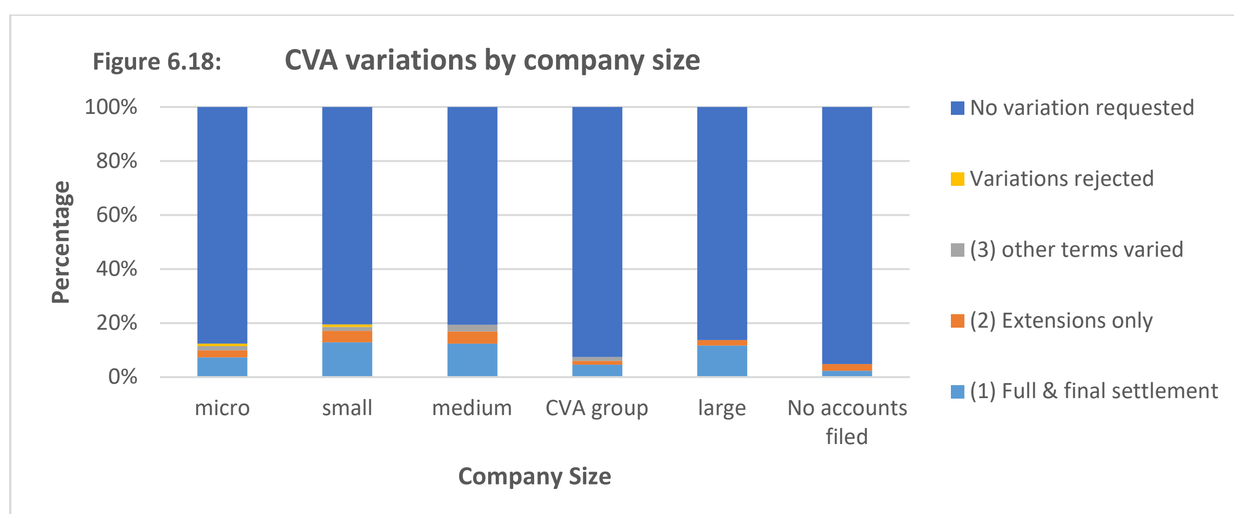
61 Also single event distribution CVAs may also contribute to this finding. For instance where funding is coming from the sale of a property which may be delayed for any number of reasons an extension is an easy solution. This type of explanation was noted when reviewing the reports.

62 The supervisor role is discussed in detail in Chapter 2 and is the office-holder in a CVA.

63 The termination reports frequently state that directors have failed to respond to breach notices with the next contact being from another firm of IPs advising that a liquidation is being commenced.

final reports reviewed for terminated arrangements,[64] and it can be concluded that communication had potentially broken down in those cases.[65] The influence of company size on variation requests was also considered.

Figure 6.18 shows that full and final settlements are most popular with the larger companies. The exception is the group arrangement. Group arrangements are by their nature often more complex and involve distribution CVAs. The distribution CVA is generally of a much shorter duration.[66]



Source: Data tables 4.2.1 and 9.3.1, Appendix C

Consideration also needs to be given to the moral hazard argument, and the motivation of the management team to fulfil their agreed obligations to the creditors. The delivery of the required funding requires motivation which is difficult to quantify, other than by assuming a desire to rescue the company against the eventual outcome. There will always be extenuating circumstances beyond the control of the management team but these can effectively be dealt with by proposing variations to the original terms. Consequentially a

64 See also Figure 6.18 in the Section 6.11 which provides more detail of the change of office-holder by company size.

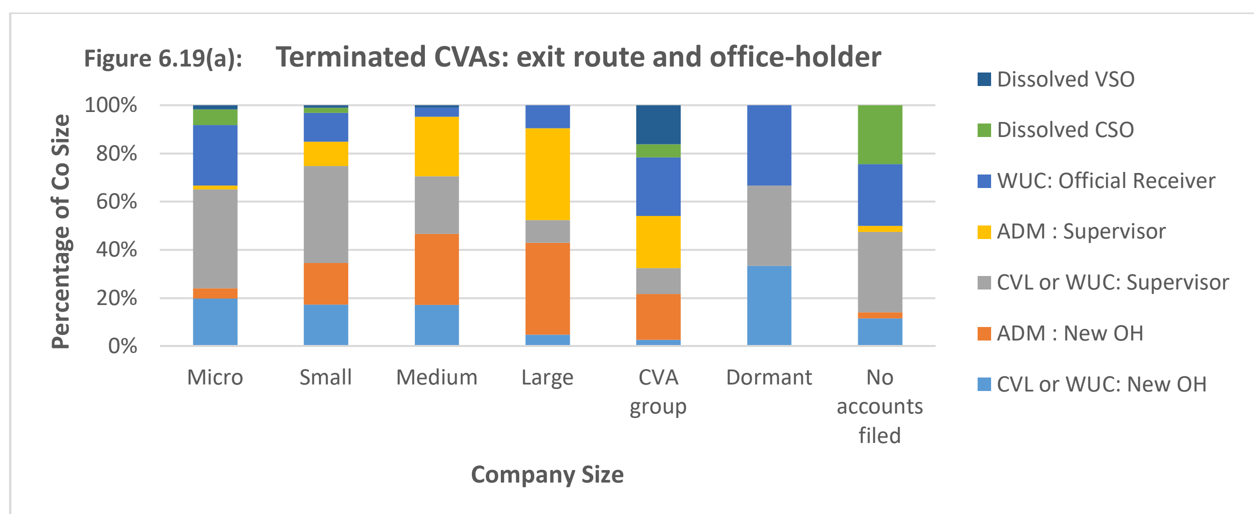
65 ibid

66 See Data tables 4.1.3(a) and (b) for estimated and actual durations, plus 4.1.4 for changes by outcome. Average expected duration was 40 months whereas actual average was 24 months. See Schedule in Appendix C.

review of the exit routes used for terminated CVAs may provide further insight into the issues facing the micro company and their management teams.

6.11 The exit route alternatives

The final question for the micro company is what happens when the CVA is terminated. The micro company has the highest termination rates in the study data. The different options of exit were reviewed to confirm what the most popular choices are, and how these different solutions affect both the business (as opposed to the company) and the return to creditors. A review of the terminated CVA exit routes is summarised in Figure 6.19(a). The figure shows that micro companies are less likely to use a new firm of IPs for any subsequent liquidation, with very few exiting into administration (the yellow stripe across the columns), and that the larger the company, the more likely the management team are to change advisers and go to a new insolvency practice for advice (orange stripe).

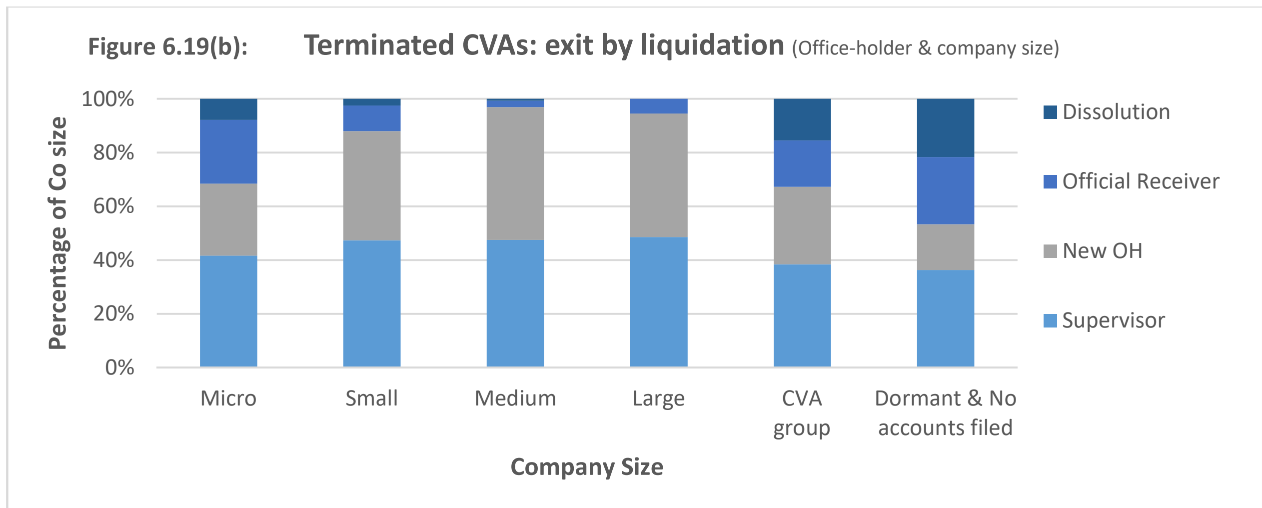


Source: Data tables 9.3.1 and 10.1, Appendix C

The same data has been split between Figures 6.19(b) and 6.19(c). In Figure 6.19(b) the propensity to change office-holder[67] at termination combines the findings from each of the insolvency procedures, showing clearly that small, medium and large companies switch to

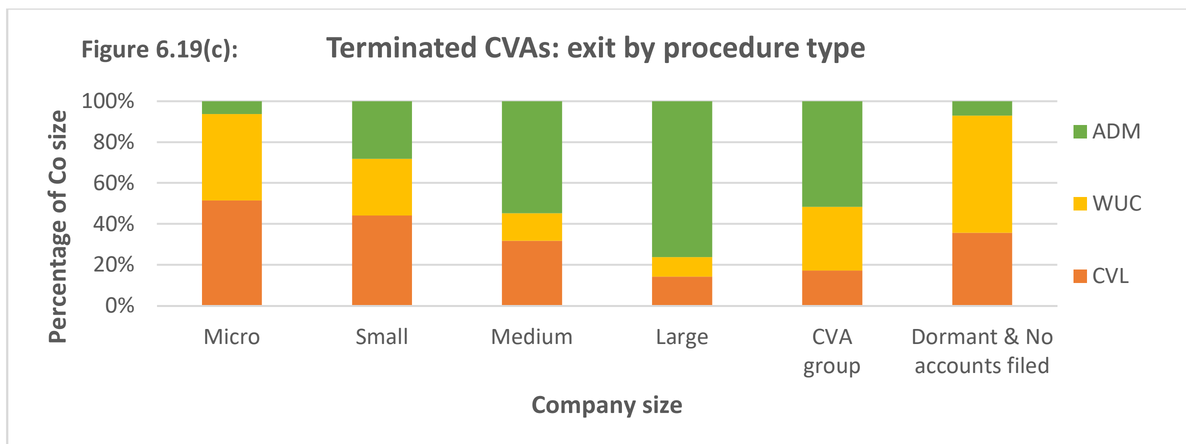
67 The term office-holder is used here to include the move from supervisor to potentially either administrator or liquidator.

new firms of Insolvency Practitioners (IP) more frequently than the micro company. Those companies with no filed accounts are even more likely to stay with the supervisor's firm, with less than 10% moving to another insolvency practice for an exit strategy.



Source: Data table 8.1.2 and 9.3.1, Appendix C

Equally in Figure 6.19(c) the type of procedure used is emphasised by discounting the change of office-holder and looking solely at whether administration or liquidation is the chosen option. Over 80% of terminated micro company CVAs end up in some form of liquidation, with a very small number going into administration.[68]



Source: Data table 7.1.2, 8.1.2 and 9.3.1, Appendix C

68 There were 92 micro company administrations identified of which 24 were instigated by the CVA supervisor and 68 by new office-holders. For small companies the volumes were 125 for the supervisors and 216 for new office-holders.

The use of the administration procedure (ADM) as an exit route increases as the company size increases. The larger the business post-CVA termination, the more likely the company is to have retained sufficient assets to make the use of an ADM as a cost-effective solution for business rescue. The alternative options of liquidation, or a short cut to dissolution by use of one of the strike-off procedures, are used more frequently by the smaller companies.[69] For the larger companies, the split of administrations between the supervisor and new office-holder as administrator is similar. In comparison, the same split for both micro and small companies shows a bias to them remaining with the supervisor in office as the new administrator. The analysis of the various CVA company actants has now come full circle, and the ANT process returns to the original relationship between age and outcomes. A review of the age data, by both company size and management group status, continues the identification of actants that impact disproportionally on the micro company.

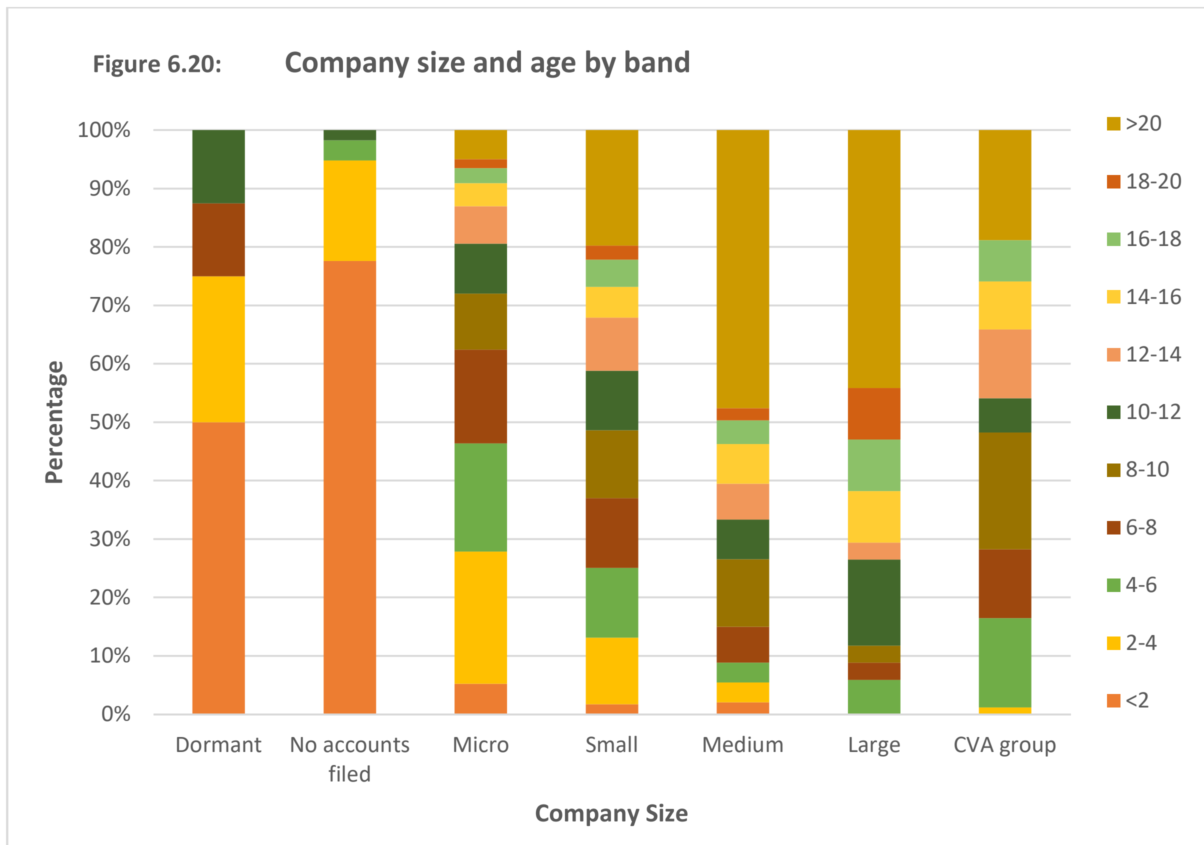
6.12 Comparison of average company age and size

The company age was identified initially as being linked to the outcome of a CVA.[70] This section takes that analysis further, and reviews the age data by company size to identify the relationship with the different sizes. Figure 6.20 shows that over 40% of micro companies in a CVA are less than six years old, and over 70% are less than ten years old, with the average age at CVA approval being just over eleven years. The volume of businesses that are under six years old (includes three stripes: the first light green stripe and the two colours below in Figure 6.20) decrease as a percentage by size from micro to

69 The power to strike-off a non-trading company is set out in s 1000 CA2006 with ss 1001-1010 setting out the requirements for compulsory striking off by the registrar and applications for voluntary strike-off by the company. S 1005 prevents any striking-off action while insolvency proceedings have not concluded however the definition of 'conclusion' refers to no filings within the previous six months. See a later note on the number of companies that are showing in being in insolvency procedures when no documents have been filed for many years. The Secretary of State has powers to fine IPs for the late filing of documents and if used would concentrate minds on ensuring that documents are properly filed. There is little point in having statutory powers if they are not used to enforce the legislation and automatic fines would improve filing compliance.

70 See Chapter 3, Figures 3.13(a) and (b).

large, with the exception of the CVA groups. Each CVA group can often contain a wide age range of companies as the structure has developed.

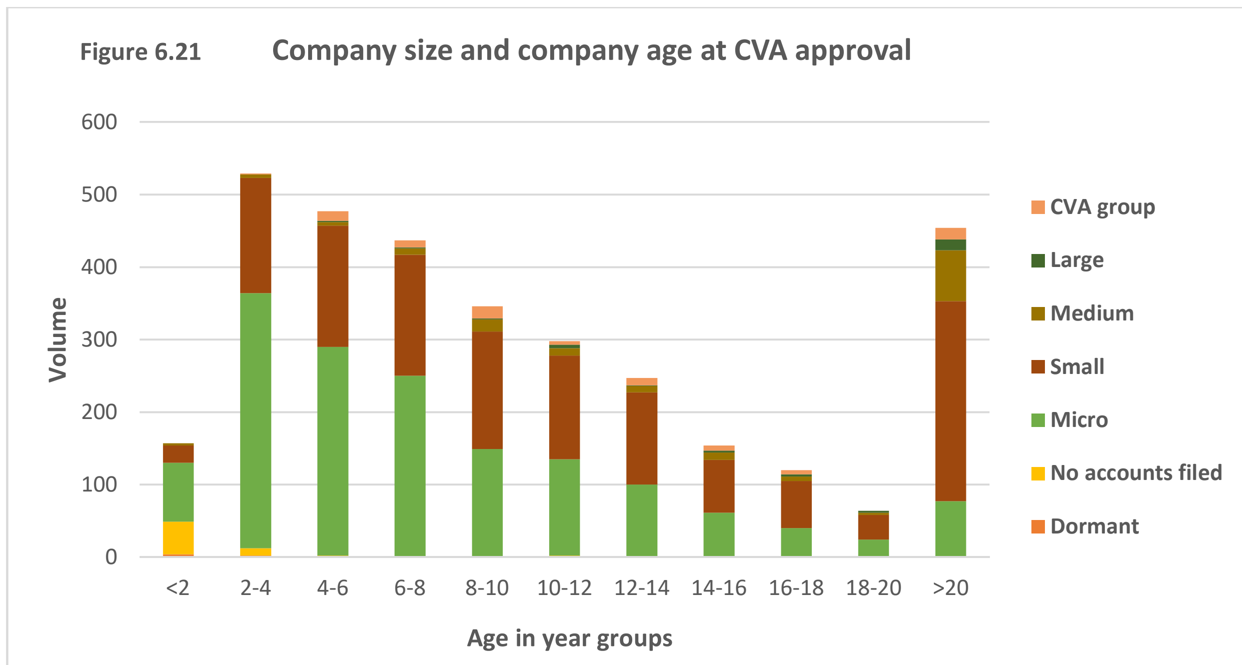


Source: Data table 9.1.1 and 9.3.1, Appendix C

Figure 6.21 shows the same data, but by volume and with age as the key actant. The micro companies reduce in volume as the age increases (the green band). The companies over twenty years old have been included as a single block due to the wide age range at the high end.[71]

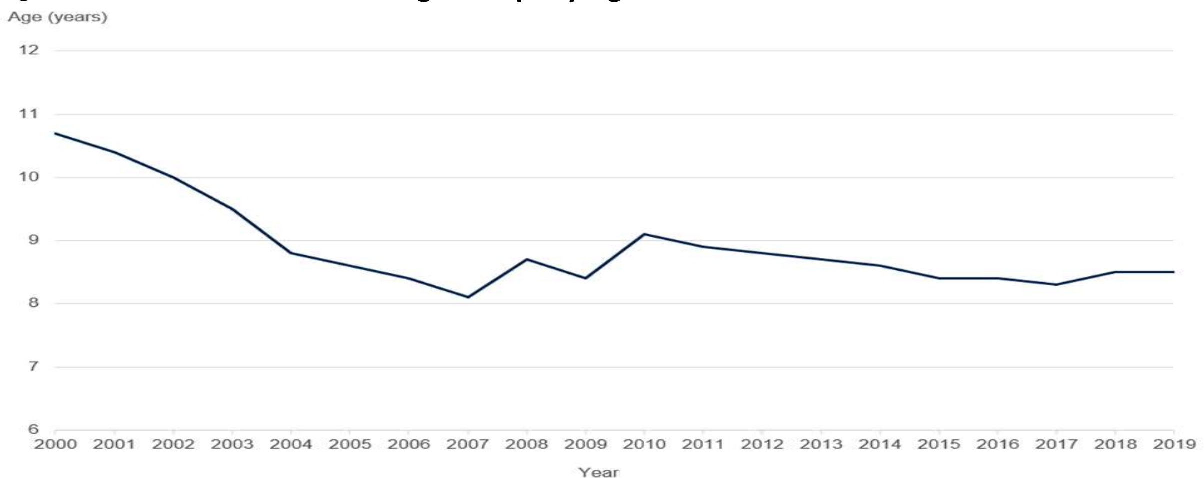
Figure 6.22 shows the average company age of companies in the UK since 2000 from the national statistics.

71 There are 458 CVAs where the company age is over 20 years with the oldest CVA being 136 years old.



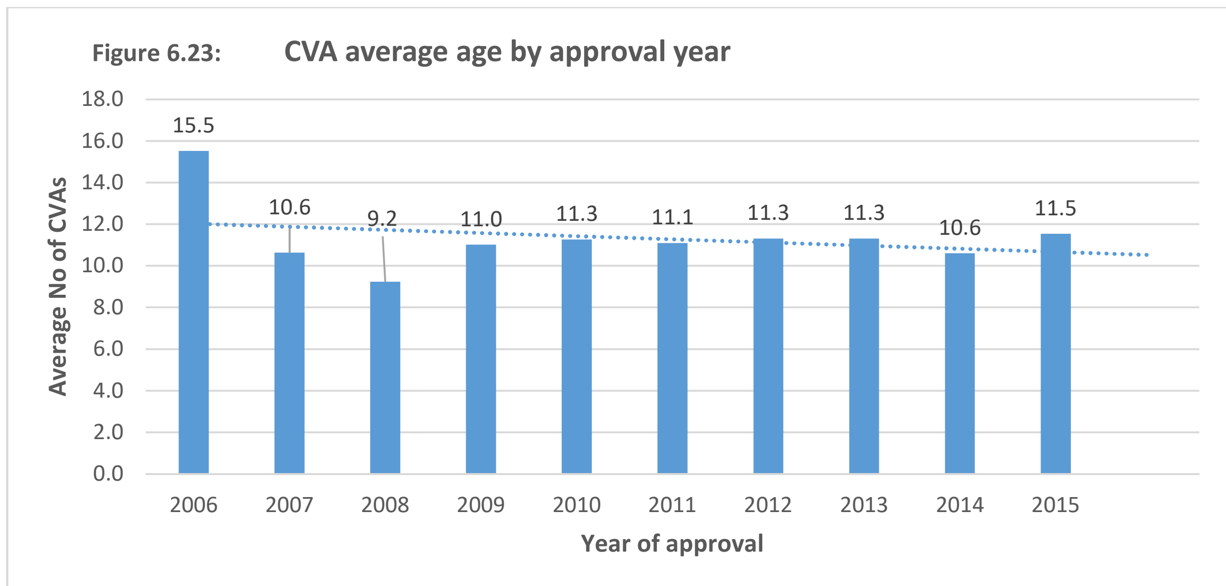
Source: Data table 9.1.1 and 9.3.1, Appendix C

Figure 6.22: **UK Annual Average Company Age 2000 to 2019**



Source: Companies register activities, 2000 to 2019, Companies House.

The company average age is decreasing over time and fell to eight and half years in 2018. A comparison between the CVA company age data and the overall UK company age data highlights the difference. Figure 6.23 shows the annual averages for the CVA, and that average has similarly been on a slow overall downward trend over the study period, from a yearly average of just over fifteen years to just over eleven years, similar to the national downward trend.



Source: Data table 9.1.1, Appendix C

The average age of a CVA company at the time of approval is just over eleven years; higher than the average population age of UK companies.[72] Historically, UK companies generally have a low average age; however the downward trend has increased over the last twenty years due to the volume of new incorporations outstripping the dissolutions. The changes during the study period are partly caused by the inability of CH to keep up with the compulsory strike-off of companies that have failed to file the relevant documents, along with the length of time it takes to resolve insolvency procedures.[73] The increasing volume of new companies works to dilute the average age of the older more established businesses.[74] The expectation would be that the same falling average would be seen in the CVA companies. The difference between the CVA and national averages indicates that fewer companies are using a CVA in the lower age range. There is also evidence that the

72 The average age of the study population is 11.31 years based on 6416 approved CVAs over the study period.

73 See Chapter 7, Section 7.7 *Reducing costs*.

74 It should be noted that during the research a number of companies were identified as being overdue for dissolution in cases where no documents have been filed for a number of years.

younger and smaller companies in financial difficulty are much more likely to choose liquidation than a CVA.[75]

6.13 The actants affecting the micro company

The low percentage use of the CVA by micro companies appears to be the main driver to the overall low usage of the CVA. The ANT analysis has identified a series of actants that disadvantage the micro company in financial difficulty, and the reasons why proportionately they make less use of the CVA than larger companies. The actants identified during the analysis cover a wide range of issues and, when combined, provide a clearer picture of why a micro company is less likely to choose, as well as successfully complete, a CVA.

The actants specifically affecting the micro company can be summarised sequentially. First, by definition, a micro company generally has a small asset base and the asset size results in less complex management teams. The lack of assets result in a reduced capacity to access expensive accounting expertise both on a day-to-day basis, and when needed during financial distress. Secondly, the lack of availability of good financial data and low asset levels limit the availability and opportunities for business funding. These elements combine to restrict the micro company options to the use of a contribution CVA, as opposed to a distribution CVA with a higher success rate. However, the options widen if a director or shareholder can provide personal funds to bail out the business and effectively fund a distribution CVA. The reliability of funding for a CVA directly affects the legal outcomes and, as a result, the options available to a micro company are restricted.

Finally the impact of proportionally higher costs for the smaller companies directly impacts on the outcome if a company is also struggling with profitability. When the majority of contributions are used to pay costs, alongside a potentially struggling relationship with the

75 Note the Federal Mogul group in 2006 may well be skewing the age data for that year. Further analysis is required over a longer period.

CVA supervisor, the appeal of an exit to liquidation increases. This final option is usually taken by the younger companies with little to lose, and bolstered by the potential option of being able to buy back any goodwill and assets from the liquidator. Chapter 3 highlighted the increasing volume of creditor voluntary liquidations (CVL) without providing any explanation or genuine root cause.[76] The ANT review has identified potentially why this option is a more favourable solution for many micro companies, as both a direct alternative to attempting a rescue through a CVA and as the first choice option when in financial distress.

Earlier in Figure 6.19[77] the choice of administration as an exit from a terminated CVA was identified as being more common for the larger companies, and in many cases after new advice has been sought from alternative IPs. In either of these exit scenarios, the downside is the impact on the distribution to unsecured creditors and the reduced chance of any payment being made at all. Most administration proposals fail to include a realistic estimate of the expected distribution levels, resulting in them being approved without any real accountability to the unsecured creditors. As a consequence of the termination of the CVA, the business may be rescued out of insolvency but at the cost of the unsecured creditors foregoing any realistic chance of receiving a distribution. The negative impact of choosing liquidation as an alternative to the CVA at the outset is the same, with the unsecured creditors similarly bearing the cost. Chapter 3 demonstrated that average distribution levels to creditors in CVAs are generally considerably higher than in other insolvency procedures, especially liquidation, and even some terminated CVAs pay reasonable distributions.[78]

The disadvantages described above are clearly a good reason why a CVA is often not the recommended option for a micro business in financial difficulty. For the company, the

76 See Chapter 3, Figure 3.3 which shows the increase in use of the CVL.

77 n 26.

78 Distributions were paid in 3,107 CVAs of which only 2001 were fully implemented.

alternatives offer a better outcome for the directors and employees at the expense of the unsecured creditors. Further, the issue of the lack of available funds to pay for the financial expertise required to prepare a CVA proposal will limit their options. For micro companies, the easier option of a CVL is a more cost effective solution, with the added benefit for the management team and any connected parties of being able to buy back the business assets. The moral hazard question was discussed earlier in relation to the management team's incentive to comply with the agreed CVA terms. The same issue arises when returning to the original choice of using a CVA. The available alternatives may disadvantage the creditors but save the business or the management team's livelihood. Retaining a business, albeit in another form, becomes a more attractive option effectively saving the business and potentially employment at the expense of the creditors.

6.14 The company networks and CVA usage

The purpose of this chapter was to identify the company actants that form networks which, when combined, can be identified as affecting the choice of the CVA. The analysis of the company elements and the networks they form has revealed a number of key areas that specifically disadvantage the micro company, resulting in lower than expected use of the CVA. The key elements for potential success for a CVA appear to be not only age and company size, but also the make-up of the management team and their relationship with the supervisor. The importance of the latter two is crucial in providing the support and communication required to promote a variation to the proposal terms, which in turn increases the chances of a fully implemented arrangement. In the case of terminated CVAs, the same elements influence the exit route and potential outcome for a second attempt at rescue by saving at least some element of the business.[79] The next chapter sets out a range of recommendations that could assist in the rescue of many businesses, whether affected by the exit from the EU or the impact of the Covid19 pandemic. In

79 See Chapter 3, Figure 3.2. CVA Rescue Hierarchy,

particular, the impact on the micro company has been identified as a key area where an increasing use of the CVA could be encouraged.

Chapter 7

Recalibrating the Company Voluntary Arrangement

7.1 The issues identified from the research data

This chapter draws together the issues identified as affecting the use of the CVA, and explains the rationale behind recommendations to improve the use and efficiency of the procedure. The use and outcome data in Chapter 3 revealed that, although the CVA volume is falling numerically, it is increasing as a percentage of the rescue market, while also increasingly resulting in more fully implemented arrangements. Despite these improvements, Chapters 4 to 6 identified a series of potential causes for the continued low level of CVA usage. These include IP bias, along with financial and structural issues that hinder the use of the CVA by smaller businesses, particularly micro undertakings.[1]

The causes and solutions discussed in this chapter are two pronged: (1) improving the professional training for Insolvency Practitioners (IP) on the use of the CVA,[2] and (2) increasing the use of the procedure by micro businesses[3] by facilitating better support from creditors. The latter includes a number of complementary areas that affect creditor engagement, covering the method and level of communication.[4] Creditor communication

1 A micro undertaking is currently defined under s 384A CA2006. The micro undertaking must comply with two of the three limits: (1) turnover must not be more than £632,000; (2) gross assets on the balance sheets must not be more than £316,000; and (3) the number of employees must not be more than 10. The term undertaking is defined in s 1161 CA2006. For the purposes of the Companies Act provisions the definition of undertaking includes all entities registered at CH including: limited liability companies, unlimited companies, companies limited by guarantee and limited liability partnerships.

2 See Chapter 4, Section 4.6 *Lock-in for other insolvency procedures*.

3 See Chapter 6, Sections 6.13 *The actants affecting the micro company* and 6.14 *The company networks and CVA usage*.

4 See Chapter 5, Section 5.8 *Creditor control of the use of the CVA*.

includes improving both the clarity and timeliness of creditor reporting,[5] which encompasses the contents of the various documents as well as the timeliness of their filing with the registrar at Companies House (CH).[6] The overall effect of the suggested improvements to creditor engagement should result in a more efficient procedure, as well as potentially increased returns to creditors via reduced costs. Increasing creditor participation is accomplished by improving the trust between IPs and creditors, through demonstrating office-holder control and clarity of actions during each CVA.

7.2 Increasing the use of the CVA

Chapter 4 analysed use of the CVA by Insolvency Practitioners (IPs), identifying potential unconscious bias and the influence that training could have on increasing the use of the CVA. In addition, Chapter 6 identified a number of structural issues that disadvantage micro companies in distress, which result in the relatively low percentage of micro CVAs even though micro companies form over 80% of UK companies.[7] The structural issues for micro companies include the initial costs and a lack of the accounting expertise needed to produce the relevant financial data for a draft CVA proposal. The potential bias of the IP, as well as the company directors, may result in the CVA option being discounted in early discussions, with preference given to a liquidation that allows the directors to buy back the key assets and continue trading in an alternative form. A combined effort is required to improve IP training, alongside the introduction of a simplified CVA protocol specifically

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5 See Chapter 3, Sections 3.10 on Creditor trust and the Insolvency Practitioner, and 3.11 on Costs and distributions and n 98 January 2020, R3, London. Full research article available online at: https:/onlinelibrary.wiley.com/doi/abs/10.1111/1911-2846.12577.

6 See Introduction *Background and Methodology*, Section 11 which explains the differences between CVA approval and registration dates at Companies House.

7 See Chapter 6, Section 6.4 *Company size and related elements* and in particular Figure 6.2, a comparison between business volumes by size and CVA volumes by size, also n 22.

designed for micro undertakings that would encourage use of a simple and cheap rescue option.[8]

It is clear from the data that more CVA experience is required by IPs in order to encourage them to pursue it as a realistic option.[9] One route could be via licensing, for example altering licence requirements to include minimum insolvency hours by work type, to ensure IPs get a wider base of experience before they are issued with an appointment taking license.[10] Such a requirement would ensure all IPs have a cross section of relevant experience, rather than a narrow focus on administration or liquidation in the corporate market sector.[11] Further, a mandatory comparison with the CVA should be required alongside liquidation when considering the purpose and outcome for each administration proposal. This would be particularly important for all designated small or micro businesses, and so the business size should be an additional disclosure requirement. However, the main recommendation in this section is the creation of a micro CVA protocol (Micro Protocol), designed to improve use of the voluntary arrangement for micro undertakings.

Figure 7.1 shows the combined data on usage by company size and IP firm experience. The low volume of micro company CVAs across all types of IP firms confirms that this is a profession wide issue, but that super-user firms could make the largest impact in terms of volume.[12]

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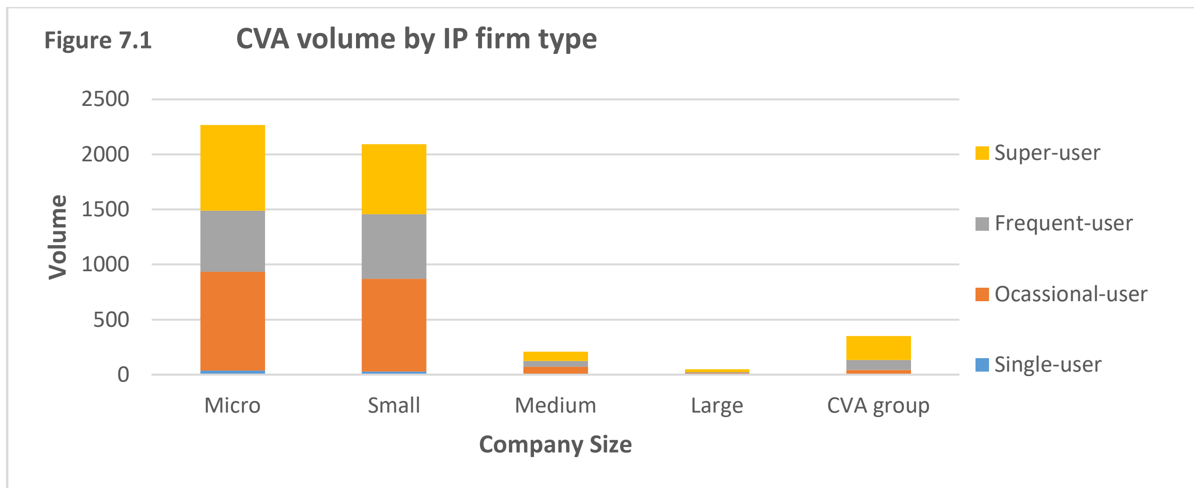
8 It should be noted that the original aim for the CVA set out in the Cork Report was as a cheap alternative of a Scheme for small businesses. See Introduction *Background and Methodology*, n 2 and Chapter 1, n 34.

9 See Chapter 4, Section 4.3 *The background and experience of IPs and their firms.*

10 See The Insolvency Practitioners Regulations 2005, Part 2 Authorisation of Insolvency Practitioners by Competent Authorities. Paragraphs 7 and 8 set out the educational and experience requirements while paragraph 9 sets out the requirement to retain a record of continuing professional development activities. Ensuring a wider range of experience could be accomplished by trainees having short periods of secondments with CVA super-user firms subsidised within the training contract requirements.

11 It is recognised that there are some practical difficulties in this suggestion but as with other types of regulation requiring specific experience this could be overcome by some firms offering secondments during the training periods which would also share best practise.

12 n 9, Figure 4.1.



Source: Data tables 1.2.2 and 9.3.1, Appendix C

The suggested format for the Micro Protocol is based on the IVA protocol[13] agreement, but with some additional alterations to recognise that its use is restricted to micro undertakings. The following is a brief explanation of the suggested process based on the study data analysis alongside the summary included in Figure 7.2:

The Micro Protocol would commence with a combined 'micro' interim moratorium that would be implemented automatically on the request of the directors. The appointed nominee would be required to file a simple statement confirming that (a) the company is a micro undertaking, together with (b) the director's sworn statement of affairs[14] (SoA). The latter providing the evidence of insolvency including the level and type of creditor involvement. Both documents would simply be filed with the registrar of companies, as well as the nominee appointment being gazetted to alert creditors to the appointment. There would also be a requirement to file a declaration in court to provide notice that any ongoing legal action should be stayed, and that new actions should not be commenced during the moratorium period. The filing would give the nominee 28 days to agree the final proposal terms with the directors, as opposed to the current process where directors are formally responsible for the proposal being drafted. Unlike a normal CVA, the nominee will

13 See the Insolvency Service IVA protocol documents which are available at https://www.gov.uk/government/publications/individual-voluntary-arrangement-iva-protocol

14 See r 1.5 IR86 for the contents of the Statement of Affairs and Appendix C for comparative rules.

not be required to comment on the efficacy and fairness of the proposal to the court. This is because the protocol compliant format must be used and confirmed by the nominee only alongside the confirmation that the business is a micro undertaking.[15] The proposal must then be circulated and approved by creditors as normal, within the twenty-eight day moratorium deadline, but using a streamlined approval process.

All associated and connected parties must be separately identified on the SoA. The normal rules on requisite majorities would continue to apply, but with the formal agreement from HMRC that they will automatically support every micro protocol proposal[16] submitted, as long as the standard conditions for micro undertakings are used and the main terms fall within the agreed protocol limits.[17] This is particularly important in the light of the move of some HMRC debt to secondary preferential status from 1 December 2020. To simplify the payment terms, the Micro Protocol must be designated as having either a contribution or distribution purpose.[18] The level of contributions required must represent a minimum of at least 1.5 times the available assets in the event of a liquidation, per the statement of affairs amounts. The total minimum contribution level based on asset values should be calculated before costs, and the fees and costs separately estimated for comparison purposes in the proposal. The duration of the arrangement will depend on the ability of the business to make the agreed contributions and in addition reimburse the nominee and supervisor costs, which for the Micro Protocol must be either a set fee or based on a percentage of realisations and distributions made in each period. However the duration should be kept as short as possible. The contributions and duration should be separately identified in the terms, and agreed by the creditors as separate resolutions. The terms can also include an extended period during which no contributions will be required, subject to

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15 See the definition of a micro business in the glossary of terms.

16 This is particularly important as HMRC PAYE debts become preferential from 1 December 2020 effectively taking the lion's share of any realisations before the non-preferential creditors get paid.

17 Currently HMRC are rejecting circa 40% of draft proposals and given their change in status from 1 December 2020 they will become the majority recipient of distributions in the majority of CVAs. See Chapter 5, Section 5.4 *HMRC voting patterns*.

18 See Chapter 3 for a detailed description of a contribution and distribution CVA.

supervisor agreement, with the exact terms being based on a business plan prepared with the assistance of the nominee and maintained during any subsequent annual reviews. Annual accounts should continue to be prepared and filed as required.

As regards costs, all the approved expenses must be paid, in addition to the agreed contributions for distribution. Any unpaid costs should not reduce the amounts to be distributed on completion or termination. All expenses incurred must be reported annually and be in accordance with the proposed terms. Any additional expenses or increase in amounts must be separately approved on an annual basis or on termination. The costs must also include any other direct costs incurred, which must also be specified and included within the agreed terms.[19] The key variables must be clearly stated in a summary of terms and confirmed to be within the Micro Protocol agreement by the nominee. Similarly for a distribution[20] CVA, the same basic principles should apply with details of the person or organisation funding the arrangement and the source of the funds being provided.[21] The distribution level must again be clearly stated in the proposal summary, and filed with the registrar on approval by the appointed supervisor.

The proposed procedure provides additional transparency as currently only approvals are filed with the registrar.[22] In addition, any changes in creditors or their claims from the SoA filed at the outset must be reported and details of those updates filed with the registrar annually, alongside any distributions made. The level and amount of each distribution

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19 See Section 7.7 on reducing costs. Costs may also include items such as the specific penalty bond, gazette and other items where these are billed direct to the insolvent estate. The status of direct cost billing for effectively overhead expenses has been the subject of an unresolved review process by the professional bodies for many years.

20 n 18.

21 For example if the business is being sold the terms of the sale and a full disclosure of any relationships should be provided in line with SIP 13 on connected party sales and in a similar manner to the SIP 16 requirements for the administration prepack sale of business.

22 The new CH Form CVA1 is an improvement to Form 1.1 but could usefully require a summary of the terms to be attached together with the voting schedule.

should be clearly reported within or attached to each receipts and payments account in accordance with SIP 7.

A list of creditors' approved claims and distributions paid must also be filed with the final report and completion statement for transparency. Termination events and completion dates are likely to continue to be different, and the supervisor should continue to inform creditors as soon as a termination event has occurred. This is in contrast to the actual completion, which is signalled by the final report.[23] The final report should disclose the total distribution of all the funds received. The SoA must also identify all associated and connected party creditors from the outset and, where these are excluded from any final distribution, must be clearly identified as such in the lists provided. In addition, the status of any creditors excluded from the arrangement must be stated and confirmation provided on their ongoing status. The reference to status will identify if they are to remain creditors of the company or whether the debt is intended to be written off in part or its entirety under the CVA.

The approval process under the Micro Protocol should be streamlined and take into account the privacy wishes of each creditor voting, to comply with the general data protection act principles on contact.[24] This has been considered a grey area until now, and should be clarified to avoid overzealous management teams from crossing the line into potential harassment when campaigning for support. The approval process should consist of a single online electronic vote, with the same requisite majority as required for all CVAs including the non-associated creditors test for rejection levels.[25] Creditors should be allowed to

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23 There is a separate requirement to provide a formal completion statement, which must be filed in court and with the registrar, identifying the termination events. This is often confused with the final report and both are filed together which results in either the certificate being late or the final report being filed before final distributions have been made.

24 See specifically the Data Protection Act 2018 in respect of rights for individuals and the restrictions on office-holders (r 4.150 for liquidations) from soliciting for some types of appointment which will result in a financial benefit for the IP. See also Chapter 2, Section 2.3 on the ethical considerations that apply to accepting an insolvency appointment.

25 The approval process for a CVA was detailed in Chapter 2, Sections 2.2 and 2.4.2.

change their votes up to the end of the decision day regardless of the voting process. This allows the opportunity to change their vote in the event new information or a clarification of terms is provided. At the same time the creditors should be able to indicate if they want to allow contact by other creditors or the company. Online voting data should remain confidential to the nominee, and not be shared with any other parties unless agreement of the creditor has been given. There would be no opportunity for modifications to the main terms at this stage (excluding a change of supervisor), as any modifications of the terms must be agreed with any major creditors during the pre-approval moratorium period. The reporting of the voting process would be simplified and include details of the actual votes together with a copy of the summary terms. Creditors would also be encouraged to report any unwanted contact or offer of inducements to change their votes. Both documents must be filed indicating the outcome clearly, both in terms of the approval of the proposal, the appointment of the supervisor(s) and the approval of the fees and costs that can be charged. Each resolution being separately documented and filed.

Any outstanding director's loans should be taken into account in the summary of terms document, together with details of the director's remuneration. To restrict abuse, once used the Micro Protocol should not be used again within two years of a similar arrangement being approved. Rather than trying to propose a new arrangement in the case of unforeseen circumstances, such as ill health, then a variation of the terms can be requested using the same voting process. However, the terms must remain within the Micro Protocol agreement. Termination events must be simply stated and ranked in priority, thereby avoiding the current problem of contradictory terms being agreed. However, as currently, new debt should not be allowed to accumulate to pay off the old debt, especially in contribution arrangements, and the annual review should confirm the continuing solvency status of the business. Diagram 7.2 summarises the suggested new process described above.

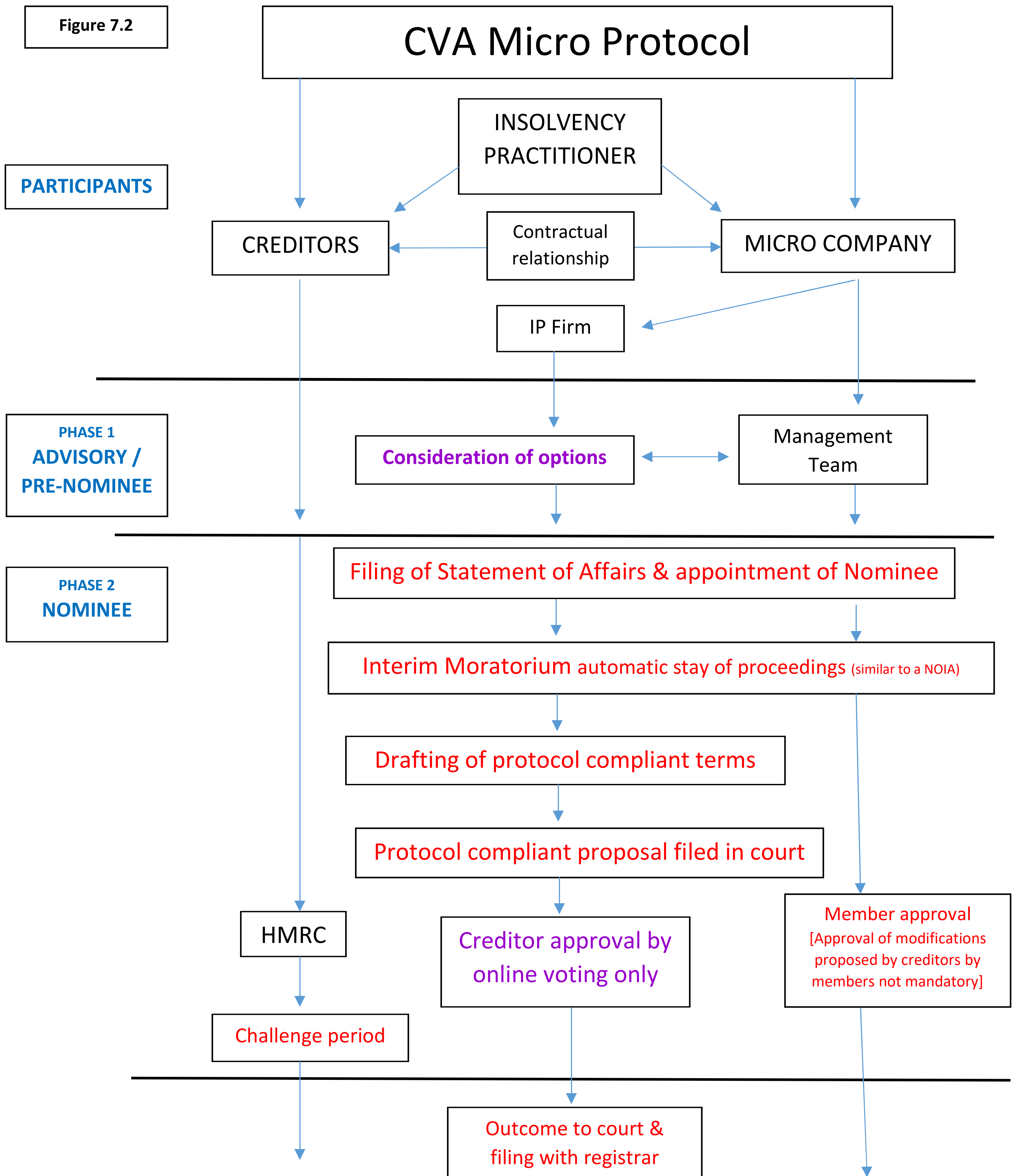
Figure 7.2
CVA Micro Protocol
PARTICIPANTS
INSOLVENCY PRACTITIONER
CREDITORS
Contractual relationship
MICRO COMPANY
IP Firm
PHASE 1
ADVISORY / PRE-NOMINEE
Consideration of options
Management Team
PHASE 2
NOMINEE
Filing of Statement of Affairs & appointment of Nominee
Interim Moratorium automatic stay of proceedings (similar to a NOIA)
Drafting of protocol compliant terms
Protocol compliant proposal filed in court
HMRC
Creditor approval by online voting only
Member approval
[Approval of modifications proposed by creditors by members not mandatory]
Challenge period
Outcome to court & filing with registrar

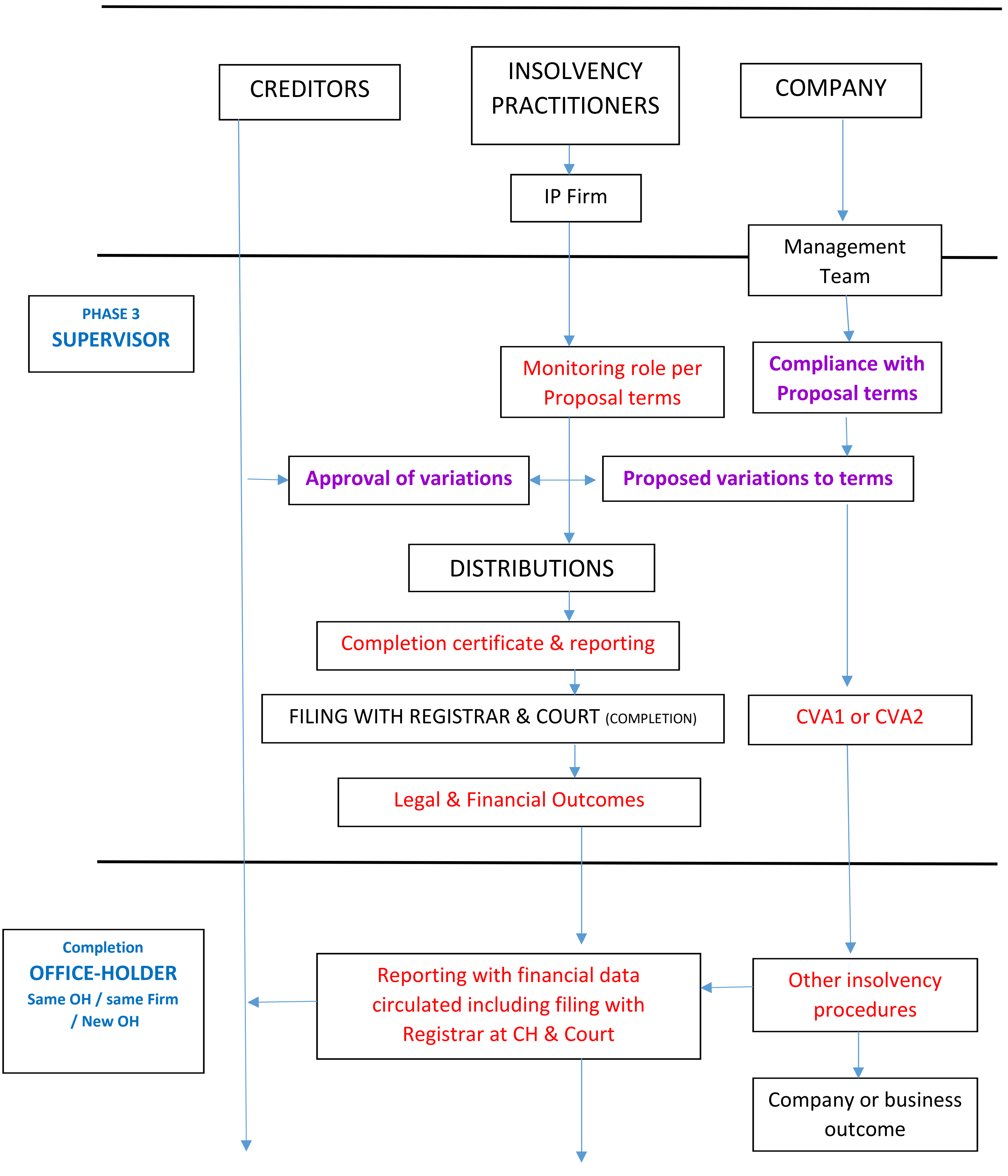
Figure 7.2 continued
CVA Micro Protocol
CREDITORS
INSOLVENCY PRACTITIONERS
COMPANY
IP Firm
Management Team
PHASE 3
SUPERVISOR
Monitoring role per Proposal terms
Compliance with Proposal terms
Approval of variations
Proposed variations to terms
DISTRIBUTIONS
Completion certificate & reporting
FILING WITH REGISTRAR & COURT (COMPLETION)
CVA1 or CVA2
Legal & Financial Outcomes
Completion
OFFICE-HOLDER
Same OH / same Firm / New OH
Reporting with financial data circulated including filing with Registrar at CH & Court
Other insolvency procedures
Company or business outcome

The Micro Protocol suggested here should be differentiated from the suggested SME Covid-19 CVA protocol,[26] which has been proposed as a short-term solution for the potential economic impact of the current pandemic. The Covid-19 version fails to target the right size of business.[27] A solution based on size is more likely to stand the test of time once the Covid-19 pandemic has run its course. The Micro Protocol is designed to level the playing field specifically and permanently,[28] and make a long-term structural change to the CVA market by increasing the use of the procedure by the smallest businesses. Micro undertakings make up over 80% of the businesses in the UK,[29] whereas they represent just under half the population of the CVA market in the study data.[30] The frequent-user and super-user IP firms are relatively small in number, and they should be encouraged to be involved in the suggested recommendation to increase the volume of micro company CVAs.[31] Equally, those IP firms that similarly specialise in liquidations and administrations should also be approached to increase their experience of the CVA procedure and add it to their options toolkit.

The Micro Protocol will provide additional clarity on the level of CVAs being rejected,[32] and ensure that there is transparency for creditor voting. The next section discusses the

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26 See K&L Gates article *COVID-19: UK Insolvency Reform - Standardising Company Voluntary Arrangement Proposals*, Lexology, published 3 November 2020. Also see the R3 standard terms for Covid-19 CVAs published in October 2020. The article is available at https://www.lexology.com/library/detail.aspx?g=0f52fa11-6017-46fa-8e74-72584e764e6a&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body++General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2020-11-05&utm_term=

27 The proposed protocol does not differentiate by business size nor does address the other structural issues such as costs.

28 A micro undertaking is currently defined under s 384A CA2006. The undertaking must comply with two of the three limits: (1) turnover must not be more than £632,000; (2) gross assets on the balance sheets must not be more than £316,000; and (3) the number of employees must not be more than 10.

29 See Chapter 6, n 22 and n 23 for the business population data.

30 See Chapter 6, *The Company*, Section 6.1, Figure 6.1. Micro companies make up just under 45% in the study data whereas they represent double that in the relevant business population estimates.

31 See Chapter 4 for a detailed explanation of the analysis by 'super-user' and 'frequent-user' IP firms.

32 Rejected CVAs will require a separate and additional CH cover sheet for the statistical data to be monitored.

current reporting requirements and how this will assist with creditor participation. Further, there is a discussion on how the CVA procedure interacts with the filing of annual accounts. There is clearly a need to agree how the status of an ongoing CVA should be reflected in the company's annual accounts, especially for micro undertakings who frequently lack in-house accounting expertise.

7.3 Improving creditor participation and streamlining communication

A key recommendation in all of the World Bank DBRs[33] is to increase creditor participation. The creditor reporting process forms a major part of the costs incurred by office-holders, across all types of insolvency procedures and especially in the CVA. The reporting format across all insolvency procedures focusses heavily on multiple compliance issues, as opposed to clarity of information. However, some IP firms have produced simplified formats ensuring the key data is easily located, with the narrative content being reduced and focused on explaining changes or areas where the terms have not been fully met. This approach provides a basis for a new standardised report format that could be easily recognised as an approved template.[34] This suggestion could be tested easily on the Micro Protocol CVA using the super-user firms to promote the change, with potentially a subsequent rollout across all the other type of insolvency procedures to effect more substantial cost savings.

To increase creditor participation generally, reporting to creditors needs to be more concise and provide more clarity on intended actions and outcomes. There is a general failure to recognise that creditors need simple communication and not voluminous repetition of the legislation in every document. The current method of reporting may allow regulators to

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33 See Chapter 1 and the World Bank Doing Business Report recommendations specifically in 2004, 2007, 2015 and 2016.

34 The proposed changes to the reporting format should be negotiated by agreement with the RPBs, so that any standard documents used have been subject to review by a single agreed committee, and the templates hosted and distributed to all IPs in a timely manner. Any legislative changes or SIP requirement updates should be made centrally and provided free online.

monitor compliance against legislative requirements, but provides little clarity for the average creditor who just wants to know how much they can expect, when and whether there is any change in strategy or expected outcome to be reported. In some respects secured creditors are better served by IP reporting when they receive special attention. However all documents issued to creditors should be shorter, not written using legal and often confusing terminology,[35] but rather in an agreed standard format using plain English. Any variations from the standard versions should be justified, and any extra cost incurred explained, justified and separately approved. The insolvency profession has used the argument of competitive advantage and also technical compliance for retaining their individual reporting styles, but this process effectively throws the burden of that cost onto the creditors. In many cases, the complicated format of the documents become virtually unreadable from the CH scanned versions due to font size and other formatting issues.[36]

As part of the overall reporting requirement, the office-holder's receipts and payments accounts are a separate but important element and require full compliance with SIP 7. The study data raised some concerns over general compliance, with information specifically required to be stated on the face of the receipts and payments account being relegated to the body of the attached report, or an appendix, if included at all.[37] SIP 7 contains very prescriptive guidance on the required format and content of every receipts and payments account filed. It was noted that in many cases the standard required by the guidance had not been fully met. The missing data included missing comparative periods and estimated outcomes, as well as failing to correctly account for VAT. Further, in cases where secured assets were included in the arrangement, the split between fixed and floating charge realisations and costs where often not displayed in a transparent way.[38] The latter is particularly important when calculating the prescribed part and allocating funds for the

35 The confusing terminology frequently employs double negatives

36 In particular reports written in PowerPoint with coloured and very small font sizes impair readability. The plain English guide to fonts should form a basis for the standard reporting.

37 See Chapter 2, Section 2.2 on SIPs.

38 ibid

payment of preferential creditors. There has been extensive research into this problem. The findings from that project[39] confirmed the same issues identified in the study data. As a result, the real financial position for creditors was often not easily visible in the receipts and payments account. In addition, the failure to routinely report all expenses incurred (paid or accrued) in the relevant period denied creditors the opportunity to challenge those costs in a timely manner. As a result, the majority of expenses suddenly appear in the final period, meaning a disproportionate level of costs being charged. In particular cases where additional expenses were incurred over and above the original estimates, the delay in reporting usually resulted in lower distributions than originally estimated without any real explanation of the causes.

Creditor participation could also be improved by simplifying the voting process, and ensuring that clearer information is provided on what it is they are being asked to decide between. In most cases, large documents are provided with multiple instructions scattered throughout the text. Anecdotally it is accepted that most creditors rarely get beyond page one before looking for further help or guidance on the process and how they should vote. Creditors are unlikely to have the in-house expertise, time or resources to engage closely with the process, and so should not be expected to read pages of data to find the key issues on which they are being asked to make a decision, or to identify issues which they can challenge. Clearer communication would avoid the implication that any unpleasant truths are being concealed amongst pages of dense data. The required documentation should also be presented in separate and brief sections, each providing clarity on the issues being explained, with clear statements of intended actions rather than multiple choice options being stated for approval. Any change in strategy should be simply communicated with a brief explanation at the relevant time, while also allowing for deemed approval if a new decision is required and there is a lack of response from the creditors.

39 See Chapter 3, Section 3.10 on Costs and distributions. See also n 98 articles.

A further recommendation is that all the standard regulatory notices, such as compliance with ethical guidance, sources of documents and similar guidance required under the statements of insolvency practice, should all be located on a single website that is freely available. A single body or committee should take responsibility for keeping all those documents and their contents up to date. Creditors will then become familiar with a single platform to find the relevant guidance and any more detailed explanations of procedures or processes when required. Some of the available alternative options for a single platform are the Insolvency Service on the .gov.uk platform, the Gazette, Companies House, or R3. All of these organisations, including the separate RPBs for England and Wales, Scotland and Northern Ireland, should cooperate and agree between them the best location for standard guidance, and assist by ensuring they direct any creditor or other queries to the relevant platform. This type of solution has worked well with the insolvency complaints procedure and the complaints gateway.[40] With mandatory requirements in other industries, such as the requirement to provide an annual energy statement to consumers, a similar process has been used to ensure that everyone involved receives a statement containing the same information in the same format.

The creditor voting process also requires streamlining, with the mandatory use of online facilities to be used by all IPs. The postal delays and additional cost involved in dealing with paper ballots discourages creditor participation in the digital age. Creditor requests for paper submissions should be limited to individuals who can justify the need for a paper alternative due to lack of internet access.[41] The number of creditors without internet access is already close to zero, and there should be a recognition of this new status quo and a move to get all IPs using a single online voting process.

40 The Complaints Gateway is available at https://www.gov.uk/complain-about-insolvency-practitioner.

41 For example online or email requests being made for paper documents should not be accepted whereas a telephone request confirming no internet access is available is acceptable as an alternative

7.4 Effective disclosure and simplification of enforcement

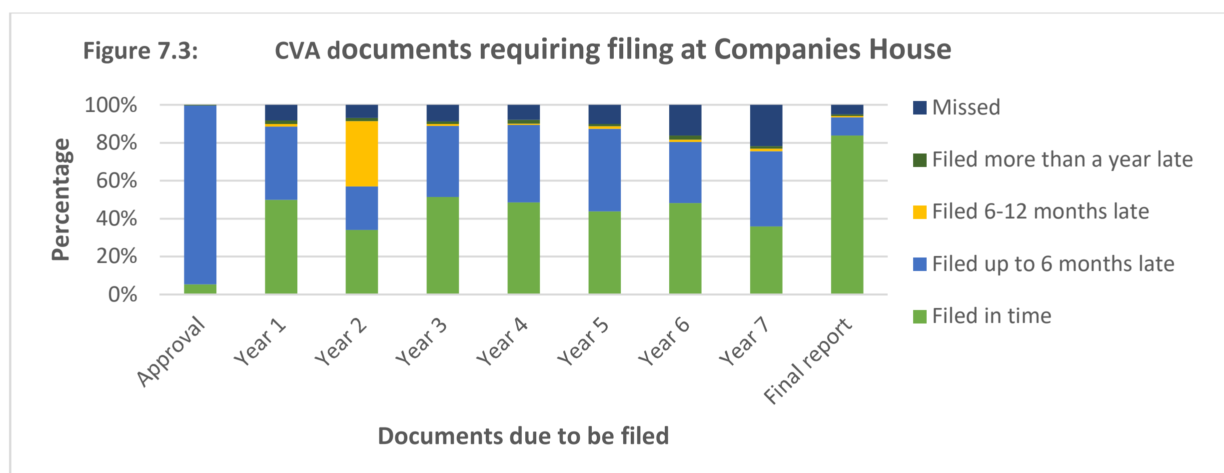
Alongside direct creditor reporting is the requirement to gazette some insolvency appointments and creditor distributions. In addition, key documents are required to be filed with the registrar at Companies House (CH), and with the relevant court to inform any ongoing or newly commenced enforcement processes. Currently there is no consistency or overview of the effectiveness of these separate notification processes for the CVA. An example from this study is the Small Company Moratorium (SCM) gazette requirement.[42] The gazette notices were checked by collating the data from the gazette with the record of the notice filed at CH, which should also have been listed as the appointment of the nominee under the insolvency section. The data from both sources were compared and discrepancies highlighted for a second review of documents filed. In some cases the documents filed at CH were incorrectly referenced and not recorded as a nominee appointment, and similarly some appointments were not gazetted. The study data represents the full use of the SCM rather than the smaller numbers originally recorded from the separate sources.[43]

The problem of late filing and missing documents was initially discussed in Chapter 3, together with the impact it was having on the publication and updating of the national statistics by the Insolvency Service. The result of the late filing of approvals required continual updates to the statistics, which resulted in the basis for the published statistics being changed to the registration date rather than the approval date (thereby avoiding the need for ongoing corrections for late registrations). The data used in this study is based on the approval date, to ensure that identification of the use of a CVA is linked to the correct time period; in one case a CVA was identified as being registered 11 years late. Unfortunately, the late filing issue does not end with the approval documents, but also

42 See Schedule A1, para 10(1)(a) IA86 for commencement and para 11(1)(a) for the ending of a moratorium.

43 See Chapter 4, Section 4.7, Figure 4.4.

includes annual progress reports, as well as final reports and completion statements. Figure 7.3 shows a summary of the high volume of late and missed filing during the study period, with timely filing being completed on average in less than 50% of cases.



Source: Data tables 3.1.2 (Form 1.3 by volume), 4.4.1 (Form 1.4 by volume) and 4.4.2, Appendix C

As a result, late and missed filing can be described as endemic across the CVA procedure, due to the lack of any enforcement or penalty process. The consequence is that any creditor who may have been missed in the circulation of the documents has a reduced chance of finding the correct details from a Companies House or Gazette search. In particular, identifying when and the amount of any distribution being made is potentially a key issue for creditors.

Distribution issues were discussed in Chapter 3, and nearly £27 million of retained funds[44] were identified across the study period as not being distributed or accounted for in the CVA final reports and completion statements.[45] The alternative option of filing additional returns after the completion certificate was also not used in these cases. Every insolvent estate account should confirm a zero balance on the reconciled bank account as confirmation of closure, and to allow them to report their release as an office-holder.[46] The

44 See Data table 5.4.1.

45 The total includes over 1300 CVAs. See Data tables 5.4(a) and (b) for analysis by value and volume.

46 See Chapter 3, Section 3.10, *Costs and Distributions,* Figure 3.16. Rule 4.21A IR86 allowed outstanding CVA fees to be a first charge in any subsequent liquidation and this was repealed during the 2016 rules update. This change appears to have recognised the impact of trust clauses and without the flow of assets allowing

majority of these surplus funds were held subject to a trust clause[47] included in the CVA terms and conditions. The intention of the trust clause being to restrict any subsequent office-holder from requesting the surplus funds and using them for costs or expenses of any subsequent procedure. Some CVA terms and conditions require a separate ring-fenced fund to be retained to commence liquidation proceedings, and this fund should also be separately identified at the outset and not used for other purposes such as office-holder fees without additional approval.

In addition, it is also unclear if some cases that appear to have been terminated have ever had their completion statement filed in court. To file for release a supervisor is required to file a completion statement and a final report, including a receipts and payments account, with the court. In both cases the documents must subsequently be filed with the registrar at Companies House.[48] An office-holder can only report their release from liability under their bonding arrangements when they have filed their final returns, confirming that no further funds are held and all assets included in the estate have been accounted for. In some cases supervisors have simply stated that the funds are held on trust and no further reporting is required. In the absence of any final report or completion statement, the bond insurers may still be liable in a large number of cases where the final distribution documents have not been properly filed and creditor distributions not accounted for formally.

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outstanding fees to remain as a first charge was not equitable. No explanation was provided by the Insolvency Service for the repeal but it was acknowledged retrospectively as intentional.

47 See Chapter 5 n 89 for an explanation of HMRC standard modifications. They include both a trust clause and the requirement to maintain a small fund to cover the cost of a winding-up petition.

48 See rule 2.44 IR2016 and equivalents in appendix B. Note that rule 2.44 needs to be amended to recognise the practical issues over making and finalising final distributions within 28 days of either a termination event or full completion. Practically supervisors either delay the filing of both documents thus exceeding the 28 day requirement or they file them prior to the final distributions being paid.

7.5 The legal consequences of late filing

In summary, there are three distinct legal issues caused by the late or missed filing of documents. The first consequence was the national statistics move to reporting registration data, as a direct result of the unreliable filing record of the chairman's report for approved arrangements;[49] the second is the inability of creditors to check and source details of any distributions paid post completion; and thirdly the office-holder's legal ability to secure and report their release from liability.[50]

Currently Schedule 10 of the IA86, relating to finable offences for an IP, only includes material irregularity for the CVA procedure, whereas all other insolvency procedures impose penalties for the late filing of documents. As a result, it is not surprising that late filing and missing or unreadable documents are a common occurrence across the CVA procedure. To address this the CVA filing requirements could be added to the Schedule 10 IA86 offences, especially in relation to the proposed micro protocol or an alternative enforcement regime proposed. Any related filing penalties could be delegated to Companies House for collection from IPs personally, and used to fund the setting up of an automatic enforcement process for all insolvency filings.[51] Most other insolvency late filing penalties are similarly not routinely imposed by any of the regulators, as enforcement under the IA86 requires a request to the Secretary of State to instigate a criminal action in a magistrates' court. There seems little point of having enforcement penalties for late filing in the legislation when the barrier to action is so high that they are never used, while the regulators only impose fines as part of a formal complaint or serious regulatory breach. The regulatory control over filing penalties should be reviewed to improve compliance and

49 See the data tables in Appendix B.

50 The liability issue relates to the mandatory requirement for office-holders to hold a general enabling bond and specific penalty cover for each separate insolvent estate.

51 The role of Companies House is under review with the recommendation that the registrar moves from being a document depository to having a more active role in identification and compliance. Ref Consultation document

transparency. The filing penalty requirements for the CVA should include approval, annual progress reports, completion statements and final receipts and payments. In addition, where final reports show surplus funds being retained at completion to be used for a later distribution, unreported remuneration or other costs, closure should not be registered. The latter is particularly important for transparency of payments, and to allow creditors the opportunity to challenge the level of costs, especially where these have exceeded the estimates and the arrangement has terminated early.[52]

The filing of all insolvency documents at CH should be moved to a streamlined electronic process, which would also speed up registration and publication times and ensure that documents could not be filed with missing data. The result of missing data such as a signature requires a return of the paper document, incurring further delays before final registration with public access to the document being affected. Further, many documents are filed without the relevant attachments, and these are not being returned for inclusion resulting in missing data across the study data. In addition, where documents require an initial filing in court, the confirmation certificate from the court (now e-filing certificates) should also be filed at CH to confirm the court filing date in the event of any subsequent challenge.[53]

A review of the current filing process could include a CH dashboard for each licensed IP, indicating due and late filing of documents across all of their appointments, to highlight any issues at an early stage. It was noted that a number of ongoing CVAs had not had any documents filed for several years,[54] and there were also instances where the completion statements were not filed while strike-off action had resulted in dissolution.[55]

52 See Chapter 3, Figure 3.16 *Allocation of CVA realisations [£millions].*

53 Previously the sealed copy of the document would have been the version filed at CH but invariably the original version is now used in most cases.

54 Over 300 CVAs appeared to be completed without the final report being filed.

55 See Data tables 4.4.1 and 4.4.2 re missing final reports and completion statements.

7.6 Clarity of disclosure in the statutory accounts

The lack of post CVA financial accounts being filed during the study period also highlighted that there is no formal guidance on how a CVA's terms and payments should be reported in the statutory accounts, where the company continues to trade. There are two key issues: the first is the identification of the assets included or excluded in the arrangement, and the second is accounting for the payments made from company funds. Where all the assets have been excluded from the arrangement the pre CVA creditors effectively become a contingent liability for the duration of the arrangement, with the type of completion determining how the creditors should finally be accounted for. The recommendation from the study data is simple. Creditors included in the arrangement should be re-designated as contingent CVA creditors on the balance sheet, and all payments made from the company into the CVA should be posted as potential payments to those creditors within the relevant period. Any fees and other costs made from those payments to the Supervisor should be accounted and adjusted for as CVA expenses and made either from the creditor's fund or separate amounts, depending on the agreed terms. Further work needs to be completed in order to get agreement on how that advice should be published to accountants, and what disclosure is required for the purpose of calculating any tax due during any CVA trading period.

7.7 Reducing costs in insolvency procedures

The main cost in the majority of CVAs is the office-holder remuneration as nominee and supervisor. There are three basic principles that apply to office-holder remuneration: the amounts charged must be fair and reasonable;[56] the information provided to creditors must be sufficient for them to make an informed decision on any request concerning basis

56 See SIP 9, version 7, para 3, effective from 1 December 2015.

or quantum;[57] and lastly that the information provided must be clear and transparent.[58] In particular, and there is an inherent mistrust by creditors of the use of the time cost basis. The courts in particular consider that time charged needs to be properly evidenced (not just recorded on a timesheet), and be fair and reasonable for the work done.[59] In court applications for fee approval, the level of time charged is invariably reduced by up to 40%, and is judged on the value provided being fair and reasonable rather than the hours reportedly spent completing the work.[60] Therefore it is unsurprising that non-preferential unsecured creditors feel aggrieved by office-holders recovering their time costs in full, especially when this results in insufficient funds being available for distribution. Given advances in technology, where office-holders are using a time cost basis, key stroke technology should be mandatory, thus avoiding the need to rely on individuals accurately completing time sheets.[61]

The second issue on calculating time cost-based remuneration relates to the hourly rates used. These often increase annually, and are no longer linked to the actual cost incurred of employing an individual but rather the perceived market rate for the relevant grade of staff. Creditors currently have little or no power to challenge those rates at the outset, with only the secured creditors having sufficient control over the costs to drive down the band levels by use of overall blended rates. The solution here is twofold. The first is preventing the use of unapproved annual increases, especially when specific rates have been used in an estimate at the outset but then later increased. The second is the use of

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57 Ibid, para 4.

58 Ibid, para 5.

59 The Insolvency Practitioners Regulations 2005, Regulation 16(2)(b) specifically requires all time to be recorded by any person assisting with the office-holder functions regardless of the basis agreed for the calculation of the remuneration.

60 See the Cabletel judgment at para 93 “I must bear in mind the words of Ferris J that the role of the court is to assess value and not cost.”

61 The use of current technology would provide more accurate data on exactly which documents have been worked on and by whom, highlighting repetitive amendments and review processes while still allowing a judgement call to be made on a fair value being charged. See the Cabletel judgment at para Ref Cabletel commentary on repetition of actions

the blended rate. To some extent this is already being implemented in fee estimates at activity level, and it is suggested for clarity that a single blended rate should be agreed for each insolvency at the outset. The agreed rates would then remain in place for the duration unless the office-holder can make a case for an increase.[62] In both cases, the estimated quantum cannot be exceeded without new approval from the creditors.

Another of the World Bank DBRs key recommendations was the reduction of costs to facilitate resolving insolvency procedures.[63] The costs in insolvent estates have been a contentious issue within the insolvency profession in the UK for many years.[64] In the words of Gabriel Moss QC "the great recession of 1989-1992 propelled many insolvency practitioners further into the media spotlight and brought them and their fees under close analysis".[65] Prior to the IA86, remuneration of an office-holder in any formal insolvency procedure was calculated by a range of percentages linked to both realisations and distribution levels, with the general opinion being "that *they* [receivers and liquidators] are an unnecessary evil put in for the sole purpose of earning a decent living for themselves".[66] The basis of fee charging changed with the introduction of IA86. A wider range of options was introduced including time costs and this was further extended in 2010 with the specific inclusion of set fees.[67] Unfortunately the initial introduction of time costs came without any separate accountability to control the quantum of the final amount

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62 For instance due to a material change in circumstances resulting in an increased involvement of higher grade staff.

63 See Chapter 1 and the World Bank Doing Business Report recommendations specifically in 2004, 2007, 2015 and 2016

64 See The Association of Chartered Certified Accountants (2001) *Burying the billable hour,* The Certified Accountants Educational Trust (CAET 2001) published July 2001 ISBN 1 85908 353 6.

65 Taken from a lecture given by Gabriel Moss QC of 3-4 South Square, Gray's Inn, London, before an audience of insolvency professionals and guests at The Old Hall, Lincoln's Inn, London, on 3 March 2005.

66 The quotation is from Sir Kenneth Cork in 1982 and included in the preface to the first edition of Lightman & Moss on the Law of Receivers of Companies in 1986, Preface page ix.

67 The available bases included time costs or percentage in IR86 with set fees being added as a separate basis by the 2010 amendment rules.

taken, other than by legal challenge.[68] This was corrected by the 2010 amendments[69] which introduced the concept of both fee and cost estimates. The fee approval process required estimates to be provided with the additional proviso that any increases required separate approval. In the case of set fees, the initial approval requires the office-holder to justify the level of the amount being requested as being fair, reasonable, and proportionate. In contrast an estimate using time costs simply requires a narrative of the expected work involved, and how that action benefits the insolvent estate.

The most popular basis for remuneration across the majority of insolvency procedures prior to the 2010 rule change was time costs. In 2010 the amendment rules[70] introduced the 'set' fee as a separate basis,[71] recognising that for many small insolvent estates (and solvent estates) this was the most cost effective way of approving and charging the office-holder's remuneration.[72] It also introduced new rules setting out a more structured process. The process required fees accrued on a time cost basis to be reported in each period (whether paid or not), and the amounts reported made subject to challenge by interested parties during the 8 week period following the publication and circulation[73] of the progress report for that period.[74] Prior to the 2010 change a time cost resolution at the outset of a procedure effectively allowed an office-holder to pay all the costs reported

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68 Note that insolvency office-holders have the power to pay themselves from estate funds in accordance with the required approval.

69 Insolvency (Amendment) Rules 2010 …..

70 Insolvency Amendment Rules 2010, SI

71 Set fees were introduced by the Insolvency (Amendment) Rules 2010 SI 2010/686. The term 'set fee' is used instead of a 'fixed fee' to avoid confusion with the process of determining the basis sometimes referred to as fixing the level of remuneration rather than approval.

72 See also Tribe, J. P. (2003). *The remuneration of office holders in corporate insolvency - liquidators, administrators and administrative receivers: part 1*. The Insolvency Lawyer, 3, 101-117.; also Office of Fair Trading (2010) *Corporate insolvency: in-depth interviews with creditors: a report for the OFT prepared by Marketing Sciences* and the follow up report by Elaine Kempson (2013) *Review of Officeholders Fees – Report to the Insolvency Service*.

73 The specific requirement for each progress report to include a Schedule of expenses (paid or accrued) for each period to be approved or challenged was introduced by the Insolvency Amendment Rules 2010.

74 See Sue Morgan (2016) *Insolvency Officeholder Remuneration: The practical aspects of fee approval, challenges and reviews*, Insolvency Intelligence, 29, Insolvency Intelligence 87.

against that estate with no further approval being required.[75] However, this guidance did not directly apply to voluntary arrangements, as the nominee and supervisor remuneration is included as part of the proposal terms rather than as a separate resolution of the creditors.[76] The result was effectively a statutory vacuum in respect of CVA fees, other than the guidance included in the various versions of SIP 3. Several of the RPBs tried to rectify this vacuum by insisting that a separate resolution should be obtained from creditors in all voluntary arrangements, addressing specifically the issue of nominee and supervisor fees. This approach was reinforced by the HMRC standard modification to limit fees taken, especially in the event of termination.

It should be noted that the majority of the actions routinely described in creditor time cost estimates concern regulatory requirements. The cost of regulatory requirements do not benefit the insolvent estate directly and are completed at the direct expense of the creditors. The issue of this regulatory burden was raised by the World Bank in their *Doing Business Reports* (DBRs) in 2012. The DBR 2012 included a specific section entitled the *UK rethinking regulation* which explained the purpose behind the red tape challenge launched in the UK in 2011[77] and highlighted some of the suggestions being made to reduce the burden of unnecessary regulation.[78] The theme of the same report was transparency and the benefits of '*doing business in a more transparent world'*. However in

75 Note up to the maximum of the available assets. Also see rule 4.21A inserted by SI 1987/1919 and amended by SI 2008/77. Subsequently revoked during the 2016 rules rewrite. The rule previously allowed outstanding expenses of a supervisor to be paid as a priority in any follow-on winding-up by court. See also Chapter 2 and reference to SIP9 of reporting requirements.

76 For the proposal contents see rule 1.3(g) IR86 for the nominee fee and 1.3(h) IR86 for the supervisor fee and other expenses. This allows scope for remuneration and other costs to be paid outside the scope of the arrangement. For comparison see the rules for office-holder remuneration in respect of other insolvency procedures applicable during the study period: rules 2.106(2) (administration), 4.127(2) (insolvent liquidation), 4.148A(2) (solvent liquidation), 6.138(2) IR86 (bankruptcy).

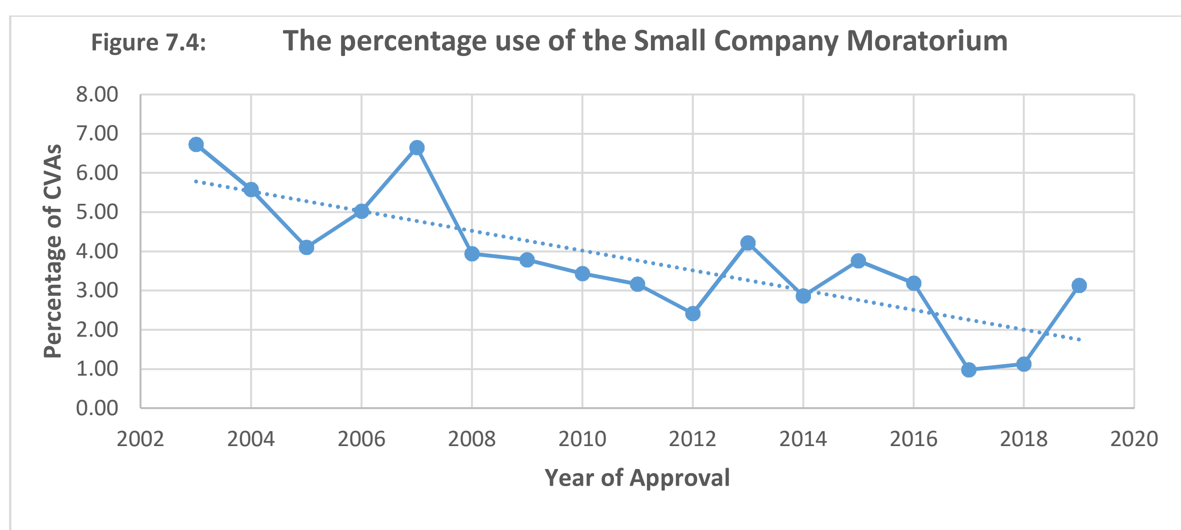
77 The red tape challenge was launched on 7 April 2011 with the intention of locating and removing unused legislation and streamlining areas were repetitive amendments had made regulation difficult to understand. More information available at https://www.gov.uk/government/news/red-tape-challenge.

78 See DBR 2012, 35-38.

the UK there is no real public funding,[79] and the cost of administering insolvency procedures must be borne by the participants of each estate. These costs include the burden of statutory and regulatory requirements, which provide little or no value to the creditors other than improving confidence in the insolvency professionals involved and as a result should be kept to a minimum.

7.8 The role of a moratorium

The use of the small company moratorium (SCM)[80] was reviewed in Chapter 3,[81] alongside the new separate general Moratorium[82] procedure which replaced the SCM in 2020. Figure 7.3 shows the overall declining use of the SCM as a percentage of CVA use.



Source: Data table 6.1.1, Appendix C

79 The Insolvency Service (IS) is an executive agency of the Department for Business, Energy & Industrial Strategy (BEIS) which helps to deliver economic confidence by supporting businesses in financial distress, tackling financial wrongdoing and maximising returns to creditors. The funding of the Insolvency Service (IS) although paid direct by government is primarily sourced from payments made for its services collected through deposits made by petitioning creditors and charges levied on funds paid into the Insolvency Services Account (ISA).

80 Revoked 26 June 2020.

81 See Chapter 3, Section 3.6, Figure 3.10.

82 See CIGA 2020,

As part of the Micro Protocol, it is suggested a new interim micro moratorium is introduced. It would use a much simpler set of requirements, to allow time for a proposal to be drafted and agreed while automatically preventing pre-emptive creditor enforcement action, in a similar way to how a notice of intention to appoint an administrator works.

It is recommended that the interim micro company moratorium is provided automatically, with the only requirement being a simple filing process. It would make provision for a maximum of 28 days while the nominee prepares the proposal for the business, rather than the directors having to complete the proposal before requesting a moratorium, as previously required for the SCM. The nominee appointment would be gazetted and registered, identifying the business as a micro undertaking.

7.9 The potential outcome of the recommendations

The recommendations set out above attempt to tackle the current low use of the CVA by identifying areas that can assist in increasing the volume of arrangements proposed, alongside improving approval levels and the percentage of CVAs being fully implemented. The recommendations included improving IP training and experience in the use of the CVA to increase the number of recommendations, while also simplifying the regime specifically for micro undertakings. The micro business should be proportionately the biggest user of the CVA based on the national business statistics but currently is not. Increasing creditor participation, and ensuring that HMRC approve a higher percentage of proposals, would allow more businesses the opportunity to be rescued.[83] The additional cost recommendations included streamlining reporting and voting to encourage more creditors to participate in insolvency proceedings and by improving the creditor experience increasing trust in the insolvency profession.

83 See Chapter 5. HMRC currently reject circa 40% of proposals requested plus the negative impact of the rejection regime by them has dampened the market with many IPs considering that the effort required to get a CVA approved is too onerous and therefore do not even attempt to submit a proposal.

Conclusion

The impact of the Company Voluntary Arrangement on the UK rescue culture

1. The price of a rescue culture

The thesis question highlights the balance and trade-off often required, between the positive impact of business rescue on the economy and the negative effect of compromised returns to creditors. This project investigated the different uses and possible outcomes of the Company Voluntary Arrangement (CVA), together with the role the procedure plays as part of the UK rescue culture. The data has demonstrated that when a CVA is used to maximum potential, business rescue and improving returns to creditors can be delivered in parallel.[1] There is confirmation from the study data that the CVA is actually achieving company rescue,[2] albeit at a lower volume than could be achieved with a change of emphasis.[3] This finding can be contrasted against the negative media portrayal of CVA failures and the lobbying from one relatively small sector of creditors.[4]

The UK insolvency framework has a diverse range of options for IPs to select from. The process to select an appropriate procedure was discussed in Chapter 4, and shown as potentially causing complexity for all parties, thus reducing the volume of CVA use.[5] The data shows that IPs and companies frequently choose familiar, less complex options

1 See Chapter 3, Figure 3.5 in relation to increasing percentage of the rescue procedures and Figure 3.16 in relation to the returns to creditors.

2 ibid

3 See Chapter 7, Section 7.2 *Increasing the use of the CVA*.

4 See Chapter 2, Section 2.8 on the discussion of fairness and the complaints of retail landlords about the CVA regime.

5 The complex choice of options reinforces a negative bias by IPs and the other participants in the options phase.

resulting in the low volume of CVAs.[6] The lack of use of the CVA has perplexed and thwarted attempts by the government to make the procedure more popular since the early 1990's.[7] The depth and detail of the data extracted and analysed for this project has revealed a range of influencing factors which, when combined, explain the current unpopularity of the CVA.[8]

Some would argue that when comparing insolvency regimes globally for rescue optimisation, one of the key elements is to determine whether the regime or procedure is either debtor or creditor friendly.[9] That means to determine whether the proposed solution effectively prioritises the best outcome for the business (debtor friendly)[10] or for the creditors (creditor friendly)[11]. The CVA can provide a range of options depending on its terms, however in most cases the procedure results in a more debtor friendly outcome, albeit with some positive outcomes for creditors. These outcomes are less publicised and could be used to provide a more positive image of the procedure, to balance the negative media impact made by a small number of high profile creditor groups.[12] In contrast, the other UK insolvency procedures can be considered to be more creditor friendly, while in

6 See Vanessa Finch and David Milman (2017) *Corporate Insolvency Law Perspectives and principles*, 3rd edition Cambridge University Press, Cambridge, 229.

7 See *Company Voluntary Arrangements and Administration Orders: A Consultative Document* (1993) para 21, DTI, London. The consultation identified six main drawbacks to the use of the CVA and despite the majority of these issues being fixed by 2003 the CVA has continued to remain the least used procedure. See also Keith Pond (2018) *Company Voluntary Arrangement – Failure to launch*, which is available online at https://www.libf.ac.uk/news-and-insights/news/detail/2018/10/24/company-voluntary-arrangement-failure-to-launch. Last accessed February 2019.

8 See Chapters 4 to 6 and the analysis of each of the key participants and issues identified.

9 See Vanessa Finch and David Milman (2017) *Corporate Insolvency Law Perspectives and principles*, 3rd edition Cambridge University Press, Cambridge, 229. The remaining three comparative elements of insolvency regimes include (1) enforcement requiring penalties to be implemented for anyone who appears to be at fault; (2) the level of professional control over the procedures; and (3) the range of rescue and insolvency solutions available.

10 The US Chapter 11 procedure is considered to be a well-known example of a debtor friendly regime.

11 The UK is generally considered to provide a more creditor friendly regime.

12 See Chapter 1, Section 1.6 and the media campaign being waged by the British Property Federation.

the main providing more advantages for secured creditors, with generally lower returns to the unsecured creditors.[13]

2. Factors influencing CVA usage

Chapter 4 analysed the influence of the insolvency practitioner (IP), and the role experience plays in considering which procedure to use and the presentation of those options to companies. The study data identified the small pool of IPs with CVA experience, and how that experience is shared within insolvency firms that specialise in the use of the CVA. In particular, the role of super-user firms was identified and discussed. Path dependence analysis was used on the study data, and the findings from earlier survey data confirmed that lack of experience and insufficient emphasis on CVA training has left many IPs often unwilling to recommend a CVA as a first-choice option. As a result, administration or liquidation is more likely to be chosen, as either invariably result in a better outcome for the management team, in contrast to either saving the company or maximising the returns to creditors.[14]

Chapter 7 identified CVA training and the impact this may have on the use of the administration procedure as a more popular alternative.[15] A recalibration of the CVA procedure is recommended by improving training and encouraging a wider range of experience, alongside some more fundamental changes in the statutory framework. In particular, there is a need to encourage IPs to fully consider the option of a CVA, rather than moving directly to a 'more comfortable' alternative as a matter of course. One of the suggestions included a new addition to the **administration proposal** requiring an explanation of why a CVA was not a feasible strategy. An explanation is required when

13 See outcome for creditors in Data tables 5.3.2 and 5.3.3 (CVAs) alongside 7.1.4 (ADM) and 8.1.3 (LIQs).

14 A better result for the management team will invariably result in a less favourable outcome for creditors.

15 Chapters 4 and 7 included some ways to increase experience and improve any unconscious bias.

justifying the inability to save the company[16] as an unachievable option. In most administration proposals this option is dismissed due to lack of funding for ongoing trading. However, funding can be managed in a CVA by allowing the directors to continue to trade while excluding the trading assets from the arrangement. The additional disclosure suggested would provide transparency when justifying the use of an administration and the chosen strategy under the procedure, while also explaining why a higher level of contributions over a longer period in a CVA is a less attractive option than a prepack sale of the business (often to a connected party[17]).

Chapter 5 analysed creditor participation in the CVA, and highlighted the impact of HMRC decision making on both approval and the terms being agreed via modifications to the proposal. The detail of the voting patterns and modification were analysed using path dependence. The analysis indicated that HMRC has reached institutional lock-in at a sub-optimal level approval. A recalibration of the CVA procedure is recommended by encouraging or directing HMRC to give more CVA proposals (specifically the micro businesses) a chance to succeed, as they currently only approve around 60% of arrangements. The recent partial change in the HMRC preferential status[18] will also directly affect the distribution hierarchy in CVAs, and this should also be taken into account when encouraging an increase in approvals by them. In future they are more likely to be repaid in full due to their change in status. Chapter 3 summarised the distribution levels made to the different types of creditors. The study data identified that distributions of circa £500 million made to unsecured creditors could potentially be diverted to HMRC due to the move to secondary preferential status. The new status effectively reduces the level of return to

16 See Schedule B1 IA86 for the hierarchy of options: "para 3(1) (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors."

17 The different definitions of connected party are explained in the Introduction *Background and Methodology*, Section 7 *Glossary of terms*. See also Data tables 7.2.1 Analysis of the sale of business in administrations; 7.3.1 Outcome for creditors in administrations and 8.2.1 Outcome for creditors in liquidations.

18 Implementation of the change in status was delayed from 1 April to 1 December 2020.

the ordinary trade creditors dramatically. This change represents an eightfold increase in distributions to HMRC, as they are also recorded as receiving over £70 million in distributions during the study period. A positive change of position within HMRC could increase the usage levels by around 30%, alongside their already improved payment status. Both changes would provide a boost to the procedure, and potentially net the UK tax payer a substantial increase in distributions. In addition, the CVA Micro Protocol could help by increasing IP and creditor support for the procedure, alongside more efficient reporting processes.

Another element of the creditor trust issue is the sale of businesses and assets to connected parties by office-holders. The process has been under scrutiny by creditors and politicians for many years.[19] The option of saving the business or retaining the assets, as opposed to rescuing the company, provides encouragement to choose an alternative option to a CVA or exit the procedure in a similar way. Connected party sales were collated for the study sample to determine the level of use of prepack equivalents both pre and post a CVA.[20] In both scenarios the regulatory reporting requirements are in place to reassure creditors that the sale process has been conducted ethically and fairly by the office-holder.[21] However, despite the guidance concerns have increased over the limited use of the Pre-Pack Pool (PPP) evaluation process.[22] As a result, additional regulations have recently been enacted to ensure there is either independent oversight or creditor

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19 SIP 16 *Pre-packaged sales in administration* was first introduced in 1 January 2009 with versions 2 and 3 being issued in November 2013 and 2015 respectively. The latest version came into force on 30 April 2021 alongside the introduction of the new regulations.

20 The Pre-Pack Pool Ltd (PPP) is an independent body of experienced business people who are paid by a potential purchaser to offer an opinion on the terms and valuation of the assets included in the sale. There is no contractual relationship with the potential office-holder. The use of the PPP and result is reported to creditors. The Graham Review (2014) made the recommendation and a working party was set up in 2014 to establish the PPP. The empirical data provided for the report was based on 500 randomly selected Prepacks commenced in 2010.

21 The reporting requirements for connected party transactions are set out in Statement of Insolvency Practice No 13 (SIP 13) plus for ADMs and Prepacks additional guidance is set out in SIP 16.

22 The low use of the PPP has been an ongoing issue and one of the key driver's for the new regulations introduced this year (The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021).

approval for connected party prepack transactions.[23] The impact of the new regulation will need to be monitored to determine if it has the desired effect or whether alternatives are used, for instance an increased use of distribution CVAs where the funds distributed are from an earlier sale of business or assets.[24]

Chapter 6 reviewed the company elements of CVA usage using actor-network theory. The analysis identified key structural elements that specifically dissuade micro businesses from using the CVA. As a result, the company size for CVAs is effectively skewed towards small and medium size enterprises, while micro companies form over 80% of UK SME market.[25] A recalibration of the CVA procedure for the micro business was recommended in Chapter 7 via the creation of a new CVA Protocol (Micro Protocol).[26] The suggested solution is based on a similar protocol used for consumer debt IVAs. This solution would support HMRC in increasing the volume of CVA proposals accepted by them, as long as an approved agreement has been used. The Micro Protocol would also include a simplified interim moratorium automatically as standard, without the need to consider the associated risks and costs of having to use a separate moratorium procedure. The option to use the Micro Protocol would ensure that micro businesses are not disadvantaged due to the high up-front costs and assistance normally required to implement a CVA. The combination of suggestions in Chapter 7 would improve the use of the CVA and give the UK rescue framework a more debtor friendly status.

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23 See The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021. The latter makes obtaining an independent opinion on the terms of a Prepack to a connected party mandatory from 30 April 2021.

24 The study data tracked over 3,700 different types of liquidations. Data on asset disposals was available in circa 70% cases with approximately 29% of those including cash based realisations. Of the 2275 with physical assets for disposal 31% did not include data on the status of the purchasers while 59% included transactions with connected parties and just 10% with third party transactions. This unsurprisingly confirms that connected party asset sales are already in the majority in liquidations as well as administrations.

25 See Chapter 6, n 22 and n 23 for the business population data and further explanations

26 See Chapter 7, Section 7.3 for an explanation of the recommended Micro Protocol.

3. The importance of employment in the rescue culture

The key link between the rescue culture and unemployment was identified and discussed in Chapter 1. The economic and social consequences of high unemployment was highlighted as one of the driving forces behind the wax and wane of political interest in improving rescue mechanisms in the UK.[27] Employment is similarly a key area highlighted in the World Bank Doing Business Reports (DBRs) and one of the drivers for the ease of doing business rankings.[28] The insolvency section of the annual DBRs[29] highlighted issues that need improving, while also confirming that the *'resolving insolvency'* section of the reports is the area where least progress has been made globally in the last two decades.[30] The worldwide drive of multiple organisations has been to improve economic security by encouraging flexibility in employment, thus increasing the levels of employment (particularly SMEs), while also simplifying regulation to encourage new business growth, especially for micro businesses. EU directives have similarly contributed to the drive towards prioritising the use of rescue procedures across Europe, as well as harmonisation of the cross border treatment of insolvency procedures. Chapter 2 provided an explanation of the flexible nature of the CVA as part of the wider insolvency statutory and regulatory framework,[31] while also considering the practical issues currently encountered that restrain its use. The benefits of rescue and employment for every small business reinforces the importance of suggesting The Protocol as a solution.

27 See *Cork Report*, Ch 52, 446.

28 See Chapter 1, Sections 1.2 and 1.3.

29 See the *Doing Business* reports (*DBR*) 2004 to 2020, World Bank Group, Washington.

30 See the *DBR* 2020 and the comment in the foreword by David R. Malpass, President of the World Bank Group.

31 See Chapter 2, Section 2.13 in respect of the flexible nature of the CVA.

4. The measurement and definitions of outcomes

The introduction provided the background to this research, together with a review of the methodology used to collect and analyse the data from the study period. The methodology section included reference to the subsidiary research questions, which provided the framework for the data collection process,[32] and each of the questions highlighted were discussed throughout the analysis chapters.[33] The importance of purpose in the formulation of a CVA proposal was identified in Chapter 3,[34] along with its influence on completion and the different ways in which outcomes can be measured. CVA purpose is considered a key element when discussing use, which encompasses both duration and implementation. The analysis by purpose assisted the identification of the importance of other factors raised throughout.

The analysis identified that in many cases follow-on procedures were often instigated by an alternative IP firm.[35] However, this trend decreased over the study period, which may indicate that IPs are becoming more comfortable taking on the role of office-holder across multiple procedures, despite the potential ethical issues that need to be negotiated.

The rescue hierarchy used by Cork,[36] which is repeated in the insolvency legislative framework,[37] was highlighted in the project as a better measure of outcome than the CVA legal outcome. The legal outcome is promoted by many as a simple success or failure with all the negative and emotional connotations that implies for the users. The CVA is the only insolvency procedure that can routinely be terminated for 'failure to complete', with the inherent inference that the IP is to blame for misjudging viability or failing to maintain the

32 See Introduction *Background and Methodology*, Section 5.

33 See Chapters 3 to 6 for the detailed data analysis.

34 See Chapter 3, Section 3.2 *The importance of purpose on CVA outcomes.*

35 See Chapter 3, Section 3.4 *Interaction with the administration procedure* and Figure 3.10.

36 See Introduction *Background and Methodology*, n 2 re Cork Report, para 627.

37 See s 3 IA86 (as originally enacted now revoked) and subsequently replaced by para 3 Schedule B1 IA86 from 15 September 2003. See also Chapter 1, Section 1.8 *The administration procedure pre and post the EA*.

cooperation of the directors.[38] Thus the reporting of the simplified outcome of 'success or failure' effectively discourages the use of the CVA by all participants.

5. The next steps

In 2015 the Insolvency Service[39] stated that *"the existing rescue option, the Company Voluntary Arrangement is considered underused, is limited in its functioning as it does not bind secured creditors, and when used often does not succeed."*[40] The negative impact of that statement further undermined the confidence in and the continued use of the CVA.[41] This research emphasised the old adage that, before you can change or improve something, you must understand it completely.[42] Although earlier studies into the CVA provided a snapshot into its use, the longitudinal nature of this study has revealed new insights into the procedure's effectiveness at delivering positive results, despite negative lobbying and adverse media coverage.[43] The factors influencing popularity and outcomes, together with the general impact on business rescue, highlighted a range of complementary issues.[44] Chapter 7 combined the findings from the analysis and presented a series of suggested improvements to recalibrate the use of the CVA. The key recommendation is the Micro Protocol, designed to specifically target an increase in use of

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38 In relation to the IVA the success or failure was considered to be an indicator of the quality of the original advice given by the IP in relation to consumer debt arrangements. See Sue Morgan (2009) *Causes of Early Failures in Individual Voluntary Arrangements,* Kingston Business School Occasional Paper No 63.

39 The Insolvency Service is an executive agency of the department of Business, Enterprise, Innovation and Skill (BEIS). The BEIS has previously had a number of different titles and portfolio of roles changing with government priorities.

40 See Impact Assessment No: BIS INSS15005 policy objective number two.

41 See Introduction *Background and Methodology,* Section 2, *Use of the CVA*, Figure 1 for a graphical view of the position in 2015.

42 There are many variations on this theme and similar comments have been used by a diverse range of people from Peter Drucker to Winston Churchill.

43 See Chapter 3, Section 3.11.

44 See Chapters 4 to 6.

the CVA by micro businesses. In addition, some of the best practice suggestions included would also reduce costs across all CVAs as well as other insolvency procedures.[45]

Further research is needed and should include a continuation of the comprehensive data collection from this study, as well as a more detailed analysis of the findings. The continuation of this project will also allow monitoring of any ongoing changes, together with a full evaluation of the impact on the rescue culture. If the Protocol suggestion is implemented, careful monitoring of usage and implementation should also provide a useful benchmarking process for further changes.

45 See Chapter 7, Section 7.7 *Reducing costs*.

Appendices

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Re Zebra Industrial projects Limited [2004] EWHC 549 (Ch). [2005] BPIR 1022

Table of Statutes and other Instruments

(Chronological order)

Year	Title	Reference
	Primary legislation	
1986	The Insolvency Act 1986 (See Appendix A for specific provisions)	1986 c. 45
1986	The Companies Director Disqualification Act	1986 c. 46
2000	The Insolvency Act 2000	2000 c. 39
2002	Enterprise Act 2002	2002 c. 40
2006	Companies Act 2006	2006 c. 46
2015	Small Business, Enterprise and Employment Act 2015	2015 c. 26
2016	Insolvency (Amendment) Act (Northern Ireland) 2016	2016 c. 2
2020	Corporate Insolvency and Governance Act 2020	2020 c. 12
	Statutory Instruments - Orders	
1989	The Insolvency (Northern Ireland) Order 1989 (See Appendix A for specific provisions)	1989 No 2405 (N.I. 19)
2003	The Insolvency Act 1986 (Prescribed Part) Order 2003 (See section 176A of Insolvency Act 1986 for implementation of the Prescribed Part)	2003 No 2097
2020	The Insolvency Act 1986 (Prescribed Part) Order 2020	2020 No 211
	Statutory Instruments - Rules	
	See Appendix B for a schedule of the comparative rules	
1986	The Insolvency Rules 1986	1986 No 1925
1986	The Insolvency (Scotland) Rules 1986	1986 No. 1915 (S. 139)
1991	The Insolvency Rules (Northern Ireland) 1991	1991 No 364
2016	The Insolvency (England and Wales) Rules 2016	2016 No 1024
2018	The Insolvency (Scotland) Rules 2018	2018 No 1082 (s. 4)
	Statutory Instruments - Regulations	
1994	The Insolvency Regulations 1994	1994 No 2507
2005	The Insolvency Practitioners Regulations 2005	2005 No 524
2008	The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008	2008 No 409
2008	The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008	2008 No 410

Year	Title	Reference
2008	The Partnerships (Accounts) Regulations 2008	2008 No 569
2008	The Small Limited Liability Partnerships (Accounts) Regulations 2008	2008 No 1912
2012	The Companies and Limited Liability Partnerships (Accounts and Audit Exemptions and Change of Accounting Framework) Regulations 2012	2012 No 2301
2013	The Small Companies (Micro-Entities Accounts) Regulations 2013	2013 No 3308
2021	The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021	2021 No 427
2021	The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations (Northern Ireland) 2021	2021 No 174

APPENDIX A

STATUTORY FRAMEWORK: Company Voluntary Arrangement

Insolvency Act 1986 (IA86)[1] & Insolvency (Northern Ireland) Order 1989 (IO89)[2]

IA86	IO89	DESCRIPTION
Section Number	Article Number	
PART 1	PART II	COMPANY VOLUNTARY ARRANGEMENTS
PART HEADING		The Proposal
1	**14**	**Those who may propose an arrangement**
1(1)	14(1)	Proposers and type of arrangement
1(2)	14(2)	Nominee role and qualification
1(3)	14(3)	Transmission of documents & nominee report to court
1(4)	14(4)	Court replacement of nominee where report has not been filed
1(5)	14(5)	COMI
1(6)	14(6)	Non UK companies with principle place of business in jurisdiction
1A[3]	**14A**[4]	**Moratorium** (revoked by CIGA)[5]
1A(1)	14A(1)	Director application
1A(2)	14A(2)	Schedule A1 effect
1A(3)	14A(3)	Documents to be submitted to nominee
1A(4)	14A(4)	Application to court to replace nominee
2	**15**	**Procedure where nominee is not the liquidator or administrator**
2(1)	15(1)	Application [excludes small company moratorium applications]
2(2)	15(2)	Timing of report to court
2(3)	15(3)	Documents to be submitted to nominee
2(4)	15(4)	Powers of the court
3	**16**	**Consideration of proposal** (previously Summoning of meetings)
3(1)	15(1)	Duty of nominee to convene meetings [decision procedures]
3(2)	15(2)	Duty of liquidator or administrator to convene meetings [decision procedures]

1 Applies to England and Wales, and Scotland and was effective from 29 December 1986.

2 For Northern Ireland it was partly effective from 1990, see The Insolvency (1989 Order) (Commencement No. 1) Order (Northern, Ireland) 1990, No. 177 (C. 7). Further provisions came into effect on 1 October 1991 under The Insolvency (1989 Order) (Commencement No. 4) Order (Northern Ireland) 1991, No. 411 (C. 20).

3 Inserted by Insolvency Act 2000 and effective from 1 January 2003 and revoked by CIGA effective 20 June 2020.

4 Inserted by the Insolvency (Northern Ireland) Order 2002, Schedule 1.

5 Revoked on 20 June 2020 and replaced by a general Moratorium procedure.

IA86	IO89	DESCRIPTION
Section Number	**Article Number**	
3(3)	**15(3)**	Persons to be summoned or notified
3(4)	**15(4)**	Requirement to advise creditors of outcome of meetings [decision procedures]
PART HEADING		**Consideration & implementation of proposal**
4	**17**	**Decisions of the company and its creditors**
4(1)	**17(1)**	Decision at meeting [replaced 2016]
4(1)	**17(1)**	Application
4(1A)	**17(1)**	Approval with or without modification
4(2)	**17(2)**	Modifications can include nomination of an alternative nominee but not a change of type
4(3)	**17(3)**	Terms and modifications may not affect the rights of secured creditors
4(4)	**17(4)**	Terms and modifications may not affect the rights of preferential [ordinary or secondary] without their agreement
4(5)	**17(5)**	Meetings [and decision procedures] to be conducted in accordance with the rules
4(6)	**17(6)**	Outcome to be reported to court and prescribed parties
4(6A)		Duty of convenor [meetings and decision procedures] to report to court and notify prescribed persons
4(7)		Preferential debts as defined in section 381 regulation xxx
4A[6]		**Approval of arrangement**
4A(1)		Application
4A(2)		Effect of decisions taken by creditors & members
4A(3)		Right of member to challenge creditors decision
4A(4)		Timing of application under (3)
4A(5)		Rights of FSA for regulated companies
4A(5A)		Appropriate regulator
4A(6)		Power of court
5	**18**	**Effect of approval**
5(1)	**18(1)**	Application
5(2)(a)	**18(2)**	Effective date
5(2)(b)	**18(2)**	Impact of binding
5(2A)	**18(3)**	Effect of completion
5(3)	**18(3)**	Power of court in relation to winding up or administration
5(4)	**18(4)**	Timing of courts power under (3)
5(5)	**18(5)**	Restrictions relating to energy administrations
5(6)	**18(6)**	Application of Part 1 Schedule 20 Energy Act 2004

6 Inserted by Insolvency Act 2000 and effective from 1 January 2003.

IA86	IO89	DESCRIPTION
Section Number	**Article Number**	
6	**19**	**Challenge of decisions**
6(1)	**19(1)**	Applicants who can challenge
6(1A)		Definitions
6(2)	**19(2)**	Applicants
6(2A)		Restrictions relating to energy administrations
6(3)	**19(3)**	Timing of applications to court
6(4)	**19(4)**	Power of court
6(5)	**19(5)**	Revocation or suspension in absence of revised proposals
6(6)	**19(6)**	Power of court to give supplemental direction
6(7)	**19(7)**	Impact of irregularity
6(8)	**19(8)**	Application of Part 1 Schedule 20 Energy Act 2004
6A[7]		**False representations, etc.**
6(1)		Offence
6(2)		Application even if proposal is not approved
6(3)		Definition of officer includes shadow director
6(4)		Penalty
7	**20**	**Implementation of proposal**
7(1)	**20(1)**	Application (approval under section 4A)
7(2)	**20(2)**	Supervisor role
7(3)	**20(3)**	Right of appeal to court
7(4)	**20(4)**	Supervisor’s right to apply for directions
7(5)	**20(5)**	Power of court to appoint
7(6)	**20(6)**	Power in (5) can be used to increase the number of supervisor’s appointed
7A[8]		**Prosecution of delinquent officers of company**
7A(1)		Application where a moratorium has been obtained
7A(2)		Duty of nominee or supervisor to report
7A(3)		Reports to SoS and power to investigate
7A(4)		Obligations imposed on investigation
7A(5)		Answers to enquiries may be used in evidence against them
7A(6)		Effect of criminal proceedings
7A(7)		Exception to offences under (6)
7A(8)		Requirement to assist in investigation
7A(9)		Courts power to compel assistance

7 ibid

8 ibid

IA86	IO89	DESCRIPTION
Section Number	Article Number	
7B		**Arrangements coming to an end prematurely**
7B		Failure to fully implement terms

Other Northern Ireland Order modifications made (but not altering text)

1. The Order was modified on1 January 2007 by the Water and Sewerage Services (Northern Ireland) Order 2006 (S.I. 2006/3336 (N.I. 21)), arts. 1(3)(e), 271(5) (with arts. 8(8), 121(3), 307)
2. The Order was modified by S.R. 1995/225 on 8 January 2007 by the Insolvent Partnerships (Amendment) Order (Northern Ireland) 2006 (S.R. 2006/515), art. 4 (with art. 2).
3. The Order was modified on 27 March 2006 by Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10)), arts. 1(3), 21(2), (with art. 4); S.R. 2006/21, art. 2 (with S.R. 2006/22 {arts. 2} 7)
4. The Order was modified by the Serious Crime Act 2007 (c. 27), ss. 28(2)-(4), 94(1)
5. The Order was modified on 1 August 2007 by the European Grouping of Territorial Cooperation Regulations 2007 (S.I. 2007/1949), reg. 7, Sch. Pt. 2
6. The Order was modified on 12 April 2007 by the Cross-Border Insolvency Regulations (Northern Ireland) 2007 (S.R. 2007/115), reg. 4
7. Parts I-V of the Order were modified by S.R.2004/307 on 1 October 2006 by the Limited Liability Partnerships (Amendment) Regulations (Northern Ireland) 2006 S.R. 2006/377), reg. 3, {Sch. 2})
8. Schedule A1 is not included in this summary.

APPENDIX B

Comparative rules for the Company Voluntary Arrangement

IR86	IR2016 (ENGLAND & WALES)	IR(NI)93	IR(SCOT)86	IR2018 (SCOTLAND)	TITLE & CONTENT
PART 1	**PART 2**	**PART 1**	**PART 1**	**PART 2**	**COMPANY VOLUNTARY ARRANGEMENT**
CHAPTER 1	**CHAPTER 1**	**CHAPTER 1**	**CHAPTER 1**	**CHAPTER 1**	**PRELIMINARY**
1.1	2.1 & 2.2	1.01	1.1	2.1	Scope of this Part; interpretation
-	-	-	1.1A	1.32	Application to CVA
12A.11	1.44, 1.45 & 1.47		1.1B	1.41, 1.42 & 1.43	Electronic delivery of documents
12A.13	1.48 & 1.50		1.1C	1.44 & 1.46	Use of Website by office-holder
12A.12	1.49-1.50		1.1D	1.45 & 1.46	General use of websites
NE	NE	NE		1.54	Sederunt book
CHAPTER 2	**CHAPTER 2**	**CHAPTER 2**	**CHAPTER 2**	**CHAPTER 2**	**THE PROPOSAL FOR A CVA (SECTION 1)**
1.2	-	1.02	1.2	-	Preparation of proposals
1.3	-	1.03	1.3	-	Contents of proposal
-	2.2 & 2.3	-	-	2.2 & 2.3	Proposal: General principles & contents
1.4	2.4	1.04	1.4	2.4	Notice to intended nominee
1.5	2.6	1.05	1.5	2.5	Statement of affairs
1.6	2.8	1.06	1.6	2.7	Additional disclosure for assistance of nominee
1.7	2.9	1.07	1.7	2.8	Nominee's report on the proposal
1.8	2.10	1.08	1.8	2.9	Replacement of nominee

IR86	IR2016 (ENGLAND & WALES)	IR(NI)93	IR(SCOT)86	IR2018 (SCOTLAND)	TITLE & CONTENT
1.9	-	1.09	1.9	-	Summoning of meetings under section 3
-	2.25-2.28	-	-	2.24-2.26	Consideration of proposal under section 3
CHAPTER 3		**CHAPTER 3**			**PROPOSAL BY ADMINISTRATOR OR LIQUIDATOR [NOMINEE]**
1.10	2.2 & 2.3	1.10	1.10	2.2 & 2.3	Preparation of proposal
1.11	-	1.11	1.11	-	Summoning of meetings under section 3
-	2.25 & 15.14	-	-	2.24	Consideration of proposal under section 3
CHAPTER 4		**CHAPTER 4**			**PROPOSAL BY ADMINISTRATOR OR LIQUIDATOR [Another Office-Holder]**
1.12	2.2, 2.4 & 2.26	1.12	1.12	2.37	Preparation of proposal and notice to nominee
CHAPTER 5		**CHAPTER 5**	**CHAPTER 5**		**PROPOSAL BY DIRECTORS**
Section A:		***Section A:***			***Meetings of Company's creditors and members***
-	***Section A:***		**-**	***Section A:***	***Consideration of the Proposal by Creditors and Members***
-	-	-	1.13	-	General
1.13	-	1.13	1.14	-	Summoning of meetings
-	2.26	-	1.14ZA	5.6	Request for physical meeting
			1.16		Meeting adjournments
1.14	2.34 & 15.21	1.14	1.14A	2.33 & 5.20	The chairman at meetings
1.15		1.15	-	5.22 & 5.25	The chairman as proxy-holder
1.16		1.16	1.15	2.29 & 5.14	Attendance by company officers
Section B:		***Section B:***			***VOTING RIGHTS AND MAJORITIES***
1.17	15.28 & 15.31	1.17	1.15A	5.26 & 5.28	Entitlement to vote (creditors)
1.17A	15.33 & 15.35		1.15B	5.30 & 5.32	Procedure for admission of creditors' claims for voting purposes

IR86	IR2016 (ENGLAND & WALES)	IR(NI)93	IR(SCOT)86	IR2018 (SCOTLAND)	TITLE & CONTENT
1.18	2.25 & 2.35	1.18	1.15AA	2.34	Members' voting rights
1.19	15.34	1.19	1.16A	5.31	Requisite majorities (creditors)
1.20	2.25 & 2.36	1.20	1.15AA	2.35	Requisite majorities (members)
12A.22			1.16B	5.35	Complaint by excluded person
12A.23			1.16C	5.33 & 5.40	Action where person excluded
12A.24			1.16D	5.34 & 5.41	Indication to excluded person
12A.25			1.16E	5.42	Complaint by excluded person
1.21	15.23	1.21			Proceedings to obtain agreement on the proposal
Section C:		***Section C:***	**CHAPTER 6**		***IMPLEMENTATION OF THE ARRANGEMENT***
1.22	-	1.22	1.18	-	Resolutions to follow approval
-	2.3 & 2.33	-	-	2.32	Proposal for alternative supervisor
1.22A	2.37	1.22A	1.18A	2.36	Notice of order made under section 4A(6) / Para 36A(5) Sched A1
1.23	2.39	1.23	1.19	2.38	Hand-over of property etc. to supervisor
1.24	2.38	1.24	1.17	1.22	Report of meetings
1.25	2.40	1.25	1.20	2.39	Revocation or suspension of the arrangement
1.25(5)	2.40(6)	1.25(5)	1.20(5)	-	Copy to registrar
1.26	-	1.26	-	REPLACED	Supervisor's accounts and reports
1.26A	2.41	-	1.21-1.21A	2.40	Supervisor's accounts and reports
1.27	2.42	1.27	-	2.41	Production of accounts and records to Secretary of State
1.28	2.43	1.28	1.22	2.42	Fees, costs, charges and expenses
1.29	2.44	1.29	1.23	2.43	Completion or termination of the arrangement

IR86	IR2016 (ENGLAND & WALES)	IR(NI)93	IR(SCOT)86	IR2018 (SCOTLAND)	TITLE & CONTENT
PART 6				**REVOKED**	**GENERAL**
CHAPTER 6		**CHAPTER 6**			
1.30	REVOKED	1.30	1.24	REVOKED	False representations
PART 7	**PART 21**				**EC REGULATION - CONVERSION**
CHAPTER 7		**CHAPTER 7**	**CHAPTER 8**		**EC REGULATION - CONVERSION**
1.31	21.1 / 21.2	1.31	1.46	7.2	Application for conversion into winding up
1.32	21.2	1.32	1.47	7.2	Contents of witness statement / affidavit (Scotland)
PART 8		**PART 8**			**EC REGULATION - MEMBER STATE LIQUIDATOR**
CHAPTER 8		***CHAPTER 8***	***CHAPTER 10***		***EC REGULATION – MEMBER STATE LIQUIDATOR***
1.33	21.3	1.33	1.48	7.2	Power of court
-	-	-	1.49	7.4	Court options
1.34	21.7	1.34	1.50		Interpretation of creditor and notice to member State liquidator
PART 9	**PART 2**	**PART 9**	**PART 1**	**PART 2**	**OBTAINING A MORATORIUM**
CHAPTER 9		**CHAPTER 9**	**CHAPTER 7**		**MORATORIUM**
Section A:	***Section A:***	***Section A:***	***Section A:***	***Section A:***	***Obtaining a moratorium***
1.35	2.2 & 2.3	1.35	1.25	2.2 & 2.3	Preparation of proposal by directors and submission to nominee
1.36	2.4	1.36	1.26	1.36	Delivery of documents to the intended nominee etc.
1.37	2.11	1.37	1.27	2.10 & 2.11	Statement of affairs
1.38	2.13	1.38	1.28	2.12	The nominee's statement
1.39	2.14	1.39	1.29	2.13	Documents submitted to the court to obtain moratorium
1.40	2.15	1.40	1.30	2.14	Notice and advertisement of beginning of a moratorium
1.41	2.16 & 2.17	1.41	1.31	2.16 & 2.17	Notice of extension of moratorium
1.42	2.19	1.42	1.32	2.18	Notice and advertisement of end of moratorium

IR86	IR2016 (ENGLAND & WALES)	IR(NI)93	IR(SCOT)86	IR2018 (SCOTLAND)	TITLE & CONTENT
-	-	-	1.33	1.49-1.51	Inspection of court file
Section B:	***Section B:***	***Section B:***	***Section B:***	***Section B:***	***PROCEEDINGS DURING A MORATORIUM***
1.43	2.20	1.43	1.34	2.19	Disposal of charged property etc. during a moratorium
Section C:	***Section C:***	***Section C:***	***Section C:***	***Section C:***	***NOMINEES***
1.44	2.21	1.44	1.35	2.20	Withdrawal of nominee's consent to act
1.45	2.22	1.45	1.36	2.21	Replacement of nominee by the court
1.46	2.23	1.46	1.37	2.22	Notification of appointment of a replacement nominee
1.47	2.24	1.47	1.38	2.23	Applications to court under paragraphs 26 or 27 of Schedule A1 to the Act
Section D	***Section D:***	***Section D***	***Section D***	***Chapter 5***	***CONSIDERATION OF PROPOSALS WHERE MORATORIUM OBTAINED***
-	-	-	1.39	2.24	General
1.48	-	1.48	1.40	-	Summoning of meetings; procedure at meetings etc.
-	2.25-2.26	-	-	2.24-2.28, 5.6	Physical meetings (on request only)
1.49	15.31	1.49	1.41	5.26	Entitlement to vote (creditors)
1.50	15.33	1.50	1.42	5.30 & 5.32	Procedure for admission of creditors' claims for voting purposes
1.51	2.25 & 2.35	1.51	-	-	Voting rights (members)
1.52	15.34	1.52	1.43	5.31	Requisite majorities (creditors)
1.53	2.25 & 2.36	1.53	1.44	5.22 & 5.25	Requisite majorities (members) and proceedings to obtain agreement on the proposal
1.54	2.39	1.54	1.45	2.38	Implementation of the arrangement
CHAPTER 10		**CHAPTER 10**		**CHAPTER 7**	**TIME RECORDING**
1.55	2.45	1.55	-	2.44	Provision by nominee or supervisor of information about time spent on a proposal or voluntary arrangement
CHAPTER 11	**CHAPTER 2**	**CHAPTER 11**		**CHAPTER 3**	**OMISSION OF INFORMATION FROM SOA**
1.56	2.7 & 2.12	1.56	-	2.6	Application to omit Information from Statement of Affairs

APPENDIX C

Data Table Schedule

The original list of company number numbers was provided by the Insolvency Service Statistics Department (ISS) and extracted from the Companies House (CH) raw data. Thanks is extended to John Perrot and his team for providing the company identification numbers and clean start dates. The following tables summarise the data extracted so that it can be used in further research. When using and referencing the source of this data please include the thesis reference and the data table number. This data was completed up to 30 June 2021 where the CVA or follow-on procedures were ongoing and the CVAs completed in quarter 3 of 2021 have been noted when relevant.

Core Data **CVA Registrations** (reported during registration period)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	TOTAL
Companies House Registrations	506	419	584	727	811	798	891	621	606	423	6386

Source: ISS based on registration of documents

Post approval of a CVA the meeting report and the progress reports registered provided information on the approval process together with ongoing events including requests for variations. The data collected included in the following tables has been extracted from a series of documents filed at Companies House. The data used and extracted is identified by document and these are listed below together with the separate data tables of information extracted from each document. The data tables listed below are available as a separate document.

	Data table Number	*Titles*	*Figure Numbers / Footnote*
1		CVA core registration data	Figs 1, 2
Section 1		**Form 1.1 / Form 1.1(Scot) / Form 1.1(NI) / CVA1**	
	1.1	**Registration and Approvals**	
2	1.1.1	CVA registrations including late registrations and data adjustments (Filing errors and unfiled revocations identified)	Analysis of core data
3	1.1.2	CVA Approvals (excluding filing errors & revocations identified)	Analysis of core data
4	1.1.3	CVA Approvals by Jurisdiction (excluding filing errors)	Analysis of core data
5	1.1.4	CVA Approvals by company type (excluding filing errors)	Analysis of core data
6	1.1.5	Approvals by CVA type	Analysis of core data
7	1.1.6	Multiple use of the CVA	Analysis of core data
8	1.1.7	Filing of registration documents	Analysis of core data

	Data table Number	Titles	Figure Numbers / Footnote
9	1.1.8	CVA applications registered	Analysis of core data
	1.2	**Office-holder and firm data**	
10	1.2.1	IP usage by band	Fig 3.14(a)
11	1.2.2	IP usage by user type	Fig 3.14(b)
12	1.2.3	IP firm usage (showing annual volume)	Figs 4.1 & 7.1
13	1.2.4	IP firm usage by band	Figs 4.1, 4.2 & 4.3
	1.3	**Group CVA data**	
14	1.3.1	Identification of CVA groups (by volume)	Fig 3.6
15	1.3.2	Identification of CVA groups (by band)	Fig 3.6
16	1.3.3	Number of CVA groups (by volume)	Analysis of core data. See sections 3.2 & 6.4
	1.4	**Creditor data**	
17	1.4.1	Number of creditor participation in approval voting (including invalid votes)	Figs 3.15(b) & 5.1
18	1.4.2	HMRC participation in approval voting (including invalid votes)	Fig 5.2
19	1.4.3	HMRC participation by share of approval voting	Fig 5.2
20	1.4.4	HMRC voting pattern (reported votes including some with only partial data)	Fig 5.3
21	1.4.5	HMRC modifications filed (by number and range of modifications filed)	Figs 5.5 & 5.6
22	1.4.6	Approval voting values	Fig 3.15(a)
Section 2		**Form 1.2 / Form 1.2(Scot) / Form 1.2(NI) / CVA2**	
23	2.1	Revocations	See 4.1.1
Section 3		**Form 1.3 / Form 1.3(Scot) / Form 1.3(NI) / CVA3**	
	3.1	**Progress Reports**	
24	3.1.1	Volume of progress reports due by year of approval (completed only)	Fig 7.3 Sections 6.10 7.5
25	3.1.2	Completion & late filing of progress reports (by volume)	-ditto-
Section 4		**Form 1.4 / Form 1.4(Scot) / Form 1.4(NI) / CVA4**	
	4.1	**Completion data**	
26	4.1.1	CVA Completion Status	-ditto-

	Data table Number	***Titles***	***Figure Numbers / Footnote***
27	4.1.2	CVA Legal Outcome (completed only)	Figs 3.1, 3.6, 3.7, 3.8, 3.11, 3.13(a)(b), 3.18, 4.3, 5.6, 6.4 6.10, 6.15 & 6.16
28	4.1.3(a)	Intended duration by approval year (volume)	Analysis of core data. See sections 3.2, 3.4 & 7.6
29	4.1.3(b)	Actual duration by approval year (volume)	-ditto-
30	4.1.4	Change in duration by approval year (volume)	-ditto-
31	4.1.5	CVA exit route	Sections 3.2, 6.10 & 6.11
32	4.1.6	Exit procedure by office-holder	-ditto-
	4.2	**Variation of terms**	
33	4.2.1	Requests for variations	Figs 6.16 & 6.17
34	4.2.2	Summary of variations by volume	Fig 6.18
35	4.2.3	Variations by type of user (office-holder / IP1)	Sections 2.10, 2.11 & 6.9
36	4.2.4	Variations by type of user (firm)	-ditto-
37	4.2.5	Summary of variations by type of user (office-holder / IP1)	-ditto-
38	4.2.6	Summary of variations by type of user (firm)	-ditto-
	4.3	**CVA *Purpose***	
39	4.3.1	CVA Purpose	Figs 3.1, 3.8, 4.2, 4.3 & 6.14
40	4.3.2	CVA change in purpose post termination event (Pre closure)	-ditt0-
	4.4	**Late and missed filings**	
41	4.4.1	Late and missed filing of reports and completion certificates	Fig 7.3
42	4.4.2	Percentages of late filings	Fig 7.3
Section 5		**CVA Financial Data [extracted from final summary R&P when filed]**	
	5.1	**Receipts and payments accounts**	
43	5.1.1	Summary of CVA financial transactions (£millions)	Fig 3.16 Ch3 n 93.
44	5.1.2	Realisations by CVA approval year (volume by band)	Fig 3.16 Ch3 n 93.
45	5.1.3	Source of realisations including interest (£millions)	Fig 3.16 Ch3 n 93.

	Data table Number	Titles	Figure Numbers / Footnote
	5.2	**Estate costs**	
46	5.2.1	Summary of CVA payments (£millions)	Fig 3.16 Ch3 n 93.
47	5.2.2	Analysis of Nominee and Supervisor fees paid from CVA estate funds (£millions)	Ch3 section 3.10
48	5.2.3	Analysis of Other office-holder fees paid from CVA estate funds (£millions)	Ch3 section 3.10
49	5.2.4	Fees reported as paid direct by the company or third party (£millions)	Ch3 section 3.10
	5.3	**Distributions**	
50	5.3.1	Intended distribution bands for unsecured non-preferential creditors	Ch3 section 3.8
51	5.3.2	Actual distribution bands for unsecured non preferential creditors	Fig 3.18
52	5.3.3	Distributions by creditor type (£millions)	Fig 3.17 Ch3 n 93.
	5.4	**Funds retained at completion**	
53	5.4.1	Summary of retained funds (£millions)	Fig 3.16
54	5.4.2	CVAs with retained funds (by volume)	Ch3 n 92.
Section 6		**Small Company Moratorium documents**	
	6.1	**Form 1.11 / Form 1.11(Scot) / Form 1.11(NI) / CVA11**	
55	6.1.1	Use of the Small Company Moratorium (published notices)	Figs 3.11, 4.4 & 7.3
56	6.1.2	Percentage use of Small Company Moratoriums	Fig 4.4
	6.2	**Form 1.12 / Form 1.12(Scot) / Form 1.12(NI) / CVA12**	
57	6.2.1	Extension of Small Company Moratoriums (published notices)	Sections 2.2, 3.5, 3.11, 4.7, 7.4 & 7.8
	6.3	**Form 1.14 / Form 1.14(Scot) / Form 1.14(NI) / CVA14**	
58	6.3	Ending of Small Company Moratoriums (published notices)	-ditto-
Section 7		**Administration procedure documents**	
	7.1	**Appointment [Form 2.21B]**	
59	7.1.1	ADM appointments pre and post CVA (by volume)	Fig 6.19(a)
60	7.1.2	Office-holder data (by volume)	Fig 3.10
	7.2	**Proposal [Form 2.17B / AM23]**	
61	7.2.1	ADM Prepacks & sale of business data (by volume)	Fig 3.9

	Data table Number	Titles	Figure Numbers / Footnote
	7.3	**Final Progress Report [Form 2.32B / 2.34B / 2.35B etc]**	
62	7.3.1	Outcome for creditors	Section 2, notes 13 & 17
Section 8		**Liquidation procedure documents**	
	8.1	**Appointment [Form 600]**	
63	8.1.1	Type of liquidation and timing in relation to the CVA	Fig 6.19(b)
64	8.1.2	Office-holder details	Fig 6.19(c)
	8.2	**Final progress report including summary R&P**	
65	8.2.1	Outcome for creditors	Section 2, notes 13 & 17
Section 9		**Company profile data**	
	9.1	**Certificate of incorporation**	
66	9.1.1	Company age at date of CVA approval	Figs 3.13(a), 6.20, 6.21 & 6.23
67		Business sic codes (identification key)	Code for 9.1.2
68	9.1.2	Business sic codes analysis (1 digit)	Section 1.12
69	9.1.3	Company volumes (identifying CVA multiple use)	Introduction Section 6
	9.2	**Annual returns / Confirmation statements**	
70	9.2.1	Management team size	Figs 6.15 & 6.17
71	9.2.2	Size of Share Capital	Figs 6.12, 6.13 & 6.14
72	9.2.3	Type of ownership pre CVA	Figs 6.9, 6.10 & 6.11
	9.3	**Filed accounts and company size**	
73	9.3.1	Company size	Figs 6.1, 6.2, 6.3(a)(b), 6.4, 6.5, 6.6, 6.7, 6.8, 6.11, 6.13, 6.18, 6.19(a)(b)(c), 6.20, 6.21 & 7.1
74	9.3.2	CVA Groups identified by size	-ditto-
75	9.3.3	Accounts filed after the commencement of the CVA	-ditto-
	9.4	**Charges filed**	
76	9.4.1	Charges registered at date of CVA approval (volume)	Fig 6.7
77	9.4.2	Type of charges registered at date of CVA approval	Ch 6 n 51.
78	9.4.3	Floating charge analysis (identification of the application of the Prescribed Part)	Fig 6.7
79	9.4.4	Charges registered post CVA approval	Fig 6.8

	Data table Number	Titles	Figure Numbers / Footnote
Section 10		**Final Outcome data** **(active / ongoing procedure / dissolution notices)**	
	10.1	**Companies House status**	
80	10.1	Final Outcomes (including invalid appointments)	Fig 6.19(a)
81	10.2	Final Outcomes (fully implemented CVAs)	Fig 3.7
Section 11		**Additional data used**	
82	11.1	Comparative HMRC voting data (1 April 2011 to 30 November 2012)	Section 5.4
83	11.2	Comparative HMRC voting data (1 April 2014 to 31 March 2015)	-ditto-