

Insolvency Engagement Document



Over time an informal protocol has developed whereby prospective Nominees of a CVA consult with the BPF in advance of a CVA Proposal being distributed. This is in order to allow representatives of the wider landlord community to identify particular issues within a CVA that may need to be addressed, and therefore helps to maximise the likelihood of approval.

This protocol appears to work well and the BPF is keen to see it adopted in all cases where landlords make up a significant element of the creditor body. However, we are keen to ensure that these engagements are conducted in a fair, transparent and effective manner which allows landlords to make informed contributions.

The BPF has therefore set out below a statement of best-practice, which details how we expect to be engaged with regarding potential CVAs. As part of this guidance, we have provided a list of what the BPF believes to be the top 10 'red-flag' clauses. We caution any prospective landlord voting on a proposed CVA to look out for these clauses and ask that insolvency practitioners consider whether they can be removed prior to engagement.

In the first instance, Insolvency Practitioners' wishing to engage should contact BPF Policy Officer, Laurence Raeburn-Smith at laeburn-smith@bpf.org.uk or on 020 7802 0121.

British Property Federation

St Albans House
5th Floor, 57-59 Haymarket
London
SW1Y 4QX

T 020 7828 0111
info@bpf.org.uk
www.bpf.org.uk

Expected Best Practice

There are several factors Insolvency Practitioners and companies seeking to engage should consider in order to display best practice.

We ask that:

1. The BPF get at least 5 working days' notice of the CVA meeting.
2. The NDA be signed at least 48 hours before the meeting.
3. The CVA information pack to be presented be provided at least 24 hours before the meeting to allow enough time for it to be reviewed by BPF attendees.
4. The BPF should receive confirmation of attendees from all parties at least 24 hours before the meeting.
5. We expect practitioners to do all they can to allow the BPF's Insolvency Committee members to dial-in to engagement meetings, should they need to.
6. CVA Proposals are also often lengthy, detailed technical documents. Where the CVA is in respect of a retailer where there are a significant number of landlords, consideration should be given to providing a supplementary mini briefing pack which pulls the key issues together in one place.
7. Practitioners and issuing companies should also come to meetings aware of what are the key issues for landlords, this includes the following:
 - a) The basis of valuation proposed for the landlords' claims (and corresponding voting rights)
 - b) The basis of stratification where different options being offered, e.g. different properties continuing to trade or closing and/or different rental discounts being applied
 - c) The ability for either party to terminate the lease, including the method of termination and any conditions attached
 - d) Compensation offered
 - e) Relevant antecedent transactions
 - f) Clawback
 - g) Rent reviews
 - h) Rent repayments, including rent paid in advance set off against future discounted rent
 - i) The effect on any guarantors
 - j) Liability for rates
 - k) Payments in lieu of dilapidations, and basis for calculation
 - l) The ability, if any, for the landlord to terminate the CVA in the event of default
 - m) If there have been previous failures, an explanation of the CVA stands a better chance of success
 - n) As required by the legislation, an explanation of why the CVA is a better option for landlords than administration (particularly in terms of the number of stores likely to be closed)
 - o) If relevant, the source of funding to make the CVA financially viable
 - p) An explanation of why the business will be sustainable post-CVA.

Company Voluntary Arrangements: Top 10 “Red Flag” Clauses for Landlords

	CLAUSE	THE ISSUE FOR LANDLORDS
1	Moratorium against enforcement of tenant’s covenants and/or full and final release of tenant’s liabilities (other than CVA rent)	CVAs which prevent the landlords from enforcing ordinary lease covenants are unfairly wide ranging. They restrict a landlord’s ability to manage the property in the usual way, e.g. compliance with user, alienation, repair and alterations covenants. An administrator using leasehold property would have to comply with all covenants.
2	Restrictions on termination rights given to landlords in CVA, particularly by time and/or resulting in a full and final release	The ability given to landlords to terminate leases is the quid pro quo for rental discounts being imposed on them by the CVA. Where the landlord only has a short period to exercise the right, this can render it effectively inoperable. Requiring landlords to accept a full and final release of liabilities is an unfair restriction on their ability to terminate.
3	Company’s right to terminate leases or trigger rent review at the end of the CVA	It should never be necessary to give the company additional rights outside the CVA period. By that time, either the CVA has succeeded and the company is in a good financial position, or it has failed, and the company has appointed administrators. For landlords, it means supporting a company through the CVA period by accepting discounted rents, only to accept another loss at the end of it (when the company may be profitable).
4	Removal of the company’s obligation to give an authorised guarantee agreement (AGA) on assignment	The ability to call for an AGA is an important aspect of the landlord’s ability to control future assignments of the lease. The tenant should not require this additional benefit for the properties it is electing to retain under the CVA. An administrator would not be entitled to rewrite the lease terms in this way.
5	Upwards only rent reviews rewritten	It should never be necessary to give the company additional benefits outside the CVA period – see above. This is another example of opportunistic drafting in CVAs where the additional advantage given to the company has no bearing on the current survival of the business (but impacts on value for landlords).
6	Dilapidations compromised to % rent (or another fixed sum)	The company will typically have obtained advice on dilapidations from property consultants. It should not, therefore, be necessary to treat all landlords in the same with a set rate for dilapidations. Liability for dilapidations does not correlate to the level of rent. An administrator would have to pay all dilapidations accruing whilst they used the property.
7	Landlords’ claims against compensation fund discounted by 75%	The discounting of landlords’ claims for voting purposes is a controversial practice; the only justification given is that the Insolvency Act 1986 allows future rent claims to be valued at £1 for voting purposes (if the company has no evidence of the landlord’s real loss). This does not apply to compensation funds, and puts landlords at disadvantage compared with other creditors.
8	Compensation fund limited to the first 3 years’ profits (or less)	The company should allow landlords to share in the future success of the business by way of a share of profits or compensation fund. This mitigates some of the unfairness that might otherwise arise from compromising landlords’ rights as a way of enhancing shareholder value (as opposed to just avoiding insolvency). When the fund is referable to a period when the company’s profits will be low or nil then it is not achieving that purpose.
9	Rental discounts for the whole of the term	It should never be necessary to give the company additional benefits outside the CVA period – see above. This would involve the CVA imposing rental discounts for a period beyond the company’s business/turnaround plan and profit forecasts. If the business is profitable then this is simply enhancing shareholder value at the landlords’ expense.
10	Rental discounts survive termination of the CVA	Termination of a CVA should apply to all of the operative terms. It is unfair for rental discounts to survive termination when the landlords will not then get the benefits provided in return by the CVA, including the prospect of a business rescue and solvent tenant.