


MVLs and indemnities

Why take indemnities from
shareholders?




Malcolm Niekirk
Insolvency & Restructuring
Partner


MVL indemnities

- Why do we use them?
 - Formal statutory procedure for distributions
 - The normal 'short-cut'
 - What if there were no indemnity?
 - The shareholders' point of view
 - The liquidator's point of view
 - Different forms of indemnity
 - Short and simple
 - Long and complicated
 - Practical points – when indemnities get complicated
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MVL indemnities – why have them

- An indemnity allows the liquidator to make an early distribution.
 - So the shareholders get most of their money quickly.
 - Otherwise they would have to wait for the liquidator to:
 - advertise for claims from creditors; and
 - process them, then pay them.
 - The liquidator, of course, holds on to enough money:
 - to pay the known claims;
 - to cover their fees and expenses; and
 - for a contingency.
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MVLs – distributions ‘by the book’

- Part 14 IR’16 – paying creditors – applies to MVLs too!
- Before paying final (or only) distribution to creditors:
 - Gazette a notice
 - Give at least 21 days to prove
 - Give a distribution date (within two months after the last proving date)
 - Tell them you won’t pay them if they haven’t proved
 - Also send it to all creditors who have not proved
 - And, you can also advertise by other means if you think it useful

(r14.28-30)



MVLs – distributions ‘by the book’

- Following the closing date for proofs, the liquidator has 14 days to:
 - Admit or reject them (in whole or part); or
 - Make provision for them.
- Liquidators have no duty to deal with proofs that are delivered late.
 - (But you have a discretion to accept them.)

(r14.32)

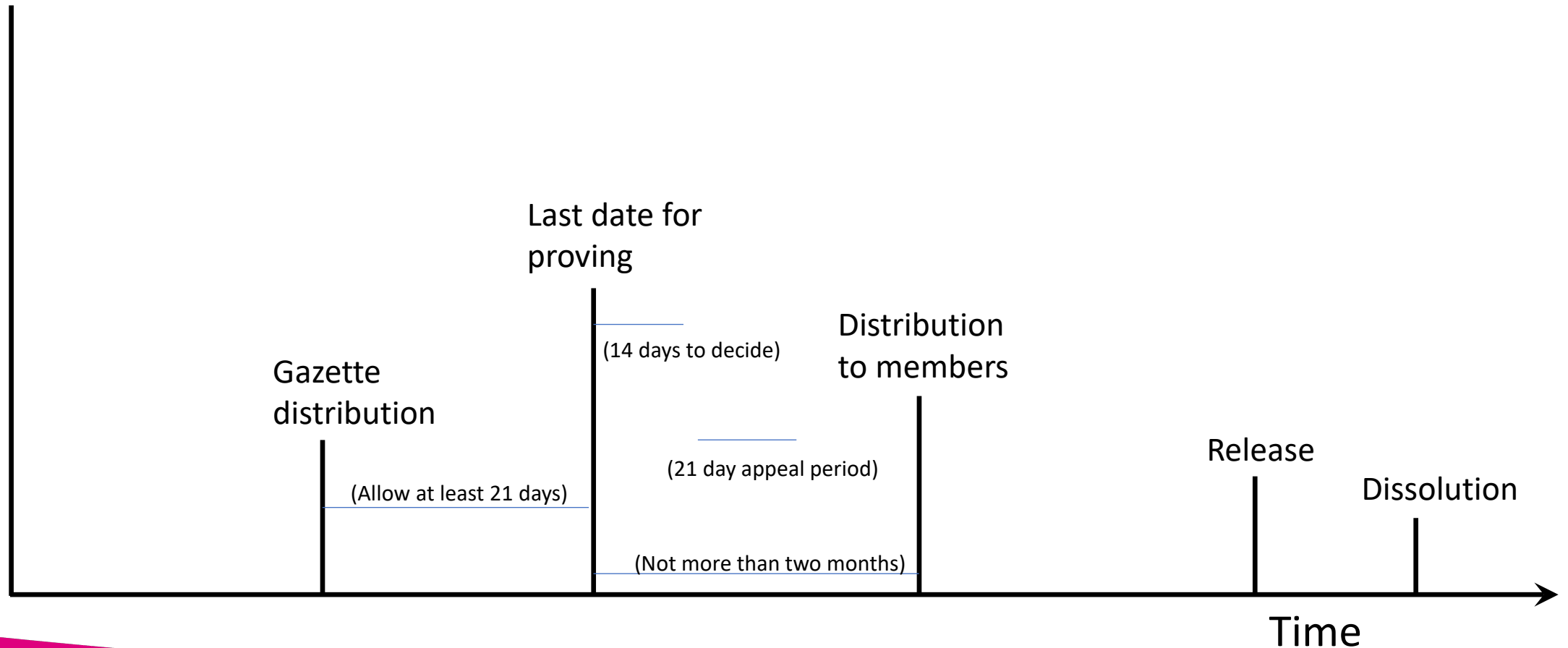


MVLs – distributions ‘by the book’


- What this means:
 - Advertise for claims
 - Wait 21 days
 - Pay within two months
 - (Wait for the 21 day appeal period to pass) (r14.8)
 - (Provide if there is a difficult claim, or postpone if very difficult)
- Once you’ve done this, your duty is done.
 - Late claims are still claims against the company
 - The creditor could get a winding up order
 - But you are not at risk

MVLs – distributions ‘by the book’


Appointment




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MVLs – how it's normally done

- Appoint as soon as the DoS is ready
 - Add a deed of indemnity to the documents tabled for signing
 - Get the company's funds into your client account
 - Hold back:
 - Liquidation expenses
 - [Any known creditors that need to be paid]
 - [A contingency]
 - Pay the rest to the shareholders
 - [Gazette for creditors and] close
- 

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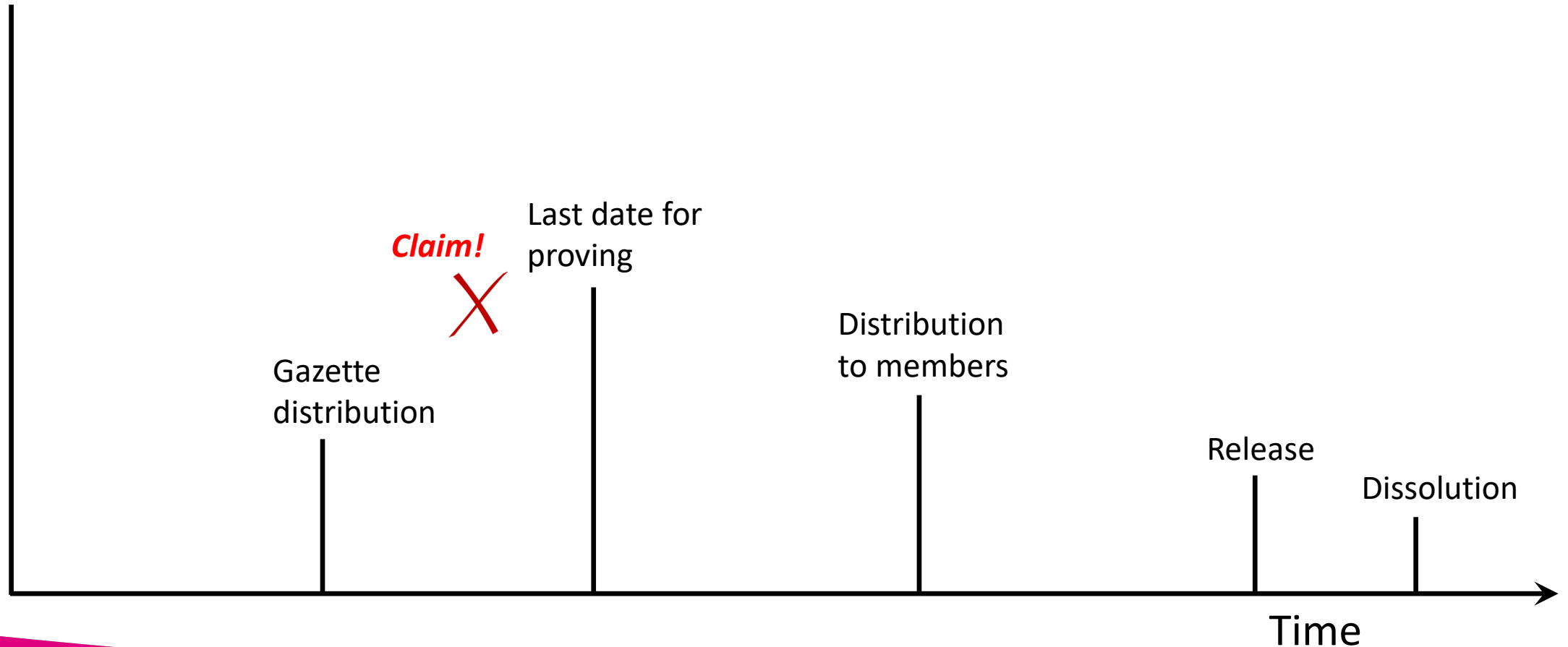
MVLs – what if there were no indemnity?

- Doing it 'by the book':
 - What if an unexpected claim comes in before the last date for proving?



MVLs – distributions ‘by the book’

Appointment



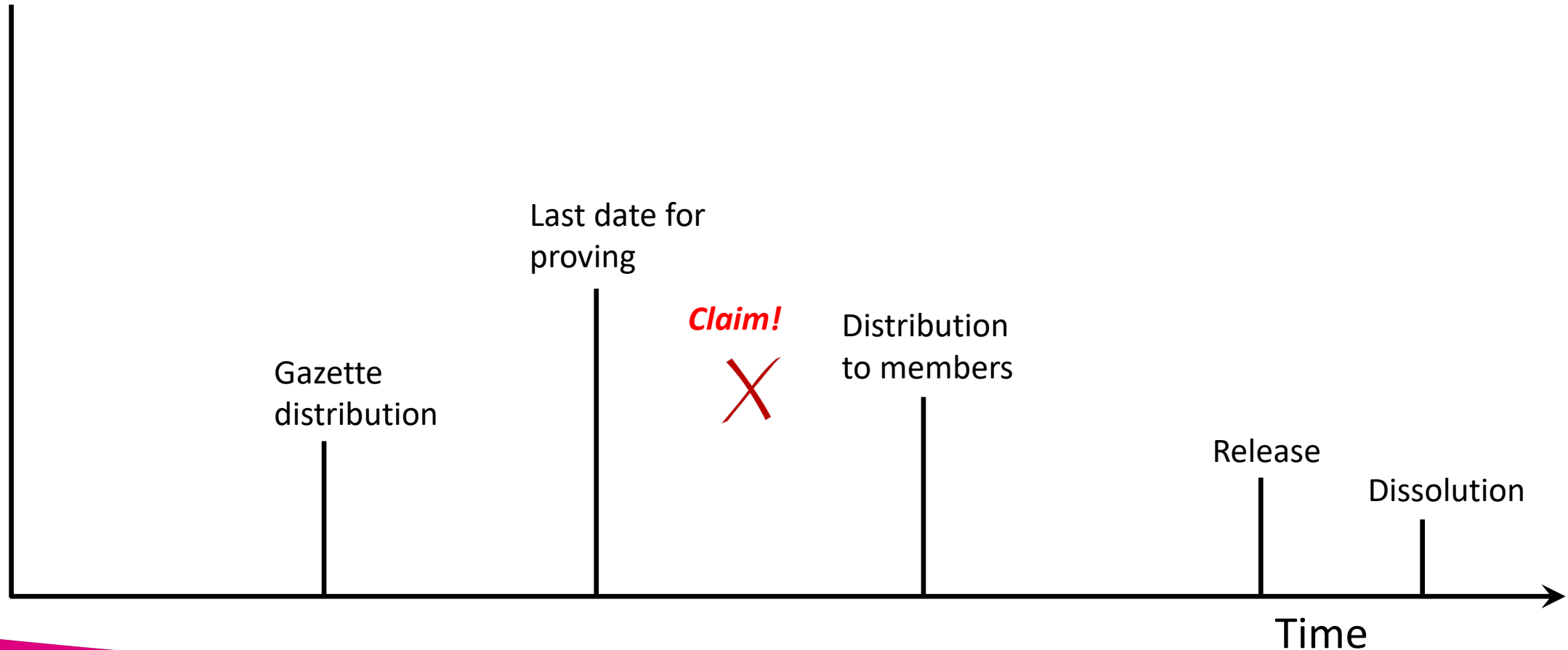
MVLs – what if there were no indemnity?

- Doing it ‘by the book’:
 - Suppose an unexpected claim comes in before the last date for proving?
 - The liquidator must admit it (assuming it’s valid)
 - And pay it – if they can
 - Or convert the MVL into a CVL – if they can’t



MVLs – distributions ‘by the book’

Appointment

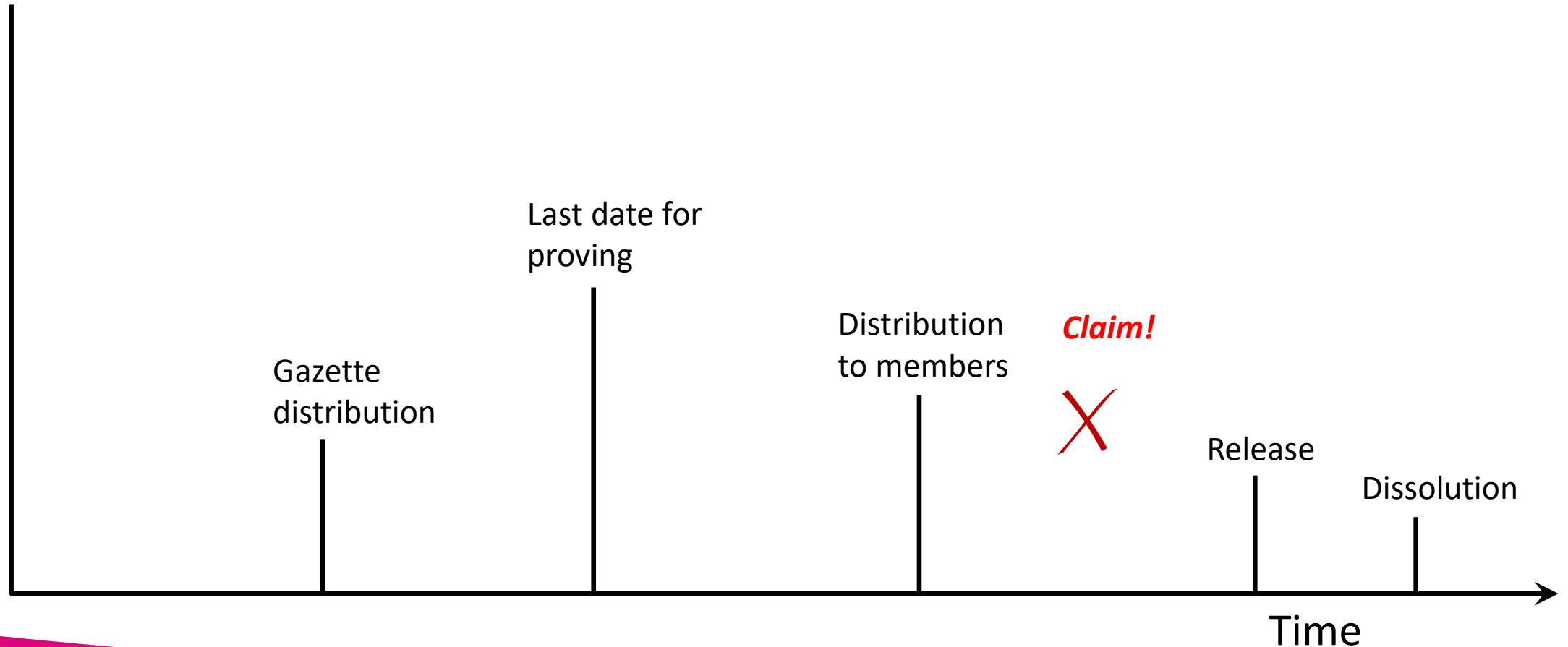


MVLs – what if there were no indemnity?


- Doing it ‘by the book’:
 - Suppose the claim comes in after the last date for proving?
 - The liquidator may admit it (as above; the MVL may convert to a CVL)
 - But if they don’t (and the liquidator has not distributed to the shareholders):
 - The company still owes the debt
 - The creditor may present a winding up petition
 - The creditor could get a freezing order, to stop the shareholders receiving their distribution
 - And if they don’t (and the liquidator has distributed to the shareholders):
 - The company still owes the debt
 - The creditor may present a winding up petition
 - Compulsory liquidator may investigate the distribution as an antecedent transaction
 - But not a misfeasance – the voluntary liquidator did their duty

MVLs – distributions ‘by the book’

Appointment



MVLs – what if there were no indemnity?

- Doing it ‘by the book’:
 - Suppose the claim comes in after the last date for proving?
 - The liquidator may admit it (as above – and can the company pay it?)
 - But if they don’t (and the liquidator has not distributed to the shareholders):
 - The company still owes the debt
 - The creditor may present a winding up petition
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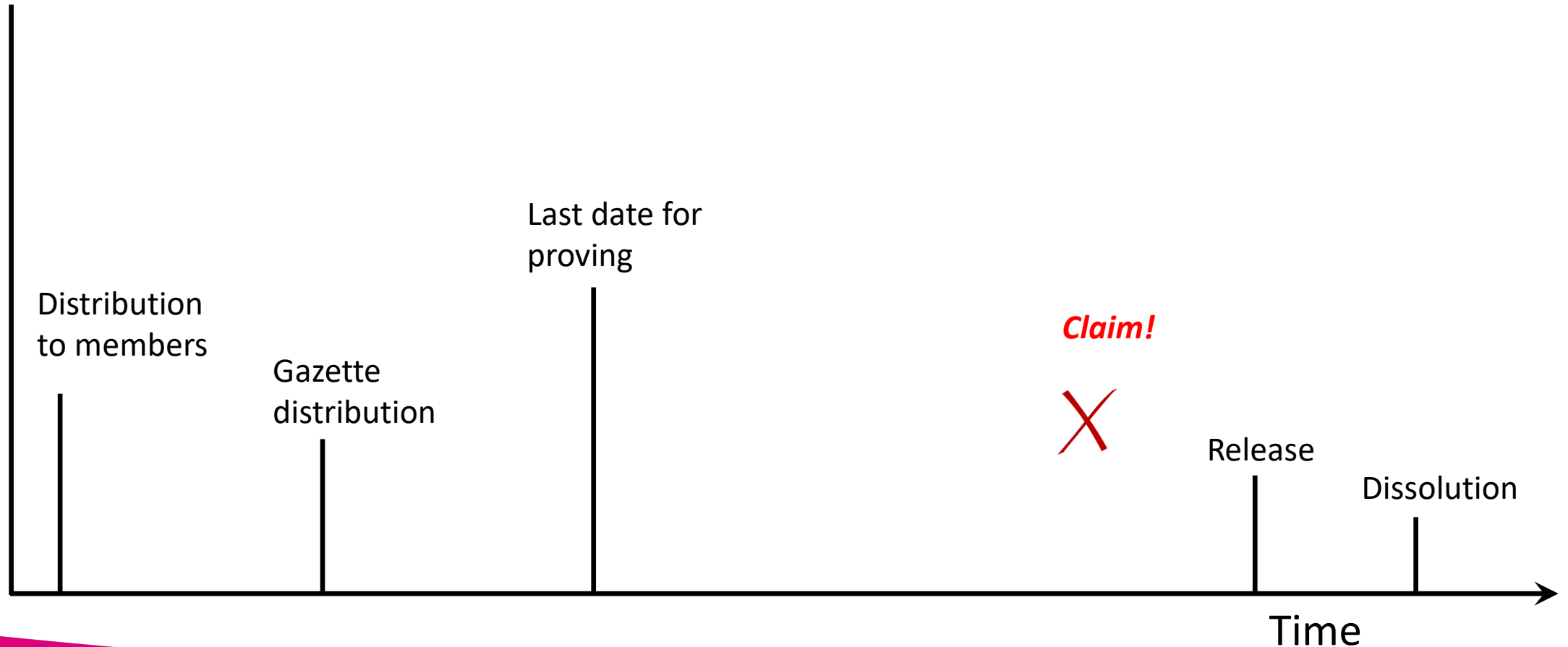
MVLs – what if there were no indemnity?

- Doing it quickly – not by the book – and without an indemnity



MVLs – distributions ‘by the book’

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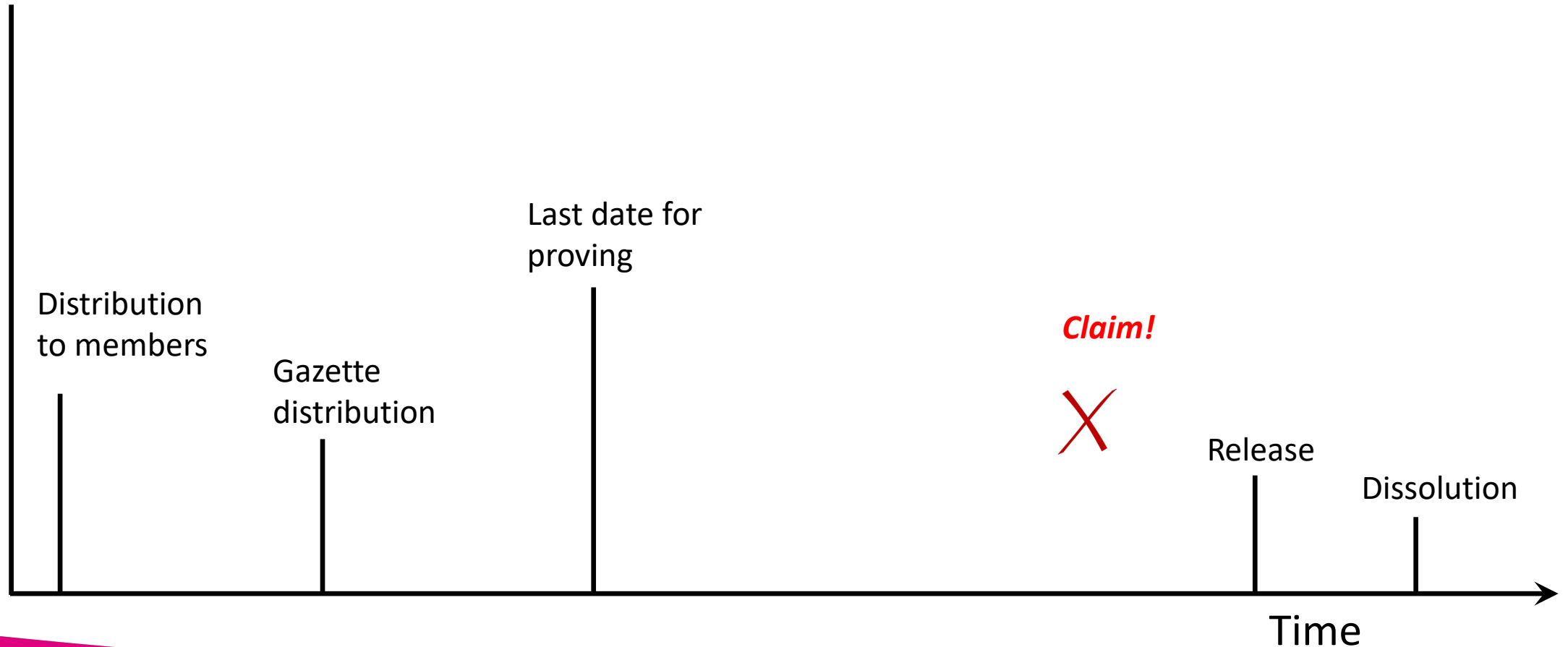


MVLs – what if there were no indemnity?


- Doing it quickly, but without an indemnity
 - Suppose the liquidator follows the distribution by Gazetting for claims
 - And suppose a claim comes in after the last date for proving?
 - The liquidator may admit it
 - And convert the MVL into a CVL – because they can't pay it
 - But if they don't (remember, the liquidator has distributed to the shareholders):
 - The company still owes the debt
 - The creditor may present a winding up petition
 - Compulsory liquidator may investigate the distribution as an antecedent transaction
 - But not a misfeasance – the voluntary liquidator did their duty – or did they?

MVLs – distributions ‘by the book’


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MVL indemnities

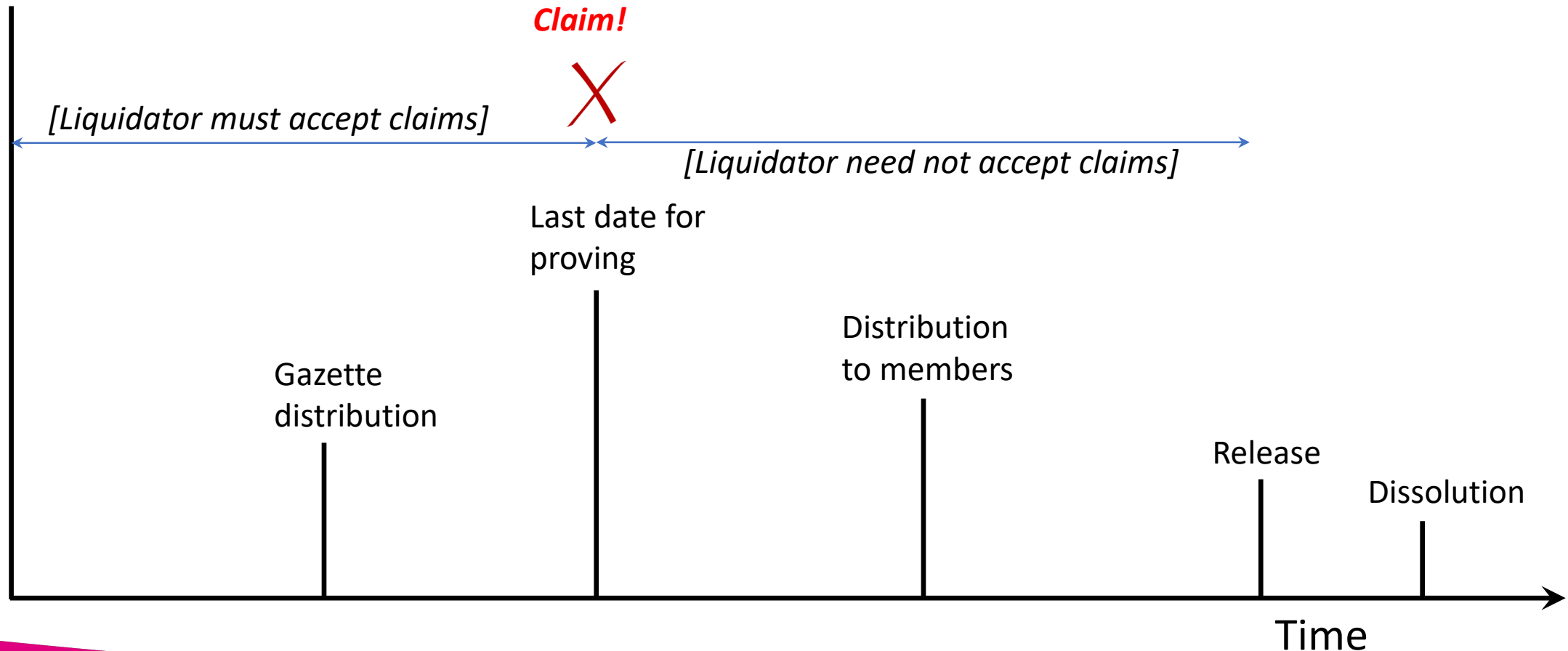
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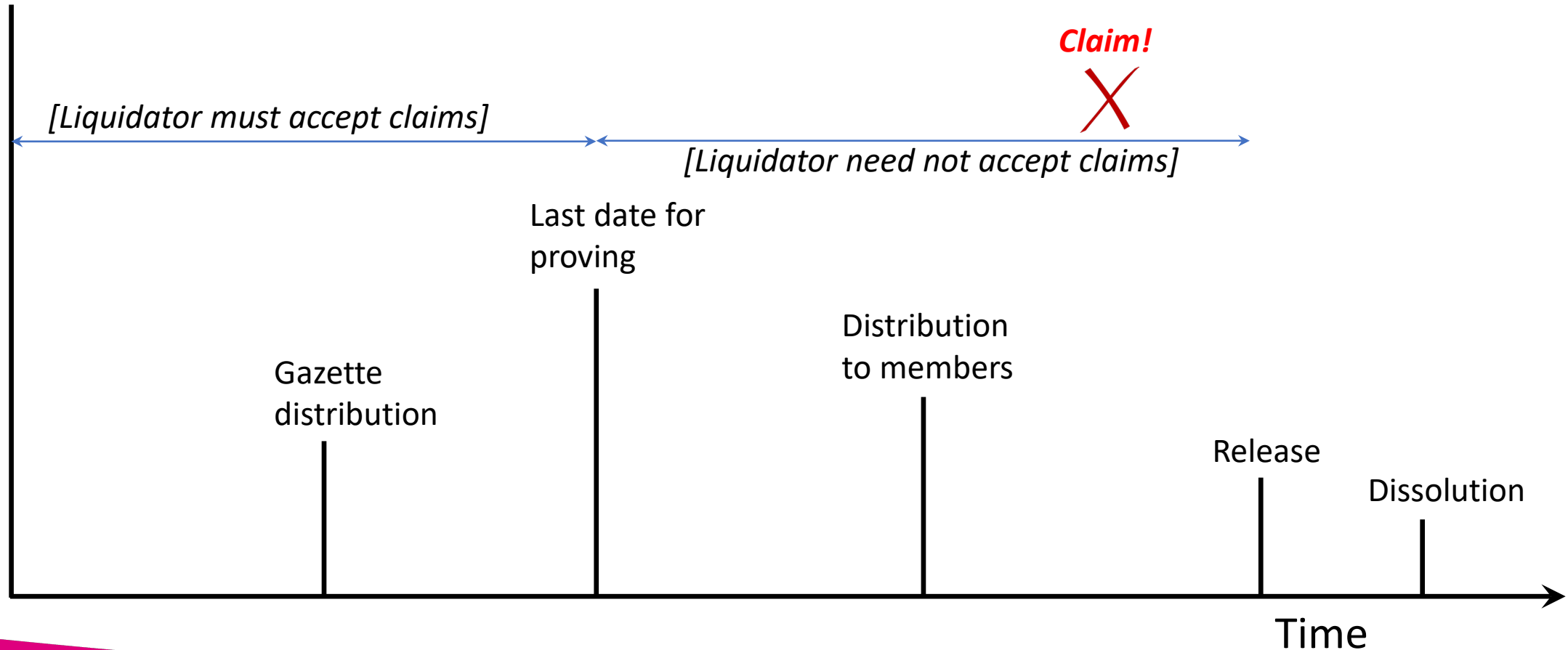


The shareholders' PoV – if no indemnity

- If 'by the book' – and a claim before the capital distribution
 - The creditor would be paid what's due (if there's enough)
 - Shareholders' funds might be reduced
 - The company might be wound up through a CVL (if there's not enough)
 - If a CVL, the (new) liquidator may challenge pre-liquidation transactions
 - If a CVL, the directors might have to justify the contents of the DoS
 - They could be prosecuted; and
 - Will have to show they were justified in missing off this claim

MVLs – distributions ‘by the book’

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The shareholders' PoV – if no indemnity

- If 'by the book' – and a claim comes in after the distribution – and the liquidator (still in office) accepts it
 - The company will be wound up through a CVL
 - The (new) liquidator may challenge pre-liquidation transactions
 - The directors might have to justify the contents of the DoS
 - They could be prosecuted; and
 - Will have to show they were justified in missing off this claim

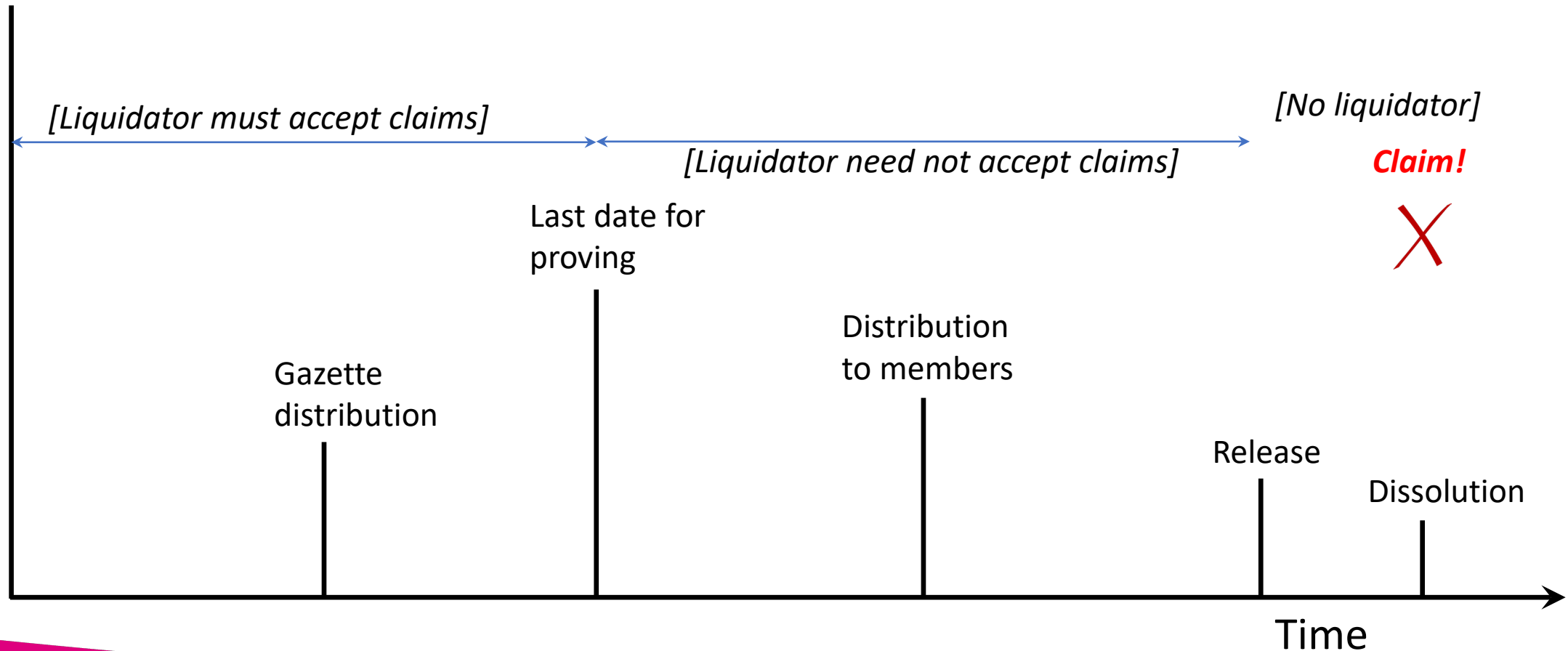
The shareholders' PoV – if no indemnity

- If 'by the book' – and a claim comes in after the distribution – and the liquidator (still in office) does not accept it
 - The company may be compulsorily wound up
 - A new liquidator may challenge pre-liquidation transactions
 - The directors might have to justify the contents of the DoS
 - They could be prosecuted; and
 - Will have to show they were justified in missing off this claim



MVLs – distributions ‘by the book’

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The shareholders' PoV – if no indemnity

- If 'by the book' – and a claim comes in after the liquidation has closed
 - The company may be (restored and then) compulsorily wound up
 - A new liquidator may challenge pre-liquidation transactions
 - The directors might have to justify the contents of the DoS
 - They could be prosecuted; and
 - Will have to show they were justified in missing off this claim

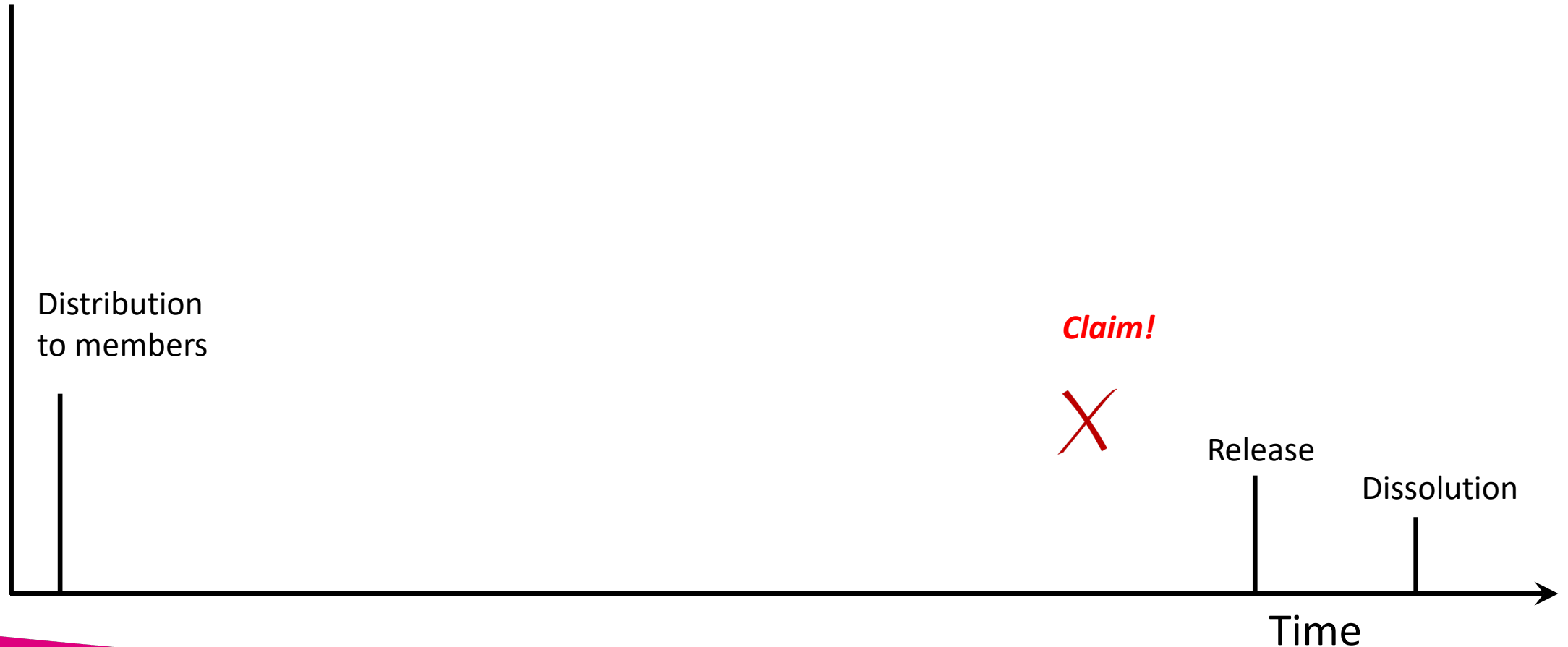


The shareholders' PoV – if no indemnity


- 'By the book liquidation' – the shareholders' decision about dealing with a late claim:
 - How much will it cost?
 - What's the potential risk to us from antecedent investigations?
 - What's the potential risk to us of prosecution for the DoS?

MVLs – distributions without gazetting


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The shareholders' PoV – if no indemnity

- Suppose the liquidator distributes without gazetting for claims
 - And suppose there is a claim after they have paid the shareholders
 - The liquidator will have to convert to a CVL
 - The (new) liquidator may challenge pre-liquidation transactions
 - The directors might have to justify the contents of the DoS
 - They could be prosecuted; and
 - Will have to show they were justified in missing off this claim
 - The (new) liquidator may try to claw back the distribution (as paid by misfeasance), probably from the former liquidator, because:
 - Paid outside the statutory order of priorities
 - Paid without following the statutory procedure
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MVL indemnities

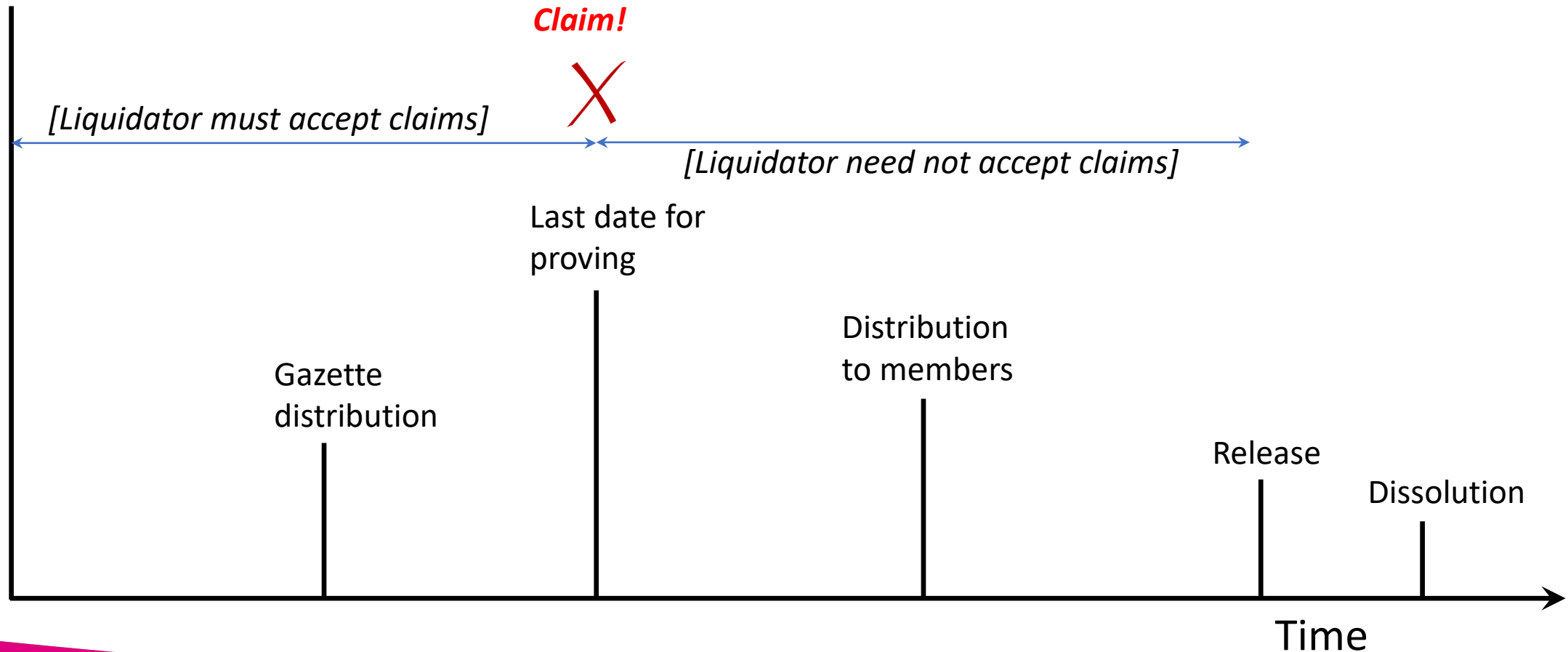
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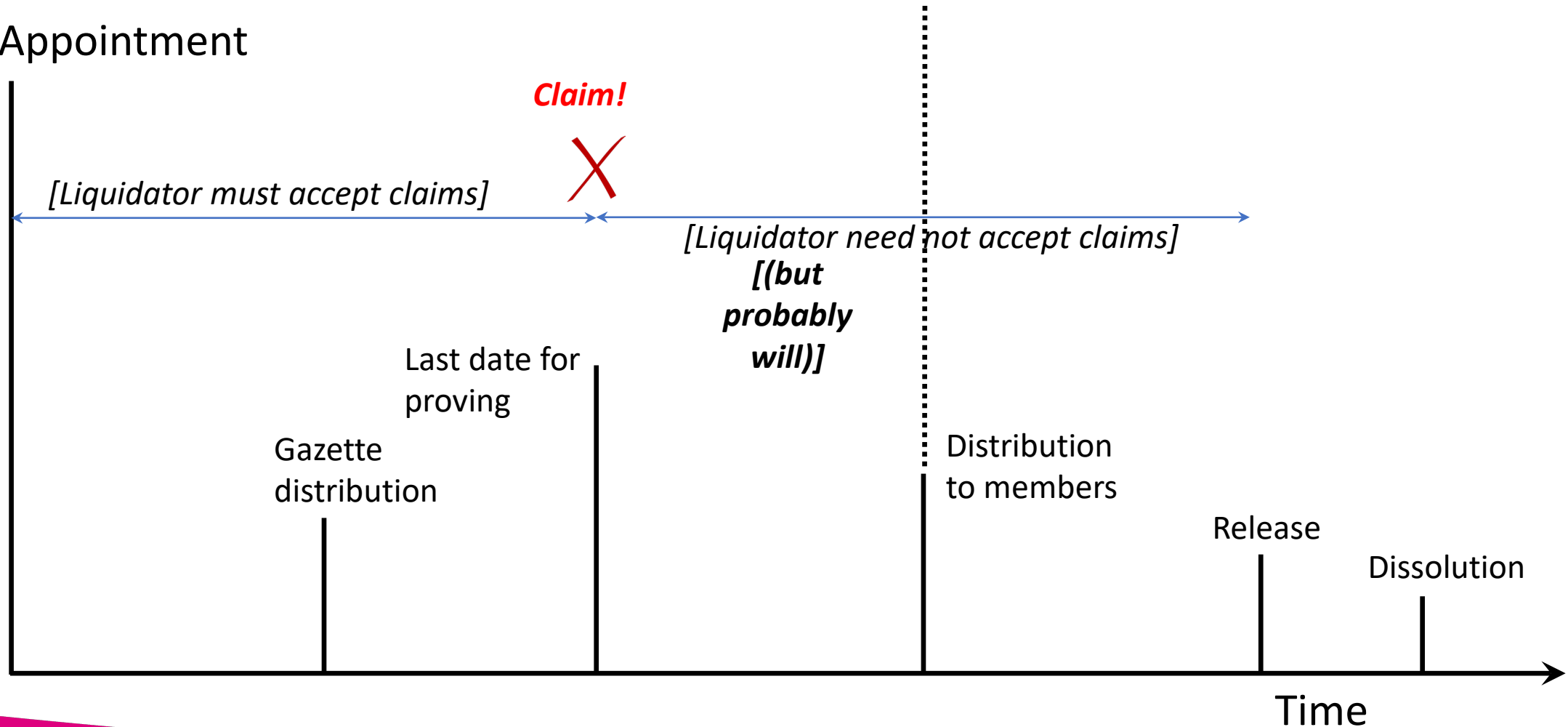
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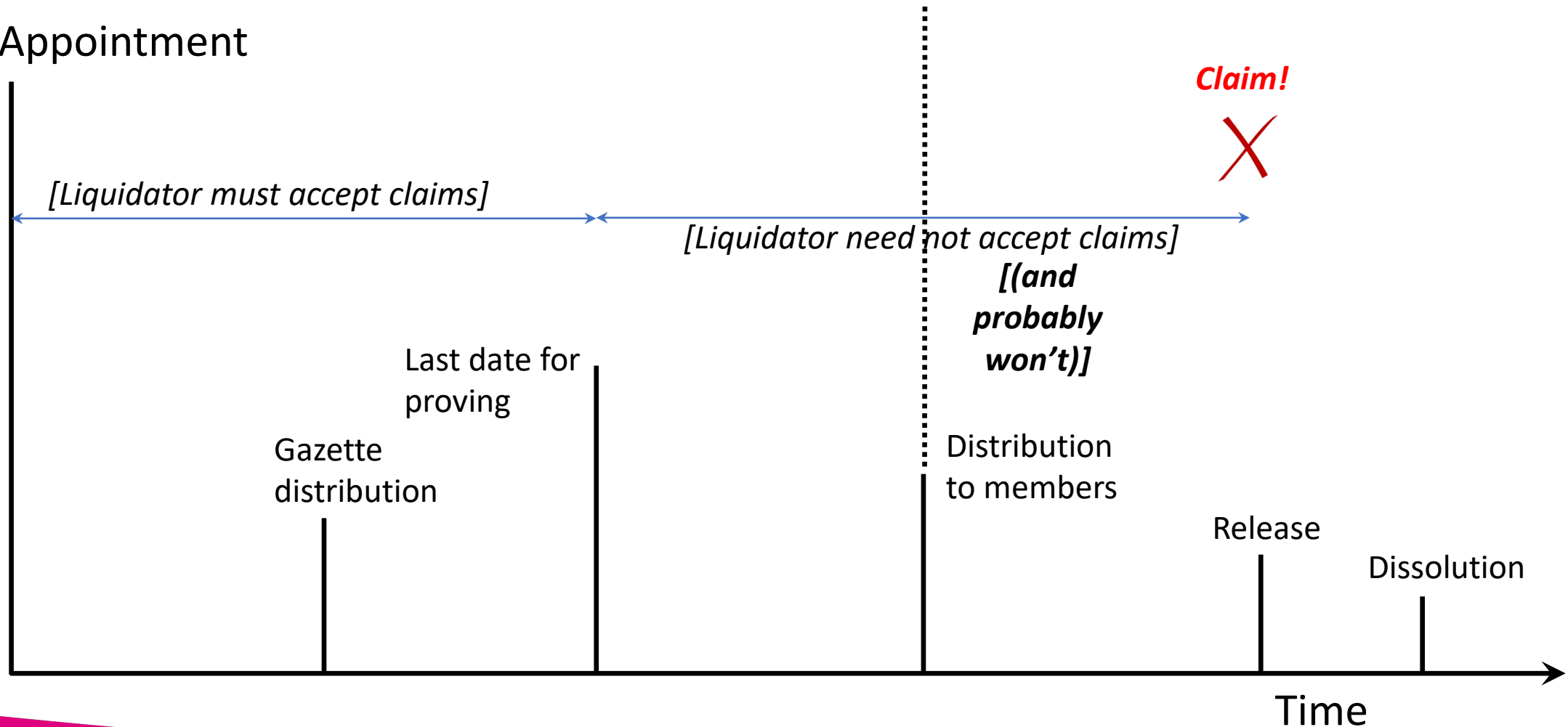
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MVLs – distributions ‘by the book’


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MVLs – distributions ‘by the book’

- In a case like this, the liquidator should be safe if they reject a claim post-distribution.
 - The liquidator has kept to their duties
 - The creditor is not entitled to a distribution from the liquidation
 - They are excluded from the statutory order of priorities in the liquidation
 - The company still owes a debt to the creditor
 - The creditor can put the company into compulsory liquidation
 - The new liquidator may be able to claw back something from the
 - members (preference?) or
 - directors (misfeasance, based on the DoS?)
 - The members may prefer to return funds to let you accept the claim and pay it

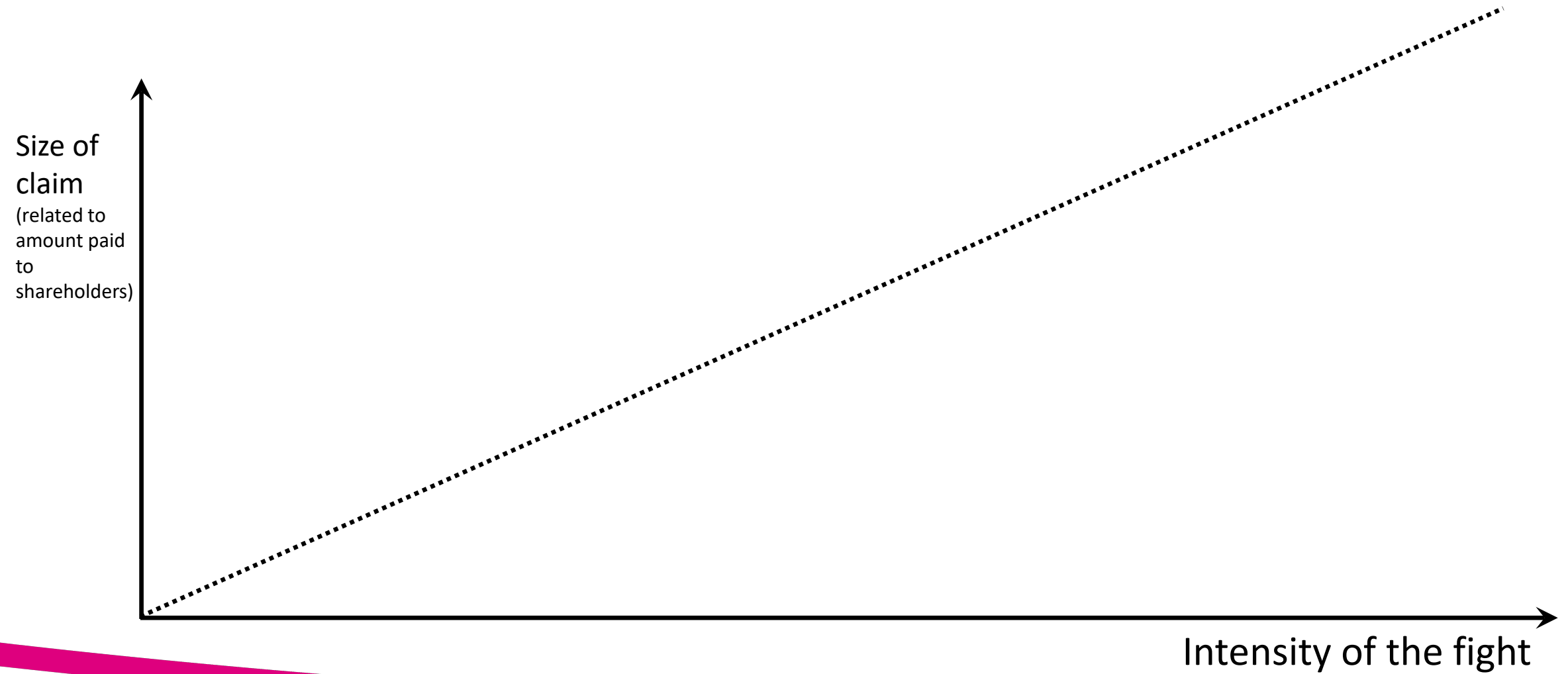
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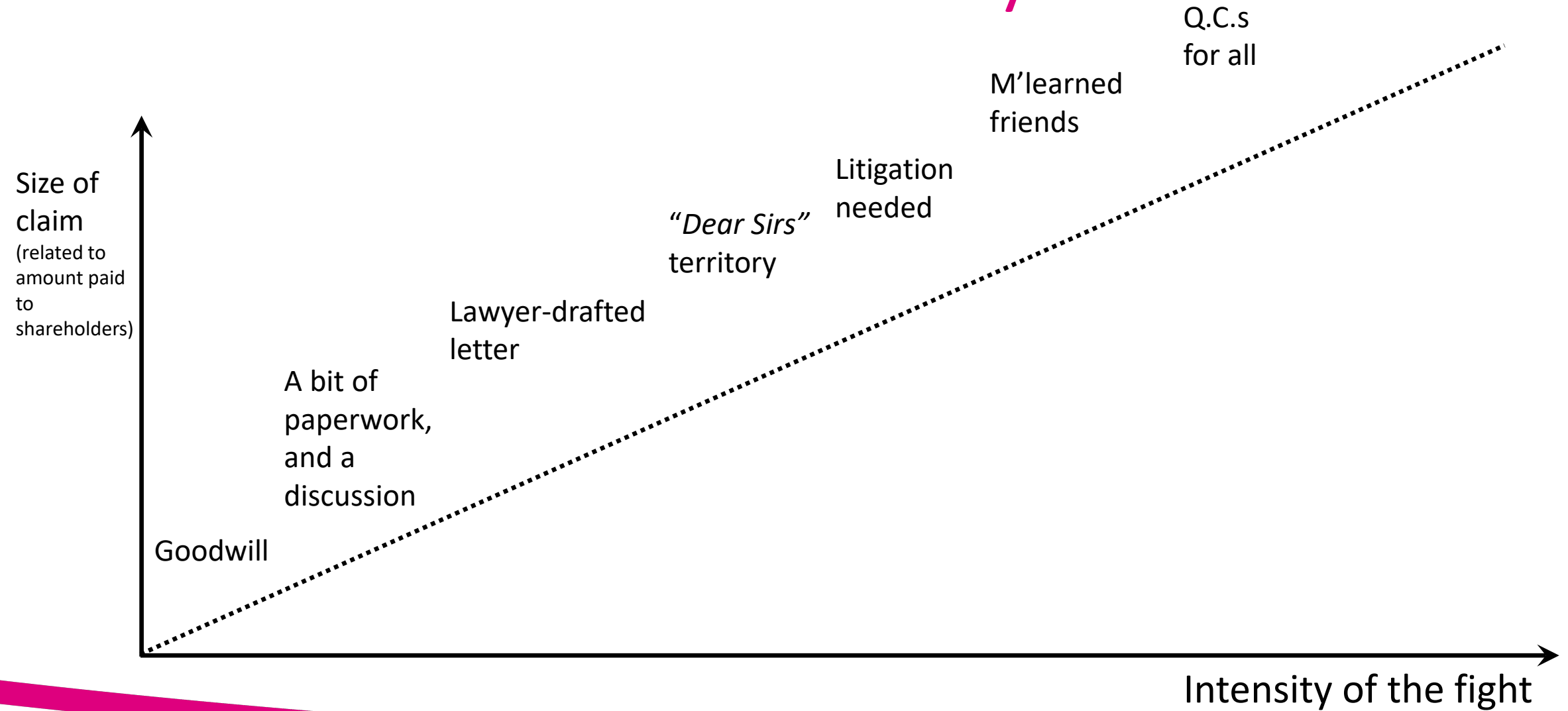
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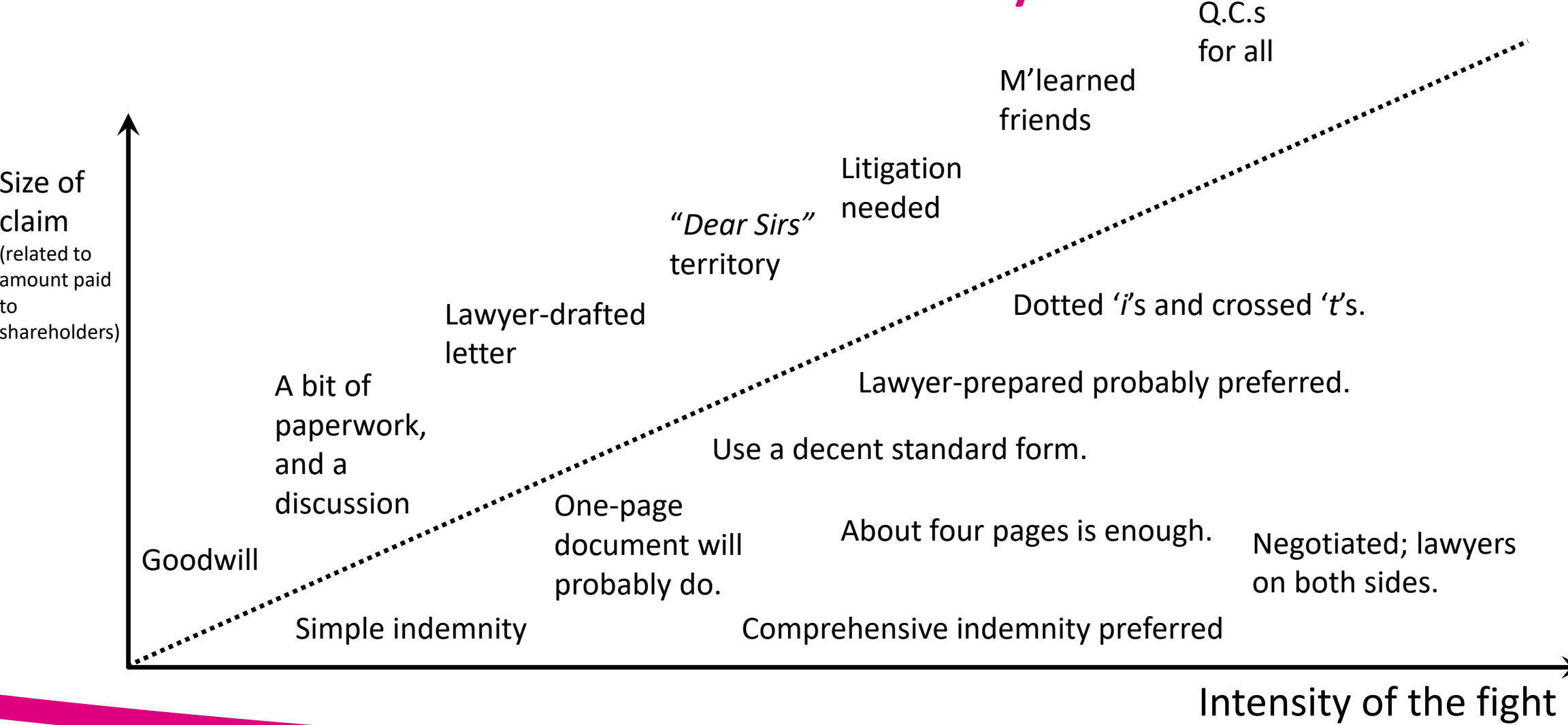
Different forms of indemnity




Different forms of indemnity



Different forms of indemnity




Different forms of indemnity

- An indemnity check-list (part 1 – the minimum):
 - Company name and number?
 - All shareholders correctly identified?
 - Indemnity to the company?
 - Indemnity to the liquidators?
 - Joint and several liability (to the extent that's appropriate)?
- 


Different forms of indemnity

- An indemnity check-list (part 2 – the four-page indemnity – adds):
 - Indemnity to the liquidators, *to include their successors in office?*
 - *Indemnity to the practice (and its people)?*
 - *Wide and effective description of 'claims'?*
 - *Exclusion of negligence?*
 - *Warranties from the shareholders?*
 - *Duration of the indemnity?*
 - *Appropriate boilerplate?*
 - *Executed as a deed?*


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Practical points – complicated indemnities

- Overseas shareholders
 - Foreign law
 - Enforcement overseas
 - Non-aligned shareholder groups
 - Shareholders who are trustees
 - Corporate shareholders (particularly if shells)
 - Distributions in specie
 - Negotiating indemnities – no indemnity if you're negligent (moral hazard)
 - Lots of shareholders? Loan arrangement instead.
- 

Practical points – complicated indemnities

- Overseas shareholders
 - Foreign law
 - For example, in France, a PG must be refreshed regularly.
 - Normally, if an English / Welsh company, we'd set our law for the indemnity.
 - Foreign courts
 - Normally, if an English / Welsh company, we'd give our courts jurisdiction.
 - But you may need to serve papers overseas.
 - And you may need to get a local judgement registered in the foreign court for enforcement.
 - Assets overseas
 - Foreign laws may make enforcement overseas difficult (eg US states with 'homestead' protections).
 - Can you find the assets; do you speak the language?
- 

Practical points – complicated indemnities

- Non-aligned shareholder groups
 - Normally the indemnifiers have joint and several obligations.
 - This works if it's a family company with few shareholders.
 - But, suppose the shareholders are:
 - Mr & Mrs A + Mr & Mrs B
 - Mr A & Mrs B
 - You could have:
 - Mr & Mrs A jointly and severally responsible for 65% of any claim; and
 - Mr & Mrs B jointly and severally responsible for 35% of any claim; and
 - Provisions for picking up the shortfall if either pair don't pay promptly.

Practical points – complicated indemnities

- Shareholders who are trustees
 - They may want to limit their liability
 - Perhaps to the lower of:
 - Payments received by them; and
 - Funds in their control, when you make a claim.

Practical points – complicated indemnities


- Corporate shareholders (particularly if shells)
 - What is their covenant worth?
 - What other assets do they have?
 - What are the plans for them?
 - The indemnity from them may not be much value if they distribute their assets (the distribution from you) to their shareholder(s).

Practical points – complicated indemnities

- Distributions in specie
 - How do you value the asset?
 - It may be worth much more – or less – when you need to call on the indemnity.
 - How is the shareholders' liability capped?
 - Is the wording clear enough on the figure for the cap?
 - What are the shareholders' plans for the asset?




Practical points – complicated indemnities

- Negotiating indemnities – no indemnity if you're negligent?
 - Many indemnities ask for an indemnity against defective appointments.
 - Many indemnities ask for cover from almost all liabilities – but not those incurred through negligence.
 - This is often a point of negotiation with the shareholders.
 - Perhaps include a warranty from the shareholders:
 - On the accuracy of the declaration of solvency;
 - On the validity of the formal resolutions?
- 


Practical points – complicated indemnities

- Lots of shareholders?
 - Lend the money to them instead.
 - Follow it later, when ready, with either
 - A distribution in specie of the loans; or
 - A cash distribution of the full amount (setting off the loans).
 - In other tricky cases, this may be a viable alternative to an indemnity.
 - The disadvantage is that the shareholders are unlikely to have joint and several liability.


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The summary slide! (1 of 4)

- Indemnities should be addressed *to the company*, as well as to the liquidators.
 - Short, simple indemnities – one page, plain English – may be best for small MVLs.
 - Mid-tier (in size – you decide) MVLs may need more detailed indemnities (up to four pages?)
 - Covering future changes of liquidator;
 - Protecting the firm, as well as the liquidator;
 - Limiting arguments about whether ‘this claim’ is covered.
- 

The summary slide! (2 of 4)

- Ask a lawyer (sorry!) to review the larger, and more complex cases:
 - Over the £ threshold you set.
 - For a distribution in specie.
 - If there are non-aligned shareholders.
 - If you're asked to change the wording of the indemnity.
 - More than one related MVL.
 - Expect lawyers to negotiate the most complex cases:
 - Your clients will decide which they are.
 - Check your engagement letter allows you to charge them for your legal advice.
- 

The summary slide! (3 of 4)

- Consider distributing ‘by the book’ (so you don’t need an indemnity) in cases where:
 - The shareholders are (or will be) overseas.
 - The shareholders are trustees
 - There are corporate shareholders
 - There are many shareholders
 - Consider also – in some cases – making an interim loan to shareholders, pending final distribution.
 - Document the loan as you would an indemnity.
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The summary slide! (4 of 4)

- Use forms with good ergonomics:
 - The more you have to type into them (before they are signed), the greater the chance for a mistake.
 - Keep a master, blank template ('Blue Peter' document production has its place; but not here).



Dates for your diary:

- NTI TAP online presentation (bankruptcy remuneration) – late August
 - SESCA conference (Reading University) – 8-9 September
 - SESCA insolvency seminar (Denbies Wine Estate) – 6 October
 - R3 SPG forum (Birmingham) – 3-4 November
 - R3 Southern & Thames Valley forum (Reading) – March 2023
 - Frettons' Second Annual Insolvency Conference – June 2023
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If you'd like to contact us...

Malcolm Niekirk

Solicitor | Insolvency Practitioner

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01202 491769

07413 164814

mniekirk@frettens.co.uk

