DISSOLUTION OF A COMPANY

The Malta Business Registry

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What are the main insolvency procedures for voluntary and compulsory liquidations?

1. Compromise or Arrangement between a company and its creditors – Members Voluntary Winding Up ;
2. Creditors' Voluntary Winding Up;
3. Dissolution and Winding Up by the Court.
4. Simplified Dissolution Procedure

A company may be dissolved voluntarily, but it may also be dissolved by order of the Court. ('Dissolution' under Maltese law refers to the decision to start the liquidation process, which is consequently followed by winding up). A voluntary winding up occurs when the shareholders of the company resolve to dissolve a company which, in the opinion of the directors, is solvent. This would be referred to as a members' voluntary winding up. However, the shareholders of a company may also decide to dissolve the company in instances where the directors of the company do not certify that the company is solvent. In this case the winding up is conducted under the control of a liquidator appointed by the creditors of the company. Voluntary dissolution in view of the insolvency of the company therefore can only take the form of a creditors' voluntary winding up following the decision of the company to be dissolved.

Dissolution and consequential winding up may also take place by order and under the control of the court. A company may be dissolved and wound up by the court for a number of reasons, with the most common being if the company is unable to pay its debts and is therefore insolvent. All forms of liquidation have the same aim, that of concluding the operations of the company, liquidating its assets and settling its liabilities when possible and a liquidator is appointed in all instances. However, there are procedural differences depending on whether the winding up was initiated voluntarily or imposed compulsorily.

The decisive criteria for adopting one form of dissolution and winding up rather than any other form relates to the solvency of the company. In the case of a voluntary winding up, the liquidator will have enough company assets to pay off all the debts of the company, and any excess would be distributed amongst the shareholders, pro rata to their shareholding.

On the other hand, in the case of a creditors' winding up or a dissolution and winding up by the court for insolvency reasons, the assets of the company would not suffice to satisfy all the debts of the company. The assets would be distributed according to the security and ranking enjoyed by each creditor in terms of various laws within the Maltese legal system.

The simplified dissolution procedure was put in place to enable a number of companies which have ceased to trade or have never traded to have a fast track method of being struck off the Register.

Dissolution of a Company

Members' Voluntary Winding Up

A Members' Voluntary Winding Up takes place after an extraordinary resolution is passed by the members to put the company in Dissolution. The Dissolution, that is the decision of the company to start the liquidation process (Winding Up), triggers the Winding Up of the company. In a Members' Voluntary Winding Up, the liquidation takes place under the control of a Liquidator appointed by the shareholders.

Declaration of Solvency

In the case of a Members' Voluntary Winding Up, a Declaration of Solvency (Form B2), which must be signed by the majority of the Directors, must be filed for registration. This Declaration of Solvency is a very important statement in which the majority of the Directors declare that they have made a full inquiry into the affairs of the company, and that they have formed the opinion that the company will be able to pay off its liabilities in full within the period specified in the Declaration. As per Article 268 (1) of the Companies, Act this period shall not exceed twelve months. This declaration should be made not earlier than one month from the resolution taken to dissolve the company. The Declaration of Solvency should also contain a statement of the company's assets and liabilities made up to a date not earlier than the date of the declaration by more than three (3) months as per Article 268 (2) of the Companies Act.

Declaration of Solvency – No Reasonable Grounds for Opinion

The law places safeguards aimed at ensuring that the Declaration of Solvency is made in good faith and given its due importance. In fact, if the Winding Up starts off as a solvent Winding Up through the appointment of a liquidator by the company, in view of the opinion by the Directors that the company is solvent, and it later emerges that the liabilities of the company will not be settled within the period stated in the Declaration of Solvency, then it may be presumed, unless the contrary is proved, that the Directors did not have reasonable grounds for opinion. In other words, it would be presumed that the declaration was wrongly made, and such an act would be a criminal offence punishable with up to three (3) years imprisonment and a fine of up to €46,587.47 as per Article 268 (4) of the Companies Act.

Procedure in the case of a Solvent Winding Up

The first effective step in a Voluntary Winding Up is the appointment of a liquidator. A company may be dissolved by an extraordinary resolution, and that same resolution may appoint the liquidator as per Article 270 of the Companies Act. The appointment of a liquidator by the Company is only possible if the Directors file a Declaration of Solvency. Otherwise, the liquidator may be appointed either through a meeting of the Creditors in a Creditors' Voluntary Winding Up (Art 279 (1) of the Companies Act), or by the Court (Civil Court (Commercial Section)). Article 305 of the Companies Act, stipulates who is qualified to act as a liquidator. A liquidator must be an individual who is an advocate, certified public accountant or certified public accountant and auditor. Once the liquidator is appointed, he/she must notify his/her acceptance to the Registrar of Companies and file the relative form.

The Liquidator

Following a decision for the Dissolution and Winding Up of a company, the powers of the Directors are shifted upon the liquidator who takes control over the entire company and its representation with a view to Winding Up. During the Winding Up process the focus of the company shifts to settling the debts due. The liquidator would proceed to draw up an exhaustive list of the assets and liabilities. He has the authority to carry on the business of company for its beneficial Winding Up, and in doing so to institute or defend any action or other legal proceedings in the name of the company. The main task of a liquidator would be to liquidate the assets of the company, pay the Creditors, if necessary, having regard to the ranking in terms of the applicable law, and distribute any proceeds to the shareholders according to their shareholding.

Powers of a Liquidator

In the case of a Voluntary Winding Up, with the sanction of an extraordinary resolution the liquidator will have the power to (Art 288 of the Companies Act):

- **Pay Creditors according to their ranking at law;**
- **Make compromises with Creditors; and**
- **Make calls on contributories.**

When the liquidator, at any time during the Winding Up process becomes aware that company will not be able to pay its debts within the period stated in the Declaration of Solvency by the Directors, he/she must summon a meeting of the Creditors as per Article 272 (1) of the Companies Act and in this case the procedure becomes that of a Creditors' Voluntary Winding Up.

Forms required

For a company to be placed in voluntary dissolution the following forms needs to be filed for registration through BAROS:

- **Notice of resolution for dissolution and consequential winding up – Form B1 (A) together with a EUR 15 publication fee**
- **Declaration of Solvency – Form B (2) – together with a statement of assets and liabilities**
- **Notice of appointment of Liquidator - Form L**

Liquidator's Statement with respect of pending Winding Up – Form L (4)

If the Winding Up is not concluded within 12 months from the Dissolution date, the liquidator shall as per Article 273 of the Companies Act, file a statement showing the proceedings and position of Winding Up Act. Subsequently the said statement is to be at intervals of six months.

Winding Up

As soon as the affairs of the company are wound up, the liquidator will render an account of the Winding Up process and draw up a Scheme of Distribution. These accounts are audited and all documents (the accounts of the Winding Up the Scheme of Distribution and the auditor's report) will be laid before the General Meeting of the company as per Article 274 of the Companies Act.

These are then sent to the Registrar for registration. As soon as these are registered there will be a three-month period from the date of the publication on the website maintained by the Registrar as per Article 401 (e) of the Companies Act that the formalities for the company to be struck off have been satisfied. During the said three-month period Creditors may bring an action before the Civil Court (Commercial Section) to defer the striking-off of the company. If no such action is brought, then the company will be struck off the Register in terms of Article 275 (1) of the Companies Act.

Creditor's Voluntary Winding Up

A Voluntary Winding Up in which a Declaration of Solvency has not been made is to be considered as an Insolvency Proceeding and is referred to as a Creditors' Voluntary Winding Up as per Article 268 (5) of the Companies Act. One should clarify that although it is referred to as a 'Creditors' Voluntary Winding Up', it is not the Creditors who initiate the Winding Up process. A Creditors' Voluntary Winding Up may be initiated by the shareholders through a resolution of the Company as per Article 278 of the Companies, Act or by the liquidator in a Members' Voluntary Winding Up if it turns out during the course of the liquidation that the company will not be able to pay its debts within the period stated in the Declaration of Solvency.

In a Creditors' Voluntary Winding up, it is the Creditors who nominate and appoint the liquidator. However, in those cases where the creditors fail to nominate a liquidator during the meeting of creditors called for such a purpose, the person nominated by the Company would become liquidator as per Article 279 (1) of the Companies Act. If the liquidator is not nominated by either the Creditors or the company, article 279 (2) of the Companies Act, stipulates that an application for the appointment of a liquidator shall be filed in Court by any Director of the company within fourteen days, and the appointment will be made by the Court.

Except for the appointment of Liquidator, the procedure in a Creditors' Voluntary Winding Up is the same as that of a Members' Voluntary Winding Up. In the case of a Creditors' Voluntary Winding Up the company would however be insolvent, and therefore there will not be enough assets to satisfy all the debts. This brings about another difference, that is the ranking of creditors. The main purpose of the liquidation process, irrelevant of the type of Winding Up procedure, is to settle the debts of the company. If there are insufficient assets to settle all the debts, as is the case with insolvent liquidation, then the debts are settled in accordance with the ranking in terms of any preference granted at law.

Forms required

For a company to be placed in a creditors voluntary dissolution the following forms needs to be filed for registration through BAROS:

Notice of resolution for dissolution and consequential winding up – Form B1 (A) together with a EUR 15 publication fee

Notice of appointment of Liquidator - Form L

Liquidator's Statement with respect of pending Winding Up – Form L (4)

If the Winding Up is not concluded within 12 months from the Dissolution date, the liquidator shall as per Article 273 of the Companies Act, file a statement showing the proceedings and position of Winding Up Act. Subsequently the said statement is to be at intervals of six months.

Winding up

As soon as the affairs of the company are wound up, the liquidator will render an account of the Winding Up process and draw up a Scheme of Distribution. These accounts must be audited, and all documents will be laid before the General Meeting of the company and a meeting of the Creditors as per Article 274 of the Companies Act. Once approved, these documents are then filed for registration and there will be a three-month period from the date of the publication on the website maintained by the Registrar in terms of Article 401 (e) of the Companies Act stating that the formalities for the company to be struck off have been satisfied.

Within such three-month period any Creditors may bring an action before the Civil Court (Commercial Section) to defer the striking-off of the company as per Article 275 (1) of the Companies Act. If no such action is brought, then the company will be struck off.

Dissolution by the Court

An action for the dissolution and winding up of a company may be filed in court for various reasons, such as in the case of insolvency. A court winding up application may be filed by:

- The company itself, following a decision of the General Meeting or the Board of Directors;
- A shareholder;
- A creditor/s;
- The Registrar of Companies;
- The Official Receiver.

A company MAY be dissolved and wound up by the Court:

1. If an extraordinary resolution for dissolution and consequent winding up by the court is passed (Art 214(1)(a) of the Companies Act);
2. If the business of the company is suspended for an uninterrupted period of twenty-four months (Art 214(2)(a)(i) of the Companies Act);
3. If the company is unable to pay its debts (Art 214(2)(a)(ii) of the Companies Act).
4. A company SHALL be dissolved by the Court and wound up either voluntarily or by the Court:

a) If there are less than 2 members for more than 6 months (does not apply to single member companies);
b) If there are less than 2 directors in public companies or 1 in private companies;
c) If there are grounds of sufficient gravity;
d) If the period fixed for the duration of the company expires.

An application in terms of 1 above may be made by the company following a decision of the general meeting, or by its board of Directors, or by any debenture holder, creditor/s, or by any contributory/ies.

An application in terms of 2 to 7 may be made by the abovementioned and also by any shareholder or director of the company.

An application in terms of 6 and 7 may be made by the abovementioned and also by the Registrar if it is expedient and in the public interest.

The court will consider the application, and in the process, it shall consider the views of all the interested parties. In the interim, before arriving at a decision whether to dissolve the company or otherwise, it may provide for the appointment of a provisional administrator who would take over the overall administration of the company's business, oversee and preserve the assets of the company and prevent anyone from taking any unfair priority or advantage. The court also has the authority, before deciding whether to dissolve the company or otherwise, to stay any procedures against the company (Art 220 of the Companies Act). When the company is insolvent, the directors have an obligation towards the creditors. Any prejudice to their rights may lead to serious consequences, including personal liability, fines and in cases where there is deliberate fraud, even imprisonment. Therefore, in brief during the winding up process, the court will:

- Consider any preliminary pleas;
- Allow the parties to bring forward evidence in accordance with their application;
- Allow the directors, company secretary, contributories, or creditors to make submissions upon their request;
- Allow the lawyers to make final submissions;
- Decide the case;
- Appoint a liquidator;
- Appoint sittings to monitor the winding up procedure;

- Approve the scheme of distribution, if any;
- Release the liquidator of his appointment as soon as the court is satisfied that he has completed his task;
- Order the Registrar to strike off the name of the company from the Register.

Following an order by the court for the dissolution of the company, the powers of the directors cease and representation of the company becomes solely vested in the liquidator (Art 295 of the Companies Act).

Simplified Dissolution Procedure

A company can file an application for a simplified dissolution procedure so that it can be dissolved and have its name struck off the register, provided that, the directors declare that six (6) months prior to the date of the application, the company has not carried out any changes in its name, or the company has not traded or otherwise carried out business, or the company has not employed employees other than any person who is an officer of the company, or the company does not have any documents or penalties with the Registrar which remain outstanding as at the date of the application, or none of the Company's shares are pledged. Furthermore, the directors must declare that the company is not regulated under any other applicable law in Malta; that it has discharged in full any liabilities towards its creditors and/or that such liabilities have been written off by its creditors, with the exception, if applicable, of any outstanding fees to the company's current officers or current corporate service providers and, or any loans payable to any of the company's shareholders. Further matters covered by the declaration include that, the company:

- has no pending court proceedings in, or outside Malta;

- does not have any assets exceeding five thousand euro (€5,000);

- has not entered into any deeds or contracts in the previous six (6) months, other than with the service provides to the company, and has no outstanding amounts due to any government authority or body.

The directors shall also confirm on the Form that they will keep the details of the beneficial owners and financial records of the company or stipulate the name of the designated person to retain the details of the beneficial owners and financial records of the company.

Furthermore, any one of the directors of the company needs to confirm that:

(i) a shareholders' resolution has been duly adopted to approve the simplified voluntary dissolution procedure, in accordance with the company's memorandum and articles of association;

(ii) all bank accounts have been closed/ the company did not have bank accounts;

(iii) an application has been filed online for the de-registration of the company for value added tax purposes in Malta / the company is not registered for value added tax purposes in Malta; and

(iv) the company has no employed person/s, other than any person who is an officer of the company.

Forms required

For a company to adopt the simplified dissolution procedure the following forms needs to be filed for registration through BAROS:

- **Application for simplified dissolution procedure – Form B (3)**
- **Notice of resolution for dissolution – Form B 1 together with a publication fee of EUR 100.**
- **Directors Declaration - Form B (4)**

Following the registration of the above-mentioned forms, the Malta Business Registry will publish a Notice to that effect on the Registry's web portal and in a daily local newspaper, which notice shall state that at the expiration of three months following the publication of said notice, the company's name shall be struck off the register.