



INSOL
INTERNATIONAL



Corporate liquidation (solvent voluntary liquidation, official liquidation – getting in, consequences and getting out)

Presented by:

Corinne Cellier, Associate Director, Ogier Global (Cayman) Limited

Nicholas Fox, Partner, Mourant Ozannes (Cayman) LLP

Introduction

- Speaker background
- Agenda for Session 4:
 - Paragraph 4.1 – Voluntary Liquidation (solvent)
 - Paragraph 4.2 – Official Liquidation – getting in, consequences and getting out
- Questions

Basic Principles

- Most common form of company is a company limited by shares
- Advantages of using Cayman companies:
 - Limited liability
 - Location in tax neutral jurisdiction
 - Mature, stable and predictable constitution and system of law
- Cayman companies often used as open-ended investment funds
- Controlled by directors, who owe duties to:
 - The company
 - If insolvent, the company's creditors
- Company may employ or utilise services of others, e.g.:
 - Investment Manager
 - Administrator
 - Custodian
 - Auditor
- It is ways the directors who have overall control

Voluntary Liquidation

- Voluntary liquidation – basic principles
- Pre-appointment considerations
 - Review of corporate documentation
 - Preparation of statutory form documents for execution
 - The Voluntary Liquidator – powers, qualifications, appointment and removal
 - Client take on considerations – risk and fees
- Post-appointment considerations
 - Statutory filings, advertising requirement
 - Declaration of Solvency
 - Fees and remuneration
 - Reporting requirements
 - General meetings of the company
- Closure considerations

Statutory Notices – CWR Forms

Companies Winding Up Rules (2023 Consolidation) CWR FORM No. 19

CWR FORM No. 19
Notice of Voluntary Winding Up (O.13, r.2)

THE COMPANIES ACT
NOTICE OF VOLUNTARY WINDING UP
[Name of company] (In voluntary liquidation)
Registration No _____

To: The Registrar of Companies

TAKE NOTICE that the above-named Company was put into liquidation on [state commencement date] by a special resolution passed at an extraordinary meeting of the Company held on [state date] [or as the case may be].

AND FURTHER TAKE NOTICE that [state name] of [state address and contact details] has been appointed voluntary liquidator of the Company.

Dated this day of 20 .

[Signature of Voluntary Liquidator or Director as the case may be]

[Full name, address and contact details of any person other than the Voluntary Liquidator who files this form]

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CWR FORM No. 20 Companies Winding Up Rules (2023 Consolidation)

CWR FORM No. 20
Voluntary Liquidator's Consent to Act (O.13, r.2)

THE COMPANIES ACT
VOLUNTARY LIQUIDATOR'S CONSENT TO ACT
[Name of company] (In voluntary liquidation)
Registration No _____

To: The Registrar of Companies

TAKE NOTICE that I/we, [state name(s)] of [in the event that the person(s) named accepts appointment in the ordinary course of their business as a corporate manager or insolvency practitioner, state the name of that named person(s)'s firm] of [state address and contact details] hereby consent to act as Voluntary Liquidator of the above-named Company with effect from the commencement of the liquidation [or, if the appointment is made following the resignation, death or removal of the previous voluntary liquidator, the date upon which the appointment takes effect].

Dated this day of 20 .

[Signature of Voluntary Liquidator]

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Companies Winding Up Rules (2023 Consolidation) CWR FORM No. 21

CWR FORM No. 21
Declaration of Solvency (O.14, r.1)

THE COMPANIES ACT
DECLARATION OF SOLVENCY
[Name of company] (In voluntary liquidation)
Registration No _____

I/we, [state the name or names of the director(s)], being a director of the Company do solemnly and sincerely declare that I/we have made a full inquiry into the affairs of the Company and that, having done so, we believe that the Company will be able to pay its debts in full, together with interest at the prescribed rate within a period of twelve (12) months from the commencement of the winding up [or state a shorter period].

1. _____
[Signature of Director]
[Full Name and Address of Director] [Date]

2. _____
[Signature of Director]
[Full Name and Address of Director] [Date]

3 etc.
[The Declaration of Solvency must be signed by all the directors]

A person who knowingly makes a declaration without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the prescribed rate, within the period specified commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years.

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Application for Court Supervision

- When is an application required?
- Form and content of the application
- Timing for the application
- Statutory requirements on form and content of the application
- Effect of the supervision order
- Practical example

Basic Principles

- OLs take control of company over from directors
- PLs will often have more limited powers and the directors may retain some functions (s.104(4))
- OLs supervise the orderly winding down of the company and the distribution of its assets to its stakeholders on a *pari passu* (i.e. on an equal footing) basis
- The identity of a company's stakeholders will depend on whether it is:
 - Insolvent – only creditors will be stakeholders; or
 - Solvent – creditors and contributories will be stakeholders

Advantages of appointing liquidators

- Independent and highly qualified
- Collective process avoids a 'scramble' for assets
- Liquidators have powers that are not available to a company:
 - Investigatory powers
 - Powers to bring avoidance actions
- Transparent and consultative process:
 - Liquidators have duties to report to stakeholders and Liquidation Committees
 - Stakeholders may apply to the Court for orders regulating the conduct of the liquidation (s.110(3))
- Liquidators are highly qualified (previous session)

Paragraph 4.2.1.1 Jurisdiction of the Court

- The Grand Court has jurisdiction to make winding up orders in respect of companies which are either:
 - (a) incorporated in the Cayman Islands;
 - (b) incorporated elsewhere but subsequently registered in the Cayman Islands; or
 - (c) in respect of a foreign company which –
 - (i) has property located in the Islands,
 - (ii) is carrying on business in the Islands;
 - (iii) is the general partner of a limited partnership; or
 - (iv) is registered under Part IX (a so-called “overseas company”).

Paragraph 4.2.1.3 Standing – who may apply?

- the company;
 - See s. 94 (2), (2A) and (2B)
- any creditor or creditors (including any contingent or prospective creditor or creditors);
- any contributory or contributories; or
 - See s. 94(3)
- CIMA.
- **Creditor** is a person with a good arguable case that a debt is due and owing to him from a company
- A **Prospective Creditor** is a person who has a debt which will certainly become due at a future date
- A **Contingent Creditor** is a person who has a debt which will or may become due at a future date

Standing – s. 94(2), (2A) and (2B) (31 August 2022)

(2) Where expressly provided for in the articles of association of a company, the directors of a company incorporated before the commencement of this amending Act have the authority to —

(a) present a winding up petition; or

(b) where a winding up petition has been presented, apply for the appointment of a provisional liquidator, on behalf of the company without the sanction of a resolution passed at a general meeting.

(2A) Subject to subsection (2B), the directors of a company incorporated after the commencement of this amending Act may present a winding up petition on behalf of the company on the grounds that the company is unable to pay its debts within the meaning of section 93 or where a winding up petition has been presented, apply on behalf of the company, for the appointment of a provisional liquidator.

(2B) The articles of association of a company may expressly remove or modify the directors' authority to present a winding up petition or apply for the appointment of a provisional liquidator on the company's behalf.

Standing – s. 94(3)

- (3) A contributory is not entitled to present a winding up petition unless either —
- (a) the shares in respect of which that person is a contributory, or some of them, are partly paid; or
 - (b) the shares in respect of which that person is a contributory, or some of them, either were —
 - (i) originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition; or
 - (ii) have devolved on that person through the death of a former holder.

Paragraph 4.2.1.2 Grounds for Winding-Up – Special Resolution etc (s.92)

- A company over which the Court has jurisdiction to wind up may be wound up in the following circumstances prescribed by section 92 of the Companies Act:
 - (a) the company has passed a special resolution requiring the company to be wound up by the Court;
 - (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
 - (c) the period, if any, fixed for the duration of the company by the articles of association expires or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;
 - (d) the company is unable to pay its debts; or
 - (e) the Court is of the opinion that it is just and equitable that the company should be wound up (commonly referred to as a “just and equitable winding up petition”).

Paragraph 4.2.1.4 - Grounds for Winding-Up – Unable to Pay its Debts

Company deemed to be unable to pay its debts if:

- A creditor (i) to whom the company is indebted in a sum exceeding one hundred dollars (ii) has served on the company, at its registered office, a demand requiring the company to pay the sum and (iii) three weeks thereafter the Company has neglected to pay such sum (Statutory Demand);
- A company fails to satisfy a judgment debt in favour of any creditor in any proceedings instituted by such creditor against the company; or
- It is proved to the satisfaction of the court that the company is unable to pay its debts

[Relevant Section: s.93]

Unable to Pay its Debts – Pitfalls (1)

- The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt
- In an appropriate case the court can determine the question of a disputed debt in the petition itself
- Appropriate cases include those where the court doubts that the debt is actually disputed bona fide on substantial grounds

[Relevant Cases: Parmalat v Food Holdings [2008 CILR 202] – Lord Hoffman; GFN Corp. Ltd [2009 CILR 650] – Vos LJ; Re Altair Asia Investments Limited (unreported, 16 March 2020); Re Adenium Energy Capital, Ltd (unreported, 29 July 2020); Re Sky Solar Holdings Ltd (unreported, 12 October 2020), Green Dragon Gas Limited (unreported, 7 April 2021); Re Grand State Investments Limited (28 April 2021)]

Unable to Pay its Debts – Pitfalls (2)

- Cash flow, not Balance Sheet test – see p.78 of course notes:
- Cash Flow: Ability of company to pay debts there and then
- Balance Sheet: A comparison of present assets with present and future assets/ liabilities

[Relevant Cases: Re Weaving [2016 (2) CILR 514]; Re Primus Investments Fund, LP and Mayer Investments Fund LP (unreported, 16 June 2020); Sky Solar Holdings Ltd (Unreported, 12 October 2020)]

Unable to Pay its Debts – Pitfalls (3)

- s.92(d) states company insolvent if unable to pay its debts
- No express element of looking into the future
- s.123 of Insolvency Act 1986 a company is deemed to be unable to pay its debts if it is unable to pay its debts as they fall due
- English Court have determined that on this wording can, on a cash flow test, look to the future
- Also the position in Cayman see *Weaving* [2016 (2) CILR 514] (at para 40) – see p.78 of course notes:

In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future...

[Other relevant Cases: *Re Cheyne Finance* [2008] BCC 182, *BNY v Eurosail* [2011] 1 WLR 2524]

Grounds for Winding-Up – Just & Equitable

Just & Equitable Petitions can be brought on the grounds of- see page 79 of course notes:

- Loss of Substratum
- Fraud / misconduct / oppression
- Need for an investigation into the company's affairs
- Breakdown of mutual trust and confidence in a quasi-partnership
- Fraud in company's inception

But beware, the words 'just and equitable' in the statute are general and are not to be limited or restricted to certain categories or classes of case or more narrowly defined

[Relevant Case: Freerider Ltd [2010 (1) CILR 486] – Foster J]

Grounds for Winding-Up – Just & Equitable (2)

Loss of Substratum

- **Traditional Position:** An order might be made if it became impossible for the company to achieve the purpose for which it was formed
- **Cayman Position:** An order might be made if it has become impractical, if not actually impossible, to carry on business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document
- Question to be posed is in what circumstances can it be said that it has become practically impossible for a company to carry on the business for which it was promoted
- If the company's articles of association contain an unrestricted objects clause allowing it to pursue any object not prohibited by law, the court will look beyond the articles to establish the company's purposes
- If the company's articles contain provisions allowing for a soft wind-down, this may prevent a loss of substratum argument succeeding

[Relevant Cases: Re Suburban Hotel Co (1867) 2 Ch App 737; In Re Belmont Asset Based Lending Ltd [2010 (1) CILR 83] and In Re Heriot African Trade Finance Fund Ltd [2011 (1) CILR 1]; Harbinger [2015 (2) CILR Note 6; Washington Special Opportunity Fund, Inc (unreported, 1 March 2016)]

Grounds for Winding-Up – Just & Equitable (3)

Need for an Investigation

- The court has jurisdiction, in the exercise of its statutory discretion to wind up a company on the basis that an investigation into its affairs is necessary and justified

[Re ICP Strategic Income Fund (unreported, 10 August 2010); Diversified Settlements Fund (unreported, 15 October 2020)]

Quasi-Partnership

- People do not become partners unless they have confidence in one another
- If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended.
- Need to establish more than just a subjective loss of confidence.

[RCB v Thai Asia Fund Ltd [1996 (1) CILR 9]; Re Fortune Nest Corporation (unreported, 5 February 2013); Re Washington Special Opportunity Fund Inc (unreported, 1 March 2015); Circumference Holdings Limited (unreported, 3 May 2021)]

Grounds for Winding-Up – Just & Equitable - Pitfalls

- Petitioner must have a tangible interest in the company's winding up
- If Petitioner has tangible interest, two questions must be asked:
 - (i) whether there is an alternative remedy available to the petitioner; and
 - (ii) whether the petitioner is acting unreasonably in not pursuing the alternative remedy

[Relevant Case: Camulos Partners v Kathrein and Co. [2010 (1) CILR 303] - Chadwick LJ; Tianrui v China Shanshui Cement [2019 (1) CILR 481]]

Petition Requirements – pages 80 & 81 of course notes

- A Petition is a form of pleading and once advertised gives notice to the world
- The Petition must contain:
 - Particulars of the company's incorporation
 - Description of the company's business
 - A concise statement of the ground upon which the order is sought
 - Name and address of the qualified IP
- Petition must be verified by an affidavit that the statements are true. And supported by affidavits from the nominated IPs.

Petition Requirements (2)

- The Petition together with the supporting affidavits and the notice of hearing must be served on the company's registered office immediately after the petition has been presented
- A creditors' petition must be advertised (i) once in a newspaper with circulation in the islands and, if carrying on business outside the islands (ii) once in a country in which it is most likely to come to the attention of the company's creditors and contributories
- A creditors' petition must be advertised not less than 7 days after the service of the petition and not less than 7 days before the hearing
- The position is slightly different if it is a contributory petition
 - Must issue a summons for directions with the summons
 - Must seek a date for the hearing of the summons prior to presenting the petition
 - Must serve the petition and summons on the company and anyone whom the petitioner has named or intends to name as a respondent to the summons

[Relevant Section: O.3; Companies Winding Up Rules, 2018]

Petition Requirements (3)

- Court can use its inherent jurisdiction to remedy procedural defects in a petition. This was changed in the Companies Winding Up Rules, 2018, at Order 1, rule 4, which now expressly incorporates Order 2 of the Grand Court Rules.
- If the petition does not meet the requirements under the CWR the Petitioner must take steps to apply to amend the petition, re-serve it and, if necessary, re-advertise it
- The Court shall dismiss a winding up petition if a petitioner is contractually bound not to present a petition against the company (s.95(2))

[Relevant Case: Pinnacle Global Partners Fund 1 Ltd (unreported, 4 February 2019); Rhone Holdings LP [2016 (1) CILR 273.]

At the end of a petition hearing - orders

- With luck order will be granted
- Order should include part 1 and part 2 powers at Schedule 3 of the Companies Act
- Should also contain explicit references to protections such as stay of proceedings
- One or more liquidators may be appointed
- A foreign practitioner may be appointed to act jointly with local IP
- Official liquidators are officers of the Court

At the end of a petition hearing – orders (2) – paragraph 4.2.2.2

In respect of a just and equitable petition, the Court may as an alternative to a winding up order make an order:

- regulating the conduct of the company's affairs in the future
- Requiring the company to refrain from doing an act or requiring the company to do an act which it has omitted to do
- authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner
- providing for the purchase of the shares of any members of the company by other members or by the company itself

[Relevant Section: s.95(3)]

Paragraph 4.2.2.3 – Commencement of winding-up

- Date of commencement of the winding up is important
- Normal rule is that the date of commencement is the date the petition is presented
- However Section 100 of the Companies Act provides that the winding up of a company by the Court is deemed to commence:
 - at the time of passing of a resolution by the company for voluntary winding up;
 - at the expiry of any period fixed for the duration of a company by its articles of association;
 - at the date of an event upon the occurrence of which it is provided by its articles of association that the company is to be wound up; or
 - if a restructuring officer has been appointed pursuant to section 91B or 91C of the Act and has not been discharged, at the date of the presentation of the petition to appoint the restructuring officer pursuant to section 91B.

If none of the above apply, then section 100(2) of the Act provides that the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.

Paragraph 4.2.3 - Stays

- At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may seek a stay of proceedings in domestic or foreign proceedings
- Upon a winding up order being made, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose
- When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void

[Relevant Sections: s.96 s.97 s.99]

Paragraph 4.2.4 – Provisional Liquidators

- 4.2.4.1 Overview and purpose
- 4.2.4.2 Statutory requirements
 - When can one apply?
 - Who may apply?
 - The grounds for an application under section 104(2) of the Companies Act (paragraph 4.2.4.2)
 - The grounds for an application under section 104(3) of the Companies Act (now the RO test)
- 4.2.4.3 Appointment of provisional liquidators and their powers
 - Overview
 - Independence
 - Limited investigatory power
 - Court oversight
- 4.2.4.4 Completion of the provisional liquidation

Questions

- Contact details below for anyone who has any follow up questions:

Corinne Cellier
Associate Director
Ogier Global

she/her/hers

[Website bio](#) | [LinkedIn](#)

D: +1 345 815 1710 | T: +1 345 949 9876

Beijing | British Virgin Islands | **Cayman Islands** | Guernsey | Hong Kong | Ireland | Jersey | London | Luxembourg | Shanghai | Singapore | Tokyo

ogier.com

- Corinne.cellier@ogier.com
- Nicholas.fox@mourant.com

Nicholas Fox
(He/Him/His)
Partner
Mourant Ozannes (Cayman) LLP

D +1 345 814 9268 | M +1 345 925 1296
94 Solaris Avenue | Camana Bay | PO Box 1348 | Grand Cayman | KY1-1108 | Cayman Islands

mourant.com