

Voluntary Liquidations of Solvent Cayman Islands Companies

1 General

- 1.1 The commencement of a voluntary liquidation is a simple procedure that does not require sanction or action by the Cayman Islands Court. This legal guide summarises the practical steps necessary to prepare for and implement a voluntary liquidation, and the role and duties of the liquidator.
- 1.2 It should be noted that the issues covered in this legal guide pre-suppose that the company is solvent i.e. it is able to pay its debts in full. If the company is unable to pay its debts or is of doubtful solvency, voluntary liquidation may still be an appropriate way forward, but different practical considerations will apply and our specific advice should be sought.

2 Commencement of Voluntary Liquidation

- 2.1 A voluntary liquidation may be commenced in a number of ways:
- (a) Automatically, if the company's Articles of Association provide that on a termination of any period or the happening of any event, the company shall be wound-up and dissolved.
 - (b) When the period, if any, fixed for the duration of the company by the Articles of Association expires or whenever an event occurs upon the occurrence of which the Articles of Association provide that the company is to be wound up and dissolved.
 - (c) If the shareholders of the company pass a special resolution (or, if the company is unable to pay its debts as they fall due, an ordinary resolution) requiring the company to be wound up voluntarily and appointing a liquidator of their choice.
- 2.2 Voluntary liquidation is most commonly commenced by the shareholders of a company as described in 2.1 (c) above. Often, the resolution of shareholders is preceded by a report from the company's directors recommending voluntary liquidation to the shareholders and explaining the reason for their recommendation.
- 2.3 In theory, a voluntary liquidation may be commenced irrespective of the financial position of the company. As noted above, however, if a company is insolvent or of doubtful solvency, practical considerations will apply that are different to those described below.

3 Preparing for a Solvent Voluntary Liquidation

- 3.1 In the vast majority of cases, voluntary liquidation will be appropriate because the company has come to the end of its natural life. To prepare for the voluntary liquidation and ultimate dissolution of the company, the company's directors should, where appropriate, take practical steps before the voluntary liquidation is commenced to simplify the company's asset and liability position. For example:
- (a) If the company is able to do so, all creditors should be paid in full, and secured creditors must be paid as a matter of priority over unsecured creditors.
 - (b) All the directors of the company should sign a declaration of solvency confirming that a full enquiry into the company's affairs has been made and that, to the best of the directors' knowledge and belief, the company will be able to pay its debts in full together with interest within a period not exceeding 12 months from the commencement of the liquidation. If such declarations are not signed and filed within 28 days of the commencement of the liquidation, the liquidator will be obliged to apply for the liquidation to continue under the supervision of the Court (see paragraph 8 below). In practice, a prospective liquidator will ask for these declarations before he gives his consent to serve as liquidator.
 - (c) If the company is a fund, then the investors should be redeemed out in accordance with the terms and conditions of their investments.
 - (d) In the case of companies other than funds, the directors should consider declaring and paying dividends to shareholders (either in cash or in kind).
 - (e) If the company is regulated by the Cayman Islands Monetary Authority ("**CIMA**"), CIMA should be informed of the position and consideration should be given to surrendering the company's licence or registration (see section 7 below).
- 3.2 The recent amendments to the Cayman Islands insolvency regime emphasise the importance of thorough preparation for a voluntary liquidation. Taking these steps will help to ensure that, at the time the liquidation is commenced, the company has few (if any) assets and no outstanding liabilities or (in the case of a fund) remaining investors. In those circumstances, the formal liquidation of the company may be no more than an administrative exercise.

4 The Liquidator

- 4.1 The company's Articles of Association or a special resolution passed by the company's shareholders will specify the identity of the company's liquidator. Under Cayman Islands law, a voluntary liquidator does not have to hold any specific professional qualifications. However, liquidation is a technical process, and even in the case of a purely administrative liquidation it can often prove more efficient to appoint a professional liquidator than to ask directors to take on this role themselves. If the liquidator is unable to file signed declarations of solvency from each of the company's directors within 28 days of the commencement of the liquidation, and the liquidation is brought under the Court's supervision, the Court will appoint as liquidator an independent professional with the qualifications prescribed by the Insolvency Practitioner's Regulations 2008

(as amended by the Insolvency Practitioners' (Amendment) Regulations, 2010) (together the "**Regulations**").

- 4.2 A liquidator will owe personal duties to maximise the returns to those with an economic interest in the company. This will include creditors and (where creditors have been paid in full) the company's shareholders in accordance with their respective rights under the company's Articles of Association.
- 4.3 The liquidator will act as agent of the company. His authority to bind the company will displace the authority of the directors to do so. Cayman Islands law gives a liquidator wide powers to deal with the affairs of the company without the sanction of the Cayman Islands Court. The liquidator may delegate certain functions, for example to the company's directors, officers and service providers (such as, in the case of a fund, the investment manager).

5 Effects of Voluntary Liquidation and Formalities

- 5.1 The commencement of a voluntary liquidation does not have the effect of terminating or suspending the company's contractual obligations. Assuming that the company is solvent the liquidator will pay any sums due to creditors as they fall due. If the company has continuing contractual obligations (e.g. pursuant to contracts of employment or service agreements), the liquidator must consider taking steps to terminate the contracts in accordance with their terms or to negotiate a commutation of future liabilities.
- 5.2 It follows that, after the commencement of the liquidation, there is no automatic moratorium prohibiting the commencement of proceedings against the company. The Cayman Islands Court does, however, have discretion to impose a moratorium if requested, either on a case-by-case basis or a "blanket" basis, but this discretion will only be exercised where the company is insolvent or of doubtful solvency.
- 5.3 The liquidation will in theory continue as long as it takes the liquidator to wind up the affairs of the company. Where the company's assets and liabilities have been dealt with prior to the liquidator's appointment, the liquidation itself will last as long as is required for the necessary formalities to be completed. If the liquidation continues for more than one year for any reason, the liquidator must summon annual general meetings of the company (i.e. of its shareholders and/or creditors, depending on who is likely to have an economic interest in the liquidation). The liquidator will lay before the meeting an account of how the liquidation has been conducted during the preceding year.
- 5.4 In addition to filing a special resolution within 15 days of being passed, a number of steps must be undertaken within 28 days of the commencement of the liquidation:
 - (a) Notice of the liquidator's appointment must be published in the Cayman Islands Official Gazette, which will invite creditors of the company to submit to the liquidator details of their claims against the company;
 - (b) Notice of the winding up must be filed with the Registrar of Companies;
 - (c) The liquidator's consent to act must also be filed with the Registrar of Companies before his appointment can become effective.

- (d) Declarations of solvency from each of the directors must also be signed and filed with the Registrar of Companies; and
 - (e) In the case of a regulated company, notice must be served on CIMA.
- 5.5 As a matter of good practice, the liquidator should give at least 21 days' notice to creditors of the intention to make a distribution. In most cases, the notice will simply be a formality because there will be no unpaid creditors. If the liquidator believes that there are unpaid creditors, he may also wish to consider advertising his appointment (and invite creditors to submit claims) in the country or countries where he believes the advertisement is likely to come to the attention of those creditors. In practice, giving notice need not delay the distribution of assets if they have been distributed before the commencement of the liquidation or if the liquidator is satisfied that no creditors would be adversely affected as a consequence of a distribution before this time period has expired.
- 5.6 As soon as the affairs of the company are fully wound up i.e. when the liquidator is in a position to bring about the dissolution of the company, the liquidator must lay his final report and accounts (showing the manner in which the winding up has been conducted) before a final general meeting, which must be called by a public notice in the Official Gazette at least 21 days before it takes place. No later than 7 days after the final meeting, the liquidator must provide the Registrar of Companies with a Final Return confirming the date on which the meeting was held and, if a quorum was present, particulars of the resolutions passed at the meeting. Upon the expiration of three months from the date of registration of that return, the company is deemed to be dissolved.
- 5.7 At the final general meeting the liquidator should ask the shareholders to pass resolutions
- (a) approving his accounts and discharging him from the performance of any further duties;
 - (b) approving his remuneration;
 - (c) authorising him to destroy the company's books and records at the end of a specified period; and
 - (d) resolving upon the method of dealing with proceeds from uncleared dividend cheques.
- 5.8 It is not possible to restore a company to the Register following its dissolution at the end of a formal liquidation. If assets owned by the company come to light after the date of its dissolution, it is likely to be impossible for the liquidator to realise them. Title to those assets will pass according to the law of ownerless property in the country where the assets are located. If the liquidator has neglected to realise an asset in these circumstances, he risks personal liability for that omission.

6 Recall of companies in liquidation

- 6.1 From March 2009, a company that went into liquidation by means of a special resolution may at any time before its final general meeting have its active status restored by Order of the Court at the request of the liquidator. The application must be accompanied by a special resolution in favour of recalling the liquidation and explaining the reasons for the decision.

6.2 The Court may recall a liquidation on such terms and conditions as it thinks fit. It is not yet clear what, if any, conditions the Court will attach to this procedure.

7 Additional Formalities for Funds

7.1 Additional formalities apply in respect of the liquidation and dissolution of mutual funds regulated by CIMA. The three available forms of regulation under Cayman Islands law are set out in our legal guide entitled "Mutual Funds".

7.2 In order to avoid incurring annual fees, the fund should seek to cancel its registration or licence at the appropriate time. In addition to requiring the submission of the fund's original certificate of registration or licence together with payment of a fee (currently Cayman Islands CI\$600.00), CIMA requires the following documents to be submitted to it:

- (a) A certified copy of a resolution of the fund's operator or participating investors indicating the date on which the mutual fund ceased (or will cease) to carry on business as a regulated fund;
- (b) An affidavit on behalf of the fund's operator setting out:
 - (i) the reason for the liquidation of the fund;
 - (ii) that, as far as the operator is aware, the fund has operated in accordance with its constitutional and offering documents, including adherence to all investment guidelines and restrictions and computation of the net asset value;
 - (iii) that all participating investors have been properly and fully redeemed; and
 - (iv) that the fund has not been or is not being wound up in a manner that is prejudicial to its investors and creditors; and
- (c) Where a liquidator has been appointed, a copy of the liquidator's report.

7.3 If the fund is licensed, CIMA will require audited accounts from the date of the last audited financial statements to the date of the final distribution of the Company's assets, or, where an independent liquidator has been appointed, the date of the commencement of the voluntary liquidation. In certain circumstances CIMA may be prepared to relax this requirement.

8 Supervision of the Court

8.1 If the liquidator does not obtain and file the requisite declarations of solvency, he must apply within a further 7 days to continue the liquidation under the supervision of the Court, and must pay a fee of CI\$5,000.00 (for which he is personally liable) for entry into the Financial Services Division of the Grand Court. If the Court makes an Order bringing a voluntary liquidation under its supervision, it will appoint as liquidator an independent professional with the qualifications prescribed by the Regulations.

- 8.2 In addition to the mandatory application in circumstances described at 8.1 above, an application to bring a voluntary liquidation under the supervision of the Court may also be brought at any time by the voluntary liquidator himself, or by a creditor or shareholder with an economic interest in the liquidation. The application will be on the grounds that:
- (a) The company is, or is likely to become, insolvent; or
 - (b) The liquidation will otherwise benefit from the Court's supervision.
- 8.3 The liquidator under the supervision of the Court is given the power to apply to the Court for guidance in matters of controversy or complexity.

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