
WINDING UP

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1. Introduction

Winding up is the process of dissolving a company. While winding up, a company ceases to do business as usual. Its sole purpose is to sell off stock, pay off creditors, and distribute any remaining assets to partners or shareholders. The term is used primarily in Great Britain, where it is synonymous with liquidation.

The winding up or liquidation of a company is the process by which a company's assets are collected and sold in order to pay its debts. Any monies remaining after all debts, expenses and costs have been paid off are distributed amongst the shareholders of the company. When the winding up has been completed, the company is formally dissolved and it ceases to exist.

Broadly speaking, a company can be wound up in one of two ways. First, the Court can compulsorily wind up a company. Secondly, the shareholders or the creditors of the company can themselves apply to wind up the company in proceedings known as "voluntary winding up".

Winding up involves the following:

- Every contract of the company, including individual contracts are completed, transferred or ended. The company is no more able to do business.
- Any outstanding legal disputes are settled.
- All the assets of the company are sold.
- Money owed to the company, if any, is collected.
- Funds raised are distributed to the creditors.
- Surplus funds left after all the transactions are distributed amongst shareholders.

2. Compulsory Winding Up

There are certain grounds upon which a company can be wound up compulsorily. A company's inability to pay its debts is a common ground for presenting an originating summons for compulsory winding up. A company is deemed to be unable to pay its debts if:

- A creditor having a claim against the company for more than S\$10,000.00 has served a written demand requiring payment, and the debt is not paid within 3 weeks;
- Execution of a judgment obtained by a creditor against a company remains unsatisfied in part or in whole; or
- It is proved to the Court's satisfaction that the company is unable to pay its debts.

The following parties can file an Originating Summons to wind up a company compulsorily:

- The company itself;
- A creditor of the company;
- A shareholder of the company;
- A liquidator;
- A judicial manager; or
- Various Ministers on grounds specified under the law.

Procedure

The Originating Summons for the winding up of a company by the Court in either Form 2 or Form 3 of the Companies (Winding Up) Rules must be filed together with a supporting affidavit (in Form 5).

When filing the Originating Summons, the plaintiff or applicant may nominate a person to be appointed as the liquidator if a winding up order is made by the Court. Before the hearing of the Originating Summons, the plaintiff or applicant, or his lawyer, must obtain and file the written consent of the nominated liquidator. If no liquidator is nominated, the Official Receiver is the default liquidator.

The Originating Summons must be served on the company, the Official Receiver and the nominated liquidator (if any). In addition, the plaintiff or applicant needs to pay a deposit of S\$10,400.00 to the Official Receiver.

An advertisement of the Originating Summons is required to be placed in an English and a Chinese local daily newspaper as well as in the Government Gazette.

If any person intends to appear at the hearing, a Notice of Intention to Appear in Form 8 must be given to the plaintiff or applicant, or his lawyer.

Any person who wishes to oppose the originating summons for winding up may file an affidavit in opposition at least 7 days before the hearing date.

The hearing of the originating summons is usually fixed within 6 weeks from the date of filing of the Originating Summons. Hearings are usually conducted in open court before a High Court Judge each Friday. The judge may dismiss the Originating Summons, adjourn the hearing or make a winding up order or an interim order.

Main Effects of a Compulsory Winding Up Order

When a company is wound up compulsorily by the Court, the winding up is deemed to have commenced at the time of presentation of the Originating Summons for winding up. Upon the commencement of winding up, the company's officers have no power to carry on the business of the company. The liquidator takes over control of the company.

Within 14 days of the winding up order, the directors and the secretary of the company must deliver a statement of the company's affairs to the liquidator, who must then make a report to the Court. The statement of affairs contains details of the company's assets and liabilities, and enables the liquidator to carry out investigations into the affairs of the company.

After the Originating Summons for winding up is presented, the company, its creditors or its shareholders may apply to restrain any pending proceedings against the company. Once the winding up order is made, no action against the company may be commenced or continued without the leave of the court. Any disposition of the company's property and any transfer of its shares after the commencement of winding up shall be void unless the Court orders otherwise.

The Court Fees payable for the filing of documents in respect of Compulsory Winding Up Proceedings may be found in the Second Schedule of the Companies (Winding Up) Rules.

3. Voluntary Winding Up

Usually, a voluntary winding up is affected by the passing of a special resolution by the members of the company. The winding up commences at the time of passing the resolution.

The two types of voluntary winding up are:

1. Members' Voluntary Winding Up

For this to happen, a company must be in a position to pay its debts in full within 12 months after the commencement of winding up. The directors of the company are required to file a declaration of solvency to the above effect. The liquidator will be appointed by the company.

2. Creditors' Voluntary Winding Up

Where a company is unable to pay its debts and wishes to be wound up, it may do so by way of a creditors' voluntary winding up. In addition to the requirement of a members' resolution to wind up the company, the company must also convene a meeting of its creditors to consider the proposal for a voluntary winding up. The company will appoint a liquidator, subject to any preference the creditors may have as to the choice of liquidator.

If no declaration of solvency is filed or if the liquidator is satisfied that the company is unable to pay its debts within the specified period of 12 months after the commencement of winding up, the winding up will proceed as a creditors' voluntary winding up.

No originating summons is filed in Court for the voluntary winding up of a company. This is dealt with by the **Accounting and Corporate Regulatory Authority (ACRA)** instead.

4. Winding Up and Bankruptcy

Winding up a business is not the same as bankruptcy, though it is usually an end result of bankruptcy.

Once the winding-up process has begun, a company can no longer pursue business as usual. The only action they may attempt is to complete the liquidation and distribution of its assets. At the end of the process, the company will be dissolved and will cease to exist.

Example of Winding Up: Well-known American companies that were liquidated, or wound up, including Circuit City, RadioShack, Blockbuster, Borders Group, and Toys "R" Us. In February 2019, the discount shoe store chain Payless closed its remaining stores, effectively beginning the winding-up process. All of those retailers were in deep financial distress before filing for bankruptcy and agreeing to liquidate.

Example of Bankruptcy: Payless, the shoe retailer, filed for bankruptcy in April 2017, almost two years before the business finally ceased operations. Under court supervision, the company shut down about 700 stores and repaid about \$435 million in debt. Four months later, the court allowed it to emerge from bankruptcy. It continued to operate until March 2019, when it abruptly shut down its remaining 2,500 stores and filed again for bankruptcy. This time, Payless is winding up.

5. Steps of Winding Up

The following steps are followed in the case of a company winding up:

- An administrator, usually denoted as a liquidator, is appointed in the context of liquefaction or winding up of a company.
- The liquidator takes control over the company, assembles its assets, pays debts of the company and finally distributes any surplus amongst the members according to their rights and liabilities.
- The company has no assets or liabilities at the end of liquefaction or winding up.
- The dissolution of a company takes place when the assets and liabilities of a company are completely wound up.
- On the context of winding up, the name of the company is struck off from the list of companies and its identity as a separate legal person is lost.
- If a company is unable to pay its debts or the debts taken by the company is worth more than the assets it owns and no agreements have been made with the creditors, then the company is considered insolvent and is subjected to compulsory liquidation or compulsory winding up.
- If an insolvent owes money to a natural person, he may ask the court of law to make a compulsory winding up order against the company.

- On the issuance of the order, the order is informed by the court to the official receiver, who eventually becomes the liquidator.
- The official receiver informs the creditors and conducts interviews with the directors of the company on the context of the winding up.
- If it is believed by the official receiver that the company has enough assets to pay its creditors, then the official receiver will seek for the appointment of an insolvency practitioner as the liquidator.
- The appointment of the liquidator is done either by calling a creditors' meeting for the creditors to elect a liquidator by vote or by requesting the Secretary of the State to appoint one.
- If there are no assets left, then the official receiver will become the liquidator.
- A person must be owed a minimum amount of INR 750 without dispute before he can ask for a winding up.
- Other business corporations or individuals can request the order of winding up of a company.
- Insolvency Service, an agent of the government, is an investigating agency, which investigates the winding up of a company.
- The Insolvency Service investigates financial failure and misconduct of individuals and companies.
- The official receiver works for the Insolvency Service.
- The official receiver finds out when and why an individual became bankrupt and finds out the primary cause behind the liquidation of a company.
- The procedure of winding up differs according to the registration status of the company, i.e., if the company is registered or if it is an unregistered company.
- If the winding up of a company is processed in the court of law, the liquidator is termed as official liquidator.
- The official liquidator acts through a recognized reporting system under the supervision of the court.

6. Powers of a Liquidator

An administrator, usually denoted as a liquidator, is appointed in the context of liquefaction or winding up of a company. The liquidator takes control over the company, assembles its assets, pays debts of the company and finally distributes any surplus amongst the members according to their rights and liabilities.

The following are the general powers of a liquidator:

- Illustrating or defending any action, suit, prosecution or any legal proceedings on behalf of the company
- Carrying out the business of the company as far as it is beneficial for the company
- Paying the creditors
- Making any compromise or arrangements with the creditors
- Compromising all the calls, debts and liabilities, which may result in further debts on the company
- Selling all the mobile and immobile assets of the company by conducting public auctions or by private contracts, with power to transfer the assets to a single person or to various persons in parcels
- Performing all the acts and deeds needed for the winding up with receipts and documents using the company's seal and name
- Drawing, accepting, making and endorsing any bill of exchange or promissory note in the name and on behalf of the company
- Raising the security of the properties and money of the company

7. Consequences of Winding Up

The most important consequences of the winding up of a company are as follows:

I. As Regards the Company Itself

- Winding up doesn't take away the existence of the company completely.
- The company continues to exist as a corporate entity till its dissolution.
- All the ongoing business of the company is administered by the liquidator during the phase of liquidation.

II. As Regards the Shareholders

- Contributors – a new statutory liability comes into existence.
- Every transaction of share during the liquefaction done without the approval of the liquidator is termed void.

III. As Regards the Creditors

- The creditors cannot file a case against the company except with the consent of the court.
- If the creditors already have decrees, they cannot proceed with the execution.
- They must explain their claims and justify their claims to the liquidator.

IV. As Regards the Management

- With the appointment of the liquidator, all the powers of the directors, chief executives and other officers tend to cease.
- Only the powers to give notice of resolution and the power of appointment of the liquidator upon winding up of the company are given to the members.

V. As Regards the Disposition of the Company's Property

All the dispositions of the company's properties are void if the dispositions are not approved by the court or the liquidator.

8. Circumstances in which a Company may be Wound Up

A company may be wound up by a tribunal where the petition has been filed under the following circumstances:

- A special resolution is passed by the company that the company shall be wound up by the tribunal.
- Failure of the company in reporting a statutory report at the registrar's office.
- Non-commencement of the company in business within one year of incorporation.
- Number of members has reduced below 7 for a public company or 2 for a private company respectively.
- The debts of the company are unpayable by the company.
- The tribunal is just equitable to wound up the company.
- The company is unable to file its balance sheet or annual return for five financial years consecutively.
- The company has acted against the sovereignty and integrity of the country.

Application of Winding Up

An application of winding up must be filed with the petition of winding up by the following entities:

- The company
- Any creditor or creditors of the company
- Any of the contributory company
- Any person authorized by the central government
- The state government or the central government

According to the procedures mentioned in section 439-481 of the Companies Act, the tribunal will move on upon the receipt of the petition.

9. Winding Up of the Company by Tribunal

When a resolution for the winding up of a company is passed inside the company, the court may make an order for the voluntary winding up to continue.

- However, the court remains in supervision of the winding up.
- The freedom and liberty of the creditors, contributors or others to apply to the court at such times is limited by the court.
- A petition for the winding up must be filed at the court for the supervision of the court over the winding up.
- The winding up of a company by the order of the court is also regarded as a compulsory wind up.

Section 305 of the ordinances justifies the following circumstances where the court may wind up the company based upon a petition submitted to a court.

- If the company decides by a special resolution that the company should be wound up by the court.
- If the company is found to be a defaulter in delivering statutory reports at the registrar's office or holding statutory meetings or holding two annual general meetings for two consecutive years.
- If the company does not start its business for one year of incorporation or its business is suspended for one year.
- If the number of members is reduced below 2, 3 and 7 for private, public and listed company respectively.
- If the company is found no more able to pay its debts.

- If the company is:
 - Carrying out or complying unlawful and fraudulent activities
 - Carrying out business activities not authorized by its memorandum of association
 - Carrying out business in an oppressive manner towards its members concerned with the promotion of the company
 - Running and is managed by the hands of persons who are in a default in maintaining proper accounts or are involved in fraudulent and dishonest activities
 - Managed by persons who fail to work in sync with the memorandum of association of the company or fail to comply with the registrar and the court of law.
- If the company, being a listed company, does not stand out to act like one.
- If the court's opinion is to wind up the company or
 - Complete deadlock in the management of the company
 - Failure of company's main objective
 - Recurring losses
 - Oppressive or aggressive policies of the majority of shareholders
 - Incorporation of a company with intent to fraudulent or illegal purpose
 - Public interest
- If the company ceases to have a member.

10. Procedure for Winding Up of a Company

- A special resolution must be passed in the company in the context of winding up and the consent of 3/4th of its members is required for the winding up to be carried out by the court.
- A list of the total assets must be prepared in order to confirm that the company is no more able to pay its debts.
- A list of the creditors must be prepared.
- In the context of any defaults in payments, the creditors of a company are required to make a decision for filing a petition in the court of law.
- Advocates must be engaged to prepare and file the petition.

11. Members' Voluntary Winding Up

This type of winding up is carried out when the company is solvent and is able to pay its liabilities totally. The important aspects of members' voluntary winding up are as follows:

Declaration of Solvency

- For the winding up of a company, it is needed for the directors to conduct a meeting, where the majority of the directors make a declaration approved by an affidavit that they have made a full assessment of the company and the company is able to pay all its debts within three years of the winding up of the company.
- It is necessary for such a declaration to be made at least 5 weeks before the resolution to become effective.
- It should be necessarily delivered to the registrar's office.

Appointment and Remuneration of Liquidators

The company, in a general meeting, must exercise the following things & minus:

- Appointment of liquidators for the purpose of winding up of the company as and when the company is about to be wound up and for the distribution of the assets of the company
- Fixing an adequate remuneration to be paid to the liquidators. This fixed remuneration cannot be changed in any circumstances. The liquidator does not take charge of his office unless the remuneration is fixed.

Board's Power to Cease

- During the course of liquidation, all the powers of the directors and managers are ceased.
- However, the power to give notices and the power to make appointments to the registrar is not ceased.
- However, the powers of the directors may continue to exist upon the sanction of their powers by the shareholders or the liquidator.

Notice of Appointment of the Liquidator Is Given to the Registrar

Power of Liquidator to Accept Shares as Consideration as Sale of Property of the Company:

- The liquidator can accept shares, policies or take interests to consider the sale of the company's belongings to another company.

- He may do so with an aim to distribute the same amount of members of the transferor company, provided –
 - A special resolution is passed in the company for this act to be effective.
 - He buys the interest of any dissenting member at a price to be determined by an agreement or arbitrarily.

Duty of Liquidator to Call Creditors' Meeting in Case of Insolvency

If the liquidator, for any reason, realizes that the company is on the verge of insolvency, i.e., thinks that the company will be unable to pay its debts and liabilities within the limited time as specified by the declaration of insolvency, he must summon a meeting of the creditors where the statement of all the assets and liabilities is laid before them.

Duty of the Liquidator to Inform the Income Tax Officer

- Upon the appointment of a liquidator, the income tax office must be informed of the appointment of the liquidator.
- This must be done within 30 days of the appointment of the liquidator.
- The tax assessment of the company is to be carried out.

Duty of the Liquidator to Call General Meeting at the End of Each Year

- In case the process of winding up takes more than one year, the liquidator must call for general meetings at the end of each year.
- The meetings should be held within three months from the end of each year or as specified by the central government of India.
- The liquidator must present a brief account of his actions and the matters he is dealing with and the progress of the winding up at the general meeting before all the other members of the company.

Final Meeting and Dissolution

When the affairs of the company are fully finished, the liquidator must do the following things:

- Make a report on how the process of winding up progressed, ensuring all the property of the company has been disposed.
- Conduct a general meeting of the company for laying the report before the company and provide justification of the steps he has taken for the successful winding up of the company.

- Send a copy of the report to the registrar's office and meet the registrar to return the report within one week and make a report to the tribunal about the conduct of the winding up to ensure that that the liquidation went as per the members of the company's interest.

Dissolution of the Company

- Bringing an end to the life of a company is termed as dissolution.
- No property can be held by a dissolved company.
- The company cannot be sued by the court after liquidation.
- If any property of the company still remains after the dissolution of the company, the property will be taken over by the government immediately.

12. Creditors' Voluntary Winding Up

Creditors' voluntary liquidation is a procedure in which the company's directors choose to voluntarily bring the business to an end by appointing a liquidator (who must be a licensed insolvency practitioner) to liquidate all its assets. The important provisions of the creditors' voluntary winding up are as follows:

Meeting of the Creditors

- A creditors' meeting must be called up within two days of the day when the resolution for winding up of the company, as proposed by the creditors, is passed.
- A notice of the creditors' meeting along with the notice of the general meeting of the company must be delivered to all the creditors of the company.
- A full-fledged report on the company's affairs, the list of the creditors of the company and the estimated number of claims made by the creditors should be presented by the directors before the creditors of the company.

Notice of Resolution to Be Given to the Registrar

When a resolution of winding up of a company, as proposed by the creditors, is passed, a notice of the resolution must be delivered at the registrar's office within 10 days from the day when the resolution is passed.

Appointment of the Liquidator

- A liquidator for the purpose of the winding up of the company may be nominated by the creditors of a company at the creditors' meeting.
- However, if there are different persons nominated at the general meetings of the company and the creditors meeting of the company, then the person nominated by the creditors is appointed as the liquidator of the company.

Appointment of the Inspection Committee

If the creditors wish, they may appoint an inspection committee for watching over the entire process of winding up of the company.

Remuneration of the Liquidator

- The creditors fix the remuneration of the liquidator.
- If the creditors fail to fix the remuneration of the liquidator, the remuneration shall be fixed by the tribunal.
- No liquidator shall join unless a respectable remuneration is fixed.
- Once fixed, the remuneration cannot be changed.

Power of the Liquidator

- The liquidator enjoys all the powers as vested on a director.
- Further the liquidator enjoys all the powers as vested on a liquidator in case of members' voluntary winding up according to section 494 of the Companies Act, 1956.

Duty of the Liquidator to Call General Meeting at the End of Each Year

- In case the process of winding up takes more than a year, the liquidator must call for general meetings and creditors' meetings at the end of each year.
- The meetings should be held within three months from the end of each year or as specified by the Central Government of India.
- The liquidator must present a brief account of his actions and the matters he is dealing with and the progress of the winding up at the general meeting before all the other members of the company.

Final Meeting and Dissolution

When the affairs of the company are fully finished, the liquidator must do the following things:

- Make a report on how the process of winding up went, ensuring all the property of the company has been disposed.
- Conduct a general meeting of the company for laying the report before the company and give certain explanation about the justification of the steps he has taken for the successful winding up of the company.
- Send a copy of the report to the registrar's office and meet the registrar to make a return of the report within one week and make a report to the tribunal about the conduct of the winding up to ensure that the liquidation went as per the members of the company's interest.

Dissolution of the Company

- Bringing an end to the life of a company is termed as dissolution.
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