A guide to members' voluntary liquidations

Introduction

A company can be put into liquidation voluntarily, at the instigation of its directors, or compulsorily, by order of the Court. The effect in either case is that a liquidator is appointed to bring the company's existence to an end so that it can be dissolved. Where the decision to go into liquidation is taken voluntarily and the company is insolvent and cannot pay all its creditors in full, the liquidation is termed a 'creditors' voluntary liquidation'. If the company is solvent and can pay all its creditors in full, the liquidation may be a 'members' voluntary liquidation'.

Commencement

The catalyst for a members' voluntary liquidation is a decision by the directors that the company has no further purpose and that available assets should be realised and distributed to shareholders. The decision may be prompted by tax planning considerations within groups of companies or as part of group or company reorganisations or reconstruction's. In certain types of reorganisation, the whole or part of the business of the company to be liquidated is sold to another company in exchange for shares or other securities in the purchasing company. In rarer situations a company's articles may provide for it to exist for a fixed period only or until a specified event occurs.

Declaration of solvency

An essential requirement for a members' voluntary liquidation is that the directors (or a majority of them) must make a statutory declaration that they have made a full inquiry into the company's affairs and have formed the opinion that the company will be able to pay its debts in full, together with statutory interest, within a specified period, not exceeding 12 months, from the commencement of the liquidation. The declaration, incorporating a statement of the company's assets and liabilities at the latest practicable date, is made before a solicitor or commissioner of oaths. The declaration must be made not more than five weeks before the liquidation and to be effective must also be filed with the Registrar of Companies within 15 days of the commencement of the liquidation.

A director making a declaration has to have reasonable grounds for the opinion that the company will be able to pay its debts in full, together with statutory interest, in the period specified. If a declaration is made but the company's debts are neither paid nor capable of being paid in the period, the onus of proof lies on the director to show that he had reasonable grounds for his opinion and, if he does not, he may be liable to imprisonment or a fine.

Members' meeting

A resolution for winding up must be passed by the company's members and for a members' voluntary liquidation a special resolution is usually required. Such a resolution can be passed in a general meeting and 21 days' notice of the meeting is normally required. Shorter notice can be agreed upon by a majority in number of the members having the right to attend and vote and holding not less that 95% in respect of public companies, or 90% in respect of private companies, of the nominal value of the shares giving that right.

A special resolution proposed in general meeting can only be passed if three quarters of the members entitled to vote and voting in person or by proxy vote in favour if it, subject to any poll based on shares held which may be provided for in the company's articles.

In certain circumstances, for private companies, valid resolutions can be passed without a meeting being held, if the resolution is signed by or on behalf of all members entitled to attend and vote at a general meeting. The date of a written resolution is the date the resolution is signed by or on behalf of the last member to sign. There is a general requirement with this new statutory provision regarding written resolutions that they be sent to the company's auditors who can, should the resolution affect them, insist it be considered at the general meeting.

The resolution has to be advertised in the *Gazette* within 14 days and filed with the Registrar of Companies within 15 days of its adoption. In a members' voluntary liquidation the company must, in addition to passing the resolution for winding up, pass a resolution for the appointment of one or more liquidators.

Commencement of liquidation

A voluntary liquidation commences at the time of the passing of the resolution and from that time the company exists only for the purposes of winding up even though its corporate state and corporate powers continue until it is dissolved. The company can carry on its business only in so far as is necessary to benefit the liquidation. In practice a liquidator might continue the business for a short period either in a limited way for the beneficial disposal of assets, or to facilitate the sale of the company's undertaking as a going concern.

A consequence of the liquidation is that the powers of the directors cease other than as sanctioned by the members or the liquidator. Further, transfers of the company's shares require the sanction of the liquidator to be valid and the status of the members of the company cannot be altered.

The liquidator

The liquidator must be an authorised insolvency practitioner and upon appointment gives notice in the *Gazette* and to the Registrar of Companies. Notice of the appointment must also be sent to creditors within 28 days. The liquidator may be removed from office by a general meeting convened for the purpose or by the Court and any type of vacancy in the office of liquidator may be filled by the company in a general meeting. If the vacancy is not filled in that way the Court may appoint.

The liquidator has a wide range of powers to enable realisation of the company's assets, agreement of creditors' claims and distributions to creditors and members. Certain powers (e.g., compromising creditors' claims) may be exercised only with the sanction of the members. The liquidator is able to operate bank accounts in the name of the company and to invest funds, subject to paying funds not required for the immediate purposes of the liquidation into an account held by the Secretary of State for Trade and Industry, at six monthly intervals.

Quantification of claims

The rules under which claims are dealt with in a members' voluntary liquidation are the same as in other forms of liquidation and claims may be made in any form. A secured creditor may either realise its security and prove for any balance due or may surrender the security and prove for the whole debt (any surplus realised by a secured creditor is payable to the liquidator). Mutual dealings between a creditor and the company prior to liquidation must be set off.

Debts in foreign currency must be converted to sterling. Interest can only be included in the debt if a legal right to such interest has been established prior to liquidation, and then only up to the date of liquidation. A liquidator may also estimate the value of contingent or unquantified claims.

In the event of a dispute regarding a claim, the liquidator may reject all or part of a creditor's proof, but the creditor then has 21 days in which to refer the matter to the Court.

Distributions to creditors

The liquidator will invite all known creditors to make their claims, usually with the notice of appointment. Notice of any intended dividend will be given to listed creditors who have not made their claims, specifying the latest date by which claims should be made. The liquidator still has the discretion to admit late claims, but only to the extent that other funds remain available.

In order to distribute funds safely regardless of potential claims of which the liquidator is not aware, an advertisement of the intention to make any distribution may be placed in the newspaper the liquidator considers most appropriate for drawing it to the creditors' attention. Any such advertisement must specify a last date for proving debts not less than 21 days from that of the notice. If the proposed distribution in question is to be the only or final distribution, the fact that late claims will be excluded must be stated in the advertisement.

Interest since the start of the liquidation

The liquidator must pay interest on all creditors' claims calculated from the later of the commencement of the liquidation or the date the debt was due, up to the date payment is made. The rate of interest used is the higher of the judgement debt rate (currently 8%) or the rate previously agreed by the company.

Insolvency

If, in the course of a members' voluntary liquidation, the liquidator is of the opinion that the company will be unable to pay its debts in full (together with statutory interest) within the period stated in the declaration of solvency, he must call a meeting of creditors to take place not later than 28 days after the day on which he formed the opinion. The liquidator must give seven days' notice in writing and advertise it in the *Gazette* and two relevant newspapers. In these circumstances, as from the day of the creditors' meeting the liquidation becomes a creditors' voluntary liquidation.

As far as remaining in office is concerned, the liquidator's professional ethical guidelines may require him to offer his resignation and refuse re-appointment, where he or his firm had previously acted for the company, e.g. as auditors.

Meetings, reports and returns

If the liquidation continues for more than one year (for example where agreement of one claim is protracted but sufficient funds to meet it are still available) a general meeting must be summoned each year within three months of the anniversary of the commencement of liquidation, although this period may be extended with the permission of the Secretary of State for Trade and Industry. The purpose of these meetings is for the liquidator to present an account of his actions and of the conduct of the liquidation and 14 days' notice is required. Within 30 days of the first anniversary of the commencement of winding up, and of every six months thereafter, the liquidator is required to send to the Registrar of Companies (in duplicate) a statement of receipts and payments. The statement also includes additional information on the liquidation.

Final meeting

As soon as the liquidation is completed, the liquidator is required to call a general meeting of the company for the purpose of laying before it an account of the liquidation. The meeting must be advertised in the *Gazette* at least one month beforehand. There is no requirement to adjourn the meeting if no quorum is present. Within one week of the final meeting the account presented to the meeting must be sent to the Registrar of Companies, together with a return of the meeting. The liquidator must vacate office forthwith and he is released from that time.

Dissolution

The company will be dissolved three months after registration of the return of the final meeting by the Registrar of Companies. The liquidator may destroy or otherwise dispose of the company's records one year after the date of dissolution. Any person appearing to the Court to be interested may, within two years of the dissolution, apply for a declaration that the dissolution of the company be void. This period is extended without limit, but subject to relevant statutory limits, in the case of claims for damages in respect of personal injuries or fatalities.

Some questions answered

Can the company's auditors carry out the liquidation?

It is still acceptable to the professional bodies for a partner in a firm which has had a client relationship with a company going into members' voluntary liquidation to be its liquidator, but by law that person must be an authorised insolvency practitioner.

Why should there be any delay in payment to creditors?

A liquidator has to ensure that sufficient assets are available to pay all claims in full. Apart from realising the assets, the liquidator must invite creditors to claim and agree those claims, all of which takes time. As noted above, creditors do receive interest up to the time they are paid.

Bearing in mind that the company is solvent, when can distributions be made to shareholders?

The shareholders can receive distributions only when creditors have been paid in full, together with interest, or when the full extent of those claims has been agreed.

Do the directors have cause for concern about having their names associated with a liquidated company?

No stigma should attach to a members' voluntary liquidation, as creditors are paid in full. It is only in insolvent liquidation that a director's conduct is examined for possible disqualification proceedings.