

Voluntary liquidation under the BVI Business Companies Act 2004

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Introduction

The BVI Business Companies Act 2004 (the **Companies Act**) provides two ways to dissolve a solvent company incorporated in the BVI (the **Company**), namely:

- 1) to complete a voluntary liquidation process, with dissolution occurring immediately thereafter; or
- 2) to allow the Company to be administratively struck off the register of companies by the BVI registrar of corporate affairs (the **Registrar**), with dissolution occurring seven years (or ten years in certain limited exceptions) after the date of strike-off.

This guide examines option 1 above, the voluntary liquidation process. For information and guidance on the liquidation of an insolvent Company under the BVI insolvency regime, please see our guide on *What a creditor needs to know about liquidating an insolvent BVI company* for further details.

Eligibility

The Companies Act only allows a Company to enter voluntary liquidation if it:

- has no liabilities; or
- is able to pay its debts as they fall due and the value of its assets equals or exceeds its liabilities.

Preparing for voluntary liquidation

Preliminary actions

To ensure that the voluntary liquidation procedure is as simple as possible, before a Company enters voluntary liquidation, its directors should (to the extent practicable):

- pay all of its creditors in full;
- distribute any of its remaining assets to its shareholders; and
- agree the amount of the fees and expenses of the voluntary liquidator(s) and provide for them or arrange for another party (eg a parent company or other shareholder) to pay them on behalf of the Company.

Although, in most cases, it will be preferable for any secured debt to be repaid before the Company enters voluntary liquidation, if the particulars of security for a security interest over the Company's property are registered with the Registrar, the voluntary liquidator will be bound to give effect to the rights and priority of the claims of the chargee (being the recipient of the security) under the security interest.

Key documents

The key documents needed to carry out a voluntary liquidation are the declaration of solvency and the liquidation plan.

Declaration of solvency

The declaration of solvency is made by the directors. It must state that, in the opinion of the directors, the:

- Company is, and will continue to be, able to discharge, pay or provide for its debts as they fall due; and
- value of the Company's assets equals or exceeds its liabilities.

A statement of the Company's assets and liabilities (prepared as at the latest practical date before the declaration of solvency is made) must be attached to the declaration of solvency. A copy of the declaration of solvency must be kept at the office of the Company's registered agent.

If a director makes a declaration of solvency without having reasonable grounds for the opinion that the Company is, and will continue to be, able to discharge, pay or provide for its debts as they fall due, the director is guilty of an offence, and, upon conviction, is liable to a fine of up to US\$10,000.

Liquidation plan

The liquidation plan must specify:

- the reasons for liquidating the Company;
- the directors' estimate of the time needed to liquidate the Company;

- whether the voluntary liquidator(s) is authorised to carry on the business of the Company if the voluntary liquidator determines that to do so would be necessary or in the best interests of the Company's creditors or shareholders;
- the name and address of each individual to be appointed voluntary liquidator;
- the fees proposed to be paid to the voluntary liquidator(s);
- the place where the Company's business is located or (if there is more than one place) its principal place of business and
- whether the voluntary liquidator(s) must send to all shareholders a statement of account for the voluntary liquidation.

Simple procedure

In most cases, a voluntary liquidation can be completed within 60 days of the date on which each voluntary liquidator is appointed.

The procedure for carrying out a voluntary liquidation is as follows:

- the directors must:
 - make the declaration of solvency not more than four weeks; and
 - approve the liquidation plan not more than six weeks,
 before the resolution to appoint the voluntary liquidator(s) is passed (in practice, the directors make the declaration and approve the liquidation plan at the same time);
- each individual named in the liquidation plan as a voluntary liquidator must consent in writing to being appointed;
- the shareholders must approve the liquidation plan;
- the voluntary liquidator(s) must be appointed by a resolution of the shareholders or (if they are permitted to do so by the Company's memorandum or articles of association and the shareholders have approved the liquidation plan) the directors;
- the shareholders or (if appointed by the directors) the directors must notify the voluntary liquidator(s) of the appointment;
- the voluntary liquidator(s) must file with the Registrar within 14 days of being appointed:
 - a notice of appointment;
 - the declaration of solvency or an extract of it (the statement of the Company's assets and liabilities attached to the declaration need not be filed); and
 - a copy of the liquidation plan;
- the voluntary liquidator(s) must, within 30 days of the date on which the notice of appointment is filed with the Registrar, publish a notice of appointment in:
 - the BVI Official Gazette;
 - at least one issue of a newspaper published and circulating in the BVI; and
 - (unless the Company's principal place of business is in the BVI) at least one issue of a newspaper published and circulating in the place where its business is located or (if there is more than one place) its principal place of business, or if it does not have a place of business or the voluntary liquidator does not know where its place of business is located, in any manner the voluntary liquidator thinks is most likely to come to the attention of any of its creditors;
- the voluntary liquidator(s) must complete the Company's voluntary liquidation by paying or discharging the Company's debts and liabilities and distributing any surplus assets to its shareholders, prepare a statement of account for the voluntary liquidation and (if required to do so by the liquidation plan) send a copy of it to the shareholders;
- once the Company's voluntary liquidation has been completed, the voluntary liquidator(s) must file with the Registrar a completion statement;
- the Registrar will then strike off the Company's name from the register of companies and issue a certificate of dissolution; and
- the voluntary liquidator(s) must publish in the BVI Official Gazette a notice that the Company has been struck off and dissolved.

If the Company has shares in issue of a class that does not carry voting rights, the holders of the shares of that class may only vote as a class on the resolutions to appoint a voluntary liquidator and to approve the liquidation plan if they are permitted to do so by the Company's memorandum or articles of association.

The Company must send to each shareholder a copy of the notice of meeting and liquidation plan (if the necessary shareholder approvals are to be given at a meeting) or the resolutions in writing and liquidation plan (if the necessary shareholder approvals are to be given in writing) even if a shareholder is not entitled to approve the liquidation plan.

Procedural pitfalls to avoid

To avoid the voluntary liquidation being invalid, it is important to ensure that:

- the directors make the declaration of solvency not more than four weeks before the resolution to appoint the voluntary liquidator(s) is passed;
- the directors approve the liquidation plan not more than six weeks before the resolution to appoint the voluntary liquidator(s) is passed;
- the statement of the Company's assets and liabilities is attached to the declaration of solvency;
- the voluntary liquidator(s) has consented in writing to being appointed before the appointment is made; and
- the voluntary liquidator(s) file a notice of appointment with the Registrar within 14 days of being appointed.

Commencement date

The voluntary liquidation of a Company commences on the date on which the voluntary liquidator(s) files a notice of appointment with the Registrar.

Effect of commencement

Once the voluntary liquidation of a Company commences:

- the voluntary liquidator(s) has custody and control of the Company's assets; and
- although they remain in office, the directors cease to have any powers, functions or duties, except that:
 - where the liquidation plan does not authorise the voluntary liquidator(s) to carry on the business of the Company, the directors may authorise the voluntary liquidator(s) to do so if a voluntary liquidator determines that this power is necessary or in the best interests of the Company's creditors or shareholders; and
 - the directors may exercise any powers given to them in a written notice from the voluntary liquidator(s).

The commencement of a Company's voluntary liquidation does not affect the right of a secured creditor to take possession of, and realise or otherwise deal with, the assets of the Company over which the creditor has security.

Termination of voluntary liquidation process

The voluntary liquidation of a Company terminates:

- on the date on which the Registrar issues a certificate of dissolution;
- on the date on which the court makes an order terminating the voluntary liquidation on just and equitable grounds upon an application being made by a voluntary liquidator, director, shareholder or creditor of the Company or (if the Company is a regulated person) the BVI Financial Services Commission (the **Commission**); or
- from the time that a voluntary liquidator forms the opinion that the Company is insolvent (for this purpose, **insolvent** means that the value of the Company's liabilities exceeds, or will exceed, its assets or it is, or will be, unable to pay its debts as they fall due).

If a voluntary liquidator forms the opinion that the Company is insolvent, the voluntary liquidator must notify the Official Receiver and (if the Company is a regulated person) the Commission. The voluntary liquidator(s) must then call a meeting of creditors and the liquidation will be carried out as an insolvent liquidation under the Insolvency Act 2003 (the **Insolvency Act**).

Who may be appointed as voluntary liquidator?

Eligibility

Except where the Company (the subject of the voluntary liquidation and dissolution) is a regulated person (see 'Regulated persons' below), any individual who is not disqualified from being appointed, or acting, as voluntary liquidator may be appointed as voluntary liquidator and need not be a licensed insolvency practitioner. A body corporate or other legal person cannot be appointed as voluntary liquidator. A director of the Company may also not act as a voluntary liquidator.

A resolution to appoint a voluntary liquidator is void unless the voluntary liquidator files a notice of appointment with the Registrar within 14 days of the date of the resolution.

Joint voluntary liquidators

The shareholders or (where they are permitted to do so) the directors may appoint two or more individuals to act as joint voluntary liquidators. In addition, if any voluntary liquidator has already been appointed, the shareholders may appoint an individual as an additional voluntary liquidator to act jointly with any voluntary liquidator already appointed.

Where joint voluntary liquidators are appointed, unless the resolutions appointing them state otherwise, the functions and powers of the voluntary liquidator may be performed or exercised by any one of them alone or any two or more of them together.

Duties and powers of voluntary liquidator

Duties

The principal duties of a voluntary liquidator under the Companies Act are to:

- take possession of, protect and realise the Company's assets;
- identify the Company's creditors;
- pay or discharge all debts, liabilities and obligations of, and all claims against, the Company;
- distribute the Company's surplus assets to its shareholders; and
- prepare a statement of account for the voluntary liquidation and (if required to do so by the liquidation plan) send a copy of it to the shareholders.

Powers

A voluntary liquidator has all of the powers of the Company (other than any reserved to the shareholders by the Companies Act or the Company's memorandum or articles of association), including the power to:

- take custody of, or sell, any of its assets;
- collect its debts and the assets due to it;
- borrow money on secured or unsecured terms;
- negotiate, compromise or settle any of its claims, debts, liabilities or obligations or prosecute or defend any action or other legal proceedings;
- engage professional advisers and appoint agents;
- (if authorised to do so by the liquidation plan or the directors) carry on the business of the Company for a period of up to two years;
- execute any contract or other document on behalf of the Company; and
- distribute the Company's assets.

Resignation and removal of voluntary liquidator

Resignation

If a voluntary liquidator wishes to resign, the voluntary liquidator must:

- give not less than 14 days' written notice of the intention to resign to each director and shareholder accompanied by a summary of the liquidation accounts and a report of the conduct of the voluntary liquidation; and

- once the notice period in the notice of intention has expired, the voluntary liquidator:
 - may send a notice of resignation to each director and shareholder; and
 - must file a notice of resignation with the Registrar.

Except where the Company to be put into voluntary liquidation and dissolved is a regulated person (see 'Regulated persons' below), the voluntary liquidator's resignation will take effect on the date on which the notice of resignation is filed with the Registrar.

Removal

The court may, on the application of a director, shareholder or creditor of the Company, the Official Receiver or (if the Company is a regulated person) the Commission, order the removal of a voluntary liquidator if the:

- voluntary liquidator was not eligible to be appointed, or is not eligible to act, as voluntary liquidator or fails to comply with a court order relating to the voluntary liquidation; or
- court has reasonable grounds for believing that the:
 - voluntary liquidator's conduct of the voluntary liquidation is below the standard that may be expected of a reasonably competent liquidator;
 - voluntary liquidator has a conflict of interests; or
 - voluntary liquidator should be removed for some other reason.

The voluntary liquidator and (if the Company is a regulated person) the Commission must be given not less than 14 days' written notice of the application to remove the voluntary liquidator.

If the court orders the removal of the voluntary liquidator, the applicant must file a copy of the order with the Registrar.

Regulated persons

Where a Company is, or has been at any time, a regulated person (eg a mutual fund, bank, broker or an insurer), a voluntary liquidator may not be appointed unless the Commission has given its prior written:

- consent to the Company being put into voluntary liquidation; and
- approval of the appointment of the individual(s) proposed to be appointed as voluntary liquidator(s).

The voluntary liquidator of a regulated person or (if joint voluntary liquidators are appointed) at least one of them must be an individual who is licensed as an insolvency practitioner under the Insolvency Act.

Where a voluntary liquidator of a regulated person resigns, the resignation will only take effect once the Commission has approved it.

BVI economic substance regime

The BVI economic substance regulations require all Companies to comply with certain reporting obligations relating to legal entities carrying on a 'relevant activity'. The voluntary liquidator of a Company will require the directors of the Company to ensure that the Company is compliant with its reporting obligations under the economic substance regime. Please see our guide on *BVI economic substance legislation* for more information on the economic substance requirements and reporting obligations.

Contacts

A full list of contacts specialising in BVI law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at mourant.com. © 2021 MOURANT OZANNES ALL RIGHTS RESERVED