Dissolution and Winding Up
Dissolution and Winding Up

By means of:

- Voluntary winding up
  - Members
- Court winding up
  - Creditors
- Company Recovery
Members' voluntary winding up

• **Extraordinary resolution** is passed marking the commencement of the dissolution and consequential winding up process.

• In the case of a voluntary winding-up, a **liquidator** is appointed by the **company**.
• If the directors are of the opinion that the company will be able to pay its debts in full within such period not exceeding 12 months from the date of dissolution after making due enquiry into the affairs of the company, they may sign a **declaration of solvency**. This declaration renders the process a **members’ voluntary winding up**, giving the members a degree of “control” in selecting the liquidator. The **declaration of solvency** must be notified to the Registrar within 14 days from the date of dissolution.
• The liquidator is obliged to convene a meeting of the members to report on the status of the winding up process, where the winding up continues for more than 12 months.
• A **final meeting** is called upon completion of the liquidation, with the laying of the liquidator’s final accounts. Final **Scheme of Distribution**.
• The company’s assets are distributed to its members.
Members' voluntary winding up

The preparation of the declaration of solvency is a distinguishing feature between a members’ voluntary winding up and a creditors winding up, in that, where such a declaration is not made and delivered, the company’s winding up is considered to be a creditors’ voluntary winding up.

RISK WARNING!!!

Any director making a declaration of solvency without having reasonable grounds for the opinion expressed therein can be rendered liable to:

(i) a fine (multa) of up to Eur 46,587.47; or
(ii) to imprisonment of up to 3 years; or
(iii) to both such fine and imprisonment.

If the debts of the company are not paid or provided for in full within the period stated in the declaration, it shall be presumed, until the contrary is shown that the director did not have reasonable grounds for this opinion.
Members' voluntary winding up

If during the liquidation process, the liquidator is, at any time after a declaration of solvency is made, of the opinion that the company will not be able to pay its debts within the period stated in the said declaration, he must call a meeting of the creditors, and lay before the meeting a statement of the assets and liabilities of the company and the provisions relating to a creditors’ voluntary winding up shall apply. If the liquidator fails to take such action, he shall be liable to a penalty.
Creditors' voluntary winding up

• **Extraordinary resolution** is passed marking the commencement of the dissolution and consequential winding up process.

• In the case of a voluntary winding-up, a **liquidator** is appointed by the **company**.

• The company directors **do not** make a **declaration of solvency**. They are instead obliged to call a meeting of the company’s creditors with at least seven days notice given, and advertised in at least one local daily newspaper.

• Creditors’ meeting will consider (i) the appointment of a liquidator of their choice; and (ii) the appointment of **up to 5** representatives on the **liquidation committee**.

• If creditors appoint a liquidator, it is their choice that takes precedence over the liquidator nominated by the company.

• The liquidator is obliged to convene a meeting of the members and the creditors to report on the status of the winding up process, where the winding up continues for more than 12 months.

• A **final meeting** is called upon completion of the liquidation, with the laying of the liquidator’s final accounts.

• The company’s assets are distributed to its creditors.
## Dissolution and Winding Up

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<th>Creditors</th>
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<td>Solvent Directors’ make Declaration of solvency</td>
<td>Insolvent Directors call Creditors’ meeting</td>
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<td>Resolution required</td>
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Dissolution and Winding Up

By means of:

- Voluntary winding up
- Court winding up
- Company Recovery
  - Subsequent to extraordinary resolution
  - Discretionary
  - Compulsory
Subsequent to an extraordinary resolution

Shareholders can take an **extraordinary resolution** to **dissolve** the company and be **consequently wound up**:

(i) by the court (Art. 214 (1) (a) CA) or
(ii) voluntarily (Art. 214 (1) (b) CA)
Discretionary power to order dissolution

A company *may* be dissolved and wound up by the court in the following cases

- (i) if the business of the company is **suspended for an uninterrupted period of 24 months**; or

- (ii) the company is **unable to pay its debts**, i.e. a debt due by the company has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the company or it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.
Compulsory power to order dissolution

A company shall be dissolved in the following cases –

(i) the number of members of the company is reduced to below 2 and remains so for more than 6 months (other than in the case of a single member company);
(ii) the number of directors is reduced to below the minimum and remains so reduced for more than 6 months;
(iii) the court is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding up of the company; and
(iv) when the period, if any, fixed for the duration of the company by the memorandum or articles expires, or a particular event occurs, as contemplated by the memorandum or articles, and the company has not passed a resolution to be wound up voluntarily.

In scenarios (ii) and (iv) the court may allow a “cure period” not exceeding 30 days, on good cause being shown.

Winding up may be ordered to be effected by the court or voluntarily.
Procedure in a court winding up:

• A **Provisional Administrator** is appointed by the courts to administer the estate or business of the company as instructed by the courts pending the winding up order/dismissal.

• A **statement of the company’s affairs**, confirmed by affidavit, must be prepared by the company’s Directors and submitted to the company’s **Official Receiver** (ministerial appointee).

• Any act or warrant, whether precautionary or executive, other than a warrant of prohibitory injunction, issued or carried into effect against the company **after the date of its deemed dissolution**, shall be void.

• If the court considers that the company should be wound up it will issue a **winding up order**. Liquidation is deemed to have commenced from the date that the winding up application was presented.

• A **meeting of the company’s members** and **creditors** is then called to appoint a liquidator, and form a liquidation committee. Until a liquidator is appointed, the functions of liquidator are performed by the Official Receiver.

• A **final meeting of creditors** is called at which the liquidator presents his accounts.
**Liquidation Committee**

- The committee is responsible to assist and overview the acts of the liquidator. It may direct the liquidator on how to administer the assets of the company.

- The creditors decide whether or not to appoint a liquidation committee and who is to sit on this committee. Not more than 5 creditors as members. If the creditors do not appoint a liquidation committee, contributories may do so - not less than 3 but not more than 5 contributories.

- The committee meets every 6 months or more frequently. The liquidator may also call for meetings of the liquidation committee. Meetings of the committee are held only if a majority of members is present and decisions are taken by a majority of the members present.

- A member may be removed by resolution of the meeting of the creditors or the contributories who appointed that member in the first place. Unless the members of the committee fall below two, the committee may continue to perform its functions.

- If a liquidation committee is not appointed, the liquidator may ask the Official Receiver to carry out the functions of the committee.
The Role and Duties of the Liquidator

Method of Appointment & Removal
## Appointment of Liquidator

<table>
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<th>Court WU</th>
<th>Members VWU</th>
<th>Creditors VWU</th>
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<tr>
<td>Official receiver occupies the position in case of any vacancy &amp; until liquidator is appointed</td>
<td>Extraordinary resolution of the general meeting</td>
<td>Extraordinary resolution of the general meeting. Creditors’ meeting called. Creditors' choice prevails.</td>
</tr>
<tr>
<td>Creditors’ and contributors’ meetings called. Creditors' choice prevails.</td>
<td>If no liquidator is appointed, any Director may apply to Court (§270(3))</td>
<td>If no liquidator is appointed, any Director may apply to Court (§279(2))</td>
</tr>
<tr>
<td>If no liquidator is appointed, Official Receiver may apply to Court. (§230)</td>
<td></td>
<td></td>
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Formalities relating to Appointment:

- **Notice of liquidator's appointment** must be served by the liquidator on the Registrar of Companies (§ 235- CWU, 290- VWU). Form L(1) or L.

- **Remuneration** determined by:
  - CWU - The court (§236(2))
  - MVWU - General Meeting, extraordinary resolution (§270)
  - CVWU - Liquidation Committee or the creditors (§281)
Removal of Liquidator:

- **CWU** - Any creditor or contributory may apply to court requesting the liquidator’s removal. If there exist sufficient grounds for his removal, the court may issue an order to that effect and appoint a new liquidator (§236)

- **VWU** - Any member, creditor or contributory may apply to court requesting the liquidator’s removal. If there exist sufficient grounds for his removal, the court may issue an order to that effect and appoint a new liquidator (§289)

- **MVWU** - By extraordinary resolution except where appointed by the Court (§289)

- **Notice of removal or resignation** must be served on the Registrar by the liquidator, the Courts, the members or the creditors, depending on circumstances (§300)

- Vacation of office may also happen by reason of death or resignation
Vacancy resulting from death, resignation or removal of Liquidator:

**CWU** - Court to appoint replacement (§236 (4))

**MVWU** - the company by extraordinary resolution or, in default, by the Court

**CVWU** - the creditors by resolution, the company by extraordinary resolution or, in default, by the Court
The Role and Duties of the Liquidator
Release from Appointment
When the liquidator has:

(i) realised all of the property of the company (or most without protracting the liquidation);

(ii) distributed a final payment, if any, to the creditors;

(iii) adjusted the rights of the contributories among themselves, and

(iv) made a final return, if any, to the contributories or has resigned

the liquidator may apply to the Court requesting a report to be prepared on the liquidator’s accounts at the company’s expense.

If the Court is satisfied that the liquidator has complied with the requirements of the Companies Act and any other requirements, after taking into consideration any objection which may be raised by any interested person, the Court will release the liquidator from his appointment (§ 244)
When the affairs of the company are fully wound up, the liquidator is required to prepare an account of the winding up, showing how the winding up has been conducted and how the property of the company has been disposed of. The account must be audited by one or more auditors appointed by ordinary resolution of the company, or in default by the court.

A scheme of distribution must also be drawn up indicating the amount due in respect of each share from the assets of the company.

The liquidator shall thereupon call a general meeting of the company (and a meeting of Creditors- CVWU) for the purpose of presenting and explaining the account and scheme of distribution together with the auditors’ report. If no quorum is present a return to that effect must be made to the Registrar.

Within 7 days of the meeting, the liquidator is required to send to the Registrar a copy of the account and of the scheme of distribution together with the auditors’ report. Penalty of €465.87, and an additional €23.29 for every day during which the default continues. (§ 274, 284)

The Company is struck off the register after the lapse of 3 months from the date of publication of notice of the striking off in the Government Gazette the Gazette or on the Registry’s website, unless during such 3 month period any interested person files an application. (§ 275, 285)
Wrongful & Fraudulent Trading
Fraudulent Trading

Article 315 (1) Companies Act:
If in the course of a winding up of a company, whether by the court or voluntarily, it appears that any business of the company has been carried on with the intent to defraud creditors... the court may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.

+ criminal offence: fine (multa) of up to Eur 232,937.34 and/or imprisonment of up to 5 years
Wrongful Trading

*Article 316 (1) Companies Act:*

*Where a company has been dissolved and is insolvent and it appears that a person who was a director knew or ought to have known prior to the dissolution of the company that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency.*

Application may only be filed by the liquidator of a company

The Court may declare any such person liable to make a payment towards the company’s assets as it deems fit.
Wrongful & Fraudulent Trading

Dr Andrew Borg Cardona Noe vs Victor Zammit Et (14.05.2010)- The Price Club cases

• Directors held responsible for **both fraudulent and wrongful trading**
• Ignorance is not an excuse
• A director shares responsibility with the other co-directors of the company and is under an obligation to know and to carry out his legal duties.

Professor Andrew Keay: “Today it is very difficult for a director to argue that he was not a party to the carrying on of the business of the company (unless such director registers a dissenting opinion), especially since it is one of the duties of directors to actually participate in the business of the company.”
Company Recovery Procedure
Company Recovery

By means of:

- Voluntary liquidation
- Compulsory liquidation
- Company Recovery

Function

Orders

Powers
Company Recovery

- When directors become aware of the company’s inability to pay its debts, it is essential that they take positive action in an attempt at **curbing the financial loss sustained by the company** and **minimising the loss suffered by creditors**.

- Where a company is **unable to pay its debts** or is **imminently likely** to become unable to pay its debts, and the directors are aware of this, they must call a general meeting of the company not later than 30 days from when the fact became known to them. The meeting must take place within 40 days from the date of the notice.

- The purpose of the meeting is that of **reviewing the company’s position** and of **determining what steps should be taken to deal with the situation**, including (i) dissolution of the company; and (ii) making a company recovery application to court.

- This procedure aims to save the company from liquidation by taking the company out of the hands of the directors, and placing it in the hands of a **special controller** for a specified period.

- The company is granted breathing space in which to trade its way out of difficulty. The appointment of the special controller may last up to 12 months and may be extended by a further 12 months.
Company Recovery

- A **company recovery application** may be made to the court requesting it to place the company under the company recovery procedure and to **appoint a special controller** to take over, manage and administer the business of the company for a period to be specified by the court.

- The application may be made by:
  - the company following an extraordinary resolution;
  - the directors following a decision by the board of directors;
  - creditors of the company representing more than **half in value of the company’s creditors**.
If the court upholds the company recovery procedure it will issue a **company recovery order**. In this order, the court will:

(i) appoint an individual to act as a **special controller**;
(ii) fix the **remuneration** of the special controller;
(iii) order the company to deposit a sum of money or suitable guarantee to cover the remuneration, and charges of the special controller, within a prescribed period (not more than ten days).

Whilst this order is in force, the company continues its normal activities under the **management of the special controller**. The special controller takes into his custody or under his control all the property of the company and becomes responsible to manage and supervise its activities, business and property.

The special controller must ascertain and verify whether there is a **reasonable expectation of the company’s recovery** and continuation as a **viable going concern**, and is required to submit an initial report to the court within 2 months from his appointment.
Effects of a company recovery order

- winding up applications are stayed
- no resolution for the dissolution and consequential winding up of the company may be passed
- the execution of claims of a monetary nature against the company and any interest thereon is stayed

except with the court’s permission

- titles of lease held by the company may not be terminated
- security over property of the company may not be enforced
- no precautionary act or executive title may be issued against the company or its property
- no judicial proceedings may be commenced or continued against the company or its property
The controller may also bring about the termination of the recovery procedure in the following cases:

- if, at any time during which a company recovery procedure is in force, the special controller concludes that it would serve no useful purpose for the company to continue with the said procedure.
- if, at any time during which a company recovery procedure is in force, the special controller concludes that the affairs of the company have improved to the extent that it is in a position to pay its debts.

In either scenario, the controller shall make an application to the court for the termination of the company recovery procedure- in the former case to wind up the company and in the latter case to enable the company to resume its business.
Summary
• A company’s life must be formally ended by either a voluntary or compulsory liquidation.

• Voluntary liquidations can be initiated by either members or creditors, dependant upon whether or not the company is solvent. The liquidations differ not only in the solvency of the company, but also in the resolutions required, appointment of the liquidator and who controls the process.

• Compulsory liquidations are usually initiated when a company cannot pay its debts. The Provisional Administrator will be appointed to start the process. Distributions will be made by the liquidator in accordance with the strict order of payment.

• A company, its directors or creditors may apply for a company to be placed under a Company Recovery Procedure. Under this procedure a company is given breathing space (up to 12 months, extendable by a further 12 months) while the special controller attempts to help the company trade its way out of difficulty. The special controller has wide powers to manage the company and its assets, taking into account the best interests of the company, its shareholders and creditors together with the interests of any other interested party.
• **Companies Act, Chapter 386, Laws of Malta, Part V Title II & Part VI**

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  ...fil-kamp kummerċjali se nagħtu prijorità lil żewġ oqsma li fis-settur legali l-aħħar ġenerazzjonijiet ta’ snin waqqħu lura – il-kamp tal-insolvenza (bankruptcy proceedings) u l-kamp tal-infurzar tal-kuntratti ...”

• In practice:
  ✓ Regulated Companies;
  ✓ Liquidator’s qualifications & liability;
  ✓ Stumbling blocks – tax & social security. How do different jurisdictions classify and deal with them?

• ccb@csb-advocates.com
Thank you! Good luck 😊