

Creditor's Voluntary Winding Up

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In this article, **Saman Bugeja** examines the Creditor's Voluntary Winding UP (CVWU) process under the Maltese Companies Act, offering a detailed overview of the procedures applicable when a company is insolvent and unable to meet its financial obligations. Building on the previous discussion of the Members' Voluntary Winding Up, the article distinguishes the CVWU as a process initiated by shareholders but primarily driven by creditor involvement to safeguard their legal rights. It outlines directors' fiduciary duties when insolvency is imminent, including the requirement to convene meetings to assess the company's financial standing. The procedural framework is analysed step-by-step – from the passing of the extraordinary resolution and filing of statutory forms to the convening of creditors' meetings, nomination of a liquidator and establishment of a liquidation committee. The article highlights the liquidator's role in managing the winding up, preparing audited accounts, and ensuring equitable distribution of assets among creditors. Emphasis is placed on transparency, oversight, and compliance with statutory timelines to achieve an orderly dissolution without court intervention. Ultimately, the CVWU serves as a structured mechanism to balance the interests of creditors and members, facilitating the fair and efficient closure of insolvent companies.

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1. Introduction

Following the first article in this series, dealing with the process of a member's voluntary winding up (the 'MVWU'), the focus of this article will shift to the second mode of voluntary winding up which is the creditor's voluntary winding up (the 'CVWU') under the Companies Act.¹

Since there is some overlap between a MVWU and CVWU, this article will necessarily touch briefly on the process already described in a MVWU whilst focusing on the specific elements of a CVWU.

2. Director's Responsibilities in View of Imminent Insolvency

Prior to delving into the process of a CVWU, it is useful to remind directors of their fiduciary duties towards the company's creditors to act within the best interests of such creditors where the company is experiencing financial difficulties and approaching insolvency. In a judgment delivered by the First Hall of the Civil Court in the names of *All Invest Company Limited vs X et al*,² the Court, with reference to the UK case of *Colin Gwyer & Associates Ltd vs London Wharf (Limehouse) Ltd*,³ noted that directors have fiduciary duties vis-à-vis a company's creditors when such company is on the brink of insolvency. In the *Colin Gwyer* case it was held that, 'in relation to an insolvent company, the directors when considering the company's interests must have regards to the interests of the creditors.'⁴ In his work, Professor Andrew Keay argues that the protection of the creditors interest is necessary since:

- (i) Creditors cannot diversify their risk as the shareholders can. They cannot readily exit or hedge their exposure⁵; and
- (ii) Insolvency may create strong incentives for shareholders to push for high-risk strategies which can harm creditors. The reasoning behind this is while any upside from risky projects will benefit the shareholders, losses would greatly impact the creditors⁶.

In the case of *West Mercia Safetywear vs Dodd*,⁷ West Mercia formed part of a group of companies controlled by the same director, Mr. Dodd. Despite

¹ Companies Act, Chapter 386 of the Laws of Malta.

² 888/2013 *All Invest Company Limited vs X et al*, Civil Court (First Hall) 17 March 2024.

³ *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch).

⁴ *ibid.*

⁵ Andrew Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) 66(5) *Modern Law Review* 665, 670-72.

⁶ Andrew Keay, *Company Directors' Responsibilities to Creditors* (Routledge 2007) 44-47.

⁷ *West Mercia Safetywear Ltd vs Dodd* [1988] BCLC 250 (CA).

being on the brink of insolvency the director authorised the transfer of funds from West Mercia to an associated entity to reduce its overdraft. By doing so, the assets available to of West Mercia's creditors were depleted to the extent that they could not be satisfied.

The liquidator of West Mercia sued Mr. Dodd for breach of duty. The Court of Appeal had to consider whether directors have a duty to protect the interests of creditors in preference to its shareholders. It was decided that when a company is insolvent, the interests of creditors are paramount as they become the residual risk-bearers of the company's financial state. A director must not dispose of the company's assets if this prejudices creditors.

Indeed, in the event that the directors of a company become aware of the company's inability to pay its debts or the imminent likelihood of such inability, it is the responsibility of the board to convene a general meeting of the company within thirty days from when they became aware of this fact to discuss the company's financial position and determine what steps should be taken to deal with the situation, including consideration as to whether the company should be dissolved.⁸

3. The Process

Both a MVWU and a CVWU are initiated by the shareholders of a company via extraordinary resolution, the critical difference being that in a creditors' voluntary winding up, the company would not be in a solvent position prior to dissolution and unable to able to pay its debts in full, including any contingent and prospective liabilities.⁹ Therefore, as the name implies, whilst the winding up process is strictly voluntary, in that it would be the shareholders who resolve to put the company into dissolution, there is a heightened involvement of the creditors of the company to ensure that their rights at law are protected throughout the dissolution and winding up process.

In fact, if the assets of the company being wound up are not sufficient to meet its liabilities, the rights of secured and unsecured creditors and the priority and ranking of their debts are regulated by the Civil Code.¹⁰

Within fourteen days from the date on which the resolution for dissolution and consequential voluntary winding up is passed, the directors of the company shall:

- (i) file the statutory form B1 at the Malta Business Registry (the 'MBR'); and

⁸ Companies Act (n 1) Article 329A.

⁹ *ibid* Article 268(5):

'A winding up in relation to which a declaration has been made and delivered in accordance with this article is in this Act referred to as 'a members' voluntary winding up', and a winding up in relation to which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditors' voluntary winding up'.

¹⁰ Civil Code, Chapter 16 of the Laws of Malta; Companies Act (n 1) Article 302.

- (ii) summon a meeting of the creditors of the company and notice of such meeting shall be sent to the creditors by post at least seven days prior to the meeting.¹¹

Ahead of the creditors' meeting, the directors of the company must:

- (i) lay a full statement, outlining the position of the company's affairs;
- (ii) submit a list of creditors of the company and the estimated amounts of their respective claims; and
- (iii) appoint any one director to be present during the meeting.¹²

During the creditors' meeting, the creditors may nominate a person to be appointed as liquidator of the company. Naturally within the context of a CVWU, it is the creditors economic interests which are at stake once the company can no longer pay its debts. It also ensures the liquidator's independence and avoids potential conflicts of interest. The nomination of the liquidator by the creditors is made by a resolution of the creditors,¹³ whilst the shareholders would have nominated a liquidator in the same extraordinary resolution approving the CVWU. If the creditors and the company nominate different persons, the person nominated by the creditors will be liquidator, and if no person is nominated by the creditors, the person, if any, nominated by the company would be liquidator.¹⁴

In the event that neither the creditors nor the shareholders nominate a person to act as liquidator, any individual director of the company is required to make an application to the court for the appointment of a liquidator within fourteen days from the creditors meeting, and the court has the discretion to appoint a liquidator of its own choosing.¹⁵ Once the liquidator is appointed, the appointed liquidator would have fourteen days to file the statutory form L at the MBR which serves to notify the appointment of the liquidator.

The creditors may, if they so choose, set up a liquidation committee to be composed of not more than five representatives of the body of creditors. If such a committee is appointed, the company has the right to appoint up to five persons to act as its representatives.¹⁶ The Companies Act refers to these as 'representatives of the contributories'. A contributory is any person liable to contribute to the assets of a company in the event of its dissolution.¹⁷

¹¹ Companies Act (n 1) Article 278(1).

¹² *ibid* Article 278(2).

¹³ *ibid* Article 298 (1)(a):

'At a meeting of creditors a resolution shall be deemed to be passed when a majority in value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution.'

¹⁴ *ibid* Article 279(1).

¹⁵ *ibid* Article 279(2).

¹⁶ *ibid* Article 280(1).

¹⁷ *Ibid* Article 215.

When one considers that the function of the liquidation committee is to oversee and assist the liquidator in the exercise of his functions, the term 'contributories' is to be read as 'members of the company'. If this was not the case, the liquidation committee would be solely composed by creditors, which would be inconsistent with the spirit of the law.

Once appointed, the liquidation committee may meet at such times as they may from time to time determine and, in any case, at least once every six months. The liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary. Meetings of the liquidation committee may only be held if a majority of the members are present, and any decision taken during such meetings shall be taken by a majority of the members present at the meeting.

The liquidation committee, or the creditors meeting if there is no such committee, is to fix the remuneration to be paid to the liquidator.¹⁸ This remuneration, together with all the costs and expenses incurred in the process of liquidation, are payable out of the assets of the company in priority to all other claims and according to the order established by the Companies Act for payment of liquidation fees and costs, unless the Court decides otherwise,¹⁹ whereby the liquidator's remuneration ranks last.²⁰

Immediately after the liquidator finalises the winding up of the company's affairs, the liquidator is to prepare an account of how the company's affairs have been fully wound up and how its property was disposed of, together with a scheme of distribution showing the amount due in respect of each share from the company's assets. Such liquidation accounts are then audited and final meetings for all the shareholders and creditors are convened for the purpose of laying before them such accounts and scheme of distribution.²¹

Following approval in the respective meetings of the shareholders and the creditors, the accounts, scheme of distribution and auditors report must then be filed with the Registrar of Companies within seven days from the date of the later meeting. In the event that a quorum is not present at neither the shareholders' nor the creditors' meeting, the liquidator shall, in lieu of the report filed at the MBR, notify the MBR that the meetings were duly summoned, and that no quorum was present.

Upon receipt of the liquidation accounts and the scheme of distribution, the Registrar of Companies is to publish a notice on its website and a newspaper and on the expiration of three months from the publication of said notice, the company will be struck off, unless during that three-month

¹⁸ *ibid* Article 281.

¹⁹ *ibid* Article 293

²⁰ *ibid* Article 258.

²¹ *ibid* Article 284(1).

period, the Court makes an order to defer the date of striking-off following an application.²²

Similar to a MVWU, in a scenario where the winding up process continues for more than twelve months, the liquidator is obliged to convene a general meeting of the company and a meeting of the creditors at the end of that twelve month period, during which he is to present an account of his dealings and of the conduct of the winding up during the preceding twelve months, including a summary of receipts and expenditure. The liquidator is to convene such a general meeting at the end of each twelve-month period depending on how long the winding up process takes. During these meetings, the liquidator is to table an account of his acts and dealings and of the conduct of the winding up during the preceding twelve months, including a summary of receipts and expenditure.

4. Conclusion

Whilst the objective of a CVWU, is to ensure that the rights of the company's creditors are protected due to the insolvent state of the company, the involvement of the members of the company is critical to ensure a fair process throughout. Ultimately, managing to secure an amicable resolution of the company's affairs without the involvement of the court would be in the best interest of all parties concerned. Nevertheless, any creditor or shareholder may make an application before the court if it wishes that the company be wound up by the court.²³

²² *ibid* Article 285(1).

²³ *ibid* Article 294.



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