Company liquidation process

In which law are included the Articles relating to the Liquidation of the company, what regulations are used in the liquidation process and what jurisprudence supports the correct conditions for the preparation and submission of request for Liquidation?

Articles relating to the winding up of a Company are included in the Companies Act known as Chapter. 113 and is indistinguishable from the Companies Act 1948 in England, in which it relies. Case-based primarily on English law and Cyprus and other countries that have variants of English Law for companies, as well as on writings such as Applications to Wind Up Companies (Second Edition-Derek French – Oxford University Press-2008). Also the companies (winding-up) Modal Regulations 1933-1999, special regulations.

What are the ways that company may be liquidated/wound-up?

Article 201 of the Companies Act (CAP.113) stipulates that an organisation may be liquidated/wound up in the following ways

(a) by the Court (b) voluntary (c) under the supervision of the Court.

In General lines, how can someone apply for the winding up of a Company by the Court?

When the liquidation of a Company is made through a Court Application, then a relevant Court Application must be submitted in Court which must be in drafted in a specified way, which is called a Petition, and must be submitted in the District Court of the District in which the registered office of the company existed at least six months preceding the date of the Court Petition.

What are the cases that can support the Winding-Up/Liquidation Application in Court?

Article 211 of the Companies Act (CAP113) sets out the circumstances under which the company may be liquidated by the Court.

An application for liquidation of the Court should specify which of the criteria of Article 211 is based upon:

The criteria are:
a) the company has decided by passing a Special Resolution that the company is liquidated by the Court
(b) By an omission to submit a customary annual report to the Cyprus Registrar of Companies, or by an omission to call an Annual General Meeting of the Company.
(c) The company has not commended operations within a time span of one calendar year from the date of its incorporation, or it has ceased, or suspended its operations for a period of one year, or more.

(d) the number of members (shareholders) falls below seven (7) in the case of a public company. The Court grants to the company sufficient time for taking all necessary measure in order to increase its members and only proceeds with the dissolution of the company only if either the company declares from the outset that it is incompetent to increase its members to at least sever (7), or is not able to achieve the increase of its members within the prescribed period set out by the Court.
(e) the Company is unable to repay its debts to its Creditors
(f) the Court is of the opinion that it is fair and consistent with the law of equity to dissolve the company;
(g) The European Public limited liability company, or Societas Europaea "SE" fails to correct the situation, in accordance with article 64 of Regulation (EC) No. Council Regulation (EC) No 2157/2001 of 8 October 2001, regarding the Memorandum of the European company (SE).

What category of natural or legal persons usually submit request for Company Liquidation by a Court and under which prerequisite conditions?

As a rule of thumb, a compulsory liquidation is being put forward, usually, with a Court Application by any Creditor of the Company (either being a natural, or legal person) pursuant to the provisions of article 211 (e) which States that a company can be dissolved if it is unable to repay its debts, as well as by virtue of article 212 (a) (b) (c), by which more specific reasons are put forward to justify as to why the Company is deemed to be unable to repay its debts.

It should be noted that the company's debt should be specific and irrefutable and may not include a Creditor whose amount of credit is not specified.

If any alleged debt in good faith, which is being brought forward by the Applicant-Creditor, is disputed by the Company on grounds of substance, then the customary practice is for the Court to reject the Court application for Liquidation, and rather first allow the alleged debt in good faith to be proved and consolidated through the issue of a relevant Court Decision before the Court re-examines the application of the Creditor to liquidate a Company.

The right to file a Liquidation Application is also extended and includes a prospective or future when the Creditor who is defined as the person against whom, on the basis of an existing obligation, the company may obtain or be accountable for this responsibility with the occurrence of a future event or at some future date such as Creditor of an undisputed debt, e.g. non-rebuttable Bill of Exchange, or in case of a guarantor who paid the company's debt or lessor regarding future rents which should be collect. However, this right does not extent and does not include persons whose debt is substantially questionable especially when the questioning is part of judicial proceedings even if the company whose liquidation is sought is actually insolvent and cannot meet its debts.

Any person who was assigned a debt or who was assigned a particular part of a debt, is entitled to apply for Liquidation unless she/he has already applied in relation to the same debt before the assignment of the debt.

A Company Creditor whose debt became payable (i.e., who is entitled by law, or by contract to collect his debt) and cannot secure repayment of the debt back to him, then she/he is entitled “ex debito justitiae” to ask the company's winding-up order by a Court of Law. This applies even where the company has filed an appeal against the decision on the basis of which the debt was created, or if the company whose liquidation is sought, has any other counter-claim against the Creditor, which is the subject of any other judicial or other proceedings.

Any kind of proof from the Creditor that the debt owed to her/him has not been paid by the company within a reasonable timeframe is prima facie evidence that the company whose liquidation is sought, is insolvent. The same result applies where there is an admission by the company whose liquidation is sought, that it has no assets which could be liquidated, unless the insolvency status, or the lack of assets is a temporary difficulty of the company at the time when the liquidation is sought, and that the temporary difficulty could be overturned within a limited amount of time.

A Creditor who has applied for the winding up of the company, and for a number of reasons, is entitled to agree that her/his application is rejected, however, she/he cannot withdraw the Court Application without the permission of the Court.

A secured Creditor is also entitled to request the liquidation of a Company without affecting her/his security.

Who is considered a Secured Creditor?

Insured or Secured Creditor is the one who holds the benefit of any guarantee or mortgage on property of the person who has been granted the loan, i.e., of the debtor.

What are the specific criteria that specify the inability of a company to pay off its debts?

The specific criteria of any company's inability to pay off its debts are defined in Article 212 of Companies ACT CAP113, namely:

(a) If a Creditor, by assignment or otherwise, who is being owed by any company an amount which exceeds €899.-Euros, has served to the company's registered office, a signed formal written demand for payment which requires from the company to pay off the amount due within a time span of three weeks from the time of the serving of the formal notice and the company neglected to pay off the amount or to secure the Creditor or to settle the debt in a reasonably satisfactory way for the Creditor or

(b) If the formal Court execution of a Court Order against a company, or any other formal Court proceedings taken in order to execute a Court Order Decree of any Court for the benefit of a Creditor of the company is totally or partially unsatisfied or

(c) If it is proved to the satisfaction of the Court that the company is unable to pay its current debts and, in the Court’s discretion, the criteria used by the Court to determine

the inability of the Company to pay its current debts may also extend also to take into consideration any potential and/or future obligations of the company.

What is the difference between the provisions of article 211 (e) and section 212 (a) (b) (c), of the Companies Act CAP.113, relating to the Company's inability to pay its debts?

The narrowing down of the special circumstances stipulated in article 212 does not limit or affect the generality of article 211 regarding the inability of a company to pay off its debts. In specific, the special circumstances laid out in Article 212 include some of the circumstances that give rise to legal presumption of the existence of inability to pay debts (insolvent situation), however they are not exhaustive in scope and do not prohibit the presentation of any additional testimony, or evidence, which could lead to the extraction of the exact same conclusion, that is, that the company is indeed insolvent.

The difference between the two provisions is that a proof of only one of the specific cases referred to in article 212 creates a presumption of inability to pay debts, while the examination based on the General reasons of a pursuant claim to the provisions of article 211 will be judged depending on how the material testimony will be presented before the Court, including the testimony in support of the company’s allegation that the company is solvent.

We can say e.g. that the specific provisions of article 212 (a) are more limited in scope than the more general scope of article 211 (e) as to the company's inability to pay its debts and it defines a specific case according to the law, in which the company is unable to pay its debts.

If the intention is to make a general argument and push forward with a Court application for liquidation based on the company's inability to pay its debts, in accordance with article 211 (e) which is more general in scope, this can only be achieved in relation or in accordance to article 212 (c) can be done, and in which case, a general remark that the company cannot pay its debts is insufficient for the Court application to be successful. A more detailed presentation of all material facts must take place and material testimony must be presented before the Court and must report on the overall situation of the company, taking in consideration all of the obligations of the company, including outcomes and future or potential obligations, in the context of the overall assessment on whether the company is solvent or not.

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What are the main provisions of the legislation when a winding up decree is issued?

The key provisions of the legislation when a winding up decree are issued in the following:

When a winding up decree is issued it is customary to order an issue requesting the expenses to be paid out of the company's property, and a copy of this order must be sent to the Company Registrar and Official Receiver.

The Official Receiver, due to his post, becomes the Provisional Liquidator and continues to act as such until he or another person becomes the Liquidator and is capable of acting as such.

If during the winding up of a company from the court, a person other than the Official Receiver is appointed, that person is not capable of acting as a Liquidator until he informs the Company Registrar about his appointment and provides security to the specified type in order to meet the Court's satisfaction criteria.

The Official Receiver convenes separate meetings of the company's Creditors and contributors in order to decide whether to submit an application to the court for the appointment of a Liquidator instead of the Official Receiver.

The Court may make any appointment and adopt a decree that is required for making such a decision. If on the above-mentioned subject there is a difference between the decisions of the Creditors and contributors taken at the general meetings, then the Court decides about the fate of that difference and issues a decree it considers as fair.

If the Court appoints no Liquidator or the Liquidator's job position is vacant, then the Official Receiver takes on as the Liquidator.

Which is the most drastic way of protecting and properly managing the company's property from the date of submitting the winding-up application until its final hearing?

The appointment of a Provisional Liquidator is regarded as the most effective measure in this case. In accordance with Article 227 of the Companies Act, the Court may appoint interim a Liquidator at any time after the submission of a liquidation application. The appointment of a provisional Liquidator may be done at any time before the Decree, and either the Official Receiver or any other fit person may be appointed. When the Court temporarily appoints the Liquidator, the Court may limit his/her powers through the decree that appoints him/her. With the appointment of the Provisional Liquidator, the authorities of the company's directors cease.

The appointment of a provisional Liquidator is not a temporary Decree but concerns the whole process of the company's request for dissolution. This is evident from both Article 227 and the role and powers of the provisional Liquidator since, a course consistent with the eventual dissolution of the company is basically tracked.

When there are special cases of mismanagement and fraud and the company's property is at risk, the Creditor may apply for, and obtain, the appointment of the Provisional Liquidator even if the company objects to this application. In any other case, the company's consent to the appointment should be taken as well.

If the Provisional Liquidator believes that further powers will help him for the purpose for which he was appointed, he may apply through a relevant application form to the court where the liquidation application is placed and request for additional authorities that will help him successfully complete his purpose.

What are the duties of the Provisional Liquidator?

According to Article 231 of the Companies Act, the Provisional Liquidator shall control or safe-keep all property and things in action which the company is entitled to or appears to be entitled to. Moreover, according to article 220 when an interim Liquidator is appointed, no legal action or procedure continues or starts against the company unless a Court permission is issued.

The main objective of appointing a provisional Liquidator is to maintain the status quo of the company's assets and to prevent anyone from having priority as a Creditor.

In case that no interim Liquidator is appointed until the issue of the liquidation decree and the appointment of a Liquidator, what other possibility exists in legislation, for securing Creditors' interests and protecting the company's assets?

Article 216 provides:

In a winding up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void.

According to Article 218 (2) of the same Act the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

The purpose of this Article is to prevent company officials, following the presentation of the petition for the winding up, from isolating company's assets. This is achieved by cancelling their procedures, except if relevant permission is asked and given to them by the court.

Article 215, enables the Creditor to submit an application to the Court in order to stay, restrain or prevent any pending proceedings against the company.

What is the purpose of Articles 215 and 220?

The purpose of Articles 215 and 220 is to protect the interests of Creditors and place the non-secured Creditors on an equal basis so that, in case of company liquidation, they will be paid the same proportion. In the event of the company's conviction on pending actions and/or procedures and of the subsequent monetary penalty imposed, the financial situation of the company, and consequently the interests of the Creditors, will be adversely affected.

How can the rest of the Creditors be involved in the hearing of the liquidation application?

Based on Article 324, during the Liquidation Hearing, the Court has the discretion apart from the views of the Creditor who have made the Liquidation Application, to also consider the rest of the Creditors who wish to express their opinion.

The objecting Creditors have an obligation to provide adequate justification for their expressed views. If the majority of the Creditors have valid reasons to object to the dissolution of the company, then prima facie are reasonably entitled to expect that their wishes will prevail provided there is absence of proof by the liquidation applicant of extenuating circumstances, which make the dissolution decree desirable.

A fair and reasonable opportunity to secure payment without the dissolution of the company constitutes a good reason, which the Lender can rely on in order to prevent the proceeding of the Liquidation Application. Finally, the status of the company should be considered (i.e., its assets and the prospects of successfully conducting its work).

If the assets of the company are already mortgaged or the company is charged to an amount equal to or exceeding the value of its assets, can the Court refuse issuing winding-up order?

According to Article 214 (1), the Court cannot refuse issuing a winding-up order, based solely on the ground that the assets of the company have been charged or mortgaged to an amount equal to or in excess of their value or on the fact that the company has no assets.

What are the duties and the role of the Liquidator?

Subparagraph 1 of article 233 of the Companies Act, Chapter 113 of the relevant amendments, provides a detailed description of the powers possessed by a Liquidator during the company's winding-up procedure by the Court. Some of these are:

1. To bring or defend any action or other legal proceeding in the name and on behalf of the
   company

2. To carry on the business of the company so far as may be necessary for the beneficial
   winding up thereof;

3. To pay any classes of Creditors in full;

4. To make any compromise or arrangement with Creditors or persons claiming to be Creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable

Section 2 of Article 233 reports further authorities possessed by the Liquidator during the winding-up proceeding undertaken by the court. ¶Among other things is to do all acts

and to execute, in the name and on behalf of the winding-up company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal.

Based on Article 231, the Liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

After obtaining a Court order, all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf, shall vest in the Liquidator under his official title, and thereupon the Liquidator shall bring or defend under his official title any action or other legal proceeding which relates to that property or which it is necessary for the purpose of effectually winding up the company and recovering its property (Article 232).

The Liquidator does not act as a Trustee for Creditors or contributors but merely represents the winding-up company.

The Liquidator exclusively ensures the rights of the winding-up company. He always acts for the company's benefits and serves its interests. The purpose of the Liquidator is the proper management and distribution of the company's assets among Creditors, provided that any due amounts that debtors may have were already collected. The Liquidator always acts for the beneficial winding-up of the company.

The Liquidator has the exclusive responsibility of managing the winding-up company's assets and affairs. Among others, he acts on behalf, and for the account of the winding-up company, to compromise any financial disputes arising between the company and Creditors or other persons claiming to have financial rights on the company.

Consequently, no one can claim that the Creditors' interests are, at any stage of the procedure, represented by the Liquidator. Within the frame of his authorities, the Liquidator can attempt to totally or partially satisfy the debt of all the Creditors mentioned in the relevant company list, through the proper and fair distribution of the company's assets. However, this does not conclude that he represents any of the Creditors' interests or rights.

After all, it would not be reasonable nor legally correct for the Liquidator to represent both the interests of the winding-up company and those of the Creditors since there is always the risk of conflict of interests at some point.

Based upon legislative provisions, the Liquidator receives in every liquidation proceeding, the management of the company's assets. He manages and safeguards those assets and in the case of cancellation of the liquidation decree, he will deliver them back to the company and not to the shareholders, Creditors or contributors.

Can a Creditor take legal action against the Liquidator or activate legislation provisions in order to control acts or omissions of the latter?

If the Creditor believes that the Liquidator has any personal responsibility for the outcome of a particular asset's ownership, or if he feels that the Liquidator had any

reprehensible behaviour affecting the fate of a particular property or of any other company asset, either through his acts or omissions, or even if he believes that the Liquidator abused his powers, then he can personally, if he wishes, turn against the Liquidator demanding compensation for any damage suffered as a result of his acts, omissions and general attitude and behaviour.
Article 233(3) supports the above mentioned position:
The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any Creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

The Creditor could consider the possibility of taking legal measures against the Company through its Liquidator, by demanding compensation for the damage he would suffer; provided the company has the potential to repay its debt but did not so far act in such a manner.

Furthermore, the Creditor can intervene in the Company's liquidation process and ask for its suspension along with any other additional legal steps he deems necessary if he believes that this will improve the situation who claims to be wrong, irregular, illegal and contrary to the interests of justice administration. According to Article 243 (1):The Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any Creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.
Article 234 (5) provides, through the relevant application, a proceeding through which any person may challenge any act or decision of the Liquidator. Under the concept provided by this article, I classify any Creditor in the category of ' person '. Specifically, this article explicitly points out the following:
If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm reverse or modify the act or decision complained of, and make such order in the premises as it thinks just.

Is the initiation of a procedure targeting the dissolution of a Cyprus-based company possible when the Creditor is located in another EU country?

Yes, this is possible. The European Regulation 1346/2000 endorses the insolvency proceedings with consequent cross-border (bicommunal) effects which can also be applied to Cyprus due to its EU membership.

This regulation establishes a common EU frame-board regarding insolvency proceedings. The purpose of harmonising provisions relating to these proceedings is to prevent the transfer of assets or legal disputes from one EU country to another, in an attempt to improve legal status versus the Creditors. Exception to the above is valid only for insurance companies, credit institutions, investment companies that provide services involving the holding of funds or of third-party securities, and for organisations undertaking collective investments.

The main insolvency proceeding has a universal validity and hence, endorses all of the debtor's EU assets. The purpose of this procedure is to consolidate and liquidate debtor's assets.

Internationally responsible for the initiation of the main insolvency proceeding is, according to national law, the locally responsible court of the EU member-state where the debtor has based his major interests. For companies and legal persons is presumed, until proven otherwise, that the centre of main interests is the location of the registered office. With respect to the assets of one and the same debtor only a single major insolvency proceeding can be carried out within the EU.

Responsible for the initiation of a minor or local proceeding is, according to national law, the locally responsible court of the EU country where the debtor possesses a property.
The decision of initiating an insolvency proceeding within an EU member-state, is acknowledged in all other member-states once results have been obtained from that proceeding.