

Winding up of a Company in Myanmar

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Abstract

The Word "company" ordinarily means an association of a number of individuals formed for some common purpose. In doing business transactions, one of the most popular business organizations is company. The defining feature of a corporation is its legal independence from the people who create it. When a company is created by its members or shareholders, it is needed to apply a permit to trade under Myanmar Law. A company is formed by relevant company law and it possesses a distinct personality different from its shareholders, members and directors. The relations between these persons and company are only by contract(s). A company can die when they lose money into insolvency. The situations relating to company creation and dissolution are governing by the Myanmar Companies Act, 1914, the Myanmar Companies Rules, 1940, and the Special Companies Act 1950. The Myanmar Companies Act, 1914 was amended twice in 1989 and 1991. In Myanmar there are three ways of winding up of a company, by Court, voluntary winding up, it may be either by members or by creditors, and by supervision of the Court. The process of winding up of a company may be done by a liquidator. He shall carry out the company winding up in accordance with the Myanmar Companies Law.

Introduction

The Word "company" ordinarily means an association of a number of individuals formed for some common purposes. It involves two ideas: firstly, the members of the association are so numerous that it cannot aptly be described as a firm or partnership, and secondly, a member may transfer his interest in the association without the consent of the other member. Such an association may be incorporated according to law where upon it becomes a body corporate with perpetual succession and a common seal. The four defining characteristics of the modern corporation are: (i) Separate Legal Personality of the corporation, (ii) Limited Liability of the shareholders, (iii) Shares (if the corporation is a public company, the shares are traded on a stock exchange, such as the London Stock Exchange, New York Stock Exchange, (iv) Delegated Management; the board of directors delegates day-to-day management of the company to executives. The defining feature of a corporation is its legal independence from the people who create it. Besides, companies are recognized by the law to have rights and responsibilities like actual people. Companies can exercise human rights against real individuals and the state, and they may be responsible for human rights violations. Just as they are "born" into existence through its members obtaining a certificate of incorporation, they can "die" when they lose money into insolvency. Winding up of a company is the normal means by which a company's existence is brought to an end. It is also referred to either alternatively or concurrently in some jurisdictions as *liquidation* or *dissolution*. Winding up of company comes in three forms, *by the Court* or, *voluntary winding up* (it may be either *members' voluntary winding up*, or *creditors' voluntary winding up*) or *winding up by supervision of the Court*.

Where a company goes into liquidation, normally a liquidator is appointed to gather in all the company's assets and settle all claims against the company. If there is

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any surplus after paying off all the creditors of the company, this surplus is then distributed to the members. Today the most important form of business organization in Myanmar is the company. The company formed in Myanmar is governed by the Myanmar Companies Act, 1914. It is enacted as India Act VII, 1913 and came into operation on 1st April, 1914.

Winding-Up of a Company in Myanmar

In the winding-up of a company it gives up its business sells off its assets, pays its debts or, if it is insolvent, does so to the extent that its fund allows and distributes whatever surplus remains amongst its shareholders or otherwise as its memorandum or articles of association may provide.¹

The conduct of the winding-up is placed by law in the hands of a liquidator, and on his appointment the director's power to manage the business of the company lapses.²

The company continues in being throughout the process of winding-up, there is still a corporate personality, and all corporate acts in the course of the liquidation, such as the transfer of property and the constitution of legal proceedings, are done in its name rather than by the liquidator in his own name. The company ceases to exist only by the formal act of dissolution after the winding-up procedure has been completed.³

Definition of Winding-Up

According to Block's Law Dictionary, 3rd editions, "winding-up of a company" means the process of setting accounts and liquidating assets in anticipation of corporation's dissolution.

In Oxford Dictionary of Law, 6th edition, winding-up is a procedure by which a company can be dissolved. It may be instigated by members or creditors of the company (voluntary winding-up) or by order of the court (compulsory winding-up). In both cases the process involves the appointment of a liquidator to assume control of the company from its directors. He collects the assets, pays debts, and distributes any surplus to company members in accordance with their rights.

Once a company is in serious difficulties, the company's life comes to an end. The existence of a company is brought to an end by winding up and ultimately dissolution. The company's legal personality disappears through dissolution. The most reason for a company to be wound up is that it has become insolvent, unable to pay its debts.

If it attempts to reschedule its debts, it will find a sponsor or otherwise raise extra funds. Then all fail, the company must come to a compromise or enter a scheme of arrangement with its creditors if it wishes to continue trading and avoid winding up.

Corporate liquidations are divided into;

¹ Sealy, L. S, Cases and Materials in Company Law, 6th Edition, 1996, p. 613

² Ibid.

³ Ibid, p-614

- (a) voluntary winding up (either by members when the company is solvent or by creditors when insolvent);
- (b) compulsory winding up (commenced by a petition of either the members of the company or creditors and ordered by the court); and
- (c) winding up under supervision of the court (similar to a compulsory winding-up).

This process is carried through by a liquidator whose functions are -

- (i) to settle the list of contributories;
- (ii) to collect the company's assets;
- (iii) to discharge the company's liabilities to its creditors;
- (iv) to redistribute the surplus (if any) to the contributories according to the rights attaching to their shares of the company's capital.⁴

Kinds of Winding-Up of Company

In Myanmar the winding-up of a company may be either,

- (i) by the Court; or
- (ii) voluntary; or
- (iii) subject to the supervision of the Court.⁵

Winding-up by the Court

This type of liquidation is ordered by the Court. A number of circumstances or grounds on which a company may be wound up by the court. The main reasons are

- (a) the company has by special resolution resolved that the company be wound up by the court;
- (b) the company is unable to pay its debts;
- (c) the court is of the opinion that it is just and equitable that the company should be wound up.⁶

A company may be wound up by the court when a number of situations occur - the most common being when the company is unable to pay its debts. A petition for winding-up may be presented by the company, but is normally presented by the creditor. When there is a petition for winding-up, the court is not forced to make an order, but if it does, a liquidator is appointed who realizes the assets and pays the creditors, handing over the surplus (if any) to the shareholders. When the company's affairs are fully wound up, the court will make an order dissolving the company.

The liquidation proceedings in a compulsory winding up are conducted by a liquidator appointed by the Court.⁷ The objective of a compulsory winding up is to bring the operations of a company to a close, realize its assets and distribute the proceeds among its creditors in the due course of administration (and if relevant, any remaining assets among its shareholders) in accordance with their rights and interests.

⁴ Smith & Keenan's, Company Law for Students, 10th Edition, 1996, p. 473

⁵ Section 155 of the Myanmar Companies Act, 1914

⁶ Simon Goulding, Principles of Company Law, 1996, p.313

⁷ Section 171 A of the Myanmar Companies Act 1914

In brief, compulsory winding up of a Myanmar-incorporated company is appropriate where;⁸

- (i) the company has by special resolution resolved that the company be wound up by the Court;
- (ii) default is made in filing the statutory report or in holding the statutory meeting;
- (iii) the company does not commence its business within one year from its incorporation or suspends its business for a whole year,
- (iv) the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven,
- (v) the company is unable to pay its debts, or
- (vi) the court is of the opinion that it is just and equitable, that the company should be wound up.

Although members will often prefer a voluntary winding up, a company may pass a special resolution for winding up by the Court. A majority of not less than 75 percent of the members entitled to vote and present in person or by proxy (where proxies are allowed) must resolve that the company be wound up compulsorily at a general meeting of which not less than 21 days notice specifying the intention to propose the resolution as a special resolution has been duly given.

In the Case of *May Li Aung International Co. Ltd V. Emarial Rose Garden Ltd* and two, in relation with the applicability for winding-up of company, under section 166 of the Myanmar Companies Act, it is provided that an application to the Court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, either "by the company", or by any creditor or creditors. In this case, the company wanted to be dissolved by appellant is Emarial Rose Garden Ltd. This company is created by the combination of May Li Aung International Co. Ltd and Emarial Development Co. Ltd. It can be seen that the Emarial Rose Garden Ltd is neither May Li Aung International Co. Ltd nor Emarial Development.

Another reason to wind up a company is inability to pay debts. A company is insolvent when the liabilities of the company (actual, contingent and prospective) exceed its present and future assets. If it is proved to the satisfaction of the Court that the company is unable to pay its debts, then the unpaid creditor can apply for the company to be wound up compulsorily.⁹ Where a creditor serves a statutory notice on a company and the company without any just cause fails or neglects to pay the demand, the creditor is entitled to a winding up order.

If the Court is of opinion that it is just and equitable that the company should be wound up it will order the winding up of the company. The expression "just and equitable" is not confined to cases similar to those covered by the other grounds in the section but gives the Court power to order the winding up of a company if it is of the opinion that such order would be just and equitable. The Court may wind up a company on just and equitable grounds where;

- (i) shareholders whose conduct requires investigation could, by reason to their majority shareholding, prevent the necessary resolution for winding up being passed;

⁸ Ibid, Section 162 and 166

⁹ Ibid, Sections 162 (v) and 163

- (ii) there is a deadlock in the management of the company;
- (iii) the company is carrying on business which is illegal;
- (iv) there is a justifiable lack of confidence in the conduct and management of the company owing to misappropriation of funds or the proven dishonesty of the directors, or
- (v) in a private company, grounds exist which would justify the dissolution of partnership.

The procedure in a compulsory winding up is as follows;

- (i) a petition, verified by affidavit, is presented to the court;
- (ii) notice of the presentation of the petition must be advertised at least fourteen days before the date set for the hearing of the petition.
- (iii) the company or its members may apply to have the court stay or restrain any legal proceedings against the company.
- (iv) the petition is heard and the court may dismiss it, adjourn it, make an interim or any other order or grant it;
- (v) if granted, the Official Receiver is, in practice, automatically appointed provisional liquidator and remains the liquidator unless the creditors wish to nominate their own liquidator.
- (vi) the order must be sent to the Directorate of Investment and Company Affairs for filing;
- (vii) a statement of affairs must be submitted to the Official Receiver by the directors; and
- (viii) thereafter, the liquidation proceeds in much the same way as a voluntary liquidation, subject to the major difference that all steps must be sanctioned by the Court.

Voluntary Winding-Up

The company can resolve by special resolution that the company be wound up or, more quickly, by extraordinary resolution that it cannot by reason of its liabilities continue its business and that it is advisable to wind up.¹⁰

The principal advantage of a voluntary winding up over a compulsory procedure, as far as the members of a company are concerned, is that control remains with the members (or creditors, as the case may be) and the timing and pace of each step of the proceedings can be controlled without reference to the Court. The two types of voluntary winding up are a members' voluntary winding up and a creditors' voluntary winding up.

In general, a company may be wound up voluntarily;¹¹

- (i) when the period (if any) fixed for the duration of the company in Articles of Association expires or upon the occurrence of the event (if any) for which the company's Articles of Association provide that the company is to be dissolved

¹⁰ Simon Goulding, Principles of Company law, 1996, P.314

¹¹ Section 203 of the Myanmar Companies Act 1914

and the company in general meeting passes a resolution requiring the company to be wound up voluntarily;

- (ii) if the company resolves by extraordinary resolution that the company be wound up voluntarily; or
- (iii) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to wind-up.

There are two different types of voluntary winding-up, a members' winding-up and a creditors' winding-up. A members' winding-up is a voluntary winding-up where a director's statutory declaration of solvency has been made and a creditors' winding-up is one where such a declaration has not been made.

Members' voluntary winding-up

The statutory declaration of solvency essential to this form of winding up is made by the directors (or in the case of a company having more than two directors, majority of them), at a meeting to the effect that they have made a full enquiry into the company's affairs and that they have formed the opinion that the company will be able to pay its debts in full, together with interest, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.¹² To be effective the declaration must be made within five weeks immediately before the passing of the resolution to wind up and it includes as recent a statement of the company's assets and liabilities as practicable.¹³ This declaration must then be delivered to the registrar within 15 days after the passing of the resolution to wind –up.¹⁴

A members' voluntary winding up can only proceed where, in the opinion of the directors, the company is solvent. To this end, a majority of the directors must swear a statutory declaration of solvency.¹⁵ If no declaration is made, a creditors' voluntary winding-up will follow. The declaration of solvency must state that the directors have fully investigated the company's affairs and that they have concluded that the company will be able to pay off all its creditors within 12 months of the day on which its members resolve to wind up the company.¹⁶

The procedure for a members' voluntary liquidation is, in outline, as follows.¹⁷

- (i) a board meeting must be held at which a majority of the company's directors makes the statutory declaration of solvency;
- (ii) within five weeks of the declaration, a special resolution must be passed by a general meeting of the shareholders and the usual notice requirements for the meeting must, of course, be complied with;
- (iii) within 14 days of the resolution being passed, the company must advertise that the resolution has been passed;

¹² Section 89 of the Myanmar Insolvency Act 1986

¹³ Ibid, Section 89 (2)

¹⁴ Ibid, Section 89

¹⁵ Section 207 of the Myanmar Companies Act 1914

¹⁶ Ibid, Section 201 (1)

¹⁷ Ibid, Section 208 to 208 (e)

- (iv) either when passing the special resolution or later, the shareholders in general meeting must appoint a liquidator.
- (v) on the appointment of a liquidator, the directors cease to be in control of the company;¹⁸
- (vi) the liquidator takes control of the company's assets, advertises for creditors of the company and either accepts or rejects proofs of debt lodged by creditors, investigates the conduct of the company's affairs and settles lists of assets, liabilities, contributories, creditors, etc;
- (vii) once all of the assets have been distributed to the creditors (pari passu subject to the order of priority), the liquidator prepares a statement of final account (the Statement) which records how the company's property has been disposed of;
- (viii) the Statement is produced to the shareholders at a final general meeting which is called by publishing a notice at least one month before the meeting; and
- (ix) the Statement is then to be filed with the Directorate of Investment and Company Administration and after three months the company is dissolved.

Creditors' voluntary winding-up

Although called a creditors' voluntary winding up, a creditor may not call for a company to be voluntarily wound up. The call for the voluntary winding up of the company may only be made by the members. Where the directors feel unable to make a declaration of solvency then the "members' voluntary winding up" becomes a "creditors' voluntary winding up". In such circumstances, the company must call a meeting of its creditors and invite them to appoint a liquidator and up to five persons to sit on a Committee of Inspection to assist the liquidator.¹⁹ The company in general meeting may then appoint up to five more person to sit on the committee, subject to the approval of the creditors. As in the case of a members' voluntary liquidation, the directors' powers cease and pass to the liquidator upon the appointment of the liquidator.²⁰

The usual procedure for a creditors' voluntary liquidation is, in outline, as follows.²¹

- (i) The directors call a meeting of the company to pass a special resolution that the company be voluntarily wound up. At this meeting, a liquidator is nominated by the company.
- (ii) The company advertises the meeting of the creditors of the company. The creditors' meeting has to be held on the day of or the day after the passing of the resolution to enter into voluntary liquidation.
- (iii) At the creditors' meeting, the creditors accept the company's nomination or choose a liquidator of their own. The winding up then begins and, where required by the creditors, a committee of inspection may be appointed.

¹⁸ Section 208 (a) (2) of the Myanmar Companies Act 1914

¹⁹ Section 209 (c), Ibid.

²⁰ Section 209 (d) (2) Ibid.

²¹ Section 209 to 209 (h), Ibid.

- (iv) The directors must produce a full statement of the position of the company's affairs together with a list of creditors and the estimated amount of their claims at the creditors' meeting.
- (v) The resolution for a voluntary winding up is to be advertised within 10 days of being passed.
- (vi) The liquidation then proceeds in the same way as outlined for a members voluntary liquidation.

According to the Myanmar Companies Act, 1914, it can be seen that there is a provision relating to persons who are able to make a petition for winding-up of a company but there is no provision relating to companies which are to be applied for winding up.²²

Winding-up by the Supervision of the Court

When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue subject to such supervision of the Court and with such liberty for creditor, contributories or others to apply to the Court and generally on such terms and conditions as the Court thinks just.²³ In deciding between a winding up by the Court and a winding up subject to supervision the Court may have regard to the wishes of the creditors and/ or contributories.²⁴

The Court has a discretion to pass a supervision order and it may take into consideration such matters as:

- (i) the delay or negligence on the part of the liquidator to realize the assets of the company;
- (ii) the liquidator not acting properly or with due regard to the rules of the winding up or otherwise being partial to any creditor or other person;
- (iii) the resolution for voluntary winding up having been obtained by fraud; or
- (iv) the powers of the liquidator appear to be insufficient for the purpose of winding up in so far as the interests of creditors or contributories are concerned.

A voluntary winding up under a supervision order remains a voluntary winding up in character, but the liquidator obtains many of the advantages of a compulsory winding up.²⁵ The main such advantage is that, unlike a true voluntary winding up, no action can be commenced or proceeded with against the company without the leave of the Court.²⁶

The Effect of Company Winding-Up

At the event of a company winding-up, it is taken into consideration that the liabilities of directors and officers.

The Court may, on an application made to it by the liquidator or by a creditor within three years from the later of the date of the first appointment of a liquidator or

²² U Than Aung V. Mr. Lim Chit Min, 2002 MLR 393

²³ Section 221 of the Myanmar Companies Act 1914

²⁴ Section 223, Ibid.

²⁵ Section 225(1) Ibid

²⁶ Section 225(2) Ibid

of the misapplication, misfeasance or breach of trust, as the case may be, enquire into the conduct of any of the directors, manager or other officers of the company who are suspected of having misapplied, retained or become liable or accountable for any money or property of the company or of having been guilty of misfeasance or breach of trust in relation to the affairs of company. The Court may, if it thinks fit, compel the director, manager or other officer to repay or restore to the company the money or property (with interest) or order him/her to contribute to the assets of the company by way of compensation in respect of the misapplication, misfeasance or breach of trust.²⁷

In addition to any civil liability, the Court may prosecute any director, manager or other officer of a company suspected of committing an offence in relation to the affairs of the company for which he/she is criminally liable.²⁸ The Court can, if it thinks fit, also direct that a delinquent director be prosecuted, without the assent and even in spite of the dissent of the class or classes of shareholders at whose expense the prosecution would be instituted.

If any director, manager or other officer of a company which is in the course of winding up destroys, mutilates, alters, falsifies or fraudulently conceals any books, papers or securities or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud; or intentionally gives false evidence, he/she is liable to imprisonment for a term of up to seven years and a fine.²⁹

Some clarification of the position for English law was made in *West Mercia Safetywear v Dodd*. Here, D was a director of both the company and its parent company. At a time when the company was in financial difficulty and after D had been instructed by an accountant not to use the company's bank account, D transferred £ 4000 from the company's account to the parent company. This reduced a debt owed by the company to the parent but the intention behind the payment was to reduce the parent company's bank overdraft which D had personally guaranteed.

In these circumstances the Court of Appeal held that the payment amounted to a fraudulent preference because D had acted in disregard of the interests of the general creditors of the company, and in approving the statement of Street CJ in *Kinsela v Russell Kinsela Pty Ltd* quoted above, held D to be in breach of his duty to the company.

So instead of owing a duty directly to creditors, the position is that directors have, in fulfilling their duties to the company in certain circumstances, most notably where the company is insolvent, a duty to consider the interests of creditors. The confirmation that a director does not owe duties to creditors as such was made in *Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd*³⁰ where in the judgment of the Privy Council, it was stated that a director does not by reason only of his position as director owe any duty to creditors of the company.

The Companies Act also establishes various activities as offences if carried out by directors, managing agents, managers or other officers of the company during

²⁷ Section 235 (1) of the Myanmar Company Act 1914

²⁸ Section 237 Ibid

²⁹ Section 236 and 238 Ibid

³⁰ *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* 1991, 1 AC 187

or within the 12 months prior to the winding up of the company.³¹ Such activities include:

- (i) Not disclosing to the liquidator all the property of the company and how, to whom, for what consideration and when the company disposed of any part of such, other than as disposed of in the ordinary course of the company's business.
- (ii) Not delivering up to the liquidator all books and papers in his/her custody or under his/her control belonging to the company and which are required by law to be delivered up.
- (iii) Making any material omission in any statement relating to the affairs of the company.
- (iv) Failing to inform the liquidator of any false debt proved under the winding up within a month of becoming aware of same.
- (v) Concealing, destroying, mutilating or falsifying or being privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company within the 12 months proceeding the winding up.
- (vi) Obtaining by false representation or fraud any property for or on behalf of the company on credit (which the company does not subsequently pay for) within the 12 months proceeding the winding up.
- (vii) Obtaining by false representation or fraud the consent of the creditors of the company or any of them to an agreement with reference to the affairs or the winding up of the company.

It is also important that directors and other company officers do not lose sight of the additional responsibilities which they have towards the company arising from their position as fiduciaries, which might give rise to further civil liability under the general law.³²

After the termination of a company, the important matters are considering the above mentioned distribution of company's assets, payment and liabilities of directors and officers. The preferences order shall be taken first to secured creditors and then costs and expenses of the winding-up, preferential creditors, floating charge holders, unsecured creditors and deferred debts. It can be ascertained that the preferences shall not be a fraudulent. So, it is needed to control the act of liquidator by the creditors through a committee which may be a liquidation committee.

So instead of owing a duty directly to creditors, the position is that directors have, in fulfilling their duties to the company in certain circumstances, a duty, most notably where the company is insolvent, to consider the interests of creditors. Further, a director does not owe duties to creditors that a director does not by reason only of his position as director owe any duty to creditors of the company.

Conclusion

To make a business, it is tradition to form a corporate entity since early days of commerce. This type of corporation had made business all around the world by

³¹ Section 238 A of the Myanmar Company Act, 1914

³² Alec Christie & Suzanne Smith, *Foreign Direct Investment in Myanmar*, 1997, P. 281

Royal Charters. It can be called company. When a company is formed by relevant company law, it possesses a legal personality different from its members, directors and all other staffs of company itself, although it conducts its business transactions through them. It can be called “personhood” or “artificial person” of company. It can be seen that, company is a legal person distinct from its owner of a company, its members and share owners. A legal person is meant that it is recognized by law as having legal rights and obligations. As a legal person, a company can own property and make contracts through its managers or directors. It has got the right to sue and to be sued in its own name and seal. Most companies are formed by registration under the Companies Act 1914. When a company comes to an end, i.e., the existence of that company terminates, it is proceeded a winding up proceeding. There are three ways for winding up of a company, by the Court, voluntary winding up and supervision of the Court. In voluntary winding up, it may be two kinds, by members or by creditors. Whatsoever, an insolvent company it is need to appoint a liquidator who manages the company assets and all other matters with respect to company. In philosophy, the court can supervise and control all acts of liquidation in process of company winding up. In Fact, it is not possible to control and monitor the acts of liquidator day by day. It is needed to inset the provisions relating to liquidation committee to monitor the every act of liquidator. These provisions in relation with the liquidation committee can be made in Myanmar Companies Act or Myanmar Insolvency Act.

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