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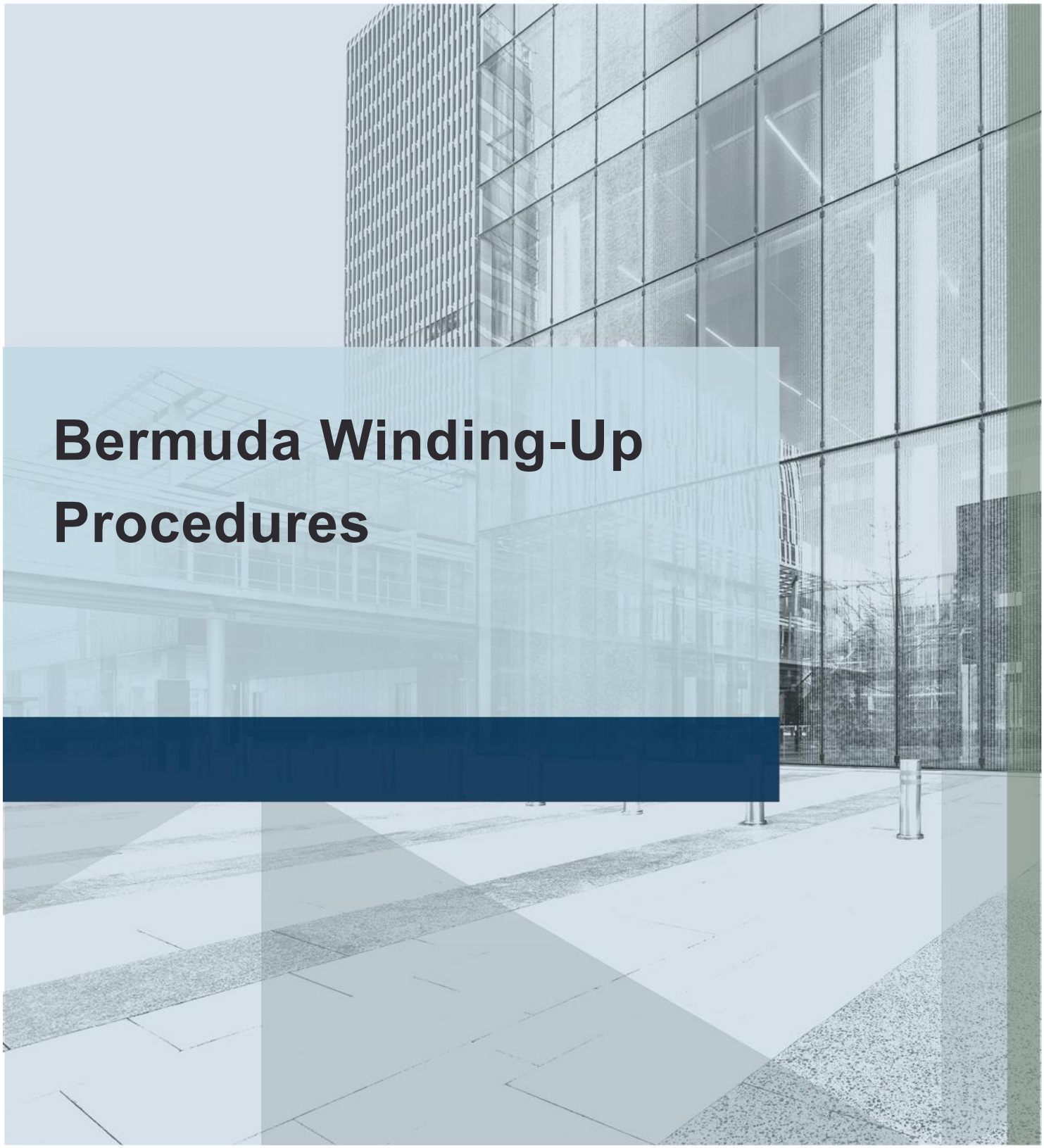

# Bermuda Winding-Up Procedures

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# Preface

The following is a summary of the law and procedure under the Companies Act 1981 ("the Act") in so far as it relates to liquidations of companies in Bermuda. The relevant sections of the Act can be found in Part XIII, and the corresponding rules are set out in the Companies (Winding Up) Rules 1982.

Before proceeding with any matter discussed herein, persons are advised to consult with their legal, tax and other professional advisers in their respective jurisdictions.

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## 1. PROCEDURE FOR A COURT ORDERED WINDING UP

There are two types of insolvent liquidations in Bermuda - voluntary and compulsory, the former is usually referred to as a "creditors voluntary" ("CVL") and is begun by the company itself passing a resolution in general meeting. A full note of the CVL procedure appears in the next section of this publication. Compulsory liquidations are commenced by way of a petition presented to the Supreme Court in Bermuda upon which the Court will be asked to make a winding up order. There are a number of circumstances in which a company may be wound up by the Court (S.161), the most common of which is when the company is insolvent (S.161 (e)). It is also possible for the company, in general meeting, to resolve to petition to wind itself up under this procedure. In that case the petition is presented by the company.

In the case of insolvency, the petition can be presented by either the company, a creditor or contributory (member – although this is limited to situations where the member continues to have an economic interest, e.g. they are liable to contribute in the event of a liquidation or the company may be solvent and capable of paying members). For the purpose of this section, creditor includes a contingent or prospective creditor (S.163). The petitioner must show that the company is insolvent. The Registrar of Companies ("Registrar") may also present a petition in circumstances where it would be just and equitable to wind up the company. Although the Act applies to insurance companies, there are additional special provisions relating to the presentation petitions in respect of insurance companies.

Insolvency can be proved in one of three ways:

(1) commercial insolvency - the company is unable to pay its debts as they fall due;

(2) balance sheet insolvency - assets do not exceed liabilities;

(3) deemed insolvency - a statutory demand for a liquidated sum which remains unpaid, without reasonable excuse, for three weeks (S.162 (a)).

The petition when presented must be verified by an affidavit. The date of the hearing of the petition must be advertised, and before an order is made the Court, through the Registrar, must be satisfied that the procedural requirements relating to service and advertising have been complied with. Any creditor or contributory can appear on the day of the hearing of the petition provided that they have filed prior notice of their intention to do so, and in the event that they wish to contest the petition, have filed affidavit evidence prior to the hearing setting out the basis of their objection to an order being made.

In respect of any petition, whatever the basis, either before (in special circumstances), or upon, a winding up order being made, a provisional liquidator is appointed and the rights and duties of the directors (or sole director, as the case may be) cease.[1] Upon the making of a winding up order, or upon the appointment of a provisional liquidator, no actions may be commenced or continued against the company without leave of the Court. This automatic stay does not extend beyond Bermuda and if there

[1] In certain circumstances it is possible to use the pre-winding up order appointment of a provisional liquidator to create a situation which might assist in a reorganization of a company, similar to that provided for under the US Bankruptcy Code or the Insolvency Act 1986 of the UK.

are proceedings against the company in a jurisdiction outside Bermuda, relief in that jurisdiction would need to be sought to obtain a stay.

The liquidator is required to collect in the assets and distribute them *pari-passu* amongst unsecured creditors. The steps to be undertaken in this procedure include the following:

Calling for a statement of affairs to be prepared by the company's former officers/directors which sets out the financial position of the company.

Calling the first meetings of creditors and contributories. This is required to be done within a month of the winding up order, but further time can be obtained by application to the Court. The purpose of the meetings is to appoint liquidator(s) and, if desired by creditors, a committee of inspection. The committee acts as an advisory "board" to the liquidator and can sanction certain of the liquidators' actions which would otherwise need to be sanctioned by the Court. In the event that the creditors and contributories cannot agree on the nomination of a liquidator, the Court will decide which candidate to appoint. In any event the appointment of the liquidator and the committee must be made by the court following the first meetings. For the purpose of voting at the first meeting proofs of debt will be called for, but a creditor can only vote in respect of that portion of its claim that is liquidated.

Secured creditors may realize their security outside the estate accounting to the liquidator for any excess, or filing a proof of claim as an unsecured creditor for any shortfall.

There are preferential creditors:

(1) employees working in Bermuda are entitled to their full contractual rights on termination (Employment Act 2000),

(2) employees employed outside of Bermuda (maximum of $2,500 per employee; and

(3) certain taxes, etc. (S.236) who will be paid in full prior to the distribution to unsecured creditors.

Expenses of the liquidation will be deducted from the available funds prior to the payment of any preferential creditors (Rule 140).

The liquidator will call for proofs of claim from creditors and adjudicate each claim to determine if it is valid. Once this process has been completed, he will make a dividend distribution to all unsecured creditors *pari-passu*.

That is, in its simplest form, the process. The liquidator's general powers are set out in s.175. However, there are a number of matters which may also arise or require to be investigated by the liquidator as follows:

- The liquidator is entitled to the entirety of the books and records and property of the company (s.186) and to aid him in this can apply to court to examine on oath anyone suspected of having property or information (s.195).
- No proceedings can be commenced or continued against the company once an order has been made or liquidator appointed (s.167).

- Any dispositions of the company's property or transfer of shares are void if carried out following the presentation of the Petition without a court order (s.166).
- Transactions involving payments to creditors within 6 months prior to the Petition being presented may be set aside if made with the dominant intention of preferring those creditors over others (s.237).
- Directors and officers may be liable for debts of the company personally if it is determined that they carried on the business of the company knowing it was insolvent and with the intent to defraud creditors (s.246).
- The liquidator has the power to investigate the affairs of the company and to determine and, if felt necessary, take action against directors for breach of duty (Directors duties are set out in s.97).

Under the provisions of the Conveyancing Act 1983, as amended, certain dispositions of a company's property are voidable if the (i) disposition was made with the dominant purpose of putting the property out of the reach of creditors and (ii) an obligation to the person seeking to set the disposition aside existed at the time of the disposition or was reasonably foreseeable at that time or arises within 2 years of that date. The limitation period on such dispositions is six years from the transfer, or, if later, from the time when the obligation arose or cause of action accrued.

Any floating charge made within 12 months immediately preceding presentation of the petition shall be invalid unless (a) the company was solvent at the time of creation or (b) the charge was in respect of monies advanced specifically at the time the security was given (s.239).

The liquidator has the right to apply to court to disclaim a contract which he considers onerous on the company or which is unprofitable or unsaleable (s.240).

Set-off in respect of debts is permissible provided there exists mutuality and the sum in question is a debt as at the date of liquidation.

There are of course numerous other procedural requirements involved in the process of winding up prior to, during and at the completion of the liquidation. Accounts are required to be filed, books kept and rules relating to proofs of debt followed. The interpretation of the various sections listed above has been developed over the years in case law in the United Kingdom (from which country most of the law is derived).

## 2. PROCEDURE FOR A CREDITORS VOLUNTARY LIQUIDATION ("CVL")

The steps to be followed in a CVL are:

The directors must prepare:

(i) a statement of affairs as of the most recent date possible; and

(ii) a list of creditors with full names, addresses and to whose attention notices of the creditors meeting must be sent.

The directors of the company meet prior to the meetings of the shareholders and of the creditors to:

(i) authorise the convening of the meetings and the resolution to be put on behalf of the board;

(ii) consider and approve the statement of affairs and list of creditors; and

(iii) appoint one of the directors to preside at the creditors meeting.

Notice must be given of a Special General Meeting of members to:

(i) wind up the company voluntarily;

(ii) to appoint a liquidator; and

(iii) appoint up to 5 nominees to the committee of inspection.

Notice must be given of a meeting of creditors to be held on the same day or the day after the members meeting (general and special proxies should be enclosed with the notice of the meeting). Notice of the meeting of creditors will be dependent upon the requirement for notice of shareholders meetings as set out in the company's bye-laws. Notice of the creditors' meeting must be published in the Official Gazette on two occasions prior to the meeting. Notice of members' meeting and of the creditors' meeting is usually sent out on the same day.

The Special General Meeting must be held and the relevant resolutions passed.

The creditors' meeting must be held. Either a general or special proxy must be received by 4:00 p.m. on the day preceding the creditors' meeting in order to be valid for the purposes of the creditors' meeting. It is not necessary for a proof of debt to be lodged with the company prior to the creditors' meeting. The Chairman will, for voting purposes, use the value shown in the statement of affairs. If a proxy holder, a liquidator cannot vote for his own appointment as liquidator.

The purpose of the creditors' meeting is to receive the statement of affairs and list of creditors and, if wished, to appoint a liquidator and committee of inspection. The quorum is three creditors present or represented, or all of the creditors, if there are less than three. A resolution of the creditors is passed when approved by a majority in number and value of those voting personally or by proxy. If the creditors do not nominate a liquidator, either because they decline to do so or because they cannot agree who should be nominated, then the company's nominee becomes liquidator. If the creditors nominate someone other than the person chosen by the company any director, member or creditor can apply to the Court, within seven days, to have the company's nominee or some other person appointed in place of, or jointly with, the creditors' nominee.

A committee of inspection consisting of a maximum of five persons may be appointed by the creditors. This committee is a representative body to assist and supervise the liquidator. The members at their earlier meeting, or at a subsequent meeting, can nominate up to five persons to act as members of the committee. The creditors may also appoint up to five persons to the committee; however, the creditors may decide, which, if any, of the members' nominees shall serve on the committee.

Liquidator's fees are fixed by this committee, or, if there is no such committee, then by the creditors at a later meeting.

Notices relating to the winding up of the company, the appointment of the liquidator and formal notice to claim are advertised in the Official Gazette and filed with the Registrar.

The liquidator will take into custody the company's seal, papers, books, documents and other property and a statement to the effect that the company is in liquidation should appear on all letters, invoices, orders etc.

The liquidator will write to creditors asking them to submit details of claims and will enclose a formal notice to claim (giving a minimum of 14 days notice). This notice of claim is the same as that which is advertised in the Official Gazette.

The liquidator must then examine every proof and claim to priority that he receives and omit or reject it in writing or require further evidence. If he rejects a proof he must state his grounds in writing to the creditor.

The liquidator realises any assets and makes calls, if any, on any members liable to contribute and pays liabilities in due order.

During this time the liquidator will call meetings of the committee of inspection (if a committee was appointed) when required.

In the event that the winding up continues for more than one year the liquidator summons a general meeting of the company and a meeting of the creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or at the first convenient date within three months from the end of the year (or such longer period as the Registrar may allow), and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year.

As soon as the affairs of the company are fully wound up the liquidator will 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. Thereupon he will call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving an explanation thereof. Each meeting will be called by advertisement in an appointed newspaper specifying the time, place and object thereof published at least 1 month before the meeting (in addition to notices and proxies being sent out to members and creditors). At the creditors' meeting a resolution is passed relating to the disposal of the company's books and records. The liquidator files relevant documentation with the Registrar within one week of the date of the meetings and on the expiration of three (3) months from the registration thereof the company will be deemed dissolved.

## 3. PROCEDURE FOR A MEMBERS VOLUNTARY LIQUIDATION ("MVL")

It is also possible to wind up a Bermuda company that is solvent by way of an MVL. The procedure for winding up a Bermuda company by way of an MVL is as follows:

### 3.1. Filing of a Declaration of Solvency (the "Declaration")

A meeting of the Board of Directors will be held for the purpose of approving the form of statutory declaration (the "Declaration"), which is required to be made by a majority of the Directors, and filed with the Registrar prior to the company entering into liquidation, i.e. prior to the date of the Special General Meeting (the "SGM") that resolves to wind up the company.

**If the company enters into liquidation without having first filed the Declaration, the company will, by default, enter into a Creditors' Voluntary Liquidation.**

The Declaration states that the Directors have made a full enquiry into the affairs of the company and have formed the opinion that the company will be able to pay its debts within a period of 12 months of the commencement of the winding up. The Declaration will include a statement of the company's assets and liabilities as at the most recent practicable date (i.e. substantially reflecting the company's present financial position). The SGM must be held within five weeks of the making of the Declaration. The Declaration can be made in counterparts.

### 3.2. Special General Meeting

The SGM will be convened primarily for the purposes of passing a resolution that the company be wound up voluntarily and appointing a Liquidator. There are no qualification requirements for appointment as a liquidator. The winding up of the company is deemed to commence at the time of the passing of the resolution to wind up the company.

### 3.3. Filing of Notices

Within 21 days after the SGM has been held, notice of the resolution to wind up the company, together with a notice from the liquidator of his or her appointment, must be published locally in an appointed newspaper. Notices must also be given to the Registrar within that period.

### 3.4. Settlement of Debts

The liquidator will publish, in an appointed newspaper, notice to creditors that they should submit any proof of debts. This will usually be published at the same time as notice of the winding up resolution is published (see 3 above). In addition, the liquidator must send notice in writing to all persons appearing from the books and records of the company to be creditors (including contingent creditors) inviting them to file a claim against the company within the allocated time period. After the period by which creditors must submit their claims has expired (which must be not less than 14 days from the date of the notice) the liquidator will arrange for the settlement of all of the company's outstanding liabilities.

### 3.5. Remaining Assets

After settlement of the company's debts, the liquidator will return the capital and surplus assets, if any, to the members.

### 3.6. Final General Meeting (the "FGM")

The FGM, which requires one month's notice in an appointed newspaper, concludes the winding-up. At the FGM the liquidator's account of the winding up is received and resolutions are passed determining the manner in which the books and records of the company are to be disposed of and dissolving the company.

### 3.7. Notification of Dissolution

Within one week after the FGM is held the liquidator must notify the Registrar that the company has been dissolved. The Registrar will record that fact together with the date of the dissolution (i.e. the date of the FGM) in the appropriate register. Subsequently a certificate of dissolution will be issued by the Registrar (usually between three to six weeks after the FGM).

If no quorum is present at the FGM, the company may be dissolved on the date for which the FGM was summoned by the liquidator's notification of same to the Registrar pursuant to Section 213(3) of the Act.

## 4. SPECIAL CONSIDERATIONS

### 4.1. Insurance Companies

In the case of insurance companies, prior to commencing the liquidation process the Bermuda Monetary Authority requires that the insurance license be cancelled. This requires evidence that all insurance obligations have been discharged and there are no further open contracts in respect of which the company is a party. Therefore, for example, any existing insurance policies, unsettled claims (including contingent claims) or rights to claim will need to be properly transferred or commuted, as appropriate, by the company entering into the appropriate agreement(s) with all relevant parties. The application for cancellation of the license will take at least one month to be reviewed for approval by the BMA, and quite possibly longer.

The financial statements submitted for the purposes of the liquidation should be prepared as at the date subsequent to the transfer of all of its insurance obligations. If in doubt as to what steps will need to be taken in order to ensure that the company's insurance obligations are fully discharged, advice should be sought from the company's Principal Representative in Bermuda.

NB: Under the provisions of the Insurance Act 1978, a company which is licenced as a long-term insurer cannot be wound up voluntarily.

### 4.2. Limited Duration Companies ("LDC")

An LDC is a company which provides in its Memorandum of Association for the automatic liquidation of the company upon the expiration of a specified period or the occurrence of a specified event (either being a "Dissolution Event"). As such, the SGM will only be concerned with the appointment of a liquidator. Furthermore, upon the happening of a Dissolution Event, an LDC will be deemed to have commenced its winding-up. Therefore, given that (as outlined above) unless a Declaration is filed prior to the commencement of the winding-up, the company will enter into a Creditors' Voluntary Liquidation, it is important that the Declaration be sworn and filed before the occurrence of a Dissolution Event.

If you have any queries please do not hesitate to contact Christian Luthi at christian.luthi@conyers.com.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*