

ARTHUR COX

**Winding Up  
Part 11 of the Companies Bill**

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## **Part 11 – Winding Up**

- Consists of 16 Chapters,
- Contain 166 sections.
- Largely restates existing law

## Chapter 1 – Preliminary and Interpretation

This Chapter sets out:

- Definitions (s 560)
- That this part is subject to the Insolvency Regulation (s 561)
- That there are two types of winding up Court and Voluntary (s 562)
- Various bars to a Members' Winding Up (s 563).

## Chapter 1 – Preliminary and Interpretation

- Section 564 provides that except where the contrary appears Part 11 applies to both voluntary and court winding up.
- Section 565 provides the High Court all have jurisdiction to wind up a company.
- Section 566 provides that the powers conferred on the High Court by the Act are in addition to the existing powers of the Court.
- Section 567 provides a general provision under which the Court may have regard to wishes of creditors or contributors.
- Section 568 applies specific provisions of the Companies Acts to companies not in liquidation where the Court decides that the principal reason for the company not being wound is the insufficiency of its assets.

## Chapter 2 – Winding up by the Court

- Sections 569 – 578:
- This Chapter applies only to Court winding up (s 569).
- Section 570 sets out the circumstances in which a company will be wound up by the Court.
- Section 571 sets out the circumstances in which a company would be deemed to be unable to pay its debts. The minimum debt in respect of which a petition can be brought is proposed to be €10,000 or where two or more creditors petition €20,000.
- Section 572 sets out who may petition.

## **Chapter 2 – Winding up by the Court (Continued)**

- Section 573 sets out the powers of the Court in relation to the petition.
- Section 573(4) provides the Court may order that the company be wound up as if it were a Members Voluntary Wind up.
- Section 574 provides for the appointment of a provisional liquidator.
- Section 575 sets out the Courts power to restrain or stay proceedings against the company.
- The Court shall appoint a liquidator or liquidators (s 576).

## **Chapter 2 – Winding up by the Court (Continued)**

- The order for winding up operates in favour of all creditors (s 577).
- Any creditor or contributory of a company being wound up voluntarily may apply to wind the company up by the Court (s 578)

## Chapter 3 – Members' Voluntary Winding Up

- This chapter applies only to a Members' Voluntary Winding Up (s 579);
- In all but the most unusual cases a Members' Voluntary Winding Up liquidation has to be commenced in accordance with the Summary Approval Procedure (s 580);
- Section 581 sets out the alternative means to be used in those rare occasions (Fixed Duration companies or the occurrence of an event upon which the company's constitution provides for the company to be dissolved);
- Section 582 provides for the advertisement of the resolution for the liquidation.

## **Chapter 3 – Members' Voluntary Winding Up (Continued)**

- Section 583 provides a mechanism for creditors to apply to Court to seek the conversion of the liquidation to a creditors' voluntary winding up. Such application can only be made within 30 days of the advertisement of the resolution for the voluntary winding of a company.
- Section 584 provides the company in general meeting appoints the liquidator.
- Section 585 sets out the duty of the liquidator to call a creditors' meeting if he forms the opinion that the Company is unable to pay its debts and liabilities.

## Chapter 4 – Creditors' Voluntary Winding Up

- The provisions of this Chapter apply only to a Creditors; Voluntary Winding Up (s 586)
- A Creditors; Voluntary Winding Up ("CVL") is commenced by the Company in General Meeting or where the summary approval procedure is not complied with (s 587)
- Section 588 sets out the requirement for and procedure for holding a creditors' meeting (note the right for a creditor to request a copy of the list of creditors in advance).
- Section 589 provides for the nomination of liquidators by the creditors and the company and where the creditors and company nominate different persons the creditors' choice shall be liquidator.

## Chapter 5 – Conduct of Winding Up

This Chapter provides:

- For the commencement of Court (s 590) and Voluntary Winding Ups (s 591)
- The requirement to notify the CRO in a Court Winding Up (s 592) and a Voluntary Winding (s 593);
- The requirement of the directors to provide a statement of affairs in a Court Winding Up (s 594) and certain supplemental provisions in relation thereto (s 595)
- Section 596 provides the obligation to include a statement that the company is being wound up on invoices, business letters, websites and emails sent for or on behalf of the company.

## Chapter 6 – Realisation of Assets and Related Matters

This Chapter contains 17 sections which deal with:

- The liquidator's entitlement to custody of the company's property (s 597);
- Circumstances in which floating charges can become invalid (ss 598-599);
- Contribution orders (s 600);
- Pooling orders (s 601);
- The power of a liquidator to accept shares as consideration for sale of property of a company in a members' voluntary liquidation (s 602);
- The avoidance of disposition of property after commencement of winding up (s 603);

## Chapter 6 – Realisation of Assets and Related Matters (Continued)

- The avoidance of execution against company property (s 604);
- Fraudulent preference provisions and their consequences (ss 605, 606);
- Restriction of rights of creditors as to execution or attachment (s 607);
- Duties of the sheriff in relation to goods taken in execution (s 608);
- The return of assets improperly transferred (s 609);
- Personal liabilities of officers of the company where books and records not kept (s 610);
- Civil liability for fraudulent or reckless trading (s 611);

## Chapter 6 – Realisation of Assets and Related Matters (Continued)

- Supplemental provisions in relation to section 600 (s 612);
- Mifeseance (s 613);
- Section 614 is a new section providing for the power of the Court to assess damages against directors of a company's holding company. The directors can be obliged on an examination of their conduct to repay or restore money to the company or contribute by way of compensation.
- Section 615 provides for the vesting of the property of the company in the liquidator.
- Section 616 permits the disclaimer of onerous property.
- Section 617 sets out some supplemental provisions to section 616.

## Chapter 7 – Distribution

This chapter deals with how the assets of the company being wound up are to be distributed and the priority of creditor's claims in respect of those assets.

- Section 618 sets out the priority of costs incurred by the liquidator;
- Section 619 provides the general principle that all creditors be treated in the same way and provides for subordination;
- Section 620 applies the bankruptcy rules to the winding up of insolvent companies;
- Section 621 sets out the debts which may be proved including contingent and future debts (in which a just estimate is to be made)

## Chapter 7 – Distribution (Continued)

- Section 622 lists the claimants which are preferential in a winding up. This list repeats Section 285 of the Companies Act, 1963 and is stated to be in addition to any other enactment providing for the priority of a particular debt or sum in a winding up.
- The limit for wages and salary is increased to €10,000 in respect of any one claimant and the four months limit is retained.
- Supplemental provisions are set out in Section 623 and unclaimed dividends are dealt with in Section 624.

## Chapter 8 - Liquidators

This Chapter deals with the duties, powers, qualifications and remuneration of liquidators and provides for the first time a requirement for qualification to act as liquidator of a company.

- Section 625 provides that the liquidator's role is to collect and gather in the company's property, realise it and distribute it in accordance with law;
- Section 626 sets out how the liquidator is to be described and that the acts of the liquidator should be valid, notwithstanding any defects in appointment or qualification that may subsequently be discovered;
- Section 627 set out that a provisional liquidator has such powers as the Court orders;

## Chapter 8 – Liquidators (Continued)

- Section 628 lists the powers of a liquidator;
- Section 629 provides the liquidator with power to summon meetings to obtain the sanction of interested parties;
- Section 630 provides the liquidator must notify creditors within 14 days after the exercise of powers that previously could only be used with the sanction of the court and provides for the requirement to notify creditors of an intention to sell assets to persons previously involved with the company;
- Section 631 limits the powers of a liquidator appointed by the members in a creditors' voluntary liquidation pending the holding of the creditors' meeting;
- Section 632 provides power to seek directions from the Court;

## Chapter 8 – Liquidators (Continued)

- Section 633 provides that no person can have a lien over the company's books and records against the liquidator or provisional liquidator;
- Section 634 deals with the requirement for qualification for appointment of the liquidator or provisional liquidator setting out five categories of people who may be appointed as liquidator. The five categories are:
  - member of a prescribed accountancy body;
  - practising solicitor;
  - a member of another professional body recognised by the Supervisory Authority;
  - persons qualified in another EEA State; and
  - persons with practical experience of winding ups.

## Chapter 8 – Liquidators (Continued)

- Section 635 sets out new requirements for professional indemnity insurance to be maintained by a new liquidator;
- Section 636 sets out classes of people who may not act as liquidator of a company;
- Sections 637 to 639 deal with appointment and removal of liquidators in a members' voluntary winding up, creditors' voluntary winding up and court liquidation respectively;
- Section 640 sets out the requirement for the liquidator to have consented to act;

## Chapter 8 – Liquidators (Continued)

- Section 641 provides the default position where there are more than one liquidators is that the liquidators must act jointly;
- Section 642 provides for resignation of liquidators; and
- Section 643 makes it an offence to offer any viable consideration to secure an appointment as liquidator or prevent the appointment of someone else as liquidator.

## Chapter 8 – Liquidators (Continued)

- Section 644 provides for the notification of liquidators of their appointment;
- Section 645 provides for the custody of books and records upon vacation of office;
- Section 646 states that the provisional liquidator is entitled to receive such remuneration as is fixed by the Court;
- Section 647 provides that the liquidator may be entitled to remuneration and may be paid by way of percentage or by reference to time expended or otherwise. The section goes on to provide that the terms in which the liquidator is to be paid must be agreed in writing and in default can be fixed by the Court;

## Chapter 8 – Liquidators (Continued)

- Section 648 provides for approval of the liquidator's fees by the committee of inspection, creditors, members, or the court, depending on the type of liquidation;
- Section 649 provides for arbitration in respect of fees where an agreement cannot be reached;
- Section 650 sets out the requirement for creditors who have a connection with the proposed liquidator to make such connection known to the chairperson of the creditors' meeting;
- Section 651 requires the liquidator to report on whether officers of the company have had personal liability declarations made against them or disqualification or restriction orders;

## Chapter 8 – Liquidators (Continued)

- Section 652 and section 653 deal with penalties and enforcement of the duty of the liquidator to make returns;
- Section 654 provides a statutory basis for the directors power to examine the books and records of the company.

## Chapter 9 - Contributories

This chapter sets out the liability of contributories amongst other matters including:

- Liability of contributories (s 655)
- Liability of past and present members (s 656)
- Settlement of the list of contributories (s 657)
- Power to make calls (s 658)
- Adjustment of rights of contributories (s 659)
  
- Section 660 provides for payment of debts due by a contributory to the company and sets out the circumstances in which set-off is allowed.

## Chapter 9 – Contributors (Continued)

- Section 661 sets out that an order in relation to contributories shall be conclusive evidence that the money is due.
- Sections 662 to 665 provide for the consequence of the death, bankruptcy or insolvency of a contributory.
- Section 666 provides for the liability of contributories on the winding up of a company that had been an unlimited company before re-registration.

## Chapter 10 – Committee of Inspection

- This chapter contains three sections which deal with the appointment of committee of inspection:
  - In a court winding up (S667);
  - In a creditors' voluntary winding up (S668); and
  - With the constitution of proceedings of committees of inspection (S669).

## Chapter 11 – Court's Powers

- This chapter contains 8 sections containing miscellaneous powers of the court including:
  - The power to annul or stay a winding up (s 670);
  - The power to compel attendance of officers of a company at meetings (s 671);
  - The power of the court to summon persons for examination (s 672);
  - The power to order payment or delivery of property against a person examined (s 673);
  - The power to order delivery of property of the company to a liquidator (s 674);

## Chapter 11 – Court's Powers (Continued)

- The power to exclude creditors not proving in time (s 675);
- The power to order, arrest or seizure of officers of the company (s 676); and
- Provisions relating to arrangements between a company about to be or in the course of being wound up and its creditors subject to agreement of  $\frac{3}{4}$  in number and value of the creditors.

## **Chapter 12 – Provisions Supplemental to Conduct of Winding Up**

Chapter 12 comprises 12 sections which are supplemental to the conduct of the winding up and they include:

- The effect of winding up on the business and status of the company (s 678);
- That actions against the company are stayed on the winding up order (s 679);
- The power of the director of corporate enforcement to compel the liquidator to call meetings (s 680);
- Duty of the liquidator to call meetings in certain circumstances (s 681);
- The requirement to make returns in relation to the conduct of the liquidation to the Companies Registration Office (s 682);

## Chapter 12 – Provisions Supplemental to Conduct of Winding Up (Continued)

- The obligation on the directors to report to the director of corporate enforcement on the conduct of the affairs of the company by the directors (s 683);
- The obligation to apply for a restriction of the directors unless relieved (s 684);
- The court may make an order for inspection of books and records by the creditors & contributories (s 685);
- Section 686 provides that resolutions passed in an adjourned meeting are treated as having been passed on the date they were passed;
- Section 687 provides that the books of the company will be evidence in civil proceedings;

## Chapter 12 – (Continued)

- Section 688 provides that the liquidator may have regard to the wishes of creditors and contributories and authorises him to convene meetings for that purpose;
- Section 689 obliges disciplinary committees of prescribed professional bodies to report misconduct by liquidators to the director of corporate enforcement.

## Chapter 13 – General Rules as to Meetings

This chapter which contains 15 sections providing general rules as to meetings in respect of company liquidation and deals with:

- Meetings directed by the court (s 690);
- Section 691 provides that the remainder of the chapter applies to meetings or creditors, contributories or members.
- These provisions include:
  - Entitlement to attend and notice (s 692);
  - Location of meeting (s 693);
  - Costs of meetings (s 694);
  - Chairperson (s 695);
  - Passing resolutions (s 696)

## **Chapter 13 – General Rules as to Meetings (Continued)**

- Registration of resolutions in the Companies Registration Office (s 697);
- Proceedings at the meeting (s 698);
- Entitlement to vote (s 699);
- Surrender of security by secured creditors' voting (s 700);
- Duties of chairperson (s 701);
- Proxies (s 702);
- Time for lodging proxies and other provisions (s 703);
- Representation of bodies corporate (s 704);

## Chapter 14 – Completion of Winding Up

This chapter provides for the completion of the winding up.

- Section 705 provides for dissolution of company by the court but also provides that the default position is that the company shall be dissolved pursuant to the creditors' voluntary liquidation procedure.
- Section 706 deals with the final meeting and dissolution in a members' voluntary liquidation;
- Section 707 provides for the final meeting and dissolution of a creditors' voluntary winding up;

## **Chapter 14 – Completion of Winding Up (Continued)**

- Section 708 deals with the disposal of books and papers;
- Section 709 sets out the power of the court to declare dissolution void within two years after the date of dissolution;
- Section 710 provides the registrar of companies shall send all the documents filed to the National Archives 20 years after the date of dissolution of the company;

## Chapter 15 -

Chapter 15 contains provisions related to the Insolvency Regulation including:

- definitions (s 711);
- Publication in relation to insolvency proceedings (s 712);
- Confirmation of a creditor's voluntary winding up for the purposes of the insolvency regulation (s 713);
- Provision of certain documents to the liquidator in insolvency proceedings (s 714);
- Language of claims (s 715).

## Chapter 16 – Offences by Officers of Companies in Liquidation

Section 716 provides that the following offences apply irrespective of the mode of winding up. These offences include:

- Failing to make disclosure or deliver certain things to the liquidator (s 717);
- Fraudulent acts within 12 months preceding the winding up or thereafter (ss 718 and 719);
- Making material omission in any statement of affairs of the company or failing to report a false debt (s 720);
- Additional offences and certain defences (s 721);
- Other fraud offences (s 722);
- Fraudulent trading of a company (s 723);

## **Chapter 16 – Offences by Officers of Companies in Liquidation**

- Prosecution of offences (s 724);
- Section 725 provides a duty to provide all assistance which a person is reasonably able to give to the DPP and the director of corporate enforcement in relation to an offence or prosecution under Section 724.

## For Further Information Contact

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# Thank You.

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