MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Speaker
SEBASTIAN LIEW
Senior Associate

Speaker
AARON LIEW
Associate

Moderator
ALICIA CHIN
Associate

Wed 11 Oct 2023
3:00pm (GMT +8)

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MWKA ONLINE TALKS

How to Close up Shops: Dissolution, Voluntary Winding Up and Striking Off a Company

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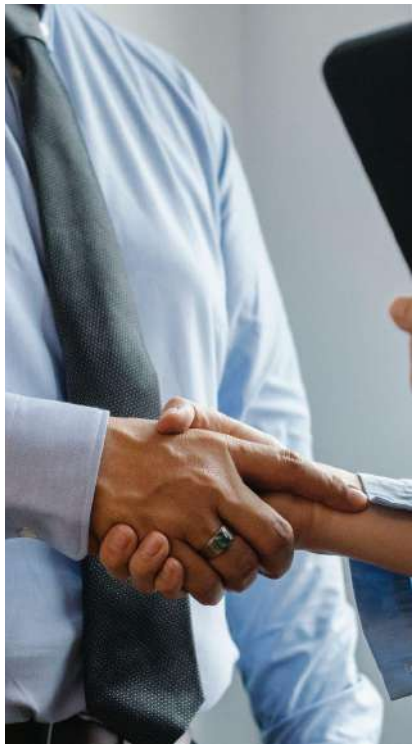

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Sebastian Liew

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Corporate litigation and company law advisory

LLB (Cardiff University) and LLM in International Financial Law (King's College London).

Called to the English Bar (Lincoln's Inn) in 2015 and admitted to the Malaysian Bar in 2018.

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Aaron Liew

Associate

Corporate and Company Law Advisory, Construction, Corporate Litigation, Trust and Probate

Bachelor of Laws (Honours) from the University of Manchester

Called to the English Bar (Middle Temple) in 2020 and admitted to the Malaysian Bar in 2021.

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Talk Points

1. Introduction to Dissolution of a Company
2. Striking off a Company
3. Winding Up of a Company
    a. Members' Voluntary Winding Up
    b. Creditors' Voluntary Winding Up

Introduction to Dissolution of a Company

by Aaron Liew

Introduction: Company Structure

In Malaysia, the two common business structures under the Companies Act 2016 are:

- Private limited companies (Sendirian Berhad)
- Public limited companies (Berhad)

A company limited by shares are a separate entity from their shareholders and can:

- own, buy or sell property;
- enter into legal contracts or arrangements;
- sue or get sued in the Courts; and
- die (dissolution).

Incorporation of a Company

A company limited by shares can be incorporated by anyone through the following procedures:

- At least one director(s) resides in Malaysia by having a primary residence in Malaysia
- Decide a name and reserve it with SSM
- Pay for incorporation fees
- After incorporation of the company, appoint Company Secretary within 30 days

Dissolution of a Company

A company may be dissolved, either by :

- Registrar of SSM;
- Shareholders;
- Directors;
- Creditors; or
- Liquidators

As an artificial person, a company cannot dissolve on its own

Dissolution of a Company (cont.)

Some reasons why a company is being dissolved and/or closed down:

- No business operation / business operation halted / dormant
- Company has no assets or liabilities
- Company is no longer profitable
- Company owes outstanding debts towards other creditors

Dissolution of a Company (cont.)

Pursuant to Companies Act 2016 ("**CA 2016**"), there are two ways to dissolve a company:

- Striking Off a Company
- Voluntary Winding Up
  - Members' Voluntary Winding Up
  - Creditors' Voluntary Winding Up

Striking off a company

by Aaron Liew

Striking off a company

Pursuant to the **CA 2016**, a Company may be struck off by the Registrar, or by the Company's own motion.

Section 550 of CA 2016 reads:

550. *Subject to section 549, the Registrar may strike a company off the register either on his own motion or upon an application by a director, member or liquidator of the company.*

Striking off a company (cont.)

Why strike off? Some reasons to strike off a company:

- No business operations
- No profits
- Company remained dormant
- Death of or unable to trace the shareholder(s)
- Cheaper, quicker and more efficient compared to winding up process
- Straightforward

Striking off a company (cont.)

Who can strike off the company?

- Registrar of SSM
- Shareholders
- Directors
- Liquidators

Requirements to Strike Off a Company

For a successful application, the following requirements under the SSM's *Guidelines on Application by Directors or Members to Strike Off the Name of a Company under Section 550 of the Companies Act 2016* must be fulfilled:

- Shareholders to pass a resolution approving the application to strike off on the grounds the company is no longer operational
    - *RDS Bina Sdn Bhd v Ong Chin Hoe & Anor* [2014] 11 MLJ 606 defined 'operational' includes engagements in negotiations and correspondence even if there were no business transactions

Requirements to Strike Off a Company

- Company has no assets or liabilities
- Company has no outstanding charges,
- Company has no outstanding penalties,
- Company has no outstanding tax or other liabilities with authorities
- Company is not involved in any legal proceedings
- Company's information is updated in SSM's register

Requirements to Strike Off a Company

- Company has not made any return of capital to the shareholders
    - If the Company still has its capital, proceed with voluntary winding up process (which will be detailed shortly)
- Company is not a holding company
- Company is not a ‘Guarantor Corporation”

Procedures to Strike Off a Company

To file an application under **S.550 CA 2016**:

- Applicant must complete Declaration for the Application under Schedule B of the Practice Directive 1/2017 together with all documents in the checklist
- Submit the Application to the Registrar with the application fee
- Process usually takes around 6 to 12 weeks time

After the Company is Struck Off

- Once approved by the Registrar, a Notice of publication of the notification and gazette will be issued to effect the strike off of the Company
- Upon the publication of the gazette, the Company is struck off the Register and dissolved under **Section 551(3) of the CA 2016**
- Section 551(3) CA 2016 reads:

  "(3) The Registrar shall publish the name of the company which has been struck off in the Gazette and upon publication in the Gazette, the company shall be dissolved."

After the Company is Struck Off

- The Company will then be ceased to exist and dissolved and no longer be able to conduct any form of business or transactions
- However, liability of director, officer or member of the Company continues and may be enforced as if it has not been dissolved (**Section 554 CA 2016**)

After the Company is Struck Off

- Section 554 CA 2016,

"Where the company is struck off from the register under section 549, the company shall be dissolved, but—

(a) the liability, if any, of every director or officer and member of the company continues and may be enforced as if the company had not been dissolved; and

(b) nothing in section 550 shall affect the power of the Court to wind up a company, the name of which has been struck off from the register provided that there is proof that the company has a property which can be realised."

Objections to Strike Off

There may be person interested objects the Company's application to strike off from the Register.

Under **Section 552 CA 2016**, any person may object to the striking off on the following grounds:

- Company is still carrying on business;
- Company is a party to legal proceedings;
- Company is in receivership or liquidation, or both;
- The person is a creditor or a member or a person having undischarged claim against the Company

Objections to Strike Off

- There exists a right of action on behalf of the Company;
- For any other reason, it would not be just and equitable to remove the Company from the Register.

The Registrar will not proceed with the striking off unless (**Section 552 CA 2016**):

- the objections have been withdrawn;
- the relevant facts are no longer correct; or
- the objection is frivolous and vexatious.

Withdrawing a Striking Off Application

To withdraw a Striking Off Application, the applicant should, within 30 days from the date specified in the notice or publication of notification under Section 551(1) CA 2016, lodge a Notice of Withdrawal to the Registrar the reasons for the withdrawal application together with the supporting documents. (**Section 553 CA 2016**)

Voluntary Winding Up

by Sebastian Liew

Winding Up in Malaysia

In Malaysia, the winding up of a company is governed by the Companies Act 2016. Winding up is the process where a company's assets are collected and used to pay off its debts.

The company will be dissolved and will no longer exist after winding up.

Reasons for Winding Up

Typical reasons for winding up a company includes:

- Cessation of trading or business activities;
- Inability to pay its debts;
- Just and equitable that the company is wound up;
- Default in lodging the necessary statutory documents; and
- Corporate restructuring exercise.

Types of Winding Up

There are two ways in which a company may be wound up in Malaysia:

- Compulsory winding up; or
- Voluntary winding up.

The process of winding up will differ in accordance with the need for the Court's involvement.

What is a Compulsory Winding Up?

A compulsory winding up is where the court makes an order to wind up a company after a party presents a petition in court.

Under section 464 of the Companies Act 2016, the petitioners may include:

- the company;
- the creditors;
- a contributory;
- the liquidator or the official receiver; or
- the Registrar of Companies.

What is a Compulsory Winding Up? (cont.)

Section 465 of the Companies Act 2016 provides the circumstances in which a company may be wound up by the Court. The common circumstances for a company to be wound up by the Court are where:

- the company is unable to pay its debts.
- the Court is of the opinion that it is just and equitable that the company be wound up.

Once an Order of Court to wind up the company is obtained, the Court may appoint a liquidator to wind up the affairs of the company. Where no liquidator is appointed, the Official Receiver shall be the liquidator.

Voluntary Winding Up

Under the Companies Act 2016, there are two types of liquidation by voluntary winding up:

- members' voluntary winding up; and
- creditors' voluntary winding up.

The appropriate type would depend on the nature of solvency of the company.

Special Resolution

- A company may be wound up voluntarily if the company so resolve by special resolution (see section 439(1)(b)).
- A company shall lodge a printed copy of the resolution with the Registrar within 7 days from the passing of a resolution for voluntary winding up (see section 439(2)(a)).
- A company shall give notice of the resolution in one widely circulated newspaper in Malaysia in the national language and in the English language within 10 days after the passing of the resolution (see section 439(2)(b)).

Members' Voluntary Winding Up

by Sebastian Liew

Members' Voluntary Winding Up

Under section 432(2)(a) Companies Act 2016:

"a members' voluntary winding up may be effected by a resolution where the company is solvent and the liquidator is appointed by the members at the members' meeting."

The date of commencement shall be the passing of the members' resolution to initiate the winding up.

Declaration of Solvency

Under section 443 of the Companies Act 2016, where it is proposed to wind up a company voluntarily:

- The majority of directors may make a written declaration to the effect that they have made an inquiry into the affairs of the company; and
- at a meeting of directors, have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.

A statement of affairs of the company shall be attached to the written declaration.

Breach of Declaration of Solvency

A director who makes a declaration without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period stated in the declaration commits an offence and shall, on conviction, be liable to imprisonment for up to 5 years or a fine not exceeding 3 million ringgit or to both. If the offence is continuing after conviction, a further fine not exceeding RM 500 each day.

Liquidators in Members' Voluntary Winding Up

Section 445(1) of the Companies Act 2016:

"In a members' voluntary winding up, the company shall appoint one or more liquidators for the purpose of winding up the company's affairs and distributing its assets in general meeting"

A liquidator may be removed by special resolution of which special notice have been given to the creditors and the liquidators in a general meeting convened by any contributory.

Conversion to Creditors' Voluntary Winding Up

- If the liquidator is of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the written declaration, the liquidator shall summon a meeting of creditors.
- At the meeting, the creditors may appoint the liquidator appointed by the company or appoint any other person to be liquidator.
- Once a meeting of creditors is held, the winding up shall proceed as if the winding up were a creditors' voluntary winding up.

Creditors' Voluntary Winding Up

by Sebastian Liew

Creditors' Voluntary Winding Up

Under section 449 of the Companies Act 2016, the company shall cause a meeting of its creditors to be summoned for the day, or the next day on which the meeting for the resolution for voluntary winding up is proposed.

The notice of the meeting of creditors shall be sent by post to the creditors simultaneously with the notices of the meeting of the company.

Prerequisites to convening a Meeting of Creditors

- The time and place of the convened meeting must be convenient to the majority in value of the creditors.
- At least 7 clear days notice by post of the meeting must be given to the creditors.
- The notice shall be advertised at least 7 days before the date of the creditors' meeting in:
  - one widely circulated newspaper in the national language; and
  - one widely circulated newspaper in the English language.

Meeting of Creditors

At the Meeting of Creditors:

- An appointed director and the secretary of the company shall disclose the company's affairs.
- The creditors may appoint one of their own or the director in attendance to preside the meeting.
- The chairperson shall then determine whether the meeting has been held at a time and place convenient to the majority in value of the creditors and his decision shall be final.
- If the chairperson decides that the meeting has not been held at a time and place convenient to the majority, the meeting shall lapse and a further meeting shall be summoned by the company as soon as practicable.

Liquidators in Creditors' Voluntary Winding Up

Section 450 of the Companies Act 2016:

(1) *"The company shall and the creditors may at their respective meetings nominate a person to be a liquidator for the purpose of winding up the affairs and distributing the asserts of the company"*

(2) *"If the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator and if no person is nominated by the creditors, the person nominated by the company shall be liquidator"*

Liquidators in every Voluntary Winding Up

Provisions applicable to Liquidators in every Voluntary Winding Up:

- Where there is no liquidator acting in a voluntary winding up, the Court may appoint a liquidator.
- The Court may, on cause shown, remove a liquidator and appoint another.
- A liquidator shall be entitled to receive salary or remuneration.
- The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

Annual meeting of members and creditors

Section 458(1) of the Companies Act 2016, if the winding up continues for more than one year, the liquidator shall summon:

(a) *"in the case of a members' voluntary winding up, a meeting of members of the company"; and*

(b) *"in the case of a creditors' voluntary winding up, a meeting of members of the company and the meeting of creditors"*

Such meetings shall be summoned at the end of the first year front he commencement of the winding up and of each succeeding year or not more than 3 years after the succeeding year.

Final meeting of members or creditors

Section 459(1) of the Companies Act 2016 provides that as soon as the affairs of the company are fully wound up, the liquidator shall:

(a) *prepare an account showing how the winding up has been conducted and the property of the company has been disposed of; and*

(b) *Call for a meeting of members of the company, or in the case of a creditors' voluntary winding up, a meeting of members of the company and creditors.*

for the purpose of laying befor the meeting the account and for giving any explanation.

Prerequisites to calling the Final Meeting

Section 459(2) of the Companies Act 2016 provides that the final meeting shall be called by an advertisement specifying the time, place and objet of the final meeting and shall be published at least 30 days before the date of the final meeting in:

(a) one widely circulated newspaper in the national language; and

(b) one widely circulated newspaper in the English language.

Dissolution of the Company

Section 459(3) of the Companies Act 2016:

"The liquidator shall lodge with the Registrar and with the Official Receiver a return of the holding of the meeting and of its date with a copy of the account attached to such return, within 7 days from the date of the meeting."

On the expiration of 3 months after lodging of the return with the Registrar and with the Official Receiver, the company shall be dissolved.

Questions?

Upcoming Talks

Date	Topic	Speakers
18 October 2023 (Wednesday)	Contempt of Court: Forcing Compliance with Orders through Committal Proceedings	Gan Chong Chieh & Joseph Khor
25 October 2023 (Wednesday)	Understanding Damages for Medical Negligence: Types, Trends and Tactics	Jeremy Balang & Alicia Chin

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