



COMPANIES ACT, 2014 – Winding Up

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Contents

	Paragraphs
Introduction	1-6
Liquidations	
Court liquidation	7-9
Members' Voluntary Liquidation ("MVL")	10-12
Creditors' Voluntary Liquidation ("CVL")	13-14
Committee of Inspection	15-18
Realisation	19-20
Distribution	21-23
Other matters	24-29
Liquidators	
Appointment	30-37
Resignation or Removal	38-40
Powers	41-45
Duties	46-49
Remuneration	50-53

INTRODUCTION

1. The provisions of Part 11, Winding Up, Companies Act, 2014, ("Part 11") came into force on 1 June 2015.
2. The principal purpose underlying the statutory changes contained in Part 11 is to achieve, to the extent possible, a consistent approach in all three types of liquidations and to reorder detailed provisions in a sequence which better reflects the liquidation process. Consequently, there is a significant reduction in the supervisory role of the High Court once a winding order has been made.
3. The minimum qualifying indebtedness to serve a statutory demand for payment is increased to €10,000 – a single creditor – and to €20,000 in aggregate for two or more creditors. The person(s) who provided funds to the company to discharge "costs, charges or expenses" of the winding up (except those relating to arranging the creditors' meeting and the statement of affairs) acquires the priority rights of such debts.
4. Part 11 specifies categories of persons entitled to be appointed as liquidator, establishes a procedure for the removal of a liquidator in a voluntary liquidation, and requires the basis of the liquidator's remuneration to be agreed by the members (members' voluntary liquidation – MVL) or by the creditors/Committee of Inspection (all other liquidations). Thereafter, prior approval of remuneration by relevant persons is required before the remuneration can be taken.
5. This Technical Release is intended to assist members in understanding the changes made to company legislation governing liquidations. However, it does not purport to be a detailed analysis of the provisions of Part 11.
6. Statutory references are to the relevant sections of Part 11 unless otherwise indicated.

LIQUIDATIONS

Court Liquidation

7. Consistent with the desire to remove basic administrative matters from the Court, together with the aim of a common approach in all three liquidation types, there is a significant reduction in the High Court's ("Court") supervisory role once the Court liquidation has begun. Various powers have been transferred from the Court to the liquidator. Additionally, various requirements previously contained in the Rules of the Superior Courts have been incorporated within Part 11.

8. The Director of Corporate Enforcement is empowered by *Section 569* to petition the Court to wind up a company "in the public interest".

9. *Section 570* increases the minimum qualifying indebtedness to serve a statutory demand for payment within twenty-one days from €1,270 to €10,000 – a single creditor – and to €20,000 in aggregate for two or more creditors.

Members' Voluntary Liquidation ("MVL")

10. As heretofore, where a company's constitution specifies that on the occurrence of a stated event, or at the end of a fixed period, the company shall be dissolved, the company may be wound up as a MVL if the company in general meeting has passed a resolution to that effect.

11. With the exception of those two sets of circumstances, *Section 579(1)* requires a MVL to commence in compliance with the generic Summary Approval Procedure contained in Chapter 7, Part 4 – Corporate Governance, Companies Act, 2014.

12. The requirement that the company's statutory auditor (or another person qualified to carry out that role) report on the directors' declaration of solvency is carried forward from earlier legislation. However, the report now states whether, in the auditor's opinion, the declaration is "not unreasonable".

Creditors' Voluntary Liquidation ("CVL")

13. In addition to situations where the CVL process commences following a members' resolution that the company be wound up because it cannot pay its debts, *Section 586(3)* lists three situations where a MVL is transformed into a CVL:

1. A creditors' meeting is called where the liquidator considers the company will be unable to pay its debts in full.

2. The Court is satisfied, following an application to it from creditor(s) representing at least 20% in number or value of the company's total creditors, it is unlikely that the company will be able to pay its debts in full.

3. The statutory procedure to place the company in a MVL was not properly complied with.

14. The content of the notice of the creditors' meeting is specified in *Section 587 (3)*, together with the obligation to attach a list of the company's creditors (or details of where that list can be inspected/how a copy can be obtained).

Committee of Inspection

15. The right, or, if directed by creditor(s) representing at least 10% in value of the company's total creditors, the obligation, in a Court liquidation to convene a meeting to consider the appointment of a committee of inspection now rests with the liquidator (*Section 666*). The notice convening the meeting must list the proposed committee members.

16. *Section 668(4)* provides that membership lapses should the person, "without leave", miss two consecutive meetings.

17. Unless sanctioned by the Court, or approved by a resolution of the company's members or creditors, as appropriate, *Section 668(9)* prohibits a member of the Committee of Inspection from profiting from the liquidation.

18. Except for a "Section 668(9)(b) resolution", approval of a resolution at the Committee of Inspection requires a majority of creditors present and voting.

Realisation

19. Part 11 imposes an obligation on any person in possession or control (without lawful authority) of "books, records or other property of the company" to "surrender immediately" such property to the liquidator (*Section 596(2)*).

20. Although the term "unfair preference" replaces "fraudulent preference", in determining whether any act constituted unfair preference, *Section 604(2)* refers to "... is done with a view to giving the creditor ... a preference over the other creditors ...". Therefore, proof of intent is still needed.

Distribution

21. A person who provides funds to the company to discharge "costs, charges or expenses" of the winding up (except those relating to arranging the creditors' meeting and the statement of affairs) acquires the priority rights of such debts (*Section 617(4)*).

22. *Section 620* expands upon earlier legislation to specify the valuation date, how to determine the claim if liquidation commences on a date other than the fixed date on which the debt is due (for example, rent), as well as the criteria to be met if the creditor is to prove for interest.

23. The maximum amount of wages of a single employee entitled to preferential status increases to €10,000 under *Section 621(4)*. Part 11 does not reduce the categories of preferential debt. It explicitly acknowledges the *Section 621* listing "... is in addition to any other enactment providing for the priority of a particular debt or sum in a winding up."

Other Matters

24. *Section 632* provides that a person who, "without just cause", withholds specified books or records from the liquidator is guilty of an offence.

25. The power to make calls on the contributories (*Section 657*), or to adjust the rights of the contributories among themselves (*Section 658*), has transferred from the Court to the liquidator.

26. The existing scope of the Court's seizure order is extended by *Section 675* to cover the person's "books and papers and moveable property".

27. *Section 679* empowers the Director of Corporate Enforcement to convene a "Part 11 meeting", specify the purpose of, and procedures relating to, the meeting and attend thereat.

28. *Section 687* provides statutory acknowledgement that the liquidator "may have regard to any directions" given by the creditors, the contributories, or the Committee of Inspection. In case of conflict, the directions of the creditors override those of the contributories, while the directions of either of those parties override the directions of the Committee of Inspection.

29. Unless the Court specifically requires the liquidator to make an application for dissolution, *Section 704* permits a company in a Court liquidation to be dissolved in the same way as a company in a CVL.

LIQUIDATORS

Appointment

30. Unlike the Companies Act, 1963, which defined a narrow group as “not qualified”, *Section 633* lists five categories of persons who are “qualified” to act as liquidator (or provisional liquidator). Those categories are:

1. Member of a prescribed accountancy body.
 2. Practising solicitor.
 3. Member of other professional body recognised by the Supervisory Authority (“IAASA”).
 4. Person qualified under the laws of another EEA state.
 5. Person with practical experience of windings up and knowledge of relevant law. Application for recognition on the basis of practical experience must be made by 31st May 2017.
31. *Section 634* requires any “such person to hold professional indemnity insurance “...in such amount and on such terms ...” as may be prescribed by IAASA.

32. The existing list of “not qualified” persons has been carried forward (*Section 635*), with the prohibition period for former officers and employees extended from 12 to 24 months.

33. The appointment powers in a Court liquidation, MVL, or CVL, are unchanged.

34. Prior written consent to act is required from the nominee in all liquidations (*Section 639*).

35. Security is no longer sought from the nominee in a court liquidation.

36. The existing requirement that various company documents bear a notice that a liquidator has been appointed is extended by *Section 595(4)* to cover the company’s website and e-mails issued by it.

37. If the company changed its name in the year prior to commencement of the liquidation, *Section 595(5)* requires the company’s website, e-mails issued by it, as well as “all notices and advertisements in relation to the winding up”, to bear the company’s former and current name.

Resignation or Removal

38. *Section 641* extends the right to resign to all liquidations. The Director of Corporate Enforcement and the Registrar of Companies (“Registrar”) must be notified of the resignation within 2 days, other specified persons within 14 days.

39. In a MVL, where 10 days' notice has been given, *Section 636(2)* empowers the company, in general meeting, to remove the liquidator, or appoint a liquidator to replace, or act with, the incumbent.

40. *Section 637(4)* similarly empowers the creditors in a CVL.

Powers

41. *Section 627* inserts a tabular summary – classified by category – of powers held by the liquidator. The final category gives the liquidator the power “... to do all such other things as may be necessary for winding up the affairs of the company...”.

42. Should the liquidator exercise any of the powers listed in category 1 or 2 of the *Table in Section 627* – legal proceedings, carrying on the company's business, payment of certain creditors, or compromise of certain claims – he or she shall notify within 14 days thereafter the Committee of Inspection (or the creditors if no committee appointed) in a CVL, or the members in a MVL (*Section 629(1)*).

43. Prior to 1 June 2015 the provisional liquidator had the powers of a liquidator, subject to any limitation of powers imposed by the Court on his or her appointment. *Section 626(1)* provides that “... the provisional liquidator has such powers as the court orders”.

44. The power of the liquidator to convene general meetings of the company is extended (*Section 628*) to cover meetings of creditors and of the Committee of Inspection.

45. The power to issue a notice requiring the delivery to the liquidator of company property (*Section 673*), or to fix the time period (a minimum of 28 days) within which the creditors must prove their debts or claims, has transferred from the Court to the liquidator.

Duties

46. Stating the liquidator's primary duty is to administer the property of the company, *Section 624* defines that duty as, firstly, ascertaining the extent of the company's property and, thereafter, collecting and gathering in the property, realising and distributing it.

47. The liquidator remains obliged to report to the Director of Corporate Enforcement on the conduct of directors of insolvent companies. Additionally, *Section 682(3)* requires the liquidator to answer “any question the Director reasonably puts” and “give such other assistance (as he or she is reasonably able to give) ...”.

48. In each periodic return the liquidator must state whether any past or present director is subject to a restriction or disqualification order, or whether any such director has had a declaration of personal liability made against them (*Section 650*).

49. Should a person vacate the position of liquidator – resignation, removal, or no longer qualified, he or she is to retain custody of “the seal, books, records and any property of the company” which they control until either:

- (i) a new liquidator is appointed to whom those items are then transferred; or
- (ii) the liquidator delivers or disposes of those items as directed by the Court.

Remuneration

50. The liquidator, “as soon as practicable” after appointment, shall seek approval of the basis of his or her remuneration, providing written details thereof (*Section 646*). The terms upon which the liquidator has an entitlement to remuneration are determined by resolution of the company members (MVL), or (in all other liquidations) by written agreement of the Committee of Inspection or resolution of the creditors, as appropriate.

51. Where the terms include provision for reference to arbitration of any dispute, *Section 648* governs such arbitration process.

52. The liquidator must obtain prior approval from the relevant interested parties specified in *Section 647(2)* before remuneration is paid. To assist the relevant interested parties come to their decision, the liquidator must provide them with the prescribed particulars on the remuneration claim.

53. In the absence of approval, the Court (or a person designated by it) can fix the remuneration amount.