**SINGAPORE MANAGEMENT UNIVERSITY**

**LAW429 CORPORATE INSOLVENCY LAW**

Creditor does not have to be in monetary terms – it can be performance obligations also – pre-payments would make one a creditor

You cannot file a stat demand for a future debt, but you can file a petition for a future debt

**Topic 2 – Insolvent Liquidation (I) – Initiation and Commencement**

Reading: You should read for class the cases and materials marked with a double asterisk \*\*. Other cases are for reference but some may be read if time permits (single asterisked \* materials taking priority).

Note: Unless otherwise stated, all references to legislation in this Outline are to the Companies Act (Cap 50, 2006 Rev Ed).

**A. Initiating a Winding-up**

General:

Goode, *Principles* *of Corporate Insolvency Law,* (4th edn) chapter 5 (winding-up procedure)

*Ibid*., chapter 4 (meaning of insolvency)

*Walter Woon on Company Law* (3rd Rev edn) 695 - 718

Other works:

Jackson, *The Logic and Limits of Bankruptcy Law,* chapter 8 (Course Reserve)

1. **Creditors’ Voluntary Winding-Up**
2. *Voluntary winding-up* is one of the two modes in which a company may be wound up: see **s 247(b)**. The procedure for voluntary liquidation is prescribed in **Part X** **Division 3***.* It will be seen that voluntary winding-up is further sub-divided into two distinct types: *members’* voluntary winding-up and *creditors’* voluntary winding-up. See **s 4(1)** for the definition of these terms. Trace the procedural steps in respect of each type of voluntary winding-up. Compare especially **ss 294** and **296**, **297**. What are the key differences between a creditors’ winding-up and a members’ voluntary winding-up?
3. A company goes into voluntary liquidation, whether a creditors’ or members’ voluntary winding-up, if a special resolution to that effect is passed or (much more rarely) if prescribed by its constitution: **s 290(1)**. The special resolution has to be passed in accordance with the procedure laid down by the Companies Act and the company’s constitution.
4. Even before the special resolution is passed, a company’s board, recognising the inevitable, will often anticipate the procedure by making a statutory declaration under **s 291(1)** and appointing a provisional liquidator. In such case, the board would often at the same time issue notices to convene the EGM and first creditors’ meeting.
5. A company cannot resolve to go into (voluntary) winding-up where a petition to wind up the company on the ground of insolvency has been presented to the Court: **s 312**. The leave of the Court has to be obtained. Why?
6. The crucial procedural step which distinguishes a creditors’ voluntary winding-up from a members’ winding-up is the absence of a declaration of solvency: read **s 293**.What is the purpose of such a declaration? Whatare the effects of a false or inaccurate declaration? See **s 293(4), (5)** and **s 295(1)**.
7. Where the company is undoubtedly insolvent, either a creditors’ voluntary liquidation or a compulsory liquidation might be initiated (or at least not opposed) by the board. What might be the reasons for preferring one route over the other?

Directors duties

1. **Compulsory Winding-Up: Inability of Company to Pay Debts**
2. *Overview*: A company goes into *compulsory liquidation* (*ie*, is “wound up by the Court”) upon the making of a winding-up order by the High Court, on a petition[[1]](#footnote-1) presented by an eligible petitioner who satisfies the court that the company is insolvent and that therefore it should be wound up: **ss 253, 254**.
3. *Who can petition*: **s 253(1)** lists the persons who may petition for a compulsory winding-up order. “Contingent or prospective” creditors may also apply, but note **s 253(2)(c)**.What is the meaning of these terms? Is it generally advisable for a contingent or prospective creditor to petition for a winding-up order?

*Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327 (CA)

*Re Rica Gold Washing Co* (1879) LR 11 Ch D 36 (CA)

*Re People’s Parkway Development Pte Ltd* [1992] 1 SLR(R) 413

*\*Stonegate Securities Ltd v* *Gregory* [1980] 1 Ch 576, 579 (CA)

1. *Insolvency ground – meaning*: Section254 contains the exhaustive list of the *grounds* on which a winding-up petition may be presented. The only ground which is relevant for our purposes[[2]](#footnote-2) is **s 254(1)(e)**: the company’s *inability to pay its debts*.

How does the Court determine whether a company is “unable to pay its debts”? What *tests* of insolvency are used and why?

See also **s 254(2)(c)**:the Court can take into account the *contingent* and *prospective* *liabilities* of the company. What does this mean? Whatabout contingent and prospective *assets* of the company?

*Re Sunshine Securities Pte Ltd* [1977-1978] SLR(R) 148

*\*\*Re Great Eastern Hotel (Pte) Ltd* [1988] 2 SLR(R) 276, at [56]ff

*\*Re Sanpete Builders (S)* *Pte* *Ltd* [1989] 1 SLR(R) 5, at [41]ff

*Chip Thye Enterprises Pte Ltd v Phay Gi Mo* [2004] 1 SLR(R) 434, at [17]-[20]

*Re Cheyne Finance plc (No. 2)* [2007] EWHC 2407 (Ch); [2008] 1 BCLC 741

*\*Cornhill Insurance plc v Improvement Services Ltd* [1986] 1WLR 114

*Re a Company (No. 0012209 of 1991)* [1992] BCLC865

*Byblos Bank SAL v Al-Khudhairy* (1986) 2BCC 99,549 (CA)

\*\**BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 (CA) (affirming [2008] 4 SLR(R) 33 on different grounds)

*\*\*BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] 1 WLR 1408; [2013] UKSC 28, esp at [23]-[42], [48]-[50]

*Bucci v Carman* [2014] EWCA Civ 383; [2014] BCC 269, esp at [29] ff

*Living the Link Pte Ltd v Tan Lay Tin Tina* [2016] 3 SLR 621, esp [26]-[34]

Wee Meng Seng, “Taking Stock of the Insolvency Tests in Section 254 of the Companies Act”[2011] SJLS 486

Wee Meng Seng, “Understanding Commercial Insolvency and its Justifications as a Test for Winding Up” [2015] LMCLQ 62

1. *Alternative ways to prove insolvency*: **s 254(2)** provides for two other ways for the petitioner to prove that the company is “unable to pay its debts”:

* 1. a company is deemed insolvent if it has failed to comply with a demand for payment issued by the creditor: **s 254(2)(a)** (a “*statutory demand*”). What requirements must this statutory demand comply with? Is strict compliance necessary?
  2. a company is deemed insolvent if execution on a judgment against the company has been returned unsatisfied: **s 254(2)(b)** (“*unsatisfied execution*”**)**.

In either case, is the presumption of insolvency a rebuttable one?

*Pac-Asian* *Services Pte Ltd v European Asian Bank AG* [1987] SLR(R) 1, at [15]; [1989] 3 MLJ 385, at 387-8 (CA)

*Ng* *Tai Tuan v Chng Gim Huat Pte Ltd* [1990] 1 SLR(R) 903, at 907

*\*Re Dayang Construction and Engineering Pte* *Ltd* [2002] 3 SLR(R) 379, at 384-387

\*\**BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 (CA) (supra)

*United Fiber System Ltd v China National Machinery & Equipment Import & Export Corp* [2011] 2 SLR 1021

Lee Eng Beng, “Excessive Statutory Demands in Winding-up and Bankruptcy”[1997] SJLS 532

1. **The Court's Discretion in Making a Winding-Up Order**
2. *Traditional rule*: Even if one of the grounds in **s 254** has been established, the Court has a discretion whether to makethe order for winding-up: **s 257(1)**.But the traditional rule is that once the petitioner establishes that the company is unable to pay its debts, he has a *prima facie* right to a winding-up order.

To what extent has this right been eroded by *BNP Paribas v Jurong Shipyard*?

*Bowes v Hope Life Insurance* (1865) 11 HLC 389, at 402; 11 ER 1383 (HL)

*\*BNP Paribas v Jurong Shipyard Pte Ltd* [2009]2 SLR(R) 949, at [15]-[20] (CA)

* 1. *Exceptions*: There are anumber of exceptions to the traditional rule, as follows.
  2. **Disputed debts**

One of the most important exceptions is that no winding-up order will be made where there is a bona fide dispute in respect of the debt on which the petition is founded. Why not? What constitutes a disputed debt in this regard? (In particular, what is the required standard of proof?) Does a disputed debt constitute a factor to be considered in the exercise of the Court's discretion or does it raise a more fundamental challenge to the *locus standi* of the applicant? Does it matter?

\**Mann v Goldstein* [1968] 1 WLR 1091

*Re Mechanised* *Construction Pte Ltd*[1989] 1 SLR(R) 500

*Re Tweeds Garages Ltd* [1962] 1 Ch 406

*Taylors Industrial Flooring Ltd v M &* *H Plant Hire (Manchester) Ltd* [1990] BCLC 26 (CA)

*\*\*Pacific Recreation Pte Ltd* v *S Y Technology* [2008] 2SLR(R) 491, at [l]-[26] (CA)

\**Chimbusco International Petroleum (S) Pte Ltd v Jalalludin bin Abdullah* [2013] 2 SLR 801, at [33]-[47] (appeal dismissed [2014] 2 SLR 446)

The approach in *Mann v Goldstein* can cause hardship to creditors when they seek to wind up recalcitrant debtors. How have courts sought to limit this abuse? Should courts modify or even abandon the *Mann v* *Goldstein* approach where it can be shown that the company is insolvent?

*Niger Merchants Co v Capper* (1877) 18 Ch D 557n

*General Welding &* *Construction Co Pty Ltd v International Rigging (Aust) Pty Ltd* (1983) 8 ACLR 307; (1984) 2ACLC 56

*\*\*Re Claybridge Shipping Co SA* (1981)[1997] l BCLC 572 (CA)

*Re RA Foulds Ltd* (1986) 3BCC 99,269

Lee Eng Beng, “Winding-up Petitions Founded on a Bona Fide Disputed Debt” (1998) 10 SAcLJ 180

Is the position any different where the dispute over the petition debt is subject to an arbitration clause?

## *Salford Estates (No. 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575; [2015] Ch 589 *BDG v BDH* [2016] 5 SLR 977

1. **Cross-claims**

Is the position any different where the debt is undisputed but the company has or alleges that it has a pending *counterclaim* or a right of *set-off* against the petitioner? In view of *Metalform,* does it matter whether the cross-claim is a mere cross-claim or a cross-claim that amounts to a set-off?

*Ng Tai Tuan v Chng Gim Huat Pte Ltd* [1990] 2 SLR(R) 231

*McDonalds Restaurants Ltd v Urbandivide Co Ltd* [1994] 1BCLC 306

*\*Re Bayoil SA* [1999] 1 WLR 147(CA)

*\*\*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 (CA)

*Denmark Skibstekniske Konsulenter A/S v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997, at [20]-[36]

* 1. **Opposition to the petition**

In exercising its discretion, the Court may have regard to the wishes of the other creditors and contributories: see **s 325**.In what circumstances would opposition to the petition by them persuade the Court to dismiss it? Does it matter whether the opposition comes from an unsecured creditor, a secured creditor, the company itself or a contributory? Note also **s 257(1)**.

\**Re P & J Macrae Ltd* [1961] 1 WLR 229 (CA)

*Wei Giap Construction Co* *(Pte) Ltd v Intraco Ltd* [1977-1978] SLR(R) 498

*Re Camburn Petroleum Products Ltd* [1980] 1 WLR 86; [1979]3 All ER297

*Re Demaglass Holdings Ltd* [2001] 2BCLC 633

*Re Craven Insurance Company Ltd* [1968] 1 WLR 675; [1968] 1 All ER 1140, at 1144 (CA)

*BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949, at [19]-[20] (CA)

* 1. **Pre-existing voluntary winding-up**

The fact that the company is already in voluntary winding-up may also persuade the Court not to make the order for winding-up: **s 253(2)(d)**.See also **s 255(1)**.

*Re Ziceram Ltd* [2000] 1 BCLC 751

*Korea Asset* *Management Corporation v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671

**B. Commencement and Effect of Winding-Up**

1. **Meaning of Commencement of Winding-Up**

When does a winding-up “*commence*”? Read **ss 255** and **291(6)**. What is the significance of this “commencement” date – does it apply for all purposes?[[3]](#footnote-3)

*Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304 (CA)

1. **Effect of the Winding-Up Order/Resolution**
2. **Appointment and Role of Liquidator**

In a Singapore compulsory winding-up, the liquidator is appointed by the court (the petitioner may make a nomination): **s 263(c)**. Historically in the UK the liquidator was always the Official Receiver, a government official. In modern times either the Official Receiver or a private liquidator (if qualified as an *approved liquidator* under **ss 9, 11** – in practice, an accountant) may be appointed as liquidator. The Official Receiver becomes the liquidator by default where no private liquidator is appointed: **s 263(d)**. Why might a private liquidator *not* be appointed?

In a creditors’ voluntary winding-up, the creditors have the ultimate right to appoint the liquidator, although they may choose to accept the members’ nominee: **s 297**. A non-approved liquidator may be appointed if the creditors so agree: **s 11(2)(b)**.

Once the liquidator has been appointed, all modes of liquidation follow broadly the same path, ie:

* collection and realisation of assets;
* quantification and discharge[[4]](#footnote-4) of liabilities;
* distribution of any surplus assets to the entitled shareholders, and
* dissolution of the company.

However, in an insolvent liquidation (CL or CVL) the potential exists for significantly more supervision of the liquidator while he fulfils his functions, by the court and/or the creditors. Further, given the underlying assumption in an insolvent liquidation that liabilities will not be paid in full, the liquidator has powers to help him maximise recoveries of assets (see further Topic 6, Avoidance) and to investigate wrongdoing (see further Topic 5, Directors’ Liability).

A liquidator in a CL is an *officer of the court* and so subject to its direct supervision. However such a liquidator (and one appointed by the creditors in a CVL) is not an *officer of the company*.

A *committee of inspection* may be appointed by the creditors (and, in a CVL, the contributories) to assist and supervise the liquidator: **ss 277-278**; **s298**. If formed, such committee has the right to consent (as an alternative to the court) to various actions by the liquidator. The committee may also give directions to the liquidator, subject to any overriding directions given by a creditors’ meeting: **s 273(1)**.

The **Appendix** below lists a number of the functions, powers and duties of the liquidator.

While we will concentrate on the main rules, which are found in the Companies Act, you should note that many of the detailed practical and procedural rules applicable in liquidations are contained in the **Companies (Winding Up) Rules** (“**CWUR**”). For example, rules on creditors’ meetings in compulsory liquidations are set out at **r 106** et seq. of the CWUR.

1. **Statutory Scheme**

The making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the insolvent company. What is the nature of this statutory trust in favour of the company’s creditors? Where does the beneficial interest of the company's assets lie?

*Re Oriental Inland Steam Co* (1874) 9 Ch App 557, 559 - 560(CA in Ch)

*Ayerst C* *& K (Construction) Ltd* [1976] AC 167 (HL)

*Ng Wei Teck Michael v OCBC Ltd* [1998] 3 SLR(R) 1, at [31] (CA)

*Buchler v Talbot* [2004] 2 AC 298; [2004] 2WLR 582, at [28]-[29] (HL)

*Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82, at [43]ff

*\*\*Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733, [39]-]53] (CA)

1. **Dispositions of the Company's Property**

Once winding-up commences, it is important that the assets of the company be preserved so as to enable a fair distribution to all the company’s creditors. **S 259** seeks to achieve this by rendering *void* all dispositions of the company’s property after the commencement of the winding-up (unless the court’s consent is obtained). Note that **s 259** does not apply in a creditors’ voluntary winding-up. Why not? (We will consider s 259 in more detail in Topic 6, Avoidance).

1. **Moratorium**[[5]](#footnote-5) **on Legal and Enforcement Proceedings**
2. Upon the making of a winding-up order or the passing of a winding-up resolution in a creditors’ voluntary liquidation, no *legal**proceedings* against the company may be instituted or continued without the leave of the court: **ss 262(3), 299(2)**.See also **s 258**.

Further, anyform of *execution* put in force against the company after the commencement of the winding-up is void: **ss 260**, **299(1)**.And the benefit or proceeds of anyexecution (including attachment of debts) against the company which has not been completed before the commencement of the winding-up must be handed over to the liquidator: **ss 334**, **335**.

What is the purpose of this moratorium?

*Re Tiong Polestar Engineering Pte Ltd* [2003] 4 SLR(R) 1

1. Inthe above instances, the leave of the court may be obtained for the bringing or continuation of legal or enforcement proceedings against the company. In what situations will such leave be given?

*The Hull 308* [1991] 2 SLR(R) 643 (CA)

*\*Re Atlantic Computer Systems plc* [1992] 2 WLR 367, at 374-376; [1992] 1 All ER 476, at 482-5 (CA)

*Jumabhoy Rafiq v Scotts Investment (Singapore) Pte Ltd* [2003] 2 SLR(R) 422 \**Korea Asset* *Management Corporation v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671, [47]-[57]

1. Are secured creditors affected by the moratorium? What is the reason? What other actions detrimental to creditors’ interests would *not* be covered by the terms of **ss 262(3)**, **299(2)**?Whatimplications do these omissions have on the winding-up?

*Re David Lloyd & Co*(1877) 6 ChD 339, 344-345

*SA Asset Management Corp v Sheahan* (1995) 17 ACSR 569; [[1995] SASC 5518](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/1995/5518.html), at [30]

1. **Cessation ofBusiness**

In thecase of a creditors’ voluntary winding-up, the company must cease business on the commencement of the winding-up: see **s 292** – why?For compulsory winding-up, see **s 272(1)(a)**.

1. **Management Powers**

What is the effect of the winding-up order on (i) its corporate capacity, (ii) the powers of the directors, and (iii) the powers of the general meeting? The powers of the directors cease on the appointment of a liquidator in a voluntary winding-up: **ss 294(2)**, **297(4)**.What is the position in a compulsory winding- up?

*Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022, at [36] (CA)

1. **Effect on Contracts**

The making of a winding-up order does not *per se*terminate the existing contracts of the company. Indeed, certain provisions of the Companies Act operate on the assumption that contracts subsist after commencement of a winding-up: see **s 332(5)**.Nevertheless, the entry into liquidation may trigger express rights in the contract to terminate or modify the agreement. Further, the circumstances of the winding-up, conduct of the liquidator, the eventual dissolution of the company and terms of the particular contract may sometimes provide grounds to terminate in accordance with general contractual principles.

*The “STX Mumbai”* [2015] 5 SLR 1, at [79]-[89] (CA)

A distinct rulehowever applies to contracts of *employment* in a compulsory (but not voluntary) winding-up.

Wee Meng Seng, “Insolvency and theSurvival of Contracts” [2005] JBL 494

1. **Transfers of Shares**

Any transfer of the company’s shares, or alteration in a member’s status, made without consent after the commencement of the winding-up is void: see **ss 259**, **292(2)**. Why? Does this affect the underlying contract of transfer?

*Kong Swee Eng v Rolles* [2010] SGHC 300, at [29]

*Seah Teong Kang v Seah Yong Chwan* [2015] 5 SLR 792, [45]-[50] (CA)

**Appendix**

**The Liquidator – Miscellaneous Provisions**

Listed below are various statutory provisions relating to the liquidator (particularly in **compulsory liquidations**) which are mostly not covered in other Topics – eg, as to his appointment, remuneration, functions, powers, duties and termination.

*This Appendix is principally for reference purposes and will not be specifically covered in class*.

|  |  |  |
| --- | --- | --- |
| *Matter* | *CA provisions* | *For further detail see Topic:* |
| 1 *Qualifications and appointment*   * qualifications * appointment; requirement to give security * filing of notices | 9, 11  263, 264(a)  316 |  |
| 2 *Remuneration*   * remuneration * costs and expenses | 268 [303 CVL]  328; 283(3) [311 CVL] |  |
| 3 *Basic functions*   * take control of company’s property * settle list of contributories (if necessary) * apply assets to discharge liabilities | 269  } 280, 281  } [300 CVL] |  |
| 4 *Specific powers*   * powers delegated by court * list of specific powers (unilateral or with consent) * calling meetings * proofs * investment of surplus funds * examination of company officers and others (by court, liquidator may participate) | 288  272  273, 277  321  285, 286  286(2) | Claims  Directors’ Liability |
| 5 *Duties*   * record keeping * misfeasance | 313(1)  313(3) |  |
| 6 *Supervision/control (by court, Committee and/or OR)*   * reporting by liquidator * control of liquidator’s exercise of powers * liquidator may apply for directions | 271, 279(2); 317-318  264(b); 265; 272(3); 273; 313(2)-(4); 315  273(3); [310 CVL] |  |
| 7 *Termination*   * release | 275-276 |  |

1. Strictly, the word “application” has replaced “petition” in the CA (since 2006); however the latter continues to be widely used and will be adopted here. The petition is made by way of originating summons which is “presented” by filing it at the High Court registry. [↑](#footnote-ref-1)
2. Another ground is the “just and equitable” one, which was covered in LAW205. [↑](#footnote-ref-2)
3. Confusingly, in compulsory liquidation such “commencement” *precedes* the date when the company *actually* went into liquidation. In Singapore, there is presently no express statutory definition for the latter date (which is the date of the winding-up *order* (in CL) or *resolution* (in VL)) but for convenience we will refer to it hereafter as the “liquidation date”. Note also that courts frequently use “commencement” loosely, meaning the liquidation date. [↑](#footnote-ref-3)
4. By means of one or more distributions (known as “dividends”) of the available assets. [↑](#footnote-ref-4)
5. The US term “automatic stay” is often used interchangeably with “moratorium”. [↑](#footnote-ref-5)