Voluntary dissolution/liquidation of a Luxembourg (unregulated) commercial company

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The number of companies incorporated in Luxembourg keeps on growing at a steady pace, and for each of them, successful or not, a liquidation may at some stage have to be considered. Liquidation (or winding up) is a process by which a company's existence is brought to an end, and the law classifies liquidations into two types: voluntary (by way of shareholder(s)' decision) or compulsory (by way of a court order). The purpose of this briefing is to set out the main points to consider about a voluntary dissolution and/or liquidation in relation to an unregulated commercial company.

Introduction

A voluntary liquidation may occur for several reasons, amongst which the realisation of the company's objects, the sale of its main assets or the arrival of its term.

Formally the process will involve the prior dissolution of the company, and once decided, the company will exist solely for the purpose of its liquidation. The voluntary dissolution of a company can only be decided by its shareholder(s). It is not necessary to make any application to a court for this, and there should not be any court involvement during the whole procedure. The end result will be that the company will cease to exist and be removed from the Luxembourg Trade and Companies Register.

A formal three-stages procedure will usually have to be followed from dissolution to liquidation, but alternative ways (with one stage or two stages procedures only) have been developed and may be used, subject to certain conditions.

I - Normal liquidation process – three-stage procedure

First stage: dissolution and appointment of the liquidator

It is generally recommended to have the annual accounts of closed financial years duly approved before a company is put into liquidation. It will also be helpful for the liquidator to receive up to date interim accounts of the company at the time it is appointed, to help separating the periods before and after dissolution and help him start its work from a clear situation.

The dissolution and initiation of liquidation proceedings being a shareholder(s)' decision, as a first step, the management body of the company should convene an extraordinary general meeting to resolve on the dissolution of the company and the method of liquidation. This meeting must take place in the presence of a Luxembourg notary, and should also appoint a liquidator. After this meeting, a notary should not be needed anymore.

There is no limitation as to who can act as liquidator, and any natural or legal person may be appointed as such. If no liquidator is appointed, the person(s) responsible for the management of the company prior to its entry into liquidation will be deemed to be the liquidator(s) towards third parties. Note that Ogier Luxembourg may act as liquidator through one of its subsidiaries.

As from the dissolution:

1. the mandates of the members of the management body (and of the members of any supervisory body and of the auditors, if any) automatically terminate
2. the liquidator represents the company and is responsible for carrying out the company's liquidation
3. statute provisions preserve the company's legal existence for the purposes of the liquidation only
4. all documents emanating from the dissolved company shall indicate that it is in liquidation.

Liquidator's work and duties

To start with, the liquidator will need to prepare a full inventory of the company's assets and a balance sheet in order to determine all the assets and liabilities of the company. As a matter of principle the liquidator should then generally take all steps necessary to carry out its duties with a view to closing the liquidation, which can be summarized as follows:

1. to act as the company's legal representative
2. to realise any remaining assets of the company
3. to pay all debts of the company

4. after such payment or the deposit in escrow of the sums necessary for this, to distribute the remaining assets or amounts (if any) to the company's shareholder(s).

Practically during the liquidation procedure, it will also often have to carry out certain other tasks, such as requesting the release from all securities or other preferential rights, collecting any money still due to the company, informing co-contractors, terminating existing contracts… The dissolution will also involve certain necessary notifications to the relevant authorities or official bodies such as the Land Registration and Estates Department (*Administration de l'enregistrement et des domaines*), the Joint Centre for Data Processing, Insurance Registration and Collection of Contributions of the Social Security Institutions (*Centre commun de la sécurité sociale*), the Chamber of Commerce… In certain instances it could prove useful to also issue confirmation requests to the company's service providers to ensure that all invoices have been received and/or all liabilities have been discharged or accounted for prior to the close of the liquidation proceedings.

Through the determination of the method of liquidation, the liquidator is entrusted with important powers to carry out the liquidation process, which may be restricted or extended to a large extend in the company's articles of association or by the meeting appointing the liquidator. Since the company is deemed to exist for the purpose of liquidation only, it however has a "limited" capacity: it can still for instance enter into contracts necessary for the disposal of assets or for terminating its activities, but it should not enter into any new business (subject however to certain shareholder(s)' prior approval, such as for eg the continuation of the activity of the company, borrowing, the issue of negotiable instruments..).

Luxembourg law does not impose any timing constraints for the liquidator's work, whose duration depends in practice on the degree of complexity of the liquidation operations (for a mere holding company this first stage could take a day or two, for an operating company with a substantial workforce, months or even years). Under Luxembourg law, an annual reporting from the liquidator to the shareholder(s) is needed each year to report on the liquidation and explain why it has not been closed.

At any time through the liquidation proceedings, the liquidator may also make interim distributions or provisional payments (in cash or in specie) to the shareholders, provided that all debts have been settled or provisioned for and there are sufficient reserves to do so. It is also sometimes recommended, at the liquidator's discretion, to keep a certain buffer when any interim distribution is made.

Indeed, whilst the liquidator is not personally liable to pay the company's debts with its own assets, it is liable, both to third parties as well as to the company:

1. for the execution of its mandate and
2. for any misconduct in the management of the liquidation.

Upon completion of its liquidation work, the liquidator will prepare (i) a liquidator's report suming up all its actions and proposals during the liquidation process and (ii) an updated set of interim statements which will serve as final liquidation accounts and reflect any relevant provisions. The liquidator will then ensure the convening of a further shareholder(s)' meeting which will consider these documents and appoint an auditor.

Second stage: auditor's appointment and mandate

The auditor's mandate focuses on the examination of the liquidator's report and the final liquidation accounts (with supporting documentation), in order to prepare a corresponding auditor's report to the benefit of the shareholder(s).

There is no limitation as to who can act as auditor either but (i) obviously this cannot be the appointed liquidator and (ii) an independent auditor will need to be appointed under certain circumstances. When the auditor is ready to issue its report, the final shareholder(s)' meeting can be convened by the liquidator.

Luxembourg law again, as for the first stage, does not impose any duration or waiting periods here. The duration of this stage hence depends in practice on how fast the appointed auditor commences its audit work, and how fast it is able to review, audit and assess the work performed by the liquidator during the first stage, with a view to reporting to the shareholder(s). In practice the auditor may be mandated to carry out its review in real time (rather than on a deferred basis after completion of the first stage) so that the liquidation proceedings can be further accelerated.

Third stage: close of the liquidation proceedings

The liquidation terminates at this third (and last) shareholder(s)' meeting, where principally the following decisions will be considered:

1. approval of the auditor's report
2. distribution of the liquidation surplus (possibly subject to the receipt of the final taxation from the tax administration)
3. relevant discharges
4. location of the storage of the company's books and documents for five years
5. decision upon the transfer of the assets which have not been distributed
6. deposit of the funds that could not be returned to creditors or shareholders
7. final mandate to the liquidator for the follow up of the provisions and the post-closing operations
8. close of the liquidation.

Publication of the close of liquidation and passive survival of the company

The close of the liquidation shall be filed as soon as possible with the Luxembourg Trade and Companies Register so that it can be published in the Luxembourg RESA (*Recueil Electronique des Sociétés et Associations*). This is important since the company shall be deemed to continue to exist for the sole purpose of answering to creditors for a period of five (5) years following the date of this publication (this is the so-called "passive survival" of the company).

After this step, the company will be definitively struck off the Luxembourg Trade and Companies Register, and it should not be possible to re-open a closed liquidation, save in case of fraud.

Assets or liabilities discovered after the close of the liquidation

If an asset of the liquidated company is discovered during the five years period after the publication of the liquidation, then the liquidator will have to resume its activities and will be in charge of distributing such asset to the (ex) shareholders.

If a liability is discovered after a standard (two or three stage) liquidation, the liquidator shall defend the liquidated company. The action will have to be initiated against the liquidator and not the (ex) shareholders.

Note that after the close of a simplified liquidation (see Section III below), creditors will have to seek payment directly from the (ex) shareholders.

II - Two-stage liquidation

In practice an alternative also exists (which is not expressly provided by the Luxembourg company law), under which the requirement to have an auditor may be waived by the shareholder(s), formally leading to a liquidation procedure in two steps only. Certain conditions will also apply for this procedure to be available.

III - Simplified liquidation - one stage only

Luxembourg law now formally regulates the so-called "simplified liquidation route" when there is a sole shareholder, although this concept is somewhat misleading since this is in essence a dissolution with immediate effect and without formal liquidation (and consequently without the need to appoint a liquidator). The procedure is straightforward, with the sole shareholder appearing in front of a Luxembourg notary to resolve upon all the required decisions.

The following documents will have to be provided to the Luxembourg notary:

1. a power of attorney from the sole shareholder together with the required UBO documents
2. an up to date interim balance sheet of the Company

3. certificates from (i) the Direct Tax Administration (*Administration des contributions directes*), (ii) the Land Registration and Estates Department (*Administration de l'enregistrement et des domaines*) and (iii) the Joint Centre for Data Processing, Insurance Registration and Collection of Contributions of the Social Security Institutions (*Centre commun de la sécurité sociale*), evidencing that the company is up to date on its relevant payment obligations
4. if the company to be dissolved is not subject to VAT and not registered with thesocial security system, so called "negative certificates" may have to be provided.

As a result of the dissolution, all assets and liabilities (even those which are unknown) of the dissolved company are transferred to the sole shareholder under universal title of succession (*transmission universelle de patrimoine*). Importantly, the creditors of the dissolved company may, within 30 days of the publication of the notarial deed, request the President of the District Court, sitting as in urgent matters, to order adequate safeguards.

A separate statement from the management body of the company will therefore also sometimes be requested by the notary with respect to this transfer of debts of the dissolved company and creditors' information.

IV - Tax aspects

Upon liquidation, the company will be considered as having realized all its assets and liabilities at market value whereby any gains and profits will be subject to corporate income tax (**CIT**) at the rate of 29.22%, save the application of any exemption (like the participation exemption, gains on foreign real estate, etc.). However, the distribution of the liquidation proceeds will not be subject to withholding tax.

Further to the dissolution of the company, the latter will file a first CIT return upon opening of the liquidation. A second one will have to be filed upon closing of the liquidation, unless the time lapse between opening and closing of the liquidation exceeds a period of 3 years in which case a CIT return needs to be filed for each year. In case of a simplified liquidation, only one CIT return needs to be filed.

It should finally be noted that during the liquidation period the company remains subject to CIT and net wealth tax (**NWT**), including the minimum NWT in the amount of EUR 3,210 *per annum* (as of 1 January 2016).

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