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DISSOLVING A COMPANY: WHAT DOES IT MEAN AND HOW IS IT DONE?

Ajay Maraj

Many countries around the world continue to grapple with the effects of the Covid-19 pandemic, which has brought more than its fair share of challenges, Trinidad and Tobago ('T&T') being no exception. Private limited liability companies operating within the jurisdiction have faced continuous operational challenges which threaten the viability of some companies. These operational challenges have resulted in the closure or dissolution of numerous private limited liability companies in T&T.

This Article will briefly explore the circumstances and methods by which private limited liability companies in T&T may be dissolved.

WHY ARE COMPANIES DISSOLVED?

The reason for winding-up or dissolving a company can typically be due to the company being unable to pay its debts. Dissolutions can also occur due to shareholders' desire for the company to cease carrying on business and for its assets, after payment of all liabilities, to be distributed among the shareholders.

During the winding up process, the assets of the company are realized, the debts paid, and the surplus of the realized assets (if any) are distributed to the shareholder(s) of the company in proportion of their shareholding.

The reason for dissolving a company will inform the method by which the Company may be dissolved.

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HOW ARE COMPANIES DISSOLVED?

The Companies Act of T&T Chap. 81:01 (the 'Companies Act') provides for two overarching modes of dissolution or winding up, namely:

- Winding Up by the Court (i.e. Compulsory Winding Up); and
- Voluntary Winding Up.

WINDING UP BY THE COURT

A company may only be wound up by the Court in certain circumstances and upon the requisite petition being made. Under the Companies Act, a company may be wound up by the Court if:

(a) the company has by special resolution resolved that the company be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for an entire year;

(c) the company is unable to pay its debts;

(d) an inspector has reported that he is of the opinion:

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up; or

(e) the Court is of the opinion that it is just and equitable that the company should be wound up.

For the purpose of a compulsory winding up, a company is deemed to be unable to pay its debts if:

- following the demand from a creditor, the company is unable to or neglects to pay a debt exceeding the sum of $5,000 within 3 weeks or to secure or compound the debt to the reasonable satisfaction of the creditor;
- the execution (or other process) issued on a judgement of any Court in favour of a creditor of the company is returned unsatisfied – whether in whole or in part; or

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CUSTOMS POLICIES ON THE WEDGE:
HIGH COURT RULES AGAINST CUSTOMS ORDER

Deandra Frederick

For businesses who rely on importing goods or raw materials it is undisputed that certainty of supply, fixed classifications for tariff purposes, and the application of appropriate rates of duty are key to fixing prices of goods and stability in local market supply chain. Transparency in the trade facilitation process and the access to recourse when disputes arise are therefore pivotal in the effective facilitation of trade.

In Trinidad and Tobago, Customs activities including the fixing of classifications and tariffs are governed by the Customs Act Chap: 78:01. The classification of goods is determined in accordance with the Universal General Rules for the Interpretation of the Harmonized System which is found in the First Schedule to the Customs Act which also sets out the general classifications of goods and the rates of duty payable.

In the recent case of Westco Foods Unlimited v the Comptroller of Customs, the High Court of Trinidad and Tobago held among other things that there was no legal justification for a post clearance audit conducted by Customs which resulted in a demand from Customs that the Claimant, an importer of food products, make payment of short-levied duties. The Court also held that the Claimant had a right to be heard on the audits conducted by Customs particularly where the Claimant had complied with all of Customs' requirements and had already taken delivery of the goods.

Evidence in the case showed that for a certain period the Claimant in its self-assessment declaration form had been using the code which related to the preferential rate of import duty of 5% for the importation of the same product under the general heading "French Fried Potatoes" to include wedges and there had been no dispute by the Division to the Claimant's use of this tariff code to clear the goods.

At the time of delivery the Claimant would have paid the duty that was due in accordance with its obligations under the Act and the Court held that it was obviously impermissible for the Comptroller to retrospectively impose back tariffs for almost nine preceding years on the basis of an order made.

One of the questions in the Westco case was– whether an importer, who had taken delivery of goods was entitled to be heard on the audits conducted.

Post clearance audits or audit-based controls are defined by the Revised Kyoto Convention as measures by which Customs satisfy themselves as to the accuracy and authenticity of declarations through examination of the relevant books, records, business systems and commercial data held by persons concerned.

The circumstances of the Westco case presented unique facts such that there ought to have been adherence to the fundamental rules of natural justice. This could have been effected by the Claimant being afforded an opportunity to participate in the process; being given prior notice of Customs' intention to perform the audits with reasons for such audits and also by the Claimant being provided with the opportunity to be heard on the legal authority for it, as well as on the methodology to be engaged in the audit. However it was found that these steps were not undertaken.

Evidence was put forward that Customs neither consulted with nor sought the representation of the Claimant/importer prior to the performance of the Post-Clearance Desk review on the imported items.

It was therefore found that the policy of Customs to conduct the post-clearance audits without first affording the Claimant an opportunity to be heard was improper, unfair and illegal and that it betrayed the basic requirements of fairness.

This case highlights some key issues and measures in trade facilitation which, if conducted effectively, contribute to pro-trade and a competitive national economy while maintaining appropriate revenue collection and border controls. These include but are not limited to transparency and access to recourse which are briefly touched on below.

Scope of the Customs Act and role of the Customs Division

The Customs and Excise Division of Trinidad and Tobago (the 'Customs Division') assists the Government in achieving its national and international policy aims. The Division undertakes the roles of revenue collection and protection, application of trade policy, protection of the physical borders, society and the environment and the collection and dissemination of accurate trade related information and statistics.

The Division is therefore responsible for enforcing, not only the Customs Act, but the Value added tax, the Excise General Provisions and the Free Zones Act just to name a few. One pivotal objective of the Customs Division is that of encouraging voluntary compliance with these laws and regulations under which the Division is empowered to act.

This is maintained through an awareness of rights and expectations of fair and efficient treatment and the implementation of clear, simple legislation and 'user friendly' administrative systems and procedures.

Transparency in Trade facilitation

The traditional public image of the Customs official is often portrayed as the uniformed man or woman at a frontier post or airport and we often believe that the term 'trade facilitation' solely involves State entities such as the Ministry of Trade in its role as the facilitator of business. However, the truth is that other actors are involved in this process such as the private sector (producer/exporter or importer) as well as other non-customs entities who play just as important a role.

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It is no doubt understood that business requires predictability in costs, processes, and government requirements. However, at both ends of the coin transparency is crucial. It supports businesses by making the "rules of the game" available and enables the state to adequately effect its objectives. This compliance is also facilitated when there is participation of trade stakeholders in both the public and private sector by consultation and interaction in the legislative process, providing their views and perspectives on proposed laws before enactment to facilitate compliance.

Access to Recourse

Providing importers with access to recourse is crucial as there can often be an imbalance of power between a trader and customs particularly where a majority of the disputes in Trinidad and Tobago concern classification issues as was illustrated in the Westco "wedges vs French fries debate." Access to recourse ensures that customs administrations work in a transparent way and that they are held accountable for their decisions. One way this is done is through an appeal or review mechanism.

This access is provided for under the Customs Act. Where documentary submissions do not support physical examinations with regard to the quantity and description of the declared goods, Customs often requires payment of additional duties. Based on the level of discrepancies found by Customs, fines may also be payable. At the point of the physical examination of cargo, if an importer disagrees with Customs' decisions they may ask for an on-site administrative review. In the case of a continued disagreement however, the importer has 90 days to appeal to the Classification Committee under the Comptroller of Customs and Excise; the time-frame for resolution of disputes at this level is 90 days with the final avenue for appeal being the Tax Appeal Board.

The governing principles relative to these appeals are set out in the Revised Kyoto Convention. The appeal system should consist of four levels: (1) the right to request the reason for the decision, (2) the right of an initial appeal to customs, (3) the right of further appeal to an authority independent of customs, and (4) the right of appeal to a judicial authority.

As seen from the Westco case customs had recalculated the duty payable by the importer with the possibility of the imposition of excess duty/ short levy duty which was found to interfere with his right to property. The Claimant since taking delivery of the goods would have long operated on the basis of what he considered to be the appropriate commercial costs. The Claimant was only asked to submit literature relative to the classification dispute after the Customs Order determining the issue had been made. In the circumstances of the Westco case this opportunity to submit literature did not discharge Customs duty to provide the Claimant with the opportunity to be heard.

In all cases, customs ought to be required to provide the reasons for the review decision in writing to ensure transparency. The right of appeal in customs matters will contribute to a predictable trading environment, especially in conjunction with the publication of customs law and regulations. Often the experience of importers will indicate that delays and bureaucratic hindrances when trading can operate as barriers that are sometimes much more restrictive than the tariff itself.

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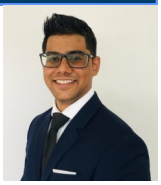

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it is proved to the satisfaction of the Court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company

WHO CAN PETITION THE COURT?

An application for the winding up of a company may be presented by:

- the company;
- a creditor of the company;
- a contributory (a person liable to contribute to the assets of the company in the event of it being wound up);
- the trustee in bankruptcy to, or the personal representative of, a creditor or contributory;
- any two or more of the parties referred to above.

WINDING UP ORDER

On hearing a winding up petition, the Court may: dismiss it, adjourn the hearing conditionally or unconditionally, make any interim order or make any other order that it thinks fit.

That said, the Court shall not refuse to make a winding up order for the sole reason that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

In the event a winding up order is granted, a liquidator is appointed by the Court to administer the affairs of the company. It is the main responsibility of the liquidator to secure that the assets of the company are realized and distributed to the company's creditors, and in the event of a surplus, distributed to the shareholders. A copy of the winding up order is required to be lodged by the company, with the Registrar, who shall make an entry thereof in his records relating to the company.

COMPLETION OF WINDING UP BY THE COURT

When the affairs of a company have been completely wound up, the Court shall make an order to this effect. The company is deemed to be dissolved from the date of this order.

VOLUNTARY WINDING UP

Voluntary winding up may occur in the following circumstances:

- when the period (if any) fixed for the duration of the company by its articles expires;
- when the event (if any) on the occurrence of which its articles provide that the company is to be dissolved occurs;
- if a general meeting so resolves by special resolution; or
- if the company resolves by ordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

A voluntary winding up may be either:

- a members' voluntary winding up ('Members' Winding Up'); or
- a creditors' voluntary winding up ('Creditors' Winding Up')

The main distinction between the modes of voluntary winding up being that a Members' Winding Up is conducted only when a company is solvent (the directors of the company are required to make a statutory declaration to this effect) whereas a Creditors' Winding Up is applicable to companies which are insolvent.

MEMBERS' WINDING UP

Where it is proposed to wind up a company voluntarily, the directors of the company are required to make a declaration of solvency to the extent that they have made a full inquiry into the affairs of the company and are of the opinion that the company will be able to pay its debts in full within a specified period, not in excess of 12 months from the commencement of the winding up. The declaration of solvency must be accompanied by a statement of the company's assets and liabilities at the latest practicable date before it is made.

Following the declaration of solvency, the shareholders, by special resolution, resolve to wind up the company. This resolution must be made and filed at the Registry within 5 weeks of the date of the declaration solvency. When resolving to wind up the company, the shareholders also appoint a liquidator who is tasked with realizing the assets of the company, satisfying outstanding debts and distributing the surplus to the shareholders.

CREDITORS' WINDING UP

Where no statutory declaration of solvency on behalf of the directors is filed with the Registrar, the voluntary winding up is classified as a Creditors' Winding Up.

In the event of a Creditors' Winding Up, the company is required to summon a meeting of its creditors. At said meeting, the directors are required to provide a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims. A notice of the meeting of creditors is required t

o be advertised in the Gazette and published in a local newspaper.

The creditors and the company, at their respective meetings, may nominate a liquidator for the purpose of winding up the company's affairs. If different persons are nominated, the person nominated by the creditors is to be appointed liquidator subject to variation by the Court. The creditors may also appoint a committee of inspection to act with the liquidator.

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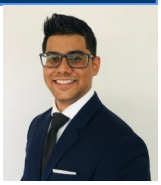

COMPLETION OF VOLUNTARY WINDING UP

In relation to a Members' Winding Up, upon the completion of the winding up of the affairs of the company, the liquidator is required to make an account of the winding up illustrating how it has been conducted (inclusive of how the property of the company has been disposed) and have the said account audited. The audited account is then laid before a meeting of the company.

Within 1 week of the meeting of the company, the liquidator is required to lodge a copy of the audited account with the Registrar and make a return of the meeting held. On receiving the audited account and return, the Registrar is required to register same. The company is deemed to be dissolved on the expiration of 3 months from the date of registration of the return.

The process to mark the completion of a Creditors' Winding Up largely mirrors the above process in relation to a Members' Winding Up, save that for a Creditors Winding Up the liquidator is required to hold meetings of both the company and the creditors of the company for the purpose of presenting the audited accounts of the winding up.

EFFECT OF VOLUNTARY WINDING

In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on business except so far as what may be beneficial in the opinion of the liquidator for winding up. Notwithstanding this, the corporate state and powers of the company continues until it is dissolved.

CONCLUSION

While dissolution may seem like a daunting process, the Companies Act sets out the relevant requirements which must be adhered to in order to formally close (or dissolve) private limited companies in T&T. The above provides a high level overview of the methods by which a company may be dissolved and does not represent an exhaustive list of requirements.

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