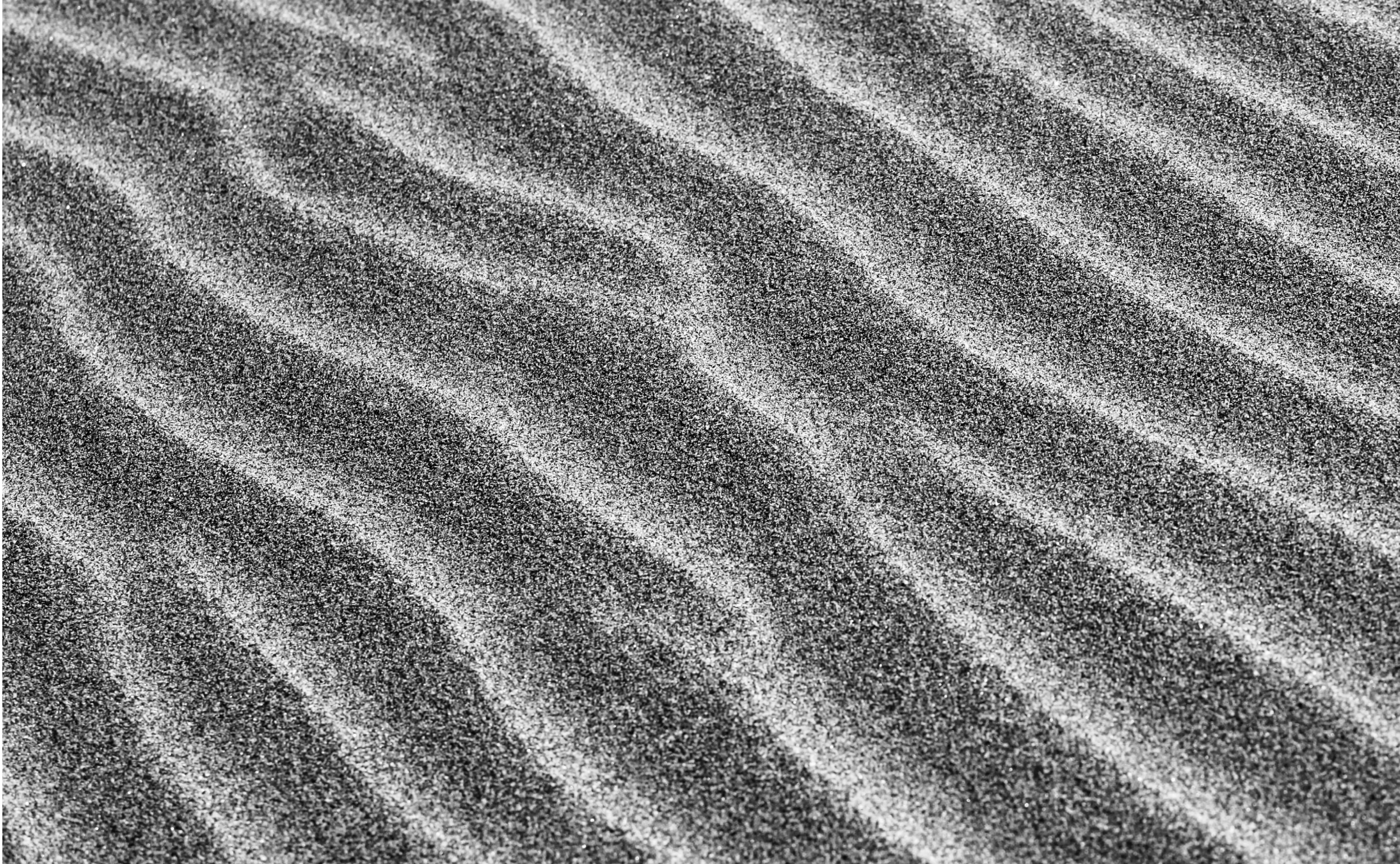
A&O SHEARMAN

Restructuring across borders
Cyprus

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | JANUARY 2024



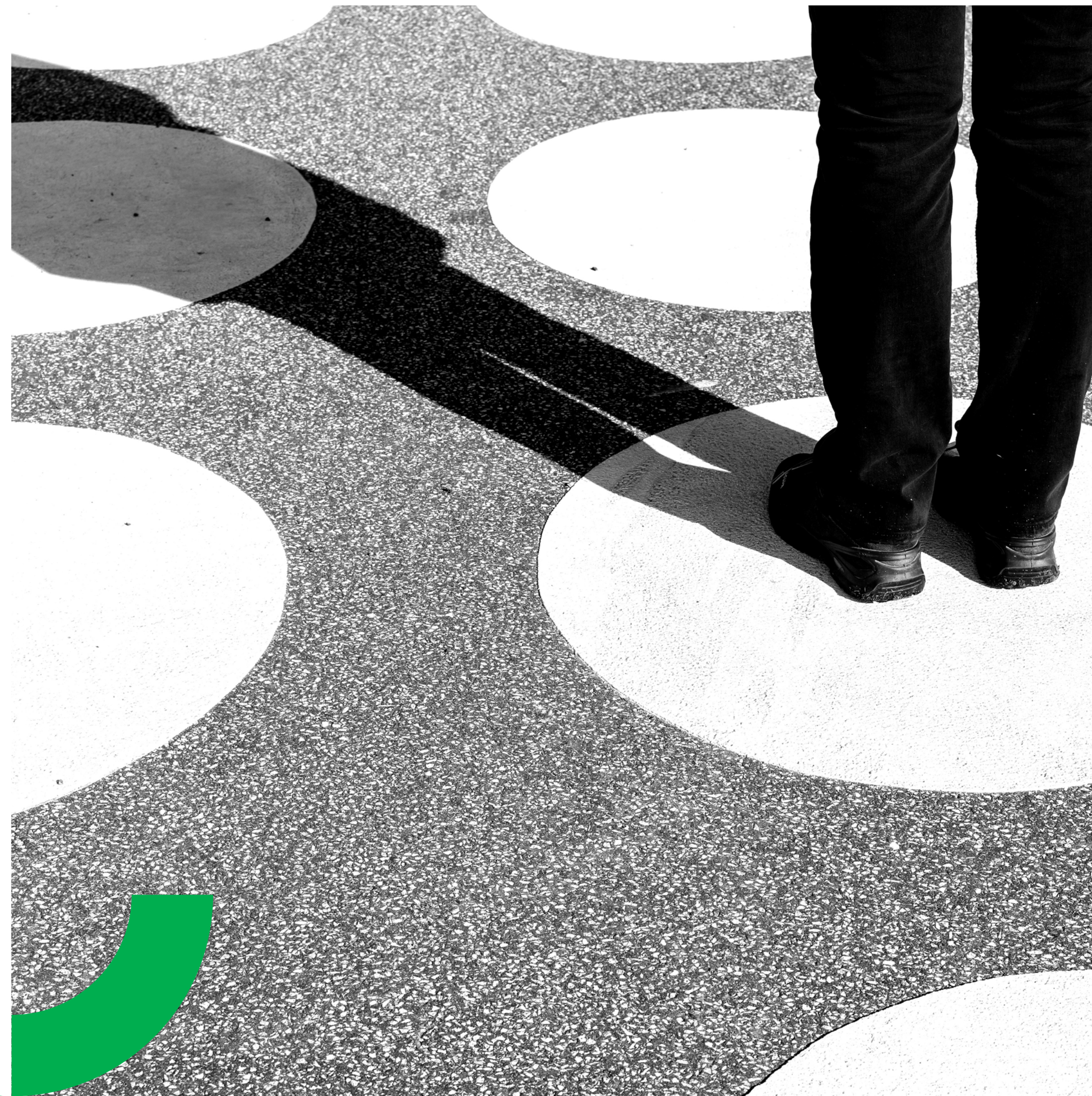
Contents

Introduction

When a corporate borrower faces financial difficulties there are a variety of restructuring and insolvency options available.

The principal restructuring and insolvency regimes for companies under Cypriot law are:

- schemes of arrangement;
- receivership;
- examinership; and
- liquidation or winding-up.



Liquidation or winding-up

Liquidation (or winding-up) is the method by which the life of a company is terminated under Cypriot law. In relation to cases of insolvency, it is a measure by which a legal entity or a company which has incurred debts and is unable to pay them is wound-up, the assets are realised and the proceeds distributed among stakeholders in line with a pre-determined order of priority. A liquidator will be appointed and will take into their custody or control all the property and things in action to which the company is, or appears to be entitled, distributing the proceeds of realisation of these assets to the creditors and (if there is a surplus after payment of creditors) to the shareholders of the company.

Shareholders, creditors and the court have different degrees of control depending on the type of liquidation. Once the process has been completed, the company is dissolved.

There are four different types of liquidation under Cypriot law:

- winding-up by the court, also known as compulsory liquidation;
- winding-up subject to the supervision of the court;
- creditors' voluntary winding-up; and
- members' voluntary winding-up.

Winding-up by the court

This is often referred to as compulsory winding up and is commenced by an application to the competent (district) court, for an order for the winding-up of a company, or by the relevant resolution passed by the company prior to the filing of the application. The competent court is that of the district in which the company has its registered office. The application may be filed inter alia by the company, the Official Receiver (i.e. the Insolvency Department), a contributory or a creditor.

Insolvency of the company is the ground for winding-up by the court most commonly encountered in practice. This mode of winding-up, however, is also available in potentially solvent situations where:

- the company has resolved by special resolution to enter into compulsory liquidation;
- it is effectively dormant (i.e. does not commence its business within a year from its incorporation or suspends its business for a whole year);
- the court is of the opinion that it is just and equitable that the company should be wound-up; or
- the company is a public company that has failed to file the requisite statutory report or to hold its statutory meeting.

A winding-up by the court imposes a greater degree of court control than other types of winding-up, although in all types of winding-up proceedings, the liquidator can apply to court for the determination of questions arising in the winding-up.

Winding-up subject to the supervision of the court

When a company has passed a resolution for voluntary winding-up, the court may make an order that the voluntary winding-up shall continue subject to the supervision of the court on such terms as the court considers appropriate (including the ability of the company, creditors, contributories and the liquidator to apply to the court). This allows a wider category of persons to apply to court, and to gain representation for their interests in the liquidation process, than in the unsupervised forms of voluntary winding-up.

A petition for a voluntary winding-up to continue subject to the supervision of the court will, for the purpose of giving the court jurisdiction over actions, be deemed to be a petition for winding-up by the court. As in a winding-up by the court, this will trigger provisions which invalidate subsequent dispositions of property of the company (subject to the court's consent) and prevent enforcement against the company. The court may order the appointment of an additional liquidator, and/or may remove an incumbent liquidator.

Additional and existing liquidators have the same powers and obligations, and exercise their powers, subject to any restrictions imposed by the court, as if the company was in voluntary winding-up, and, generally, without any statutory requirement for further sanction or intervention by the court. By way of exception, the court's sanction is needed for the liquidators to (i) pay any classes of creditors in full; (ii) make any compromise or arrangement with creditors or alleged creditors; and (iii) compromise all calls, debts and claims.

If the voluntary winding up, prior to becoming subject to the court's supervision, was a creditors' voluntary winding up, then the necessary sanction for these issues may alternatively be obtained from the so-called "committee of inspection".

Creditors' voluntary winding-up

This is the only form of voluntary liquidation available to a company that is unable to pay its debts in full and is controlled by the creditors, in whose interests the winding-up is undertaken If a resolution is proposed for creditors' voluntary liquidation the company must summon a meeting of its creditors for not later than the day after the resolution for the voluntary winding-up is proposed.

Commencement of a creditors' voluntary winding-up on the grounds of insolvency requires an extraordinary resolution to be passed by at least 75% (or such other higher percentage as the company's articles may provide) of the shareholders present in person or by proxy and voting at a meeting of the company, of which notice has been duly served. If the resolution for winding-up is on the grounds that an event has occurred which the company's articles specify as triggering a winding-up, then only a majority of the shareholders present or represented and voting at the meeting is required (or such other higher majority as the company's articles may provide).

In addition to passing a resolution to wind up the company the members may nominate a person to be liquidator for the purpose of winding-up the affairs and distributing the assets of the company. The first meeting of creditors may confirm the members' appointee or may appoint another liquidator to act in their place. In the case of a disagreement between the members and creditors, the creditors' wishes prevail, subject to a right to apply to the court, in which case the Court may order that the liquidator nominated by the members can act jointly with the liquidator nominated by the creditors or in their place or may order that another person is appointed as liquidator.

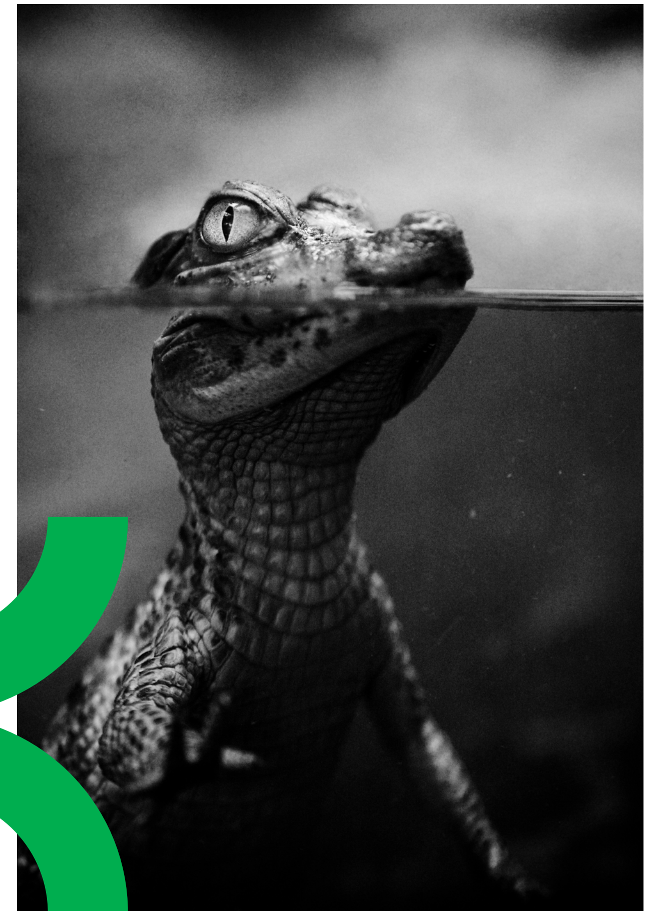
If for any reason there is no liquidator acting, the court may appoint a liquidator. The court may, if it is satisfied that there are grounds for so doing, remove a liquidator and appoint another liquidator. The liquidator, contributory or creditor may apply to the court to determine any question arising in the winding-up of a company or to exercise, in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court.

Members' voluntary winding-up

A members' voluntary winding-up is carried out under the control of the members. It is therefore available only to companies that are able to pay all their debts in full. Prior to the commencement of a members' voluntary liquidation the directors of the company are required under s.266 of the Companies Law, Cap.113 (the Law) to make a statutory declaration verified by affidavit, that having made a full inquiry into the affairs of the company they are of the opinion that the company will be able to pay its debts in full within a maximum of 12 months from the commencement of the winding-up. This declaration will not be effective unless it is made within a period of five weeks prior to the date of the passing of the resolution for the winding-up, and also embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration. The declaration of solvency must be delivered to the Registrar of Companies before the day the resolution to wind up is passed.

The resolution to wind up will generally appoint one or more liquidators for the purpose of winding-up the affairs and distributing the assets of the company and may fix the remuneration to be paid them. On the appointment of a liquidator, all the powers of the directors cease unless the liquidator or the company in a general meeting approve their continuation, which is unlikely to happen in practice.

As soon as the affairs of the company are fully wound-up, the liquidator is required to compile an account of the winding-up showing (i) how the winding-up has been conducted; and (ii) how the property of the company has been disposed of. The liquidator is also required to call a general meeting of the company for the purpose of laying before it the account and giving any explanation required by the members. The liquidator is required to submit a return of the holding of the meeting and of its date, accompanied by a copy of the account, to the Registrar of Companies. The Registrar of Companies must register the return immediately and the company is deemed to be dissolved on the expiration of three months from the date of registration of the return, subject to the court's discretion, on the application of the liquidator or any other person who appears to the court to be interested, to make an order deferring the effective date of dissolution for such time as the court thinks fit.



Schemes of arrangement

Pursuant to the Law, a compromise or arrangement may be proposed between a company and its creditors or between the company and its members or any class of them. Under such an arrangement, the court may, on application by the company or any creditor or member or, in the case of a company being wound-up, by the liquidator, order a meeting of the creditors or of the members of the company to be summoned in such a way as the court directs.

Any compromise or arrangement passed at such a meeting by a majority in value of creditors or a majority in votes of members present or represented, and subsequently approved by the court, is binding on all the creditors or members or any class thereof, as the case may be, and also on the company and, in the case of a company being wound-up, on the liquidators and contributories of the company.

To have binding force on (i) all the creditors or a class of creditors; (ii) all the members or class of members, as the case may be; (iii) on the company; or (iv) in the case of a company in the course of being wound-up, on the liquidator and contributories of the company, the court order must be delivered to the Registrar of Companies for registration.

Schemes of arrangement or reconstruction were not listed as main or secondary proceedings under the Original Regulation (as defined below) and are not listed in Annex A of the Recast Regulation (as defined below).

However, Article 47 of the Recast Regulation allows a secondary proceeding to be closed by means of a restructuring plan, composition or comparable measure to the extent that such measure is available in the local jurisdiction. Cypriot law allows for an arrangement between a company in the course of a voluntary winding-up and its creditors to be binding on the company if the appropriate creditor and company resolutions are passed, and it may therefore be possible to open creditors' voluntary winding-up proceedings as secondary proceedings under the Recast Regulation, and then to exit from them via a scheme of arrangement.

Receivership

Receivership is principally a "self-help" remedy for debenture holders, although other creditors may make an application to court for a court-appointed receiver. Receivership is not a collective proceeding (although a liquidation will not displace an existing receiver and does not prevent receivers from being appointed during the liquidation), was not listed in the Annexes to the Original Regulation (as defined below) and is not listed in Annex A of the Recast Regulation (as defined below).

A receiver may be appointed by a debenture holder over only part of the company's property, or over the whole or substantially the whole of it (pursuant to a floating charge in the debenture), and will have slightly different powers and duties depending on whether they are appointed in respect of part, or the whole of the company's property. A receiver appointed under a floating charge over the whole or substantially the whole of the company's property has power to manage the business and the Law requires the directors of the company to prepare and submit to them a statement as to the company's affairs showing (i) full particulars of the company's assets, debts, liabilities as at the date of their appointment; (ii) the names, addresses and occupations of its creditors; (iii) the securities held by them respectively; (iv) the dates when the securities were respectively given; and (v) such further information as may be prescribed. Unless the debenture provides otherwise and they contract out of liability, the receiver will be personally liable on any contract entered into by them in the performance of their functions, but they will be entitled to an indemnity out of the company's assets in respect of that liability.

The receiver has wide powers to enable them to perform their functions including the ability to manage a company's business and to sell its assets. The primary duty of the receiver is owed to their appointer although they owe a duty to the company, guarantors and creditors to exercise their powers in good faith.

Examinership

The examinership process is intended to provide a "breathing space" during which a company facing insolvency is placed under the court's protection while an insolvency practitioner appointed by the court assesses its business and, if appropriate, compiles a rehabilitation plan, based on a voluntary arrangement. The procedure is available to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures.

The company, a creditor or a member holding not less than 10% of the paid up voting share capital or a guarantor of the company's obligations may present a petition for an examiner to be appointed. The petition must be accompanied by a report by an independent expert (either the auditor of the company or another auditor or a licensed insolvency practitioner) providing the information required to demonstrate that the company has a viable future and outlining a recovery plan.

In order for the court to appoint an examiner the following tests must be satisfied:

- The company must be insolvent or there must be a likelihood of insolvency;
- No resolution has been passed for voluntary winding-up of the company;
- No order has been made for the company to be wound-up;
- No receiver has been in office for 30 days or more; and
- The court must be satisfied that there is reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

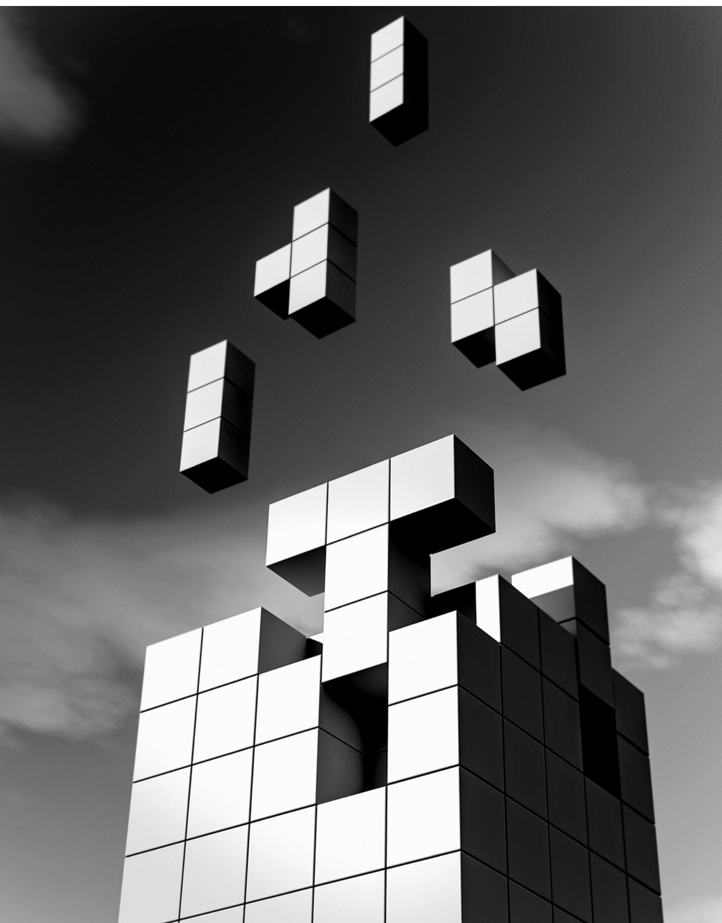
On hearing the petition the court may make the order requested, dismiss it or make any other order it deems appropriate.

While the company is under the court's protection no petition may be presented for the company to be wound-up, nor may any resolution be passed for it to be wound up. No legal action may be taken against the company to recover any debt without prior court permission, no receiver may be appointed and any receiver in place may be required to cease to act, and no steps may be taken to repossess goods in the company's possession, without the prior consent of the examiner. No proceedings may be commenced against any guarantor of the company's debts. The foregoing prohibitions do not apply to creditors of the company who are its employees with particular types of claim which are listed in the legislation.

The initial period of court protection isfour calendar months from the date of presentation of the petition, and the examiner, or any person entitled to apply for the appointment of an examiner to the company, may request the extension of the protection period. The maximum duration of the protection period cannot exceed12 months from the date of presentation of the petition (except in the case of companies whose center of main interests has transferred to Cyprus from another EU Member State within a three-month period prior to the presentation of the petition, in which case the maximum duration of the protection period cannot exceed 4 months from the date of presentation of the petition). Before the end of this period the examiner must prepare proposals for a voluntary arrangement and present them to the court.

The procedure generally concludes either with the approval of the examiner's proposals for a voluntary arrangement or with their rejection. If the examiner concludes that they are not able to put forward proposals, they may apply to the court for directions and the court may give such directions or make such order as it deems fit, including an order for the company to be wound-up.

European Insolvency Regulation



The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings. Main proceedings are the proceedings opened in the EU Member State where the debtor company has the so-called "centre of its main interests", while secondary/territorial proceedings are proceedings in any other EU Member State, in which the debtor company has an establishment. Secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. This means that secondary proceedings may now aim to rescue the company, rather than simply winding it up. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, winding-up by the court (compulsory liquidation), winding-up subject to the supervision of the court, creditors' voluntary winding-up and members' voluntary winding-up were available as main proceedings under the Original Regulation. Winding-up by the court (compulsory liquidation), winding-up subject to the supervision of the court and creditor's voluntary winding-up were available as secondary proceedings.

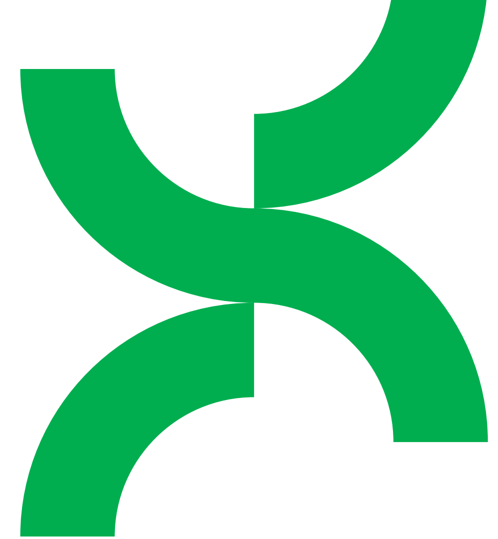
Under the Recast Regulation, winding-up by the court (compulsory liquidation), winding-up subject to the supervision of the court, creditors' voluntary winding-up, members' voluntary winding-up and examinership are listed in Annex A.

Note that examinership was only added to Annex A by means of an amendment on 9 January 2022.

It should be noted that the availability of members' voluntary liquidation as a main proceeding is anomalous since, by definition, the members' voluntary liquidation procedure is available only to solvent companies.

Examinership, schemes of arrangements and receivership were not listed in Annex A of the Original Regulation, and schemes of arrangements and receivership are not listed in Annex A of the Recast Regulation.

Key contacts



If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

This factsheet has been prepared with the assistance of Georgiades & Pelides LLC. Any queries under Cyprus law may be addressed to the key contacts listed below from Georgiades & Pelides LLC.

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Further information

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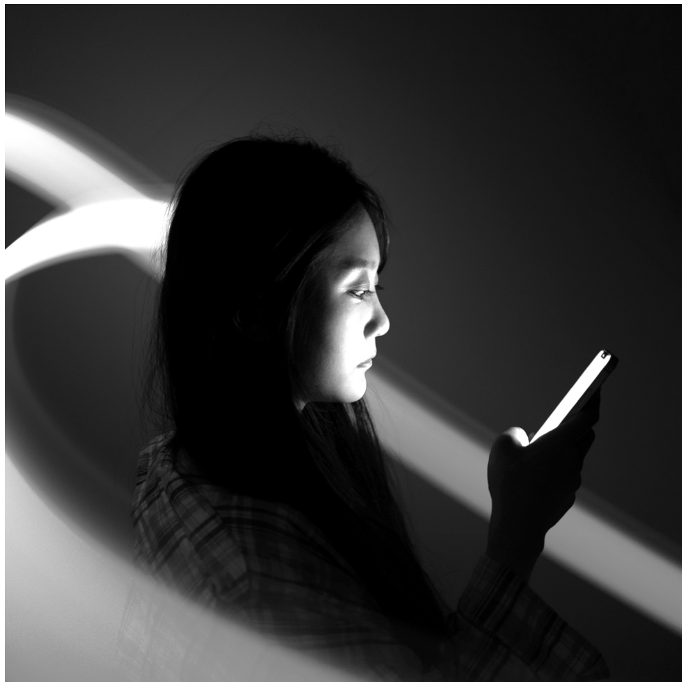
To access this resource, please **click here**.



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