A&O SHEARMAN

Restructuring across borders
Malta

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2025

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Introduction

Under the Maltese Companies Act, 1996 (Chapter 386 of the Laws of Malta) (the "**Companies Act**"), a company can be said to be insolvent when it is "*unable to pay its debts*". A company shall be deemed to be unable to pay its debts:

i) If a debt due by the company has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the company per the Code of Organisation and Civil Procedure; or

ii) If it is proved to the satisfaction of the court that the company is unable to pay its debts (taking into account any contingent and prospective liabilities of the company).

For clarity's sake, "administration" (*amministrazzjoni*), which is listed as an insolvency proceeding under the Recast Regulation, is not a stand-alone procedure under Maltese law. It is unclear as to what "administration" in the context of the Recast Regulation seeks to achieve seeing that under no circumstance does Maltese insolvency law list it as a separate process which is independent of any other. As further outlined below, it is the company recovery procedure, which is a "stand-alone" insolvency process and which is largely modelled on the administration procedure in the UK and, as specified above, this is not referred to as "administration" under Maltese Company law.

Another possible interpretation of "administration" could revolve around the fact that under Maltese law, reference is made to the appointment of a provisional administrator (*Amministratur Provizorju*), but, again, this is not a similar process to what is termed "administration" under UK law and is not typically considered to be a stand-alone insolvency proceeding. The provisional administrator is however listed under Annex B of the Recast Regulation as an insolvency practitioner. In fact, said provisional administrator is a court appointed official who is bestowed with powers and functions relative to the administration of the estate or business of the company in the context of a winding up by the court. The provisional administrator may be appointed by the Court at any time after the presentation of a winding up application and before the making of a winding up order. As stated, the appointment of said official is done within the context of a winding up by the court and is not independent of it.

The provisional administrator holds office until the winding up order is made or the winding up application is dismissed, unless before this they resign or are removed by the court upon a good cause being shown. The law does not define the term "good cause" and much is left to the discretion of the Court to determine the same on a case by case basis, seeing that the Maltese courts are not bound by the doctrine of judicial precedent, but an example of a good cause for the removal of a provisional administrator would be misconduct or fraud by such an officer.

Notably, in December 2022, the Maltese legislature transposed Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) by promulgating three different laws: (i) the Pre-Insolvency Act (Chapter 631, Laws of Malta), (ii) the Insolvency Practitioners' Act (Chapter 632, Laws of Malta) and (iii) the Commercial Code (Amendment) Bill. In particular, the Pre-Insolvency Act has created a new court procedure under Maltese law which is applicable to a number of legal persons, including limited liability companies which are facing a "likelihood of insolvency" and in connection with which a preventive restructuring application may be filed in Court. The purpose behind the Pre-Insolvency Act is to provide entities falling within its scope with the tools and procedures required to avoid insolvency where this is a viable option and to avail of the opportunity to restructure.

Towards the end of 2024, the Insolvency and Receivership Service within the Malta Business Registry announced the launch of the very first "self-assessment insolvency tool" intended to give companies the preliminary tools to be able to assess their own position and their viability going forward as well as the ability to detect circumstances which may give rise to a "likelihood of insolvency", which triggers a positive obligation on the directors of such company to convene a board meeting for the purpose of reviewing the company's position and determining the appropriate steps to be taken to deal with such situation – always having regard to the interests of the company's creditors, employees, shareholders and other stakeholders. This "review" should include (but is not limited to) giving due consideration as to whether the company should consult with an insolvency practitioner and / or make a preventive restructuring application in terms of the same Pre-Insolvency Act. It should also be noted that the long-awaited list of Insolvency Practitioners which are required to be appointed in the event of the filing of a preventive restructuring application, has also been published by the same Insolvency and Receivership Service.

The restructuring and insolvency regimes for companies under Maltese law, under the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "**Recast Regulation**") are:

- dissolution (*xoljiment*);
- administration (*amministrazzjoni*);
- members' voluntary winding up (*stralċ volontarju mill-membri*);
- creditors' voluntary winding up (*stralċ volontarju mill-kredituri*);
- winding up by the court (*stralċ mill-qorti*); and
- company recovery procedure (*biex kumpanija tirkupra*).

Dissolution (*xoljiment*)

A company is said to be in a state of dissolution once the decision has been taken to wind up the company. As a matter of chronology, for the purposes of Maltese law, dissolution precedes a company's winding up and subsequent striking-off from the company registry.

The Companies Act provides that a company can be dissolved on a number of grounds including where it has resolved to do so itself, by means of an extraordinary resolution. Said resolution may specify either that the company will be dissolved and consequently wound up by the court or else that it will be wound up voluntarily. It is to be noted that an extraordinary resolution is one which is (i) taken at a general meeting for which a notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and (ii) in the case of public companies, the resolution is passed by at least 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51% (or such higher percentage as the memorandum or articles may prescribe) in nominal value of all the shares entitled to vote at the meeting (whether present or not), or in the case of a private company, the resolution is passed by a number of members having the right to attend and vote at any such meeting holding in aggregate not less than 51% in nominal value of the shares conferring that right (or such other higher percentage as the memorandum or articles may prescribe). Furthermore, a company may be dissolved and eventually wound up by the court in the event that the business of the company is suspended for an uninterrupted period of 24 months or if the company is unable to pay its debts.

The Companies Act further provides that a company *shall* be dissolved by the court, and wound up either by the court or voluntarily (in accordance with the court's discretion) in any of the following cases:

- where the number of members of the company is reduced to below two and remains so reduced for more than six months (for obvious reasons, this does not apply to single member companies);
- where the number of directors is reduced to below the minimum prescribed by law (one director for a private company and two directors for a public company) and remains so reduced for a period of more than six months;
- if the court is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding up of the company; or
- when the period stipulated in the memorandum and articles for the expiration of the company has expired, or an event occurs according to which the memorandum or articles provide that the company is to be wound up **and** there has been no extraordinary resolution to the effect that the company should be wound up voluntarily.

It is to be noted that the law does not provide a definition or a list of what qualifies as a "ground of sufficient gravity". However, although Maltese Courts and authorities have tended to favour some sort of favour some sort of classification in this regard, such classifications are not exhaustive. This ground is likened to the "just and equitable" ground under English law which has served as guidance for our Courts which commonly refer and rely on English authorities and jurisprudence in this area of law. Examples of grounds of sufficient gravity could therefore include situations of deadlock within a company both at board level or at shareholder level or situations where the substratum of the company has disappeared ie the company has abandoned all of its main objects. Despite these examples of what could qualify as grounds of sufficient gravity, our Courts have held that their discretion here is extremely wide and depending on the facts of the case, any facts and circumstances could potentially fall within this ground so it cannot exclude any possibility and the Courts will determine whether the facts justify a ground of sufficient gravity on a case by case basis.

In certain cases, the court may, upon good reason being shown, allow for a period of time in which the relevant default may be remedied.

For the purposes of Maltese law, "dissolution" is therefore akin to a declaration of status and is not an insolvency procedure *per se*, even though it was listed as such in the Recast Regulation. It denotes the start of every winding up procedure that a company may undergo, whether solvent or insolvent.

Members' voluntary winding up (*stralċ volontarju mill-membri*)

A members' voluntary winding up is a winding up procedure that can be adopted for the purposes of winding up a company which is solvent. It is primarily distinguished from a creditors' voluntary winding up by the requirement for the directors to make a declaration during the month immediately preceding the resolution to wind up the company, that they have made a full inquiry into the company's affairs and that they have formed the opinion that the company will be able to pay its debts in full within a maximum of 12 months from the date of the resolution. Criminal liability may be incurred if a director makes such a statement without having reasonable grounds to form this opinion as to the company's solvency. This will be deemed to be the case if the company's debts are outstanding or not provided for in full within the period specified in the declaration.

If, during a members' voluntary winding up, the liquidator considers that the company will not be able to pay its debts by the date stated in the declaration referred to above, they will summon a meeting of creditors and lay before the meeting a statement of the assets and liabilities of the company. They therefore have a duty to convert the members' voluntary winding up into a creditors' voluntary winding up and the provisions of the Companies Act applicable to a creditors' voluntary winding up will apply from the date of that meeting. On an application for a court winding up on grounds other than the company's dormancy or insolvency, the court may order the winding up to take effect as a members' voluntary winding up (and the directors' declaration of solvency will accordingly be required).

Creditors' voluntary winding up (*stralċ volontarju mill-kredituri*)

A creditors' voluntary winding up, like a members' voluntary winding up, is a liquidation procedure which is commenced by an extraordinary resolution of the shareholders of the company to place the company into dissolution and consequent winding up. Creditors must be summoned by the directors to a meeting to take place within 14 days of the resolution and the creditors and the members may nominate a liquidator at their respective meetings. If they nominate different persons, the person nominated by the creditors shall be the liquidator. If the creditors do not appoint anyone, the person nominated by the members shall be the liquidator. If neither the creditors (by resolution) nor the members (by extraordinary resolution) nominate a liquidator, a liquidator will be appointed by the court on the application of a director. The winding-up commences on the date of the resolution for the dissolution and consequential winding up of the company (or such later date as may be specified in the resolution) and the company is deemed to have been dissolved on that date.

The most important feature of a creditors' voluntary winding up is that it is an insolvent winding up and the declaration of solvency cannot be made by the directors of the company. This is why it is termed a "creditors'" voluntary winding up, as the creditors play a vital role during these liquidation proceedings. Their interests are paramount during these proceedings due to the insolvent state of the company.

Winding up by the court (*stralċ mill-qorti*)

A winding up by the court may be commenced by a number of interested parties by virtue of an application made to court. A winding up application may be made (i) by the company itself following a decision of the general meeting; (ii) by its board of directors; (iii) by any debenture holder, creditor or creditors; or (iv) by any contributory or contributories. A limited power to initiate winding up proceedings of a company is also granted to the Registrar of Companies. A winding up commenced by court application may in certain cases be converted to a voluntary winding up, and vice versa.

Where a winding up order has been made, the company shall be deemed to have been dissolved at the time of filing of the winding up application. However, where a winding up order is made on grounds of sufficient gravity, the company shall be deemed to have been dissolved on the day on which the winding up order is made. Where a winding up order has been made subsequent to an extraordinary resolution of the company to be dissolved and subsequently wound up by the court, the deemed date of dissolution shall be the date of the passing of the resolution or such later date as specified in the resolution. Additionally, where, before the filing of a winding up application, an extraordinary resolution has been passed by the company for it to be dissolved and consequently wound up voluntarily, the company shall be deemed to have been dissolved at the time of the passing of the resolution.

In a court winding up, the official receiver, which is an office within the Malta Business Registry, is usually appointed by the court and can also act as liquidator of the company as the court directs. As indicated by its name, a court winding up is a court-controlled process. This means that the official receiver or the liquidator, as the case may be, is obliged to report to the court and provide it with an account of the winding up and any other developments and requisite reports.

Company recovery procedure (*biex kumpanija tirkupra*)

Although previously omitted from Annex A of the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the "**Original Regulation**"), the company recovery procedure, unlike a scheme of compromise or arrangement (which shall be discussed further below), is listed as a "stand-alone" insolvency process under the Recast Regulation.

Where a company is unable to pay its debts or is imminently likely to become unable to pay its debts, a company recovery application may be made to the court. Such an application requests the court to place the company under the company recovery procedure and to appoint a special controller to take over, manage and administer the business of the company for a period to be specified by the court itself. The application may be made (i) by the company following an extraordinary resolution; (ii) by the directors, following a decision of the board of directors when, following a notice to convene a general meeting, the general meeting does not convene or a quorum is not present at said meeting, or a resolution with regard to the filing of a recovery application is not passed due to an unresolved tie following a vote; (iii) by the creditors of the company representing more than half in value of the company's creditors; or (iv) by creditors forming part of a class of creditors if such creditors represent more than half in value of the company's creditors in that class.

The court shall issue the order only if it is satisfied that: (i) the company is unable to pay its debts or is imminently likely to become unable to pay its debts; and (ii) the order would be likely to achieve either the survival of the company as a viable going concern either in part or in whole or the sanctioning of a compromise or scheme of arrangement between the company and any of its creditors or members. The court shall take into account the best interests of the creditors and the different classes of creditors, shareholders, the company itself and its employees, as well as the potential costs of a company recovery procedure.

There is a moratorium on judicial proceedings (except with leave of the court), the enforcement of security and the filing of any winding up application or the passing of a resolution for dissolution and consequential winding up (amongst other things) from the date of the application (unless dismissed) and in the period during which the company recovery procedure is in force.

If the court makes a company recovery order, it will appoint a "special controller" to (i) take control of the company's business and assets, (ii) manage the company and its business, and (iii) ascertain whether a recovery plan is viable and, if so, to prepare and submit their initial report thereon to the court within two months of their appointment. The special controller must take into account the best interests of the company, and its shareholders and creditors, together with the interests of any other interested party. They must also examine any proposals made by the applicant. A company recovery order may, upon the application of a special controller, be extended to any company within the same group.

A company recovery order will be made for a maximum of 12 months, extendable for an aggregate maximum of a further 12 months by the courts upon good cause (again undefined in the law and left at the discretion of the Courts) being shown. At the end of the original period, or at the end of each extension, the special controller shall submit to the court a comprehensive report in writing on the proceedings of their administration and of their proposals regarding the prospects for the recovery of the company as a viable going concern in whole or in part. At the conclusion of the special controller's period of appointment (unless otherwise terminated earlier) they will submit a detailed report to court as to whether or not the company has a reasonable prospect of continuing as a viable going concern in whole or in part and whether the company will be in a position to repay its debts regularly in the future. If the report is positive, it will include a detailed recovery plan which, if approved by the court (whether or not with amendments), will be binding on all interested parties, subject to a right of appeal of any dissenting creditors. If the report is negative, or the company recovery procedure is otherwise terminated due to the lack of reasonable prospect of the company continuing as a viable going concern which could pay its debts regularly in the future, the court will order that the company is to be wound up by the court.

Company reconstruction *(rikostruzz joni ta' kumpanija)*

Part VI of the Companies Act outlines two procedures which fall under the general heading of "Company Reconstruction". The first procedure is the company recovery procedure mentioned above which, as discussed, is included in Annex A of the Recast Regulation. The second procedure (which was excluded from the remit of Annex A of the Recast Regulation but remains available under Maltese law) is the scheme of compromise or arrangement, by means of which a compromise or arrangement is proposed and arranged between a company and its creditors, or any class of them, or between the company and its members, or any class of them.

When such an arrangement is proposed and arranged, essentially two options may apply:

The first option allows the court, on the application of (i) the company; (ii) any creditor or member of the same company; or (iii) the liquidator, to order a meeting of the creditors, or of the members of the company or a class of them, to be summoned in such manner as the court directs.

If a majority representing two-thirds in value of the creditors, or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at said meeting, agree to the proposed compromise or arrangement, that compromise or arrangement, if sanctioned by the court, shall be binding on all creditors or the class of creditors or on the members or class of members, as the case may be, and also on the company or, if the company is in the course of being wound up, on the liquidator and contributories of the company.

Alternatively, the company or any creditor, with the sanction of not less than two-thirds of the creditors or class of creditors, may seek the appointment of a mediator in terms of the Mediation Act (Chapter 474, Laws of Malta), and such mediator shall organise a meeting of the creditors, or class of creditors, as the case may be, in order for such creditors and the company to reach a compromise or arrangement.

The principles under the Mediation Act will apply in such cases. In this second option, if all the creditors, as a result of the mediation process, execute a written agreement containing a compromise or arrangement, such arrangement shall be binding on all creditors, and also on the company or, in the case of a company in the course of being wound up, on the liquidator.

A copy of the court's order with respect to the compromise or arrangement reached during the above-mentioned mediation must be delivered to the Registrar of Companies for registration, for it to have effect.

European Insolvency Regulation (Recast)

The Recast Regulation applies to all proceedings opened on or after 26 June 2017 while its predecessor, 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 brought into scope certain "rescue" proceedings, which can be implemented apart from the standard route of dissolution and liquidation for those companies which are unable to pay their debts. These are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation.

The Recast Regulation retained the split between main and secondary/territorial proceedings, but secondary proceedings are no longer restricted to a separate list of winding up proceedings and can now be any of those proceedings listed in Annex A.

Of the above-mentioned restructuring and insolvency regimes/processes, *xoljiment (dissolution), amministrazzjoni (administration), stralċ volontarju mill-membri (members' voluntary winding up), stralċ volontarju mill-kredituri (creditors' voluntary winding up)* and *stralċ mill-qorti (winding up by the court)* were available as main proceedings under the Original Regulation. The Recast Regulation now includes the company recovery procedure *(proċedura biex kumpanija tirkupra)* within its remit under Annex A, but strangely did not mention the statutory scheme of compromise or arrangement which is also a mode of company reconstruction available to insolvent companies under Maltese law.

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's, or email rab@aoshearman.com.

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Further information

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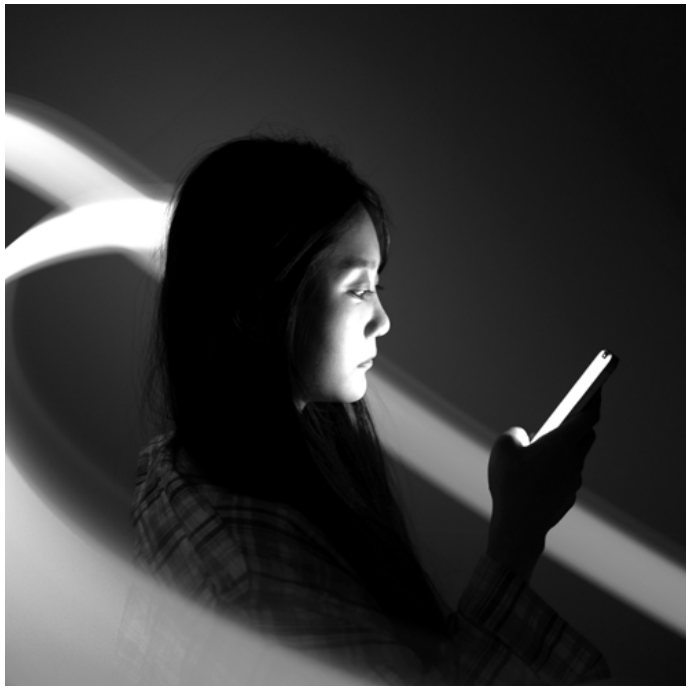
To access this resource, please click here.



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