

Who Would Be The Liquidator of An Insolvent Company?

Written by Kiki Setiawan, S.H., LL.M.

Winding Up of An Insolvent Company

Winding up is a final measure that should be conducted to completely end existence of a limited liability company. This is determined in Article 142 until Article 152 of Law Number 40 of 2007 regarding Limited Liability Company (“**Indonesian Company Law**”).

Article 142 of the Indonesian Company Law provides some grounds of winding up as follow:

1. based on a resolution of the general meeting of shareholders (GMS);
2. due to the expiry of its term of association as provided in the articles of association;
3. based on a court order;
4. by the revocation of its bankruptcy status through a commercial court order having permanent and binding legal force, the bankrupt company's assets being insufficient to settle the bankruptcy costs;
5. the bankruptcy assets of a bankrupt company are insolvent as provided in Law Number 37 of 2004 regarding Bankruptcy and Suspension of Payment Obligations Law; or
6. due to the revocation of the company's business license.

In practice, the GMS shall dissolve the company as a result of the company operating at a loss for certain period of time and enable to recover such loss, the company does not perform its business for three years of more or dispute between shareholders which cause valid resolution cannot be adopted. For foreign investment companies, global economic development, change of parent companies' business strategy or economic barrier from host country play crucial role in this regard.

Duties and liabilities of managing the company shall be legally handed over to the liquidator once the winding up resolution is approved by the Ministry of Laws and Human Rights or the court decision is granted. At this stage, liquidator shall perform its duties to record all company's assets and debts, make an announcement on the distribution of assets resulting from the liquidation, make payments to creditors and shareholders and other acts required for settlement of the assets.

For further information please contact:

Kiki Setiawan and Partners

Office:

Jalan Pedati I No. 15

Jakarta 13330

Indonesia

Meeting Venue:

Palma One Ground Level

Jl. H.R. Rasuna Said Kav. X-2 No. 4

Jakarta 12950 - Indonesia

M : +62 812 9691 3777

T : +62 21 2128 1038

F : +62 21 2128 1038

E : kiki.setiawan@ksplaw.co.id

mail@ksplaw.co.id

W : www.ksplaw.co.id

Requirements of Being A Liquidator

The GMS is authorized to appoint a liquidator as it will be stated in the winding up resolution. In the event of failing to do this, director of the company shall automatically be a liquidator. If the company has more than one member of board of directors (BOD), the President Director will represent the BOD as the liquidator of the company.

However, Article 99 paragraph (1) of the Indonesian Company Law prohibits a director to act for and on behalf of a company if the concerned director has pending legal dispute or conflict of interest with company. For instance, the concerned director is reported to Police for an embezzlement of the company's assets. In this case, an independent liquidator should be nominated by the GMS.

In some cases, director sits outside Indonesia jurisdiction and has limited knowledge and experience on Indonesian laws and regulations. Thus, an independent Indonesian liquidator is necessarily appointed to structuring the preparation and the liquidation stage. Having a systematic preparation such as listing all creditors and settling all debts before signing winding up resolution would be more efficient to avoid any claim from creditors during the winding up process which potentially obstruct the sequence of process. In fact, tax clearance process shall take approximately twelve months or more.

Judges, through a court order, are also authorized to appoint a liquidator which most likely refers to the disputing parties' recommended candidates. The candidates shall be shortlisted by judges based on their competency, capability and capacity. Judges will ensure that the appointed liquidator is not a creditor of the company and has no conflict of interest with the company.

Indonesian laws and regulations do not specifically require certain degree, qualification or license of being a liquidator. However, in practice, a liquidator is required to have certain strong background and knowledge across numerous area such as legal, tax, accounting or payroll. Lack of these causes a liquidator would be in a difficult position to map out, predict and resolve obstacles during the process.

A liquidator has legally the same responsibility as the director of the company. He/she shall be held jointly and severally liable for all the outstanding liabilities if he/she is negligent in performing his/her liquidator role. Most independent liquidators would require indemnification from the shareholders of the company and/or the company for any loss incurred by misleading information from the company or any action done by the company before the winding up process which leads to the obligation to compensate any third party.

Any Indonesian may be a liquidator of an insolvent company without having to have particular decree, qualification or license, though extensive multi-disciplined knowledge and experience are significantly required.