

CAYMAN ISLANDS



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**THE COMPANIES LAW (2013 REVISION) (AS AMENDED)
COMPANIES WINDING UP (AMENDMENT) RULES, 2016**

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These Rules are made by the Insolvency Rules Committee pursuant to Section 155 of the Companies Law (2015 Revision)

1. Citation, Commencement and Interpretation

- (1) These Rules shall be cited as the Companies Winding Up (Amendment) Rules 2016.
- (2) These Rules shall come in operation on the 1 day of August 2016.
- (3) Words and expressions used in these Rules which are also used in the Companies Winding Up Rules 2008 (as amended) (referred to as "the principal rules") shall have the same meaning in these Rules as in the principal rules.

2. Amendment of Orders 16 and 24

Orders 16 and 24 of the principal rules are hereby revoked and replaced by the new Orders 16 and 24 attached as a Schedule hereto.

MADE by the Insolvency Rules Committee on the 18th day of May 2016

The Honourable Andrew Jones QC, Judge

The Honourable Sam Bulgin QC, Attorney General

Colin McKie QC, Legal Practitioner

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SCHEDULE

ORDER 16

PROOF OF DEBTS IN OFFICIAL LIQUIDATION

PART I: PROCEDURE FOR PROVING

Introduction (O. 16, r. 1)

1. (1) Where a solvent company is being wound up by the Court, the official liquidator shall pay the debts owing to its creditors in the ordinary course and in the currency of the obligation as if the company were still carrying on business.
- (2) Where a company which is insolvent or of doubtful solvency is being wound up by the Court, a person claiming to be a creditor of the company and wishing to recover his debt must (subject to Rule 7) submit his claim in writing to the official liquidator and is referred to as "proving" for his debt and the document by which he seeks to establish his claim is referred to as his "proof" or "proof of debt".
- (3) The official liquidator of a solvent company which is being wound up by the Court may require a creditor to submit a proof of debt if there is a doubt or dispute about the existence of the debt or the amount owing to the creditor.
- (4) It is the duty of the official liquidator to adjudicate the creditors' claims, for which purpose he acts in a quasi-judicial capacity.

Form and Content of Proof (O. 16, r. 2)

2. (1) A proof of debt shall be in CWR Form No 24 or such other form or forms as the official liquidator may prescribe having regard to the nature of the claims against the company.
- (2) The official liquidator may prescribe different forms of proof of debt for use by different classes of creditor.
- (3) The following matters shall be stated in a creditor's proof of debt –
 - (a) the creditor's name and address;
 - (b) the total amount of his claim as at the date on which the company went into liquidation;
 - (c) whether or not the claim includes interest and, if so, the basis upon which the creditor claims to be entitled to interest;

- (d) particulars of how and when the debt was incurred by the company; and
 - (e) particulars of the security held by the creditor, the value which he puts on the security and the basis of his valuation..
- (4) Copies of all the documents evidencing the existence and amount of the debt must be annexed to the proof of debt.
 - (5) The official liquidator may require the creditor to submit further and better particulars of his claim, including additional supporting documents.
 - (6) The person signing the proof of debt (other than the creditor himself) must state his name, contact details and the basis upon which he is authorised to act on behalf of the creditor.
 - (7) The official liquidator may require that a proof of debt be verified by affidavit.

Supply of proof of debt forms (O. 16, r. 3)

- 3. (1) Subject to Rule 7, proof of debt forms shall be sent by the official liquidator to every person who appears to him to be a creditor of the company.
- (2) Subject to Rule 7, proof of debt forms shall be sent to every person to whom the official liquidator sends notice of the first meeting of creditors in accordance with Order 8, rule 4.

Cost of proving (O. 16, r. 4)

- 4. (1) Every creditor bears his costs of proving his own debt, including the cost of responding to the official liquidator's requirement that he provide further and better particulars of his claim.
- (2) Nothing in this Rule shall prevent a creditor from claiming his costs of proving pursuant to the terms of a contract which is enforceable against the company.
- (3) The official liquidator's cost of adjudicating the proofs of debt is paid out of the assets as an expense of the liquidation.

Withdrawal and variation of proof (O. 16, r. 5)

- 5. (1) A creditor's proof may at any time, by agreement between himself and the liquidator, be withdrawn or varied as to the amount claimed.

Admission and rejection of proof (O. 16, r. 6)

6. (1) A proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount.
- (2) Where the official liquidator has admitted a creditor's proof in full, he shall notify the creditor of this fact in CWR Form No 25.
- (3) Where the official liquidator has rejected the creditor's proof or admitted it only in part, he shall notify the creditor in CWR Form No. 26, including –
 - (a) a statement of the official liquidator's reasons for rejecting the whole or part of the claim; and
 - (b) a statement of the creditor's right to apply to the Court for the official liquidator's decision to be reversed or varied.

Admission without proof of debt (O. 16, r. 7)

7. (1) This Rule applies to a company which has carried on a deposit taking business as a licensed bank.
- (2) All of the company's depositors to whom periodic statements of account were sent by the company shall be admitted to proof in respect of the amounts recorded due to them without requiring them to lodge proofs of debt unless the official liquidator has reason to believe that the company's deposit taking records are unreliable.
- (3) Where the official liquidator has admitted a depositor to proof without requiring him to submit a proof of debt, he shall send notice in CWR Form No 27 informing the depositor of this fact.

Inspection of Proofs of Debts (O. 16, r. 8)

8. (1) Subject to sub-rule (2), any proof of debt (including the supporting documentation, any further and better particulars and any correspondence relating to its adjudication) may be inspected by or on behalf of –
 - (a) any creditor whose proof of debt has been admitted in whole or in part; or
 - (b) any contributory of the company.

- (2) In the case of a creditor to whom the company owes a duty of confidentiality, the official liquidator shall not allow his proof of debt to be inspected by another creditor or contributory without first –
 - (a) obtaining his written consent; or
 - (b) obtaining a direction of the Court pursuant to section 4 of the Confidential Relationships (Preservation) Law.

PART II: QUANTIFICATION OF CLAIM

Enforcement of Subordination, Set-Off (or Non Set-Off) and Netting Agreements (O.16, r.9)

9. (1) Any agreement made between the company and a creditor prior to the commencement of the winding up that the claims of such creditor be subordinated or otherwise deferred to the claims of any other creditors (referred to in this Order as a "subordination agreement") are binding on the company in liquidation and shall be enforced by the official liquidator.
- (2) Any contractual right of set-off or non set-off or netting arrangement agreed between the company and any creditor prior to the commencement of the liquidation (including both bilateral and multi-lateral set-off or netting arrangements) (referred to in this Order as a "set-off agreement", "non set-off agreement" and "netting agreement") are binding upon the company in liquidation and shall be enforced by the official liquidator.

Mutual credit and set-off (O.16, r.10)

10. (1) This Rule applies where, before the commencement of the liquidation, the company has not concluded any set-off, non set-off or netting agreement with the creditor.
- (2) If there have been mutual credits, mutual debts or other mutual dealings (other than a set-off or not set-off or netting agreement) between the company and the creditor, an account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other.
- (3) Sums due from the company to another party shall not be included in the account taken under sub-rule (2) if that other party had actual notice at the time they became due that a winding up petition had been presented and was pending against the company.

- (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively, (as the case may be) the amount shall be paid to the official liquidator.

Pre-liquidation Interest on Debts (O. 16, r. 11)

11. (1) A creditor who has a contractual right to claim interest against an insolvent company may prove for the amount of the interest accrued up to the date of the commencement of the liquidation.
- (2) A creditor having a contractual right to interest as against an insolvent company shall not be entitled to prove for any interest accrued after the commencement of the liquidation.

Post-liquidation Interest on Debts (O. 16, r. 12)

12. (1) This Rule applies to every official liquidation of a company which lasts more than six months.
- (2) Any surplus remaining after payment of the debts proved in the liquidation shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the commencement of the liquidation pursuant to section 149 of the Law.
- (3) The rate of interest payable under this Rule is the greater of –
 - (a) the contractual rate; or
 - (b) the prescribed rate under the Judgment Debts (Rates of Interest) Rules.
- (4) The liquidator shall not pay interest under this Rule to any creditor whose claim to interest would amount to less than \$500.

Determination of the currency of the liquidation (O. 16, r. 13)

13. (1) In the case of a solvent liquidation, the creditors are entitled and the official liquidator is required to pay the company's debts in the currency of the obligation.
- (2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company (referred to in this Rule as the "currency of the liquidation") at the mid-market exchange rates prevailing –
 - (a) on the date of the commencement of the voluntary liquidation; or

- (b) the date on which the winding up order was made, (referred to in this Rule as the "applicable exchange rate").
- (3) The official liquidator shall determine the currency of the liquidation in accordance with section 150(3) of the Law within 28 days of the date of his appointment and his determination shall be final and binding upon the company's creditors for all purposes.
- (4) The official liquidator's determination shall be certified in CWR Form No 28 and the certificate shall be filed in Court.
- (5) When a creditor proves for his debt in a currency other than the currency of the liquidation, the amount claimed shall be translated into the currency of the liquidation at the applicable exchange rate.
- (6) A creditor shall not be entitled to claim against an insolvent company in liquidation any compensation for exchange losses resulting from changes in the market exchange rate occurring during the period between the date on which the winding up order was made and the date on which the dividend is paid.

Payments of a periodical nature (O. 16, r. 14)

- 14. (1) In the case of rent and other payments of a periodical nature, the creditor may prove for any unpaid amount accrued up to the date when the winding up order is made.
- (2) Unless the official liquidator continues to pay the rent or other payments accruing due after the date on which the winding up order is made as an expense of the liquidation, the creditor's claim in respect of amounts accruing after the date on which the winding up order is made shall be limited to a claim for damages for breach of contract.
- (3) In calculating the amount of damages, the official liquidator shall assume that the creditor has taken all such steps as may be reasonable to mitigate his loss and shall apply a discount for accelerated payment using the rate of interest prescribed by the Judgment Debts (Rates of Interest) Rules.

Debts payable at a future date (O. 16, r. 15)

- 15. (1) A creditor may prove for a debt of which payment was not yet due on the date when the company went into liquidation.
- (2) If the dividend becomes payable before the date on which the debt would have fallen due, the amount of the dividend shall be discounted for accelerated payment using the rate of interest prescribed by the Judgment Debts (Rates of Interest) Rules.

Contingent claims (O. 16, r. 16)

16. (1) The official liquidator shall estimate the value of any debt which, by reason of its being subject to any contingency or for any other reason, does not bear a certain value.
- (2) The official liquidator may revise any estimate previously made, if he thinks fit by reference to any change of circumstances or to information becoming available to him.
- (3) Where the official liquidator has put an estimate upon a contingent claim or a debt the amount of which is subject to a contingency, he shall notify the creditor of this fact in CWR Form No 29, stating –
- (a) the basis upon which this estimate has been made;
 - (b) the fact that the creditor may submit a varied proof of debt, having regard to changed circumstances;
 - (c) the fact that the official liquidator may vary his estimate, having regard to changed circumstances; and
 - (d) the official liquidator's agreement to extend generally the creditor's time for applying to the Court pursuant to Rule 18.

PART III: APPEAL AGAINST REJECTION OF PROOF

Introduction (O. 16, r. 17)

17. If a creditor is dissatisfied with the official liquidator's decision with respect to his proof (including any decision on the question of priority), he may appeal to the Court for the decision to be reversed or varied.

Application to Court (O. 16, r. 18)

18. (1) An appeal to the Court under Rule 17 shall be made within 21 days of the date upon which he received the official liquidator's notification under Rule 6.
- (2) Every appeal under this Rule shall be made by summons in CWR Form No 30 and shall be served on the official liquidator.
- (3) Every appeal under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

- (4) Order 11, rule 3 shall apply to the hearing of every appeal under this Rule.
- (5) An appeal under this Rule shall be treated as a *de novo* adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of his claim, notwithstanding that he failed to make such evidence available to the official liquidator.

19.

[No order]

PART IV: EXPUNGING ADMITTED CLAIMS

Introduction (O. 16, r. 20)

- 20.**
- (1) The Court may expunge a proof which has been admitted or reduce the amount in respect of which it has been admitted.
 - (2) The official liquidator may apply to expunge a proof on the ground that it appears, on the basis of information not available to the official liquidator at the time of his adjudication of the proof, that it ought not to have been admitted or ought to have been admitted for a lesser amount.
 - (3) A contributory or creditor who is dissatisfied with the official liquidator's decision to admit the whole or part of a creditor's proof for an amount exceeding \$100,000 (or its equivalent in the currency of the liquidation) or 5% of the company's total liabilities (whichever is the less) may apply to expunge the proof on the ground that it should not have been admitted.

Application to Court (O. 16, r. 21)

- 21.**
- (1) An application to expunge a proof of debt shall be made by summons in CWR Form No 31 and shall be served on the creditor and, if made under Rule 20(3) of this Order, shall also be served on the official liquidator.
 - (2) An application under this Rule must be made promptly and, in any event, not later than the date upon which a dividend has been paid in respect of it.
 - (3) Every application under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

ORDER 24

APPLICATIONS TO COURT UNDER PART V OF THE LAW

PART I: GENERAL PROVISIONS

Originating Applications (O. 24, r. 1)

1. (1) Every originating application under Part V of the Law shall be made by petition.
- (2) The general provisions of GCR Order 9, and GCR Order 18, rule 19 and Order 20, rule 7 shall apply to every petition presented under these Rules.
- (3) Unless a specific form of petition is prescribed by these Rules, GCR Form No 7 shall be treated as the generally applicable form.
- (4) A petition under this Rule cannot relate to more than one company.
- (5) The Court may hear two or more petitions at the same time, but it shall not make any order for two or more petitions to be consolidated.
- (6) An office copy of every petition presented under these Rules shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

Applications in Existing Proceedings (O. 24, r. 2)

2. (1) Every application or appeal to the Court made in connection with a proceeding which is already pending before the Court shall be made by summons.
- (2) The general provisions of GCR Order 32 shall apply to every summons issued under these Rules.

Hearings (O. 24, r. 3)

3. (1) Every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.
- (2) Every summons shall be heard in chambers unless –
 - (a) the Court has directed that it should be advertised, in which case it must be heard in open court; or

- (b) the Court directs that it should be heard in open court.

Court Files (O. 24, r. 4)

- 4. (1) A Court file shall be established in respect of each winding up proceeding in accordance with GCR Order 63, rule 2.
- (2) The Registrar shall not permit the creation of more than one Court file (or the allocation of more than one cause number) in respect of a liquidation proceeding or company in liquidation.
- (3) The Registrar shall not permit any Court file (and associated cause number) to relate to more than one company in liquidation.

Orders made in Liquidation Proceedings (O. 24, r. 5)

- 5. Every order made in a liquidation proceeding, whether made in open court or in chambers, shall be placed on the Register of Judgments maintained by the Registrar under GCR Order 63, rule 7 and shall be open to public inspection upon payment of the prescribed fee.

Order for Documents to be Sealed (O. 24, r. 6)

- 6. (1) The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that –
 - (a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and
 - (b) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company.
- (2) The liquidator and any creditor or contributory may apply to the Court for a direction that a sealed document be unsealed on the grounds that –
 - (a) the information contained in it is no longer confidential;
 - (b) the reasons for sealing the document no longer exist or have expired; or

- (c) publication of the information is not or is no longer harmful to the economic interests of creditors or contributories.

PART II: COSTS IN LIQUIDATION PROCEEDINGS

Interpretation (O. 24, r. 7)

- 7. (1) "Costs" shall mean the reasonable legal fees and expenses incurred by a person in conducting or participating in a liquidation proceeding in an economical, expeditious and proper manner.
- (2) "Liquidation proceeding" shall mean –
 - (a) any petition presented under Part V of the Law;
 - (b) any application to Court made in a proceeding commenced under Part V of the Law ; and
 - (c) any appeal against an order made on a petition or in any proceeding under Part V of the Law.
- (3) Words and expressions defined in GCR Order 62, rule 3 shall have the same meaning when used in Part II of this Order.

General Rules as to Costs (O. 24, r. 8)

- 8. (1) The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule 3 should have his costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.
- (2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that –
 - (a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or
 - (b) if the Court has directed that the winding up petition be treated as an *inter partes* proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the

costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.

- (2A) An order for security for costs may only be made if the petitioner is a nominal petitioner who has presented the petition for the benefit of another person and who would be unable to pay the costs of the company or other respondent, as the case may be, if ordered to do so.
- (3) In the case of an Authority's petition under Order 3, Part IV, the general rule is that -
 - (a) the Authority's costs of successfully presenting a petition should be paid out of the assets of the company, such costs to be taxed on the indemnity basis if not agreed with the official liquidator; or
 - (b) the company's costs of successfully resisting the petition should be paid by the Authority, such costs to be taxed on the indemnity basis if not agreed.
- (4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.

Costs of Sanction Applications (O. 24, r. 9)

- 9. (1) This Rule applies to every sanction application under Order 11, including any application for the approval of the official liquidator's remuneration.
- (2) The official liquidator's costs of making a sanction application shall be paid out of the assets of the company unless the Court is satisfied that –
 - (a) the application ought not to have been made because the directions sought by the official liquidator were unnecessary and served no useful purpose;
 - (b) the directions sought by the official liquidator were wholly unreasonable; or
 - (c) the official liquidator has misled the Court or otherwise acted improperly in connection with the application.
- (3) The Liquidation committee's costs of participating in a sanction application shall be paid out of the assets of the of the company unless the Court is satisfied that –
 - (a) the liquidation committee's participation in the application served no useful purpose or constituted an unreasonable duplication of the costs incurred by the official liquidator;
 - (b) the position adopted by the liquidation committee was wholly unreasonable; or
 - (c) the liquidation committee has misled the Court or otherwise acted improperly in connection with the application.

- (4) In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that –
 - (a) his costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and
 - (b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that his position was wholly unreasonable or he is guilty of having misled the Court or otherwise acting improperly in connection with the application.
- (5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs.

Costs of Appeals (O. 24, r. 10)

10. (1) This Rule applies to appeals by contributories under Order 12, rule 4 and appeals by creditors under Order 16, Part III.
- (2) The general rule is that the official liquidator's costs should be paid out of the assets of the company in any event.
- (3) The general rule is that the appellant's costs should follow the event, such that –
 - (a) if the appellant succeeds, the Court shall order that his costs be paid out of the assets of the company as an expense of the liquidation;
 - (b) if the appellant is unsuccessful, the Court will order him to pay the official liquidator's costs,
 - (c) such costs to be taxed on the standard basis unless agreed.
- (4) In deciding how to exercise its discretion under sub-rule (3) the Court shall have regard to the manner in which the appellant originally sought to prove his claim (and, in particular, any failure to provide to the official liquidator with the whole of the evidence relied upon in support of his appeal to the Court) and the reasons why the Court reversed or varied or upheld the official liquidator's decision.
- (5) On an appeal to the Grand Court an appellant shall not be required to provide security for costs in any appeal to which this Rule applies.

Taxation of Costs and Appeals (O. 24, r. 11)

11. (1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.
- (2) The Guidelines issued by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3) shall apply to every taxation under this Order.

- (3) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision in accordance with the provisions of GCR Order 62, Part VII.