MEMBERS' VOLUNTARY LIQUIDATION:

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A voluntary winding-up occurs when either the shareholders or creditors of a company decide to terminate the business. It takes two forms (1) The members' voluntary liquidation (MVL), whereby the directors make a statement of solvency in accordance with section 293(1) of the Companies Act and make a declaration that the company will be able to pay all its debts within 12 months following commencement of the winding-up; and (2) The creditors' voluntary liquidation (CVL), whereby the directors do not make such a statement of solvency.

It has been a common perception that MVLs only concern the shareholders of the companies undergoing liquidation and do not involve other stakeholders such as creditors. As such, there are few regulations in Singapore governing the conduct of MVLs. MVLs are presently undertaken by either approved or non-approved liquidators, or both qualified and

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unqualified persons. Certainly, the upside of non-approved liquidators or unqualified persons undertaking an MVL is that it enables more liquidated assets to be distributed among the shareholders given the lower cost.

However, this approach also has a major downside – during an MVL, the liquidator takes custody of the company's assets, helps to liquidate them, and uses the cash proceeds to first pay off the company's outstanding debts. Thereafter, the remaining cash is distributed among the shareholders on a *pro rata* basis, based on the number of shares held by each shareholder. The amounts of cash vary according to the size of the companies undergoing MVL. In some cases, where the companies liquidated are large, solvent, and therefore cash-rich, the amounts involved may run into millions of dollars. Interestingly, notwithstanding the amounts involved, the Board of Directors is not required to exercise "active oversight" and controls over how monies are handled and kept by the liquidators in MVLs and would usually only practise "passive oversight" (that is, in choosing the person to be appointed as liquidator for the MVL during the Extraordinary General Meeting). As the saying goes, "When the cat's away, the mice will play." Without proper Board oversight, companies undergoing MVLs face the risk of misappropriation of assets by errant liquidators.

INTERESTINGLY, NOTWITHSTANDING THE AMOUNTS INVOLVED, THE BOARD OF DIRECTORS IS NOT REQUIRED TO EXERCISE "ACTIVE OVERSIGHT" AND CONTROLS OVER HOW MONIES ARE HANDLED AND KEPT BY THE LIQUIDATORS IN MVLS, AND WOULD USUALLY ONLY PRACTISE "PASSIVE OVERSIGHT".

Recent events have proven that these fears are not unfounded. Newspaper reports have cast light on an instance where an approved liquidator was alleged to have misappropriated a large amount of funds entrusted to him when undertaking an MVL. Litigation relating to the matter is pending in the courts. This incident (if true) could have sounded the alarm bells for the relevant authorities which may be contemplating more robust measures, even as we speak, to help companies undergoing MVLs to safeguard against rogue liquidators.

Nevertheless, we hold the view that although regulations may help to a certain extent, pure reliance on statutory regulation may not afford the most practical and cost-effective solution. Indeed, the main solution would be self-regulation from within – by both the insolvency profession and the Board of companies undergoing MVLs. We will first discuss what can be done by the insolvency profession.

INSOLVENCY PROFESSION'S ROLE IN MVL

As stated earlier, there are two groups of liquidators applicable to MVLs – (a) approved liquidators who are public accountants under the oversight of the Accounting and Corporate Regulatory Authority (ACRA) of Singapore and practising members of the Institute of Certified Public Accountants of Singapore (ICPAS), and (b) Non-approved liquidators who could be any person, provided they have been appointed by the Board. There is no need for them to be a member of any professional body.

Practising members of ICPAS are required to adhere to Part A of the Code of Professional Conduct and Ethics, which has a number of safeguards with regard to the custody of clients' assets. These could be applied during the conduct of MVLs:

- Keeping entrusted assets separate from personal or firm assets;
- Using such assets only for the purpose for which they are intended;
- Being ready at all times to account for these assets, and any income, dividends or gains generated, to any persons entitled to such accounting; and
- Complying with all relevant laws and regulations relevant to the holding of and accounting for such assets

To further supplement the Code, ICPAS has, since 2011, been developing a series of insolvency practitioners' guidelines to provide practical guidance to members of ICPAS who also serve as insolvency practitioners. The first three of these, which provide guidance in the areas of (a) ethics; (b) remuneration, and (c) book and record-keeping, are currently undergoing internal review and would be issued by ICPAS once the due process is completed.

On the other hand, non-approved liquidators may not be members of any professional body, and may not have the benefit of professional codes or practitioners' guidelines to serve as a reference.

In this regard, relevant regulatory bodies could consider raising the bar on the qualifications of persons who are able to perform MVLs, so that MVLs are

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performed by qualified professionals who are under the purview of the relevant Code of Ethics of professional bodies such as ICPAS and Insolvency Practitioners Association of Singapore (IPAS), and subject to oversight by relevant authorities such as ACRA. Even in the absence of further regulations, the Board may also wish to note the differences between approved and non-approved liquidators when making their choice of persons to undertake MVLs for their companies.

Sole reliance on ethical codes to safeguard against potential misappropriation of assets during an MVL is in itself insufficient, since ethical codes are self-regulatory in nature, and would not be able to prevent a rogue liquidator determined to resort to dishonest behaviour.

BOARD'S ROLE IN MVL

Having explored what can be done by the insolvency profession, we now turn to what could be done by the Board, so as to provide another line of defence. Based on our research into the practices in other jurisdictions, we hold the view that one practical and cost-effective method would be for the Board to set up a Committee of Inspection (COI) comprising shareholders/directors of the companies undergoing MVLs. The COI would provide oversight of the liquidation proceedings, and serve as joint bank signatories when cheques are issued to pay off outstanding debts owed by the companies. This way, the Board would be able to exercise a greater degree of control and oversight of the proceedings during the conduct of an MVL.

We are confident that the above suggestions present practical, balanced and cost-effective approaches which accord companies a greater degree of confidence in the conduct of MVLs.

Relevant regulatory bodies, the insolvency profession and the Board would do well to take heed of and work together to explore best solutions on the matter.

It is always better to be safe than sorry. CPA

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