

# Summary Winding Up of Jebel Ali Free Zone Offshore Companies Avoiding Delay

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## Introduction and Scope of this Article

The unprecedented financial crunch experienced globally has forced many businesses to question their existing corporate structures, and also to consider ways in which these structures can be realigned with minimum cost, which has, in some cases, necessitated winding up group companies.

As offshore companies have often been used in cross-border transactions, they have recently been the subject of winding up with shareholders wanting to do this involving minimum costs.

For offshore companies set up in the Jebel Ali Free Zone Authority (“JAFZA”) the preferred mode, in most cases, has been the summary winding up (also called Voluntary Winding up).

In the background of the recent desire to keep group structures to the bare minimum in order to reduce costs, there can be several reasons why shareholders might wish to summarily wind up a JAFZA offshore company. A business may have run its course; the company may be inactive (and therefore not serving any useful purpose); or a shareholder may simply wish to receive his share of its assets. Whatever the reason, one should know that the process of winding up a company is not always a simple one and there are a number of matters that should therefore be considered beforehand, so that everything proceeds smoothly.

This article attempts to describe steps to be taken to summarily wind up a JAFZA offshore company. It is recognized that this Article may not address completely all the questions which may be relevant in this regard as it is intended to provide a quick insight into the subject matter covered: the article is designed as a starting-point for a more detailed and comprehensive consideration of the issues covered herein.

## Governing Regulatory Regime

The concept of the offshore was first introduced in Dubai in late 2001 but it took concrete shape on January 15, 2003 when Jebel Ali Free Zone Offshore Companies Regulations 2003 came into force. Jebel Ali Free Zone Offshore Companies Regulations 2003 (the “Regulations”) laid down detailed rules and regulations for offshore companies in JAFZA. The procedure which governs the summary winding up of a Jebel Ali offshore company is set out in Articles 70 to 79 of the Jebel Ali Offshore Regulations 2003.

The Regulations recognize three types of winding up and they are:

- Summary winding up,
- Creditors’ winding up which applies after the commencement of a summary winding up, where the directors or the liquidator form the opinion that the offshore company has liabilities which it will be unable to discharge in full within six months after the commencement of the winding up; and
- Winding up by the court under the UAE Commercial Transactions Law No. 18 of 1993 (Volume 5, Bankruptcy and Preventive Composition) and other applicable legislation.

## Preconditions for Commencement of Summary Winding up

A process that avoids supervision of court

In case of summary winding up, the entire process is done without court supervision. When the winding up is complete, the relevant documents are filed before the Registrar for obtaining the letter of dissolution.

## **Circumstances in which a company can be wound up summarily**

The Regulations also set out certain circumstances in which a company may be wound up summarily and they are:

- When the offshore company has no assets and no liabilities, or
- The offshore company has assets and no liabilities; or
- The offshore company is able to discharge its liabilities in full within six months after the commencement of the winding up which commences on the passing of shareholder(s) resolution for summary winding up.

## **Who can wind up the company?**

A summary winding up may be done only by the members of the offshore company. Article 18 of the Regulations defined the "Members" term by (1) the incorporators of an offshore company and (2) Every other person who agrees to become a shareholder of an offshore company, and whose name is entered in its register of members.

## **Statement of Solvency**

To commence the procedure an offshore company has to pass the so called Statement of Solvency for Summary Winding up. Article 71(2), which is relevant in this regard states as follows:

"A statement of solvency shall be signed by each of the directors and state that, having made full inquiry into the offshore company's affairs, each of them is satisfied:

- That the offshore company has no assets and no liabilities; or
- That the offshore company has assets and no liabilities; or
- That the offshore company will be able to discharge its liabilities in full within six months after the commencement of the winding up, as the case may be."

## **Difference between the law and practice**

In practice, the Offshore Registrar would normally require that the statement of solvency be signed by all of the shareholders of the offshore company (as opposed to the directors as provided for in the law) or their duly authorized representatives.

## **Repercussions of summary winding up on directors of company**

Whether or not a company's directors are happy to allow their company to be wound up, the process may have very serious consequences for the directors involved. The three main areas that company directors need to be aware of are summarised below:

- Freezing of Company Bank Accounts – Once a Summary Winding up notice is advertised in the newspaper by the registrar, it is assumed that this should be identified by the company's bank. Normally the bank will automatically suspend the company's banking facilities until the winding up is either completed or terminated. Clearly, if banking facilities are suspended, this will make it very difficult to trade and cause serious disruption. There is normally no way to prevent this once a Summary Winding up has been issued.
- Director Investigation – As well as disposing of the company's assets, the liquidator may, under Part 14 of the Regulations, request from the Registrar to appoint inspectors to investigate the affairs of the company and the activities of the company's directors to ensure that they have acted properly and according to their directors duties as prescribed in the Regulations. If the appointed Inspector believes that the directors are guilty of wrongful trading (trading while knowing that the company was insolvent) and pointed out this conclusion in his report to the Registrar, the director in default will be personally responsible for such liabilities of the offshore company as are incurred at the time of his wrongful acts <sup>1</sup>. In addition he might get banned from all current and future directorships for a period of time and he or she might risk being accused of committing an offence <sup>2</sup>. This procedure is commonly known as blacklisting. If blacklisted, a director in default will have to give up all other directorships that he or she currently holds.
- If company directors are found guilty of continuing to allow a business to trade while insolvent or with

lack of cooperation with the appointed liquidator, they may become personally liable for committing an offence.

### **Steps Towards Summary Winding up**

First - commencement, statement of solvency and appointment of liquidator

As mentioned above, the offshore company has to pass a Shareholder(s) Resolution calling for the commencement of the Summary Winding up and shall include:

- A statement of the reason for Winding Up, and
- A statement of Insolvency, and
- A statement that the company is and will continue to be able to discharge or pay, provide for the payment of all claims, debts, liabilities and obligations in full, and
- A statement of the name and address of the appointed liquidator and the remuneration proposed to be paid to the liquidator.

If a statement is delivered that confirms that the offshore company has assets and no liabilities the offshore company shall forthwith proceed to distribute its assets among its members according to their rights. In the event the statement provides that the offshore company will be able to discharge its liabilities in full within six months after the commencement of the winding up, the assets of the offshore company shall be applied in satisfaction of the offshore company's liabilities and, subject to that application, shall be distributed as aforesaid. In both scenarios appearing above, the appointed Liquidator will review all of the company's assets and try to sell them to repay the company's members or creditors as may the case be. The company's assets are sold and the surplus, if any, shall be distributed among the members, the liquidator, having made full inquiry into the offshore company's affairs, shall apply to the Registrar for the business to be dissolved through submitting a statement that he is satisfied that the offshore company has no assets and no liabilities. The company will not be dissolved unless the statement is submitted before the Registrar.

### **Second - return of originals**

All originals which were given to the offshore company by the Registrar must be returned.

### **Third - liquidators report**

The appointed liquidator will need to formulate a liquidation report for the offshore company which will be submitted to the Jebel Ali Free Zone Authority. On the appointment of a liquidator all the powers of the directors cease except so far as the resolution appointing the liquidator or any subsequent resolution otherwise provides and, subject to any such resolution and to Regulation 75, all those powers shall thereafter be exercisable by the liquidator.

### **Fourth - advertisement**

The Registrar upon receipt of the above mentioned documentation will post an advertisement in a public news paper on the expense of the offshore members.

After the collapse of 14 days period from the advertisement date the Registrar will issue a Letter of Dissolution for the offshore company unless reason is shown to the contrary.

### **Some Relevant Aspects to Summary Winding up**

Does the validity of an offshore company effect the commencement of Summary Winding up?

The Regulations are silent in this regard, but the offshore Register has adopted an approach to facilitate the Summary Winding up without extra expenses whereby it would be acceptable to file the winding up Resolution within 6 months of the expiry date, the period of 6 months is based on the fact that offshore companies can benefit from a grace period of 6 months after the commencement of winding up to settle their affairs. In this sense, summary winding up is not possible after 6 months of the expiry of the offshore company.

### **Termination of Summary Winding up**

Where the summary winding up of an offshore company has commenced; the termination of this winding up may only occur by instrument of a shareholder resolution approving the termination of the winding up process and provided that the offshore company has not for the purposes of the winding up distributed any of its assets among its members. In addition, the offshore company must not have received any contribution from any present or past member pursuant to Regulation 100 which requires every present and past member which was a member for less than one year before the commencement of the winding up to contribute to its assets to an amount sufficient for payment of its liabilities arisen after their membership, and the expenses of the winding up.

### **Distinction Between Winding up” and “Striking off”**

The terms “Winding up” and “Striking off” are sometimes erroneously used to mean the same thing. However, they are quite different in their meanings. Winding up is a process whereby all assets of the company are realized and used to pay off the liabilities and members. Striking off of the company takes place after the entire process of winding up is over. Striking off practically ends the corporate existence of the company.

Pursuant to Article 113 of the Regulations the Registrar has been granted authority to strike off a company that he has cause to believe is not in business or operation. This is usually because documents have not been delivered by the company, and in particular because it has not been renewed annually, and because there has not been a response to statutory enquiries sent to the registered office. Notwithstanding the above, it is not a recognized practice in JAZFA Offshore Registration to strike off defunct offshore companies.

### **Conclusion**

Summary winding up is currently being preferred as a way to wind up insolvent JAFZA off shore companies. This procedure is relatively quick, however, cannot be used for disputed debts and, if the offshore company has debts due to it, members of the offshore company should consider all the debt recovery options before proceeding down this path .

#### Footnotes

<sup>1</sup> See Article 41 of the Offshore Regulations 2003

<sup>2</sup> Article 76 (7) of the Offshore Regulations 2003