



ARRIS MANAGEMENT SERVICES SDN. BHD.

(Company No. 607434 – P)

No. 39, Second Floor, Jalan Kenari 17C, Bandar Puchong Jaya,
47100 Puchong, Selangor Darul Ehsan

Tel: 603 – 8076 3063 Fax : 603 – 8073 1232

COMPANIES ACT 1965

Application of winding up

Arris Notes 13

Section 217 (1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of:-

- (a) the company;
- (b) any creditor, including a contingent or prospective creditor, of the company;
- (c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Director General of Insolvency of the estate of a bankrupt contributory;
- (d) the liquidator;
- (e) the Minister pursuant to section 205 or on the ground specified in paragraph 218(1)(d);
- (f) in the case of a company which is a licensed institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under subsection 24(1) of the Banking and Financial Institutions Act 1989, or a non-scheduled institution in respect of which such Minister has made an order under subsection 93(1) of that Act, Bank Negara Malaysia;
- (g) in the case of a company which is licensed under the Insurance Act 1996 [Act 553], Bank Negara Malaysia;
- (h) the Registrar on the ground specified in paragraph 218(1)(m) or (n);
- (i) in the case of a member institution under the Malaysia Deposit Insurance Corporation Act 2005 [Act 642], the Malaysia Deposit Insurance Corporation under section 71 of that Act,
or of any two or more of those parties.



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Section 217 (2) Notwithstanding anything in subsection (1):-

- (a) a person referred to in paragraph (1)(c) may not present a petition on any of the grounds specified in paragraph 218(a), (b), (c), (e) or (i) unless:-
 - (i) the number of members of the company (not being a company the whole of the issued shares of which is held by a holding company) is reduced below two; or
 - (ii) the share in respect of which the contributor was a contributory or some of them were originally allotted to the contributor, or have been held by him and registered in his name for at least six months during the eighteen months before the presentation of the petition or have devolved on him through the death or bankruptcy of a former holder;
- (b) a petition shall not, if the ground of the petition is default in lodging the statutory report or in holding the statutory meeting, be presented by any person except a contributory or the Minister nor before the expiration of fourteen days after the last day on which the meeting ought to have been held;
- (c) the Court shall not hear the petition if presented by a contingent, or prospective creditor until such security for costs has been given as the Court thinks reasonable and a prima facie case for winding up has been established to the satisfaction of the Court; and
- (d) the Court shall not, where a company is being wound up voluntarily, make a winding up order unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.



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Grounds for Court Winding-Up

Section 218 (1) The Court may order the winding up IF:-

- (a) the company has by a special resolution resolved that it be wound up by the court;
- (b) default is made by the company in lodging the statutory report or in holding the statutory meeting;
- (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;
- (d) the number of members is reduced below two in the case of a company (other than a company in which the whole of the issued shares are held by a holding company);
- (e) the company is unable to pay its debts;
- (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;
- (g) an inspector appointed under Part IX has reported that he is of opinion:-
 - (i) that the company cannot pay its debts and should be wound up; or
 - (ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up;
- (h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved;
- (i) the court is of opinion that it is just and equitable that the company be wound up;



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| Section 218 | <ul style="list-style-type: none">(j) the company has held a licence under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, and that licence has been revoked or surrendered;(k) the company has carried on Islamic banking business, licensed business or scheduled business, or it has accepted, received or taken deposits in Malaysia, in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be;(l) the company has held a licence under the Insurance Act 1996 and:-<ul style="list-style-type: none">(i) that licence has been revoked;(ii) Bank Negara Malaysia has petitioned for its winding up under subsection 58(4) of the Insurance Act 1996; or(iii) an order under paragraph 59(4)(b) of the Insurance Act 1996 has been made in respect of it;(m) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or(n) the company is being used for any purpose prejudicial to national security or public interest. |
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What are unfair and unjust acts

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Extract of legal opinions from court cases:-

Departure from proper standards of commercial morality

The Judge is of the opinion that the petitioner must show substantial case of departure from proper standards of commercial morality before he is entitled to relief under that Section 218(1)(f); and that departure from those standards must have resulted in unfairness or injustice to him as a shareholder.

In situations where there are allegations of directors' unfair and unjust acts, there is the possibility that the facts relied upon by the petitioner may also be capable of being relied upon if the petitioner were to bring an action under the oppression provisions; this is also the case for a winding-up under just and equitable grounds ie Section 218(1)(i).

Directors are acting in their own interests

There have been cases where the petitioner, applying under Section 218, applies for alternative remedy other than a winding-up or cases where the court, under an application to wind up under Section 218, did not order a winding-up because the company is profitable. The Privy Council said that to wind up a successful and prosperous company being properly managed, on the ground that the directors are acting in their own interests or in ways which are unfair and unjust, is an extreme step and requires a strong case to be made out by the applicant.

However, this does not mean that the court has discretion to decide to grant an alternative remedy once it has been proven that the directors have acted in their own interest in the affairs of the company. In fact, once it has been proven to the satisfaction of the court that the directors have acted in their own interest in the affairs of the company, the court should not be swayed by the fact that the company is profitable.



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Company was a going concern and is capable of making profits

The Court of Appeal overturned the decision of the High Court. The High Court did not make an order to wind up the company as the company was a going concern and is capable of making profits. The Court of Appeal held that these considerations should not be considered as factors whether or not to make an order to wind up a company under Section 218(1)(f). The section does not give a discretion to the court to order any alternative remedy once the grounds for just and equitable winding-up is established.

Differences between directors / deadlock

The Court held that differences between directors do not justify the winding-up of a company. The High Court of Malaya has refused to grant a winding-up order on the petition of a director. The court said that the petitioner failed to show that the deadlock between him and another director could not be resolved. The misconduct on the part of the petitioner was a contributory factor to the company's problems. Further, the petitioner had acted against the company and against the spirit of mutual understanding between directors.

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