

# Vountary Winding Up

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# Voluntary Winding Up

- Starting point – passing the resolution for voluntary winding up
- Corporate entity continues till the company is dissolved
- Company is dissolved on the making of the order under Sec.59(8) of IBC on the making of application under Sec.59(7)

# Voluntary winding up

- Sec.59(1) A corporate person **who has not committed any default** may initiate voluntary liquidation proceedings under the provisions of this chapter.

# Declaration of Solvency

- Sec.59(3) without prejudice to sub-section (2), voluntary liquidation proceedings **of a corporate person registered as a company** shall meet the following conditions:
  - (a) A declaration from majority of the directors of the Company verified by an affidavit stating that
    - (i) they have made a full enquiry into the affairs of the Company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation
    - (b) the company is not being liquidated to defraud any person
- Reg.3(1)(a) of IBBI (Voluntary Liquidation Process) Regulations, 2017 for LLP and individuals constituting the governing body in case of other corporate persons

# Declaration of solvency

- Declaration shall be accompanied with audited financial statements **and record of business operations of the company** for the previous two years or for the period since its incorporation, whichever is later;
- A report of the valuation of assets of the company, if any, prepared by a registered valuer.
- Whether this declaration of solvency is required to be filed ROC or IBBI – No.

# Sanctity of Declaration of solvency

- The IBC contemplates only one type of voluntary liquidation – i.e., liquidation of the Company
- There is no members' or creditors' voluntary winding up under IBC.
- Sec.59(4) and Reg.3(2) IBBI (Voluntary Liquidation Process) Regulations, 2017 contemplate filing of resolution passed by members and subsequent approval by creditors with ROC and IBBI
- Declaration shall list each debt of the corporate person  
Reg. 3(4)

# Sanctity of Declaration of Solvency

- Code and Rules do not contemplate filing the declaration financial statements
- Under 1956 Act, u/s.488(5), when declaration is made it is members voluntary winding up and when such declaration is not made, it is creditors voluntary winding up.
- Resolution – ordinary or special shall be passed within four weeks of declaration

# Sanctity of Declaration of Solvency

- Under the 1956 Act, u/s.488 If Declaration of solvency is not filed at least one day before the General meeting wherein the resolution is passed, the voluntary winding up becomes void.
- Under IBC there is no requirement of filing the declaration with ROC or IBBI.



# Sanctity of Declaration of solvency

- Reg.40(2) Where the liquidator is of the opinion that the corporate person will not be able to pay debts in full from the proceeds of assets in liquidation, he shall make an application to adjudicating authority to suspend the process of liquidation and pass such orders as it may deem fit.
- **Sec.72** Where an officer of the corporate debtor makes any material and wilful omission in any statement relating to the affairs of the corporate debtor, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both

# Resolution

- Ordinary or Special
- Ordinary is required when the period under the articles has expired or the event, if any, has occurred on the occurrence of which the articles provide that the company is to be **dissolved**  
Sec.59(3)(c)(ii) of IBC / Reg.3(1)(c)(ii) of IBBI (voluntary liquidation process) Regulations, 2017

# Resolution

- Other than the above, special resolution of members is required to be passed Sec.59(3)(c)(i) of IBC / Reg.3(1)(c)(i) of IBBI (voluntary liquidation process) Regulations, 2017
- Proviso to sec and Regulation: where the company owes debt to any person, creditors representing two-thirds in value shall approve the resolution within 7 days.
- This resolution shall be filed within 7 days of passing or within 7 days of approval with ROC and the IBBI.
- Belated filing of resolution will not invalidate the voluntary liquidation. At the maximum it may be a violation.
- There is no need to give publication in Government Gazette unlike 1956 Act.

# Resolution

- The ordinary or special resolution passed shall contain the terms and conditions of the liquidator including the remuneration payable to him – Reg.5(2)
- Reg.6 Eligibility of an insolvency professional for being appointed as liquidator

# Effect of liquidation

- Corporate persons ceases to carry on business except as far as required for beneficial winding up of business

# Voluntary Winding Up

- There is no specific provision for ceasing of powers of directors unlike sec.491 and 505 of the 1956 Act.
- This causes a doubt whether the Board continues
- This is reinforced by Reg.9(1) which says that liquidator shall submit **a preliminary report to corporate person (whether members or Board)** within 45 days from the liquidation commencement date

# Public announcement

- Liquidator shall make public announcement in Form A of Schedule I within five days from his appointment calling upon the stakeholders to submit their claims within 30 days from the liquidation commencement date Reg.14 and Sec.38(1) of IBC

# Public announcement

- Announcement in one newspaper in English and regional language – having wide circulation at the Registered office, principal office and any other location, where the corporate person conducts material business operation
- On the website, if any, of the corporate person
- On the website, if any, designated by the Board for this purpose



# Reports

- Reg.8(1) The liquidator shall prepare and submit
  - (a) Preliminary report
  - (b) Annual Status report
  - (c) Minutes of consultation with stakeholders
  - (d) Final report

# Preliminary Report

- The liquidator shall submit PR to corporate person within 45 days from the liquidation commencement date, detailing capital structure of the corporate person estimates of assets and liabilities as on the liquidation commencement date based on the books of corporate person
- Under the 1956 Act, u/s. 511A, the directors of the company shall submit statement of affairs to the voluntary liquidator. Now the liquidator has to prepare the estimates of assets and liabilities as on the date of commencement

# Completion of liquidation

- Reg.37(1) liquidator shall endeavour to complete the liquidation process within 12 months of commencement
- Reg.37(2) if liquidation is not completed the liquidator shall convene the **meeting of contributories** within 15 days from the end of 12 months and at the end of every 12 months till the dissolution of the corporate person
- Annual status report shall enclose the audited accounts showing the receipt and payments from commencement date

# Completion of liquidation

- Reg.2(1)(b) “contributory” means a member of a company, partner of a limited liability partnership, and any other person liable to contribute towards the assets of the corporate person in the event of its liquidation;
- Sec.2(26) “*contributory*” means a person liable to contribute towards the assets of the company in the event of its being wound up.
- *Explanation.—For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory;*

# Completion of liquidation

- There is no requirement under the Code or the Rules to submit the preliminary report or the Annual Status Report to ROC or the IBBI.
- Under 1956 Act, report for the first year in case liquidation is not completed within 12 months of commencement and thereafter report for every six months shall be filed with ROC

# Final Report

- Reg.38 Liquidator shall prepare final report
- Final Report shall be filed with forthwith the Registrar and the Board
- Final report shall include audited accounts from the commencement till the end of liquidation
- Liquidator shall submit the final report along with the application with

# Claims by creditors

- **Reg.15 Proof of claim.**
- A person, who claims to be a stakeholder, shall prove his claim for debt or dues to him, including interest, if any, as on the liquidation commencement date

# Claims by operational creditor – Reg.16

- Claim be submitted in person or post or electronic form in form B of Schedule I
- The existence of debt due to an operational creditor under this Regulation may be proved on the basis of-
- (a) the records available with an information utility; or
- (b) other relevant documents which adequately establish the debt, **including** any of the following -
- (i) a contract for the supply of goods or services with corporate person, **supported by an invoice** demanding payment for the goods and services supplied to the corporate person;
- (ii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; and
- (iii) financial accounts of the corporate person.



# Claim by financial creditor – Reg.17

- Claim be submitted in person or post or electronic form in form C of Schedule I
- The existence of debt due to the financial creditor may be proved on the basis of-
- (a) the records available in an information utility; or
- (b) other relevant documents which adequately establish the debt, including any or all of the following -
- (i) a financial contract supported by financial statements as evidence of the debt;
- (ii) a record evidencing that the amounts committed by the financial creditor to the corporate person under a facility has been drawn by the corporate person;
- (iii) financial statements showing that the debt has not been repaid; and
- (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

# Claim by workmen and employees – Reg.18

- Claim be submitted in person or post or electronic form in form D or form E of Schedule I
- The existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of-
- (a) records available in an information utility; or

# Claim by workmen and employees – Reg.18

- (b) other relevant documents which adequately establish the dues, including any or all of the following –
  - (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
  - (ii) evidence of notice demanding payment of unpaid amount and any documentary or other proof that payment has not been made; and
  - (iii) an order of a court or tribunal that has adjudicated upon the non-payment of dues, if any.
- The liquidator shall admit the claims of a workman or an employee on the basis of the books of account of the corporate person if such workman or employee has not made a claim

# Claim by other stakeholders – Reg.19

- Claim be submitted in person or post or electronic form in form F of Schedule I
- The existence of the claim of the stakeholder may be proved on the basis of -
  - (a) the records available in an information utility; or
  - (b) other relevant documents which adequately establish the claim, including any or all of the following-
    - (i) documentary evidence of notice demanding payment of unpaid amount or bank statements of the claimant showing that the claim has not been paid and an affidavit that the documentary evidence and bank statements are true, valid and genuine;

# Claim by other stakeholders – Reg.19

- (ii) documentary or electronic evidence of his shareholding; and
- (iii) an order of a court, tribunal or other authority that has adjudicated upon the non-payment of a claim, if any.

## Reg. 20 - Proving security interest

- The existence of a security interest may be proved by a secured creditor on the basis of-
- (a) the records available in an information utility;
- (b) certificate of registration of charge issued by the Registrar of Companies;
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India; or
- (d) other relevant documents which adequately establish the security interest

## Reg. 24 Determination of quantum of claim

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- Where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim, based on consultation with the claimant **and the corporate person** and the information available with him

## Reg. 25 Debt in foreign currency

- The claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the liquidation commencement date.

*Explanation- “The official exchange rate” is the reference rate published by the Reserve Bank of India or derived from such reference rates*



# Reg.26 - Periodical payments

- In the case of rent, interest and such other payments of a periodical nature, a person may claim only for any amounts
- due and unpaid up to the liquidation commencement date

## Reg. 28 Mutual Credits and set off

- **Mutual credits and set-off.**
- Where there are mutual dealings between the corporate person and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate person or to the other party.
- *Illustration: X owes Rs.100 to the corporate person. The corporate person owes Rs.70 to X. After set off, Rs.30 is payable by X to the corporate person.*

# Reg.31 – Manner of sale

- The liquidator may value and sell the assets of the corporate person in the manner and mode approved by the corporate person in compliance with provisions, if any, in the applicable statute.
- *Explanation: “assets” include an asset, all assets, a set of assets or parcel of assets, as the case may be, in relation to sale of assets.*

# Reg.32 – Recovery of monies due

- The liquidator shall endeavor to recover and realize all assets of and dues to the corporate person in a time-bound manner for maximization of value for the stakeholders.

# Reg.34 – All moneys to be paid into bank account

- The liquidator shall open a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person.
- The liquidator shall pay to the credit of the bank account opened under sub-regulation (1) all moneys, including cheques and demand drafts received by him as the liquidator of the corporate person, and the realizations of each day shall be deposited into the bank account without any deduction not later than the next working day.
- The money in the credit of the bank account shall not be used except in accordance with section 53(1).
- All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account

# Reg.35 – Distribution

- The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders.
- The liquidation costs shall be deducted before such distribution is made.
- **Distribution in specie:**The liquidator may, with the approval of the corporate person, distribute amongst the stakeholders, an asset that cannot be readily or advantageously sold due to its peculiar nature or other special circumstances.

# Sec. 53 Distribution of assets

- **53(1)** *Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :—*
  - *(a) the insolvency resolution process costs and the liquidation costs paid in full;*

# Sec. 53 – Distribution of assets

- *(b) the following debts which shall rank equally between and among the following:*
- *(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
- *(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;*



# Sec. 53 -Distribution of assets

- *(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;*
- *(d) financial debts owed to unsecured creditors;*
- *(e) the following dues shall rank equally between and among the following:—*
- *(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;*
- *(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;*
- *(f) any remaining debts and dues;*
- *(g) preference shareholders, if any; and*
- *(h) equity shareholders or partners, as the case may be.*

# Sec. 52 Position of Secured Creditors

- May stand inside the liquidation
- May stand outside the liquidation

Thank you

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