

**WINDING UP OF A COMPANY
UNDER THE INSOLVENCY AND
BANKRUPTCY CODE, 2016: A
COMPARATIVE ANALYSIS**

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ABSTRACT

Winding up of a company is the process whereby the life of a company is ended and the property of a company is administered for the benefit of its creditors and the members. When the company presents its petition for winding up the Board of Directors of a company stops functioning and the powers of the BODs is vested with the 'liquidator' who takes the control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their respective rights. The Insolvency and bankruptcy code, 2016 (IBC) is a landmark development in the dynamic world of our country. The code is a revolutionary change brought to amend the existing provisions of the Companies Act, 2013 as it entirely removed the provisions of the voluntary winding up in the Companies Act, 2013.

The ICB, 2016 consolidate and amend the laws relating to insolvency of companies, partnership firms, limited liability partnership into a single legislation. It aims to provide time bound resolution and empowered the creditors to initiate the insolvency resolution process if default occurs. The authors in the present research would enlighten the comparison of the provisions of winding up of a Company

between the Companies Act, 2013 and the provisions of winding up in the IBC, 2016. The research would be a doctrinal research and during the course of research the authors would be referring to existing literatures and various judicial pronouncements given by the tribunals and courts.

At the end of this research the author would be able to draw a clear distinction and comparison of the winding up provisions under the existing Company laws and the new code, i.e the IBC, 2016.

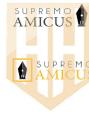
KEY WORDS: Insolvency and Bankruptcy Code, 2016, companies Act, 2013, Winding up, Liquidator.

INTRODUCTION

MEANING OF WINDING UP

The winding up of a company is the process by which the assets of the company are collected and sold in order to pay its debts. In the words of Pennington¹ winding up or liquidation is the process by which the management of a company's affairs is taken out of its director's hands, its assets are realized by a liquidator, and its debts and liabilities are discharged out of the proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. Generally, winding up is the last option available to a company in case the company is unable to pay its debts and liabilities to its members and shareholders through any alternative options. When the wind up of a company is completed, first the

¹Pennington's Company Law, 5th Edition, Page 839



company is dissolved and then it ceases to exist.

Broadly a company can be dissolved by two ways, first is when the tribunal or court passes an order to compulsory wind up that company on the grounds of petition presented in the Tribunal or Court and Secondly, when a resolution is passed in the General meeting of members to wind up the company.

INTRODUCTION OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Before the introduction of the Insolvency and Bankruptcy Code, the winding up of a company was solely and exclusively governed by the Companies Act, 1956 and under the supervision of the Courts. After the introduction of the Companies Act, 2013 the provisions specified under the 1956 Act were carried forward with some minimal changes to the Companies Act, 2013. However, in the original form the provisions of the winding up under the Companies Act, 2013 were never notified and the winding up henceforth continued to be broadly governed by the provisions mentioned in the old 1956 Act. Both the Acts allowed a company to be wound up by two ways i.e, Compulsory winding up and Voluntary winding up. The grounds for winding up of a company were also specified in the provisions of the Companies Act. The introduction of the IBC, 2016 brought major and important changes in the provisions governing the winding up of a Company.

Some of the major and notable changes brought up by the introduction of the IBC,

2016 in the winding up of a company are as follows:

- The introduction of IBC, 2016 removed the inability to pay debts as a ground of compulsory winding up of a company.
- The introduction of the IBC, 2016 sweep out the part in the companies Act which dealt with the Voluntary winding up of a company

MODES OF WINDING UP OF A COMPANY UNDER COMPANIES ACT, 2013

a) BEFORE THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Before the introduction of the IBC, 2016 a company can be wound up by two modes and the Companies Act provides provisions for the same. **Section 270(1)** of the Companies Act, 2013 provides for the modes of winding up of a company:-

Section 270 provides that the winding up of a company may be either-

- a) By the Tribunal, i.e, **compulsory** winding up or
- b) **Voluntary** i.e, by passing of an appropriate resolution for voluntary winding up at a general meeting of members.

b) AFTER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

After the introduction of the IBC, 2016 the Section 270 of the Companies Act, 2013 stands amended. Due to the notification of Section 255 of the IBC, 2016 the provisions of voluntary winding up of a company are omitted from the Companies Act, 2013. Section 255 of the IBC, 2016 provides that the Companies Act, 2013 shall be amended



as in the manner provides in the Eleventh Schedule. The provisions of voluntary winding up of a company now fall under Section 59 of the IBC, 2016 which deals with the voluntary liquidation of the corporate persons. Earlier this section under the IBC, 2016 was not notified therefore the question prevails that whether the Companies Act or the IBC, 2016 would govern the voluntary winding up. To this **Section 468(3)** of the Companies Act, 2013 provided that the rules framed by the hon'ble Supreme Court before the commencement of the companies act, 2013 shall continue to be in force till the time new rules are framed to that effect by the Central Government. Now on 31st March, 2017 IBBI has notified the **Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017**. The same is published in the official Gazette of India. Hence, till now it is settled that the provisions of the Voluntary winding up of a company under the 2013 Act stands omitted after the IBC, 2016 and the voluntary winding up of a company would be governed by the IBC, 2016 only.

COMPULSORY WINDING UP OF A COMPANY UNDER COMPANIES ACT, 2013

MEANING

A compulsory winding up of a company is winding up of a company when it is ordered by the National Company Law Tribunal (NCLT). The tribunal makes a winding up order on an application presented by any persons who are entitled to present a petition under the provisions of the Companies Act, 2013.

GROUND FOR COMPULSORY WINDING UP UNDER COMPANIES ACT, 2013

a) BEFORE THE INSOLVENCY & BANKRUPTCY CODE, 2016

Before the IBC, 2016 under **Section 271** of the Companies Act, 2013 total 7 grounds for the Compulsory winding up of a company were provided. Any person entitled under Section 272 of the Companies Act, 2013 can file a petition on these 7 grounds before the tribunal in order to seek a winding up of a company. The grounds are as follows:

- i. if the company is unable to pay its debts²;
- ii. if the company has, by special resolution, resolved that the company be wound up by the Tribunal³;
- iii. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality⁴;
- iv. if the Tribunal has ordered the winding up of the company under Chapter XIX;
- v. if on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or

² Omitted by the Insolvency & Bankruptcy Code, 2016

³ Section 271(1)(a) of the Companies Act, 2013

⁴ Section 271(1)(b) of the Companies Act, 2013



- misconduct in connection therewith and that it is proper that the company be wound up⁵
- vi. if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years⁶; or
 - vii. if the Tribunal is of the opinion that it is just and equitable that the company should be wound up⁷.

b) AFTER THE INSOLVENCY & BANKRUPTCY CODE, 2016.

The introduction of the IBC, 2016 has a sweeping effect on the provisions of winding up of a company. After the introduction of IBC, 2016 **the ground under which a company can seek winding up by presenting a petition when there is inability to pay debts [Section 271(1) (a)] in a tribunal under, Section 272 of the Companies Act, 2013 stands omitted by the virtue of Section 255 of the IBC, 2016.** However the same is dealt with Sections 7 to 9 of the IBC, 2016, being initiation of corporate insolvency resolution process by financial and operational creditors.

Presently only 5 grounds for winding up of a company are prevailing under Section 271 of the Companies Act, 2013, and the satisfaction of these grounds by the tribunal leads to the winding up of a company. However the tribunal as long as

possible will try to figure out the ways such that a company could be saved from winding up and the last available option available for a tribunal is the dissolution of a company.

VOLUNTARY WINDING UP OF A COMPANY UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Earlier the provisions concerning the voluntary winding up of a company were contained under Section 304-325 of the Companies Act, 2013 although these were not notified and hence the voluntary winding up of a company was governed by the Companies Act, 1956 until the IBC got the assent of president on 28/05/2016 to introduce the IBC, 2016 and as per Section 255 of the Code the sections of voluntary winding up of a company are ‘omitted’ from the Companies Act, 2013. The same is now governed by Section 59 of the code which was notified on April 2017. As a result the voluntary winding up of a company shall be governed by the IBC, 2016.

MEANING OF VOLUNTARY WINDING UP

Members' Voluntary Liquidation (MVL) is where the shareholders of a solvent company adopt a voluntary winding up resolution and appoint a liquidator to realize the assets of the business in order to distribute the proceeds to company members. Section 59 of the Code provides for the voluntary winding up of a company. Clause 1 of Section 59 A

⁵ Section 271(1)(c) of the Companies Act, 2013
⁶ Section 271(1)(d) of the Companies Act, 2013
⁷ Section 271(1)(e) of the Companies Act, 2013



corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the code.

(ii) the company is not being liquidated to defraud any person;⁸

The aforesaid declaration shall be accompanied with the following documents:-

(i) 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;

(ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;⁹

INITIATION OF VOLUNTARY WINDING UP OF A COMPANY

The **Insolvency and Bankruptcy Board of India (Voluntary Liquidation) regulations, 2017** (hereinafter referred as IBBI) and the IBC, 2016 provides that the commencement of the voluntary winding up of a company starts when the corporate person satisfies all the conditions mentioned under **Section 59** of the Code as provided by **Section 59(2)** of the Code and the procedural requirements shall be specified by the board as per the said section. Following are the conditions that a corporate person shall meet in order to initiate the voluntary liquidation:

2) GENERAL MEETING

Section 59 further provides for passing of a special resolution in a general meeting of shareholders in order to commence the voluntary winding up of the Company. Clause c of the Code provides for the same, it provides that

Within four weeks of a declaration under sub-clause (a) of Section 59 there shall be—

(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on

1) DECLARATION OF INSOLVENCY

Section 59 of the Code provides that a declaration from majority of the directors of the company verified by an affidavit stating that—

(i) they have made a full inquiry 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; and

⁸ Section 59(3)(a) of the Insolvency & Bankruptcy Code, 2016

⁹ Section 59(3)(b) of the Insolvency & Bankruptcy Code, 2016



the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

The proviso to this Section provides that if the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

APPOINTMENT OF THE LIQUIDATOR

The regulations and the Code provides for the appointment of an insolvency professional to be appointed as a liquidator in order to collect the assets of the company and discharge its liabilities at the time of winding up and such professional shall be qualified as per the regulations of the Voluntary liquidation. A professional shall be eligible to be appointed as the company liquidator if he fulfills the following requirements:

- (a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate person is a company;
- (b) is not a related party of the corporate person; or
- (c) has not been an employee or proprietor or a partner:

 - (i) of a firm of auditors or company secretaries or cost auditors of the corporate person; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, in the last three financial years.

(2) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.

(3) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.¹⁰

EFFECT OF VOLUNTARY WINDING UP ON STATUS OF A CORPORATE PERSON

The corporate person shall from the voluntary liquidation commencement date cease to carry on its business except as far as required for the beneficial winding up of its business: Provided that the corporate state and corporate powers of the corporate person shall continue until it is dissolved.¹¹

CONCLUSION

The current provisions with regard to the winding up of a company may be

¹⁰ Regulation 7 of the Insolvency and bankruptcy Board of India (Voluntary liquidation) regulations, 2017.

¹¹ Regulation 6 of the Insolvency and bankruptcy Board of India (Voluntary liquidation) regulations, 2017.



summarized as that the compulsory winding up of a Company is governed by the Companies Act, 2013 and the grounds for the compulsory winding up are mentioned in Section 271 of the Companies Act, 2013 and due to the effect of Section 255 of the Insolvency and bankruptcy Code, 2016, Section 271(1) (a) of the old companies Act, 2013 is omitted which was winding up on the ground of inability to pay debts. Also, the whole part of the Companies act which dealt with the voluntary winding up of a company is omitted from the Act and it is now governed by the IBC, 2016. The tribunals and the liquidators play a major role in the winding up of a company. The main objective in shifting the proceedings of winding up from the courts to the tribunal is mainly to shift the burden from the courts. It is very interesting after the introduction of the code to see that how the tribunals will deal with the winding up proceedings applying both the 2013 Act and the Code.

