



CS-EXECUTIVE *Module-I*

Volume-II

SETTING UP OF BUSINESS ENTITIES & CLOSURE

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CORPORATE INSOLVENCY RESOLUTION PROCESS, LIQUIDATION AND WINDING UP: AN OVERVIEW

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC) was passed by the Parliament on 11th May, 2016, received Presidential assent on 28th May, 2016 and was notified in the official gazette on the same day. The Act consolidates and amends the laws relating to insolvency of -

- Companies formed under Companies Act, 2013 or previous law
- Companies governed by Special Act
- Limited Liability Partnership (LLP) incorporated under LLP Act, 2008
- Any other body corporate notified by Central Government
- Partnership firms
- Individuals

IMPORTANT DEFINITIONS

- Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal
- "corporate applicant" means –
 - (a) corporate debtor; or
 - (b) a member or partner of the corporate debtor who is authorised to make an application
 - (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
 - (d) a person who has the control and supervision over the financial affairs of the corporate debtor;
- Corporate person – "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.
- "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to

- Insolvency professional - "Insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.
- Insolvency professional agency - "Insolvency professional agency" means any person registered with the Board under section 201 as an insolvency professional agency.
- "insolvency resolution process costs" means –
 - (a) the amount of any interim finance and the costs incurred in raising such finance;
 - (b) the fees payable to any person acting as a resolution professional;
 - (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
 - (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
 - (e) any other costs as may be specified by the Board
- Liquidator - "Liquidator" means insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be.

PERSONS WHO MAY INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution Process.

RESOLUTION PROCESS

1. A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.
2. The financial creditor shall, along with the application furnish –
 - (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
 - (b) the name of the resolution professional proposed to act as an interim resolution professional; and
 - (c) any other information as may be specified by the Board.
3. The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub- section (2), ascertain the existence of a default from the

records of an information utility or on the basis of other evidence furnished by the financial creditor.

4. Where the Adjudicating Authority is satisfied that –
 - (a) a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
 - (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

However, before rejecting the application, the Adjudicating Authority shall give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

5. The corporate insolvency resolution process shall commence from the date of admission of the application.
6. The Adjudicating Authority shall communicate the order to the financial creditors and the corporate debtor within seven days of admission or rejection of such application, as the case may be.
7. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
- (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –
 - (a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
 - (b) the repayment of unpaid operational debt –
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

TIME LIMIT OF CORPORATE INSOLVENCY RESOLUTION PROCESS

Corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

However, in case corporate insolvency resolution process cannot be completed within 180 days, it may by order extend the duration of such period beyond 180 days by such periods as it thinks fit, but not exceeding 90 days: and also the extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

MORATORIUM

On commencement of the CIRP, the adjudicating authority passes an order declaring moratorium for prohibiting all of the following by virtue of section 14 of the IBC:

- (a) Institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein
- (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under SARFAESI
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The order of moratorium shall have effect from the date of order till the completion of CIRP or date of approval of resolution plan or order of liquidation, as the case may be.

INTERIM RESOLUTION PROFESSIONAL

The IRP takes over the management of the corporate debtor and is in charge of day of day affairs of the corporate debtor. He may appoint professionals and consultants to support him in his duties.

The primary duty of the IRP is to:

- (a) Make public announcement about the CIRP of the corporate debtor
- (b) Invite claims from creditors
- (c) Get valuation of the corporate debtor done

On receipt of claims from the creditors, the IRP shall verify the claims and make list of accepted claims. Within 30 days of commencement of CIRP, the IRP shall constitute a Committee of Creditors (COC) which primarily consists of all financial creditors of the corporate debtor..

RESOLUTION PROFESSIONAL

Resolution Professional (RP) is a new category of professionals who on meeting stipulated criteria, is registered with the Insolvency and Bankruptcy Board of India. Only a person who is registered as a Resolution Professional / Insolvency Professional can act as such. Company Secretaries are eligible to be registered as Resolution Professionals subject to meeting stipulated criteria.

COMMITTEE OF CREDITORS

The COC at its first meeting shall appoint a Resolution Professional (RP). In doing so, it may either confirm the appointment of IRP as RP or appoint another RP of its choice. The RP then takes over the management of the corporate debtor from the IRP. The RP shall act under the guidance and superintendence of the COC. All decisions of the COC shall be taken by 75% majority. Each member of the COC has voting share in proportion to the amount of debt outstanding to the corporate debtor. The RP shall take approval of the COC for matters stipulated in the Code.

RESOLUTION PLAN:

The objective behind the CIRP is that the corporate debtor should get a chance to revive itself from insolvency. The corporate debtor is in insolvency due to various reasons including market conditions, business cycles, wrongful acts of the promoters, amongst others. The corporate debtor should get a fresh chance to revive itself and recommence its operations either in the same management or a new management. With this intent in mind, the RP invites proposals to revive the corporate debtor. These proposals are known as “resolution plans” and they can be submitted by any person who is interested in revival of the company. These plans include proposals to pay off the existing liabilities of the corporate debtor in part or in full and to restart its operations over a period of time. There are safeguards against a defaulting promoter submitting a resolution plan so that such defaulting promoter is not able to takeover a debt free company at lower cost by way of a resolution plan.

The resolution plan is submitted to the RP who in turn places all such plans before the COC. The COC shall approve the most suitable resolution plan. Such resolution plan approved by the COC is submitted to the Tribunal for its approval. In case the Tribunal approves the resolution plan, the corporate debtor is out of CIRP.

LIQUIDATION PROCESS

In terms of Section 59 of the IBC, only a corporate person is allowed to initiate voluntary liquidation process, which has not committed any default.

1. Additional declaration by the directors that company is not wound up to defraud any person
2. Only insolvency professional can, who meets the eligibility criteria as specified under New Regulations, be appointed as liquidator;
3. Maintenance and preservation of various registers in the prescribed manner;
4. Preparation of various reports by the liquidator as to be submitted to a corporate person, Registrar of Companies; and the Insolvency and Bankruptcy Board of India;
5. Receipt of stakeholders claims by liquidator;
6. The liquidator shall Endeavour to wind up the affairs of the corporate person within 12 (twelve) months from the voluntary liquidation commencement date;

(1) Where the Adjudicating Authority, –

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

- (3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).
- (4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).
- (5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

- (6) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

VOLUNTARILY LIQUIDATION

A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation.

Below is the brief procedure of voluntary liquidation of a corporate person under IBC:

Step I: Submission of declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person;

Step II: Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator ("Approval"), within 4 (four) weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required;

Step III: Public announcement inviting claims of all stakeholders, within 5 (five) days of such Approval, in newspaper as well as on website of the corporate person;

Step IV: Intimation to the ROC and the Board about the Approval, within 7 (seven) days of such Approval;

Step V: Preparation of preliminary report about the capital structure, estimates of assets and liabilities, proposed plan of action etc., and submission of the same to a corporate person within 45 (forty-five) days of such Approval;

Step VI: Verification of claims, within 30 (thirty) days from the last date for receipt of claims and preparation of list of stakeholders, within 45 (forty-five) days from the last date for receipt of claims;

Step VII: Opening of 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

Step VIII: Sale of assets, recovery of monies due to corporate person, realization of uncalled capital or unpaid capital contribution;

Step IX: Distribution of the proceeds from realization within 6 (six) months from the receipt of the amount to the stakeholders;

Step X: Submission of final report by the liquidator to the corporate person, ROC and the Board and application to the National Company Law Tribunal ("NCLT") for the dissolution;

Step XI: Submission of NCLT order regarding the dissolution, to the concerned ROC within 14 (fourteen) days of the receipt of order.

WATERFALL ARRANGEMENT:

Section 53 of the IBC provides for the manner of distribution of assets in case of liquidation and order of priority of distribution. It is pertinent to note that this order of priority is notwithstanding anything contrary which is contained in any other Central or State law. This order of priority is also known as the "waterfall arrangement" since each of category of persons comes in priority after the previous one.

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:

- (a) Insolvency resolution process costs and liquidation costs paid in full
- (b) Following debts shall rank equally between and among the following:
 - (i) Workmen's dues for the period of 24 months preceding the liquidation commencement date
 - (ii) Debts owed to secured creditor in the event such secured creditor has relinquished security under section 52

- (c) Wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date
- (d) Financial debts owed to unsecured creditors
- (e) Following dues shall rank equally between and among the following:
 - (i) Any amount due to the Central / State Government including amount to be received on account of Consolidated Fund of India and Consolidated Fund of a State, if any, in respect of 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 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.

Any contractual arrangements between recipients above with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.

WINDING UP

OBJECT AND SCOPE OF THE LAW

One of the hallmarks of a reliable economy is the time taken for a company to wind up. India's record in this area was not very remarkable. This was a major sore point for foreign investors who were looking for a way to close down the operations in a reasonable time. With this as one of its intents, the Insolvency and Bankruptcy Code was brought into effect in the year 2016. The Code is a game changer in the way insolvency is dealt with in this country.

MEANING OF WINDING UP:

Winding up is the process of closing down the legal existence of a company or LLP. During this process, the assets of the entity are realized, its liabilities are paid off and any surplus is distributed amongst the contributories. Once the adjudicating authority is convinced that these processes are completed, the entity is dissolved.

During winding up, the management of the company / LLP is in the hands of the liquidator and not the governing body / board of directors. However, the assets and liabilities still belong to the company until dissolution takes place. On dissolution, the entity loses its legal existence.

Section 270 of the Companies Act, 2013 regarding the Modes of winding up, has been deleted after the enforcement of this Code. It has been substituted by Winding up by Tribunal.

DIFFERENCE BETWEEN 'WINDING UP' AND 'DISSOLUTION':

Many times, the terms 'winding up' and 'dissolution' are used interchangeably. This is not correct. There are very important differences in these two terms which are given below:

- (1) Winding up is the first stage of ending the legal existence of the entity. In this stage, the assets of the entity are realized, its liabilities paid off and surplus, if any, is distributed amongst the contributories. Whereas dissolution is the final stage after completion of winding up process and by act of law, the legal existence of the entity comes to an end.
- (2) The winding up process is handled by a liquidator / insolvency professional. The dissolution can happen only by way of an order passed by the adjudicating authority.
- (3) Creditors can prove their claims during winding up but not on dissolution since the entity no longer exists.
- (4) Winding up need not result in dissolution in all cases. A company which is in winding up can be taken over / amalgamated by any other entity / company which will result in the company coming out of winding up process and being handed over to the shareholders. This is not possible in case of dissolution.

WINDING UP BY TRIBUNAL

Section 271 of the Companies Act 2013 provides grounds for winding up of the company by the Tribunal. According to section 271, a company may be wound up by the Tribunal in following cases:

- (a) If the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- (b) 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 morality;
- (c) 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;

- (d) If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
- (e) If the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

For commencing proceedings under section 271, a petition is to be made to the Tribunal. According to section 272, this petition may be made by any of the following persons:

- (a) The company;
- (b) Any contributory or contributories;
- (c) All or any of the persons specified in clauses (a) and (b);
- (d) The Registrar;
- (e) Any person authorised by the Central Government in that behalf; or
- (f) In a case falling under clause (b) of section 271, by the Central Government or a State Government.

Any petition filed by the company shall be accompanied by a statement of affairs in prescribed form.

A petition can be filed by the Registrar only with previous sanction of the Central Government which shall be accorded only after giving to the company a reasonable opportunity of being heard.

Any petition filed under this section, apart from that filed by the Registrar himself, shall be served on the Registrar and the Registrar shall submit his views to the Tribunal within 60 days of receipt of such petition.

On a petition filed under section 272, the Tribunal may pass any of the following orders within 90 days of presentation of the petition:

- (a) Dismiss it, with or without costs;
- (b) Make any interim order as it thinks fit;
- (c) Appoint a provisional liquidator of the company till the making of a winding up order;
- (d) Make an order for the winding up of the company with or without costs; or
- (e) Any other order as it thinks fit.

The Tribunal shall give an opportunity of being heard to the company before appointment of a Provisional Liquidator.

The order for winding up of a company shall operate in favor of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

The liquidator is required to submit to the Tribunal, a report containing the following particulars, within sixty days from the order:

- (a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company;
- (b) valuation Report of the assets obtained from registered valuers
- (c) amount of capital issued, subscribed and paid-up;
- (d) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;
- (e) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;
- (f) guarantees, if any, extended by the company;
- (g) list of contributories and dues, if any, payable by them and details of any unpaid call;
- (h) details of trademarks and intellectual properties, if any, owned by the company;
- (i) details of subsisting contracts, joint ventures and collaborations, if any;
- (j) details of holding and subsidiary companies, if any;
- (k) details of legal cases filed by or against the company; and
- (l) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company.

The Tribunal shall on an application filed by the Company Liquidator or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that

an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

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Adv Chirag Chotrani is a young yet experienced faculty in the field of Law. From being the topper of his batch, to creating many All India Rankers in the Field of Company Secretary, Chirag has proved his academic capabilities time and again.

Chirag is a Commerce and Law Graduate and holds a Masters Degree in Corporate Law, earned specialisation in Corporate Laws and in Arbitration Law and is currently completing his PHd in Corporate Laws.

The ease with which this faculty introduces the concepts is commendable and every student who has studied under him has passed in his subjects with flying colours. From the start of his career till now he has always been into teaching and has served in many Prestigious Institutions and is presently the Top Educator for CS Category at UNACADEMY Platform which currently caters to 10 Million students across the country.



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