CLOSURE OF COMPANIES & LLP

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Modes of closure of companies

- Winding up under Companies Act 2013
- Fast Track winding up under Companies Act 2013
- Voluntary winding up under Insolvency and Bankruptcy Code 2016 (IBC)
- Winding up following unsuccessful CIRP under IBC
- Dormant company
- Strike off name from register of companies

Modes of closure of LLP

- Voluntary winding up under Insolvency and Bankruptcy Code 2016 (IBC)
- Voluntary Winding up under LLP Act
- Strike off name from register
- Winding up under LLP Act

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WINDING UP UNDER COMPANIES ACT 2013

WINDING UP UNDER CA 2013

Relevant Law:

- Sections 271 - 303 of Companies Act 2013
- Sections 324 – 358 of Companies Act 2013
- Companies (Winding Up) Rules, 2020

Jurisdiction - NCLT

WINDING UP UNDER CA 2013

A company may be wound up by the Tribunal u/s 271 -

a. If Special Resolution passed for winding up by Tribunal

b. If 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. On an application by ROC due to fraud, misfeasance or misconduct

d. If there is default in Annual filing for 5 consecutive years

e. On just and equitable grounds

WHO CAN APPLY

(*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;

(f) Central Govt or State Govt in cases where company is alleged to have acted against interests of sovereignty etc

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COMPANY

Company may apply:

(a) If special resolution to that effect is passed by the company

(b) Petition shall be accompanied by statement of affairs

(c) Copy of petition to be filed with the ROC

(d) ROC to submit views to NCLT within 60 days of receipt of petition

CONTRIBUTORY

Contributory may apply notwithstanding:

(a) That he holds fully paid up shares or

(b) Company has not assets at all or

(c) Company does not have surplus assets left for distribution among the shareholders after satisfaction of its liabilities; and

(d) Shares were originally allotted to him or have been held by him and registered in his name for at least 6 months during the 18 months immediately before the commencement of winding up

(e) Shares have devolved on him through death of a former holder

REGISTRAR

Registrar may apply:

(a) After obtaining previous sanction of RD to present the petition

(b) RD shall accord sanction only after giving the company reasonable opportunity of making representation

(c) On any grounds in 271 except (a) i.e. passing of special resolution by the company – acting against sovereignty of India, affairs are conducted in fraudulent manner / purpose, default in filing returns for 5 years or on just and equitable grounds

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POWERS OF NCLT

NCLT may pass orders:

(a) Dismissing the petition, with or without costs

(b) Make any interim orders

(c) Appoint provisional liquidator till final winding up order

(d) Any other order as it thinks fit

Timeline – within 90 days from date of presentation of petition

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POWERS OF NCLT…

(a) Before appointing provisional liquidator, opportunity of being heard to be given to the company

(b) NCLT cannot refuse to make order on the ground that only assets of the company have been mortgaged for an amount equal to or more than the assets, or that the company has no assets

(c) In case of petition on just & equitable grounds, NCLT may refuse to pass order in case it is of the opinion that alternate remedy is available to the petitioner

STATEMENT OF AFFAIRS

(a) Where petition filed by any person other than the company, and if prima facie case is made out, NCLT shall direct the company to file objections along with statement of affairs

(b) If company fails to file within prescribed time, right to oppose petition shall be forfeited and directors / officers of the company found responsible for this non compliance shall be liable for punishment

(c) Punishment – imprisonment upto 6 months or fine not less than Rs. 25,000 upto Rs. 5 lakhs or both

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ADVERTISEMENT

(a) NCLT may pass directions for advertisement of the petition, notice to relevant parties including the company

(b) Before issue of directions for advertisement, opportunity of being heard may be given

(c) Petitioner to bear cost of advertisement

(d) Advertisement to be in prescribed format

(e) NCLT may also direct advertisement of order

LIQUIDATOR

(a) Liquidator shall be an Insolvency Professional

(b) NCLT may appoint provisional liquidator or company liquidator, as it deems fit

(c) NCLT may restrict powers of Provisional liquidator

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EFFECT OF ORDER

(a) Notice of discharge to officers, employees and workmen of the company, except when business of the company is continued

(b) Order shall operate in favour of all creditors and contributories as if it had been made on joint petition by them

(c) No suit or legal shall be commenced / proceeded with, by or against the company, except with the leave of the NCLT

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POWERS & DUTIES OF LIQUIDATOR

(a) As per section 290

(b) Filing of periodic reports

(c) Custody of assets and records of the company

(d) Books of accounts of liquidation and audit

(e) Settlement of list of creditors and contributories

POWERS OF NCLT

(a) To make calls

(b) Order costs

(c) Summon persons suspected of having company property

(d) Order examination of promoters, directors

(e) Arrest of person trying to abscond

(f) Hearing of suits etc u/s 280

DISSOLUTION

(a) By order of NCLT on application by liquidator

(b) Unclaimed amount to be deposited in designated account

(c) Summon persons suspected of having company property

(d) Order examination of promoters, directors

(e) Arrest of person trying to abscond

(f) Hearing of suits etc u/s 280

FAST TRACK WINDING UP UNDER COMPANIES ACT 2013

SUMMARY PROCEDURE

(a) Under section 361 of CA 2013 and Rule 190 of Rules

(b) Powers delegated to RD

(c) Official Liquidator is appointed as liquidator

(d) All actions to be taken by OL

(e) OL to submit report within 30 days to RD

(f) RD may refer matter to NCLT at any stage

ELIGIBILITY – BASED ON LATEST AUDITED BALANCE SHEET

(a) Company which has taken deposit and total outstanding deposits is not exceeding Rs. 25 lakhs, or

(b) Company of which the total outstanding loan incurred including secured loan does not exceed Rs. 50 lakhs, or

(c) Company of which turnover is up to Rs. 50 crores, or

(d) Company of which paid up capital does not exceed Rs. 1 crore

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VOLUNTARY WINDING UP UNDER IBC

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VOLUNTARY WINDING UP OF COMPANY

Relevant Law:

- Section 59 of IBC

- Sections 35 – 53 of IBC with suitable modifications

- IBBI (Voluntary Liquidation) Regulations, 2017

Jurisdiction - NCLT

PREREQUISITES

(a) No default

(b) Solvency declaration by directors (realizable assets are more than estimated liabilities)

(c) Audited financials for last two years and provisional till the date near to solvency declaration

(d) Valuation report, if any

(e) Special resolution within 4 weeks of declaration

(f) Creditors' resolution with 2/3rd in value approving the resolution

(g) Directors to make provision for preservation of records after dissolution

PREREQUISITES

(a) Directors to make provision for preservation of records after dissolution

(b) Resolution to decide remuneration of liquidator

(c) Liquidator should be eligible to act

(d) If FY has ended, complete AGM and annual filing formalities before starting liquidation

BROAD STEPS

(a) Liquidation starts from the date of special resolution

(b) Liquidator to take over affairs and bank accounts

(c) Make public announcement for claims

(d) Claims to be filed within 30 days

(e) Separate liquidation account to be maintained

(f) Liquidator to realise all assets and pay off **all** liabilities

(g) Various reports to be prepared by liquidator

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BROAD STEPS…

(a) In case of foreign shareholders, surplus / capital to be remitted as per FEMA compliances

(b) Income Tax NOC is not mandatory*

(c) Withholding tax computation required

(d) If any asset cannot be advantageously or readily sold due to its peculiar nature, it may be distributed amongst stakeholders with the approval of the corporate person

TIMELINES

(a) Where creditors have passed resolution to commence liquidation, liquidation process to be completed within 270 days

(b) In other cases, within 90 days

(c) Where it continues for more than one year, liquidator to hold meeting of contributories within 15 days and present annual status report along with audited receipt & payment statement

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DISSOLUTION

(a) On completion of process, liquidator to prepare final report along with Receipt & Payments Statement and compliance certificate

(b) Final report to be submitted to ROC and IBBI

(c) Application for dissolution to be filed with NCLT along with final report, compliance certificate, R & P statement

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OTHERS

(a) If any person initiates voluntary liquidation proceedings with the intent to defraud any person, NCLT may impose upon such person a penalty which shall not be less than Rs. 1 lakh but may extend to Rs. 1 crore

(b) No NCLT intervention in the process

(c) Liquidator may demonstrate that sufficient provision has been made to meet the obligations arising from pending litigation

LIQUIDATION UNDER IBC

WINDING UP OF COMPANY

Relevant Law:

- Sections 7 - 53 of IBC

- IBBI (CIRP) Regulations, 2016

- IBBI (Liquidation) Regulations, 2016

Jurisdiction - NCLT

STAGES IN THE PROCESS

(a) May be initiated by financial creditor or operational creditor or the company / LLP itself

(b) Minimum default amount Rs. 1 crore

(c) Petition is for declaring the entity insolvent

(d) Application to be filed with NCLT which will decide the petition on merits

(e) On admission, the CD is declared insolvent and CIRP is initiated

(f) Specific provisions for MSME revival (prepack)

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STAGES IN THE PROCESS

(a) During CIRP, moratorium is imposed on certain actions

(b) Independent professional takes over the affairs of the company and directors' powers are suspended

(c) Invites claims and forms Committee of creditors

(d) Keeps CD as going concern

(e) Takes steps to resolve the CD within given timeframe

(f) Invites bids to takeover the CD

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STAGES IN THE PROCESS

(a) In case bids are approved by the COC and the NCLT, the CD is out of insolvency and plan is implemented

(b) In case no bids are received or approved, the CD goes into liquidation

(c) In case the COC decides not to proceed with the resolution process, COC can resolve to put the CD into liquidation

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LIQUIDATION UNDER IBC

(a) Liquidator who is appointed by NCLT, invites claims from creditors

(b) Liquidator sells assets and pays of liabilities to the extent possible from available funds

(c) Secured creditors have preferential rights to recover from the assets charged to them

(d) Distribution is as per Section 53 of IBC – known as waterfall mechanism

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LIQUIDATION UNDER IBC…

(a) Liquidator has authority to sell assets and distribute proceeds

(b) Reports to be filed at various stages

(c) Books to be maintained

(d) Statutory timeline is one year

(e) On realization / write off of all assets, liquidator to apply for dissolution of the entity

CLOSURE OF SEC 8 COMPANY

SECTION 8

Relevant Law:

- Sections 8 of Companies Act 2013

- Companies (Incorporation) Rules, 2014

Jurisdiction – NCLT, RD

CLOSURE

(a) Method 1 – Conversion into company of any other kind under Rule 21 and Rule 22. Once it is converted into any other kind of company, go for liquidation / strike off etc

(b) Method 2 – Section 8(9) – go for winding up u/s 59 of IBC or Sec 271 of CA 2013

METHOD 1 – CONVERSION RULE 21 & 22

(a) Pass special resolution approving the conversion

(b) Explanatory statement to contain specific matters

(c) File form MGT-14 and INC-18 with RD and ROC

(d) Public advertisement

(e) Notice with application for conversion to be sent to Income Tax Dept, Charity Commissioner, any other relevant Govt dept or authority

(f) These authorities can make representation before RD within 60 days

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METHOD 1 – CONVERSION RULE 21 & 22

(a) BOD to give declaration that no portion of income / property of the company has been or shall be paid or transferred directly or indirectly by way of dividend or bonus or otherwise to persons who are or have been members of the company or to any one or more of them or to any persons claiming through any one or more of them

(b) If company has obtained any special status / privilege / exemption etc from any authority, NOC of that authority to be obtained

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METHOD 1 – CONVERSION RULE 21 & 22

(a) All filings should be complete

(b) If application made after 3 months from date of preceding FY, statement of financial position duly certified by CA made up to a date not preceding 30 days before the application

(c) Certificate from CA / CS / CWA certifying that conditions in the Act and Rules regarding conversion are complied with

(d) RD may seek approval from any specific authority / ROC

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METHOD 1 – CONVERSION RULE 21 & 22

(a) Application may be approved by RD imposing conditions pertaining to:

- company shall not claim / give up its special status / privilege etc on conversion

- if company had acquired immovable property at free / concessional rates, difference in the market price to be paid by the company

- accumulated profit or unutilised income b/f from previous years to be first utilized for payment to creditors including statutory dues and loans from promoters and balance to be transferred to IEPF

METHOD 1 – CONVERSION RULE 21 & 22

(a) After obtaining approval, hold general meeting to pass special resolution to alter MOA and AOA

(b) File necessary forms and declarations

(c) Receive fresh COI

(d) Then as a regular private company, opt for strike off / voluntary winding up / Sec 271 winding up

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METHOD 2 – WINDING UP

Section 8(9) states:

"If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to IBBI Fund"

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METHOD 2

(a) Option to go for voluntary winding up / Companies Act

(b) Surplus cannot be distributed amongst members, hence either assets to be transferred to another company with NCLT approval or assets to be sold and proceeds transferred to IBBI Fund

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VOLUNTARY WINDING UP UNDER IBC

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VOLUNTARY WINDING UP OF COMPANY

- Process is similar to that of voluntary winding up of companies under Section 59 of IBC read with IBBI (Voluntary Liquidation) Regulations, 2017

- LLP agreement to be checked for any specific inclusions regarding closure

VOLUNTARY WINDING UP UNDER LLP ACT

VOLUNTARY WINDING UP

- Under section 63 of LLP Act read with Rule 5 – 24 of LLP (Winding up & Dissolution) Rules 2012

- E-forms are not available for all filings

- Clarity on role of ROC etc not proper

- Preferable to go under IBC

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WINDING UP UNDER LLP ACT

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WINDING UP

- Under section 64 of LLP Act read with LLP (Winding up & Dissolution) Rules 2012

- Grounds are similar to those under Section 271 of CA 2013

- Powers are with NCLT to initiate winding up

- Steps and procedure is very similar to that under section 271

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OPPORTUNITIES

- As Insolvency Professional – IRP / RP / Liquidator / VL
- Drafting of petitions / applications
- Appearance before NCLT
- Advising your company / clients:
- To recover outstandings from / initiate action against debtors
- To avoid action against your company / client
- To file claims in case debtor goes into CIRP / liquidation
- To prepare resolution plans
- To acquire such CD / their assets in liquidation
- To support in other winding up actions

QUESTIONS?

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THANK YOU!

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