

Voluntary Liquidation Under IBC

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- Vinod Kothari and Company, consultants and advisors
 - Based out of Kolkata, New Delhi, Mumbai & Bengaluru
- We are a team of consultants, advisors & qualified professionals having over 33 years of practice.

Our Organization's Credo:

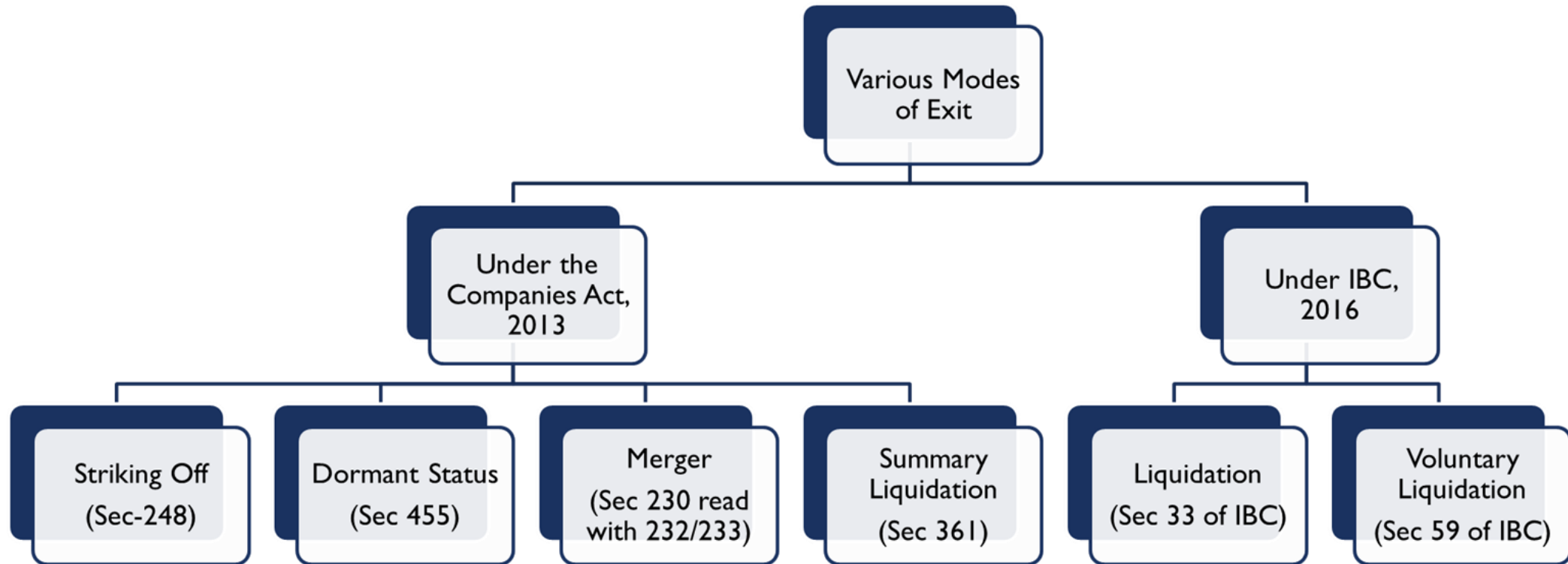
Focus on capabilities; opportunities follow



Various modes of corporate exit



Different modes of closure



Different modes of winding up of a company

- Resolution and Winding up in case of a default – Chapter II and III of this Code
- Winding up on any of the grounds listed in section 271 of CA, 2013, as amended by the Code – Section 271 of Companies Act
- Voluntary winding up (other than summary winding up process below) – Section 59 of the Code read with IBBI (Voluntary Liquidation) Regulations, 2017. [S. 35-53 to the extent applicable]
- Summary winding up of companies having assets upto Rs 1 crore – sections 361-365 of Companies Act, 2013
- Winding up of unregistered companies including partnership firms and foreign companies – sections 375 and 376 of Companies Act, 2013
- Dissolution without winding up by merger – section 232 (3) (d) of the Companies Act, 2013
- Removal of the name of a defunct company from register of members – section 248 of the Companies Act, 2013
- In case of financial service providers, until explicit provisions are enacted, either the Companies Act 2013, and/or the relevant special laws, will continue to prevail.

Summary Liquidation

Provisions of law

- Sec 361 of the Companies Act, 2013
 - Section effective from 15th Dec, 2016
 - However, class of cos. notified vide the Companies (Winding Up) Rules, 2020, effective from 1st April, 2020

Eligibility / Prerequisites

- Company with book value of assets < 1 cr. and
 - Total outstanding loan including secured loan < 50 lakh, or
 - Turnover < 50 cr., or
 - Paid up share capital < 1 cr.

Process in gist





Comparison b/w different modes of exit for corporates



Comparison b/w different modes (1/8)

<u>Basis</u>	<u>Striking Off</u>	<u>Dormant Status</u>	<u>Merger</u>	<u>Summary Liquidation</u>	<u>Liquidation</u>	<u>Voluntary Liquidation</u>
Governing Statute	Sec. 248 (2) of CA, 2013	Sec. 455 of CA, 2013	Sec. 230 read with sec 232 or 233 of CA, 2013	Sec. 361 of CA, 2013	Sec. 33 of IBC, 2016	Sec 59 of IBC, 2016
Eligibility/ Prerequisites	<ul style="list-style-type: none"> •Nil assets nil liabilities; •No Notice received from Roc u/s 248 (1); •No change in name or RO of the company in preceding 3 months; •No matter of compromise or arrangement pending before NCLT; •Not active in previous 3 months 	<ul style="list-style-type: none"> •Companies formed for future project or hold assets; •Inactive Company; •Companies having no significant accounting Transaction 	<ul style="list-style-type: none"> •Approval of members or creditors wither by way of affidavit or at NCLT convened meeting 	<ul style="list-style-type: none"> •Low level of deposit or outstanding loan; •Asset value less than Rs. 1 Cr. 	<ul style="list-style-type: none"> •Failure/ non-receipt of approval of Resolution Plan from CoC; •Decision of CoC before expiry of moratorium 	<ul style="list-style-type: none"> •Solvency •No default

Comparison b/w different modes (2/8)

<u>Basis</u>	<u>Striking Off</u>	<u>Dormant Status</u>	<u>Merger</u>	<u>Summary Liquidation</u>	<u>Liquidation</u>	<u>Voluntary Liquidation</u>
Liability of directors	Directors will remain responsible to make payment of all the lawful claim/ liabilities that may arise after striking off in terms of indemnity bond	Filing return on financial position on annual basis (within 30 days from the end	Liabilities of Transferor Company will be vested into the Transferee Company	Liabilities of directors shall continue and may be enforced	Liabilities of directors shall continue and may be enforced	<ul style="list-style-type: none"> •Liabilities to prosecution for wrong DoS- As per sec 72 (wilful and material omission) or sec 235A •Liability to breach of fiduciary duty- may be asked to compensate

Comparison b/w different modes (3/8)

Basis	Striking Off	Dormant Status	Merger	Summary Liquidation	Liquidation	Voluntary Liquidation
Who controls the process?	Company	Company	Company	Liquidator	Liquidator	Liquidator
Pay down the shareholders	No question arises	No question arises	Shareholders of the transferor company will get shares of the transferee company in terms of exchange ratio	Lowest in the hierarchy	In terms of section 53. Lowest in the hierarchy	Surplus, if any, after paying all the liabilities, will be distributed among shareholders in proportion to their contribution
Involvement of creditors	-	-	For approval of the scheme	-	Consultation Committee is for advising the Liquidator	For approval of liquidation process.

Comparison b/w different modes (4/8)

<u>Basis</u>	<u>Striking Off</u>	<u>Dormant Status</u>	<u>Merger</u>	<u>Summary Liquidation</u>	<u>Liquidation</u>	<u>Voluntary Liquidation</u>
Liabilities towards creditors	To be paid before filing for striking off	Company will be liable towards is creditors, if any, as it is merely getting the status of 'Dormant Company'	Liabilities of transferor company will get vested into transferee company	To be paid in terms of hierarchy	To be paid in terms of sec 53 of the Code	To be paid in terms of section 53 of the Code
Appointment of professional, if needed ?	No	No	Yes	RD shall appoint Official Liquidator	Yes. AA shall appoint the Liquidator	Yes. The BoD shall appoint liquidator subject to approval of shareholders

Comparison b/w different modes (5/8)

Basis	Striking Off	Dormant Status	Merger	Summary Liquidation	Liquidation	Voluntary Liquidation
Role of Professional	N/A	N/A	Companies are required to appoint (a)registered valuer for calculating exchange ratio; and (b)Advocate/AR- to represent before NCLT	(a)Preparing report w.r.t. affairs of the company within 30 days; (b)Inviting claims; (c)Taking custody of all the assets; (d)Discharging dues of creditors	As per Ch. III of the Liquidation Regulations including <i>inter-alia</i> - (a)Inviting claims; (b)Verification of claims (c)Reporting to AA; (d)Realisation of assets of CD; (e)Distributing realised proceeds among stakeholders in terms of section 53; (f)Filing dissolution application	(a)Inviting claims; (b)Verification of claims (c)Reporting to contributories (d)Realisation of assets of CD; (e)Distributing realised proceeds among stakeholders in terms of section 53; (f)Filing dissolution application

Comparison b/w different modes (6/8)

Basis	Striking Off	Dormant Status	Merger	Summary Liquidation	Liquidation	Voluntary Liquidation
Role of NCLT	Not applicable. However, NCLT can wound up struck off companies	N/A	<ul style="list-style-type: none"> •Dispensing with the meeting of shareholders and creditors/ passing order for NCLT convened meeting(s); •Approval of Scheme; •Dissolution of transferor company without winding up 	N/A	<ul style="list-style-type: none"> •Sanction of Resolution Plan/Liquidation order; •Condonation of delay in filing claim; •Matters connected with liquidation; •Periodical Reporting by Liquidator; •dissolution of company 	At the time of dissolution

Comparison b/w different modes (7/8)

Basis	Striking Off	Dormant Status	Merger	Summary Liquidation	Liquidation	Voluntary Liquidation
Tax implications as per IT, 1961	Sec 179- Pending tax liabilities of struck off co. (private limited) may be recovered from the directors of the co.	As company is getting merely 'dormant status', all the liabilities will remain unaffected	(a)Sec 47-No capital gain tax on transfer of capital assets, if transferor co. is an Indian co.; (b)Sec 72A- Carry forward of accumulated losses and unabsorbed depreciation; (c)Sec 35 DD- Deduction of expenses done for the purpose of merger- 1/5 th every year for 5 years	Income, if any, during the liquidation, will be liable to tax	Income, if any, during the liquidation, will be liable to tax	(a) Section 178 (1)- Intimation to AO within 15 days of commencement of liquidation; (b) Section 2 (22)(c)- Amount distributed to shareholders to the extent of attributable profit, shall be treated as Dividend (c) Income, if any, will be liable to tax

Comparison b/w different modes (8/8)

Basis	Striking Off	Dormant Status	Merger	Summary Liquidation	Liquidation	Voluntary Liquidation
Role of Regulatory Authorities	Mandatory NOC from Regulatory Authorities required	N/A	NOC from RD, ROC, SEBI (if Listed), RBI (if NBFC), IRDA (if insurance co.), IT and OL	Reporting to RD	Regular Reporting to IBBI	Regular Reporting to IBBI
Tentative time taken	Within 1 -2 month	Within 1 month	6-7 months	1-2 months	Case specific. Normally 2-3 years	Case specific. Normally 1 year
Whether applicable on section 8 company ?	No	Yes	Sec 8 co. can only merge with other sec 8 company	Not expressly exempted	Not expressly exempted	Not expressly exempted



Voluntary Liquidation - Legislative Framework



International Scenario

- **UK**

- Chapter II of the Insolvency Act, 1986 provides for voluntary winding up
 - When can a company be wound up voluntarily?
 - Period fixed for the duration of the company by its articles expires + passing of resolution in the general meeting; or
 - On occurrence of event the articles provide the company to be dissolved + passing of resolution in the general meeting; or
 - Company resolves by SR for winding up
 - Chapter III deals with members' voluntary winding up
 - Sections 91 - 96
 - Chapter IV deals with creditors' voluntary winding up
 - Sections 97 - 106

- **Singapore**

- Section 271 provides for 2 modes of winding up
 - Compulsory, i.e., winding up by court
 - Voluntary (division 3)
 - Members' voluntary winding up (division 3 (2))
 - Creditors' voluntary winding up (division 3 (3))

Applicable Provisions of Law | Voluntary Liquidation

IBC, 2016:

- Section 59 read with IBBI (Voluntary Liquidation) Regulations, 2017
- Sections 35 to 53 with such modifications as may be necessary [Sec 59(6)]
 - **Sec 35-** Powers and duties of liquidator
 - **Sec 36-** Liquidation estate
 - **Sec 37-** Powers of liquidator to access information
 - **Sec 38-** Consolidation of claims
 - **Sec 39-** Verification of claims
 - **Sec 40-** Admission or rejection of claims
 - **Sec 41-** Determination of valuation of claims
 - **Sec 42-** Appeal against the decision of liquidator
 - **Sec 43-** Preferential transactions and relevant time
 - **Sec 44-** Orders in case of preferential transactions
 - **Sec 45-** Avoidance of undervalued transactions
 - **Sec 46-** Relevant period for avoidable transactions
 - **Sec 47-** Application by creditor in cases of undervalued transactions
 - **Sec 48-** Order in cases of undervalued transactions
 - **Sec 49-** Transactions defrauding creditors
 - **Sec 50-** Extortionate credit transactions
 - **Sec 51-** Orders of Adjudicating Authority in respect of extortionate credit transactions
 - **Sec 52-** Secured creditor in liquidation proceedings
 - **Sec 53-** Distribution of assets
- **Income Tax Act, 1961:**
 - Section 2 (22) (c) - Dividend
 - Section 46 - Capital Gain
 - Section 176 - Discontinued Business
 - Section 178 - Company in Liquidation
- **Companies Act, 2013:** In case of financial service providers, until explicit provisions are enacted, either the Companies Act 2013, and/or the relevant special laws, will continue to prevail.

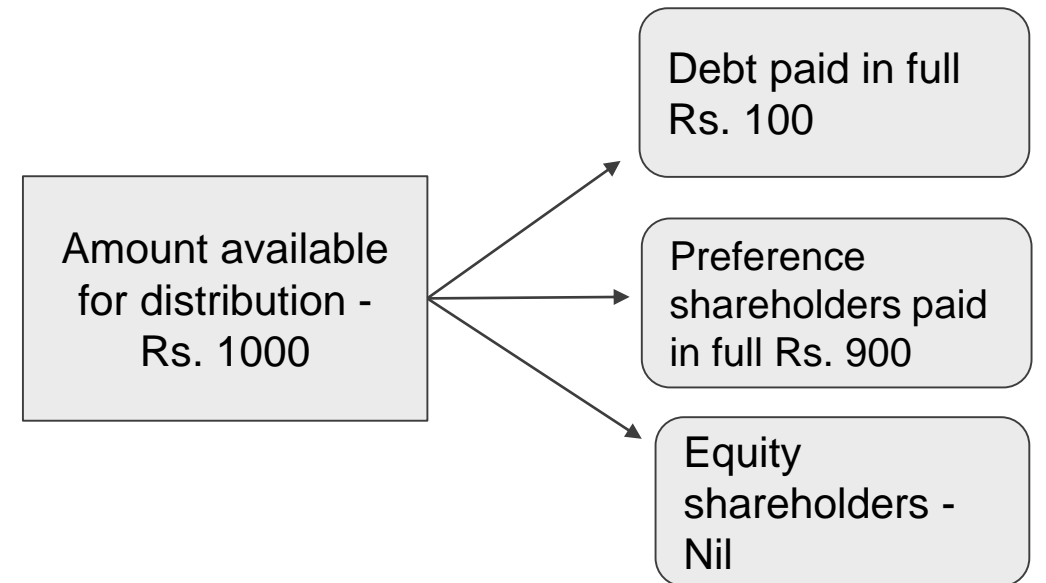


Case Studies



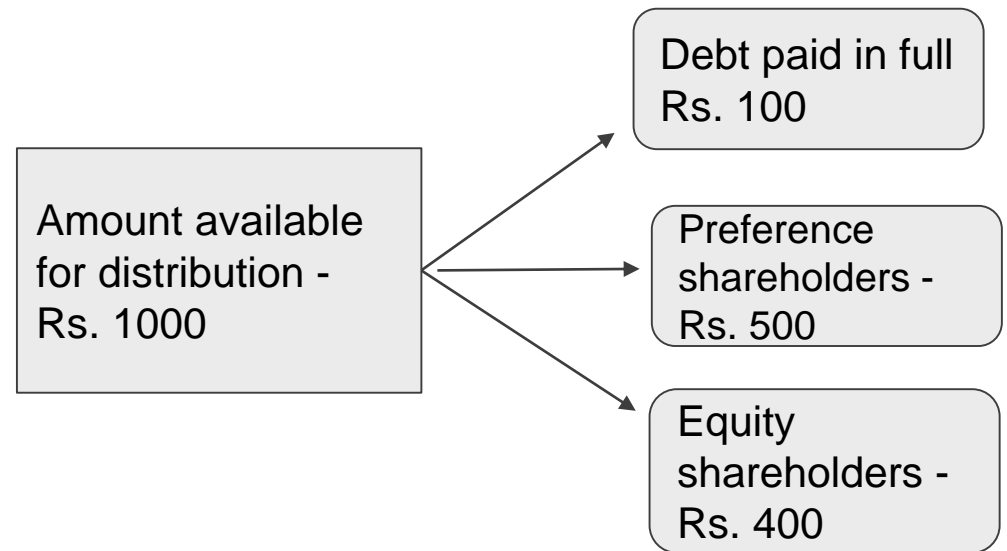
Case Study: Scenario I

LIABILITIES	ASSETS
Share capital - Equity: Rs. 500 - Preference: Rs. 900	Cash: Rs. 1000
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<u>1000</u>	<u>1000</u>



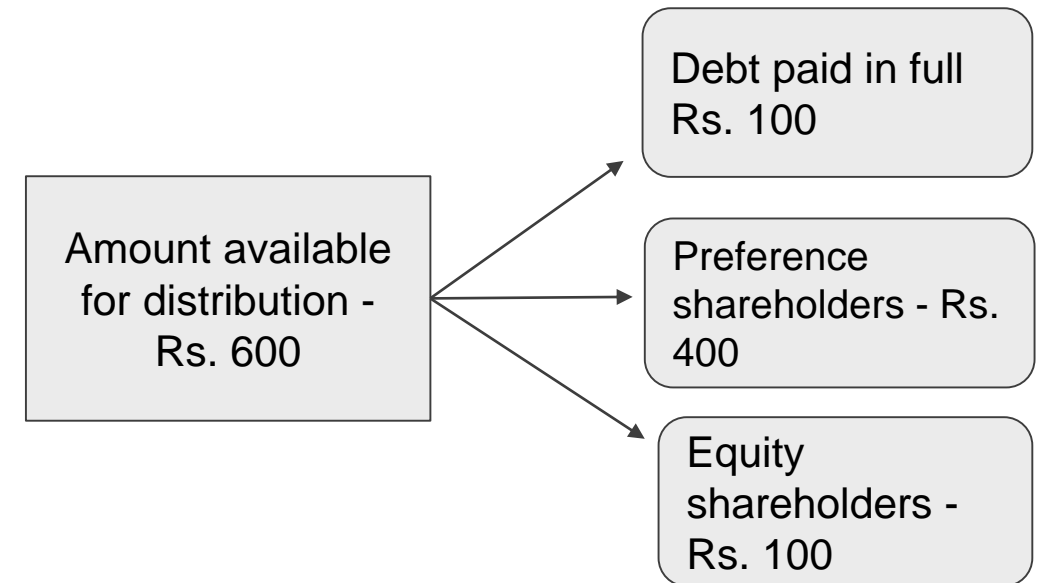
Case Study: Scenario 2

LIABILITIES	ASSETS
Share capital - Equity: Rs. 500 - Preference (inc. premium on issue Rs. 400): Rs. 900	Cash: Rs. 1000
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<u>1000</u>	
	<u>1000</u>



Case Study: Scenario 3

LIABILITIES	ASSETS
Share capital - Equity: Rs. 800 - Preference: Rs. 200	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<u>600</u>	
	<u>600</u>



Additional information:

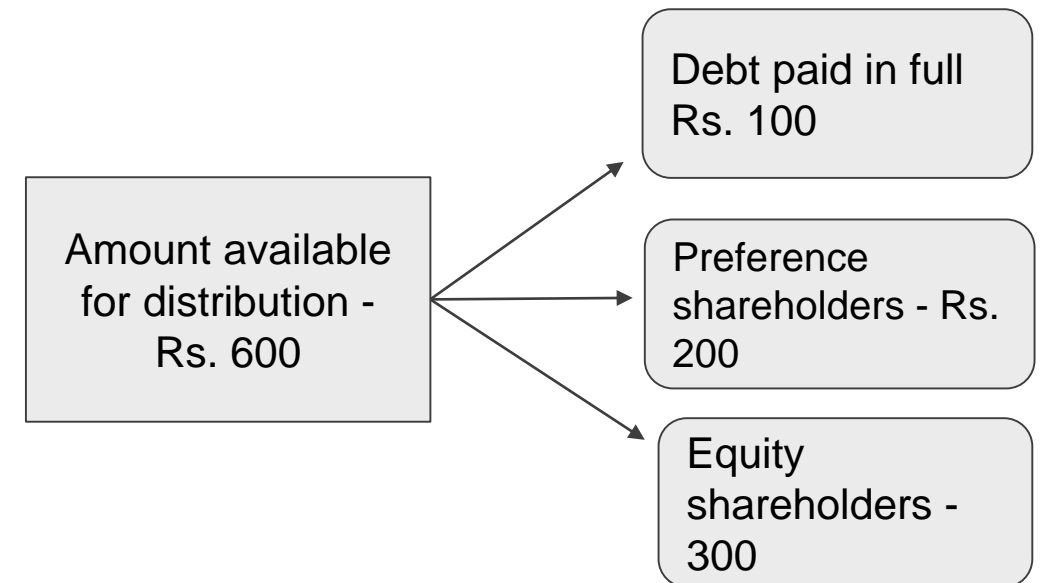
1. Premium payable on redemption of preference shares - Rs. 200

Case Study: Scenario 4

LIABILITIES	ASSETS
Share capital - Equity: Rs. 800 - Preference: Rs. 200	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<u>600</u>	
	<u>600</u>

Additional information:

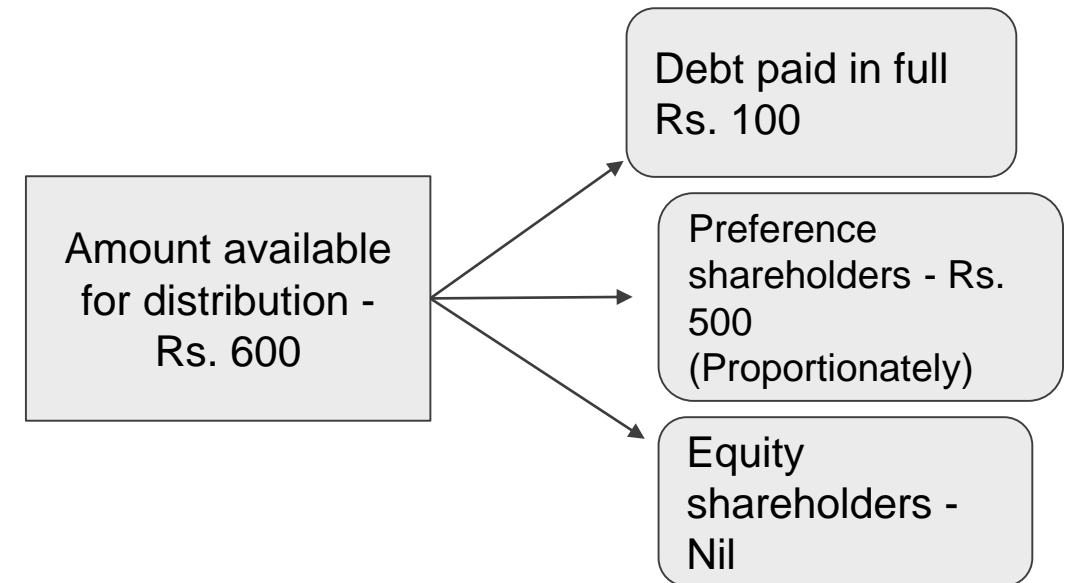
1. Premium payable on redemption of equity shares - Rs. 200



The premium on redemption of equity is just a trap - there is no question of redemption of equity, and hence, no question of any premium

Case Study: Scenario 5

LIABILITIES	ASSETS
Share capital - Equity: Rs. 300 - S-1: Preference: Rs. 400 - S-2: Preference: Rs. 300	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<u>600</u>	
	<u>600</u>



Assumption-

- *There is no preference among the preference shareholders*



Voluntary Liquidation: Highlights



Voluntary Liquidation: Highlights [Sec. 59 of IBC, 2016]

- Voluntary liquidation (VL) procedure removed from Companies Act and shifted to the Insolvency & Bankruptcy Code, 2016 ('IBC')
- Distinction between members' voluntary and creditors' voluntary winding up removed
 - Creditors' approval required in all voluntary winding up – 2/3rds in value
- VL proceedings start from the date of passing of resolution by members and in case there are creditors in the company, from the date of taking consent of 2/3rd of creditors
- Upon initiation of VL, corporate person cease to carry on business except as required for beneficial liquidation
- IBC not applicable to financial sector entities
 - So, section 271 of the Companies Act will have to be used in such cases
- Unclaimed and undistributed amount to go into Corporate Voluntary Liquidation Account in the Public Account of India before filing application for dissolution– Reg 39
- Liquidator receives a receipt from IBBI for such payment- Reg 39(6)
- Money can be claimed from IBBI – who make an order after satisfaction and taking adequate security
 - After 15 years, money goes to the general reserve account of the Central Government – Reg 39(13)
- Once the affairs are completely wound up, application for dissolution is made - Sec 59(7)
- Dissolution order



Entities Eligible



Entities Eligible

Under IBC

- Any solvent Company (S. 59(3))
 - Public or private
 - Listed or unlisted
- LLPs (S. 59(2))
- Other bodies corporate with limited liability

Under Companies Act

- Unregistered companies
- Foreign companies
- Financial services providers
 - VL of financial service provider - either the CA, 2013 and/or the relevant special laws, will continue to prevail

Important preconditions for voluntary liquidation

- The most important objective of voluntary liquidation is release of assets of the company to its shareholders
- Sec. 59 (1) refers to “no default”
 - Should practically mean no default is subsisting on the date of the entity proposing voluntary liquidation
- Declaration of solvency
- There must be no contractual bar on the company passing a resolution for voluntary liquidation:
 - Continuing contractual obligations
 - Long term supply contracts
 - Guarantees
 - Derivatives



Qualifications of IP to be a liquidator



Qualification of IP to be liquidator – Reg 6

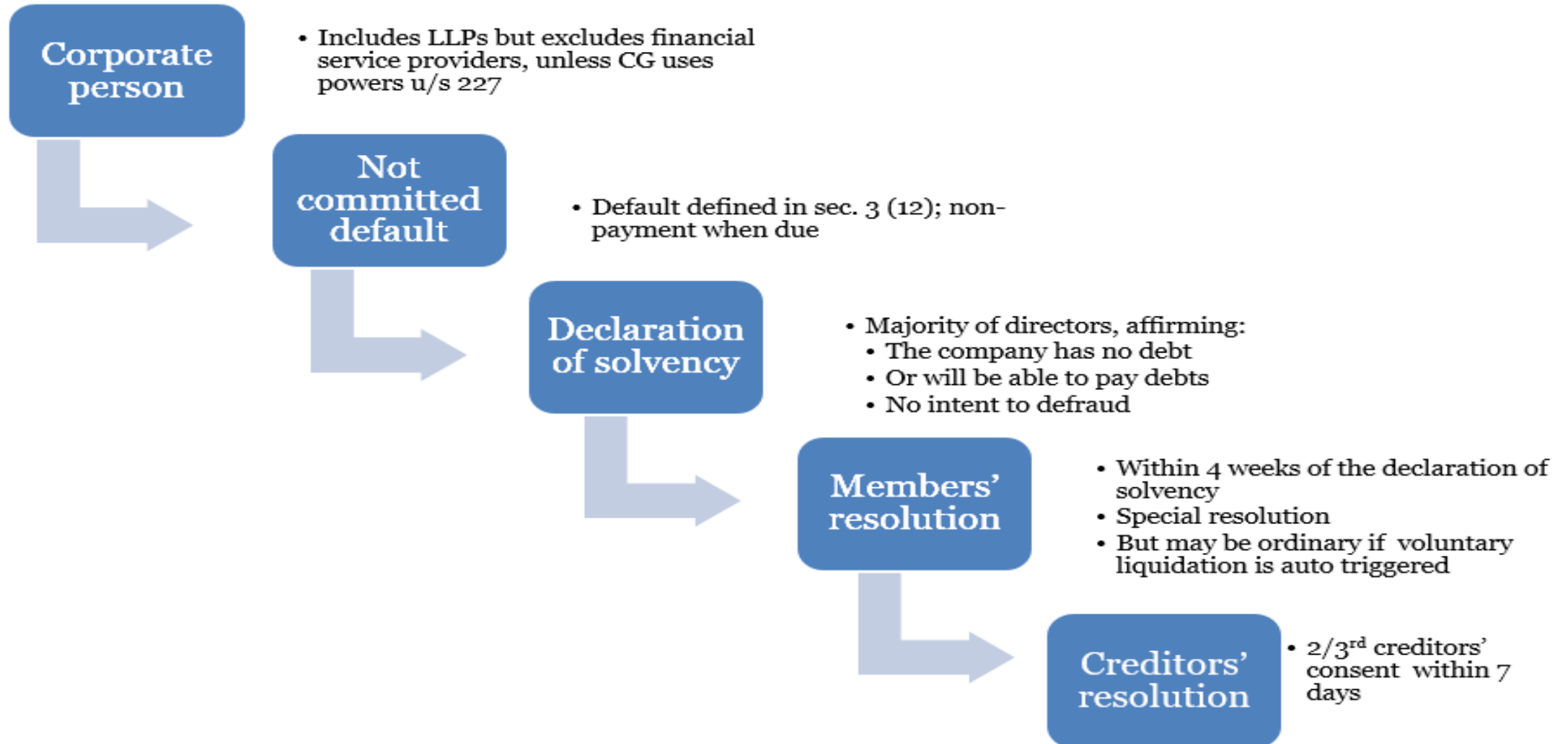
- Should be independent of the corporate debtor
 - In case of independent IP – such IP should be independent
 - In case of partner / director of IPE – all the partners / directors of such IPE shall be independent
- Conditions of independence:
 - The IP is eligible to be appointed as an ID on the board of the corporate debtor, in case of a company
 - Is not a related party of the corporate person
 - Has not been an employee / proprietor / partner at anytime in the last 3 years
 - Of a firm auditors / secretarial auditor / cost auditors of the corporate person
 - Of a legal or a consulting firm that has or had any transaction contributing ten per cent or more of the gross turnover of such firm
- Should not be under a restraint order of the IBBI
- Liquidator should disclose to the IBBI and the RoC
 - the existence of any pecuniary or personal relationship
 - with the corporate debtor or any of its stakeholders
 - as soon as he becomes aware of it
- Partners / Directors of same IPE cannot act as liquidators of a corporate debtor and its stakeholder at the same time



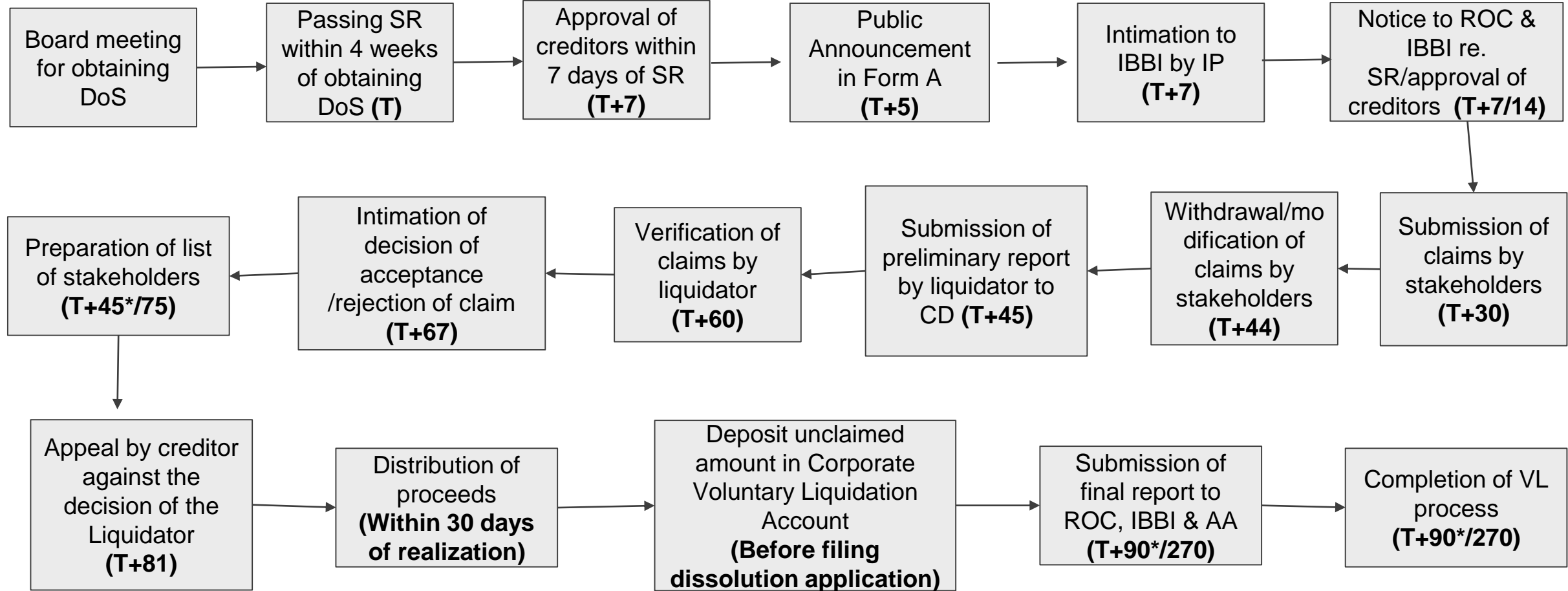
Voluntary Liquidation - Process Overview



Pre-conditions for Voluntary Liquidation



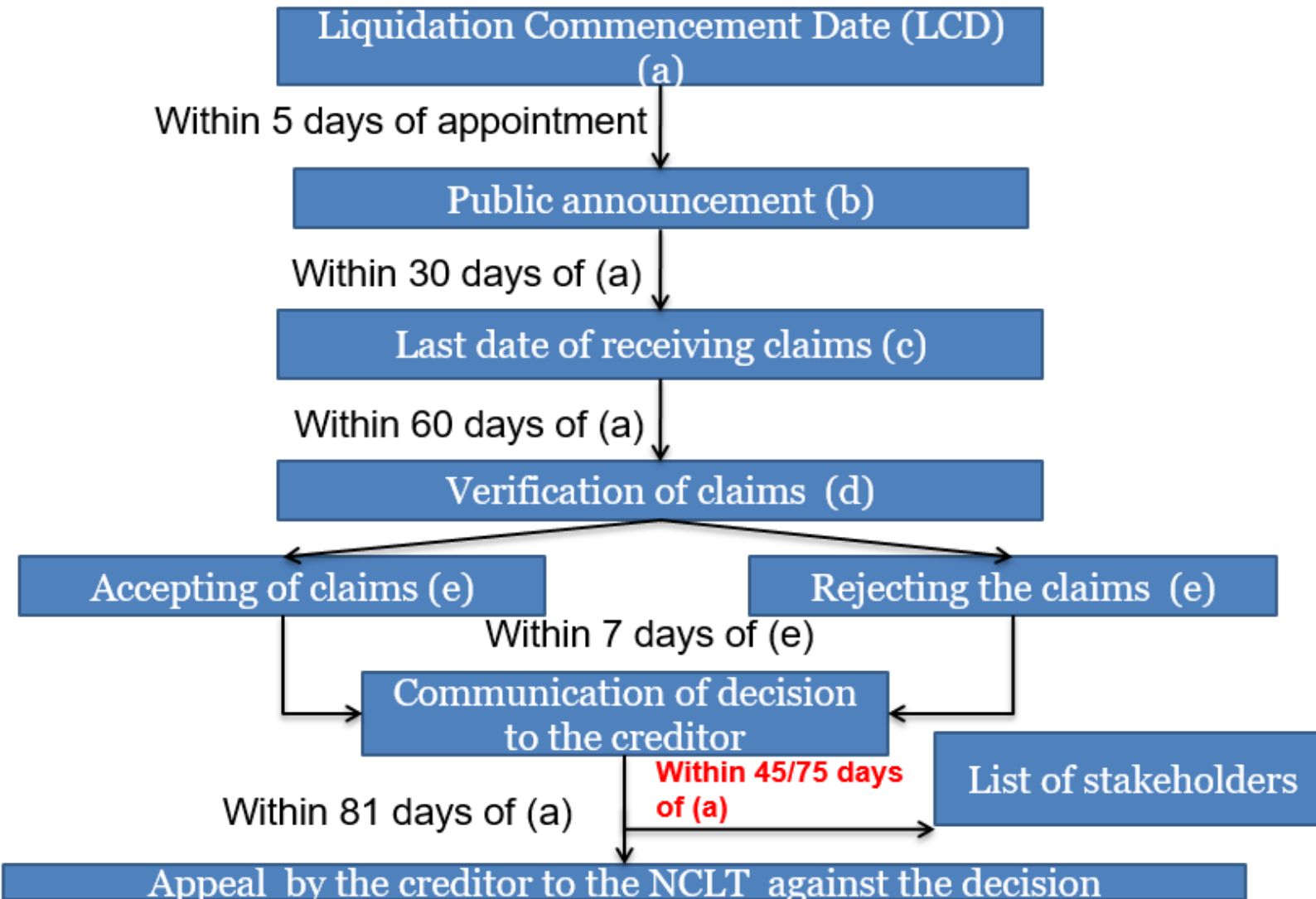
Complete process timeline



* Applicable where approval of creditors was not required

T = Liquidation commencement date

Timelines for Liquidator



The Liquidator shall endeavor to complete the process within 90 days of LCD when there are no creditors otherwise within 12 months of LCD

Concept of declaration of solvency

- Obtain DoS by majority directors / DPs of the corporate person verified by an affidavit
 - DOS shall contain the following:
 - Shall list each debt as on the date of making the DoS
 - That they have made full inquiry into the affairs of the corporate person and either
 - That it has no debts; or that its assets are sufficient to pay off the debts in full
 - The corporate person is not being liquidated to defraud any person
 - That the corporate person has made provision for preservation of its records after its dissolution [New addition]
- The DoS shall accompany the following documents:
 - Audited financial statements for previous 2 yrs or since incorporation – whichever is later
- Valuation report, **if any**, prepared by a registered valuer

Phases in voluntary liquidation- Board's approval and Shareholders'/creditors' approval

- Within 4 weeks of DoS – obtain SR / OR from the members in a GM for
 - **Voluntary Liquidation**
 - **appointment of liquidator along with his remuneration**
 - **Manner and mode of value and sale of the assets**
 - **Distribution in kind**
 - In case the clause of VL is present in the Charter of the Company – OR is sufficient
 - As a result of expiry of period of duration fixed by Charter
 - On the occurrence of any event, mentioned in the Charter on which the corporate person shall get dissolved
 - If otherwise – SR is required
- Within 7 days of SR/ OR – approval of the resolution by creditors representing 2/3 in value of the debt
- The corporate person shall **cease to carry on its business except as far as required for beneficial winding up of its business from the date of passing SR/OR**
- Within 7 days of SR/ OR / creditors' approval (as the case may be) – notification to RoC and IBBI regarding the SR / OR and the creditors' approval
- Once the affairs are completely wound up **and** assets completely liquidated – the liquidator shall make an application to the NCLT for dissolution of the corporate person
- NCLT passes an order for dissolution
- From 14 days of the Order – the Order to be forwarded to the RoC

Liquidation commencement date

- Section 59 (5)- Subject to approval of creditors, the VL proceedings shall be deemed to have commenced from the date of passing of the resolution
 - Two situations can arise in this regard:
 - There are creditors-
 - Members pass the required resolution, creditors do NOT approve it – voluntary liquidation does not commence at all
 - Members pass the required resolution, creditors approve it – voluntary liquidation commences
 - There are no creditors at all-
 - Members pass the required resolution - voluntary liquidation commences

EXAMPLE:

- Members' resolution date - 18th Jan
- Creditors' approval date - 25th Jan

Liquidation commences date - 25th Jan

Consequence of commencement of voluntary liquidation

- Cease to carry business but exists until dissolution
 - Except for the beneficial winding up of the business
- Directors cease to hold office
 - Section 491 of CA 1956 contained explicit provision; by implication, apply to voluntary liquidation under the Code.
 - Liquidator assumes office as the agent of the company – *Hari Prasad Jayantilal Company vs ITO AIR 1966 SC 1481*
- Registered office of the company stays
- Discharge of employees:
 - *In Reigate vs. Union Manufacturing Co, (1918) 1 KB 593*, court held voluntary winding up serves as a notice of discharge to employees, except where the winding up is being done with a view to reconstruct the company
- Interest on debt
 - In case of insolvent companies, interest stops accruing; no such reason in case of solvent companies
 - However, provisions about claims refer to claims as on the date of commencement of liquidation
- Consolidation of suits
 - Unlike in case of compulsory liquidation, voluntary winding up does not stay suits by or against the company
 - No consolidation of suits as well before the NCLT
- Further claims by creditors
 - company's creditors cannot file suit for recovery of debt; instead they will have to lodge claims on the liquidator



Detailed Procedure



Valuation requirement

Valuations are required at following stages:

- Valuation by the Board of Directors at the time of making declaration of solvency [sec 59 (3) (b) (ii)]
- In case the liquidator finds substantial difference between values as initially estimated, and the disposal prices, he needs to explain the same [reg 38 (1) (c) (iv)]
 - Therefore he may engage a valuer(s) to examine the difference before he disposes the asset

Public announcement by Liquidator

- To be made by the liquidator
- In Form A of Schedule I
- Within 5 days of his appointment
- To call upon the stakeholders to submit their claims along with the proof thereof
 - As on the liquidation commencement date
 - Within 30 days from the liquidation commencement date
 - i.e the stakeholders have effectively less than 30 days to submit their claims
- To be published in
 - English
 - One regional language newspaper with wide circulation
 - At the location of the registered office of the CP
 - At the location of the principal office of the CP
 - At any other location, where in the opinion of the liquidator, the CP conducts material business
 - On the website of the CP, if any
 - On the website of the IBBI

Preliminary Report

- Contents of the Preliminary Report:
 - Capital structure of the CP
 - Estimates of the assets and liabilities as on the liquidation commencement date
 - Based on the books of the CP – if reliable , or
 - based on reliable records and data otherwise
 - The reasons of not relying on the books have to recorded in writing by the liquidator
- Whether the liquidator intends to make any further inquiry into the matter relating to promotion, formation, failure or the conduct of the corporate person
- Proposed plan of action, estimated timelines and estimated liquidation costs

- Preliminary report to be submitted by the Liquidator
 - To the corporate person
 - Within 45 days of liquidation commencement date

Classification of Creditors vs Claims

Creditor type	Form of submitting claims	Mode of submitting claims
Operational creditor	Form B	In person / by post / by electronic means
Financial creditor	Form C	Only electronic means
Workmen and employees	If individually - Form D If by an Authorized Representative – all claims clubbed in Form E	In person / by post / by electronic means
Other stakeholders Eg Shareholders in case of unpaid dividend	Form F	In person / by post / by electronic means

There is no provision for creditors crystallizing out of contingent liability of the CP

Basis to prove the existence of claim and security interest - indicative list

- **Basis to prove existence of claim-**

- As per the records of the Information Utility
- Contract (operational / financial / employment) as the case may be
- Financial accounts of the CP (except for other stakeholders)
- An Order of a court, tribunal or any authority that has adjudicated upon non payment of a claim
- Document evidencing amount getting accrued and due and that it is not paid and a document demanding payment
- Affidavit that the documentary evidence and bank statements are true – this is provided only for Other stakeholders
- Documentary / electronic evidence of shareholding
- The liquidator may call for such other evidence or clarification as he may deem fit for substantiating the claim (R. 22)

- For debt in respect of bills of exchange, promissory notes or other NI or security of like nature – such NI or security should be produced before the liquidator before the claim is admitted (R.21)
- For claims of workmen and employees only - the liquidator shall admit the claim on the basis of books of account of the corporate person, in case no claim is made by the workmen himself (R.18(4))

- **Basis to prove security interest-**

- Records available with the information utility
- Charge certificate issued by RoC
- Proof of registration of charge with the CERSAI
- Other relevant documents which adequately establish security interest

Determination of amount of claim and cost of proof

- In case of any contingency or any other reason
 - The liquidator shall make best estimate of the amount of claim based on:
 - The information available with him
 - Consultation with claimant
 - Consultation with the CP
- Debt in foreign currency
 - shall be valued in Indian currency
 - at the official exchange rate published by the RBI
 - as on the liquidation commencement date
- Debt of periodical payment like monthly rents / interest
 - Only amounts due and unpaid upto liquidation commencement date can be claimed
- Mutual credits and set off
 - For mutual dealings between the corporate person and the creditor
 - The sums due and from the corporate debtor and the creditor shall be set off and net amount shall be paid to the either party

Cost of proof

- For proof produced by claimant – cost to be borne by the claimant
- For verification by the liquidator – cost to form part of liquidation cost
 - In case of false claim
 - the liquidator shall endeavor to recover the costs incurred from such claimant, **and**
 - provide the details of such claimant to the IBBI

List of stakeholders

- Liquidator to prepare list of stakeholders (Reg. 30)
 - Within 45 days of the last date of acceptance of claims
 - In case there are no claims of creditors, within 15 days of last date of acceptance of claims
- The list can be modified from time to time
 - Available for inspection by
 - Claimants
 - Members, partners, directors, guarantors of the CP
 - Displayed on the website of
 - the CP
 - IBBI
- List Shall contain-
 - Amount accepted
 - Extent to which secured / unsecured
 - Details of stakeholders
 - Proofs admitted / rejected in parts and proofs wholly rejected

Liquidation cost

- **Liquidation cost to include-**

- Remuneration of the liquidator
- Remuneration of the professional engaged by the liquidator
 - Remuneration should be reasonable
- Cost incurred by the liquidator for verification and determination of a claim
- Routine costs such as rent of the registered office, salaries/ wages paid to the employees/ security guard etc.

- **Liquidation cost to not include-**

- any amount towards any loss, including penalty, if any
- incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting the process (new insertion) [Reg. 27B of IP Reg.]



Powers & Duties of Liquidator



Powers and Duties of the liquidator – Sec-35 and Ch- IV of the Reg (1/2)

Subject to the directions of NCLT, the liquidator shall have the following powers and duties:

- To verify claims of all creditors
- To take into his custody or control all the assets, property, effects and actionable claims of the CP
- To evaluate the assets and property of the CP in a manner as may be specified by IBBI and prepare a report
- To take measures to protect and preserve the assets and properties of the CP
- To carry the business of the CP for its beneficial liquidation
- To sell the immovable and movable property and actionable claim of the CP by-
 - Public auction
 - Private contract
- Power to transfer such property to any person or body corporate or to sell the same in parcels
- to draw, accept, make and endorse any negotiable instruments
- to take out, in his official name, letter of administration to any deceased contributory and to any other act necessary for obtaining payment of any money due and payable from a contributory
- to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities
- to invite and settle claims of creditors and claimants and distribute proceeds

Powers and Duties of the liquidator – Sec-35 and Ch- IV of the Reg (2/2)

- To institute or defend any suit, prosecution or other legal proceedings, on behalf of the CP
 - civil or
 - Criminal
- To investigate the financial affairs of the CP and to determine undervalued or preferential transactions
- To take all such actions, steps, sign or execute documents etc as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator
- To apply to the NCLT for such orders or directions as may be necessary
- To report the progress of the liquidation process
- To consult any of the stakeholders entitled to distribution of proceeds under section 53
- The stakeholders consulted shall extend all assistance and cooperation to the liquidator to complete the liquidation of the CP
 - However such consultation shall not be binding on the liquidator
 - The liquidator shall maintain the particulars of any consultation with the stakeholders
- The records of such consultation shall be made available to all the other stakeholders not so consulted
- To recover and realise all assets and dues to the corporate person in a time-bound manner for maximisation of value to stakeholders
- To realise uncalled capital or unpaid capital contributions

Appointment of Professionals

- Upon initiation of liquidation, the liquidator may appoint professionals for-
 - Assisting the liquidator in the discharge of his duties, obligations and functions
 - For a reasonable remuneration
- Professional engaged or proposed to be engaged by the liquidator to disclose the existence of any pecuniary or personal relationship with -
 - Any of the shareholders of the corporate person;
 - Corporate person
- Following class of professionals are disqualified to be appointed by the liquidator-
 - Relative of the liquidator;
 - Related party of the corporate person;
 - Any person who has served as auditor to the corporate person at any time during the five years preceding the



Reporting & Record Keeping Records



Registers and Books maintained by the Liquidator

- Cash Book
- Ledger
- Bank Ledger
- Register of Fixed Assets and Inventories
- Securities and Investment Register
- Register of Book Debts and Outstanding Debts
- Tenants Ledger
- Suits Register
- Decree Register
- Register of Claims and Dividends
- Contributories Ledger
- Distributions Register
- Fee Register
- Suspense Register
- Documents Register
- Books Register
- Register of unclaimed dividends and undistributed properties deposited in accordance with Regulation 39; and
- such other books or registers as may be necessary to account for transactions entered into by him in relation to the corporate debtor.

Indicative formats of each of the below is provided in the Schedule II of the VL Regulations. In case the books of accounts are not complete as on the liquidation commencement date – the liquidator shall have them completed and brought-up-to-date, with all convenient speed.

Preservation of records

Liquidator shall preserve copies of records relating to-

- his appointment as liquidator, including the terms of appointment;
- handing over / taking over of the assignment;
- initiation of voluntary liquidation process;
- public announcement;
- claims, verification of claims, and list of stakeholders;
- engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;
- all filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;
- statutory filings with Board and insolvency professional agencies;
- correspondence during the voluntary liquidation process;
- cost of voluntary liquidation process;
- all reports, registers, documents such as preliminary report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in Regulation 8 and 10 of principal regulations; and
- any other records, which is required to give a complete account of the process.

The liquidator shall preserve:

- (a) electronic copy of all records(physical and electronic) for a minimum period of 8 years; and
 - (b) a physical copy of records for a minimum period of 3 years;
- In case of replacement of liquidator during the process, the outgoing liquidator shall handover the records;
 - Records includes records pertaining to the
 - period of a liquidation process during which the liquidator acted as such
 - irrespective of the fact that he did not take up the assignment from its commencement or
 - continue the assignment till its conclusion



Conduct of Liquidation Process



Realization of assets & uncalled/unpaid capital

Realization of assets

- The manner and mode of sale of assets to be approved by the corporate person
- The liquidator may value and sale the assets in such approved mode
- “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

Realization of uncalled/unpaid capital

- Liquidator shall realise any amount due from any contributory
- To call and realise the uncalled capital / unpaid capital (call made prior to the liquidation commencement date)
- 15 days Notice to be given to the contributory
- Money to be paid within 15 days of the receipt of the notice
- In case of charge on the uncalled capital – the liquidator shall hold the realised money subject to the rights of the charge holder
- In case the contributory does not pay the called money – he will not be entitled to any distribution

Bank Account opened by Liquidator

- The liquidator shall open a bank account
 - In a scheduled bank
 - In the name of the corporate person
 - Followed by the words “in voluntary liquidation”
 - For the receipt of all monies due to the corporate person
- All monies received by the liquidator shall be deposited in the bank account without any deduction
- Money to be deposited not later than the next working day
- Money in the bank shall be used only for distribution of assets
- Payment above Rs 5000 can be made only by cheque or online
- **The realised amount should be distributed within 30 days from the receipt (Earlier the time limit prescribed was 6 months)**

Distribution of assets: order of priority

- The liquidation costs paid in full
- debts which shall rank equally
 - debts owed to a secured creditor in the event such secured creditor has relinquished security
 - workmen's dues for the period of 24 months preceding the liquidation commencement date
- wages and any unpaid dues owed to employees
 - other than workmen for the period of 12 months preceding the liquidation commencement date
- financial debts owed to unsecured creditors
- dues which shall rank equally
 - amount due to the CG and the SG
 - 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 2 years preceding LCD;
 - debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- any remaining debts and dues;
- preference shareholders, if any; and
- equity shareholders or partners, as the case may be.
- Fees payable to liquidator shall be deducted proportionately from the proceeds payable to each class of aforementioned recipients

Timeline for completion of liquidation

- Endeavour should be to complete the liquidation process within-
 - 270 days where the creditors approval is to be obtained
 - 90 days where creditors approval is not required
- If the process continues beyond 12 months, the liquidator has to do the following:
 - Hold a meeting of contributories within 15 days of the end of 12 months, every year, until dissolution
 - Present an Annual Status Report indicating progress in liquidation including-
 - Annual Status Report to include the following-
 - settlement of list of stakeholders,
 - details of any assets that remains to be sold and realized,
 - distribution made to the stakeholders, and
 - distribution of unsold assets made to the stakeholders;
 - developments in any material litigation, by or against the corporate person; and
 - filing of, and developments in applications for avoidance
 - The Annual Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since LCD



Final Report



Final Report

- Final Report to be prepared on completion of the liquidation process and to consist of
 - Audited accounts of the liquidation, showing receipts and payments pertaining to liquidation since liquidation commencement date
 - Statement demonstrating that the
 - Assets have been disposed of
 - Debts have been discharged to the satisfaction of the creditors
 - Litigation
 - Either nothing pending; or
 - Sufficient provision has been made to meet obligation arising out of pending litigation
 - A sale statement in respect of all assets
- This Report shall be send to the RoC and IBBI
- **And submitted to the NCLT along with the application for dissolution**

- Sale statement in respect of all assets shall contain the following –
 - the realized value;
 - cost of realization, if any;
 - the manner and mode of sale;
 - an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets;
 - the person to whom the sale is made; and
 - any other relevant details of the sale.



Treatment of unclaimed/undistributed amount



Treatment of unclaimed/undistributed amount

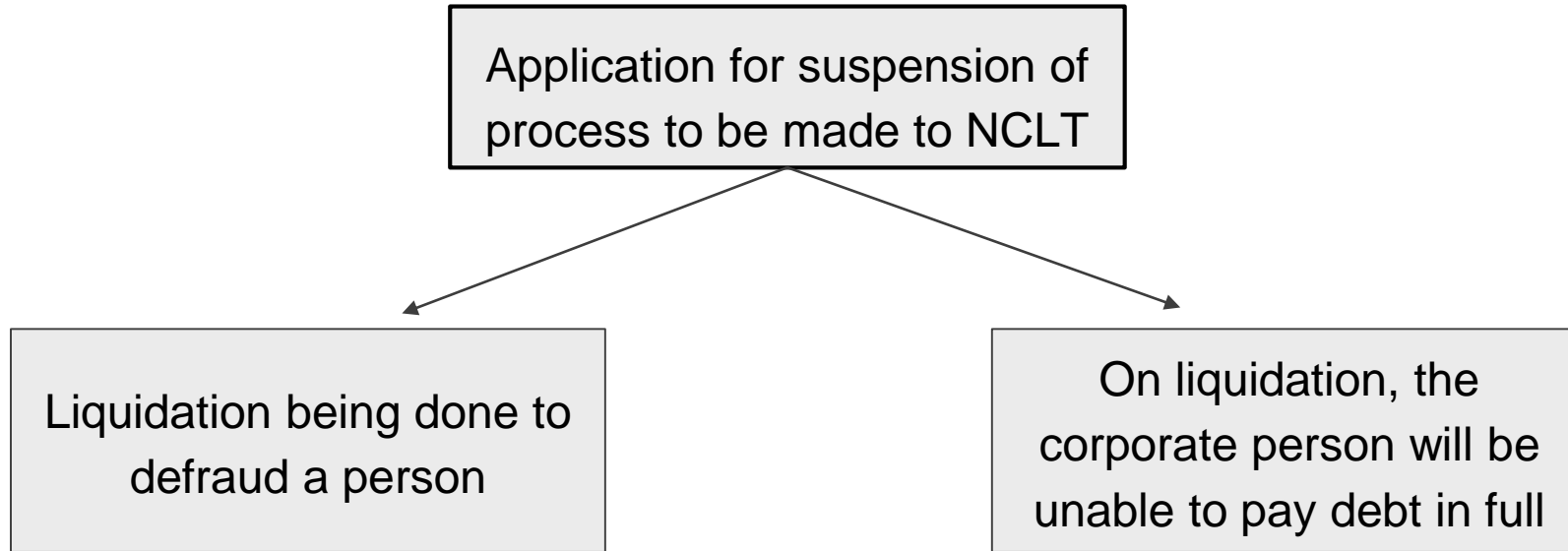
- Liquidator shall deposit the amount of -
 - unclaimed dividends, undistributed proceeds, if any
 - income earned thereon till the date of deposit
 - into the Corporate Voluntary Liquidation Account before filing application for dissolution
- If the liquidator fails to deposit any amount into the Corporate Voluntary Liquidation Account, shall
 - deposit the same along with interest thereon at the rate of 12% p.a.
 - from the due date of deposit till the date of deposit
- Evidence of deposit of the amount into the Corporate Voluntary Liquidation Account under this regulation to be submitted to-
 - authority with which the corporate person is registered
 - IBBI
 - in Form-G setting forth the nature of the amount deposited
 - and the names and last known addresses of the stakeholders entitled to receive
- Stakeholder claiming to be entitled to any amount deposited into the Account-
 - may apply to IBBI in form I
 - Along with the proof that he is entitled to the amount
 - The Board may, if satisfied that the stakeholder or any other person making application is entitled to withdrawal of any amount from the Account, make an order for the same
- Any amount deposited into the said Account
 - which remains unclaimed or undistributed for a period of 15 years from the date of order of dissolution and
 - any amount of income or interest received or earned in the Account shall be transferred to the Consolidated Fund of India



Suspension of Process



Instances of suspension of process





Tax Implications



Taxation aspects

- Taxation of shareholder
 - Sec 2 (22) (c) distribution made by companies in liquidation, to the extent the same pertains to accumulated profits, to be taxed as dividend
 - Distribution of assets may happen in tranches
 - So question, whether what is distributed is capital or accumulated profits?
 - It is possible to take a view that the capital is distributed first, before the profits
 - Note that distribution in respect of bonus shares is regarded as dividend
 - Sec 46 (2) capital gains payable on the consideration received, minus what is treated as dividends
- Directors' liability - section 179 in case of private companies
- Taxation of the company upto dissolution
 - The company survives till the date of dissolution – hence, tax payable till that date
 - Sec 178 of the Income tax Act
 - Within 1 month of appointment, liquidator to intimate the assessing officer
 - AO may require the liquidator within 3 months to set aside amount for estimated tax liability
 - No distribution shall be made without intimating the AO or before setting aside such money
- Obligations of the liquidator
 - Sec 2 (35) of the Income-tax Act – liquidator is the principal officer – several rulings
 - Sec 178 (4) imposes personal liability on the liquidator for taxes if money already distribution by the liquidator
 - Hence, it makes sense to obtain a declaration from the contributories that they will refund their distribution to the extent required for tax payment



Recent Amendments



Snapshot of Voluntary Liquidation Process 2nd Amendment Regulations, 2022

Amended provision

[Reg. 3\(5\): Declaration by directors upon initiation of liquidation](#)

The declaration by directors shall also provide that CD has made provision for preservation of its records after its dissolution

[Reg. 41: Preservation of records](#)

List of documents has been provided which the liquidator has to preserve to give a complete account of the liquidation process. Also, the liquidator, in application u/s 59(7) provide details and manner of preservation of records.

[Reg. 41\(3\): Preservation of records](#)

Electronic copy of all records to be preserved for at least 8 years and physical copy for at least 3 years from the closure of liquidation



Practical Queries



Practical issues

- Reg 31 provides liquidation may sell assets in such manner and mode as permitted by corporate person
 - Ideally, the special resolution approving voluntary liquidation may grant permission to liquidator
- Transparency of selling process important
 - Liquidator accountable for any shortfalls vis-à-vis valuations done by the board
- Can liquidator distribute assets in kind
 - Generally permitted. However, specific approval may be obtained in the members' resolution
- What will be the fate of the subsidiary company whose holding company has filed for liquidation?
- What will be the fate of a guarantee provided by a corporate person which is under liquidation?
- Whether Co. under VL required to file Annual Return?
 - No. As per MCA circular dated 6th March, 2020, Form AOC-4 and MGT-7 is to be filed through GNL-2 till the Company is under CIRP.

Practical issues

- Will IT returns be filed for a company under liquidation ?
 - Yes, liquidator has to ensure that IT returns and all other statutory dues required to be paid and returns required to be filed are carried out regularly during the period of Voluntary Liquidation
- Can dividend be declared by a company which is under liquidation?
 - No, a Company under Voluntary Liquidation cannot declare dividend.
- Whether liquidator's accounts needs to be audited?
 - Yes, as per reg. 37 in case the liquidation period continues for more than 1 year, the annual status report submitted by the liquidator must contain the audited annual account of liquidation,
 - Further, the as per reg. 38 the final report of the liquidator must contain the audited accounts of the liquidation, since the liquidation commencement date.
- Is a no-dues certificate from the IT Department is required to be submitted along with the dissolution application?
 - IBBI vide circular dated November 15, 2021 has clarified that NoC from the IT Department is not required.

Practical issues

- Presence of preference shares and debentures
 - ❑ Solvency position of the Company, to meet other liabilities should not be compromised, along with the preference shares and debentures
- Multiple Branches
 - ❑ In case on rent, termination of rent may be a lengthy process and may consume substantial time during liquidation process.
- Terminal benefits of employees
 - ❑ While determining the solvency position, such expenses must also be considered, further the Company may also consider adopting a gradual release of employees
- Contingent liabilities and litigations
 - ❑ The value of such assets must be crystallised so as to ascertain whether the declaration of solvency can be made
- Role of directors and promoters vis-à-vis the Voluntary Liquidator
 - ❑ In case of any non-cooperation by the directors/ promoters or officials of the Company, the Liquidator shall have the right to report the same before NCLT

Practical issues

- Proceedings from avoidance transaction application, if any
 - ❑ Will go to shareholders.
- Preferential transactions [s. 43 of IBC]
 - ❑ In case of any transaction is detected an application will have to be filed with the NCLT for avoidance of the same
- Undervalued transactions [s. 45 of IBC]
 - ❑ A transaction will be considered as undervalued when carried out a consideration less than the actual consideration an outside the ordinary course of business
 - ❑ Upon detection of such transactions an application for avoidance will have to be made before the NCLT
- Extortionate credit transactions [s. 50 of IBC]
 - ❑ Extortionate credit transactions is one in which exorbitant payments are made in respect of the credit provided or are unconscionable under the principles of law relating to contracts
 - ❑ Upon detection of such transactions an application for avoidance will have to be made before the NCLT

Revival of a Company that is dissolved

- Can a company dissolved under orders of NCLT be revived?
 - Section 560 (6) of CA 1956 contained provisions for restoration
Within 20 years of name being struck off
 - Similar provisions in CA, 2013 – sec 252 (3)
 - Long trail of rulings both in UK and India on restoration
- Every case of a dissolution order leads to the name being struck off
- Therefore, sec 252(3) ought to be applicable in case of dissolution under IBC as well
 - The purpose of restoration is mainly to admit a claim that may have remained, or distribution an asset that may have escaped attention – Oakleagues Ltd (1995) 2 BCLC 624