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Office Address: The i–thum, Tower–B, Unit No 801, Plot No A–40, Block A, Industrial Area, Sector–62, Noida – 201301, U.P., India. **Ph:** +91 120 4273970 | **E–mail:** sharad.tyagi@fjls.in

VOLUNTARY LIQUIDATION – A COMPARATIVE ANALYSIS BETWEEN IBC AND CA 1956

Article by: Sharad Tyagi and Poonam Saxena

The Insolvency and Bankruptcy Board of India has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("**New Regulations**") on March 31, 2017. The New Regulations provides the process for initiating voluntary liquidation by a corporate person i.e. companies, limited liability partnerships and any other persons incorporated with limited liability.

Before introduction of New Regulations, voluntary liquidation of the companies was governed by the Companies Act, 1956 ("**CA 1956**") since the provisions as mentioned in the Companies Act, 2013 ("**CA 2013**") had never been notified. Now, the Government has repealed / omitted the provisions of voluntary liquidation as mentioned in CA 1956 as well as CA 2013 vide notification dated March 31, 2017 and May 28, 2016, respectively.

The erstwhile CA 1956 and CA 2013 had 38 and 20 sections dealing with voluntary liquidation, respectively. Chapter V of Part II of the IBC consist of only one section, i.e. Section 59, which deals with voluntary liquidation.

Another key point to be noted that, voluntary winding up under the CA 1956 had been segregated into two types, i.e. members' voluntary winding up and creditors' voluntary winding up. This distinction has now been eliminated under the IBC.

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. It is imperative to understand, whether the word 'default' includes past default or existing default of a corporate person? While analysing the definition of a default which is defined under the IBC to mean – "*non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be*", we observed that it contains those debts which have become due and payable and are not repaid. It seems that default, which occurred in past and had been cured, is not intended to be covered hereunder. Hence, the word 'default' will include the existing debts of a corporate person. The aforesaid condition did not exist in CA 1956.

New regulations require the compliance of the following additional requirements, which were not mentioned earlier in CA 1956:

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 ("**ROC**"); and the Insolvency and Bankruptcy Board of India ("**Board**");
5. Receipt of stakeholders claims by liquidator only in specified forms;
6. The liquidator shall endeavour to wind up the affairs of the corporate person within 12 (twelve) months from the voluntary liquidation commencement date;

Under New Regulations, the Government has also reduced the time period of various compliances. 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 form 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.

In view of the above, it is evident that the Government intends to expedite the process of voluntary winding up in a time bound manner by introducing the New Regulations. Such move of the Government is welcome by the corporates as well as professionals, since, the voluntary winding up under CA 1956 was a time-consuming process and there was no qualification for appointment of the liquidator. Now, only the insolvency professionals, who are experts on the subject, are allowed to be appointed as liquidators which will expedite the completion of voluntary winding up including resolution of all issues in a time bound manner.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.