VOLUNTARY WINDING-UP UNDER IBC 2016 AND COMPANIES ACT 2013

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ABSTRACT

India's corporate insolvency and winding-up framework currently offers two distinct pathways for dissolving a company: voluntary liquidation under Section 59 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), and voluntary winding-up under Sections 271(a) and 272 of the Companies Act, 2013. While the IBC route is time-bound, creditor-friendly, and free of tribunal interference, it is available only to solvent companies. Insolvent companies are left with the Companies Act route, which imposes no solvency requirement but subjects the process to open-ended National Company Law Tribunal (NCLT) oversight and offers weaker creditor protections. This divergence creates room for forum shopping, as illustrated by instances where companies have used the Companies Act route to bypass IBC scrutiny despite being eligible for insolvency proceedings. This article examines the statutory gap between the two regimes, argues that the lack of coordination between them undermines both creditor interests and procedural efficiency, and proposes reforms including mandatory tribunal referrals to the IBC, relaxation of the Section 59 solvency test, and stricter timelines under the Companies Act to harmonize the two frameworks and close the loopholes currently available to defaulting companies.

Voluntary Winding-Up Under IBC 2016 and Companies Act 2013

Companies Act 1956 and later Companies Act 2013 have proved to be game-changing statutes in the governance of corporates in India. They govern the entire lifecycle and conduct of these artificial persons, or corporate entities, along with their memorandum and articles of association. Although these laws are comprehensive in nature, the changing times affecting the performance and debt-resettlement mechanisms of some companies have necessitated the government to come up with the Insolvency and Bankruptcy Code (IBC) in 2016.

The IBC deals with restructuring companies that are unable to manage their liabilities against existing assets. Before erasing the existence of the entity, the IBC gives the corporate one opportunity to regenerate through a resolution plan. If the restructuring, or the Corporate Insolvency Resolution Process (CIRP), fails, the company undergoes the process of liquidation.

It is at the stage of liquidation and winding-up that the corporate laws in the country are scattered. This diversity across statutes, and the gaps between them, is what constitutes the subject-matter of this article.

Voluntary Liquidation under IBC

Section 59 of the Code provides for a streamlined voluntary liquidation process. This route is time-bound and excludes the interference of any court or tribunal. It requires a declaration by the majority of the directors of the entity showing an intention to voluntarily liquidate the company, followed by a special resolution passed by the members in a general meeting. However, the most important aspect of this route is the solvency test of the company. This simply means that the debtor is able to cover all unpaid dues i.e., liabilities are fully covered by assets. The section requires the directors of the company to submit an affidavit affirming the solvency of the company, and confirming that the liquidation process has not been initiated to defraud any person.

Thus, any solvent company looking for an expeditious process without the need to go to court may opt for voluntary liquidation under Section 59.

Voluntary Winding-Up under Companies Act 2013

Under Section 272, a company itself can present a petition for winding-up to the tribunal based on Section 271(a), i.e., by passing a special resolution. Once the members pass the resolution, the company becomes eligible for the winding-up procedure. However, the Act does not mandate a solvency test, nor does it require creditors' approval. Therefore, any defaulting company can be wound up simply by passing a resolution.

The Act stipulates supervision by the National Company Law Tribunal (NCLT). Once the tribunal admits the company's petition, it appoints a liquidator. Furthermore, the process under Section 272 does not provide for a fixed timeline meaning the voluntary winding-up process for a company could drag on indefinitely.

Hence, a company willing to accept tribunal oversight of its winding-up process, without the added conditions such as the solvency test, may opt for voluntary winding-up under the Companies Act.

The Act also provides a simpler route under Section 248, i.e., removal of the company's name from the Register of Companies. The section provides four grounds on which a party may move the Registrar to remove the name of the company, namely:

a. The company did not commence business within one year of its incorporation; or

b. The company did not carry on any business in the preceding two financial years and did not apply for dormant-company status under Section 455 of the Act; or

c. The subscribers to the memorandum have not paid the subscription fees at the time of incorporation, and no such declaration has been filed within 180 days of incorporation; or

d. Physical verification of the company reveals that it is not carrying on any business.

This route does not require the appointment of a liquidator, nor does it invite court or tribunal oversight. It only requires that the Registrar be satisfied that sufficient provision has been made to meet the liabilities of the company seeking voluntary strike-off.

The Code or the Act Use and Misuse

Generally, a company chooses voluntary liquidation under Section 59 of the Code owing to its flexibility and timelines. It provides a route that helps companies avoid complicated court procedures and formalities, and keeps control with management during the liquidation process.

Section 59 is a win-win for both the company and its creditors as if the company has any running debts, the liquidation of the entity must be supported by two-thirds of the majority.

In most cases, the tribunal itself dismisses or redirects petitions filed under the Act for voluntary winding-up if it appears that the application under Section 272 is being used to evade the provisions of the Code. However, if permitted, the application follows the usual procedure under the Act, with a liquidator appointed by the tribunal. Though the company must file a declaration under Section 248, and a statement of affairs under Section 272 showing its financial position and ability to meet its debt liabilities, once the petition under the Act is submitted, creditors are largely left out of the winding-up process.

The caveat lies at the very first stage the decision to proceed under the Act or the Code. Only solvent companies, i.e., those whose assets exceed their liabilities, are eligible to apply for voluntary liquidation under Section 59. Companies that are not eligible under the Code because they cannot match their liabilities against their assets are left only with the route the Act offers. In such cases, even bona fide petitions may come to be seen as attempts by the company to bypass the scrutiny of creditors and the other provisions of the Code. This not only undermines healthy company-creditor relations, but also defeats the purpose of structured winding-up under both the Act and the Code.

Furthermore, the possibility of forum shopping is worth noting. As seen in *Vishal Soyamul Pvt. Ltd. v. SBI*, a voluntary winding-up petition was approved by the NCLT, Mumbai, despite the company's insolvency and the availability of the CIRP mechanism. Sections 271(a) and 272 offer companies a viable route to bypass the IBC and its obligations toward creditors, without the need to liquidate assets.

Additionally, none of the provisions account for the possibility of parallel proceedings, leaving a gap that can be exploited. A company may initiate voluntary winding-up proceedings under the Act while remaining a party to a creditor dispute case.

Way Forward

Sections 271 and 272 of the Companies Act 2013 were carried over from the 1956 Act. Until 2016, these provisions were the only route to winding up a company. However, post-IBC, the added qualification of solvency has opened up both opportunities and gaps. To avoid confusion and complexity, there needs to be compatibility between the two provisions.

First, the Act should make it mandatory for the tribunal to refer any case of voluntary liquidation or voluntary strike-off to Section 10 of the Code, i.e., liquidation following a structured CIRP. Under Section 248, the Registrar should refer the matter to the tribunal, and the tribunal should, in turn, refer it to the Code where appropriate.

Second, the solvency qualification under the Code should either be diluted or removed, so that genuinely bona fide insolvent companies can also avail themselves of the winding-up facility under the Code. This would encourage more transparent filings for voluntary dissolution without prejudice to creditors.

Third, non-defaulting, solvent companies approaching the Registrar or the tribunal under the Act should be assured of strict timelines. Such entities should, in fact, be encouraged to apply under the Code instead, so that creditor interests are also protected. Involving the tribunal in straightforward, clean cases only reduces the efficiency and integrity of the overall process.

The real concerns arise only with respect to insolvent entities. The two sets of provisions need to work in sync not only to prevent misuse, but also to provide a smooth and streamlined path for both companies and creditors. A clearer connection between the two provisions is what can prevent a repeat of the Vishal Soyamul case. Tribunal oversight under the Act, and the vigilance and due diligence built into the Code, are features that cannot be dispensed with.

Conclusion

In practice, it is the IBC that practitioners most often turn to for the voluntary liquidation of a corporate entity. Its timeline-bound, moratorium-assisted, creditor-friendly, and structured mechanism is widely considered more efficient. Moreover, the two provisions were never meant to oppose or override each other. Harmony between the two is what productive winding-up ultimately requires.

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