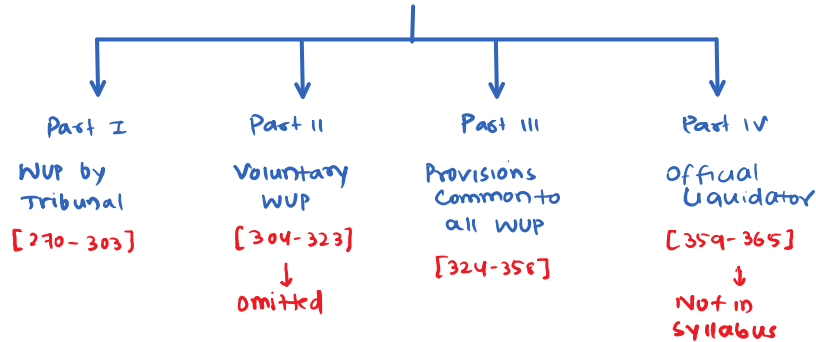


Winding up [Section 270 - 365]

4-6 marks

Section 2(94A): winding up means $\begin{cases} \text{WUP as per this Act. or} \\ \text{Liquidation as per IBC} \end{cases}$



Winding up by the Tribunal: [270-303]

Sec 270: Provision of part I shall apply to WUP by Tribunal

SECTION 271: CIRCUMSTANCE IN WHICH CO. MAY BE WOUND UP BY NCLT

[FIRST]

A company may, on petition u/s 272, be wound up by Tribunal if:

- R** (i) Co. has resolved so by a SR
- I** (ii) Co. has acted against the →
 - Interest of S&I of India
 - Friendly relations with foreign states
 - Security of the state
 - Public order
 - Decency or morality
- F** (iii) On application made by Registrar or person auth. by Cg
↓
Tribunal is of opinion that:
 - Affairs of co. - Fraudulent
 - Co. formed - Fraudulent / unlawful Purpose
 - Person concerned in formation/mgt are guilty of fraud/misconduct

AND

It is proper
the co. be wound up
- D** (iv) Co. has made defaults in filing with ROC of $\begin{cases} \text{FS or} \\ \text{AR} \end{cases}$ for last 5 consecutive FY
- J** (v) Tribunal - Opinion - Just & equitable that co. be wound up.

SECTION 272: PETITION FOR WINDING UP (WUP)

Petition to the Tribunal for WUP may be filed by:

- (i) Company (accompanied by statement of affairs)
- (ii) contributories - Notwithstanding that —
 - (i) He may be holder of fully paid up shares or
 - (ii) Co. has no asset at all or
 - (iii) Co. may have no surplus asset for SHs

However, the share(s) in respect of which he is a contributory:

- Originally allotted to him or
- Held & registered in his name for 6m in last 18m (before WUP) or
- Devolved to him on death of formal holder.

- (iii) Registrar - Expects on ground u/s 271(a) [i.e. SR by co.]
- Provided that ROC to obtain prior sanction of Cg before petition
 - Cg to give R.O.B.H to co. before sanction of such petition.

(iv) Person authority by Cg

(v) Cg/SG in case of 271(b) i.e. interest of state, etc.

In any case, copy of petition → ROC $\xrightarrow[\text{submit views}]{60 \text{ days}}$ Tribunal

SECTION 273: POWER OF TRIBUNAL

- (1) On receipt of petition u/s 272, Tribunal may, within 90 days: → IBC?
- Dismiss it, with or w/o cost
 - make an interim order
 - appoint a Prov. Mgr. [P.M.] till order of WUP [Give notice to co. + grant R.O.B.H.]
Else, reason recorded]
 - order WUP, with or w/o cost
 - Other order as it may deem fit

[2] Where petition is on ground that it is J & E that co. be WUP:

↓
Tribunal may refuse order of WUP if opinion:

- Other remedy is available and
- Acting unreasonably by seeking WUP

SECTION 274: DIRECTION FOR FILING STATEMENT OF AFFAIRS

- (1) On receipt of petition, if tribunal is satisfied that it is prima facie case of WUP
- ↓
- Direct co. to file $\left\{ \begin{array}{l} \text{objections} \\ \text{within 30 days} \\ (+ 30 \text{ days in} \\ \text{special circumstances}) \end{array} \right.$ + Stat. of affairs
 - Direct petitioner to make security deposit (for cost)
- (2) If co. fails to file SOA → Right to oppose petition stands forfeited.
+ Directors/officers punishable under (4)
- (3) Where order of WUP is passed u/s 273(1)(d)
- ↓
- Co. to submit BOA audited to date of order within 30 days of order
- (4) Dis./off. punishable for non compliance of this section:

Jail upto 6m and/or Fine 25k - 5 lakhs

- (5) Complaint for non-compliance may be filed - with Sp. Court
- By ROC, PL, CL or person auth. by NCLT

SECTION 275: COMPANY LIQUIDATOR AND THEIR APPOINTMENT

- (1) For the purpose of WUP, the Tribunal shall, at the time of passing order for WUP:
- Appoint $\left\{ \begin{array}{l} \text{Official Liquidator (OL)} \\ \text{Insolvency prof. (IP)} \end{array} \right\} \rightarrow \text{To act as company liquidator [CL]}$
- (2) PL to have same power as CL unless Tribunal restricts power via order.
- (3) T&C of Appointment & Fees payable to PL & CL decided based on:
- Task to be performed
 - Size of Co.
 - Liquidator's experience & qualification
- (4) Within 7 days of appointment, PL/CL to file declaration
- ↓
- Disclosing $\left\{ \begin{array}{l} \text{Conflict of interest or} \\ \text{lack of independence} \end{array} \right\}$
- (5) Tribunal may appoint PL as CL while passing WUP order

SECTION 276: REMOVAL OR REPLACEMENT OF LIQUIDATOR

CFA ID

- (1) Tribunal may, for reason recorded in writing (RRW), remove PL/CL on grounds of:
- C** - Misconduct
 - F** - Fraud / Misfeasance
 - D** - Professional incompetence / failure to exercise DD
 - A** - Inability to act as PL/CL
 - I** - Conflict of interest or lack of independence - during his term
- (2) In the event of $\left\{ \begin{array}{l} \text{Death} \\ \text{Resignation} \\ \text{Removal} \end{array} \right\} \rightarrow \text{Trf work to another CL}$
- (3) Where Tribunal is of opinion that Liq. is responsible for causing loss/damage to Co.
- ↓
- Tribunal may recover such loss/damage from Liq.
- (4) Before order in this section \rightarrow R.O.D.H to Liq.

SECTION 277: INTIMATION TO PL/CL AND ROC AND EFFECT OF ORDER (WUC)

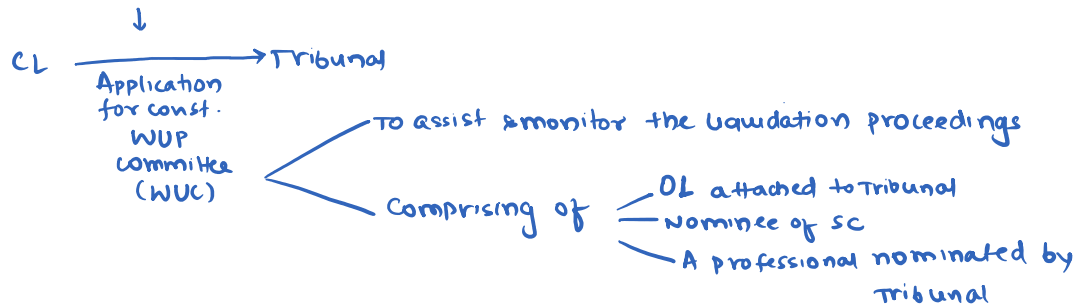
- (1) When tribunal makes order $\left\{ \begin{array}{l} \text{Appointment of PL or} \\ \text{WUP of Co.} \end{array} \right\}$
- ↓
- Within 7 days \rightarrow Intimate $\left\{ \begin{array}{l} \text{PL/CL} \\ \text{ROC} \end{array} \right\}$ and
- (2) On receipt of above order, the ROC shall:

- (i) Make an endorsement to that effect in its records
- (ii) Notify in OG
- (iii) If listed co. → Intimate stock exchange

(3) Order of WUP = Notice of discharge
 \swarrow Officers
 \swarrow Fee
 \swarrow Workmen

Unless business is continued

(4) Within 3 weeks of passing WUP order



(5) - CL shall be convener of the meetings of WUC

- WUC shall assist & monitor in following:

- (i) Taking over assets
- (ii) Sales of assets
- (iii) Recovery of cash, property or other assets
- (iv) Examination of SOA
- (v) Review of accounts & Audit Reports
- (vi) Finalisation of List of crs & contributors
- (vii) Claims
 \swarrow compromise
 \swarrow Abandonment
 \swarrow Settlement
- (viii) Payment of dividends
- (ix) Other functions specified by Tribunal

(6) CL
 $\xrightarrow{\text{Place MoM on a monthly basis duly signed by members present}}$ Tribunal

 Till submission of final report for dissolution of the co.

(7) CL to submit draft final report for consideration & approval of WUC
Notice the irony

(8) Final report approved by WUC \longrightarrow Submit to NCLT for dissolution order.

SECTION 278: EFFECT OF WUP ORDER (FAVOURABLE FOR ALL CRS)

Order of WUP shall operate in favour of all crs & cont.

↓
 As if made out of joint petition of crs & cont.

SECTION 279: STAY OF SUITS, ETC. ON WUP ORDER

- (1) Where an order of $\begin{cases} \text{WUP} \text{ (or)} \\ \text{Appt. of PL} \end{cases}$ has been passed:

- No suits or legal proceedings shall be initiated
 - If pending, shall not be proceeded with.
- } By or against the co.
↓
Except with the leave of Tribunal
[Application for leave to be disposed within 60 days]

- (2) Above provision not applicable to appeal pending in SC/Hc

SECTION 280: JURISDICTION OF TRIBUNAL

The Tribunal shall have jurisdiction to entertain/dispose off:

- (i) Any suits or proceedings by/ag. the co.
 - (ii) Any claims made by/ag. the co. (incl. its branches in India)
 - (iii) Application u/s 233 [..... ?]
 - (iv) Question of priorities or law or fact including those related to asset, business, rights, obligation, etc.
- ↓
Irrespective of whether before or after the order of WUP

SECTION 281: SUBMISSION OF REPORT BY CL [Similar to info. memorandum]

- (i) Within 60 days of order $\begin{cases} \text{WUP} \\ \text{Appt. of CL} \end{cases}$

↓
The CL shall furnish a report to Tribunal containing:

- (i) Nature & details of assets of co. incl. location & value (by a Reg. valuer)
 - + Cash balance (in hand) & bank
 - + Neg. Instruments (if any)
- (ii) Amount of capital $\begin{cases} \text{Issued} \\ \text{subscribed} \\ \text{Paid up} \end{cases}$
- (iii) Existing & contingent liabilities of the co. (incl. details of sec. & unsec. crs) & details of security given to SC
- (iv) Debts due to the co. (along with details)
- (v) Guarantee, if any by the co.
- (vi) List of contributories & dues if payable by them
 - + Details of unpaid calls
- (vii) Details of TM & IP owned by co.

(viii) Details of subsisting contracts, JV, etc

(ix) Details of Hold. & Subsy co.

(x) Legal cases by/ag. co.

(xi) Other info directed by tribunal

Asset	Liability	Equity	Others
(1) Assets, cash, NI	- Existing $\begin{matrix} \swarrow \text{SC} \\ \searrow \text{VSC} \end{matrix}$ or Contingent	- Capital $\begin{matrix} \swarrow \text{I} \\ \searrow \text{S} \\ \text{PV} \end{matrix}$	- Subs. cont. & JV
(2) Debts due to co.	- Guarantee by co.	- List of cont. & dues payable	- Hold. & Subsy co.
(3) Trademark & IP		- Details of unpaid call	- Legal cases
			- Others

(2) CL shall include in report:

[Followed by Sec 300]

- Manner in which co. $\begin{matrix} \swarrow \text{Promoted} \\ \searrow \text{Formed} \end{matrix}$
- Opinion on whether fraud committed by person in promotion/formation

(3) CL shall also make report on:

- viability of the business
- Steps necessary for maximising value of asset

(4) crs or cont entitled to inspection of above report (fees as presc.)

SECTION 282: DIRECTIONS OF TRIBUNAL ON REPORTS OF CL

(1) Tribunal shall, based on report of CL, fix a time limit to complete entire proceedings & dissolve the co.

On examination of report of CL & After hearing the CL/crs/cont.

Tribunal may revise \downarrow time limit if opinion that - Advantageous & economical to continue proceedings

(2) On examination of report of CL & After hearing the CL/crs/cont.

\downarrow
Tribunal may order sale of co. as going concern
or its assets
or part thereof [Tribunal may form
Sale committee to assist
in such sales]

(3) Where a report is received from CL/CL/any person

\downarrow
That fraud is committed w.r.t. co.

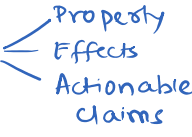
\downarrow
Tribunal may order investigation u/s 210 (w/o prejudice to WUP order)

\downarrow
Based on investigation report \rightarrow issue direction u/s 339 to 342

or direct CL to file criminal complaint against person involved

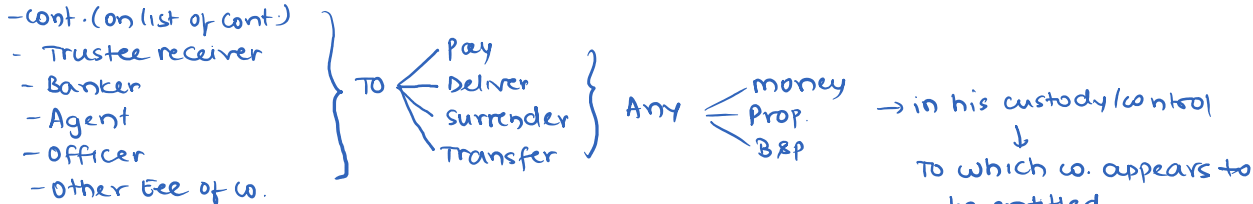
(4) Other directions including orders to protect, preserve or enhance value of assets of co.

SECTION 283: CUSTODY OF COMPANY PROPERTIES

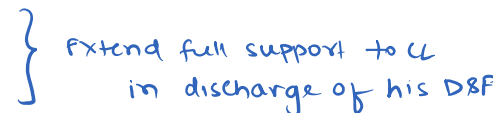
(1) CL/PL shall take custody or control of the
  } to which co. appears to be entitled to.

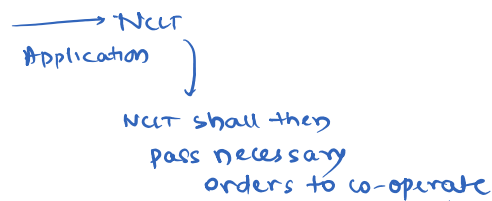
(2) All prop. & effects of co. shall be deemed to be in custody of Tribunal from date of order of WUP

(3) Tribunal may require any:



SECTION 284: PROMOTORS, DIRECTORS, ETC. TO COOPERATE WITH CL

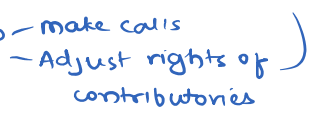
(1)
 

(2) If anyone doesn't co-operation, CL 

amp

SECTION 285: SETTLEMENT OF LIST OF CONTRIBUTORIES AND APPLICATION OF ASSETS

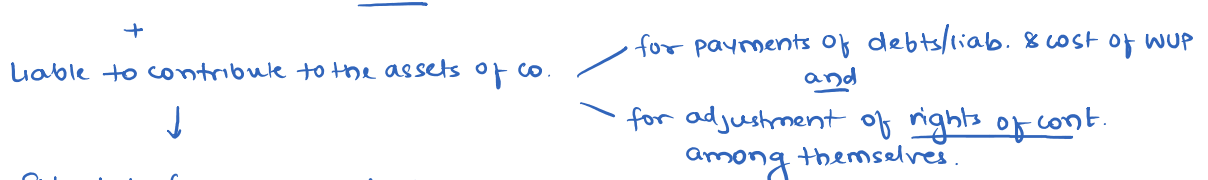
(1) After passing the WUP order, the tribunal shall:

- (i) Settle the list of contributories (Need not settle if not necessary to 
- (ii) Cause rectification of Register of members (if required)
- (iii) Cause assets of co. to be applied for discharge of liab.

(2) In settling list of cont., distinguish:
 

(3) While settling list of cont., Tribunal shall include:

Any person, who is/has been member



> subject to following conditions:

(i) A person who has been a member (Ex-member) shall not be liable to contribute:

- If ceases to be a member for 1 year or more preceding WUP. (or)

In respect of deb +/liab. contracted after he ceased to be a member

(ii) No ex-members shall be liable to contribute unless present members unable to satisfy required cont.

(iii) Co. limited by shares - liable for unpaid amt. of shares held.

(iv) Co. limited by guarantee - liable for amount undertaken to be contributed in event of WUP

If a co. limited by guarantee has share capital → Treat as if co. limited by shares

Section 2(26) - **Contributory** means a person **liable to contribute** towards the assets of the company in the event of its being wound up.

Explanation: For the purposes of this clause, it is hereby clarified that a **person holding fully paid-up shares** in a company shall be considered as a contributory but shall have **no liabilities** of a contributory under the Act whilst **retaining rights** of such a contributory;

SECTION 286: OBLIGATION OF DIRECTORS AND MANAGERS

(1) In case of a limited co., any director/mgrs with unlimited liability shall contribute in course of WUP as if he were member of an unlimited co.

Provided that, dir./mgr shall not be liable:

- ceased to hold office 1 year or more prior to commn. of WUP
- Debt/liability contracted after he ceased to hold office.
- Unless tribunal deems necessary to satisfy debts/liab. of co. / cost of WUP

SECTION 287: ADVISORY COMMITTEE

(Ac)

(1) While passing WUP order, Tribunal may direct to form AC / To advise CL and
Report to NCLT

(2) Constitution: ≤ 12 members
↳ cont./crs / other person - As NCLT may direct.

(3) **Within 30 days** of WUP order → CL shall convene meeting of crs/cont. ↳ As per Books
To enable Tribunal to determine members of AC

(4) AC shall have right to inspect / BOA
Other docs
Asset & Prop. of co.

(5) Meeting of AC to be chaired by CL.

SECTION 288: SUBMISSION OF PERIODICAL REPORTS TO NCLT

CL to make periodical report including quarterly report on progress of WUP to NCLT

SECTION 289: OMITTED

SECTION 290: POWERS AND DUTIES OF CL (Similar to that of IRP & RP)

CL may exercise following powers **subject to overall control of the Tribunal**:

- to carry on the **business** of the company for beneficial WUP;
- to do all acts and to **execute deeds**, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;
- to **sell** the immovable and movable **property** and **actionable claims** of the co. by **public auction** or **private contract**;
- to **sell** the whole of the undertaking of the company as a **going concern**;
- to **raise** any money required on the security of the assets of the company;
- to institute or defend any **suit**, prosecution or other legal proceeding;
- to invite and settle **claim** of creditors, employees or any other claimant **and distribute sale proceeds** as per this Act;
- to **inspect** the records and returns of the co.;
- to **prove rank** and **claim** in the insolvency of any contributory for any balance against his estate;
- to draw, accept, make and endorse any **negotiable instruments** including cheque, bill of exchange, hundi or promissory note;
- to obtain any **professional assistance** from any person in discharge of his duties, obligations and responsibilities and for protection of the assets of the company;
- to take **all such actions** as may be necessary
 - for WUP of the company;
 - for distribution of assets;
 - in discharge of his duties and obligations and functions as CL; and
- to apply to the Tribunal for such **other** orders as may be necessary for WUP.

SECTION 291: PROFESSIONAL ASSISTANCE TO CL

(1) CL may, with sanction of Tribunal,

↓

Appoint one or more

- CA
- CS
- CMA
- legal pract.
- Others

} to assist him in performance of duties

(2) Appointed person shall forthwith disclose

- Conflict of interest
- Lack of indep.

} to Tribunal

SECTION 292: EXERCISE AND CONTROL OF CL'S POWER

(1) CL shall, in

- administration of assets &
- Distribution thereof

↓

Have regard to directions by

- Resoln of crs & cont. at any GM
- AC

} In case of conflict, Crs/cont. override AC.

(2) Summoning meetings of crs/cont.

CL may summon meetings

CL may summon meetings

- suo-moto to ascertain wishes
- shall summon if
 - Directed by resolution
 - Requested in writing by 1/10th value of Crs/cont.

(3) Person aggrieved by act of CL

↓

Apply to Tribunal

→ Tribunal may

- Confirm
- Modify
- Reverse

SECTION 293: BOOKS TO BE KEPT BY CL

- (1) CL shall keep proper book which includes MOM
- (2) Books open to inspection by co./crs.

SECTION 294: AUDIT OF CL'S ACCOUNT

- (1) CL shall maintain proper BoA including details of receipts & payments (R&P)
- (2) CL shall present accounts of R&P to Tribunal at such times (prescribed) but not less than twice in each year during tenure
- (3) Tribunal shall cause audit of BoA maintained by CL & CL shall provide necessary information for such audit
- (4) Once accounts are audited, copy sent to
 - Tribunal
 - ROC - open for inspection by crs/cont./interested person
 - If Govt co.
 - CG (if member)
 - SG (if member)
 - Both (if members)

SECTION 295: PAYMENT OF DEBT BY CONTRIBUTORY AND SET OFF

- (1) Tribunal may, after passing WVP order, direct any cont. (on the list of cont.)
 - ↓
 - To pay any money due to co. from
 - him
 - from estate of person he represents
 - ↓
 - Exclusive money payable by virtue of any call
- (2) In making such order above, the Tribunal may:
 - (i) In case of an unlimited co., allow the contributory → **By way of set off**
 - ↓
 - Any money due to him from co. for independent dealing/contract but not as member of co.
 - (ii) In case of limited co., allow any director/mgr with unlimited liab.
 - ↓
 - such set-off.
- (3) In case of a co., whether limited/unlimited, when all crs have been paid in full
 - ↓
 - Such set-off may be allowed on subsequent calls.

SECTION 296: POWER OF TRIBUNAL TO MAKE CALLS

- (1) Tribunal may, any time after passing WVP order, before or after ascertaining sufficiency of assets
 - (i) Make calls on cont. (in the list)
 - ↓

of assets

(i) Make calls on cont. (in the list)

↓
for payment of money to the extent of liab.

↓
TO { Satisfy debts/liab of companies & cost of WUP
Adjustment of rights of cont. amongst themselves

(ii) Make an order for payments of call so made.

SECTION 297: The Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto

SECTION 298: In the event of the assets of a company being insufficient to satisfy its liabilities, the Tribunal may make an order for the payment of the costs of winding up, in such order of priority inter se as the Tribunal thinks just and proper.

SECTION 299: POWER TO SUMMON PERSONS SUSPECTED TO HAVE PROPERTY OF CO.

(1) Tribunal may, any time after order of { WUP or
Appt. of PL

↓
Summon any officer/person { known/suspected { TO have property (B&P of co.
to be indebted to co.
capable of giving info. about co.
↓
For examination on oath
- By word of mouth or (reduce to writing & make him sign)
- Written interrogatories or
- Affidavit

(2) Tribunal may require the person summoned to produce B&P in his custody
↓
In claims of lien → Production w/o prejudice to lien.

(3) Tribunal may require CL to file report on property in possession of others

(4) Tribunal may require:

(i) Person indebted - TO pay (fully or partly)

(ii) Possession of property - TO deliver to PL/CL

SECTION 300: POWER TO ORDER EXAMINATION OF PROMOTORS, DIRECTORS, ETC. IN CASE OF FRAUD

(1) Where CL in his report states that in his opinion, fraud has been committed in promotion, formation or conduct of affairs of co.,

↓
Tribunal may direct such person to attend before it for examination on oath

(2) CL shall take part in such examination & may employ legal assistance
(if sanctioned by NCLT)

(3) A person examined under this section:

- Shall be furnished CL's report (at his cost)
- may employee CA/CS/CWA/legal pract., etc.

(4) If such person applies to NCLT to be exculpated from charges
↓

Duty of CL to attend the hearing & call the attention of NCLT to relevant matter.

SECTION 301: ARREST OF PERSON ABSCONDING INDIA

Any time either before or after passing a winding up order, if the Tribunal is satisfied that -

- a contributory, or
- a person having property, accounts or papers of the company in his possession

is about-

- to leave India or
- otherwise to abscond, or
- is about to remove or conceal any of his property, for evading payment of calls, or
- of avoiding examination respecting the affairs of the company,

the Tribunal may cause—

- the contributory to be detained until such time as the Tribunal may order; and
- his books and papers and movable property to be seized and safely kept until such time as the Tribunal may order.

SECTION 302: DISSOLUTION OF COMPANY BY TRIBUNAL

- (1) When the affairs of the co. has been completely wound up,
↓
CL shall make an application to NCLT for dissolution of co.
- (2) On receipt of application, if NCLT find it just and reasonable
↓
Order the dissolution of co.
↓
Company stands dissolved from date of order
- (3) Copy of order ← Roc for records
within 30 days CL

Delete the penalty
from material

SECTION 303: TRANSITION PROVISION

Winding Up

Part III - Provision applicable to all types of Winding up

✓ Section 324 - Debts of all descriptions to be admitted to proof

In every WUP (subject to IBC),

- a. all debts payable on a contingency, and
- b. all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages,

shall be admissible to proof against the company.

A just estimate being made of the value of such debts or claims may not bear a certain value.

Section 325 - Omitted

Section 326 - Overriding preferential payments

In case of WUP, the following debts shall be paid, in priority to all other debts in following sequence:

- a. workmen's dues (excluding payment for death/disability and PF/Gratuity etc) payable for 2 years preceding the WUP shall be paid within 30 days of sale of assets;
- b. The following shall be paid pari passu:
 - a. Workmen's comp other than (a) and
 - b. where a secured creditor has realised a secured asset, lower of:
 - a. such debts due to such secured creditor as could not be realised by him or
 - b. the amount of the workmen's portion in his security (if payable under the law)

Illustration given in the Act:

The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The amount of the debts due from the company to its secured creditors is Rs.3,00,000. The aggregate of the amount of workmen's dues and the amount of debts due to secured creditors is Rs. 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is Rs. 25,000.

Notes (based on ICAI May 2017 question)

Any cost incurred by liquidator towards cost for preserving the security of secured creditor shall be borne by Workmen and SC in the ratio of their debt.

For example: CL incurred Rs. 10,000 to preserve the secured asset in above illustration. The cost shall be borne as follow - Workmen (Rs. 2,500) and SC (Rs. 7,500)

Example:

Amount payable to Secured creditor - Rs. 1.5 lakhs

Amount payable to Workmen's comp (total and not just 24m) = Rs. 50,000

Amount payable to Workmen's comp (Last 24m) = Rs. 20,000

Total payable = Rs. 2 lakhs

Market value of security available with secured creditors - Rs. 1 lakh.

Share of Workmen's comp on realization of security will be - Rs. 1 lakh * 0.5/2 = Rs. 25,000

Therefore, firstly, the Liquidator will make payment of Rs. 20K for the Workmen's comp of last 2 years, then on realization of security, the following debts will rank pari passu:

1. Workmen's comp - Rs. 30K - Rs. 25K = **Rs. 5k**
2. Sec creditor = Lower of Rs. 75K or Rs. 25K i.e., **Rs. 25K**

Definition:

"Workmen's dues" means the **aggregate** of the following sums due from the company to its workmen, namely:

- (i) **all wages or salary** including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947;
- (ii) **all accrued holiday remuneration** becoming payable to any workman;
- (iii) **all amount due** in respect of any compensation under the said Act in respect of the **death or disablement**;
- (iv) **all sums due** to any workman from the **provident fund, the pension fund, the gratuity fund** or any **other fund** for the welfare of the workmen, maintained by the company;

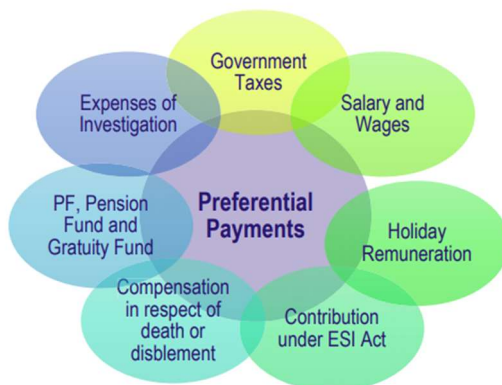
Section 327 - Preferential payments

"Relevant date (RD)" means the date of appointment of PL or the date of WUP order, as the case may be.

1. In a WUP, subject to sec 326 and subject to retention of such sums as may be necessary for the **cost** and **expenses of the winding up**, following shall be paid in priority to all **other debts, equally ranked**:
 - a) **all revenues, taxes, cesses and rates due to the CG or a SG or to a local authority** at the **RD**, and having become due and payable within the **12m** immediately before;
 - b) **all wages or salary due for a period not exceeding 4m within the 12m immediately before the RD** including wages payable for time or piece work and salary earned by way of commission of any employee; [Example - An employee can get **max. of 4 months' salary** in one go here]
 - c) **all accrued holiday remuneration** becoming payable to any employee;
 - d) **all amount due** in respect of **contributions payable in 12m** immediately before the **RD** by the company as the employer of persons **under Employees' State Insurance Act, 1948**
 - e) **all amount due** in respect of any **compensation for death or disablement** of any **employee** of the company
 - f) **all sums due** to any **employee** from the **PF & GF or other fund** maintained for the welfare of the employees; and
 - g) **the expenses of any investigation** held u/s 213 and 216, in so far as they are payable by the company.
2. Where any **payment** has been made to any **employee** out of **money advanced** by some person (Haan Bank Ltd.) for that purpose, **Haan Bank Ltd.** shall, in a winding up, have the **same right of priority** as the employee would have been entitled to had the payment not been made.
3. The **debts enumerated** in this section shall have **priority over** the claims of **debentures holders** under any **floating charge** created by the company and be paid accordingly out of any property subject to that charge.
4. In the event of a **landlord or other person distraining (seize)** any **goods or effects** of the co. **within 3m** immediately before the date of a WUP order, the **priority debts** as per this section shall be a **first charge on the goods or effects** so distrained on or the **proceeds** of the sale thereof; **Provided that**, in respect of any money paid under any such charge, the **landlord/other person** shall have the **same rights of priority** as the person to whom the payment is made.

5. Any holiday remuneration on medical grounds through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period.
6. Sections 326 and 327 shall be N.A. in the event of liquidation under the IBC, 2016

Explanation: For the purposes of this section, the expression employee does not include a workman.



Sequence of Payment as per Winding up	Sequence of Payment as per IBC
1. Workmen's due (2 years) Other workmen dues + Unpaid Realised SC	1. IRP and Liquidation Cost
2. Cost and expenses of winding up	2. Workmen dues (24m) + Relinquished SC
3. Equally ranked:	3. Salary to EE other than workmen(12m)
• CG/SG dues (12m)	4. Financial Debts - Unsecured
• Salary (due <4m in last 12m)	5. CG/SG dues (2 yrs) and Unpaid Realised SC
• Accrued holiday rem.	6. Remaining debts and dues
• Contributions under ESI (12m)	7. Preference Shareholders
• Compensation for death/disablement	8. Equity
• PF/GF/Other fund to EE	
• Investigation expense u/s 213,216	
4. Crs / Debenture holders having floating charge	
5. Unsecured Creditors	

ICAI - Nov 2015 Question:

BP Limited is being wound up by the Tribunal. The liquidator after realization of the asset has an amount of Rs. 28 lakhs in his hands towards payments of creditors of the company. Details of the creditors are as follows:

- (i) Secured Creditors - Rs. 20 lakhs
- (ii) Worker's Wages - Rs. 15 lakhs
- (iii) Income Tax Payable - Rs. 2 lakhs
- (iv) Unsecured Creditors - Rs. 40 lakhs

Since the available amount for distribution is only Rs. 28 lakhs, explain the procedure for payment you would follow as per the provisions of Companies Act, 2013.

Answer:

The amount is insufficient and hence as per Sec 326, Worker's wage and Secured Creditors shall be paid pari-passu. Therefore, worker's wage paid = Rs. 12 lakhs and Secured creditor = Rs. 16 lakh (15:20 ratio)

$$\frac{15}{20} \times 28 = 16$$

ICAI - Nov 2010 Question:

In light of provision of the Companies Act, 2013, examine whether the following debts of a company shall be "Preferential Payment" and shall be paid in priority to claim of unsecured creditors:

- 1. Wages of Rs. 30,000 only of employees for services rendered for a period of 8 months within the preceding 12 months next before the relevant date

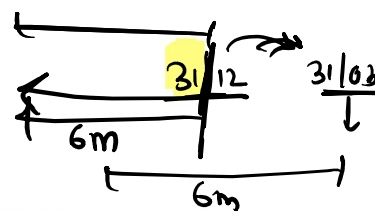
- ✓ 2. Rs. 1 lakh due to an employee from PF and Rs. 50,000 towards Gratuity
- ✓ 3. Rs. 20,000 payable by the company on account of expenses incurred w.r.t investigation u/s 213

Answer:

1. Wages of 4 months instead of 8 months shall amount to preferential payment
2. Yes, both Rs. 1 lakh and Rs. 50,000 amounts to preferential payment
3. Yes, Rs. 20,000 amounts to preferential payment

Section 328 - Fraudulent Preference

1. Where a company has given preference to a creditors/surety/ guarantor (CSG) of the company, and does anything which has the effect of putting that person into a position which, in the event of liquidation, will be better than the position he would have been in if that thing had not been done prior to 6m of WUP application (i.e. within 6m preceding the date of making the petition for WUP and not order of WUP by Tribunal), the Tribunal may order for restoring the position to what it would have been if the company had not given that preference.
2. If the Tribunal is satisfied that there is a preference:
 - a. transfer of property, movable or immovable, or
 - b. any delivery of goods,
 - c. payments,
 - d. execution made, taken or done by or against a company
 within 6m before WUP application, the Tribunal may declare such transaction invalid and restore the position.



Note - A transaction shall amount to fraudulent preference only if there is any element of dishonesty i.e., there is a malafide intention to give undue advantage to the creditors over others.

[Example - Preference given to bank to increase the loan limit few months prior to WUP application may not be a FP as the intention was to give advantage to the company and not the creditor]

ICAI - May 2005 Question:

ABC Ltd. has been running in losses and has defaulted in payment to its creditors. On 1.8.2020, the company mortgaged its P&M to Mr. Patel, a close friend of MD of the company, against unsecured dues of Rs. 10 lakhs. Another creditor, Mr. Rajesh, a trade creditor, was not paid Rs. 50,000 for supply of raw material. A petition for WUP was presented before Tribunal on 31.12.2020 and order for WUP was passed by Tribunal on 4.4.2021. Can the Tribunal declare the transaction of mortgage with Mr. Patel as invalid?

Answer:

Yes, as a fraudulent preference w.r.t. property of the co. is made within 6m before WUP petition, therefore Tribunal may declare such transaction invalid and restore the position.

Section 329 - Transfer not done in good faith to be void

Any transfer of:

- property, movable or immovable, or
- any delivery of goods,

made by a company:

- not in the OCOB or
- not in favour of a purchaser or encumbrance in good faith and for valuable consideration, if made within 1 year before petition u/s 272 shall be void against the CL.



Section 330 - Any transfer or assignment by a company of all its properties or assets to trustees for the benefit of all its creditors shall be void

Section 331 - Liabilities and rights of certain persons fraudulently preferred

1. In the event of WUP of a co., where a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt (Mr. Secured Creditor) is made, then, the person preferred (Mr.

Jugaadu) shall be subject to the same rights and liabilities as if he had undertaken to be personally liable as a surety for the debt, to the extent which is lower of:

- a. the charge on the property or
- b. the value of his interest (as on date of preference as if it were free of all encumbrances).

2. On an application made to the Tribunal w.r.t any payment being a fraudulent preference of a surety or guarantor (S/G), the Tribunal shall have jurisdiction to:

- determine any questions w.r.t the payment arising between person to whom payment was made & S/G
- and to grant relief in respect thereof and
- for that purpose, may give leave to bring in the S/G as a third party for the recovery of the sum paid.

Section 332 - Effects of floating charge

- Where a co. is being wound up,
- a floating charge on the undertaking or property of the co. created within 12m immediately preceding the commencement of WUP (Refer Sec 357),
- shall be invalid,
- unless it is proved that the company immediately after the creation of the charge was solvent

What will not be invalid? The amount of any cash paid to the company in consideration for the charge together with interest on that amount at the rate of 5% p.a. or such other rate (CG)

Samjho: If you gave loan to company against a floating charge on the receivables of the company, the charge shall be invalid except to the extent of money you paid shall be valid and shall be paid back to you along with int. @5% p.a.

Question:

Abc Ltd. approached Risky Finance Company Limited for a loan of Rs. 20 lakhs to finance a purchase of some essential machinery.

The company created a floating charge on some of its assets on 1st December, 2016 for Rs. 25 lakhs to secure Rs. 5 lakhs already due to Risky Finance Company Ltd and additional amount to be advanced by the said Finance company.

Risky Finance Company Ltd advanced Rs. 15 lakhs on 15th December 2016 towards purchase of certain machinery.

A winding up petition was filled before the Tribunal on 1st January 2017 and the company was ordered to be wound up on 15th Mar 2017.

Examine with reference to the provision of the Companies Act 2013 whether the floating charge is valid.

Answer:

Relevant Provision:

As per section 332, a floating charge created by the company within 12 months prior to the commencement of winding up shall be invalid.

However, this provision has 2 exceptions:

(a) A floating charge shall **not be invalid** if proved that the co. was solvent immediately after creation of charge.

(b) A floating charge shall be **valid upto** the amount of any cash paid to the company (whether at the time of creation of charge or thereafter) as a consideration of the charge. Also, interest shall be allowed on that amount at the rate of 5% per annum.

As per section 357, in case of a winding up by the Tribunal, the winding up shall be deemed to have commenced at the time of presentation of the petition for the winding up.

Given case:

1. In the given case, the winding up petition was filed with the tribunal on 1st January 2017 and the company was ordered to be wound up on 15th March, 2017. As per section 357, winding up commenced on 1st January, 2017.
2. On 1st December, 2016, the company created floating charge on some of its assets in favour of Risky Finance Company Ltd. The amount secured by floating charge was Rs. 25 lakhs. Thus, floating charge was created within 12 months prior to the commencement of winding up. Therefore, this action is covered under section 332.
3. The amount of Rs. 15 lakhs advanced by Risky Finance Company Limited towards purchase of machinery falls under one of the exceptions (cash paid to the company under as a consideration for the charge) and therefore the floating charge is valid upto Rs. 15 lakhs along with interest @5% per annum

Conclusion:

- (i) Floating charge for Rs. 5 lakhs not yet advanced by Risky Finance Company Ltd is void.
- (ii) The floating charge is valid for Rs 15 lakhs along with interest @5% per annum
- (iii) The floating charge shall be valid for Rs. 20 lakhs (i.e. 15 lakhs advanced to the company subsequent to the creation of the floating charge as well as for 5 lakhs which was already due from the company before the creation of floating charge) along with interest, if it is provided that the company was solvent immediately after the creation of the floating charge.

Section 333 - Disclaimer of onerous property

1. Where any part of the property of a company consists of--

land of any tenure, burdened with onerous covenants	shares or stocks in companies	any other property - not saleable/readily saleable cause the possessor thereof is bound either to performance of any onerous act or to payment of any money	Unprofitable contracts
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the CL may, with the leave of the Tribunal, by writing signed by him, at any time within 12m after the commencement of WUP, disclaim the property, notwithstanding that he has:

- endeavored to sell or
- taken possession of the property or
- exercised any act of ownership

If CL was unaware of existence of such property within 1m from comm. of WUP, can disclaim within 12m from the date he became aware.

2. Such disclaimer of property shall not affect the rights, interest or liabilities of any other person.
3. The Tribunal, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such T&C of granting leave as the Tribunal considers just and proper.
4. The CL shall not be entitled to disclaim any property in any case where:
 - a. an application in writing has been made to him by any person interested in the property requiring him to decide whether he will or will not disclaim and
 - b. the CL has not, within 28 days after the receipt of the application, given a notice to applicant that he intends to apply to the Tribunal for leave to disclaim, and
 - c. in case the property is under a contract (unprofitable contract), if the CL after such an application does not within the said period disclaim the contract,
 - d. he shall be deemed to have adopted it.
5. On the application of any person who is entitled to the benefit or subject to the burden of a contract, the Tribunal may make an order rescinding the contract on such terms as to payment of damages for the

nonperformance of the contract, or otherwise as it may deem just and proper, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

6. The Tribunal may, on an application by any person who:

- either claims any interest in any disclaimed property (DP) or
- has undischarged liability under this Act in respect of any DP,
- make an order for the vesting of the property on such terms as the Tribunal considers just and proper in
 - any person entitled thereto or
 - to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid,

Provided that where the property disclaimed is of a leasehold nature, the Tribunal shall not make a vesting order in favour of any person claiming under the company, whether as under-lessee (sub-tenant) or as mortgagee or holder of a charge by way of demise, except upon the terms of:

(a) making that person subject to same liabilities and obligations as those to which the company was subject under the lease; or

(b) if the Tribunal thinks fit, making the person subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date,

and in either event as if the lease had comprised only the property comprised in the vesting order

7. Any person affected by disclaimer under this section shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of such effect, and may accordingly prove the amount as a debt in the winding up.

Section 334 - Transfers, etc., after commencement of winding up to be void

In the case of a WUP,

- any disposition of property including actionable claims, of the co. and
- any transfer of shares in the company or
- alteration in the status of its members,

made after the commencement of the WUP shall be void, unless the Tribunal otherwise orders.

Section 335 - Certain attachments, executions, etc., in winding up by Tribunal to be void

1. Where any company is being wound up by the Tribunal, after the commencement of WUP:

a) any attachment, distress or execution put in force against the estate or effects of the company; or

b) any sale of any of the properties or effects of the company without the leave of Tribunal, shall be void.

2. Section N/A to any proceedings for the recovery of any tax or any dues payable to Government.

Section 336 - Offences by officer of companies in Liquidation

1. If an officer of a company which is being wound up or which is subsequently ordered to be wound up:

a) does not fully and truly disclose all the property (M/IM), of the co. and details of disposal of any part thereof, except where disposed in OCOB;

b) does not deliver all such part of the property (M/IM) and books and papers of the company as is in his custody or control;

c) within 12m immediately before the commencement of the WUP or at any time thereafter:

i. conceals any part of property (>= value of Rs. 1,000), or conceals any debt due to/from the co.;

ii. fraudulently removes any part of property (>= value of Rs. 1,000);

iii. conceals, destroys, mutilates or falsifies, or is privy to the same of, any books and papers affecting or relating to, the property or affairs of the company;

iv. makes any false entry in any B/P affecting or relating to, the property/affairs of co.;

- v. fraudulently alters or makes any omission in any B/P affecting/relating to property or affairs of the co.;
- vi. by any false rep. or pretence that the co. is carrying on its business or any other fraud, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for;
- vii. pawns, pledges, or disposes of any property which has been obtained on credit and has not been paid for, unless in OCOB
- d) makes any material omission in any statement of affairs of the company;
- e) knowing that a false debt has been proved by any person under the WUP, fails for 1m to inform the CL;
- f) prevents the production of any B/P affecting or relating to the property or affairs of the company;
- g) 12m before the commencement of WUP or after commencement, attempts to account for any part of the property of the company by fictitious losses or expenses; or
- h) is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors, to an agreement with reference to the affairs of the company or to the WUP, he shall be punishable with imprisonment 3-5 years and with fine (Rs. 1 lakh to Rs. 3 lakhs)

Provided that it shall be a good defense if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

2. Where any person pawns, pledges or disposes of any property as mentioned above, every person who takes in pawn or pledge or otherwise receives the property, knowingly, shall be punishable with imprisonment 3-5 years and with fine (Rs. 3 lakhs to Rs. 5 lakhs)

Summary:

Officer of company fails to:

1. Doesn't disclose property of company
2. Fails to deliver property or B/P
3. Within 12m before WUP - Conceals, removes prop (\geq Rs. 1000)
4. Material omission
5. Doesn't inform false debt proved for one month
6. Prevents production of B/P
7. Attempts to account for fictitious losses or expenses
8. Guilty of fraud or false rep.

Section 337 - 343 - Excluded - Thanks, ICAI

Section 344 - Statement that company is in liquidation

Where a company is being wound up, every invoice, order for goods or business letter being a document on or in which the name of the company appears, issued by or on behalf of:

- a) the company or
- b) a CL,
- c) or a receiver
- d) or manager of the property of the co.,

shall contain a statement that the company is being wound up.

Contravention: Fine Rs. 50K - Rs. 3 lakhs

Section 345 - Books and papers of company to be evidence

Where a company is being wound up, all B/P of the co. and of the CL shall be prima facie evidence of the truth of all matters purporting to be recorded therein.

Section 346 - Inspection of Books and papers by Crs/Cont.

- a. After comm. of WUP, any C/C of the co. may inspect the B/P only in accordance prescribed rules.
- b. Nothing in this section shall exclude or restrict any rights conferred by any law:
 - a) on the CG/SG;
 - b) on any authority or officer thereof; or
 - c) on any person acting under the authority of aforementioned person

Section 347 - Disposal of books and papers of company

1. When affairs of a co. is completely wound up and it is about to be dissolved, the B/P of such company and CL may be disposed of in such manner as the Tribunal directs.
2. After the expiry of 5 years from the dissolution of the company, no responsibility shall devolve on the company, the CL, or any person to whom the custody of the books and papers has been entrusted, by reason of any B/P not being forthcoming to any person claiming to be interested therein.
3. The CG may, by rules, :
 - a) prevent for such period as it thinks proper the destruction of B/P of co. and CL; and
 - b) enable any C/C to make representations to the CG in respect of the above matters and to appeal to the Tribunal from any order made by the CG.
4. Contravention - Fine up to Rs. 50K (No jail)

Section 348 - 351 - Excluded. Thanks, ICAI

Section 352 - Liquidation Dividend and Undistributed Assets Account

1. Where any co. is being wound up (not yet dissolved) and the liquidator has any money representing:
 - a) dividends payable to any creditor unpaid for 6m after the date on which they were declared; or
 - b) assets refundable to any contributory undistributed for 6m after date on which they become refundable,the liquidator shall forthwith deposit the said money into a separate special account to be known as the "Company Liquidation Dividend and Undistributed Assets Account (CLDAUAA)" maintained in a scheduled bank.
2. The liquidator shall, on the dissolution of the co., pay into the CLDAUAA, any money representing unpaid dividends or undistributed assets in his hands at the date of dissolution.
3. The liquidator shall, when making any payment to CLDAUAA, furnish to the Registrar, a statement in the prescribed form, setting forth, in respect of all sums included in such payment, the nature, the names and addresses, the amount and such other particulars as may be prescribed.
4. The liquidator shall be entitled to a receipt from the scheduled bank for any money paid into CLDAUAA, and such receipt shall be an effectual discharge of the CL in respect thereof.
5. Ignore cause voluntary WUP - Where a co. is being wound up voluntarily, the CL shall, when filing a statement u/s 348(1), indicate the sum of money payable to CLDAUAA during the 6m preceding the date on which the said statement is prepared, and shall, within 14 days of the date of filing the said statement, pay that sum into CLDAUAA.

6. Any person claiming to be entitled to any money paid into the CLDAUAA may apply to the Registrar for payment thereof, and the Registrar, if satisfied that the person claiming is entitled, may make the payment to that person of the sum due:

Provided that the Registrar shall settle the claim of such person within a period of 60 days from the date of receipt of such claim, failing which Registrar shall make a report to Regional Director giving reasons.

7. Any money paid into the CLDAUAA, which remains unclaimed thereafter for a period of 15 years, shall be transferred to the general revenue account of the CG, but a claim to any money so transferred may be preferred and shall be dealt with as if such transfer had not been made and the order, if any, for payment on the claim will be treated as an order for refund of revenue.

Unclaimed funds in
CLDAUAA account for 15
years



Transfer to General
Reserve A/c of CG

8. Any liquidator retaining any money which should have been paid by him into CLDAUAA shall:
- pay interest on the retained amount @12% p.a. and also pay such penalty as determined by Registrar
Provided that the CG may in any proper case remit the amount of interest payable under this clause
 - be liable to pay any expenses occasioned by reason of his default; and
 - where the winding up is by the Tribunal, also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper, to be disallowed, and to be removed from his office by the Tribunal.

Section 353 - Liquidator to make returns, etc.

- If any CL who has made any default in filing, delivering or making any return, account or other document, or in giving any notice which he is by law required to file, deliver, make or give, fails to make good the default within 14 days after the service on him of a notice requiring him to do so, the Tribunal may, on an application made to it by any C/C of the company or by the Registrar, make an order directing the CL to make good the default within such time as may be specified in the order.
- Any order under sub-section (1) may provide that all costs of, and incidental to, the application shall be borne by the CL.

Section 354 - Meetings to ascertain wishes of creditors or contributories

- In all matters relating to the WUP, the Tribunal may:
 - have regard to the wishes of C/C of the company, as proved to it by any sufficient evidence;
 - if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the C/C to be called, held and conducted in such manner as the Tribunal may direct; and
 - appoint a person to act as chairman of any such meeting and to report the result thereof to the Tribunal.
- While ascertaining the wishes of creditors above, regard shall be had to the value of each debt of the creditor.
- While ascertaining the wishes of contributories, regard shall be had to the number of votes which may be cast by each contributory.

Section 355 - Court, tribunal, or person, etc., before whom affidavit may be sworn

- Any affidavit required to be sworn for the purposes of this Chapter may be sworn:
 - in India before any court, tribunal, judge, or person lawfully authorised to take and receive affidavits; and
 - in any other country before any court, judge or person lawfully authorised to take and receive affidavits in that country or before an Indian diplomatic or consular officer.

2. All tribunals, judges, Justices, commissioners and persons acting judicially in India shall take judicial notice of the seal, stamp or signature, as the case may be, of any such court, tribunal, judge, person, diplomatic or consular officer, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Chapter.

Section 356 - Power of Tribunal to declare dissolution of company void

1. Where a co. has been dissolved, the Tribunal may at any time within 2 years of the date of the dissolution, on application by the CL or by any other person who appears to the Tribunal to be interested, make an order declaring the dissolution to be void, and thereupon such proceedings may be taken as if the company had not been dissolved.
2. The Tribunal shall:
 - a. forward a copy of the order, within 30 days to Registrar who shall record the same; and
 - c. direct the CL or the person on whose application the order was made, to file a certified copy, within 30 days, with the Registrar who shall record the same.

Section 357 - Commencement of winding up by Tribunal

The WUP of a co. by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the WUP.

Section 358 - Exclusion of certain time in computing period of limitation.

Notwithstanding anything in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to a period of 1 year immediately following the date of the winding up order shall be excluded.