

Meaning of winding up:

“Winding up is a means by which the dissolution of a company is brought about and its assets realised and applied in payment of its debts, and after satisfaction of the debts, the balance, if any, remaining is paid back to the members in proportion to the contribution made by them to the capital of the company.”

“The liquidation or winding up of a company is the process whereby its life is ended and its property is administered for the benefit of its creditors and members. An Administrator, called a liquidator, is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights.”

As per section 2(94A) of the Companies Act, 2013, “winding up” means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016.

Thus, winding up ultimately leads to the dissolution of the company. In between winding up and dissolution the legal entity of the company remains and it can be sued in a Tribunal of law.

Modes of Winding up of a Company:

The liquidation of the Company’s assets, which are collected and sold in order to satisfy the obligations accrued, is referred to as winding up. When a corporation is wind up, the debts, expenditures, and charges are first paid off and dispersed among the shareholders. When a company is subject to liquidation, it dissolves officially and ceases to exist.

Winding up is the legal process of closing down a firm and ceasing all operations. After the winding up of Company, the Company’s existence ends, and the assets are subject to supervision to ensure that the stakeholders’ interests are not jeopardised.

Modes of Winding up of a company-

According to Section 270 of the Companies Act, 2013, a company can be wind up in two ways. They are:

- Compulsory Winding up of Company by Tribunal
- Voluntary Winding up of Company

Compulsory Winding up of Company by Tribunal

According to Section 271 of the Companies Act, a Tribunal may issue an order to wind up a company in the following circumstances, as detailed in Section 271(1) of the Companies Act, 2013.

1. Sick Company
2. Special Proposal
3. Acts against the State
4. Fraudulent Conduct of Business
5. Failure to file financial statements with the Registrar
6. It is just and equitable to wind up.

Let us discuss them one by one in detail.

- **Sick Company:** If the firm is in a position where creditors have a dominating position, with debt dues, the Committee of Creditors shall appoint an administrator to hold up the winding up of the Company, in accordance with the

Tribunal's ruling. This occurs when the company is in a sick state, i.e. the firm is unable to pay its obligations and it is not feasible to resuscitate and rehabilitate such opinion and order that the Company may be wind up.

- **Special Resolution:** If the Company has agreed, by a special resolution that it will wind up by the Tribunal then the said winding up is at the discretion of the Tribunal. This exempts the Tribunal's ability to wind up a corporation if it is contrary to the public interest or the company's interest.
- **Acts against the State:** If the Company commits an act that is detrimental to India's sovereignty and integrity, the security of the State, cordial relations with other states, public order, decency, or morals, the Tribunal may ask company to wind up the company.
- **Fraudulent Conduct of Business:** If the Tribunal believes that the Company's affairs have taken place by way of fraud or that the reason for forming the company is for fraudulent or unlawful purpose, the Tribunal has the ultimate discretion to wind up the company only after receiving an application from the Registrar of Companies or any other person authorised by the Central Government.
- **Failure to file financial statements with the Registrar:** If the Company has failed to file its financial statements or annual reports with the Registrar for the last five consecutive fiscal years, as required by Section 271(1) (f) of the Act.
- **It is just and equitable to wind up:** Section 271(1) (g) of the Act states that if the Tribunal believes that it is just and equitable that the company be wind up, it must consider the interests of the company, its employees, creditors, shareholders, and the general public interest, as well as all other remedies to resolve the circumstance that led to the Tribunal's decision to wind up. Under this premise, winding up the firm necessitates a strong ground to liquidate that company.

Procedure of Modes of Winding up of a Company-Compulsory Winding up of Company by Tribunal

A petition is use to make an application to the Tribunal in the winding up of a company under Section 272 of the statute.

The following individuals are entitled to file this petition:

- The Company;
- Any creditor or creditors, including any contingent or potential creditors;
- Any Contributors to that company;
- The Registrar; and
- Any person authorised by the Central Government to do so.

Procedure

The following is the procedure for compulsory winding up of company by tribunal:

- Appointment of a Liquidator to the Company under Section 275 to examine the Company's debts and credits in order to verify the Company's eligibility for forced winding up by the Tribunal.
- Following the appointment, Liquidators as per section 281 of the Act to make a report to the Tribunal.
- The Tribunal issues orders to the liquidators in dissolving the Company under Section 282 of the Act. And according to which, the company's property undergo shift into custody in order to satisfy the creditors and contributors first.

- Finally, the Court issues the order for dissolution under Section 302 of the Act, after carefully reviewing the audits and reports provided by the liquidator to the Court in the interest of resolving the obligations owed to creditors and other contributors.

Voluntary Winding up of Company

Section 304 of the Companies Act, 2013, specifies two statutory conditions in which a company may be voluntarily wind up. They are;

- If the company's general meeting approves a resolution requiring the company to be wind up voluntarily as a consequence of the expiration of the time for its duration, if any, as per its articles, or the occurrence of any event for which the articles prescribe that the company may be dissolve; or
- If the board of directors approves a special resolution requesting that the firm is wind up voluntarily.

Procedure of Modes of Winding up of a Company- Voluntary Process

The following are the procedure for winding up of company voluntarily:

- Convene a board meeting with the directors and approve a resolution with a statement by the directors that they have inquired into the accounts of the business and that the company has no obligations or that the company will pay from the proceeds of the assets sold in the voluntary winding up of the company.
- Notices calling for the general meeting of the Company proposing the resolutions should be in writing. In addition with a relevant explanatory statement.
- Pass the ordinary resolution for the Company's winding up by a simple majority in the general meeting; or the exceptional resolution by a 3/4 majority. The Company's liquidation will begin on the date the resolution.
- A creditors' meeting should take place on the same day or the following day after the resolution to wind up passes. If two-thirds of the creditors agree that winding up the company is in the best interests of all stakeholders, the company can be wind up voluntarily.
- A notification for appointment of liquidator must be file with the registrar within 10 days. After passing the resolution for company winding up.
- Certified copies of the ordinary or extraordinary resolutions passed at the Company's general meeting for winding up must be sent within 30 days after the meeting.
- The company's affairs must be subject to wind up, and the liquidators' account of the Winding up account should be prepare and audit.
- When the company's affairs have been entirely wound up and it is going to be dissolved; a specific resolution should be enacted to dispose of the company's books and documents.
- Within two weeks following the Company's general meeting; applicant may file a copy of the accounts and an application to the tribunal for an order of dissolution.
- Within 60 days after receiving the application, the tribunal must issue an order dissolving the firm.
- The company liquidator must file the copy of order with the registrar.
- After obtaining a copy of the Tribunal's ruling, the registrar will issue a notice in the official gazette. This takes place to indicate the status of Company.

Provisions regarding Company's Voluntary Winding Up of Company by Creditors:

Voluntary winding up is of two types. They are Members Voluntary winding up, and Creditors' Voluntary Winding up.

Creditors voluntary winding up takes place only when the company is in an insolvent condition and so it is unable to discharge its liabilities in full.

It is already stated that in a members' voluntary winding up, the directors should make a Declaration of Solvency before 5 weeks from the date of the General Meeting in which a resolution to the effect is to be passed.

If they are unable to make a Declaration of Solvency within the time, the winding up shall be a creditors' voluntary winding up and the winding up proceedings should be conducted according to the provisions laid down for that purpose.

Procedure for Creditors' Voluntary Winding Up

The Companies Act lays down the following procedure for Creditors' voluntary winding up.

1. Holding of the Meeting of the Members and Creditors

A meeting of the members should be held and a special resolution to wind up should be passed in the meeting. A meeting of the creditors should also be conducted either on the same day fixed for the General Meeting or on the next day of the General Meeting.

2. Provisions Regarding the Creditors' Meeting

The following procedure should be followed regarding the creditors' meeting.

1. The notice of the meeting should be sent by post to each creditor simultaneously with the sending of the notice for the general meeting.
2. It should also be published in the Official Gazette and in two newspapers circulating in the district in which the Registered Office is situated.
3. A Statement of Affairs and a list of creditors and the amount due to them should be prepared and placed at the meeting of the creditors.
4. If any resolution is passed in the creditors' meeting, a copy of the resolution should be filed with the Registrar within 10 days from the date of passing the resolution.

3. Appointment of Liquidators

The members and the creditors at their respective meetings should appoint one or more Liquidators. If they appoint the same person or persons as Liquidators, no complication will arise. If they appoint different persons, the person nominated by the creditors alone is entitled to act as the Liquidator. If no Liquidator is appointed by the creditors in their meeting, the person appointed by the members shall be the Liquidator and vice versa.

4. Appointment of the Committee of Inspection

The creditors may appoint a Committee of Inspection at their meeting. The Committee may consist of a maximum of 6 members. The members can also appoint 5 more members to the Committee appointed by the creditors. If the creditors want that the

members appointed by the shareholders should not act as the members of the Committee of Inspection, their nominees cannot act as such.

5. Remuneration to Liquidator

The remuneration to the Liquidator can be fixed by the Committee of Inspection. If no such committee is appointed or the committee does not fix his remuneration, creditors can fix the remuneration.

If his remuneration is not fixed either by the committee or by the creditors, the National Company Law Tribunal shall fix the remuneration. The remuneration once fixed cannot be increased with the permission of the National Company Law Tribunal.

6. Board's Powers to Cease on Appointment of Liquidator

All the powers of the Board of directors shall cease on the appointment of a liquidator. But the committee of inspection, or if there is no such committee, the creditors may sanction the continuance of the Board, in general meeting.

7. Power to fill Vacancy in Office of Liquidator

If a vacancy occurs by death, resignation or otherwise, in the office of a liquidator (other than a liquidator appointed by, or by the direction of, the National Company Law Tribunal), the creditors in general meeting may fill the vacancy.

8. Winding up Proceedings conducted by the Liquidator

Winding up proceedings in creditors' voluntary winding up are similar to that of a members' voluntary winding up, however, subject to certain exceptions. The procedure for winding up is as follows:

1. If the winding up process continues for more than one year, the Liquidator must call for a meeting of the creditors as well as a meeting of the members at the end of the first year.
2. Meetings should also be called for at the end of each subsequent years, if the process of winding up continues for more than one year.
3. A statement in the prescribed form with prescribed particulars must be submitted to the meetings. The Liquidator must also place account of his acts and dealings before the meetings.

9. Final Meetings and Dissolution

The following are the provisions of the Act regarding the final meetings and dissolution.

1. As soon as the affairs of the company are fully wound up, the Liquidator should prepare the accounts of winding up. The accounts should show how the winding up has been conducted and how the property of the company has been disposed of.
2. The Liquidator should then call for a meeting of the members and also the creditors. Each of the meetings should be called by an advertisement in the Official Gazette and in the newspaper.
3. The Liquidator should submit the statement of affairs in each of the meetings.

4. Within a week after the date of the meetings, the Liquidator should send a copy of the accounts along with a return to each of the meeting to the Registrar and official liquidator.
5. If a quorum (i.e. two persons) is not present at either of such meetings, the liquidator shall, make a return that the meeting was duly called and that no quorum was instead of the return specified in point 3 above present thereat.
6. The Registrar, on receipt of the account as well as the return mentioned in point 3 above or the return mentioned in point 4 above, shall register them immediately.
7. A similar copy should be sent to the Official Liquidator, and the Official Liquidator should submit a report thereon to the National Company Law Tribunal. The follow up proceedings are similar to the members' voluntary winding up.

Procedures for Voluntary Winding Up of Company by Members:

A members' voluntary winding up is possible only when the company is solvent and is able to pay its debts in full. In this case, it is not necessary for the members to consult the creditors or to call their meeting. A Declaration of Solvency should be made by the Directors.

Declaration of Solvency

The Declaration of Solvency is an important document in the members' voluntary winding up. The declaration must be made in the meeting of the Board of Directors. It should be made by a majority of the directors and certified by an affidavit.

The declaration must be accompanied by a statement of assets and liabilities up to the date of declaration. A copy of the Auditor's Report on the Profit and Loss Account and on the Balance Sheet from the last accounting date to a date ending with the latest practicable date immediately before the date of making the declaration also attached to it.

The Declaration should be made and filed with the Registrar at least 5 weeks immediately before the date on which it is proposed to pass the resolution relating to the winding up. Otherwise, the declaration will not be effective.

Procedure for A Members' Voluntary Winding Up

The following procedure should be adopted in case of Members' Voluntary Winding up.

1. Holding of the General Meeting
After filing the Declaration of Solvency, the Directors should arrange to convene a meeting of the company and a resolution should be passed to this effect.
2. Appointment of Liquidators
A resolution should also be passed in the same meeting appointing one or more Liquidators. The members should also fix the remuneration of the Liquidator.
3. Notice to the Registrar
The company should give a notice of appointment of the Liquidator to the Registrar within 10 days from the date of appointment. The Liquidator should also inform the Registrar about his appointment within 30 days from the date of his appointment and should also publish the same in the Official Gazette.
4. Powers of the Board etc.

As soon as the Liquidator is appointed, all the powers of the Board of Directors or Managing Directors, or Whole Time Directors or Manager shall come to an end. However, the Liquidator or the members may allow them to continue for the beneficial winding up of the company.

5. Reconstruction in Winding up

Generally, the Liquidator shall take in charge of all the assets of the company, convert them into cash and pay the money first to the creditors and then to the members, if any surplus is left. But sometimes, instead of selling the property of the company for cash, he may sell the assets of the company for shares in another company.

6. Holding of the General Meeting at the end of the First Year

Where the process of liquidation continues for more than one year, the Liquidator must call for a general meeting at the end of the first year and also at the end of each subsequent years. He must submit before the meeting, an account of his acts and the progress of winding up during the year.

7. Final Meeting of the Members

As soon as the affairs of the company are fully wound up, the Liquidator should call for a meeting of the members by giving an advertisement in the Official Gazette and in some newspapers circulating in the district where the Registered Office is situated. The notice must be given at least one month before the date of the meeting. It should specify the time, date and plan of the meeting. The Liquidator should submit before the meeting an account of the winding up showing how the winding up has been conducted; and how the company's property has been disposed of.

8. Notice to the Registrar and Official Liquidator

The Liquidator, within one week after the date of the meeting, should send a copy of the account along with a return of the meeting, to the Registrar of Companies and also to the Official Liquidator attached to the concerned High Court.

9. Report of the Official Liquidator to the National Company Law Tribunal

On receipt of the account and the return of the meeting, the Official Liquidator should make a scrutiny of the books and papers of the company; After scrutiny, the Official Liquidator should submit a report to the National Company Law Tribunal.

If the report reveals that the affairs of the company were not conducted in a manner prejudicial to the interests of the members or public, the company is deemed to be dissolved from the date of submission of the report.

If the report, on the other hand, contains any adverse remarks, the National Company Law Tribunal must direct the Official Liquidator to make further investigation into the affairs of the company.

On the receipt of the report of the Official Liquidator on such further investigation the National Company Law Tribunal may either make an order that the company shall stand dissolved with effect from the date to be specified by the National Company Law Tribunal therein or make such other order as the circumstances of the case brought out in the report permit.

10. Duty to Call for the Creditors' Meeting

If, in the opinion of the Liquidator, the company will not be able to pay its debts in full, within the period specified in the Declaration of Solvency, the Liquidator should immediately call for a meeting of the creditors of the company. He should submit a statement of affairs of the company before the meeting.

Thereafter, the winding up shall cease to be a members' voluntary winding up but will proceed in accordance with the provisions applicable to the creditors' voluntary winding up.

11. Provisions as to Annual and Final Meeting in case of Insolvency

If in the case of a members' voluntary winding up, the liquidator finds that the company is insolvent, Secs. 508 and 509 shall apply as if the winding up were a creditors' voluntary winding up and not a members' voluntary winding up.

Powers of Liquidator:

Subject to certain legal provisions and adherence to certain procedures the powers of a liquidator are broadly enumerated as follows:

1. He can exercise the following powers only with court sanction:
 - a) To institute or defend any suit, prosecution or other legal proceedings, civil or criminal in the name of the company.
 - b) To carry on the business of the company.
 - c) To sell the immovable property and actionable claims of the company by public auction or private contract with power to transfer the whole thereof to any person or body corporate.
 - d) To raise the required money as the security of the assets of the company.
 - e) To appoint an advocate, attorney or pleader entitled to appear before the court to assist him in the performance of his duties.
 - f) To compromise call, debts and other pecuniary liabilities with contributories or debtors and take any security in discharge of any such claim and give a complete discharge in respect thereof.
2. He can exercise the following powers without obtaining court sanction:
 - a) To do all acts and to execute on behalf of the company all deeds, receipts and other documents and for the purpose to use, when necessary, the company's seal.
 - b) To inspect the records and returns of the company on the files of the Registrar without payment of any dues.
 - c) To prove rank and claim in the insolvency of any contributory, for any balance against his estate.
 - d) To receive dividends in the insolvency, in respect of any balance against his estate, as a separate debt due from the insolvent and rateable with other creditors.
 - e) To draw, accept, make and endorse any bill of exchange, hundi or promissory note on behalf of the company.
 - f) To take out in his official name, letters of administration to any deceased contributory, and to do any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company.
 - g) To appoint an agent to do any business which the liquidator is unable to do himself.

Duties of Liquidator:

A liquidator is expected to perform his duties equitably and impartially according to the Companies Act.

Some of the important duties are enumerated below:

1. When the liquidator receives the Statement of Affairs from the Directors, he must submit a preliminary report to the court.

2. On making of the winding up order, the liquidator has to take the properties under his control.
3. He must protect the assets of the company.
4. Within two months from the date of direction of the court, the liquidator must call a meeting of the creditors for determining the persons who are to be members of the Committees of Inspection.
5. He must keep proper books and cause entries or minutes to be made of all proceedings at meetings.
6. He must, at least twice in each year, present to the court an account of his receipts and payments as liquidator.
7. Official liquidator shall pay all moneys received by him as liquidator of the company into the Public Accounts of India in Reserve Bank of India.
8. He should realise the assets and distribute the proceeds among the creditors and the surplus, if any, among the contributories according to their rights.
9. All the papers of the company must clearly indicate that the company is being wound up, i.e., by adding the words "In liquidation".

Appointment of Liquidator: