

# **Exit Options**

## **COMPANY & LLP**

**By**  
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graph TD; A[Company and LLP] --> B[Exit options without winding up]; A --> C[Exit options with winding up];
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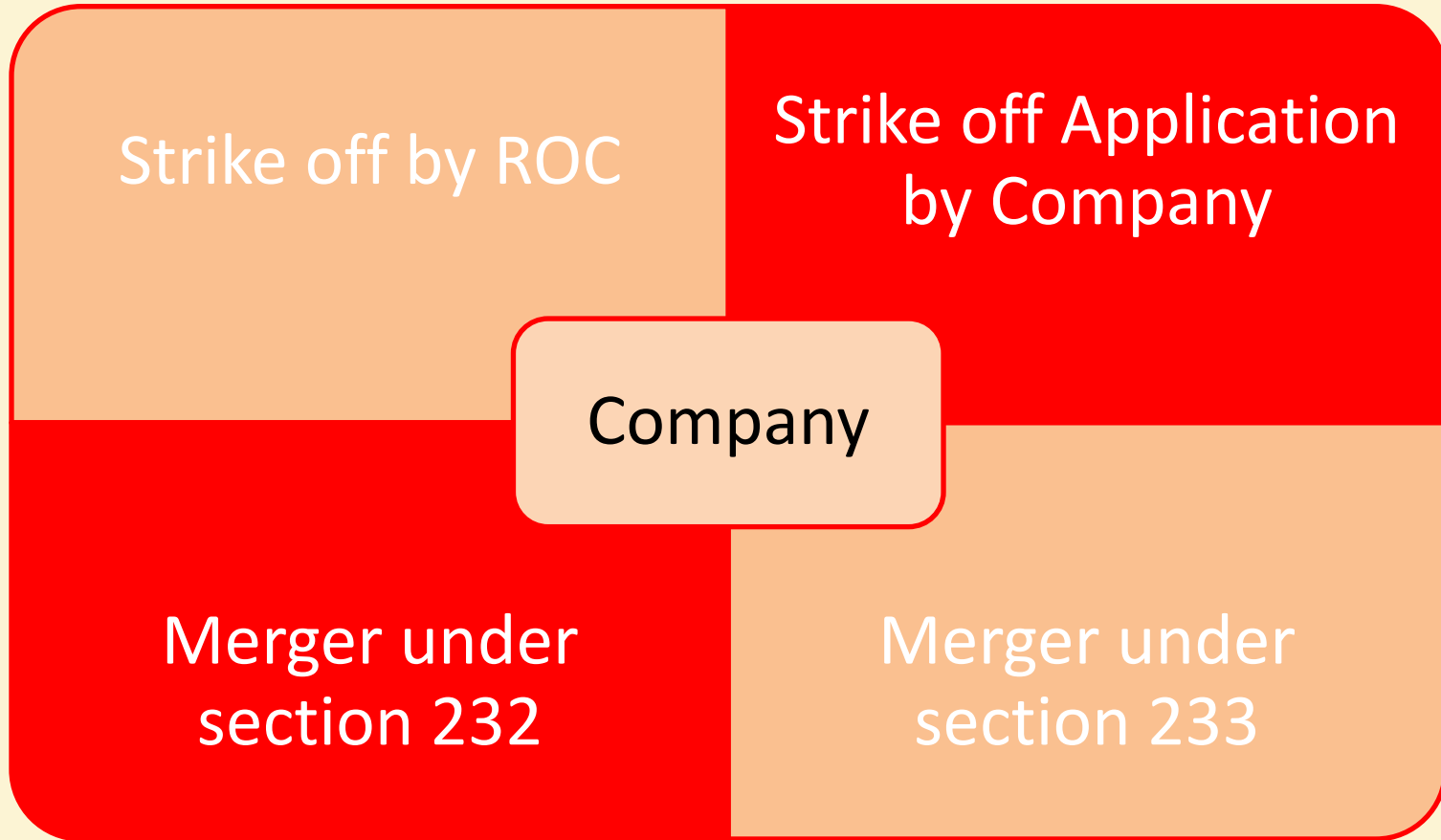
Company and  
LLP

Exit options  
without  
winding up

Exit options  
with winding  
up

# Exit Options - Without winding up for Company

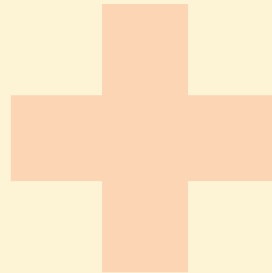
# Exit options – without winding up



# Strike-off of Company by Registrar Section 248 (1)

# Grounds of Strike Off by Registrar Section 248(1)

**A Company has failed to commence its business within one year of its incorporation**



**A Company not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining status of a dormant company u/s 455**

# Brief Process of strike off by ROC

## Section 248 (1)

# Brief Process

- **ROC shall send notice** to the Company and all the Directors of the Company (intention to remove name) requesting representation within **30 days** from the date of the notice
- Notice shall be published in form **STK-5 English +Vernacular Newspaper** of wide circulation
- It shall be placed on official **Website of MCA\***



Form STK5

\*STK-5 Notice- <http://www.mca.gov.in/MinistryV2/roc.html>



# Brief Process

- ROC shall **simultaneously** intimate the concerned regulatory authorities for objections within 30 days viz-
  - Income **Tax**
  - Central **Excise**
  - Service tax
  
- If no objection is received within **30 days**- it is presumed that they have no objection
  
- Notice of striking off and **dissolution** of Company in Official Gazette in STK-7 and on MCA\*



Form STK7

# Critical Questions on Strike off by ROC under Section 248(1)

# Critical Questions

- Obtaining No Objection Certificate from specific authority as may be applicable (For eg. RBI)
- What will be status of **legal proceedings**, pending if any
- What will be status of **contracts**, agreements of the Company
- What is the **liability of Directors** of the Company?

# Strike off Application by Company

# Brief Process

# Brief Process

- **Board** to ensure grounds of application for strike off and settle liabilities and assets to fulfil criteria of inoperation
- Company to obtain **NOC from specific authority** under which company is registered (Banking/Insurance Regulator etc)
- **Close Bank Account** and Pass Board Resolution for making application under Strike off
- Company to prepare and get certified **NIL** statement of **Assets and Liabilities** from Practicing Chartered Accountant
- Directors to sign **affidavit and Indemnity** Bond and allied documents etc for strike off
- Members to pass **special resolution**/ Company to take written consent of at least 75% of members

# Brief Process

- Company to file Form STK 2 with ROC
- ROC to obtain NOCs from various tax authorities and other Government Authorities
- ROC to make publication of notice in Form STK 6 in
  - Official gazette
  - Official website of MCA
  - English and vernacular newspaper having wide circulation in state
- ROC to strike-down name of the Company if no objection is received within 30 days



Form STK6

# Contents of application to strike off (Form STK 2)

- Summary of **pending litigations**
- Board Meeting date for authorising Director to submit application
- No **Inspection** /Investigation pending
- No **Public Deposit** +interest O/s
- No outstanding loans-secured or unsecured
- No **Govt. dues**
- All other liabilities settled and discharged



# Attachments of application to strike off (Form STK 2)

- A **statement of accounts** showing NIL assets and liabilities – not more than **30 days** before the date of application certified by Practising Chartered Accountant
- Copy of Board Resolution - authorising filing strike off application
- Copy of special resolution Section/ 75% of written consent of members -248(2)
- Indemnity Bond (Form STK-3)
- Affidavit (Form STK-4)

# Criticality of attachments of Form STK-2

# Extract of Indemnity Bond (Form STK 3)

- That I/We have made an affidavit confirming that the Company **does not have any assets or liabilities** as on date
- Further, the Company has been **inoperative from the date of its incorporation/** the Company commenced business/ operations/ commercial activity after incorporation but has been inoperative from the past \_\_\_\_ years.

# Extract of Indemnity Bond (Form STK 3)

that I/We do hereby undertake to **indemnify**:-

- The **claimants** for all lawful claims against the company arising in future after the striking off the name of the company.
- Any person for any losses that may arise pursuant to striking off the name of the company
- The claimants for all lawful claims and liabilities, which have not come to our notice up to this stage and if any claim arises or observed even after the name of the company has been struck off in terms of section 248 of the companies Act 2013.

# Extract of Affidavit (Form STK 4)

- The Company **does not maintain any bank account** as on date
- The Company **does not have any assets and liabilities** as on date
- The Company has been **inoperative from the date of its incorporation/** the Company commenced business/ operations/ commercial activity after incorporation but has been **inoperative** for past \_\_\_\_\_ years

# Extract of Affidavit (Form STK 4)

- As on the date, the Company **does not have any dues** towards Income Tax / Sales Tax Central Excise/ Banks and Financial Institutions; any other Central or State Government Departments/Authorities or any Local Authorities
- Directors to further affirm that-
  - No inquiry, technical scrutiny, inspection or investigation for any offence** is ordered or pending against the company;
  - No prosecution** or any **compounding application** for any offence under the Act or under any of the other Acts is pending against the company or against the undersigned;
  - The company is neither **listed nor delisted** for non-compliance of listing agreement;

# Extract of Affidavit (Form STK 4)

- The company is not a company incorporated for charitable purposes under **Section 8** of the Companies Act 2013 or **Section 25** of the Companies Act 1956;
- The company does not have any **management disputes** or there is no **litigation pending** with regard to management or shareholding of the company;
- No order is in **operation staying filing of the documents** by the court or tribunal or any other competent authority
- The Company is not **prevented from making the application** for strike off as mentioned in **Section 249** of the Act

# Certification of Form STK 2

## Contents and checklist

- That the CA/CS/CWA in practice is **duly engaged** for the purpose of certification of form - [Checklist](#)
- The Provisions of **Companies Act, 2013** and rules made thereunder relevant to this form **are complied** - [Checklist](#)
- The verification of attachments and details filled in with **original records** - [Checklist](#)
- **The Information is true, correct** and complete and no material to this form has been suppressed



# Critical Questions on Strike off by Company under Section 248(2)

# Strike Off –Critical Aspects

- What does it mean by not carrying on business or operation?
  - Statutory Payments?
  - Rent charges for Registered office?
  - Old Stock sale?
  - Repayment of loan?
  
- Whether annual filing Forms needs to be filed before filing Form STK - 2 for Strike off?
  - Section 164(2)- Disqualification
  - Section 167-Vacation from Directorship

# Strike Off –Critical Aspects

- Can professional certify STK Form in case of Disqualification of Directors?
  - ❑ Director can not sign Indemnity Bond etc in capacity of Director

# Strike Off –Critical Aspects

## Foreign Nationals or NRIs- Director Indemnity Bond and Affidavit

Treaty	Mode
Hague Convention Countries*	Apostille + Notary
Commonwealth Countries**	Public Notary
<b>Any other Country which does not form part of Hague or Commonwealth</b>	<b>Public Notary + Authentication by Consular / Diplomatic Officer</b>

\*Hague Convention Countries - <https://www.hcch.net/en/states/hcch-members>

\*\*Commonwealth Countries- <https://www.tendringdc.gov.uk/council/elections-voting/list-commonwealth-countries-voting-rights>

# Which Companies Cannot go for Strike off under section 248?

# Companies which cannot apply for Strike off

- Rule 3(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016
  - ❑ Listed Companies
    - “means a Company means a Company which has any of its securities recognised on stock exchange”*
  - ❑ **Delisted due to non-compliances** of Listing regulations or LODR or any other statutory law
  - ❑ Companies wherein **investigation** or inspection is ordered etc

# Companies which cannot apply for Strike off

## Vanishing Companies

*“means a Company registered under the act or previous Companies Law or any other law for time being in force and listed with stock exchange which has failed to file its returns with the registrar of Companies and stock exchange for a consecutive period of 2 years and is not maintaining its registered office at the address notified with Registrar of Companies or stock exchange and none of its Directors are traceable”*

Companies where **prosecution** is pending

Companies where **Compounding** is pending

# Companies which cannot apply for Strike off

- Companies having public **deposit** O/s or default in repayment
  - Companies where **Charges are pending**
  - Non Profit Organisation (**Section 8** Companies)
- Section 249:-in addition to above there is Restriction on making application under section 248 in following cases if at any time in previous 3 months:-
- Changed name or Registered office from one state to another
  - Disposed off property or rights immediately before cessor of trade  
or



# Companies which cannot apply for Strike off

- has **engaged in any other activity** except the one which is **necessary** or expedient **for the purpose of making an application under that section**, or deciding whether to do so or concluding the affairs of the company, or **complying with any statutory requirement**;
- has made an **application to the Tribunal for the sanctioning of a compromise or arrangement** and matter is not concluded
- is **being wound up** under Chapter XX of **this act** or under Insolvency and **Bankruptcy Code, 2016**
- Dormant Companies**

# Common Critical Aspect in Company Strike off

# Strike Off – Common Critical Aspect

- Whether the Company still exists after strike off?
  - ❑ Section 248(8) – Nothing in this section shall affect the powers of the Tribunal to wind up a Company the name of which has been struck off from Register of Companies
  - ❑ Definition of Company- Section 2(20)-Company means a Company incorporated under this Act or under any previous Company law
  - ❑ Section 250
    - Company stands dissolved w.e.f. date mentioned in the notice u/s 248(5)
    - It cease to operate and Certificate of incorporation shall be deemed to be cancelled.. **except...**
    - **For the purpose of realising the amount due to the Company and for the payment or discharge of the liabilities or obligations of the Company**

# Strike Off – Common Critical Aspect

What will be the status of Wholly owned Subsidiary Company if Holding Company is struck off Suo moto or by ROC?

# Strike Off – Common Critical Aspect

- Struck off company can be restored OR wound up
- Subsidiary to continue
- If number of members fall below minimum, members will be personally liable
- Residual members can add new member (transfer or allotment)
- Whether holding company directors and shareholders will be liable?

# Merger of Company

# Merger - Process & Timeline

- Valuation Report indicating share exchange Ratio
- Approval of Scheme and Valuation by Board of Directors
- Application to NCLT for Directions
- NCLT Directs to hold Meeting of shareholders & sending of Notices to Creditors & Statutory Authorities
- Sending of notices to Shareholders, Creditors & Statutory Authorities
- Holding of Meeting of shareholders

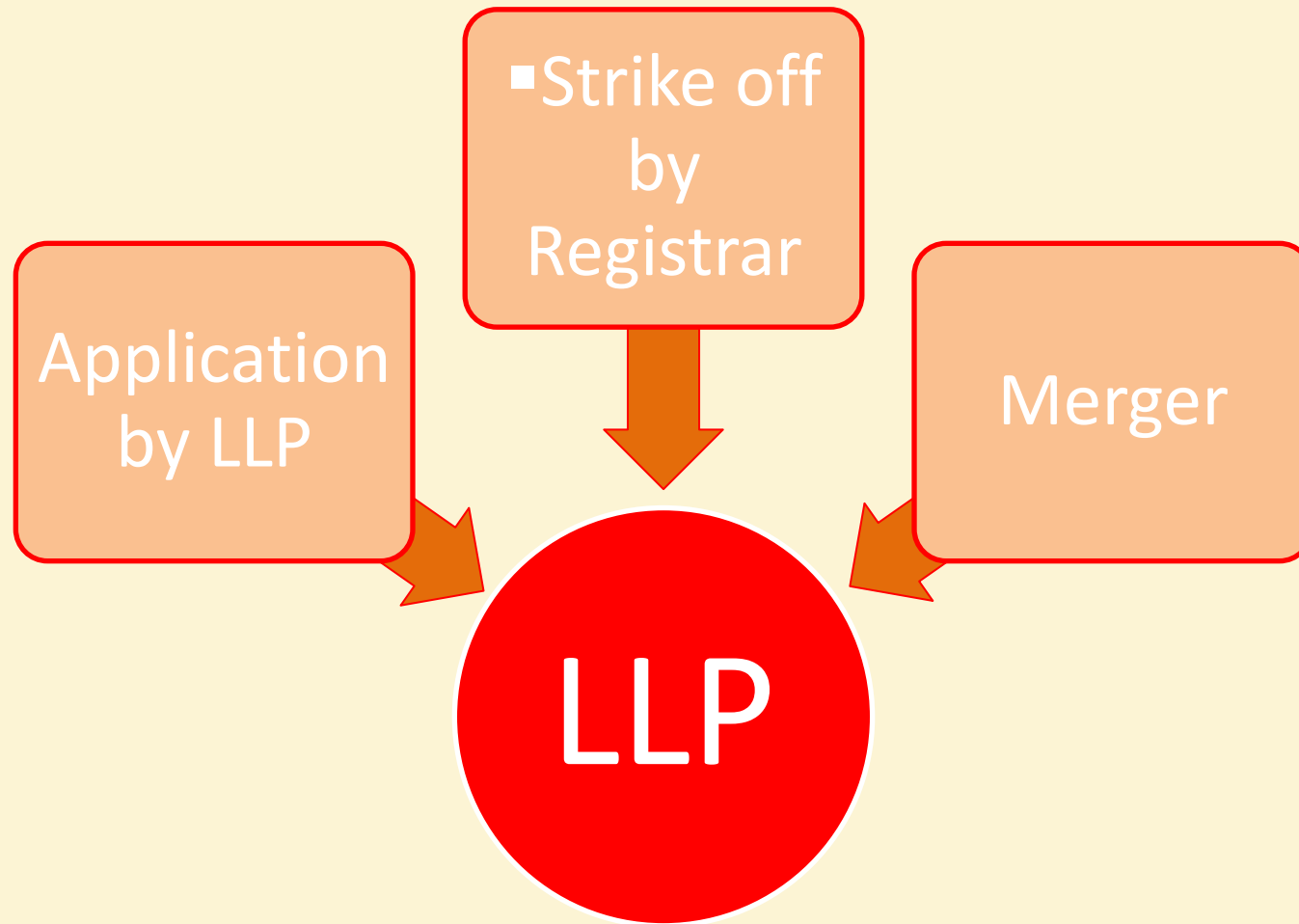
# Merger - Process & Timeline

- Filing of Petition with NCLT for Sanctioning of Scheme
- Submission of Reports by Statutory Authorities [OL/ RD/ ROC].
- Final Hearing & Sanctioning of the Scheme
- Filing of Final Order with the Registrar of Companies & Stamp Office
- Allotment of Shares to Shareholders transferor Company.



# Exit Option – LLP – Without Windingup

# Exit Option- LLP- Without winding up



# Application by LLP to Strike off

# Brief Process of strike off by LLP

## Section 37

# Brief Process

- LLP to not to carry on business from past one year
- LLP to file all returns in **Form 8 and 11** for all pending years upto which LLP had carried out business
- LLP to file **Form 3** if not filed earlier
- LLP to obtain **NOC** from specific authority under which LLP is registered (Banking/Insurance Regulator etc)
- **Close Bank Account** and Pass resolution for making application under Strike off
- LLP to prepare and get certified **NIL** statement of **Assets and Liabilities** from Practicing Chartered Accountant

# Brief Process

- Designated partners to sign **affidavit (and Indemnity?)** Bond and allied documents etc for strike off
- LLP to file Form24 with Registrar
- Registrar to send **notice various tax** authorities and other Government Authorities
- Registrar to strike-down name of the Company if no objection is received within **30 days**

# Contents and attachments of application to strike off (Form 24)

- Copy of authority to make the application **duly signed by all partners**
- Copy of acknowledgement of latest **Income-tax Return**
- Statement of Accounts disclosing **Nil assets and liabilities**
- Affidavit signed by Designated Partners

# Strike off by Registrar



# Grounds of strike off

➤ Section 75- Rule 37(1)(a)

Where the LLP is not carrying out any business or operation for a period of **2 years** or more

**and**

The Registrar has **reasonable cause to believe the same**

# Brief Process of strike off by Registrar Section 37

# Brief Process- Section 75- Rule 37

- The **Registrar** shall send notice to the **LLP and all its partners** of his intention to strike off with a request to send their representation **within a period of 1 month** from the date of notice
- Rule 37(4) – If Registrar feels that there are certain **assets or liability**, he shall satisfy himself about provision for realising it and paying it before passing the order
- Rule 37(3)-After the expiry of 1 month, strike off name and publish notice in official Gazette
- On Publication of notice such LLP shall stand dissolved

# Brief Process- Section 75- Rule 37

- Proviso to Rule 37(4)- The Assets of the LLP shall be made available for payment of liability even after the date of order of removing the name of the LLP
- Rule 37(6) – Tribunal shall have power to wind up LLP after the name is struck off from Register

# Critical Questions on Strike off of LLP by Registrar

# Critical Questions

- Obtaining No Objection Certificate from specific authority as may be applicable (For eg. RBI)
- What will be status **of legal proceedings**, pending if any on LLP
- What will be status of **contracts**, agreements of the Company
- What is the liability of **Partners** of the Company?

# Strike off Difference Between Company and LLP

# Strike off- Company Vs LLP

	Strike off- Company	Strike off- LLP
<b>Criteria for making application</b>	Company which is not carrying on business for immediately preceding <b>two financial years</b> can make application for strike off	LLP which is not carrying on business <b>one year or more</b> can make application for strike off
<b>Consent</b>	Consent of <b>atleast 75%</b> members is required to be obtained	Authority letter signed by <b>all partners</b> is required for making application
<b>Latest Income Tax Return</b>	Latest Income <b>Tax Return is not required</b> to be attached in E-Form	Latest copy of Income Tax Return is mandatorily <b>required</b> to be attached



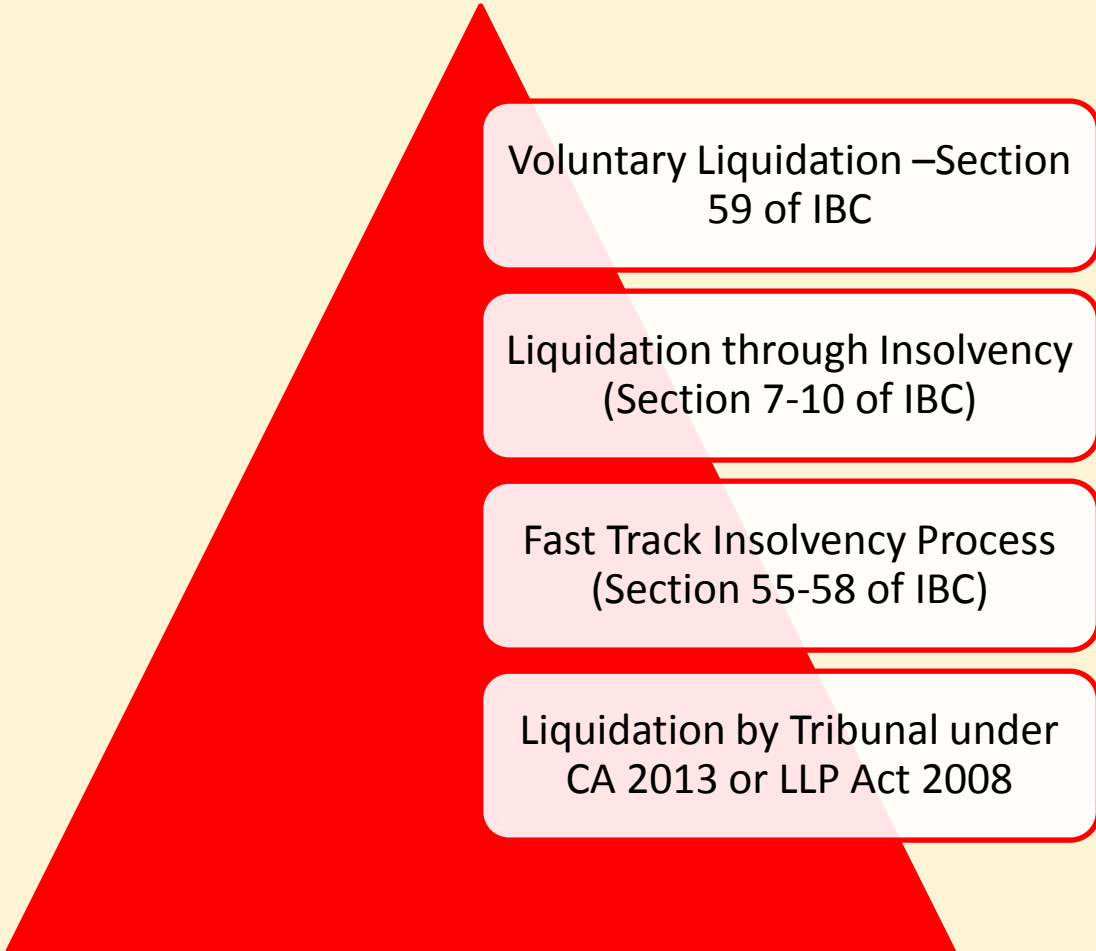
# Strike off- Company Vs LLP

	Strike off- Company	Strike off- LLP
<b>Annual Returns and financials of past years</b>	Though not mandatory, it is advisable to file returns with ROC for pending years	Returns for pending years are required to be filed with ROC before making strike off application

Strike off may not put an end!!

# Corporate Persons- Exit Options- With winding up

# Corporate Person Exit Options- with Winding up



Voluntary Liquidation –Section  
59 of IBC

Liquidation through Insolvency  
(Section 7-10 of IBC)

Fast Track Insolvency Process  
(Section 55-58 of IBC)

Liquidation by Tribunal under  
CA 2013 or LLP Act 2008

# What is the difference between winding up and Liquidation ?

- Winding Up involves ending all business affairs and includes the closure of the company (including liquidation or dissolution), whilst Liquidation is specifically about selling off company assets in order to pay creditors

***Eg. Section 2(94A) of Companies Act- “Winding up means winding up under Companies Act or Liquidation under Insolvency and Bankruptcy Code, 2016, as applicable***

# Framework Prior to IBC

# Framework prior to IBC

- Prior to enactment of the Insolvency and Bankruptcy Code, 2016 (the “Insolvency Code”) the existing framework was governed by:-
  - ❑ The Companies Act, 1956 and the Companies Act, 2013;
  - ❑ The Sick Industrial Companies (Special Provisions) Act, 1985;
  - ❑ The Recovery of Debts Due to Banks and Financial Institutions (“**RDDBI**”) Act, 1993;
  - ❑ The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (“**SARFAESI**”) Act, 2003;
  - ❑ The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920;

# Features of IBC



# Features of IBC

- Single consolidated framework for insolvency and bankruptcy resolution dealing with body corporates, partnerships and individuals;
- Time – bound resolution of insolvency and bankruptcy process so as to preserve the value of the corporate debtor as a going concern and the value and / or of the assets forming part of the corporate debtor;
- To enable the functioning of a robust debt / bond market

# Applicability of IBC + Companies Act + LLP Act to various types of winding up

# Sections applicable in each type

- Sections and regulations applicable for **Voluntary** Liquidation of Corporate Person under IBC
  - ❑ Section 35 to 53 of IBC
  - ❑ Section 59 of IBC
  - ❑ Insolvency And Bankruptcy Board Of India (Voluntary Liquidation Process) Regulations, 2017

# Sections applicable in each type

- Sections and regulations applicable for **Insolvency Resolution Process of Corporate Person** under IBC
  - ❑ Section 6 to 53 of IBC
  - ❑ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016
  - ❑ Insolvency And Bankruptcy Board of India (Liquidation Process) Regulations, 2016

# Sections applicable in each type

➤ Sections and regulations applicable for **Fast Track Insolvency Process of Corporate Person** under IBC

Section 55 to 58 of IBC

Insolvency And Bankruptcy Board Of India (Fast Track Insolvency Resolution Process For Corporate Persons) Regulations, 2017

# Sections applicable in each type

➤ Sections applicable for winding up **by Tribunal** under Companies Act, 2013

Sections 270 – 288

Section 290 – 303

Section 324

Section 326 – 355

# Sections applicable in each type

- Sections applicable for winding up **by Tribunal** under Limited Liability Partnership Act, 2008
  - Section 64 of Limited Liability Partnership Act, 2008
  - Limited Liability Partnership (Winding up and Dissolution ) Rules, 2012

# Process of Voluntary Liquidation of Company



# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 1- Board Meeting

- Majority of Directors to give declaration of solvency in the form of Affidavit

A declaration given shall be accompanied by-

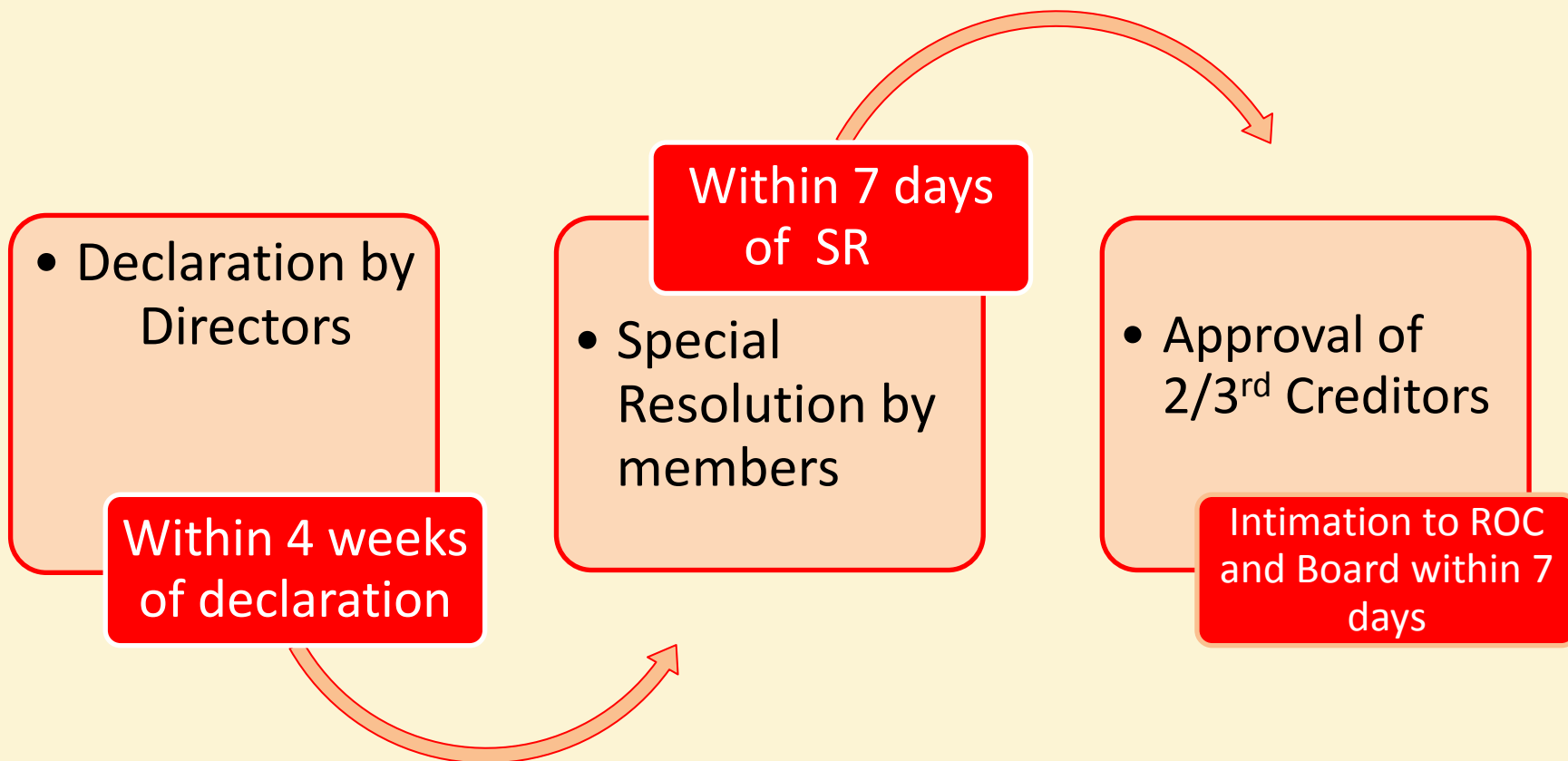
**i. Audited financial statement** and record of business operation of the Company for **previous 2 years**/from the incorporation whichever is later

**ii. a report of valuation of the assets of the Company, if any, prepared by registered valuer**

- **Finalization** of a Registered **Insolvency Professional** who will act as a Liquidator of Company

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 2- Special Resolution and Creditor approval



# Process of Voluntary Liquidation (Section 59 of IBC)

## Step – 3 Public Announcement

Reg. 14 (1)

- IP to do **public announcement** within 5 days of appointment in Form A-

Reg. 14 (2)

- Public announcement to be made in **English and vernacular** newspaper circulated widely at registered office and principal office of the Company + on website of Company and IBBI

Reg. 14 (3)

- Public announcement shall **call for claims** from stakeholders. Last date of submission of claim is **30 days**.

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 4 - Proof of claim by stakeholders

Form B-Operational Creditors

Form C- Financial Creditors

Form D - Workmen and Employees

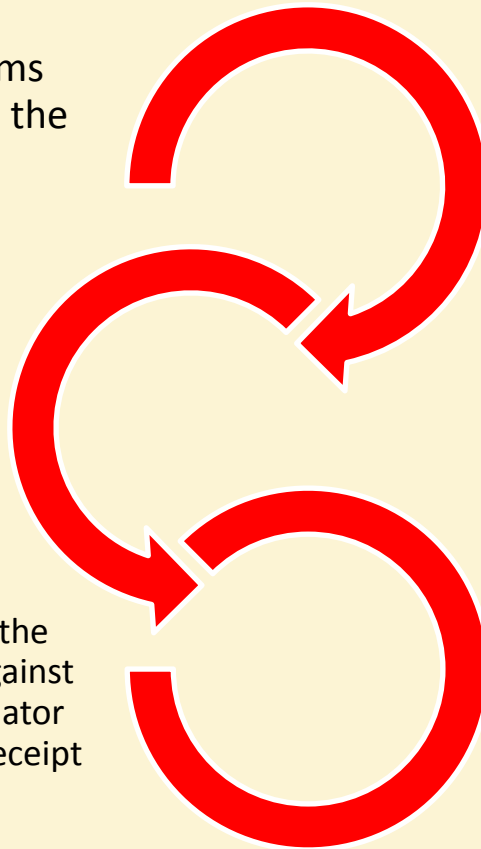
Form E- Authorized representative in  
case of workmen or employees

Form F- Any other stakeholder

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 5 - Actionable of liquidator post receipt of claims

Verification of claims  
within 30 days from the  
receipt of claim



Intimation to  
Claimants about  
admission/rejection of  
claim within 7 days of  
such  
admission/rejection

Creditor may appeal to the  
Adjudicating Authority against  
the decision of the liquidator  
within 14 days from the receipt  
of such decision

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 6 - Preliminary Report

- Liquidator to submit **Preliminary Report** to Corporate Person
- The report shall be submitted **within 45 days** from the date of commencement of liquidation
- It shall contain-
  - i. **Capital structure** of Corporate Person
  - ii. Estimates of its **assets and liabilities**
  - iii. Proposed plan of action for carrying out the liquidation etc

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 7 - Separate Bank Account

- Immediately on passing liquidation resolution the liquidator is to open a bank account in the name of the corporate person followed by the words '**in voluntary liquidation**', in a scheduled bank.
- The realizations of each day shall be deposited into the bank account without any deduction not later than the next working day
- After realization of proceeds liquidator shall distribute the same within six months from the receipt to the stakeholders

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 8 - Time limit for liquidation

Liquidator shall endeavor to complete the liquidation process of the corporate person within **twelve months** from the liquidation commencement date.

Liquidator to call meeting of contributories within **15 days** if process is not completed within 12 months

Liquidator shall present an Annual Status Report(s) indicating progress in liquidation



# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 9 – Completion of Liquidation Process

- the **assets** of the corporate person has been **disposed-off**
- the **debt** of the corporate person has been **discharged** to the satisfaction of the creditors;
- Company has received **NOC from Tax Authorities** and other government authorities as may be applicable
- **no litigation is pending** against the corporate person or sufficient provision has been made to meet the obligations arising from any pending litigation

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 9- Completion of Liquidation Process... Cont..

➤ On completion of the liquidation process, the liquidator shall prepare the **Final Report** consisting of the following:

Audited accounts of the liquidation

A **statement** demonstrating that

a) the **assets** of the corporate person has been disposed of

b) the **debt** of the corporate person has been discharged to the satisfaction of the creditors;

c) **no litigation** is pending against the corporate person or sufficient provision has been made to meet the obligations arising from any pending litigation.

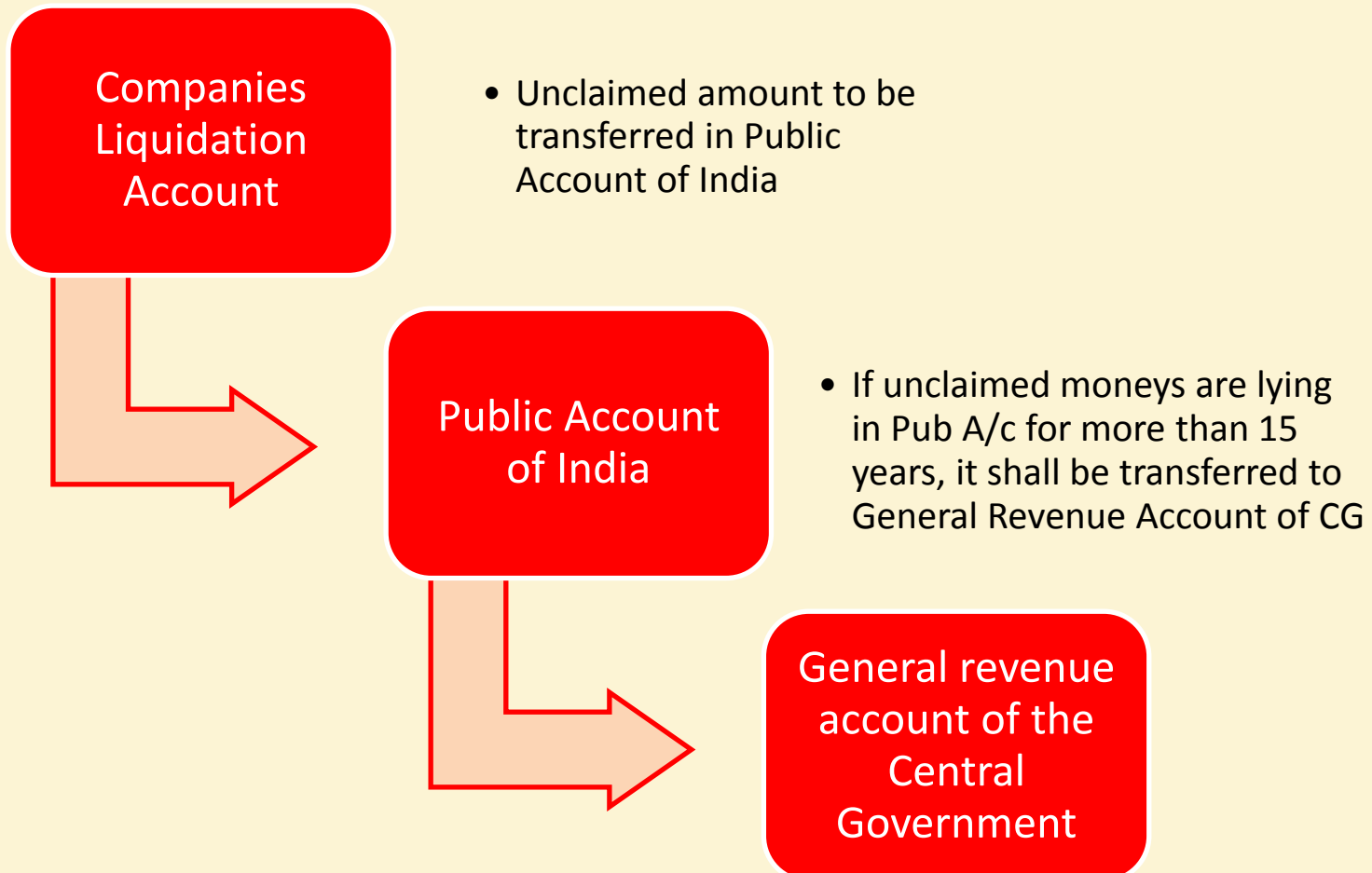
# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 9- Completion of Liquidation Process... Cont..

- Liquidator to **send Final Report** forthwith, to the **Registrar** and the **IBBI**
- Liquidator shall also submit the **Final Report to the Adjudicating Authority** along with the application under section 59(7) for dissolution of the Corporate person

# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 9- Completion of Liquidation Process... Cont..



# Process of Voluntary Liquidation (Section 59 of IBC)

## Step 10- Application to NCLT

- After the application is made to NCLT , **NCLT** shall obtain **report from ROC** and shall **pass an order** for dissolution of the Corporate person
- The order shall be forwarded to the authority with which the Corporate person is registered within 14 days
- The **liquidator** shall preserve a physical or an electronic copy of the reports, registers and books of account referred to in Regulations 8 and 10 for at **least 8 years** after the dissolution of the corporate person, either with himself or with an information utility

# Factors to be considered for Declaration of Solvency (DOS)

# Factors to be considered for DOS

Factor	Regulation under IBC
Cost for <b>maintaining office</b> for the purpose of keeping books of accounts of Company	Reg 41 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017
Cost for <b>appointment of auditor</b> for the purpose of conducting audit for every year post completion of first 12 months	Reg 37 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017
Cost of <b>Insolvency Professional</b>	Reg 7 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017
Filing Fees / newspaper publications / NCLT Fees	Misc.

# Factors to be considered for DOS

Factor	Regulation under IBC
Cost of <b>other professional</b> in case any assistance required by Liquidator	Reg 7 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017
Provisions of <b>tax liabilities</b> and contingent liabilities if any	Reg 38 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017
<b>Cost of Lawyer</b> etc in case of any pending litigation	Reg 11 of Insolvency & Bankruptcy Board of India ( Voluntary Liquidation Resolution Process) Regulations 2017



# Preference of Payment

## Section 53 of IBC

# Preference Payment

The following debts will be paid in PRIORITY given below:

Insolvency Resolution Cost & Liquidation Cost;

Debts to Secured Creditor (who have relinquished their security interest) & Workmen's' dues (for 24 months before commencement);

Wages & Unpaid Dues to employees (other than workmen) (for 12 months before commencement);

Financial Debts to Unsecured Creditors;

**Following shall rank equally-**

Amount due to Central or State Govt

Debts to Secured Creditor following Enforcement of Security Interest;

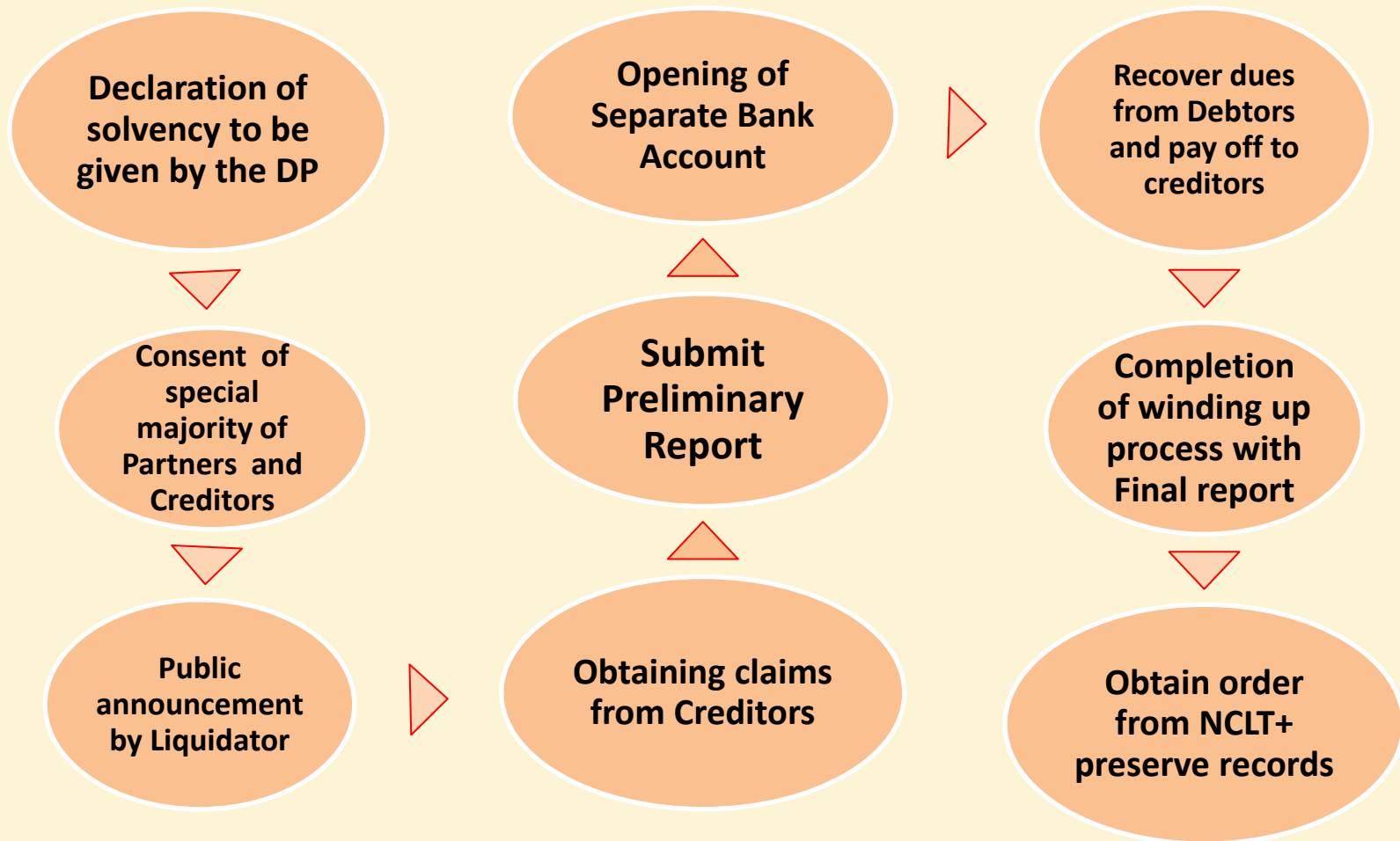
Remaining Debts;

Preference Shareholders;

Equity Shareholders or partners.

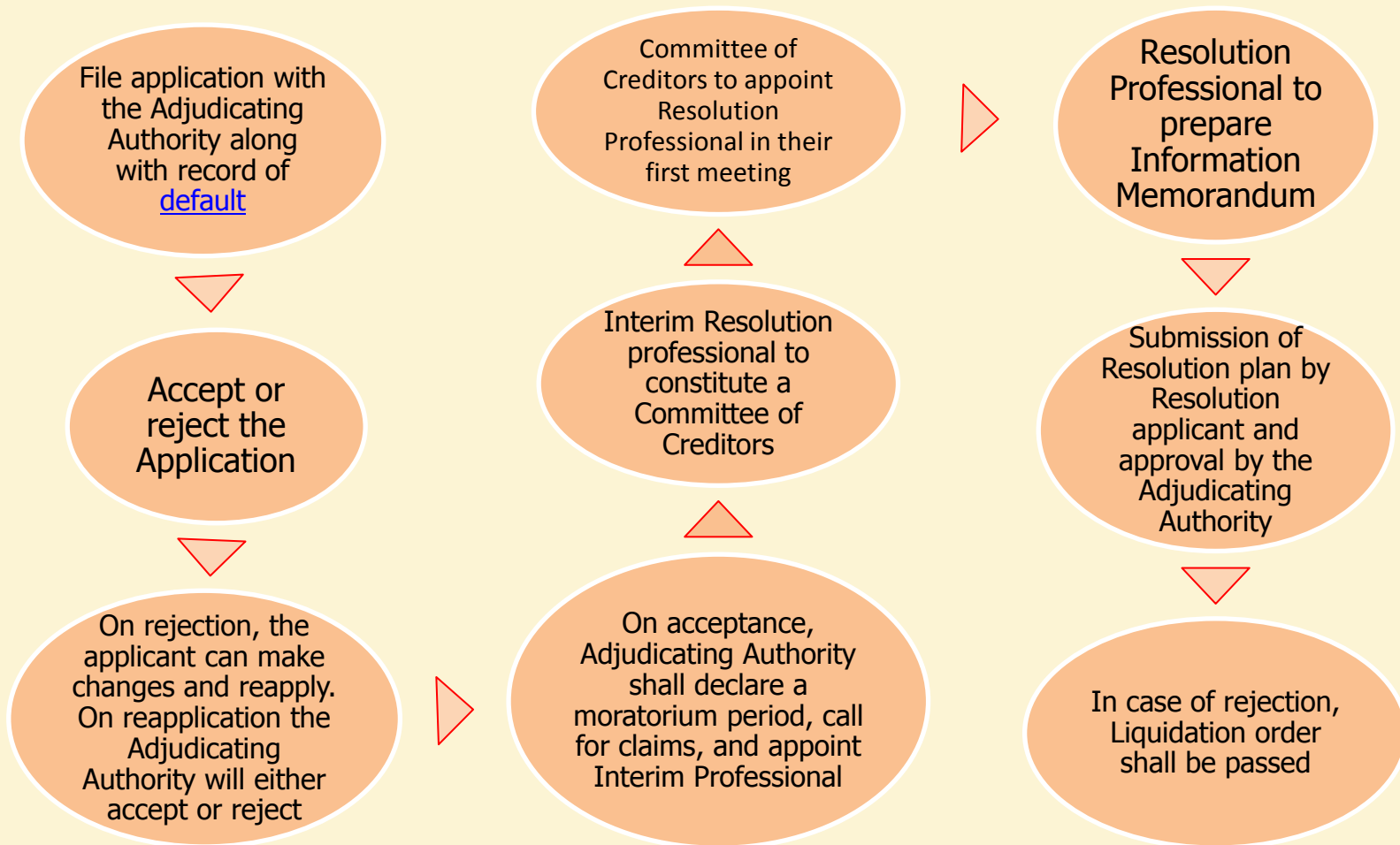
# Process of Voluntary Liquidation of LLP

# Birds Eye in case of Voluntary Winding Up under IBC

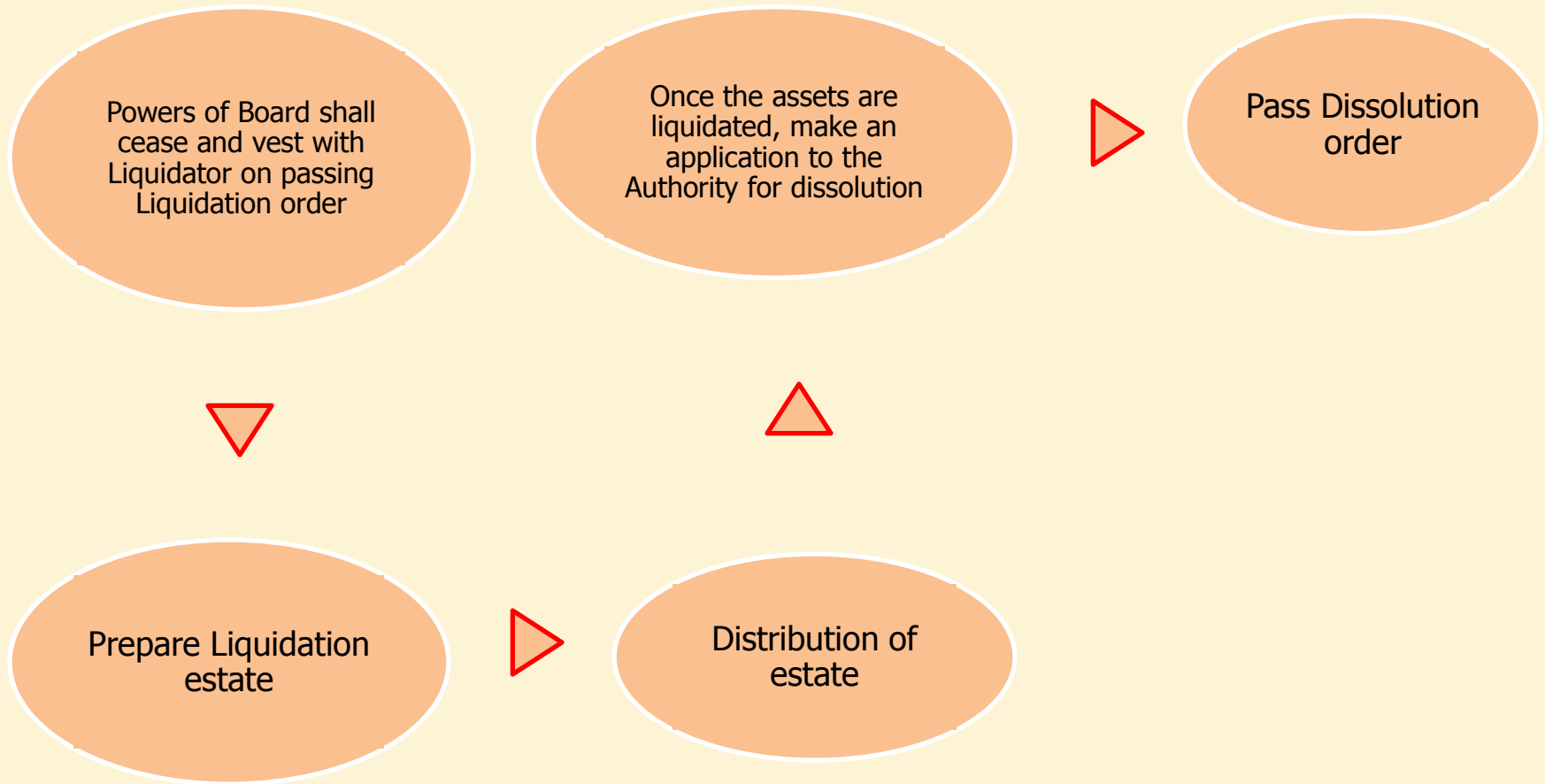


# Brief Process of Liquidation through insolvency route for Corporate Person

# Birds Eye in case of Insolvency Resolution Process



# Birds Eye in case of Insolvency Resolution Process



# Comparison

## Fast Track Insolvency Process Vs. Normal Insolvency Process



# Comparison – Fast track Insolvency process vs. Normal Insolvency process

	Fast track Insolvency process	Normal Insolvency process
<b>Process</b>	It is mandatory <b>to complete</b> the Insolvency Process within a period <b>of 90 days</b> from the Insolvency Commencement date	It is mandatory to complete the Insolvency Process within a period <b>of 180 days</b> from the Insolvency Commencement date
<b>Extension</b>	On receipt of application for extending the time period of Insolvency process, the Adjudicating Authority shall grant an extension of <b>not more than 45 days</b>	On receipt of application for extending the time period of Insolvency process, the Adjudicating Authority shall grant an extension of <b>not more than 90 days</b>

# Comparison – Fast track Insolvency process vs. Normal Insolvency process

	Fast track Insolvency process	Normal Insolvency process
<b>Applicability</b>	<p>Applicability for initiating this process is restricted as given below</p> <ul style="list-style-type: none"><li>i) <b>Small Company</b> as defined under CA 13</li><li>ii) Unlisted Company with total <b>assets not exceeding 1 Cr</b> as mentioned in immediately preceding FY</li><li>iii) <b>Start Up</b> as defined by Ministry of Commerce &amp; Industry</li></ul>	<p>Application for initiating this process is restricted as given below</p> <ul style="list-style-type: none"><li>i) Where any corporate debtor commits default, the Financial Creditor, or the Operation Creditor, or the Corporate Debtor itself</li></ul>

# Liquidation of Company by Tribunal

# Grounds for Liquidation by Tribunal

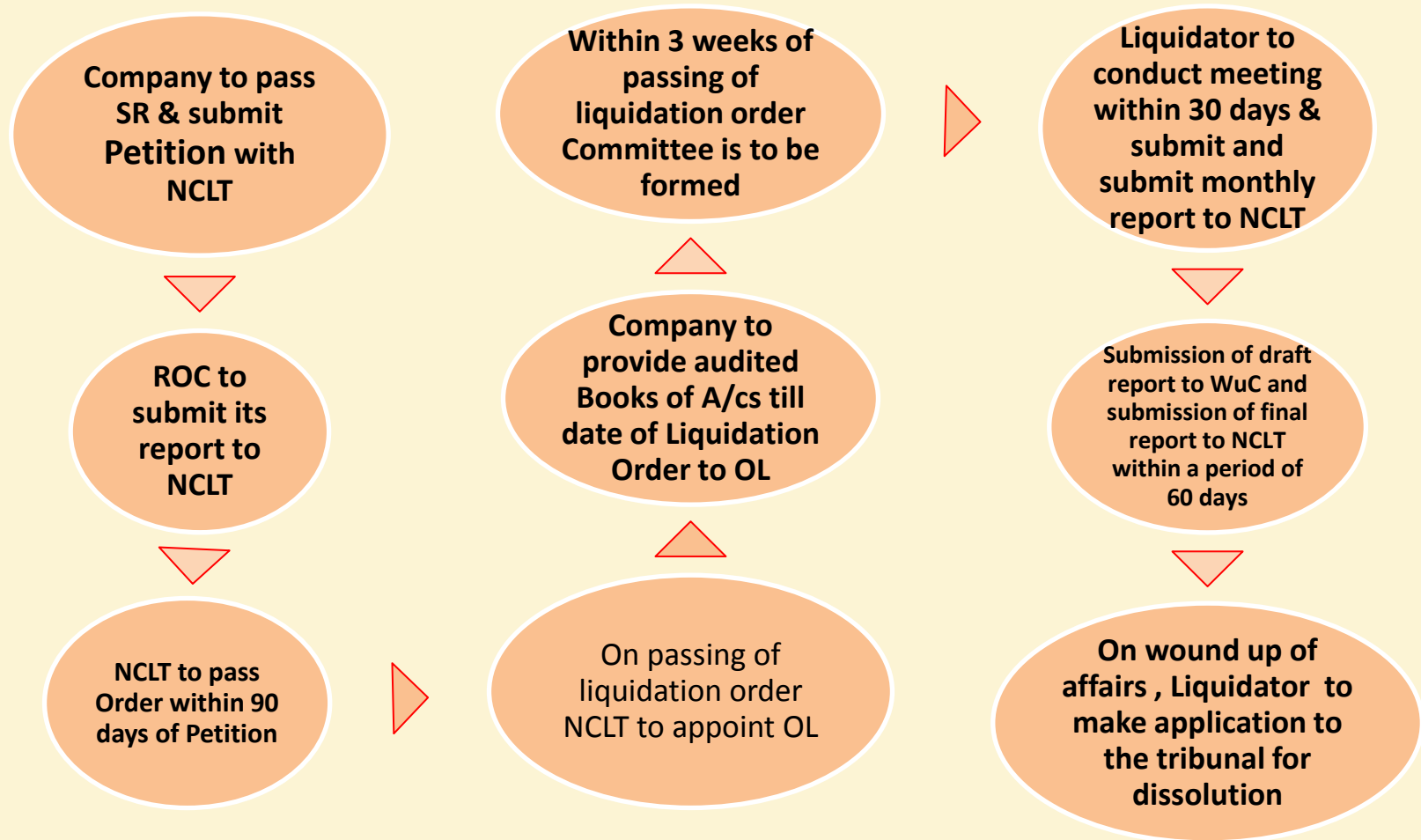
## Section 271 of Companies Act 2013

- if the Company has, by **special resolution**, resolved that the company be wound up by the
- if the **Company** has acted against the **interests of the sovereignty and integrity of India**, the security of the State, friendly relations with foreign States, public order, decency or morality;
- if the Company has made a default in filing with the Registrar its **financial statements** or **annual returns** for immediately **preceding five consecutive financial years**; or
- if the Tribunal is of the opinion that it is **just and equitable** that the Company should be wound up

# Grounds for Liquidation by Tribunal Section 271 of Companies Act 2013

➤ if on an **application made by the Registrar** or any other person authorised by the **Central Government** by notification under this Act, the Tribunal is of the opinion that the **affairs of the company** have been conducted in a **fraudulent manner** or the **Company was formed for fraudulent and unlawful purpose** or the **persons concerned in the formation** or management of its affairs have been **guilty of fraud, misfeasance or misconduct** in connection therewith and that it is proper that the company be wound up;

# Birds Eye in case of Liquidation of Company by Tribunal



# Liquidation of LLP by Tribunal

# Grounds for LLP by Tribunal Section 64 of LLP Act 2008

- If LLP decides that LLP be wound up by tribunal
- Number of **partners of LLP** is reduced **below 2** for a period of 6 months or more
- if the **LLP** has acted against the **interests of the sovereignty and integrity of India**, the security of the State or public order
- if the LLP has made a default in filing with the Registrar the **statement of accounts and Solvency** or **annual return** for any **preceding five consecutive financial years**; or
- if the Tribunal is of the opinion that it is **just and equitable** that the LLP be wound up



# Critical Questions on Liquidation

- Can a Company withdraw application of liquidation
- Whether Company under liquidation is required to comply with provisions of Companies Act, 2013
- What is the corporate status of Company under Liquidation
- Effect of initiation on legal proceedings
- How to obtain consent of 2/3rd of Creditors in case of winding up under Section 59 of IBC?
- Whether process is entirely revoked in case approval is not obtained from Creditors under Section 59 of IBC

# Comparison Companies Act Vs. Insolvency Code

# Companies Act, 1956 Vs. Insolvency Code, 2016

	Companies Act, 1956	Insolvency Code, 2016
<b>Process</b>	Time consuming process which would take minimum period of 3 years	Process is clear and faster and comparatively as minimum interference of government authorities
<b>Appointment of Insolvency Professional</b>	The said concept <b>did not exist</b> under the Companies Act, 1956	Company is mandatorily required to appoint an <b>Insolvency Professional</b> for Winding up the affairs as it requires high level of diligence in conducting the closure process
<b>Regulatory Bodies</b>	Liquidator has to take approvals from <b>Official Liquidator</b> and from the <b>Hon'ble High Court</b>	Insolvency Professional is required to take approval from the <b>NCLT</b>

# Companies Act, 1956 Vs. Insolvency Code, 2016

	Companies Act, 1956	Insolvency Code, 2016
<b>Creditors Inclusion</b>	There was <b>no definition</b> for Creditor	Definition of “Creditor” is widened to include any person to whom debt is owed and includes a <b>financial</b> Creditor, an <b>Operational</b> Creditor (Trade Creditor, unpaid employees etc.), a Secured Creditor, an unsecured creditor and a <b>decree holder</b>
<b>Widened Scope</b>	There were no separate provisions being defined and only Company related matters were covered	Umbrella Code which <b>covers Companies , LLPs, Individuals and Partnership firms</b>
<b>Preference for repayment</b>	<b>Government was given preference</b> above Creditors and Shareholders dues	Creditors and employees have been given preference over government dues

# Companies Act, 1956 Vs. Insolvency Code, 2016

	Companies Act, 1956	Insolvency Code, 2016
<b>Powers of Board</b>	Powers of Board were <b>completely ceased</b> (Section 491)	The <b>Board shall have limited powers</b> vested to them subject to approval of Insolvency Professional. Insolvency Professional would conduct the business affairs and would be liable for all the acts of the Company and will have access to all the books of accounts, records and other relevant documents of the Company.

# Comparison Winding up Vs. Strike off

# Comparison – Winding up Vs. Strike Off

	Winding Up	Strike off
<b>Indemnity Bond / Declaration of Solvency</b>	Indemnity Bond is <b>not required</b> , but majority of Directors are to provide Declaration of Solvency	Indemnity Bond is <b>required</b> from all the Directors of the Company
<b>Obligation on Directors</b>	Directors have <b>limited liability</b>	Directors have <b>Unlimited Liability</b>
<b>Process</b>	Winding up can be completed within a period of <b>12 months</b> as per the Insolvency code	Strike off can be completed <b>6-8</b> within a period of months
<b>Liabilities</b>	Company is <b>not required to extinguish</b> its liabilities for going under winding up	Company is <b>required to extinguish</b> all its liabilities before making application of strike-off

# Comparison – Winding up Vs. Strike Off

	Winding Up	Strike off
<b>Assets</b>	Company can go under winding up even if it has assets	Company cannot go under Strike off unless all assets are disposed-off
<b>Appointment of Liquidator</b>	Company is <b>mandatorily</b> required to appoint Insolvency Professional as a liquidator of the company	It is not required to appoint a liquidator while filing forms for Strike off of the company
<b>NOC</b>	NOC is required to be obtained from Tax Authorities and other statutory bodies	NOC is not required to be obtained by the Company
<b>Approval of Creditors</b>	Approval of <b>2/3<sup>rd</sup></b> of <b>creditors</b> is mandatory	Approval of Creditor is not required as Company is required to <b>extinguish all its liabilities</b>



# Comparison – Winding up Vs. Strike Off

	Winding Up	Strike off
<b>Procedural Requirement</b>	Company is required to adopt process such as opening of <b>Liquidation Account</b> , Newspaper Publications, Notices to authorities etc.	There is no such requirement under Strike-off
<b>Adjudicating authority</b>	<b>NCLT</b> is adjudicating authority in case of winding up	<b>ROC</b> is an adjudicating authority in case of strike off
<b>Surplus Distribution to Shareholders</b>	<b>Possible</b>	<b>Not possible</b>

# Comparison Voluntary Liquidation Vs. Liquidation under Insolvency

# Voluntary Liquidation Vs Insolvency

	Voluntary Liquidation	Liquidation under Insolvency
<b>Declaration of Solvency (DOS)</b>	<b>DOS</b> is mandatory under Voluntary Liquidation. Company is required to be solvent to go under Liquidation	Company is <b>not required</b> to give DOS
<b>Time Bound Process</b>	Process is not time bound. Post completion of <b>12 months</b> , additional compliances are triggered	Process is time bound and IP is required to adhere all time lines as specified in Code and Regulations
<b>Power of Board</b>	Powers of Board are not <b>suspended to its entirety</b>	Powers of Board is suspended to its entirety. Powers of Board are entrusted with IP.

# Voluntary Liquidation Vs Insolvency

	Voluntary Liquidation	Liquidation under Insolvency
<b>Appointment of Insolvency Professional (IP)</b>	IP is appointed at the beginning of the process who is mandated to carry out activity of Liquidation	IP is appointed at following occasions during liquidation process- <ol style="list-style-type: none"> <li><b>Interim Resolution Professional</b> By NCLT at the time of accepting application</li> <li><b>Resolution Professional</b> by COC</li> <li><b>Insolvency Professional</b> by NCLT at the time of Liquidation order</li> </ol>
<b>Liquidation</b>	Company is said to have gone under liquidation on <b>passing of Special Resolution</b> and obtaining approval of creditors	Company goes under Liquidation on passing of order by NCLT. NCLT passes order of liquidation <b>on failure of resolution plan</b>

# Voluntary Liquidation Vs Insolvency

	Voluntary Liquidation	Liquidation under Insolvency
<b>Fast track insolvency</b>	There is no mention of Fast track process for voluntary liquidation	Fast track insolvency process is prescribed under 55 to 58 of Insolvency Code
<b>Moratorium period</b>	There is no express provision of staying of suits or concept of “Moratorium Period” under Voluntary Liquidation	Under Insolvency Process, applicability of “Moratorium Period” is mandatory

# Best exit route?

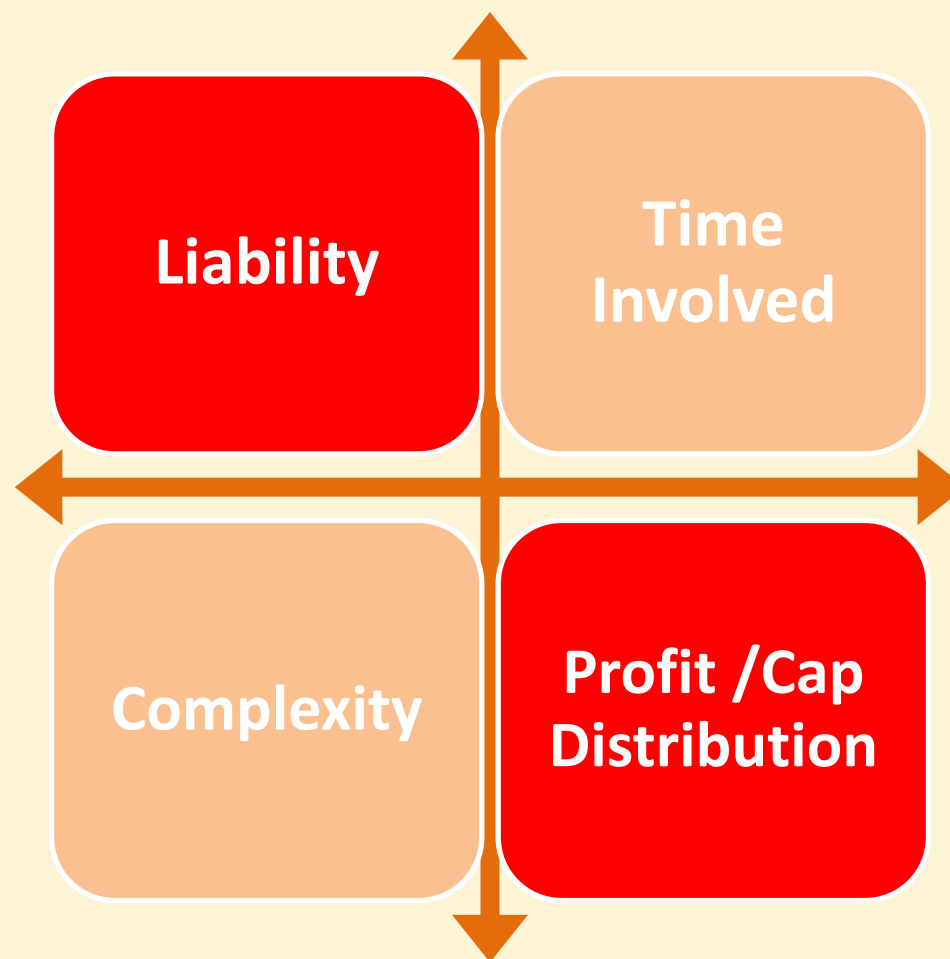


Strike Off



Liquidation

# Key Factors



**THANK YOU**



# Checklist- Form STK 2 attachments

- Secretarial Standard compliances for passing Board and Special Resolution
- Shareholding pattern of the Company
- Id and Address proofs of Directors for present and permanent address
- Stamp Papers and Notary as per prevailing laws
- Certificate from Bank in relation to closure of Bank Account
- Confirmation from applicable tax authorities, Financial Institutions, State/Central/Local Government Departments in relation to No Dues

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# Checklist- Compliances under Companies Act, 2013

- Copy of Tally extract and bank statement for preceding 2 financial years
- Copy of annual returns of the Company and status of Disqualification of Directors
- List of litigations pending against Company
- De-listing order passed by Stock-Exchange with reasons mentioned therein
- Status of litigations/compounding/prosecution pending before any statutory authority

# Checklist- Compliances under Companies Act, 2013

- List of outstanding charges, deeds entered with Banks/Financials Institutions etc
- Status of Company on MCA Portal (whether Company is listed /NPO etc
- Checking documents/records kept at the address of registered office of the Company
- Order/notice of inspections/investigations, if any, filed against Company
- Registration documents to be verified for Companies registered under appropriate (Eg. Banking Company, NBFC, Housing Finance Companies, Insurance Companies etc)

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# Checklist- Appointment of Professional

- Copy of signed Board Resolution for appointment of professional
- Copy of signed engagement letter

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# Verification of Claims

## ➤ Documents to be verify –

- Copy of financial contract or any other contract, if any, entered with Creditor by Company
- Copy of invoice of Creditor
- Record available with information utility
- Extract of Talley/ relevant system maintained by Company and creditor
- Order passed by Court/Tribunal under summery suit or any other suit if any

# Default Section 3(12) of IBC, 2016

- **Regulation 3(12)** of Insolvency and Bankruptcy Board of India Code 2016

*“default” means 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;*

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