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## **The Faster way to Corporate Death: MCA initiates Measures to Speed- up Winding Up**

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**Question 1:** How long does it take to form a company?

In older days, nearly 1 month to 2, but with the reforms that MCA has recently introduced, may be the entire process may be completed in a single day. Birth to a new company can be given in 24 hours now.

**Question 2:** How long does it take for a company to be put to death?

Can anyone dare to answer? Even the wildest of fluke guesses will possibly miss the number, because there are cases of winding up that are going on since 1946. – that is, good 67 years ! Well known author Gower has a beautiful quote in his book – “*not even a hydrogen bomb can kill a company*”. In a rather satirical sense, this is truer for Indian companies than for companies elsewhere in the world. We have been in corporate law practice for over 2 decades, and we have not been able to take a single company through the process of voluntary winding up. The process is so unreasonably tardy that corporates are forced to use surrogate routes like mergers, and once in a while when the MCA comes with an “easy exit scheme”, by way of striking off the name of the company. But what is surely no solution, as striking off of name presupposes that the company is defunct, whereas a company may simply need to wind up its affairs because the company is no more needed. The result is that we continue to add deadwood to the Company Law register in the country.

In the past, several committees have commented on the sad state of the winding up process. The Eradi Committee possibly startled many when it gave data about the average time taken to wind up a company – it was over 25 years in the Eastern Region. The N L Mitra Committee also had lots of submissions about the winding up, particularly bankruptcy of companies, as the present provisions of the Companies Act on winding up relate both to bankrupt companies and healthy companies, and while individual insolvency is dealt with by the Insolvency Laws, winding up of insolvent companies continues to be driven by company law procedures. USA always had a separate law dealing with bankruptcy of both corporate and non corporate bodies. UK originally had winding up of bankrupt companies as a part of Companies Act, but later moved the provisions to a separate Insolvency Act.

The Companies Amendment Act of 2002 made lots of changes in the winding up process, but all these are still lying inoperative due to the constitution of the NCLT.

The essence of all this is that winding up of companies is the darkest of alleys of corporate law which despite several suggestions and committee recommendations has remained as morose as it was.

However, recently, the MCA took some very positive measures to speed up the winding up process, pending the operation of the 2002 Amendments. This article gives a quick overview of the winding up process in general, and deals with the recent amendments.

Different steps have been prescribed for winding up a company in different style:

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### **Compulsory winding up**

As the name suggests, in this kind of winding up, the situation of the company becomes as such that there would be no other option left but to wound up the company. The grounds on which a company is to be compulsorily wound up are given in section 433 of the Companies Act, 1956. The general procedure to be followed in such kind of winding up is:

- Filing of a petition for winding up – may be by the company, any creditor, contributory, Registrar or any person authorized by Central Government in case of oppression mismanagement [sec 439]
- If petition is admitted, winding up commences [sec 441]
- Intimation by court to an Official Liquidator (OL) for his appointment and taking charge of the company [sec 444]
- Notice to the company for filing Statement of Affairs (SOA) and filing of SOA with the OL [sec 454]
- Submission of preliminary report by OL to court within 6 months from the date of the order [sec 455]
- On satisfaction with the report of the OL, dissolution of the company is to be initiated [sec 481]

### **Voluntary winding up**

1. Members Voluntary Winding up
2. Creditors Voluntary Winding up

A company may opt for voluntary winding up either by passing an ordinary resolution, where the object or the time limit for which the company was formed has achieved or by passing a special resolution. Once the resolution is general meeting is passed, the company may go either for members or for creditors voluntary winding up. The only difference between the two is that in case of members voluntary winding up, the directors are required to furnish a declaration of solvency in Form 4A which is not required in the other case.

The general procedure in a voluntary winding up is:

- Passing of requisite resolutions in a general meeting and appointment and fixation of remuneration liquidator [sec 490(1) and (2)]
- Notice of appointment of liquidator to the Registrar within ten days of appointment [sec 493]

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- Filing of Declaration of Solvency with the Registrar within five weeks of passing resolution for winding [Sec 488]
- Report of the liquidator on statement of affairs of the company in a general meeting duly called by publishing the notice of the meeting in newspaper and in Official Gazette [sec 497(1) and (2)]
- Liquidator's report to the Registrar and the Official Liquidator within a week from the meeting [sec 497(3)]
- Company deemed to be dissolved from the date of the report to the court, if the Official Liquidator has no objection on the report [sec 497(6)]

### ***Winding up under the supervision of court***

Winding up subject to supervision of court, is different from "Winding up by court." Here the court only supervises the winding up procedure. Resolution for winding up is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also. However, liberty is granted to creditors, contributories or other to apply to court for some relief. [sec 522]. The procedure involved is as follows:

- Filing of winding up petition
- Appointment of liquidator as per the instruction of the court
- Liquidator to have all the powers as if the company is being wound up voluntarily
- Submission of SOA with the Liquidator by the company
- Liquidator's report to the court on SOA
- Application of assets of the company on priority of payments basis [sec 529/529A/ 530]
- Dissolution of the company [sec 481]

### ***Winding up in the light of recently issued circulars***

Above are the procedures to be followed by the companies, professionals for getting the company dissolved. However, the process is quite time consuming which sometimes do not even have a favorable order from the court. To hasten



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the process with better governance and compliance, Ministry has issued some circulars for its various departments opening another field for practicing professionals.

#### **Accelerating the process of winding up**

It is clear that in the whole winding up proceeding, the role of the liquidator is very vital. Ministry has issued a **General Circular 54/2011 dated 26<sup>th</sup> July, 2011**<sup>1</sup> to expedite the winding up proceeding. As per the Circular, the petitions filed before the high courts without providing adequate information can now be closed in lesser time with the help of the Official Liquidators (OL). The OL will be taking the following additional steps in order to fasten the disposal of the winding up petitions:

- Keeping a track of all the pending cases by appointing a staff of company court
- Obtain information from “institution register” maintained with high courts
- Application to court praying to direct the management of the company to file the following information duly verified by a chartered accountant or a company secretary or a cost accountant in practice<sup>2</sup>:
  - Current Addresses of directors, secretary and statutory auditor of the company
  - Location and physical details of each immovable asset of the company along with its current valuation;
  - Details of all the debtors and creditors with their complete addresses and occupations;
  - Details of each movable asset of the company along with value;
  - Details of workmen/employees and any amount outstanding to them;
  - Details of all movable and immovable assets held in the personal names of director by providing its location, value, dates of acquisition and nature of right, title and interest therein;
  - Copies of last three years audited balance sheet of the company;
  - Details of location of the registered office of the company.

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<sup>1</sup> [http://www.mca.gov.in/Ministry/pdf/Circular\\_54-2011\\_26july2011.pdf](http://www.mca.gov.in/Ministry/pdf/Circular_54-2011_26july2011.pdf)

<sup>2</sup> Amended vide [http://mca.gov.in/Ministry/pdf/Circular\\_58-2011\\_01aug2011.pdf](http://mca.gov.in/Ministry/pdf/Circular_58-2011_01aug2011.pdf) including the company secretaries and cost accountant in practice with the chartered accountants

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The Circular also binds the RDs for the winding up cases. It will be the duty of the RD to ensure that all the pending applications are moved before the Court before the next date of hearing and in all new cases, these are filed before the Hon'ble Court before the second hearing of the case. RDs will also ensure that a standard draft is prepared by them after taking legal advice and the same is used in all cases by OLs.

### **Inspection and investigation in all winding up cases**

Vide **General Circular 55/2011 dated 26<sup>th</sup> July, 2011<sup>3</sup>**, the Ministry has prescribed some stringent steps to be followed while dealing with the malpractice and mismanaged companies. There are many winding petitions filed by the companies after having committed major violations of Companies Act and involving misappropriation of funds. In order to curb such malpractices, following guidelines have been prescribed for the OL while dealing with winding up petitions for such companies:

- OL will obtain a copy of the petition as soon as the same is filed before the court and forward the same to the Registrar for their report
- RoC will conduct a detailed scrutiny of the details and documents available in its records for the previous five years and will submit a preliminary report to the Ministry within a week
- MCA will take its view based on the preliminary report of the RoC within 15 days and any inspection under section 209A and/or investigation under section 235/237, if directed by the Ministry, is to be carried out by the RoC within 30 days.
- If found guilty, necessary actions may be initiated against the directors, ex-directors and other key managerial personnel of the company for any violation under Companies Act or any other law.
- As the last step, the OL will submit the final report with the High Court for passing necessary order.

The RD is entrusted to supervise all these actions of RoC and the OL prescribed above and to monitor all such cases of malpractices.

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<sup>3</sup> [http://www.mca.gov.in/Ministry/pdf/Circular\\_55-2011\\_26july2011.pdf](http://www.mca.gov.in/Ministry/pdf/Circular_55-2011_26july2011.pdf)



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Ministry's such initiatives for creating faster ways to wind up a company is welcomed and is appreciated.

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