

LIQUIDATION PROCESS

Insolvency & Bankruptcy Code, 2016

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Presentation Flow

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LIQUIDATION ORDER – Sec 33

Liquidation Order will be passed

- If the NCLT does not receive Resolution Plan within stipulated period
 - Within 180 / 270 days in case of normal CIRP
 - Within 90/135 days in case of Fast Track CIRP
- If the NCLT rejects the Resolution Plan for non-compliance of requirements
- If the RP, before confirmation of Resolution Plan, intimates the NCLT decision of the CoC to liquidate the company
- If the Resolution Plan is not properly implemented by Corporate Debtor, any aggrieved person shall apply to NCLT for liquidation

Consequences of Liquidation Order

- Issuance of Public Announcement stating that CD is in liquidation
- Order shall be sent to authority where CD is registered
- No suit or other legal proceeding shall be instituted against CD
- No suit shall be instituted on behalf of CD without prior NCLT approval
- Liquidation order shall be deemed to be notice of discharge to the officers, employees and workmen of CD unless business is continued for limited period during liquidation process by Liquidator
- All powers of BOD, KMP shall cease and shall be vested in the Liquidator

APPOINTMENT OF LIQUIDATOR - Sec 34

If NCLT passes Liquidation Order

- RP appointed for CIRP shall act as Liquidator unless:
 - replaced by NCLT if the Resolution Plan was rejected for non-compliance of Code
 - IBBI recommends the replacement for reasons to be recorded in writing
- Personnel of CD shall extend all assistance and co-operation to Liquidator
 - Liquidator may make application to NCLT for a direction in case of non-co-operation by any, present or past, officer, auditor, employee or promoter of CD – even IRP, RP and previous liquidator is covered under the provision

Powers and Duties of Liquidator

- To verify claims of all the creditors
- To take into his custody or control all the assets of the CD
- To carry out the business of CD for its beneficial liquidation if he considers necessary
- To sell movable and immovable property of CD by public auction or private contract
- To obtain any professional assistance to discharge his duties, obligations & responsibilities provided such professional is not a relative of Liquidator or related party of CD or has served as auditor to CD in 5 years preceding the Liquidation Commencement date
- To investigate financial affairs to determine undervalued or preferential transactions
- The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds
 - provided that any such consultation shall not be binding on the liquidator
 - provided further that records of such consultation shall be made available to other stakeholders not so consulted
 - Liquidator to maintain particulars of any consultation as specified in Form A
- Liquidator has power to access information from any information system for admission and proof of claims and identification of liquidation estate assets
- Liquidator shall provide financial information, as may be specified, within 7 days from the date of request to any creditor
- To file various reports with the NCLT on the progress of the liquidation proceedings
- To distribute proceeds as per provisions of the Code

Public Notice and Verification of Claims (1/2)

Public Notice

- Public Announcement shall be made in Form B within 5 days of appointment
- Claims to be submitted as on Liquidation Commencement Date
- Claims to be submitted within 30 days from Liquidation Commencement Date

Proof of Claims

- Claims shall include interest, if any, as on Liquidation Commencement Date
- All claims shall be submitted with an affidavit

Form C

- Operational Creditor ,other than Workman or Employee
- Claims submission in Person, by Post or by Electronic means

Form D

- Financial Creditor
- Claims submission by Electronic means only

Form E

- Workman or Employee in Individual Capacity ;
- Claims submission in Person, by Post or by Electronic means
- If workman or employee has not made a claim, liquidator may admit claims on basis of books of account of CD

Form F

- Workman or Employee through Authorised Representative
- Claims submission in Person, by Post or by Electronic means

Form G

- Any other stakeholder
- Claims submission in Person, by Post or by Electronic means

- Creditor may withdraw or vary his claim within 14 days of its submission
- Claims to be verified within 30 days from last date of receipt of claims

Verification of Claims – Key Points (2/2)

- Existence of security Interest must be proved
- Claimant shall bear cost of proving its claims; if claim is not precise, liquidator shall make best estimate of claim basis details available
- If claim is found to be false, liquidator shall endeavour to recover costs and shall provide details of such creditor to IBBI
- Debt in Foreign Currency shall be converted at RBI reference rate as on Liquidation Commencement Date
- Periodical payments like Unpaid rent and interest etc can be claimed for only amounts due and unpaid up to Liquidation Commencement Date
- Debts due on future date shall be determined on present value terms; Discount rate shall be closing yield rate of G-Sec of similar maturity as on date of distribution
- Mutual credits and set-off allowed
- Liquidator shall verify claims within 30 days from the last date of receipt of claims; he may either admit or reject the claim in whole or part and communicate his decision within 7 days of such admission or rejection of claims
- Creditor to appeal to NLCT within 14 days from date of receipt of rejection of claims
- List of stakeholders with admitted claims shall be filed by Liquidator with NCLT within 45 days from last date of receipt of claim; list can be amended based on any additional information and as directed by NCLT
- List of stakeholders shall be available for inspection by persons who submitted proof of claims, by members, directors , guarantors of CD and displayed on website of CD

Liquidation Estate

Inclusion

- Assets over which CD has ownership rights
- Assets in or not in possession of CD including but not limited to encumbered assets
- Tangible assets, whether movable or immovable
- Intangible assets and Contractual Rights
- Assets subject to the determination of ownership by the court or authority
- Any assets or their value recovered through proceedings for avoidance of transactions
- Any asset of the CD in respect of which a secured creditor has relinquished security interest
- Any other property belonging to or vested in the CD at the Insolvency commencement date
- All proceeds of liquidation as and when they are realised

Exclusion

- Assets in possession of CD but owned by a 3rd party – assets held in trust, bailment contracts, Provident Fund, Pension Fund and Gratuity Fund; contracts for use of assets and not transfer of title, etc.
- Assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions
- Personal assets of any shareholder or partner of a CD, provided the assets are not held under avoidance transactions
- Assets of any Indian or foreign subsidiary of CD
- Any other assets as may be specified by the Board including assets subject to setoff on account of mutual dealings between CD and any creditor

Liquidation Estate is held by liquidator as fiduciary for the benefit of creditors

Reporting by Liquidator

Liquidator shall prepare and submit to NCLT :

- Preliminary Report
 - Submit to NCLT within 75 days of Liquidation Commencement Date
 - Details of capital structure, estimates of assets and liabilities, intention of further investigation, plan of action with timelines and estimated liquidation costs
- Asset Memorandum
 - Form Liquidation estate and submit report within 75 days of Liquidation Commencement Date
 - Details on value of assets (standalone / slump sale / assets in parcel), intended manner of sale with reasons, expected realisation and other relevant information
 - Shall not be accessible to any person during liquidation without prior NCLT approval
- Progress Reports
 - Submit 1st report within 15 days from end of quarter of appointment, further reports within 15 days after end of every quarter
 - Details on appointment / cessation of various professionals, statement of progress on liquidation, remuneration and other expenses, developments on material litigation / avoidance of transaction, **material change in expected realisation value** and changes in estimate of liquidation cost / realisable value
 - Report of 4th quarter shall include audited accounts of Statement of Liquidators receipts and payments
- Asset Sale Report
 - Shall be submitted with Progress reports with details of sale of any asset
- Minutes of Consultation with Stakeholders
- Final Report prior to dissolution
- Registers, Receipts and Books

Liquidator shall preserve physical and electronic copies of reports, records and minutes for 8 years after dissolution of CD

Preferential Transactions

Preferential Transaction

- Transfer of property or interest thereof for benefit of creditor / surety / guarantor or on account of antecedent Financial / Operational debt or other liabilities owed by CD
- Above transfer has effect of putting such creditor / surety / guarantor in beneficial position as compared to in the event of liquidation

Not a Preferential Transaction

- Transfer made in ordinary course of business or financial affairs of CD / transferee
- Any transfer creating security interest in property acquired by CD if such security interest secures new value AND was given at time of signing security agreement containing the description of such property as security interest AND was used by CD to acquire such property
- Such transfer was registered with IU on or before 30 days after CD receives possession of such property
- Transfer made pursuant to Court order

Preference shall be deemed; if given to related party within 2 years prior to Insolvency Commencement date and within 1 year to any other person

Avoidance of Preferential Transactions

Liquidator / RP may make an application to NCLT for an order for:

- Vesting of the property / money / proceeds from sale of property to the CD
- Release / Discharge of security interest created by CD
- Directing any Guarantor released / discharged to be under new / revived debts
- Direct to provide security / charge on any property for discharge of debts

Preference presumed

- If other person receiving preference had sufficient information of initiation / commencement of CIRP
- Is a related party
- Public Notice regarding CIRP has been made

Avoidance of Undervalued Transactions

Undervalued transaction shall include

- Gift to a person
- Transfer of assets at consideration significantly lower than the value paid by CD
 - *Provided such transaction has not taken place in ordinary course of business of CD*
- Relevant period – Transactions entered into with related party within period of 2 years preceding Insolvency Commencement date or within 1 year with any other persons
- NCLT may require independent expert to assess the evidence relating to value of transactions

If RP / Liquidator fails to report undervalued transactions

- Creditor / Members can inform NCLT for restoring the position
- NCLT to inform IBBI to initiate disciplinary proceedings against RP / Liquidator

Extortionate Credit Transactions

Extortionate Credit Transaction

- Relevant period – 2 years preceding the Insolvency Commencement Date
- Involves receipt of Financial / Operational Debt
 - Terms require CD to make exorbitant payments
 - Unconscionable under principles of law relating to contracts
- Does not include any debt extended by persons engaged in Financial Services and is in compliance with applicable laws

Liquidator / RP may make an application to NCLT for an order to:

- Restore position as it existed prior to such transaction
- Set aside whole or part of the debt created on account of the transaction
- Modify terms of the transaction
- Require a person to repay any amount received
- Require security interest relinquished in favour of Liquidator / RP

Distribution of Assets – Sec 53 defines order of priority

Insolvency Resolution Process Costs and Liquidation Costs

Workmen dues up to 24 months **AND** Debts owed to Secured Creditors who have relinquished security

Employee dues up to 12 months

Financial Debts owed to Unsecured Creditors

Government Dues (up to 24 months) **AND** unpaid debts of Secured Creditors following enforcement of security

Any remaining debts and dues

Preference Shareholders

Equity Shareholders

Contractual arrangements between recipients with equal ranking shall be disregarded if disrupting the order of priority

Secured Creditor in Liquidation Proceedings- Sec 52

Secured Creditor may opt to:

- Relinquish security interest in Liquidation estate in favour of Liquidator
- Realise its security interest on its own
 - Identify the asset to be realised, inform the liquidator and seek permission
 - Can enforce, realise, settle, compromise or deal with assets in compliance with law applicable to the assets enforced and to the secured creditor
 - Apply to NCLT in case of any resistance to enforce security and seek relief
 - Excess proceeds from sale of assets shall form part of Liquidation Estate
 - Insolvency Resolution Costs due by secured creditors shall be form part of Liquidation Estate
 - Unpaid debts of secured creditors shall be paid as per the waterfall mechanism

Secured Creditor shall inform Liquidator the price he proposes to sell under Reg. 37 before sale of the asset. Not applicable if sale under SARFAESI / DRT

Sale of Assets in Liquidation

Manner of Sale:

- Standalone basis
- In slump sale / set of assets collectively / assets in parcel
- Sell the CD as a going concern

Mode of Sale:

- Auction
 - Prepare marketing strategy i.e. release advertisements, assets information sheets, notice of sale and liaising with agents
 - Prepare T&C of the sale i.e. Reserve price, earnest money, pre-bid qualifications etc
 - Reserve price cannot be more than 6 months old, can be reduced to max 75% in case of auction failure, can sell through online or physical auction in transparent manner
 - Balance consideration to be received within 15 days of intimated date
 - Power to execute sale deed / transfer formalities on receipt of full consideration
- Private Sale
 - perishable assets and assets likely value deterioration
 - asset is sold at higher price than the reserve price of failed auction
 - private sale allowed with prior permission of NLCT and for sale to related parties of CD, liquidator's related party / professional appointed by liquidator
- Liquidator shall not proceed with asset sale if there is collusion amongst parties and seek appropriate NCLT orders against colluding parties

No sale of assets to persons ineligible to be Resolution Applicants

Liquidators Fee and Remuneration

- Liquidator's fee will be decided by CoC before liquidation order is passed:
 - u/s 33(1)(a) – Resolution Plan not received before end of CIRP period
 - u/s 33(2) – RP intimates NCLT on CoC decision to liquidate the company
- In all other cases, fee shall be as prescribed the Code as amount of % realised net of other liquidation costs and of the amount distributed
 - Liquidator entitled to receive only 50% on realisation and balance on distribution

Amount of Realisation / Distribution (In Rupees)	Percentage of fee on the amount realised/distributed			
	In First six months	in next six months	in next one year	thereafter
Amount of Realisation (exclusive of liquidation costs)				
On the First 1 crore	5.00	3.75	2.50	1.88
On the next 9 crores	3.75	2.80	1.88	1.41
On the next 40 crores	2.50	1.88	1.25	0.94
On the next 50 crores	1.25	0.94	0.68	0.51
On further Sum Realised	0.25	0.19	0.13	0.10
Amount Distributed to stakeholders				
On the First 1 crore	2.50	1.88	1.25	0.94
On the next 9 crores	1.88	1.40	0.94	0.71
On the next 40 crores	1.25	0.94	0.63	0.47
On the next 50 crores	0.63	0.48	0.34	0.25
On further Sum Realised	0.13	0.10	0.06	0.05

Proceeds of Liquidation and Distribution of Proceeds

- Liquidator shall open a bank account – “CD-Name in Liquidation”
- All money received shall be deposited without any deduction on the next working day
- Cash of 1 lakh allowed or higher if approved by NCLT for payments less than Rs.5000
- Distribution to commence after filing list of stakeholder and asset memorandum with NCLT
- Proceeds to be distributed within 6months of realisation
- Insolvency and Liquidation Costs to be deducted before any distribution
- Liquidation shall be completed within 2 years, NCLT approval required to continue liquidation beyond 2 years with specific reasons and additional timelines
- Final report to constitute liquidation account, conduct and manner of liquidation of CD asset
- Liquidator to explain if liquidation costs exceeds estimates given in Preliminary Report
- Unclaimed liquidation proceeds / undistributed assets shall be paid into Companies Liquidation Account in Public Account of India with details, liquidator shall pay interest @12% on retained amounts plus penalty if any levied by IBBI
- Stakeholders claiming stake on undistributed assets shall write to IBBI for payment
- Unclaimed money / assets for a period of 15 years shall be transferred to General Revenue Account of Central Government

Dissolution of CD

Liquidator shall make an application to NCLT for:

- Dissolution; if assets of CD are completely liquidated
- Early dissolution – if realisable properties are insufficient to cover liquidation cost AND affairs do not require any further investigation

Liquidator shall file Final report

- giving an account of liquidation
- how liquidation has been conducted
- how assets have been liquidated
- explain with reasons if liquidation costs exceeds estimates provided in Preliminary Report

Copy of dissolution order shall be sent within 7 days to authority where CD is registered

Liquidation to be completed within 2 years.

Liquidator to approach NCLT to continue such liquidation after 2 years giving adequate reasons

Voluntary Liquidation Guidelines

Qualifying Requirements

- Solvent Companies who have not committed any default

Initiation Process

- Declaration from majority directors that company has no debt or is able to pay entire debt from proceeds of sale of assets AND company is not being liquidated to defraud any person
- Declaration shall be accompanied by Audited Financial Statements / Records of business for previous 2 years or from incorporation till date if less than 2 years **AND** report on valuation of assets
- Within 4 weeks of declaration,
 - Pass special resolution of members to liquidate and appoint IP as Liquidator
 - Pass resolution of members if Articles provide for dissolution on specified events and appoint IP as Liquidator
- Creditors, 2/3rd in value, to approve resolution passed by members within 7 days if company owes any debt
- Company to notify RoC and IBBI within 7 days of passing of such resolution
- Liquidation Commencement date - deemed to be date when members approved resolution
- After completing the process, Liquidator shall apply to NCLT for dissolution and liquidation order shall be sent to RoC where company is registered within 14 days of the order

THANK YOU

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