

Liquidation: Liquidator's role, functions and distributive justice under section 53

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About Us



- Vinod Kothari and Company, consultants and advisors
 - Based out of Kolkata, New Delhi & Mumbai
- We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

Our Organization's Credo:

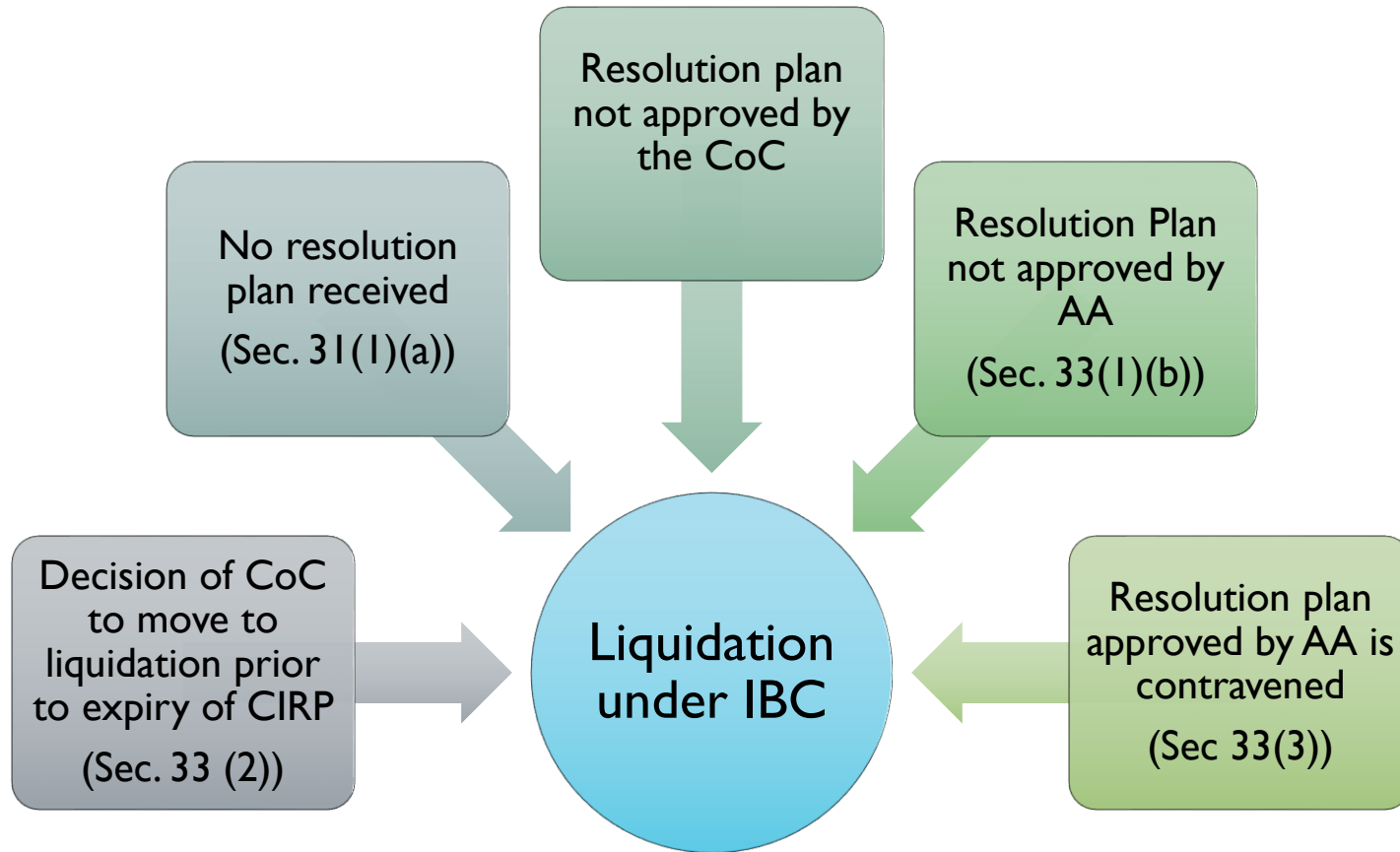
Focus on capabilities; opportunities follow



Liquidation Process- Introduction

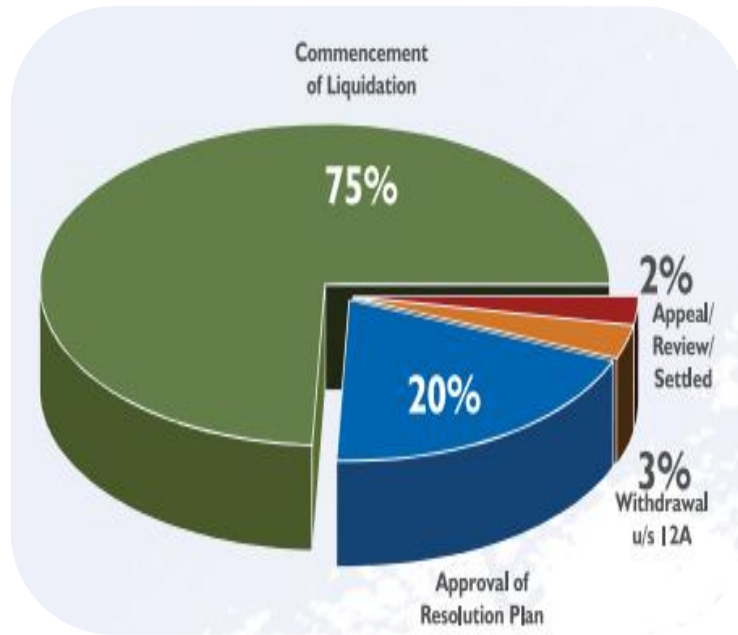


What leads to Liquidation?

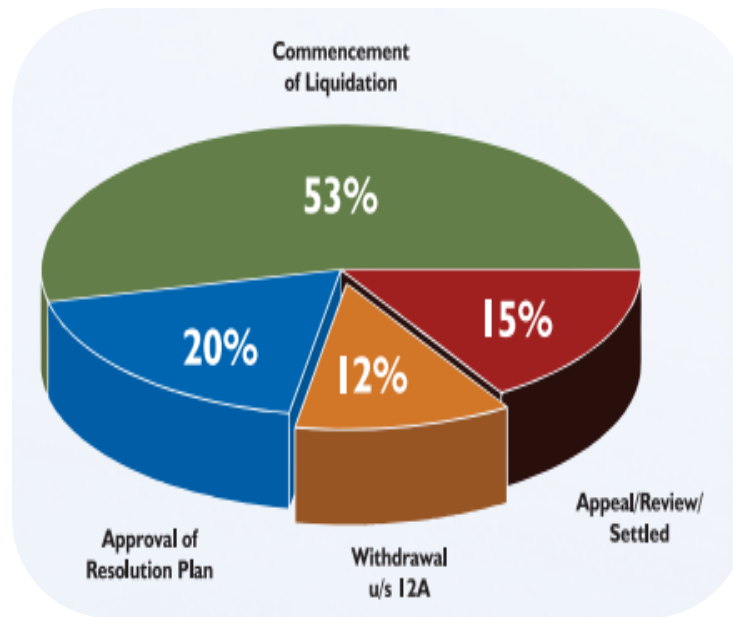


- Liquidation is the terminal process for a business
 - In case of voluntary liquidation, it is based on decision to liquidate
 - In case of insolvent liquidation, it is based on failure of rescue effort
- Therefore, the key principle is:
 - We first try to rescue and revive a business; if that fails, liquidation follows
- Insolvency – resolution – acquisition
- Bankruptcy – liquidation - dissolution

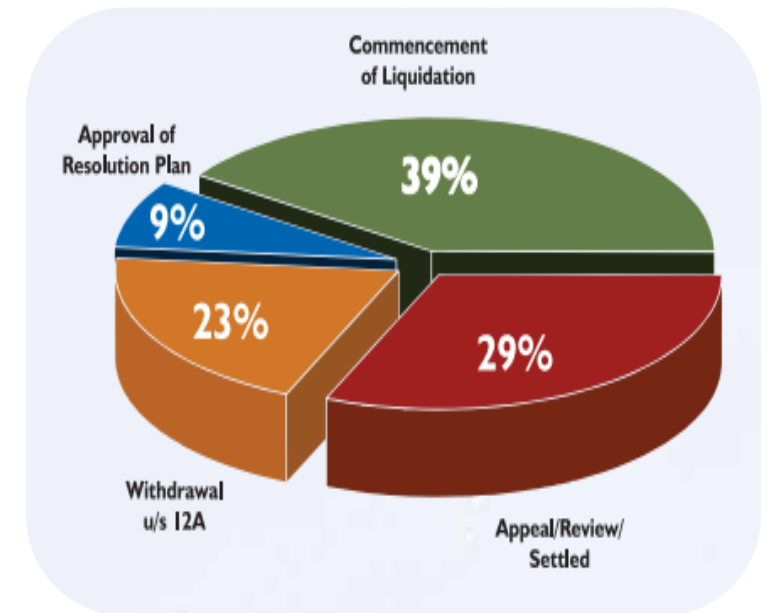
Outcome of CIRPs as on 31st March, 2022



Initiated by corporate debtors

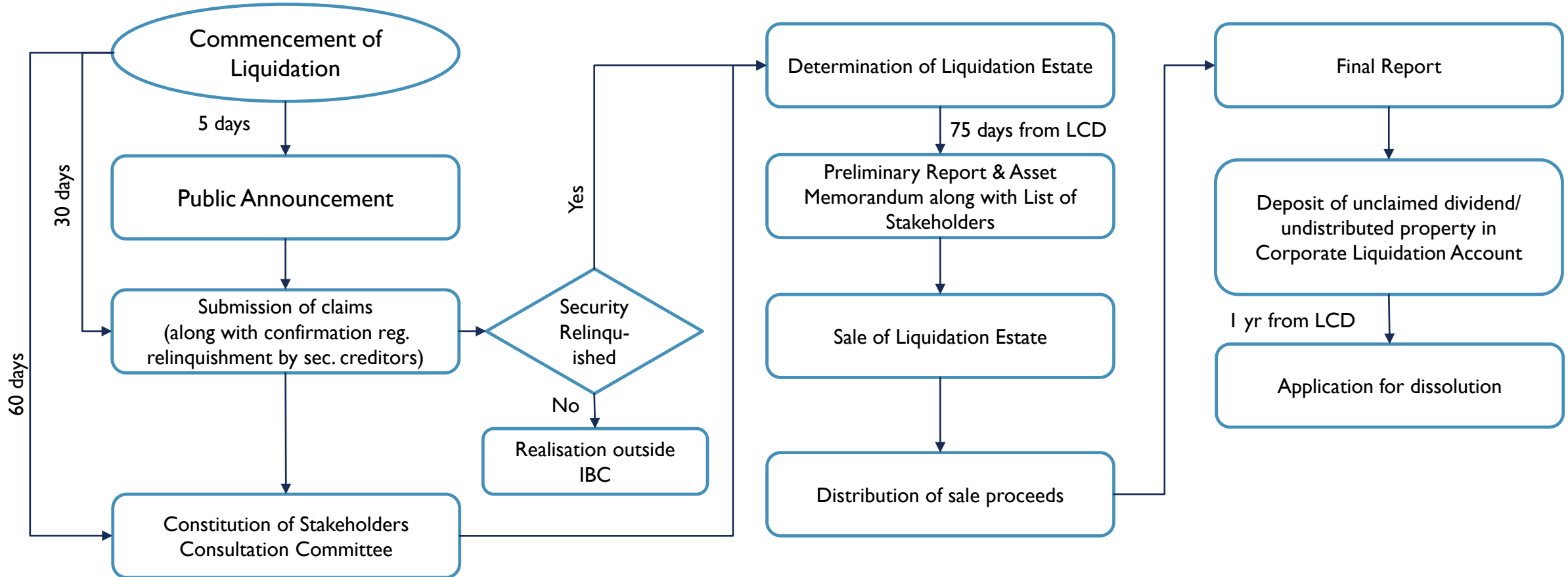


Initiated by financial creditors



Initiated by operational creditors

Liquidation Process- Summary



Aspects of Liquidation Process

Creditors

- Creditors file their claims within 30 days of LCD
- Liquidator verifies and admits the claims within 30 days
- Creditors come as a part of the stakeholders' consultation committee
- Unlike CIRP, liquidation rules focus more on
 - Secured and unsecured creditors
 - Rather than financial/operational creditors

Liquidation Estate

- A notional liquidation estate, consisting of all assets of the Company.
- Liquidation as the fiduciary.
- Exceptions:
 - Third party assets
 - Financial service providers holding security collateral
 - Personal assets of shareholders & partners of CD
 - Assets of subsidiaries.

Realization & Distribution

- Options:
 - Going concern sale
 - Slump sale
 - Piecemeal sales
- Distribution to creditors as per the waterfall mechanism u/s 53 of IBC



Appointment, Powers and Duties of Liquidator



Appointment and fees of Liquidator

- Who appoints the liquidator:
 - Sec 34: AA while passing the order for liquidation u/s. 33 appoints liquidator.
- Replacement (Proposal under IBBI Discussion paper dated 14th June, 2022)
 - SCC by 66% votes (present & voting) may propose replacement of liquidator & file application for appointment of new liquidator

- Fees of the liquidator *

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised / distributed		
	in the first six months	in the next six months	thereafter
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5.00	3.75	1.88
On the next 9 crore	3.75	2.80	1.41
On the next 40 crore	2.50	1.88	0.94
On the next 50 crore	1.25	0.94	0.51
On further sums realized	0.25	0.19	0.10
Amount Distributed to Stakeholders			
On the first 1 crore	2.50	1.88	0.94
On the next 9 crore	1.88	1.40	0.71
On the next 40 crore	1.25	0.94	0.47
On the next 50 crore	0.63	0.48	0.25
On further sums distributed	0.13	0.10	0.05

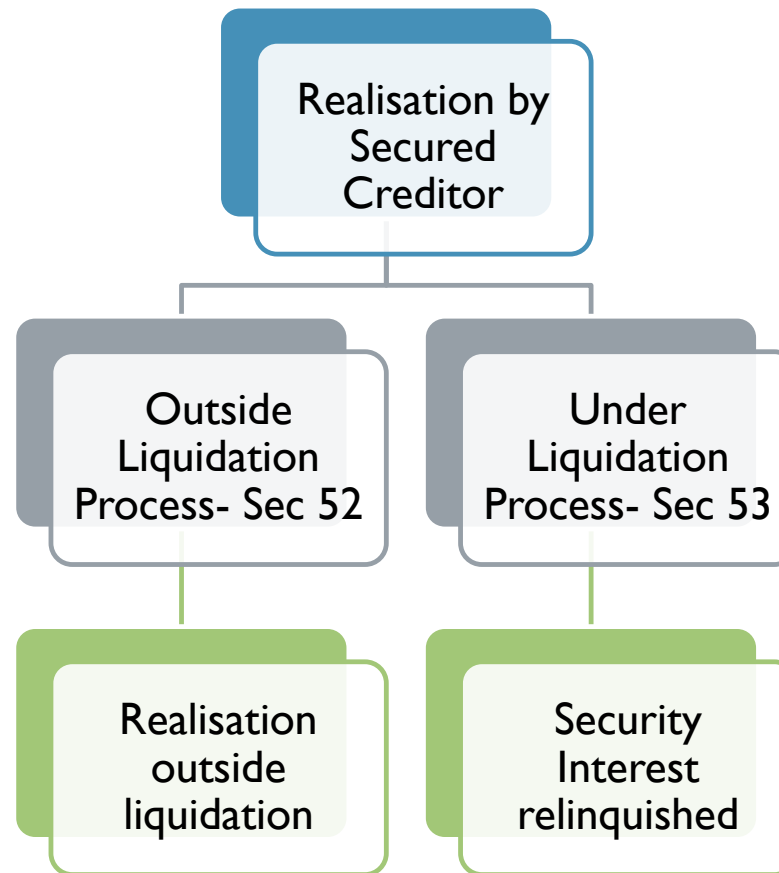
* Under IBBI Discussion Paper it is proposed that SCC shall review fees of liquidator

Powers and duties of Liquidator

- On commencement of liquidation, all directors and employees of the company automatically vacate offices
- Hence, liquidator becomes the sole directing force of the company, taking the company through the liquidation process
- Unlike in case of CIRP, liquidation does not work under the directions of the CoC – there is no CoC during liquidation
- There is consultative committee – Stakeholder Consultation Committee, consisting of diverse stakeholders
 - Which is consultative; liquidator may, for reasons to be recorded, decide to deviate from the views of the SCC
- Liquidator, of course, works under the directions of the AA
- Long list of powers given in the law include
 - Claim verification
 - Custody or control all the assets, property, effects and actionable claims of the CD, their preservation
 - To carry on business of CD for its beneficial liquidation
 - Selling immovable and movable property and actionable claim of the CD by – (a) Public auction ; (b) Private contract
 - except the ones specified in Sec 29A or to sell the same in parcels
 - To obtain any professional assistance. However, the professional should not be – (a) a relative of liquidator; (b) related party of CD; (c) auditor of CD anytime during 5 years preceding LCD
 - To invite & settle claims of creditors and claimants
 - To institute or defend any suit, prosecution or other legal proceedings, on behalf of the CD

Decision of Secured Creditors- *Realisation vs. Relinquishment*

Secured Creditors in liquidation



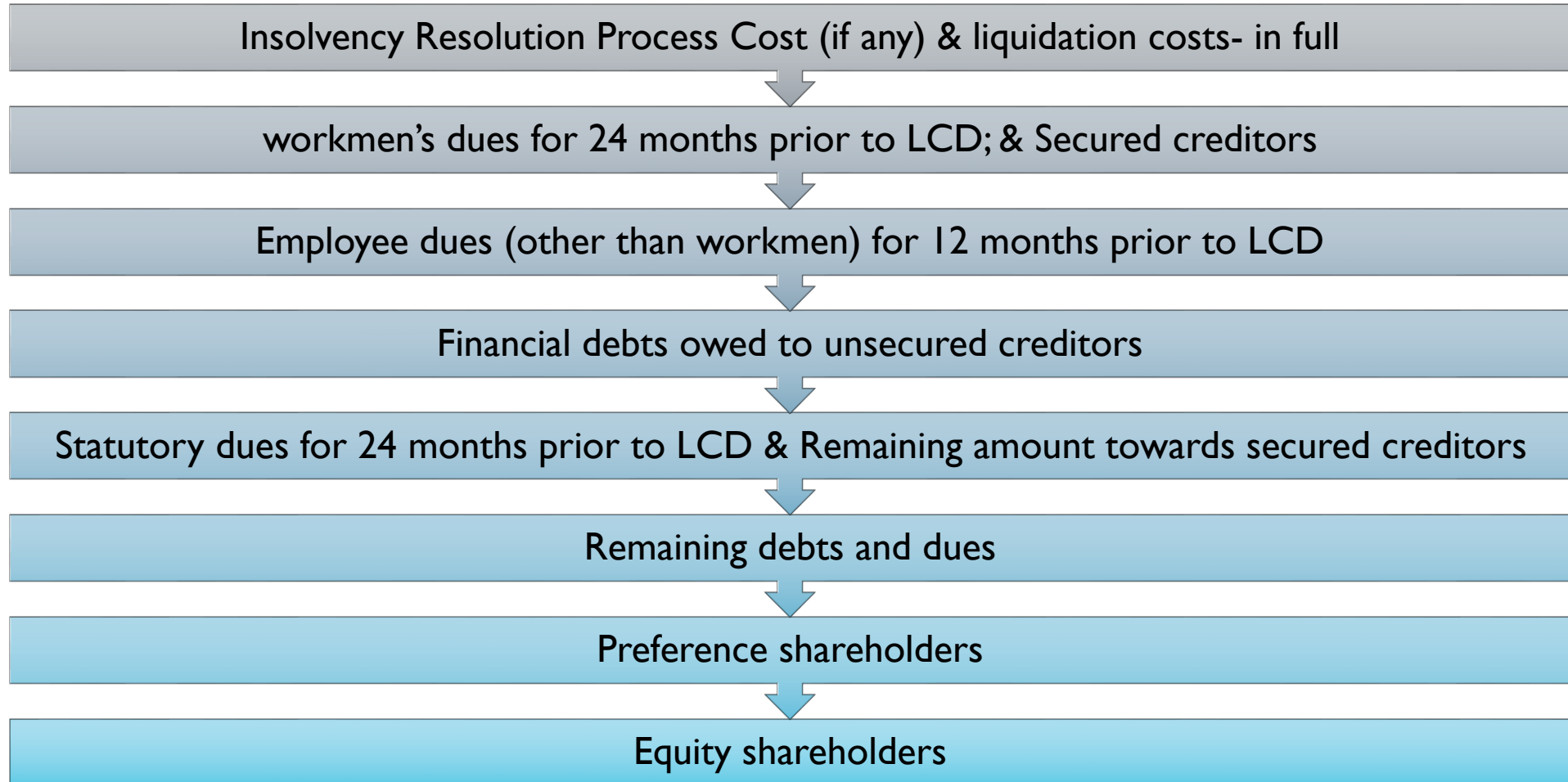


Distribution to Creditors-

The Waterfall Mechanism



Priorities u/s 53 (I) of IBC - Waterfall Mechanism



Priorities u/s 53 (1) of IBC

Clause (a)- CIRP & Liquidation Costs

What constitutes CIRP Costs- (Sec 5 (13) and Reg 31 of CIRP Regulations)

Amount due to
suppliers of essential
goods and services

Fee payable to AR of
class of creditors

Out-of-pocket
expenses of RP for
discharge of functions

Amounts due to
person whose rights
are prejudicially
affected due to
moratorium

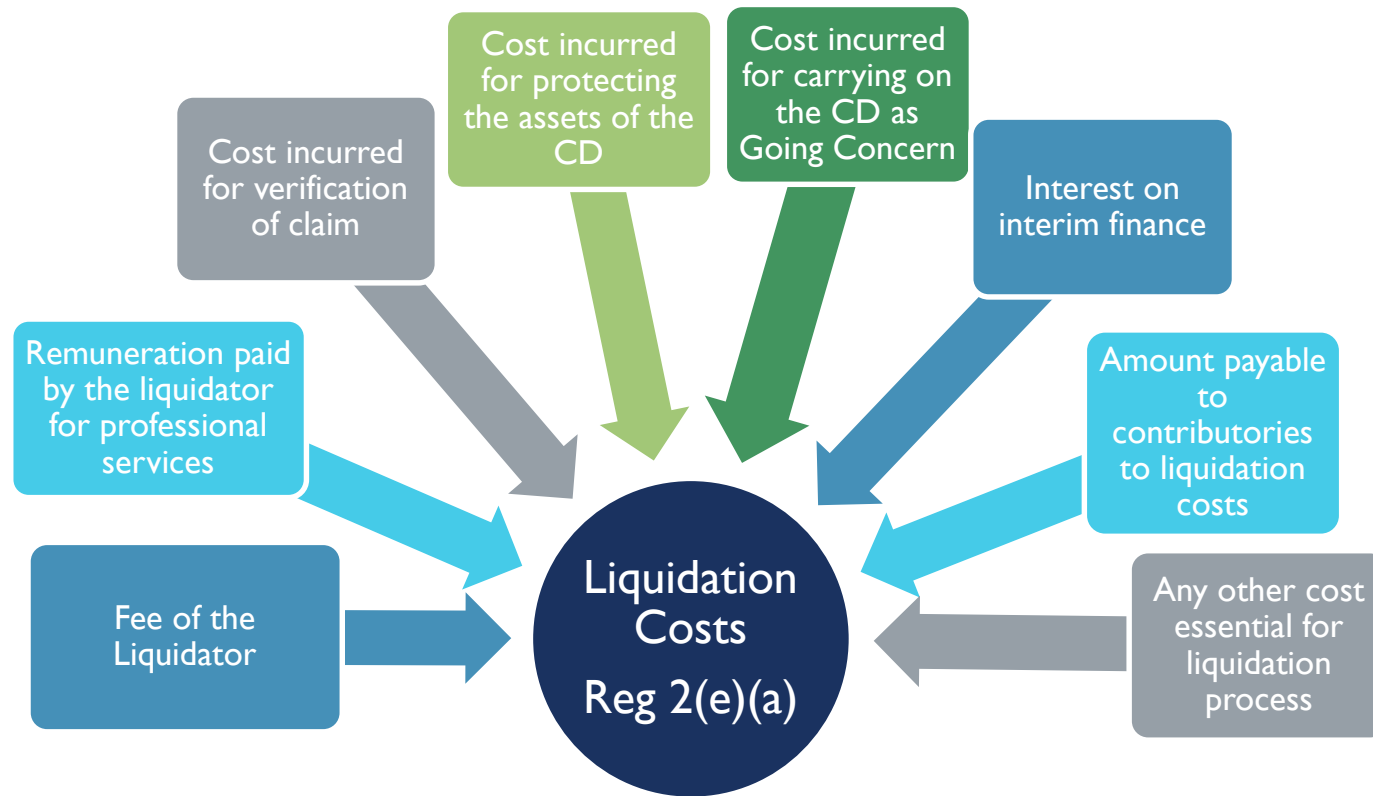
Expenses incurred on
and by the RP

Other costs directly
related to CIRP and
approved by CoC

- Where expenses incurred towards or by IRP are not ratified by CoC- Applicant must bear the expenses
- Only expenses ratified by CoC shall form part of CIRP Cost
- Interim financing and cost thereof – sec 5 (13)
- **Not forming part of CIRP Cost-** (As per IBBI Circular dated 12.06.2018)
 - any fee or other expense beyond the amount approved by CoC,
 - any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the CD in relation to the CIRP
 - any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP

Priorities u/s 53 (I) of IBC

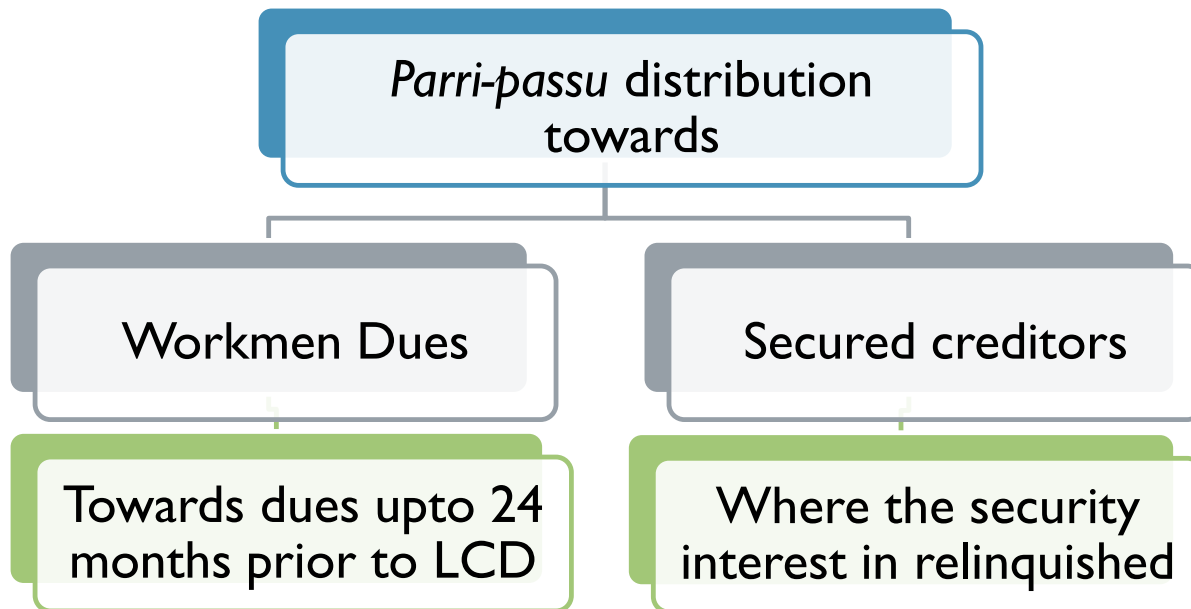
Clause (a)- CIRP & Liquidation Costs



- Fee of the liquidator- in terms of Reg. 4
 - Percentage based; or
 - As decided by the CoC
- Interest on Interim Finance- for the period lower of-
 - 12 months; or
 - LCD till repayment of interim finance
- Contribution under Reg. 2A of Liquidation Regulations - read with Reg. 39B of CIRP Regulations
 - Also entitled to interest @bank rate
- Any cost incurred by the liquidator in relation to a scheme of compromise or arrangement- **does not form part of Liquidation Costs**
 - Shall be paid by the applicant

Priorities u/s 53 (I) of IBC

Clause (b)- Secured creditors & Workmen dues



- Workmen as defined under the Industrial Disputes Act-
- Meaning of workmen dues- As per section 326 of the Companies Act, as per which workmen dues mean aggregate of-
 - All salary or wages;
 - Accrued holiday remunerations
 - all amount due in respect of any compensation or liability for compensation in respect of death or disablement of any workman
- Sums due towards PF, Pension & Gratuity outside the scope of Sec 53 read with section 36 (4) (a) (iii)
 - See *SBI v. Moser Baer Karamchari Union & Ar*
- Secured creditor's claim is covered to the extent of value of security; and not the total sum due
 - Recommendations of the Second ILC Report

Wide Coverage of the Expression “Wages”

- There have been lots of rulings defining what all is included in “wages”
 - Rulings under the winding up regime of the 1956 Act should all remain relevant
- The following have been included in definition of wages
 - Dearness allowance
 - Bonus
 - Unavailed leave
 - Compensation for Termination is clearly covered by Explanation (b) (i) below sec. 326 (2) of the Companies Act
- The following are held not included
 - Ex gratia payments

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