

# Analysing Current Issues in Liquidation under IBC & Future Reforms

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- Vinod Kothari and Company, company secretaries, is a firm with more than 34 years of vintage
  - Based out of Kolkata, Mumbai, New Delhi and Bengaluru
- We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

***Our Organization's Credo:***

***Focus on capabilities; opportunities follow***

# Outline

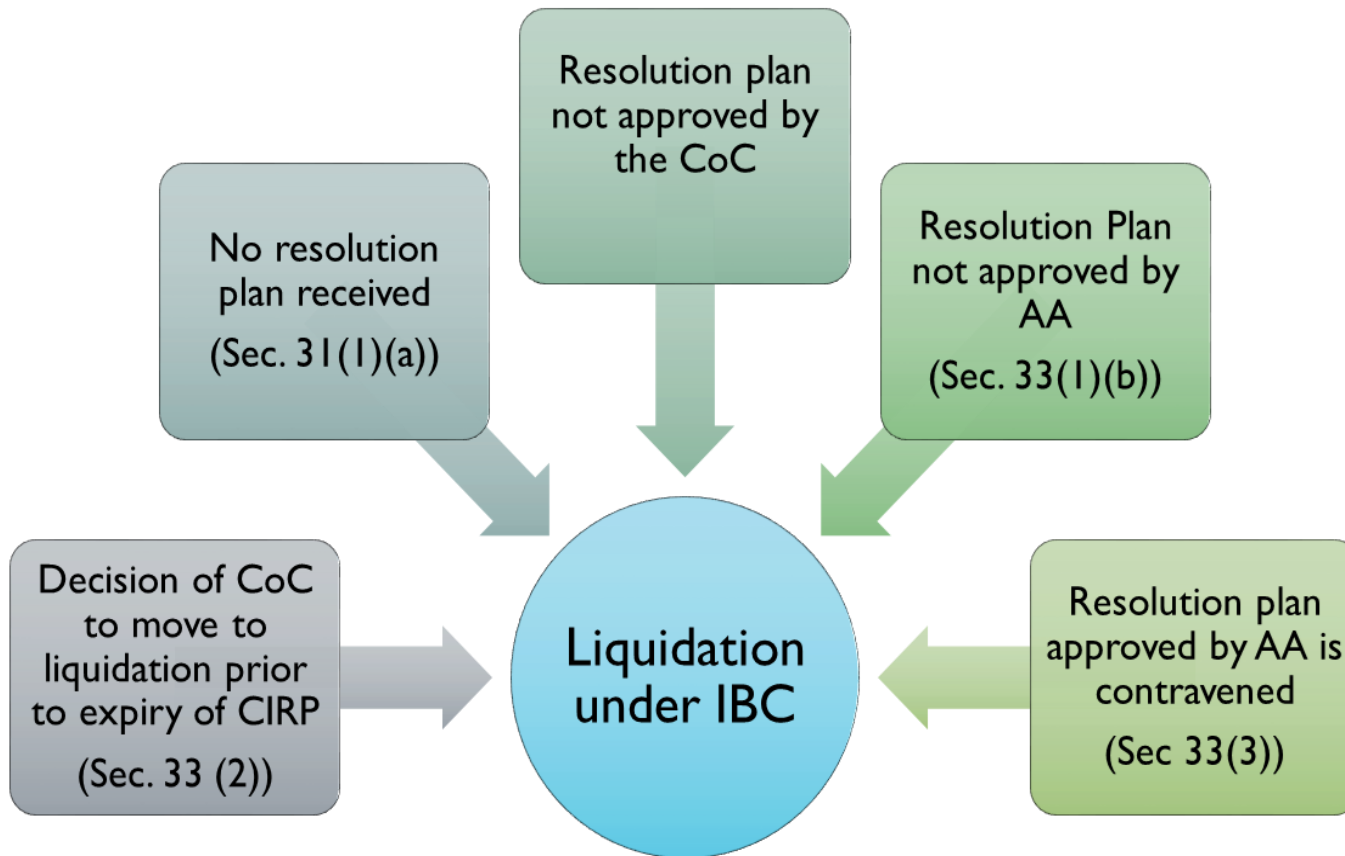
- Overview of Liquidation Process
- Important aspects of liquidation process
- Potential areas of discussion:
  - ❖ Collation and verification of claims
  - ❖ Secured creditor
  - ❖ Stakeholder Consultation Committee
  - ❖ Inter-se priority of creditors
  - ❖ Treatment of Workmen/Employees dues/benefit funds
  - ❖ Treatment of Avoidance transaction proceedings
  - ❖ Liquidation Cost
  - ❖ Concerns relating to VL matters
  - ❖ Others



# Overview of Liquidation Process

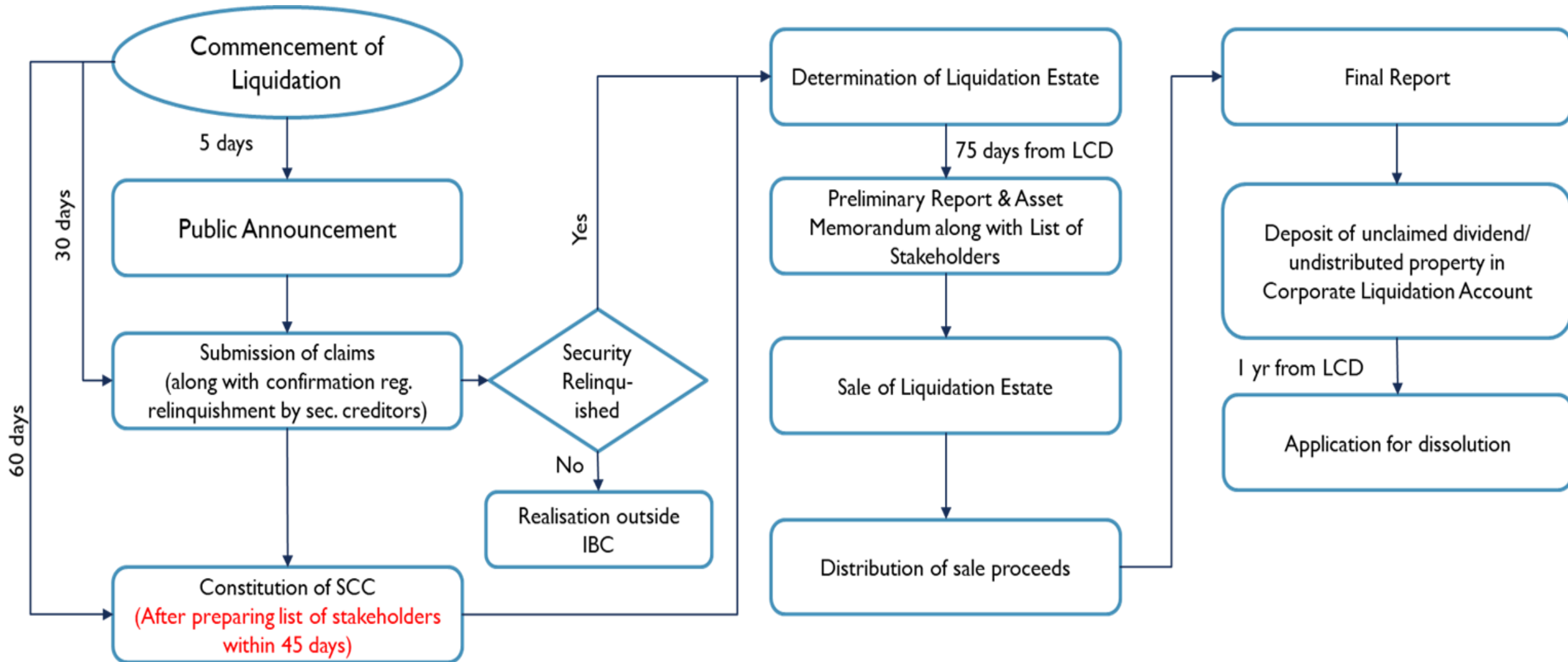


# What leads to liquidation?



- Liquidation process cannot be initiated directly (except voluntary liquidation)
  - Application for liquidation can only be made in the given circumstances
- Where application made upon decision of CoC to liquidate before CIRP expires
  - Such application must be made any time after constitution of CoC and before preparation of information memorandum
- In case of contravention of an approved resolution plan
  - The corporate debtor cannot file application for liquidation
  - Person who is prejudiced due to such contravention shall file the application

# Steps involved in liquidation process - summary



# Important 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

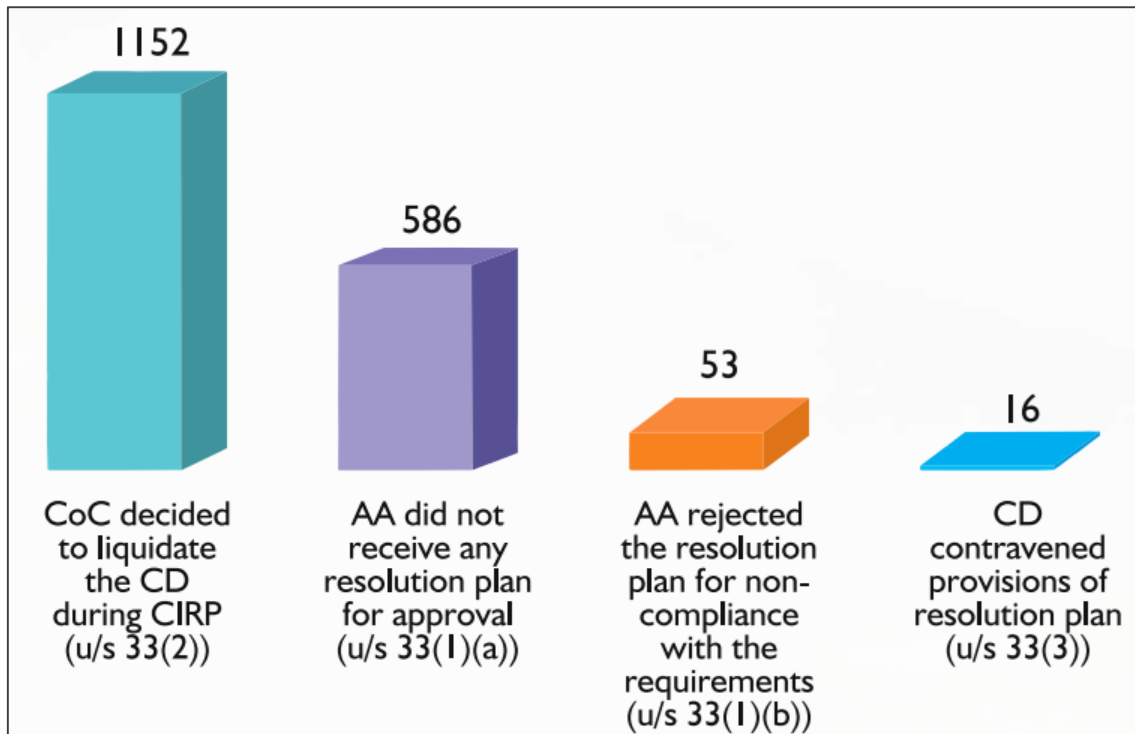
- A notional liquidation estate, consisting of all assets of the Company.
- Liquidator as the fiduciary
- Exceptions:
  - Third party assets
  - Financial service providers holding security collateral
  - Personal assets of shareholders & partners of CD
  - Assets of subsidiaries.

## Realization & Distribution

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



# Reasons for liquidation- Statistics

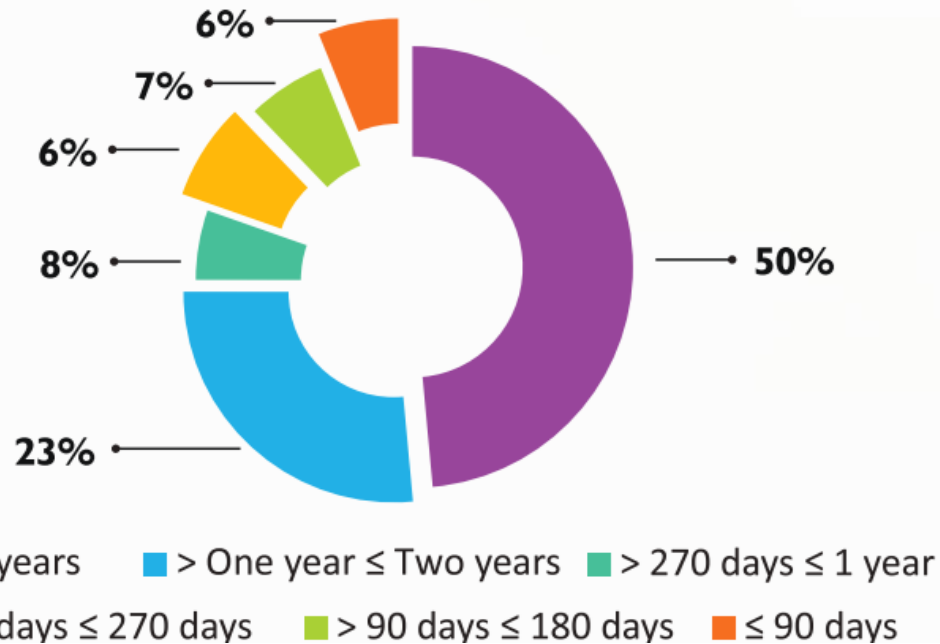


Reasons for liquidation (As on 30.09.2022)\*

- As on 30th September, 2022, 1807 orders for commencement of liquidation have been passed
- In almost 67% of the cases, liquidation was ordered on account of CoC deciding to liquidate the CD
- As on 30.09.2022, average time
  - From LCD to submission of final report under Liquidation - **715 days**
  - From LCD to order for dissolution under Liquidation - **906 days**
- Timelines under VL is also similarly unrushed
  - From LCD to submission of final report under VL - **338 days**
  - From LCD to order for dissolution under VL - **745 days**

# Long drawn liquidation & depletion in realization - Statistics

**Timeline of ongoing liquidation**



**Claims in liquidation process (As on 30.09.2022)**

Stakeholders under Section	Number of Claimants	Amount (in ₹ crore)			
		Admitted Claims	Liquidation Value	Sale Proceeds#	Distributed to Stakeholders
429 Liquidations where Final Report Submitted					
52	53	2074.30	290.48	345.11	334.28
53 (I) (a)	NA	NA	3284.13	2961.13#	175.22
53 (I) (b)	2705	69993.64			2630.86
53 (I) (c)	2823	83.05			9.07
53 (I) (d)	512	3775.17			45.84
53 (I) (e)	385	3816.78			20.78
53 (I) (f)	4859	4240.92			82.38
53 (I) (g)	0	0			0
53 (I) (h)	142	40.88			2.83
Total (A)	11479	84024.74			3574.61

\* Source: [IBBI Quarterly newsletter](#)

# Potential areas of discussion

01

Claim collation and verification

02

Clarity on and treatment of secured creditors

03

Inter-se rights and priorities of creditors

04

Treatment of employee benefit funds

05

Clarity on tax dues

06

Role of stakeholder consultation committee

07

Various aspects relating to avoidance proceedings

08

Multiplicity of litigation, consolidation, etc.

09

Declogging of NCLTs

10

Going concern sale & scheme of arrangements

11

voluntary liquidation process

12

Other aspects



# Claim collation and verification



# Delayed claims/non-receipt of claims

## Existing procedures

- Liquidator to make public announcement for submission of claim [Reg. 12]
- Liquidator to receive and collect the claims of the creditors within 30 days from the date of commencement of liquidation process [Sec. 38]
- Liquidator to verify the claim within 30 days from the last date of receipt of claim and may either accept or reject the same [Reg. 30]
- Liquidator to also verify the claim collated during CIRP but not submitted during liquidation, within 30 days from the last date for receipt of claim during liquidation process [Reg 30]
- Creditor may file an application before NCLT against decision of liquidator [Sec. 42]

## Practical difficulties and possible solutions

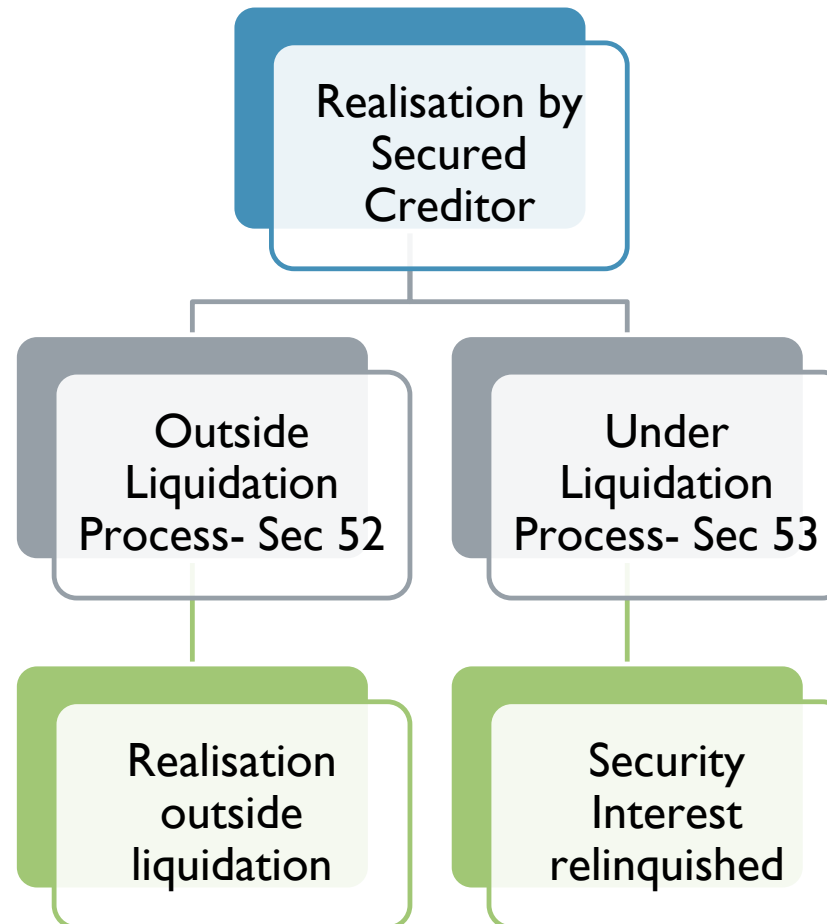
- No power on the liquidator to condone delay
  - Claimant has to approach NCLT
  - Can liquidator be empowered?
- Claims on account of income tax dues/other government dues/even operational creditors
  - usual instances of non-receipt of claims/delayed claims
  - should there be a deadline for acceptance of claims?
- Verification of claims of secured creditors
  - sec. 77 of Companies Act, 2013
- Clarification w.r.t. claim submitted during CIRP as well as during liquidation process
  - Claim at the commencement of CIRP will not be the same as that at the liquidation commencement date



# Secured creditors



# Decision of Secured Creditors- *Realisation vs. Relinquishment*



# Realisation outside Liquidation Process

## Regulation 21A

### Step 1

- Communication of decision within 30 days of LCD
- In Form C (Operational creditors) or Form D (Financial Creditors)

### Step 2

- **Proportional contribution towards Liq. Costs & workmen dues**
- Within 90 days of LCD

### Step 3

- Excess of realised amount over submitted claim to be submitted to liquidation estate
- Within 180 days of LCD

### Note

- Such assets cannot be sold to any person who is disqualified u/s 29A of the Code;
- Must be sold within 180 days of LCD

## Regulation 37

- The secured creditor must intimate the liquidator the realisable price at which he proposes to realise the asset.
- Within 21 days of such intimation, liquidator shall
  - Of a person willing to buy the asset before the expiry of 30 days of intimation; and
  - At a higher price than intimated by the secured creditor
  - Secured creditor shall sell the asset to such person; and bear the cost incurred by the liquidator for identification of such person



# Secured creditors - extent of priority and sharing with workmen

## Scenario:

- Bank Ltd. lent loan of Rs. 100 crores to CD Ltd., on the strength of a secured asset worth Rs. 125 crores.
- Value of secured asset was worth Rs. 80 crores on LCD
- Amount realised = Rs. 70 crores.
- Secured creditors claim = Rs. 100 crore
- Workmen claim for last 24 months = 40 crores

## Questions:

- To what extent is Bank Ltd. secured?
  - Is Bank Ltd. secured to the extent of Rs. 100 crores or 80 crores or 70 crores?
  - Can Bank Ltd. drop an asset worth Rs. 70 crores in the liquidation estate and claim Rs. 100 crores on priority, even from the unencumbered assets?
- What would be the workmen's portion if Bank Ltd. relinquishes the secured asset?
  - What if Bank Ltd. seeks to realise the secured asset?
- What happens to the deficit claim of secured creditors?
  - because of workmen portion
  - because of security deficit
- What happens to deficit claim of workmen?

# Determination of workmen share

- Can Bank Ltd. claim priority for entire Rs. 100 crores?
  - A secured creditor has only a right over the particular property offered to him as security and all the creditors have equal rights over the other properties comprising the estate of the person adjudged insolvent - *Jitendra Nath Singh v. Official Liquidator & Ors.*
  - ILC Report, 2020 [para 7.1 to 7.4]
    - provision intends to replicate the benefits of security even where it has been relinquished, in order to promote overall value maximisation
  - Sec. 110 and 123 (individual insolvency/bankruptcy provisions) - explicit segregation of the secured creditor's claim into a secured part and an unsecured part
  - At what point of time?
    - At the time loan was given? OR LCD? OR, final realisation?
- How would one determine workmen portion under sec. 53(b)?
  - Workmen held to be co-charges in several rulings in past. As such, the sale proceeds are required to be divided proportionately between them in the same proportion as their dues. Hence, when a sale takes place, it is for the simultaneous recovery of all claims of all pari passu charge-holders. See, *Maharashtra State Financial Corporation v. Ballarpur Industries Limited*, *International Coach Builders Limited v. Karnataka State Financial Corporation*
  - Proportion of claims to be taken as on LCD?

# Dealing with the deficit suffered by secured creditors

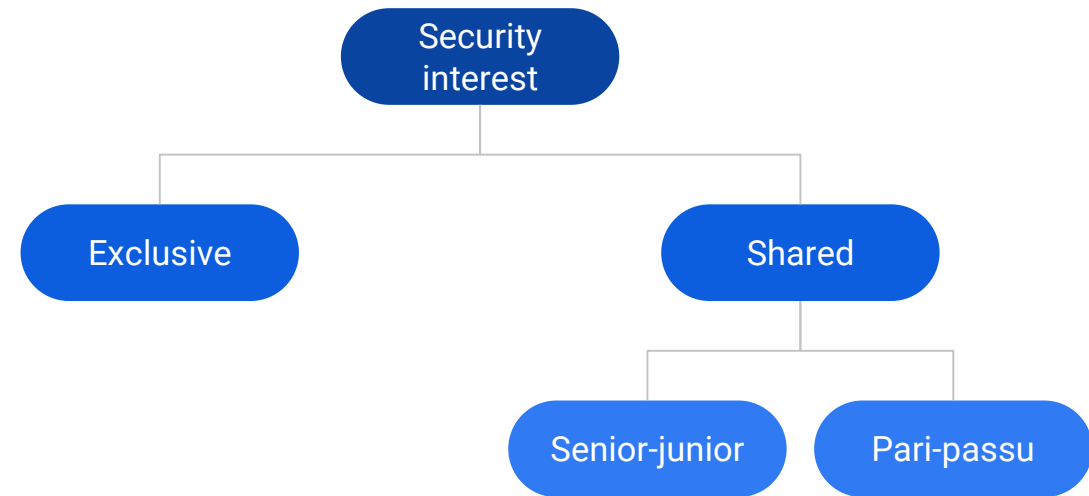
- What happens to the deficit suffered by Bank Ltd.?
  - For portion ceded in favour of workmen
  - For portion arising out of security deficit

Realisation	Security deficit (shortfall in realisation) - sec. 53(1)(e)
	Statutory compromise - ?
Relinquishment	Security deficit (shortfall in value of security) - no explicit provision - ?
	Statutory compromise - ?

- Statutory compromise in favour of workmen
  - Can one invoke the principles of erstwhile sec. 529A?
    - Overriding preferential payments to creditors realising security interest and ceding a part of realisation in favour of workmen
    - Unencumbered assets to be first used to pay off first priority creditors
- Security deficit
  - Does the secured creditor become 'unsecured' because of the fall in value of security?
  - Does it fall under sec. 53(1)(d) - financial debts owed to unsecured creditors?
  - Should it be treated at par with secured creditor who realises security interest and claims for the deficit under sec. 53(1)(e)?

# Inter-se priorities and rights of secured creditors

- Established precedents in *ICICI v. SIDCO Leathers*
- Differential security rights (senior, subordinated etc.) are a matter of mutual agreement between the creditors inter se, and with the debtor.
  - First ranking secured creditors to be paid off first.
  - Residual value, if any, shall be distributed to second or subsequent secured creditors, sequentially.
  - In case of exclusive security interest, the exclusive charge holders to the extent of such claim shall have the right.
- Diverse rulings under IBC
  - NCLAT in *Technology Development Board vs. Anil Goel*
    - Secured Creditors relinquishing the security interest to be treated as one class ranking equally for distribution u/s 53(1)(b)(ii). See also *Anil Kumar Anchalia v. Oriental Bank of Commerce*.
  - NCLAT in *JM Financial Asset Reconstruction Company Ltd. Vs. Finquest Financial Solutions Pvt. Ltd. & Ors.*
    - Right to realize security under Section 52 of IBC is restricted to a creditor that has an 'exclusive charge' or 'sole first charge'
- Interpretation of sec. 53(2)
  - Contractual arrangements between recipients with equal ranking, if disrupting the order of priority under sec. 53(1) shall be disregarded
  - **Does not deal with inter-se priorities between unequal secured creditors**



- Right of realisation in case of joint-financing /pari-passu charges
  - NCLAT ruling in *Srikanth Dwarakanth Liquidator of Surana Power Limited vs. BHEL*
    - If the secured creditors having 60% of the value in the secured debt decide to relinquish or realize the security interest, such decision shall be binding on the other pari-passu charge holders.
  - Also see NCLT order in *Alchemist Asset Reconstruction Company Limited v. Abhijeet MADC Nagpur Energy Pvt. Ltd.*
  - SARFAESI provision - sec. 13(9)

# Realisation by secured creditors and related aspects

LCD	T
Last day for intimation of decision	T+30
Last date for contribution of dues	T+90
Last date for payment of excess realisable value	T+180
Transfer of asset to the liquidation estate (assuming the creditor was unable to contribute or realise)	T+180

- Timelines for completion of liquidation
  - Liquidation has to be completed within 1 year of LCD
    - Need for seeking extension from NCLTs
  - Regulations may provide for a breather in such cases
- Estimation of realisable value
  - Contribution is to be made within T+90 days; however, sale may happen later. Question of estimation
    - As may be estimated by liquidator
    - Clarification required
- Estimation of costs
  - No guidance at present.
  - Possible solution: Akin to Reg. 39B of CIRP Regulation where the CoC makes a best estimate of the liquidation cost in consultation with the RP



# Workmen/Employee dues and welfare funds



# Treatment of workmen/employee benefit dues/funds

- “Workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013
  - All sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company.
- Whether the shortfall can be compensated from the liquidation estate beyond section 53?
  - Treatment of overdue interest on deficit contributions?
  - Treatment of penalties imposed by EPFO or otherwise under the provisions of PF Act?
- Treatment of voluntary funds
  - Created out of company policies and not statutory obligation
  - Whether it is possible to treat such voluntary funds as being held in ‘trust’ under sec.36(4) (a) (i)?
- Retrenchment compensation
  - Whether payable beyond the priorities under sec. 53?
- Pension fund, provident fund and gratuity fund dues cannot be recovered by section 53 of the Code. And in the event of any shortfall in the same, the liquidator shall ensure that the fund is made available. NCLT (PB) in *Alchemist Asset Reconstruction Co. Ltd v. Moser Baer India*
  - Upheld by NCLAT in *State Bank of India v. Moser Baer Karamchari Union & Anr.* Appeal pending before SC.
- If CD had not created a fund for PF & Gratuity, then the liquidator is not under any obligation to provide for the same. *Savan Godiwala v. Apalla Siva Kumar*. See also, Asset Reconstruction Company (India) Limited vs. Precision Fasteners Ltd. [NCLAT]
- EPF dues have to be paid in full calculated till the Insolvency Commencement Date (“**ICD**”), along with any damages and interest as levied as per the provisions of the EPF Act, since they do not form part of the assets of the Corporate Debtor by virtue of Section 18 and Section 36 of the Code [NCLAT in *Tourism Finance Corporation of India Pvt. Ltd. v. Rainbow Papers Ltd & Ors*],
- Even if the approved resolution plan does not provide for payment of unpaid provident fund and gratuity to the workmen and the employees, the same has to be paid by the successful Resolution applicant. NCLAT in *Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia & Ors.*



# Tax Dues





# Priority of Tax Dues vis-a-vis secured creditors

- 'Secured creditor' defined u/s 3(30) as creditor in favour of whom security interest is created
- In case of priority of secured creditors over tax dues
  - SC has upheld the precedence of secured creditor dues over tax dues
  - In Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs, SC held that IBC has an overriding effect on Customs Act (which too, creates statutory charge in favour of customs authorities)
  - Also, Andhra Pradesh HC in Leo Edibles and Fats Limited v. the Tax Recovery Officer clearly ruled that income tax authorities cannot be equated to secured creditors, and thus cannot claim priority
- Somewhat contradictory ruling came in State tax Officer v. Rainbow papers Limited
  - by virtue of the 'security interest' created in favour of the Government under GVAT, the State is a 'secured creditor' as per the definition in IBC
  - as workmen's dues are treated pari passu with secured creditors' dues, so should the debts owed to the State be put at the same pedestal as the debts owed to workmen under the scheme of section 53(1)(b)(ii)

# Treatment of tax dues under IBC and various rulings so far

## ■ **Overriding effect on IT Act-**

- Pursuant to Section 238 of IBC, provisions of IBC are regarded as a complete code in itself and would have an overriding effect over other legislations

- Supreme Court in case of Monnet Ispat also laid down that IBC shall override anything inconsistent contained in any other enactment, including Income tax act

Applicability of the moratorium period extends to the income tax proceedings

## ■ **Right of Income tax department to claim preferential treatment in the event of liquidation**

- Section 178(6) provides that a liquidator of a company under IBC is not required to set aside assets for payment of outstanding tax dues
- No provision in IBC that gives a right to the department to claim preferential treatment
- In the case of Leo Edibles and Fats, Hyderabad, High Court upheld that income tax department cannot claim any priority only because the order of attachment issued by it was prior to the initiation of liquidation proceedings under the code

# Treatment of tax dues under IBC and various rulings so far

- ❑ Set off and carry forward of losses u/s 79 of IT Act in case of change in shareholding
  - ❑ Whether benefit should extend to GCS under liquidation?
- ❑ Provisions of MAT u/s 115JB
  - ❑ Whether benefit should extend to GCS under liquidation?
- ❑ Treatment of income tax refund pertaining to the period after commencement of liquidation
  - ❑ If adjusted u/s 250 of IT Act, will become a priority claim
  - ❑ Whether moratorium extends to the Income tax refund pending clearance as well?
- ❑ Taxability on write back of loans
  - ❑ Whether write back of loan will be taxable? Clarity required
- ❑ Overriding effect of IBC

## Points to note-

- Not applicable to a Company in which public is substantially interested [Defined in sec 2 (18) of IT Act]
- Sec 79 (2) has allowed the benefit of carry forward losses where such change in shareholding takes place pursuant to a resolution plan,
  - Whether these exemptions will be applicable in case of GCS as well ?
  - *in Gaurav Jain v. Sanjay Gupta, Liquidator of Topworth Pipes & Tubes Pvt Ltd. and Nitin Jain Liquidator of PSL Limited v. Lucky Holdings Private Limited* , the NCLTs have passed orders for carrying the benefit of set off to the buyer, however, the same is subject to the provisions of the Income Tax Act and the powers of the income tax authorities.



# Stakeholder consultation committee - constitution and role



# Stakeholders Consultation Committee in Liquidation Process

- SCCs have become a part of the liquidation process since the 2019 amendments
- Even if the Covid period was a temporary break, it was necessary to have evaluated the present working of the SCCs in existing liquidations:
  - Important distinction between CoCs and SCCs
    - CoCs are mainly comprised of banks/ARCs; people who have been in resolution business
    - These are the creditors whose claims are large, and they can easily correlate their recoveries with the resolution process
    - Mostly, they are first-ranking creditors
  - SCC members come from diverse priority levels; mostly, will have very little chance of any recovery
  - They will mostly have no prior experience of resolution process

## Questions:

- Decision-making is directly related to incentives of the decision; will a creditor (operational creditor, government claims, employees), with very little chance of any realisation, make meaningful contribution to the decision-making process?
- Is SCC a decision-making body, or advisory body?
- Creditors lose their last chance to be masters of the process by not agreeing to resolution; are they still properly considered master of the process?
- Incentives of SCC members at different priority levels may not be aligned
  - Note that it includes promoters without voting rights and shareholders too

# Constitution of Stakeholders Consultation Committees

- Some parts of Reg 3 I A as it stands after amendment easy to understand; however, the whole process of constitution of the SCC seeks quite difficult to understand; may be even more difficult to implement
- Clear part:
  - Until SCC is constituted, CoC will continue
  - first meeting is to be called within 7 days - hence, obviously, it is the meeting of the CoC members now on SCC
- However, within 60 days of LCD, liquidator needs to constitute a proper SCC
  - reg 3 I A (1) says: “comprising of all creditors of the corporate debtor”
  - While there is a provision for appointment of representatives, it seems all the creditors are a part of the SCC
- Amended regulation neither talks about the size of the SCC, nor the number of representatives from each class of creditors
- Classes: 3 I A (3)
  - Financial creditors
    - How can financial creditors have just one class? There are secured and unsecured creditors, retail creditors such as debentureholders, etc
  - workmen
  - employees
  - government departments
  - other operational creditors
  - shareholders/ partners - no voting share
- These representatives, in turn, are to be appointed by the respective classes: “liquidator may facilitate”
  - practically, there is no other way the stakeholders in a class know each other - therefore, the liquidator shall have to
  - This seems like a complete election process for each class, virtually unmanageable

# Scope of SCC powers: have we moved from consultation to compulsion?

- Reg 31A (1) confers consultation powers to SCC:
  - Remuneration of professionals - even advocates engaged for litigation are professionals
  - sale of assets - manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process
    - These are core liquidator functions. If all these are driven by SCC, basic question on what is the professional doing?
  - Fees of the liquidator:
    - This is to be read with reg 4 (1A) - the liquidator's fees are to be fixed by the SCC
    - Question - will a liquidator take up the job with no clarity on his fee?
  - Valuations
  - Vulnerable transaction proceedings be continued after close of liquidation, and the manner of distribution of proceeds
- Decision-making at the SCC:
  - Voting share shall be in proportion to the claim
  - irrespective of priority
- 31 (4A) provides that the representative of a class has voting rights of the “stakeholders it represents”, meaning the whole class
  - This is conflicting with sub-reg (2), which is talking about the stake of the voting member
  - It cannot be that a class has both a class representative as well as individual member
- in case of shareholders, this will exclude the voting share of the promoters/directors
- If a class representative is voting on the strength of the whole class, does he consult the constituents of the class as well?



# Avoidance proceedings





# Treatment of avoidance proceedings

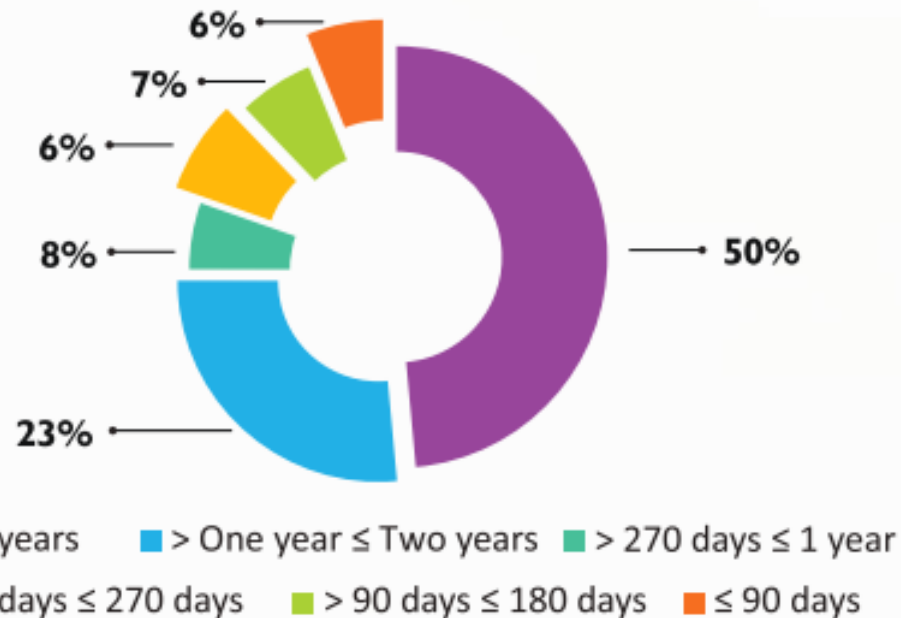
- Look-back period
  - Preferential transactions [sec. 43], Undervalued transactions [sec. 45]: 1 year (for unrelated parties), 2 years (for related parties) from insolvency commencement date
    - ILC recommendation [2022] - Threshold date to be changed to initiation of CIRP process.
  - No look-back for transactions defrauding creditors [sec. 49], Fraudulent trading [sec. 66]
    - Fraud a nullity forever.
- In case of undervalued transactions, current provisions only includes transactions where -
  - CD makes a gift or enters into a transaction which involves the transfer of assets by the CD for a consideration significantly less than the value of the consideration provided by the CD and such transaction has not taken place in the ordinary course of business of the CD
    - Therefore, the scope of undervalued transactions may be widened
    - to add series of transactions, arrangements or schemes which have the effect of diverting the property, assets or business of the CD, or
    - eroding the value thereof, or shifting any profits, property or assets which, in absence of such scheme or arrangement, would have belonged to the CD
- Treatment of avoidance proceedings post dissolution
  - Section 26 contains provisions pertaining to CIRP
    - *“The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process.”*
- Various amendments in Liquidation Regulations
  - Reg 44: Liquidator to conclude the liquidation process within 1 year from LCD notwithstanding pendency of avoidance transaction proceedings before AA;
  - Reg. 44A: Liquidator to mention in the application to be filed u/r 45 the manner in which application for avoidance transaction or fraudulent transaction will be pursued after the dissolution or closure of liquidation process and the manner in which the proceeds, if any, from such proceedings shall be distributed.
    - Various aspects, particularly who bears the cost? whether the liquidator continues and at what fee?
    - Need for broadening sec. 26 to liquidation process as well.?



# Adjudicating authority and legal proceedings



# Declogging of NCLTs



Timeline: Ongoing liquidation (As on 30.09.2022)\*

Average time for order of liquidation:

■ As on 30.09.2022

- it took an average of 715 days from LCD to submission of final report under Liquidation
- it took an average of 906 days from LCD to order for dissolution under Liquidation

Areas where NCLTs involvement may be reduced/minimised:

- Non-adjudicative matter to not go before the Bench
  - may be passed on to either IPAs or IBBI, with a power to refer matters to NCLTs
- Voluntary liquidation may be taken completely off the NCLTs
- Matters like extension of time, modification of claims, etc. may be taken off NCLTs
- Operational creditors' claims beyond a certain timeline may be disallowed
- Explicit power to penalise frivolous applicants

\* Source IBBI Quarterly newsletter

# Moratorium, Consolidation of litigation

- Section 33(5):

- *“(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:”*
- does not include the word ‘continued’, which apparently implies that suits or proceedings that were instituted prior to the insolvency commencement date may be continued during the liquidation proceeding
- Notes to Clauses of the Bill stated that, “The liquidation order shall result in a moratorium on the *initiation or continuation* of any suit or legal proceeding by or against the corporate debtor.”
  - Similar stipulations under sec. 446 of the Companies Act, 1956
- May possibly be a drafting glitch; amendment may be needed

- Sec 60(5) provides for a non-obstante clause according to which-

- NCLT shall have jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate Person

- Even upon initiation of resolution/liquidation

- various forums deal with the applications by or against the CD
- Even Industrial Tribunal and other forums like labour courts, are dealing with workmen’s claims related issues during liquidation
- See LML Ltd. vs. State of U.P

- Therefore, once insolvency initiates all proceedings should be consolidated at one forum

- Sec 446(3) of earlier Companies Act & sec 279 of present companies Act also provides for same



# Scheme of arrangement, GCS, Voluntary Liquidation



# Need for schemes of arrangement?

- Code does not provide for scheme of arrangement
    - Reg. 2B of the liquidation reg. provides for the same
      - a timeline of 90 days is provided for completion of the process
  - As on 30.09.2022, just 8 liquidation processes were closed by compromise/arrangement
    - which took an average 466 days for completion and the liquidator has realised only 87% of the liquidation value
  - Since CIRP is nothing but an attempt to revive the CD
    - Further, there are possibilities of GCS during liquidation
    - Therefore, IBC would be better off without schemes of arrangement
  - Supreme Court too, in *Arun Kumar Jagatramka v. Jindal Steel and Power Ltd.*, refused to comment on the “merits” of such schemes
- ILC Report, 2020
    - Section 230 of the Companies Act, 2013 is not aligned with the liquidation process of the Code - 2 processes incompatible
    - However, an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code
  - IBBI Discussion Paper in 14th June, 2022 observed
    - the process under section 230, in majority of the cases where it is explored, is continued beyond the specified period of 90 days
    - and the Tribunal interpret this timeline as only directory in nature
    - Such delay has a cascading effect on the timely conclusion of liquidation process as the liquidator cannot proceed with the auction of assets of the CD when the process under section 230 is underway
  - Our detailed article - “An Odd Scheme: Case for exclusion of schemes of arrangement from scheme of liquidation” can be read [here](#)

# Going concern sale

- Code does not provide for going concern sale
  - Reg. 32A of the liquidation Regulations provides for the same
- In case of going concern sale, there will be no need for dissolution of the company in terms of sec 54
  - reg. 45(3) provides for making application for 'closure' of liquidation process where the CD was sold as going concern, and an application for dissolution in other cases
- Sec 54 may be amended to provide that
  - in case of going concern sale, instead of filing of dissolution application, liquidator may file a completion application
    - thereby consolidating the manner of realisation of assets and distribution thereof and
    - matters connected to the going concern sale that may require specific directions from NCLT for the smooth transitioning of the CD to the acquirer

# Voluntary liquidation process

- ❑ Section 59 of IBC read with VL Regulations
- ❑ Pre- conditions-
  - ❑ Solvency of the CP
  - ❑ no default is subsisting on the date of the entity proposing voluntary liquidation
  - ❑ CP should not be liquidated to defraud any person
- ❑ Reports to be filed by liquidator
  - ❑ Preliminary report
  - ❑ Annual status report
  - ❑ Minutes of consultation with stakeholders; and
  - ❑ Final Report
- ❑ Dissolution of CD-
  - ❑ Realisation of assets and distribution of realised proceed in terms of sec 53
  - ❑ Closure of Liquidation account
- ❑ Termination of VL Process

## Concerns-

- ❑ What will be the fate of subsidiary whose parent company has filed for voluntary liquidation?
- ❑ What will be the fate of corporate guarantee provided by the corporate person which is under voluntary liquidation?
- ❑ DoS should be accompanied by audited accounts as on the LCD
- ❑ Given VL process is opted by a solvent company, liquidator should be given right to adjudicate claim received even after the last date of submission of claim till the date of filing of dissolution application





Other areas/practical concerns



# Other areas

- Early dissolution
  - presently, allowed under reg. 14 of Liquidation Regs.
    - the realizable properties of the corporate debtor are insufficient to cover the cost of the liquidation process; and the affairs of the corporate debtor do not require any further investigation
- Stock exchange compliances by a company in liquidation
  - necessary sensitisation/policies in place to avoid adverse actions against CDs which are promoters
- Compliances under Takeover Code
  - for a buyer of shares comprising part of liquidation estate
- Stamp duty on sale of assets
  - need for explicit provision to allow actual sale values to be taken as values for the purpose of stamp duty levy
- Liquidator fee
  - Should it also have a performance-linked component?
- Any other?

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