

SUPPLEMENTARY

INSOLVENCY AND BANKRUPTCY CODE, 2016





Introduction

Corporate Insolvency Resolution Process

Liquidation of a Corporate Person

INTRODUCTION

The Insolvency and Bankruptcy Code passed by the Parliament is a welcome overhaul of the existing framework dealing with insolvency of corporate, individuals, partnerships and other entities. It paves the way for much needed reforms while focussing on creditor driven insolvency resolution.

There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The erstwhile legislative frame work comprised of:

- (a) Chapter XIX and Chapter XX of Companies Act, 2013
- (b) Part VIA, Part VII and Section 391 of Companies Act, 1956
- (c) RDBFI Act, 1993
- (d) SARFAESI Act, 2002
- (e) SICA Act, 1985
- (f) The Presidency Towns Insolvency Act, 1909
- (g) The Provincial Insolvency Act, 1920
- (h) Chapter XIII of LLP Act, 2008

This legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system. Recognising that reforms in the bankruptcy and insolvency regime are critical for improving the business environment and alleviating distressed credit markets, the Government introduced the Insolvency and Bankruptcy Code Bill in November 2015, drafted by a specially constituted 'Bankruptcy Law Reforms Committee' (BLRC) under the Ministry of Finance. After a public consultation process and recommendations from a joint committee of Parliament, both houses of Parliament have passed the Insolvency and Bankruptcy Code, 2016.

Insolvency and Bankruptcy Code, 2016

The old and archaic provisions to deal with sickness arising out of financial difficulties are being replaced by Insolvency and Bankruptcy Code, 2016.

As per preamble to the Code, the purpose of this Act is as follows —

- Consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals
- In a time bound manner
- For maximisation of value of assets of such persons
- To promote entrepreneurship
- Availability of credit

- Balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues
- Establish an Insolvency and Bankruptcy Board of India

The Insolvency and Bankruptcy Code, 2016 applies to whole of India. However, Part III of the code, which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership, shall not extend to the State of Jammu and Kashmir.

Applicability of Insolvency and Bankruptcy Code, 2016

The provisions of Insolvency and Bankruptcy Code, 2016 applies to the following, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be (Section 2 of Insolvency and Bankruptcy Code, 2016).

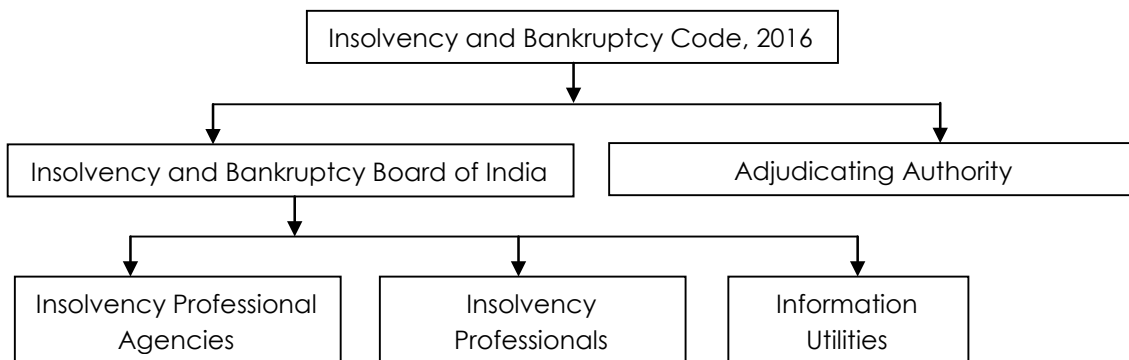
- (a) Companies incorporated under Companies Act
- (b) Companies governed under special Act (so far as of Insolvency and Bankruptcy Code, 2016 is consistent with those special Acts i.e. provisions of Special Act will prevail over of Insolvency and Bankruptcy Code, 2016)
- (c) Limited Liability Partnership (LLP)
- (d) Other body corporates as may be notified by Central Government
- (e) Partnership firms and individuals.

Code not applicable to financial service providers - The Insolvency and Bankruptcy Code is not applicable to corporates in finance sector. Section 3(7) of Insolvency and Bankruptcy Code, 2016 states that "Corporate person" shall not include any financial service provider. Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

The Regulatory Mechanism and Regulatory Bodies

The regulatory mechanism as per The Insolvency and Bankruptcy Code, 2016 would be based on the following five pillars:

- Insolvency and Bankruptcy Board of India
- Adjudicating Authority
- Insolvency Professional Agencies
- Insolvency Professionals
- Information Utilities





Insolvency and Bankruptcy Board of India

An Insolvency and Bankruptcy Board of India (IABBI) will be established by Central Government under Section 188(1) of Insolvency and Bankruptcy Code, 2016.

“Board” means the Insolvency and Bankruptcy Board of India established under sub-Section (1) of Section 188 - Section 3(1) of Insolvency and Bankruptcy Code, 2016.

The Board will have powers of civil court in respect of issuing summons, discovery and production of books, inspection of books/ registers and issue of commissions for examination of witnesses -Section 196(2) of Insolvency and Bankruptcy Code, 2016.

Constitution of Board has been specified in Section 189 of Insolvency and Bankruptcy Code, 2016. The Board will be headed by Chairperson. It will consist of ten members out of which at least three will be whole-time members.

Function of the Board is to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities. Some of the main functions of the Board are enumerated as follows:

- (a) register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;
- (b) specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities;
- (c) levy fee or other charges for the registration of insolvency professional agencies, insolvency professionals and information utilities;
- (d) specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities;
- (e) lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;
- (f) carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder;
- (g) monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder;
- (h) call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities;
- (i) publish such information, data, research studies and other information as may be specified by regulations;
- (j) specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data;
- (k) collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases;
- (l) constitute such committees as may be required including in particular the committees laid down in Section 197;
- (m) promote transparency and best practices in its governance;
- (n) maintain websites and such other universally accessible repositories of electronic information as may be necessary;

- (o) enter into memorandum of understanding with any other statutory authorities;
- (p) issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities;
- (q) specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder;
- (r) conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board;
- (s) specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations;
- (t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and
- (u) perform such other functions as may be prescribed.

Adjudicating Authority

National Company Law Tribunal (NCLT) constituted under Section 408 of Companies Act, 2013 is the Adjudicating Authority for purpose of insolvency resolution and liquidation for corporate persons - Section 5(1) read with Section 69(1) of Insolvency and Bankruptcy Code, 2016. National Company Law Appellate Tribunal (NCLAT) is the appellate authority over decisions of NCLT - Section 61 of Insolvency and Bankruptcy Code, 2016.

Debt Recovery Tribunal (DRT) will be adjudicating authority for individuals and firms - Section 179(1) of Insolvency and Bankruptcy Code, 2016. Powers of Adjudicating Authority are specified in Section 179(2) of Insolvency and Bankruptcy Code, 2016. DRAT (Debt Recovery Appellate Tribunal) will be appellate authority - Section 181 of Insolvency and Bankruptcy Code, 2016.

Appeal against order of NCLAT and DRAT can be filed to Supreme Court on question of law arising out of such order, within 45 days.

Insolvency Professional Agencies

Work relating to insolvency resolution is expected to be handled by 'Insolvency Professionals'. These professionals are required to be registered with 'Insolvency Professional Agency'.

"Insolvency Professional Agency" means any person registered with the Board under Section 201 of Insolvency and Bankruptcy Code, 2016 as an insolvency professional agency - Section 3(20) of Insolvency and Bankruptcy Code, 2016.

The Insolvency Professional Agencies will develop professional standards, code of ethics and be first level regulator for insolvency professional members. This will lead to development of a competitive industry for such professionals.

Insolvency Professionals

The Insolvency and Bankruptcy Code, 2016 envisages a very big role for insolvency professionals. It is envisaged that most of work relating to insolvency and bankruptcy will be handled by insolvency professionals.



“Insolvency Professional” means a person enrolled under Section 206 of Insolvency and Bankruptcy Code, 2016 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207 of Insolvency and Bankruptcy Code, 2016 - Section 3(19) of Insolvency and Bankruptcy Code, 2016. Thus, insolvency professional can be only an individual.

Disciplinary action against insolvency professional agency and insolvency professional can be initiated by Board as per provisions of Sections 217 to 220 of Insolvency and Bankruptcy Code, 2016.

Information Utilities

The Insolvency and Bankruptcy professionals are expected to function on basis of financial information available electronically. Information Utility will collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.

“Information utility” means a person who is registered with the ‘Insolvency and Bankruptcy Board of India’ (Board) as an information utility under Section 210 of Insolvency and Bankruptcy Code, 2016 - Section 3(21) of Insolvency and Bankruptcy Code, 2016. They will have to be registered with Board - Section 209 of Insolvency and Bankruptcy Code, 2016.

The information utility shall provide services as may be specified by Board. It will also provide core services to any person if such person complies with terms and conditions as may be specified in regulations - Section 213 of Insolvency and Bankruptcy Code, 2016.

“Core services” means services rendered by an information utility for –

- (a) accepting electronic submission of financial information in such form and manner as may be specified
- (b) safe and accurate recording of financial information
- (c) authenticating and verifying the financial information submitted by a person; and
- (d) providing access to information stored with the information utility to persons as may be specified - Section 3(9) of Insolvency and Bankruptcy Code, 2016.

CORPORATE INSOLVENCY RESOLUTION PROCESS

Part II of Insolvency and Bankruptcy Code, 2016 [Sections 4 to 77] deal with Insolvency Resolution and liquidation of corporate persons. This part is divided into seven chapters pertaining to:

- (i) Corporate Insolvency Resolution Process [Section 4 – 32]
- (ii) Liquidation Process [Section 33 – 54]
- (iii) Fast Track Corporate Insolvency Resolution Process [Section 55 – 58]
- (iv) Voluntary Liquidation of Corporate Persons [Section 59]
- (v) Adjudicating Authority for Corporate Persons [Section 60 – 67]
- (vi) Offences and Penalties [Section 68 – 77]

We would be learning about Corporate Insolvency Resolution Process and Liquidation process [Section 4 – 54] of this Code. To start with, let us understand a few definitions:

Definitions [Section 3 and 5]

- (1) **Corporate Person** means
 - (a) a company as defined under Section 2(20) of the Companies Act, 2013;
 - (b) a Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008; or,
 - (c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. [Section 3(7)]
- (2) **Corporate Debtor** means a corporate person who owes a debt to any person. [Section 3(8)]
- (3) **Creditor** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. [Section 3(10)]
- (4) **Debt** means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. [Section 3(11)]
- (5) **Claim** means a right to payment or right to remedy for breach of contract if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. [Section 3(6)]
- (6) **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. [Section 3(12)]
- (7) **Financial information**, in relation to a person, means one or more of the following categories of information, namely:—
 - (a) records of the debt of the person;
 - (b) records of liabilities when the person is solvent;
 - (c) records of assets of person over which security interest has been created;
 - (d) records, if any, of instances of default by the person against any debt;
 - (e) records of the balance sheet and cash-flow statements of the person; and
 - (f) such other information as may be specified. [Section 3(13)]
- (8) **Financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. [Section 5(7)]
- (9) **Financial debt** [Section 5(8)] means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—
 - (a) money borrowed against the payment of interest;
 - (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
 - (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
 - (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
 - (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
 - (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;



- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;
- (10) **Operational debt** means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
- (11) A **person** includes:-
- an individual
 - a Hindu Undivided Family
 - a company
 - a trust
 - a partnership
 - A limited liability partnership, and
 - any other entity established under a Statute.
- And includes a person resident outside India [Section 3(23)]
- (12) **Secured creditor** means a creditor in favour of whom security interest is created; [Section 3(30)]
- (13) **Security Interest** means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. [Section 3(31)]
- (14) A **transaction** includes an agreement or arrangement in writing for transfer of assets, or funds, goods or services, from or to the corporate debtor. [Section 3(33)]
- (15) **Transfer** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. In case of property- transfer of property means transfer of any property. [Section 3(34)]
- (16) **Transfer of property** means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property; [Section 3(35)]
- (17) **Adjudicating Authority**, for the purposes of this Part II (Insolvency Resolution and Liquidation for corporate persons), means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013. [Section 5(1)]
- (18) **Corporate applicant** means—
- (a) corporate debtor; or
 - (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

- (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
 - (d) a person who has the control and supervision over the financial affairs of the corporate debtor; [Section 5(5)]
- (19) **Dispute** includes a suit or arbitration proceedings relating to—
- (a) the existence of the amount of debt;
 - (b) the quality of goods or service; or
 - (c) the breach of a representation or warranty; [Section 5(6)]
- (19) **Financial position**, in relation to any person, means the financial information of a person as on a certain date; [Section 5(9)]
- (20) **Initiation date** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process; [Section 5(11)]
- (21) **Insolvency commencement date** means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10, as the case may be; [Section 5(12)]
- (22) **Insolvency resolution process period** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day; [Section 5(14)]
- (23) **Liquidation commencement date** means the date on which proceedings for liquidation commence in accordance with Section 33 or Section 59, as the case may be; [Section 5(17)]
- (24) **Operational creditor** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; [Section 5(20)]
- (25) **Related party**, in relation to a corporate debtor, means—
- (a) a director or partner or a relative of a director or partner of the corporate debtor
 - (b) a key managerial personnel or a relative of a key managerial personnel of the corporate debtor;
 - (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
 - (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent, of its share capital;
 - (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent, of its paid-up share capital;
 - (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
 - (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
 - (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
 - (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

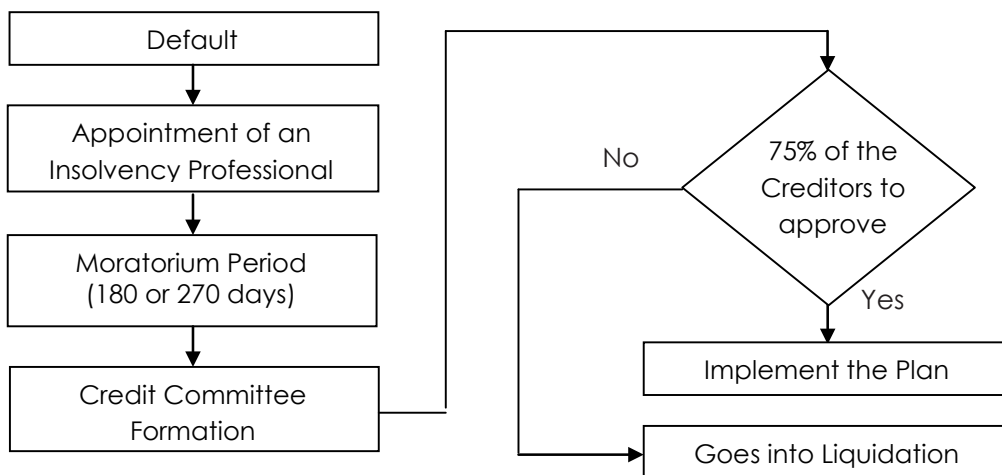
- (j) any person who controls more than twenty per cent, of voting rights in the corporate debtor on account of ownership or a voting agreement;
 - (k) any person in whom the corporate debtor controls more than twenty per cent, of voting rights on account of ownership or a voting agreement;
 - (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
 - (m) any person who is associated with the corporate debtor on account of—
 - (i) participation in policy making processes of the corporate debtor; or
 - (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person; [Section 5(24)]
- (26) **Resolution plan** means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; [Section 5(26)]
- (27) **Resolution professional**, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; [Section 5(27)]
- (28) **Voting Share** means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

Initiation of corporate insolvency resolution process

Corporate insolvency resolution process can be commenced when a corporate debtor commits a default - Section 4(1) of Insolvency and Bankruptcy Code, 2016.

The default should be minimum Rupees one lakh. The amount can be increased by Central Government but shall not exceed Rupees one crore - proviso to Section 4(1) of Insolvency and Bankruptcy Code, 2016.

The resolution process and timeline can be diagrammatically represented as:



Meaning of Corporate Person

Corporate person means company or LLP or other body corporate with limited liability. However, the Code completely excludes financial service providers. The reason is that they are regulated by specialized agencies. Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

Who can initiate insolvency resolution process

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided - Section 6 of Insolvency and Bankruptcy Code, 2016.

Persons who are not entitled to initiate insolvency resolution process

The Code states that a corporate debtor (which includes a corporate applicant in respect of such corporate debtor) shall not be entitled to make an application to initiate corporate insolvency resolution process [Section 11 of Insolvency and Bankruptcy Code, 2016] in the following cases:

- (a) when undergoing a corporate insolvency resolution process; or
- (b) having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (c) or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) in respect of him a liquidation order has been made.

Thus, application to initiate insolvency resolution process cannot be filed within 12 months or if there were violation of conditions or where order of liquidation has been made.

Process of initiation by Financial Creditor

A financial creditor can initiate action himself or jointly with other financial creditors against a corporate debtor when a default occurs. The default can be in respect of any other financial creditor also - Section 7(1) of Insolvency and Bankruptcy Code, 2016.

Application shall be made in prescribed form with fees. Application should give details of record of default and name of resolution professional proposed to be appointed as interim resolution professional - Section 7(3) of Insolvency and Bankruptcy Code, 2016.

Adjudicating Authority (NCLT) shall ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

Rejection of application - Adjudicating Authority may reject the application by issuing order, if it is satisfied that - (a) default has not occurred or (b) the application under sub-Section (2) is incomplete or (c) any disciplinary proceeding is pending against the proposed resolution professional- Section 7(5) (b) of Insolvency and Bankruptcy Code, 2016.

Before rejecting application, opportunity will be given to applicant to rectify the defects within seven days. If defects are not rectified, application will be rejected by Adjudicating Authority and intimation sent to the financial creditor.

Admission of application - If Adjudicating Authority is satisfied that default has occurred, it will admit application - Section 7(5)(a) of Insolvency and Bankruptcy Code, 2016. Order of admission will be sent to financial creditor and corporate debtor - Section 7(7)(a) of Insolvency and Bankruptcy Code, 2016.



Commencement of corporate insolvency resolution process initiated by a financial creditor – The corporate insolvency resolution process shall commence from the date of admission of the application under Section 7(5) - Section 7(6) of Insolvency and Bankruptcy Code, 2016.

Initiation of Insolvency resolution by operational creditor

Operational creditor means creditor in respect of goods and services. Process of insolvency resolution can be initiated by operational creditor on the occurrence of default, by delivering demand notice or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor.

The operational creditor is required to deliver demand notice of unpaid operational debtor copy of invoice to corporate debtor in prescribed manner - Section 8(1) of Insolvency and Bankruptcy Code, 2016.

“Demand notice” means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred - Explanation to Section 8(2) of Insolvency and Bankruptcy Code, 2016.

Action to be taken by corporate debtor on receipt of demand notice

The corporate debtor is required to reply within ten days of receipt of copy of invoice. If he had repaid the unpaid operational debt, he will inform details of electronic transfer or encashment of cheque issued by corporate debtor to operational creditor - Section 8(2)(b) of Insolvency and Bankruptcy Code, 2016.

Inform existence of dispute - If there is existence of dispute, the same shall be informed and record of pendency of suit or arbitration proceedings, if any.

Since the word used in definition of ‘dispute’ as per Section 5(6) is ‘includes’, the dispute can be on any ground. It is not necessary that suit or arbitration proceeding should be pending.

Further action by operational creditor

If no reply is received from within ten days from date of delivery of demand notice or copy of invoice, operational creditor can file application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process - Section 9(1) of Insolvency and Bankruptcy Code, 2016.

The application should be in prescribed form, with documents as specified in Section 9(3) of Insolvency and Bankruptcy Code, 2016.

The operational creditor may propose a resolution professional to act as an interim resolution professional - Section 9(4) of Insolvency and Bankruptcy Code, 2016.

The application will be admitted if notice of dispute is not received from operational debtor and evidence is produced that amount is not received.

If notice of dispute has been received, the application will not be admitted. The application will be admitted if (a) it is complete, (b) unpaid operational debt has not been paid (c) demand notice was delivered (d) notice of dispute is not received from operational creditor and (e) no disciplinary proceeding is pending against the proposed resolution professional - Section 9(5)(i) of Insolvency and Bankruptcy Code, 2016.

If any of these requirements is not fulfilled, application will be rejected - Section 9(5)(ii) of Insolvency and Bankruptcy Code, 2016. Before rejecting application, notice will be given to operational creditor.

Commencement of corporate insolvency resolution process initiated by an operational creditor – The corporate insolvency resolution process shall commence from the date of admission of the application

under Section 9(5) - Section 9(6) of Insolvency and Bankruptcy Code, 2016.

No admission of application if demand disputed - If demand is disputed, application will not be admitted at all. Adjudicating Authority (NCLT) is not empowered to go into dispute i.e. whether dispute is genuine or bogus.

Initiation of corporate insolvency resolution process by corporate debtor

As per Section 10, where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

The application under sub-Section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

The corporate applicant shall, along with the application furnish the information relating to—

- (a) its books of account and such other documents relating to such period as may be specified; and
- (b) the resolution professional proposed to be appointed as an interim resolution professional.

The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—

- (a) admit the application, if it is complete; or
- (b) reject the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

The corporate insolvency resolution process shall commence from the date of admission of the application under sub-Section (4) of this Section.

Time-limit for completion of insolvency resolution process

Subject to sub-Section 12(2), where extension of time is requested, the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.

On receipt of an application under sub-Section 12(2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this Section shall not be granted more than once.

Moratorium and public announcement

Meaning of Moratorium - A "moratorium" is a delay or suspension of an activity or a law. In a legal context, it may refer to the temporary suspension of a law to allow a legal challenge to be carried out. It is legal authorisation to debtors to delay payments due.



After admission of application, Adjudicating Authority shall pass following orders [Section 15(1)]

- (a) declare a moratorium for the purposes referred to in Section 14 of Insolvency and Bankruptcy Code, 2016
- (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under Section 15 of Insolvency and Bankruptcy Code, 2016; and
- (c) appoint an interim resolution professional in the manner as laid down in Section 16 of Insolvency and Bankruptcy Code, 2016

The public announcement referred to above shall be made immediately after the appointment of the interim resolution professional - Section 15(2) of Insolvency and Bankruptcy Code, 2016.

Order declaring Moratorium

On the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following [Section 14(1)]

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

No moratorium on essential supplies or notified transactions

The supply of essential goods or services to the corporate debtor as may be specified under Regulations shall not be terminated or suspended or interrupted during moratorium period - Section 14(2) of Insolvency and Bankruptcy Code, 2016.

Moratorium shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator - Section 14(3) of Insolvency and Bankruptcy Code, 2016.

"Property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property - Section 3(17) of Insolvency and Bankruptcy Code, 2016.

Duration of order of moratorium - The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. However, if resolution plan is approved under Section 31(1) or order of liquidation or corporate debtor is passed, the moratorium shall cease to have effect from the date of such approval or liquidation order - Section 14(4) of Insolvency and Bankruptcy Code, 2016.

Period of moratorium excluded for purpose of limitation - In computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded. This provision overrides provision of Limitation Act or any other law - Section 60(6) of Insolvency and Bankruptcy Code, 2016.

Public announcement of corporate insolvency resolution process

The public announcement of the corporate insolvency resolution process shall contain information as specified in Section 15(1) of Insolvency and Bankruptcy Code, 2016 and will be made in manner prescribed.

Appointment and tenure of interim resolution professional

The Adjudicating Authority (NCLT) shall appoint an interim resolution professional within fourteen days from the insolvency commencement date, as per procedure specified in Section 15 of Insolvency and Bankruptcy Code, 2016. His appointment cannot be for more than 30 days - Section 16(5) of Insolvency and Bankruptcy Code, 2016.

Management of affairs of corporate debtor by interim resolution professional

From the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional.

The powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.

The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional [Section 17(1) of Insolvency and Bankruptcy Code, 2016].

Authority of interim resolution professional

The interim resolution professional vested with the management of the corporate debtor shall have all the powers of management as specified in Section 17(2) of Insolvency and Bankruptcy Code, 2016.

He can act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any. He can take such actions, in the manner and subject to such restrictions, as may be specified by the Board. He has the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor. He has the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.

Duties of interim resolution professional

The interim resolution professional shall perform the following duties - Section 18(1) of Insolvency and Bankruptcy Code, 2016.

- (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—
 - (i) business operations for the previous two years
 - (ii) financial and operational payments for the previous two years
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified.



- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15.
- (c) constitute a committee of creditors.
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors.
- (e) file information collected with the information utility, if necessary; and
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets.
- (g) perform such other duties as may be specified by the Board.

Personnel to extend cooperation to interim resolution professional

The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor - Section 19(1) of Insolvency and Bankruptcy Code, 2016.

If they do not cooperate, application can be made by interim resolution professional to the Adjudicating Authority (NCLT) for necessary directions. NCLT will issue suitable orders - Section 19(3) of Insolvency and Bankruptcy Code, 2016.

Management of operations of corporate debtor as going concern

The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern [Section 20(1) of Insolvency and Bankruptcy Code, 2016].

For this purpose, he can take any of the actions specified in Section 20(2) of Insolvency and Bankruptcy Code, 2016. This includes appointments of professionals, entering into contracts, raise interim finance etc.

“Interim finance” means any financial debt raised by the resolution professional during the insolvency resolution process period -Section 5(15) of Insolvency and Bankruptcy Code, 2016.

Committee of creditors

The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors - Section 21(1) of Insolvency and Bankruptcy Code, 2016.

The committee of creditors shall comprise all financial creditors of the corporate debtor.

Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

However, related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Section 21 of Insolvency and Bankruptcy Code, 2016 makes detailed provisions relating to composition and voting rights of Committee of Creditors.

All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors - Section 21(8) of Insolvency and Bankruptcy Code, 2016.

The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process - Section 21(9) of Insolvency and Bankruptcy Code, 2016.

The resolution professional shall make available any financial information so required by the committee of creditors within a period of seven days of such requisition - Section 21(10) of Insolvency and Bankruptcy Code, 2016.

Voting share of creditors - Committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor - Section 5(28) of Insolvency and Bankruptcy Code, 2016.

Related Party in case of corporate debtor - The definition in Section 5(24) of Insolvency and Bankruptcy Code, 2016 is very wide. It covers director, partners, LLP or firm having common even one common partner or director, relative of director or partner, KMP, private company where a director holds more than 2% of share capital, holding and subsidiary, person controlling more than 20% of voting rights, company having more than two directors common and even person on whose advise or directions a director or partner is accustomed to act.

Appointment of resolution professional

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors - Section 22(1) of Insolvency and Bankruptcy Code, 2016.

The committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional - Section 22(2) of Insolvency and Bankruptcy Code, 2016.

If they decide to continue interim resolution professional, they will inform its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority [Section 24(2)(a) of Insolvency and Bankruptcy Code, 2016].

However, if they decide to replace the interim resolution professional, the resolution professional can be appointed only with approval of Board. Till then, the interim resolution professional will continue - Section 22(5) of Insolvency and Bankruptcy Code, 2016.

Resolution professional to conduct corporate insolvency resolution process

The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period - Section 23(1) of Insolvency and Bankruptcy Code, 2016.

The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional - Section 23(2) of Insolvency and Bankruptcy Code, 2016.

If another resolution professional is appointed as per Section 22(4) of Insolvency and Bankruptcy Code, 2016, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional - Section 23(3) of Insolvency and Bankruptcy Code, 2016.

Meeting of committee of creditors

The members of the committee of creditors may meet in person or by such electronic means as may be specified - Section 24(2) of Insolvency and Bankruptcy Code, 2016.

All meetings of the committee of creditors shall be conducted by the resolution professional - Section 24(3) of Insolvency and Bankruptcy Code, 2016.

Notice of such meeting will be given to (a) members of Committee of creditors (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

The directors, partners and one representative of operational creditors, as referred above, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings - Section 24(4) of Insolvency and Bankruptcy Code, 2016.

Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors. The fees payable to such insolvency professional representing any individual creditor will be borne by such creditor - Section 24(5) of Insolvency and Bankruptcy Code, 2016.

Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor - Section 24(6) of Insolvency and Bankruptcy Code, 2016.

The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board - Section 24(7) of Insolvency and Bankruptcy Code, 2016.

Any resolution at meeting of secured creditors should be passed with 75% majority.

The meetings of the committee of creditors shall be conducted in such manner as may be specified.

Duties of resolution professional

It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor - Section 25(1) of Insolvency and Bankruptcy Code, 2016.

He can take any or all the actions specified in Section 25(2) of Insolvency and Bankruptcy Code, 2016 for this purpose. However, action as specified in Section 28 of Insolvency and Bankruptcy Code, 2016 cannot be taken without prior approval of committee of creditors with 75% voting in favour.

File Application for avoidance of transactions not to affect proceedings

The resolution professional can file application for avoidance of transactions as specified in Sections 43 to 51 of Insolvency and Bankruptcy Code, 2016 - Section 25(2)(j) of Insolvency and Bankruptcy Code, 2016.

Filing of such avoidance application under by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process - Section 26 of Insolvency and Bankruptcy Code, 2016.

Replacement of resolution professional by committee of creditors

Committee of Creditors can change the resolution professional. They have to forward new name to Adjudicating Authority who will appoint another resolution professional after getting approval from Board - Section 27 of Insolvency and Bankruptcy Code, 2016.

Prior approval of committee of creditors for certain actions by resolution professional

In following cases, resolution professional can take action only with prior approval of committee of creditors, with 75% voting in favour [Section 28(1) of Insolvency and Bankruptcy Code, 2016].

- (a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting.
- (b) create any security interest over the assets of the corporate debtor.
- (c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company.
- (d) record any change in the ownership interest of the corporate debtor.
- (e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting.
- (f) undertake any related party transaction
- (g) amend any constitutional documents of the corporate debtor.
- (h) delegate its authority to any other person.
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
- (j) make any change in the management of the corporate debtor or its subsidiary.
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.
- (l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- (m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

“Constitutional document”, in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership - Section 5(4) of Insolvency and Bankruptcy Code, 2016.

“Security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. However, that security interest shall not include a performance guarantee - Section 3(31) of Insolvency and Bankruptcy Code, 2016.

“Transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor - Section 3(33) of Insolvency and Bankruptcy Code, 2016.

Action void if taken without approval - Where any action under Section 28(1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this Section, such action shall be void - Section 28(4) of Insolvency and Bankruptcy Code, 2016.

The committee of creditors may report the actions of the resolution professional under Section 28(4) to the Board for taking necessary actions against him under the Insolvency and Bankruptcy Code - Section 28(5) of Insolvency and Bankruptcy Code, 2016.



Preparation of information memorandum

The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan - Section 29(1) of Insolvency and Bankruptcy Code, 2016.

The resolution professional can appoint resolution applicant for this purpose.

“Resolution applicant” means any person who submits a resolution plan to the resolution professional - Section 5(25) of Insolvency and Bankruptcy Code, 2016.

The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form. The resolution applicant should undertake - (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading (b) to protect any intellectual property of the corporate debtor it may have access to and (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-Section are complied with - Section 30(1) of Insolvency and Bankruptcy Code, 2016.

“**Relevant information**” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

Submission and approval of resolution plan by resolution applicant

A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum - Section 30(1) of Insolvency and Bankruptcy Code, 2016.

Requirements of resolution plan - The resolution plan shall contain following [Section 30(2) of Insolvency and Bankruptcy Code, 2016] —

- (a) provision for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor.
- (b) provision for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under Section 53 of Insolvency and Bankruptcy Code, 2016.
- (c) provision for the management of the affairs of the Corporate debtor after approval of the resolution plan.
- (d) the implementation and supervision of the resolution plan
- (e) the plan should not contravene any of the provisions of the law for the time being in force.
- (f) plan should conform to such other requirements as may be specified by the Board of Insolvency and Bankruptcy of India.

Insolvency resolution process costs

Insolvency resolution process costs means –

- (a) the amount of any interim finance and the costs incurred in raising such finance
- (b) the fees payable to any person acting as a resolution professional
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern

- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board - Section 5(13) of Insolvency and Bankruptcy Code, 2016.

Interim finance means any financial debt raised by the resolution professional during the insolvency resolution process period - Section 5(15) of Insolvency and Bankruptcy Code, 2016.

Approval of resolution plan by Committee of Creditors

The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions in Section 30(2) of Insolvency and Bankruptcy Code, 2016.

The resolution plan should be approved by 75% of voting shares of financial creditors - Section 30(4) of Insolvency and Bankruptcy Code, 2016.

The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered, but he will not have voting rights, unless such resolution applicant is also a financial creditor - Section 30(5) of Insolvency and Bankruptcy Code, 2016.

After approval of Committee of Creditors, the resolution professional shall submit the resolution plan to the Adjudicating Authority - Section 30(6) of Insolvency and Bankruptcy Code, 2016.

Approval of resolution plan by Adjudicating Authority

If the Adjudicating Authority (NCLT) is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as referred to Section 30(2) of Insolvency and Bankruptcy Code, 2016, it shall by order approve the resolution plan.

The resolution plan so approved shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan - Section 31 (2) of Insolvency and Bankruptcy Code, 2016.

After the order of approval of resolution plan by Adjudicating Authority (a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

Effect if resolution plan rejected by NCLT

If resolution plan is rejected by Adjudicating Authority, liquidation process will commence - Section 33(1) of Insolvency and Bankruptcy Code, 2016.

Appeal against order of adjudicating authority

Any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61 (3) of Insolvency and Bankruptcy Code, 2016. Appeal can be only on the grounds specified in that Section.

LIQUIDATION OF A CORPORATE PERSON

Initiation of Liquidation [Section 33]

Where the Adjudicating Authority,—

- (a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under Section 12 or the fast track corporate insolvency resolution process under Section 56, as the case may be, does not receive a resolution plan under sub-Section (6) of Section 30; or
- (b) rejects the resolution plan under Section 31 for the non-compliance of the requirements specified therein, it shall—
 - (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
 - (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
 - (iii) require such order to be sent to the authority with which the corporate debtor is registered.

Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of the above sub-Section.

Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of the above sub-Section.

On receipt of an application under sub-Section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-Section (1).

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:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

The provisions of sub-Section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

The order for liquidation under this Section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Appointment of Liquidator and fee to be paid [Section 34]

Where the Adjudicating Authority passes an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-Section (4).

On the appointment of a liquidator under this Section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

The personnel of the corporate debtor shall extend all assistance and co-operation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of Section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

The Adjudicating Authority shall by order replace the resolution professional, if-

- (a) the resolution plan submitted by the resolution professional under Section 30 was rejected for failure to meet the requirements mentioned in sub-Section (2) of Section 30; or
- (b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing.

For the purposes of clause (a) of sub-Section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

The Board shall propose the name of another insolvency professional within ten days of the direction issued by the Adjudicating Authority under sub-Section (5).

The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

The fees for the conduct of the liquidation proceedings under sub-Section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under Section 53.

Powers and duties of Liquidator

The liquidator will work under overall directions of the Adjudicating Authority. He will have the following powers and duties [Section 35(1) of Insolvency and Bankruptcy Code, 2016].

- (a) to verify claims of all the creditors.
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor.
- (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report.
- (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary.
- (e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.
- (f) subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.
- (g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business.



- (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself.
- (i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities
- (j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code.
- (k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor.
- (l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions
- (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator.
- (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board, and
- (o) to perform such other functions as may be specified by the Board.

Consultation with stakeholders - The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under Section 53 of Insolvency and Bankruptcy Code, 2016. However, such consultation shall not be binding on the liquidator. The records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board - Section 35(2) of Insolvency and Bankruptcy Code, 2016.

Liquidation Estate

The liquidation estate shall comprise all liquidation estate assets as follow, except those specified in Section 36(4) of Insolvency and Bankruptcy Code, 2016 [Section 36(3) of Insolvency and Bankruptcy Code, 2016]

- (a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor.
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets.
- (c) tangible assets, whether movable or immovable.
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights.
- (e) assets subject to the determination of ownership by the court or authority.

- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter.
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest.
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date, and
- (i) all proceeds of liquidation as and when they are realised.

Assets which will not form part of liquidation assets - As per Section 36(4) of Insolvency and Bankruptcy Code, 2016, the following shall not be included in the liquidation estate assets. These shall not be used for recovery in the liquidation.

- (a) assets owned by a third party which are in possession of the corporate debtor, including - (i) assets held in trust for any third party (ii) bailment contracts (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets and (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.
- (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions.
- (c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter.
- (d) assets of any Indian or foreign subsidiary of the corporate debtor, or
- (e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Workman - "Workman" shall have the same meaning as assigned to it in Section 2(s) of the Industrial Disputes Act, 1947 - Section 3(36) of Insolvency and Bankruptcy Code, 2016.

Liquidator to form a liquidation estate - The liquidator shall form an estate of the assets mentioned in Section 36(3) of Insolvency and Bankruptcy Code, 2016. These will be for the purposes of liquidation. These which will be called the 'liquidation estate' in relation to the corporate debtor - Section 36(1) of Insolvency and Bankruptcy Code, 2016.

The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors - Section 36(2) of Insolvency and Bankruptcy Code, 2016.

Insolvency commencement date - "Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or Section 10 of Insolvency and Bankruptcy Code, 2016, as the case may be - Section 5(12) of Insolvency and Bankruptcy Code, 2016.

Liquidator has powers to access information

The liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following specified sources. These powers are overriding powers, irrespective of provisions in any other law [Section 37(1) of Insolvency and Bankruptcy Code, 2016]

- (a) an information utility.



- (b) credit information systems regulated under any law for the time being in force.
- (c) any agency of the Central, State or Local Government including any registration authorities.
- (d) information systems for financial and non-financial liabilities regulated under any law for the time being in force.
- (e) information systems for securities and assets posted as security interest regulated under any law for the time being in force
- (f) any database maintained by the Board, and
- (g) any other source as may be specified by the Board.

Creditors can ask for information from liquidator

The creditors may require the liquidator to provide them any financial information relating to the corporate debtor in specified manner - Section 37(2) of Insolvency and Bankruptcy Code, 2016.

The liquidator shall provide information to such creditors within a period of seven days or provide reasons for not providing such information.

Ascertaining claims against corporate debtor

The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process - Section 38(1) of Insolvency and Bankruptcy Code, 2016.

A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility. However, where the information relating to the claim is not recorded in the information utility, the financial creditor may submit claim with supporting documents to prove the claim -Section 38(2) of Insolvency and Bankruptcy Code, 2016.

An operational creditor may submit a claim to the liquidator in manner, along with supporting documents required to prove the claim as may be specified by the Board - Section 38(3) of Insolvency and Bankruptcy Code, 2016.

A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner provided in Section 38(2) and to the extent of his operational debt under Section 38(3).

Withdrawal or variation of claim within 14 days - A creditor may withdraw or vary his claim under this Section within fourteen days of its submission - Section 38(2) of Insolvency and Bankruptcy Code, 2016.

Verification of claims by liquidator

The liquidator shall verify the claims submitted under Section 38 within the time as specified by the Board. The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim - Section 39 of Insolvency and Bankruptcy Code, 2016.

Admission or rejection of claims by liquidator

The liquidator may, after verification of claims, either admit or reject the claim, in whole or in part. If the liquidator rejects a claim, he shall record in writing the reasons for such rejection - Section 40(1) of Insolvency and Bankruptcy Code, 2016.

The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims - Section 40(2) of Insolvency and Bankruptcy Code, 2016.

Determination of valuation of claims

The liquidator shall determine the value of claims admitted under Section 40 of Insolvency and Bankruptcy Code, 2016, in such manner as may be specified by the Board - Section 41 of Insolvency and Bankruptcy Code, 2016

Appeal against the decision of Liquidator

A creditor may appeal to the Adjudicating Authority against the decision of the liquidator rejecting the claims within fourteen days of the receipt of such decision - Section 42 of Insolvency and Bankruptcy Code, 2016.

On decision of NCLT, further appeal before NCLAT is possible, which will further delay the process.

Avoidance of preferential transactions by liquidator

The corporate debtor is of course aware that order of liquidation is possible. Hence, he may give preference to some transactions where he may be interested.

Meaning of preferential transaction - Corporate debtor shall be deemed to have given a preference, if—

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor and
- (b) the above transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53 of Insolvency and Bankruptcy Code, 2016 - Section 43(2) of Insolvency and Bankruptcy Code, 2016.

Even if any transfer is made in pursuance of the order of a court, such transfer can be held to be deemed as giving of preference by the corporate debtor, if aforesaid circumstances exist - proviso to Section 43(3) of Insolvency and Bankruptcy Code, 2016.

Order of Adjudicating Authority in case of preferential transactions

On an application made by the resolution professional or liquidator under Section 43(1) of Insolvency and Bankruptcy Code, 2016, Adjudicating Authority can pass any of following orders [Section 44(1) of Insolvency and Bankruptcy Code, 2016]:

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor.
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred.
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor.
- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct.



- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate.
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference, and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

Order cannot be passed if interest in property was acquired in good faith

The Adjudicating Authority cannot pass order in respect of preferential transaction, if the third party had acquired interest or benefit in property from a person other than the corporate debtor in good faith.

Presumption that interest was not acquired in good faith

If a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference –

- (i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor
- (ii) is a related party, it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.

A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under Section 13 of Insolvency and Bankruptcy Code, 2016- Explanation II to Section 44(1) of Insolvency and Bankruptcy Code, 2016.

In such case, it shall be presumed that the person had not acquired interest in property in good faith and burden is on that person to prove that he had acquired interest in property in good faith-Explanation I to Section 44(1) of Insolvency and Bankruptcy Code, 2016.

Avoidance of undervalued transactions. [Section 45]

If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-Section (2) of Section 43 determines that certain transactions were made during the relevant period under Section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

A transaction shall be considered undervalued where the corporate debtor —

- (a) makes a gift to a person; or
- (b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Relevant period for avoidable transactions [Section 46]

In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—

- (i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or
- (ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this Section.

Application by creditor in cases of undervalued transactions [Section 47]

Where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.

Where the Adjudicating Authority, after examination of the application made under sub-Section (1), is satisfied that—

- (a) undervalued transactions had occurred; and
- (b) liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

it shall pass an order—

- (a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in Section 45 and Section 48;
- (b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Order in cases of undervalued transactions. [Section 48]

The order of the Adjudicating Authority under sub-Section (1) of Section 45 may provide for the following:—

- (a) require any property transferred as part of the transaction, to be vested in the corporate debtor;
- (b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;
- (c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or
- (d) require the payment of such consideration for the transaction as may be determined by an independent expert.

Transactions defrauding creditors. [Section 49]

Where the corporate debtor has entered into an undervalued transaction as referred to in Sub-section(2) of Section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or
- (b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order—
 - (i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and
 - (ii) protecting the interests of persons who are victims of such transactions:

Provided that an order under this Section—

- (a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and
- (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

Extortionate credit transactions [Section 50]

Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

The Board may specify the circumstances in which a transactions which shall be covered under sub-Section (1).

Explanation.—For the purpose of this Section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

Orders of Adjudicating Authority in respect of extortionate credit transactions [Section 51]

Where the Adjudicating Authority after examining the application made under sub-Section (1) of Section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order—

- (a) restore the position as it existed prior to such transaction;
- (b) set aside the whole or part of the debt created on account of the extortionate credit transaction;
- (c) modify the terms of the transaction;
- (d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or
- (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

Secured creditor in liquidation proceedings [Section 52]

A secured creditor in the liquidation proceedings may—

- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in Section 53; or

(b) realise its security interest in the manner specified in this Section.

Where the secured creditor realises security interest under clause (b) of Sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

Before any security interest is realised by the secured creditor under this Section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-Section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

Where the enforcement of the security interest under Sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this Section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-Section (1) of Section 53.

Distribution of assets [Section 53]

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:—

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:—

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;



- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:—
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
 - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;
- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

Any contractual arrangements between recipients under Sub-section (1) with equal ranking, if disrupting the order of priority under that Sub-section shall be disregarded by the liquidator.

The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under Sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this Section—

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term “workmen's dues” shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 (18 of 2013).

Dissolution of corporate debtor [Section 54]

Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

The Adjudicating Authority shall on application filed by the liquidator under Sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

A copy of an order under Sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.