

## **Insolvency and Bankruptcy Board of India**

### **Subject: Amendment to the IBBI (Liquidation Process) Regulations, 2016**

The Governing Board considered the Board Note No. 020/2018 on the subject in its meeting held on 26<sup>th</sup> June, 2018 and offered certain inputs with an advice that a revised Board Note may be brought up in the next meeting for its consideration. A revised note is accordingly submitted for consideration of the Governing Board.

#### **Sale of Business**

2. In the matter of M/s. Gujarat NRE Coke Limited ]C.P. )I.B.( No. 182/KB/2017[, after failure of resolution even during the extended period, the AA appointed the RP as liquidator. An affidavit filed by workmen and employees emphasized that the regulations provide for slump sale of assets and, therefore, permit sale of the business of the corporate debtor (CD), including all its assets and properties, as a going concern. The Hon'ble Supreme Court and High Courts have often directed sale of assets of the company as a going concern to preserve employment, particularly when CD is a going concern. Accordingly, the AA directed: *"The Liquidator shall try to dispose of the Corporate Debtor company as a going concern after publication of notice in newspaper with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three month from the date of the order if the process of sale as a going concern is failed during this period, then process of the sale of the assets of the company will be according to the provisions of sale of asset of the Corporate Debtor prescribed under section 33, Chapter VI of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016. In case it is not concluded within this period, the order of this Court directing the sale of the company as a going concern shall stand set aside and corporate debtor to be liquidated in the manner as laid down in Chapter III of the Liquidation process provided in Insolvency & Bankruptcy Code."*

3. However, the sale could not happen. An application was filed under sections 230 to 232 of the Companies Act, 2013 for obtaining the sanction of the NCLT to a scheme of compromise and arrangement between the petitioner and the secured/unsecured creditors, foreign currency convertible bond (FCCB) holders and shareholders of Gujarat NRE Coke Ltd. The NCLT passed an order directing separate meetings of the shareholders, FCCB holders, secured

creditors, unsecured creditors to consider and, if thought fit, to approve, with or without modification, the scheme of compromise and arrangement.

4. A key benefit of selling the CD, as a going concern in liquidation, as against other manners of sale, is that it can preserve employment while maximising the returns for stakeholders. In some cases, viable companies may end up in liquidation in the absence of availability of suitable resolution plans in the market or non-approval of resolution plan by requisite voting share of the CoC or other reasons. Liquidation of such companies may be premature and can result in avoidable loss of going concern value and loss of employment, critical disruption for trade creditors who are dependent on the enterprise for their survival, reduction in returns for secured and unsecured creditors and other stakeholders, loss of revenue to government due to drying up of collection of tax and other revenue from such enterprise. Therefore, there is a need to attempt sale of CD as a going concern in liquidation process.

5. It is observed that till June 2018, the CIRPs under the Code have resulted in 32 resolutions and 136 liquidations. Of the 136 liquidations, 112 CDs were either not going concerns or under previous BIFR regime, and thus may be attributed to legacy reasons. Nevertheless, it is important to avoid liquidation. In fact, the Ordinance of 6<sup>th</sup> June, 2018 explicitly aims to promote resolution over liquidation.

6. Regulation 32(c) aims to save a company from liquidation, even though CIRP has failed to yield resolution. It reads as under:

“32. Manner of sale.

The liquidator may

(a) sell an asset on a standalone basis; or

(b) sell

(i) the assets in a slump sale,

(ii) a set of assets collectively, or

(iii) the assets in parcels; or

(c) sell the corporate debtor as a going concern.”.

7. Stakeholders have been expressing difficulty as to how to use the option to sell the CD as a going concern. A round table was held with them on 21<sup>st</sup> May, 2018 to understand the difficulties in selling the CD as a going concern. Several challenges were brought up. Section

52 read with section 33 (5) allows a secured creditor the option to (i) 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 (ii) realise its security interest in the manner specified in section 52 of the Code read with regulation 37. Thus, a secured creditor may opt to realise its security interest outside the liquidation, foreclosing the option of sale of CD as a going concern by the liquidator. In order to sell the CD as a going concern in liquidation process, either the secured creditors opt in favour of relinquishing their security interest in favour of liquidation estate; or the secured creditors postpone exercise of their option under section 52 to realise security interest outside liquidation process to allow the liquidator to explore the possibilities of sale as a going concern.

8. Further, liquidation is the process that entails disposal of the assets of the entity. A Liquidator does not run the company; his task is to liquidate, though the law has always empowered the liquidator to carry on the business of the company to the extent required for its beneficial liquidation. The liquidator may do only such things, and carry on only such activities, as are conducive to liquidation. Section 33 (7) mandates that the order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the CD, except when the business of the CD is continued during the liquidation process by the liquidator.

9. “Going Concern” means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity, which may be whole or a part of the business of the CD without values being assigned to the individual asset or resource. In view of this, the following options are submitted for consideration:

I. The CD may be sold as a going concern, as provided in the extant regulations. As the company survives, there will be no need for dissolution of the company in terms of section 54 of the Code. The assets, along with all attendant claims, limitations, licenses, permits or business authorizations remain in the company. The company survives as it is; the ownership of the company is transferred by the liquidator to the acquirer. The liquidator shall make an application to the AA for approval of the sale of the CD as a going concern and the AA may pass an order with respect to: -

- (a) Sale of the CD to the intended buyer as a going concern
- (b) Transfer of shares of the CD to the intended buyer

- (c) Transfer of the going concern of the CD to the buyers
- (d) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the CD,
- (e) Payment to stakeholders in accordance with section 53 from the liquidation bank account, and
- (f) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the CD as a going concern.

In such a case, the final report of liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the CD and not for the dissolution of the CD to the AA to be made under section 54.

II. The regulations may provide another option of sale, that is, sale of business of the CD as a going concern. It will be only sale of one or more of the business vertical(s), not the CD which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the said business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with section 53 and the CD will be dissolved.

10. Both the options require consent of the secured creditors to relinquish security interest. If security interest is not relinquished, other modes of sale will be used.

11. It is, therefore, proposed to add one more option of sale, namely, ‘(d) sell the business(es) of the corporate debtor’ in regulation 32. This option as well as the option of sale of corporate debtor in regulation 32 (c) may be available only if the secured creditors have relinquished security interest in respect of assets covered in the corporate debtor or business, as the case may be. Corresponding amendment need to be made in regulation 34 (2) (b) to include ‘value of the business’ and in explanation to regulation 40 to include ‘business(es)’.

### **Liquidation value**

12. Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the CD in accordance with regulation 35. Further, regulations 35 of the IBBI (Liquidation),

Regulations, 2016 provides for appointment of at least two valuers to value assets intended to be sold by the liquidator.

13. Thus, where CIRP of a CD ends up in liquidation, the assets of the CD shall be valued again in terms of Liquidation Regulations. Often the circumstances on the ground may not change enough to warrant a fresh valuation. At times, the CD may not have enough resources even to pay for expenses on valuation. It may be desirable to mandate valuation only in cases the liquidator feels that such a valuation is required. Wherever valuation is required in the opinion of the liquidator, he may appoint one valuer to value the assets. If the value arrived at by the said valuer is not substantially different, in the view of the liquidator, from the value arrived at CIRP stage, the liquidator shall average the value arrived at by the valuer appointed by him and the value arrived at CIRP stage to arrive at liquidation value for the purpose of Liquidation Regulations. If the value arrived at by the valuer appointed by the liquidator is substantially different, in his view, from the value arrived at CIRP stage, the liquidator shall appoint a second valuer. The average of the values arrived at by the first and the second valuer will be considered liquidation value. Accordingly, it is proposed to amend regulation 35.

#### **Public Announcement Form**

14. Regulation 12 of the Liquidation Regulations, 2016 provides that the liquidator shall make a public announcement in Form B of Schedule II within five days from his appointment. As of now, Form B provides for inclusion of details with respect to the name, address, email address, telephone number and registration number of the liquidator. Vide circular dated 3<sup>rd</sup> January, 2018, it has been mandated that in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, an IP shall prominently state his name, address and email, as registered with the IBBI, and his Registration Number as an IP granted by the IBBI. Additionally, an IP may use a process (Example: CIRP, Liquidation, etc.) specific address and email in its communications, if he considers it necessary subject to certain conditions. It is, therefore, necessary that Form B has provision to carry his registered address and also the process specific address. This provision has already been made in the form for public announcement under the CIRP Regulations. IT is now proposed to make similar provision in Form B for public announcement under Liquidation Regulations.

15. A draft of the amendment regulations, as proposed above, is enclosed as **Annexure-I**.

16. It is submitted for consideration and approval of the Governing Board, with or without modifications.

**GAZETTE OF INDIA  
EXTRAORDINARY  
PART III, SECTION 4  
PUBLISHED BY AUTHORITY**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
NOTIFICATION**

New Delhi, the ....., 2018

**THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA  
(LIQUIDATION PROCESS) (SECOND AMENDMENT) REGULATIONS,  
2018**

No. IBBI/2018-19/GN/REG..... -In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2018.  
(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as the principal regulations), in regulation 32, after clause (c), the following clause shall be inserted, namely: -  
  
“(d) sell the business (es) of the corporate debtor.”.
3. In the principal regulations, in regulation 34, in sub-regulation (2), for clause (b), the following sub-clause shall be substituted, namely: -  
  
“(b) value of set of assets or assets in parcels or assets in a slump sale or value of business, as the case may be, valued in accordance with Regulation 35, if intended to be sold as specified in Regulation 32 (b) or Regulation 32 (d);”.
4. In the principal regulations, in regulation 35, for sub-regulation (1), (2), (3) and (4), the following sub-regulations shall be substituted.
  - (1) “Wherever valuation is required to be conducted in a case, in opinion of the liquidator, he shall appoint one valuer to value the assets for the purposes referred under Regulation 34 (2).
  - (2) If the estimates arrived at by the valuer appointed under sub-regulation (1) is not substantially different, in view of the liquidator, from the estimates arrived during the corporate insolvency resolution process, the average of the estimates arrived at by the

- valuer appointed under sub-regulation (1) and the estimates arrived at during the corporate insolvency resolution process shall be considered the value of the assets.
- (3) If the estimates arrived at by the valuer appointed under sub-regulation (1) is substantially different, in view of the liquidator, from the estimates arrived during the corporate insolvency resolution process, the liquidator shall appoint a second valuer.
- (4) Subject to sub-regulation (3), the average of the estimates arrived at by the first valuer appointed under sub-regulation (1) and second valuer appointed under sub-regulation (3) shall be considered the value of the assets.”.
- (5) The provisions of Regulation 7 shall apply *mutatis mutandis* to registered valuers appointed under sub-regulation (1) or sub-regulation (3), as the case may be.
- (6) The registered valuer appointed under sub-regulation (1) or sub-regulation (3), shall independently submit to the liquidator the estimates of the realizable value of the asset (s) computed in accordance with internationally accepted valuation standards, after physical verification of the assets of the corporate debtor.”.
5. In the principal regulations, in regulation 40, after sub-regulation (3), in explanation, after the words “parcel of assets,” the words “business (es),” shall be included.
6. In the principal regulations, in the Schedule II, -
- (a) for Form B, the following Form shall be substituted, namely: -

## **“SCHEDULE II**

### **FORM B**

#### **PUBLIC ANNOUNCEMENT**

(Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

FOR THE ATTENTION OF THE STAKEHOLDERS OF THE [NAME OF  
CORPORATE DEBTOR]

<b>RELEVANT PARTICULARS</b>		
1.	Name of corporate debtor	
2.	Date of incorporation of corporate debtor	
3.	Authority under which corporate debtor is incorporated / registered	
4.	Corporate Identity No./ Limited Liability Identification No. of corporate debtor	
5.	Address of the registered office and principal office (if any) of corporate debtor	
6.	Date of Closure of Insolvency Resolution Process	
7.	Liquidation commencement date of corporate debtor	
8.	Name and registration number of the insolvency professional acting as liquidator	
9.	Address and e-mail of the liquidator, as registered with the Board	
10.	Address and e-mail to be used for correspondence with the liquidator	
11.	Last date for submission of claims	

Notice is hereby given that the National Company Law Tribunal has ordered the commencement of liquidation of the [name of the corporate debtor] on [date of passing of order of liquidation under section 33 of the Code].

The stakeholders [name of the corporate debtor], are hereby called upon to submit their claims with proof on or before [insert the date falling thirty days after the liquidation commencement date] to the liquidator at the address mentioned against entry No. 10.

The financial creditors shall submit their claims with proof by electronic means only. All other creditors may submit the claims with the proof in person, by post or by electronic means.

Submission of false or misleading proofs of claim shall attract penalties.

Name and Signature of Liquidator :  
Date and Place: :”

Dr. M. S. Sahoo  
Chairperson  
Insolvency and Bankruptcy Board of India  
[ADVT .....]

**Note:** The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 were published vide notification No. IBBI/2016-17/GN/REG005 on 15<sup>th</sup> December, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 460 dated 15<sup>th</sup> December, 2016.

(2) The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 vide notification No. IBBI/2017-18/GN/REG028, dated the 27<sup>th</sup> March, 2018.