

Insolvency and Bankruptcy Board of India

Subject: Issues related to Liquidation Process

A Board Note [REDACTED] on the above-mentioned subject, was placed before the Governing Board for consideration at its 26th meeting held on 24th December, 2021. However, it could not be considered due to paucity of time.

The same has been revised and placed again before the Governing Board for its consideration.

Insolvency and Bankruptcy Board of India

Subject: Issues related to Liquidation Process

The issues covered by this Board Note are divided into three parts. In pursuance of the directions of the Governing Board provided in its 25th meeting held on 24th September, 2021, Part-A provides details / analysis of various types of auctions. In Part-B, the proposal is to provide that if the secured creditors having 60% of the value in the secured debt decide to relinquish or realize the security interest, such decision shall be binding on the other *pari-passu* charge holders, is being placed before the Governing Board for its reconsideration. Part-C presents the outcome of review of the Circulars pertaining to liquidation process issued by the IBBI from time to time, in pursuance of the directions of the Governing Board provided in its 25th meeting held on 24th September, 2021.

Part-A: Note on Auctions

2. The Governing Board in its 25th meeting held on 24th September, 2021 had considered the Board Note [REDACTED] and while approving the amendments to the IBBI (Liquidation Process) Regulations, 2016 ('Liquidation Regulations') proposed therein, had directed that, "*The IBBI may study various options for auctions, internally or with external assistance, to figure out the most suitable format for auctions under the Code.*"

3. Pursuant to the aforesaid directions, Note on suitability of various types of auctions is presented below:

Background

4. The Insolvency and Bankruptcy Code, 2016 ('Code') provides market mechanism for time bound insolvency resolution of corporate persons, thereby, facilitates freedom of exit for such persons, while ensuring maximisation of value of assets of such firms, promotion of entrepreneurship, availability of credit and balancing of the interests of all stakeholders. Higher the intensity of competition and innovation in an economy, higher is the rate of business failure, and higher is the incidence of sunrise businesses replacing the sunset ones. Each such failure has an adverse impact on the availability of funds with the creditors, thereby, constraining their ability to lend for other viable projects. Through reorganization - first by a resolution plan, failing which, by liquidation, the Code provides for recycling of resources for alternate uses.

5. Both resolution and liquidation processes foster market led solutions. The stakeholders – interim resolution professional (IRP), resolution professional (RP), liquidator, committee of creditors (CoC), stakeholders’ consultation committee (SCC), have been granted considerable freedom to take commercial decisions in order to maximise the value of the corporate debtor. For instance, the Code does not spell out the shape of the resolution plan and leaves its delineation to the ingenuity of the stakeholders, while merely stipulating the basic requirements which a resolution plan must fulfil, under section 30. Similarly, regulation 32 read with regulation 33 of the Liquidation Regulations provide the freedom of manner and mode of sale to the liquidator, i.e., he may sell an asset on a standalone basis, assets in a slump sale, assets in parcels, set of assets collectively, the corporate debtor as a going concern or the business(s) of the corporate debtor as a going concern, through auction or private sale (while laying down some basic conditions to be adhered in such situations).

Auction under Liquidation Process

6. Market discovery of value play a crucial role in creating equilibrium of supply and demand of the stressed assets in the market. In this context, the auction is thought to be a potent mechanism for determining competitive price in the market in a fair and transparent manner. Regulation 33 of the Liquidation Regulations provides that a liquidator shall *ordinarily* sell the assets of the corporate debtor through auction, without specifying the type of auction to be adopted. The liquidator may, however, undertake private sale of assets under four specific circumstances when:

- i. the asset is perishable;
- ii. the asset is likely to deteriorate in value significantly if not sold immediately;
- iii. the asset is sold at a price higher than the reserve price of a failed auction; or
- iv. the prior permission of the Adjudicating Authority has been obtained for such sale.

7. During CIRP, the Code prohibits the IRP or RP from taking certain actions without seeking the prior approval of CoC. In contrast, though constitution of SCC is mandatory during liquidation process, its recommendations are not binding on the liquidator. Considering the same and the fact that the auction process in comparison to private sale ensures higher transparency and accountability, the auction process has been mandated as the default option for sale of assets in liquidation under the Code. Being an officer of the Court, the liquidator is

expected to conduct a fair and rule-based liquidation process and undertake private sale only in the foregoing exceptional circumstances.

Features of a Desirable Auction Process

8. There are five fundamental features of a desirable auction process:

- i. **Economic Design:** The auction process should be designed on sound economic principles and provide incentives to participants / bidders to reveal their maximum willingness to pay, thereby maximize realization from sale.
- ii. **Accountability:** The auction process should allow the participants to be held accountable for their actions, i.e., there should be certain economic or legal consequences to the actions of the participants, for which sufficient non-repudiable evidence should be available to prove what actions were taken and to enforce the consequences. In order to enforce non-repudiation, or at least to associate a cost with repudiation, bid submissions may include submission of Earnest Money Deposit by the participants. Further, manipulation with the submitted bids should also not be possible.
- iii. **Transparency:** The auction process needs to be transparent and open to scrutiny by the regulator / stakeholders, which would induce confidence of the market players and encourage participation.
- iv. **Comprehension:** The process should be easily comprehensible by the participants.
- v. **Fast Execution:** The auction process should result in early identification of successful bidder. A long-drawn auction process would result in higher transaction costs and hence, result in lower net realisation.

Four Standard Types of Auctions

9. The auction theory enumerates a plethora of auctions such as English auction, Scottish auction, Dutch auction, Japanese auction, First-price sealed-bid auction, etc. However, the available auctions can be broadly categorized into the following four standard types:

S. No.	Auction	Dynamic / Static
1.	Open Ascending-bid (English) Auction	Dynamic
2.	Open Descending-bid (Dutch) Auction	
3.	First-price Sealed-bid Auction	Static
4.	Second-price Sealed-bid (Vickrey) Auction	

Dynamic and Static Auctions

10. Under dynamic auctions, each bidder gets the opportunity to revise his / her own bid, thereby, beat the higher bid of the rival bidder. The auction process ends when only a single bidder remains, and no other bidder is willing to beat the bid of the last bidder. In contrast, under static auctions, the bidders submit bid only once and the auctioneer / liquidator selects the best bid amongst them. Thus, there is only one round in such auctions.

Open Ascending-bid Auction / English Auction

11. Under English auction, the liquidator opens the bidding at a reserve price, i.e., the lowest price he is willing to accept for the item. The participants bid openly against one another, with each bid being higher than the previous bids. This continues until no one is willing to increase the bid any further, at which point the auction is closed and the final bidder receives the item at his bid price. *This method is generally employed by the liquidator to auction assets in liquidation process under the Code.*

12. As this auction happens in multiple rounds, the bidders get the opportunity to better their bids in successive rounds. This results in better price discovery as the asset is allocated to the bidder with the highest valuation. The English auction can also be considered as relatively transparent, as the best bid is disclosed to all bidders during the auction. However, the slight disadvantage of this auction is the requirement of continuous participation by the bidders which can be little difficult and expensive at times.

Open Descending-bid Auction / Dutch Auction

13. Under Dutch auction, the liquidator begins at a high price, higher than he believes the item will fetch, then decreases the price until a bidder makes a call. The bidder then receives the item at the price at which he made the call. If multiple items are offered, the process continues until all the items are sold. This type of auction is similar to the English auction in that the bidding price varies over time, however, in this case, the price decreases.

14. One of the primary advantages of Dutch auction is speed. Since there are never more bids than the items being auctioned, the process takes relatively little time. Further, it also has the advantage of preserving maximum privacy as no information is revealed except the winning bid and bidder. However, the Dutch auction may not be economically efficient – if the tick size of the bid is too large, then the bidder with highest willingness to pay may be able to buy the

asset at a lower price than his maximum willingness to pay, thus, it may not result in maximisation of value of assets. On the other hand, if the tick size is too small, the bidders may get frustrated and lose interest in the process. Further, the liquidator holds excessive power of determining tick size in the Dutch auction, unlike the English Auction.

First-price Sealed-bid Auction

15. In this auction, each bidder submits a single bid in a sealed envelope. Then, all of the envelopes are opened together, and the highest bidder is announced, and he receives the item at his bid price. In a sealed bid auction, participants will have *beliefs* about what others will bid. If a participant believes that she will have the highest bid, and the second highest bid will be substantially below that, then she has an incentive to lower her bid. For example, if she values an item at Rs.1,000, but believes that the second highest bidder values the item at Rs.500, then she is likely to place a bid slightly higher than Rs.500. However, if she is wrong about the distribution of other bids, then the final item will not go to the party that values it most, and the seller may give up the item at a price lower than he would have achieved with an English auction.

16. This type of auction can be executed in a single round of communication between the bidders and the liquidator. However, it does not result in value maximisation for the liquidator, as the winner of the auction would not be paying his maximum willingness to pay.

Second-price Sealed-bid Auction / Vickrey Auction

17. As in the first-price sealed-bid auction, in the Vickrey auction, all bidders simultaneously submit their bids, however, the price paid by the highest bidder is the second-highest bid price and not the winning bid price.

18. Under this auction, the bidders are motivated to bid their maximum value truthfully as they need to pay the second-highest bid value, if their bid wins, unlike in the first-price sealed-bid auction. However, it may not be as transparent as the English auction.

19. Snapshot of Comparison of Four Standard Types of Auctions

Types of Auctions	Price	Quantity	Accept or Reject Bid	Advantage	Disadvantage
	Policy Variables exercised by				
Open Ascending-bid Auction / English Auction	Bidders	liquidator / Bidders	liquidator	Better price discovery	Relatively lengthy process
Open Descending-bid Auction / Dutch Auction	liquidator			Faster process than English auction	1. Relatively inefficient price discovery than English auction; 2. Exercise of excessive power by liquidator
First-price Sealed-bid Auction	Bidders			Faster process	Relatively inefficient price discovery
Second-price Sealed-bid Auction / Vickrey Auction	Bidders			Faster process	Better price discovery than First-price Sealed-bid Auction

Special Mention: Swiss Challenge Method (SCM)

20. It is a form of English auction wherein first an unsolicited bid is received by the auctioneer / liquidator. The liquidator then invites bids from other bidders to beat the unsolicited bid. The unsolicited bidder is also allowed to counter the bid received from the other bidders, if any. The winner is the highest bidder or the unsolicited bidder, if no bids are received. This method gives a preferred position to the first bidder, who submits the initial bid and has a right of first refusal (with restrictions to ensure that he does not underquote).

21. This type of auction results in maximization of value of the assets as the other bidders get the opportunity to beat the original bid. Further, since the auction process starts with a base bid, the chances of failure of the auction is almost negligible. However, it is difficult to identify the preferred bidder in the first instance and the transparency of the process may get compromised in such situations. Further, it may be difficult to accept the original bid if it is less than the reserve price.

Companies Act, 2013 and Companies Act, 1956

22. Both the Companies Act, 2013 (under section 290(1)(c)) and Companies Act, 1956 (under section 457(1)(c)) empower the liquidator to sell the assets of the company through auction or private contract. However, they do not specify the exact auction method to be adopted by the liquidator.

International Practice

United Kingdom

23. Schedule 4 of the Insolvency Act 1986 provides for, "*Powers of Liquidator in a Winding Up*". Clause (6) of the said schedule provides for, "*Power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.*" Thus, the instant law is silent on the type of auction to be employed by the liquidator for selling the assets in winding up.

Singapore

24. Section 144 of the Insolvency, Restructuring and Dissolution Act 2018 provides for, "*Powers of Liquidator*". Clause (b) of sub-section (2) of the said section provides that the liquidator may, "*sell the immovable and movable property and things in action of the company by public auction, public tender or private contract, with power to transfer the whole of the immovable and movable property and things in action of the company to any person or company or to sell the same in parcels*". Further, clause (b) of sub-section (2) of section 214 provides that the Official Receiver may, "*sell or otherwise dispose of or deal with any estate, property or interest mentioned in subsection (1), either solely or in concurrence with any other person, in such manner, for such consideration, and by public auction, public tender or private contract upon such terms and conditions as the Official Receiver thinks fit, with power to rescind any contract and resell or otherwise dispose of or deal with such property as the Official Receiver thinks expedient...*". As is the case in United Kingdom, the instant law is also

silent on the method of auction to be utilized by the liquidator for selling the assets during winding up.

Analysis

25. As stated above, the Liquidation Regulations provides that the liquidator shall *ordinarily* sell the assets of the corporate debtor through an auction except under specific circumstances, through private sale. Part I of Schedule I of the Liquidation Regulations details out certain requirements / principles to be followed by the liquidator during auction. Clause (9) of Part I of the said Schedule mandates that, “*An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders*”. Thus, the Code / Liquidation Regulations only mandate that the auction should be undertaken in a transparent manner and should lead to maximization of realization from sale as well as promote the interests of the stakeholders. There is no express stipulation for the adoption of a particular method of auction for sale of assets under liquidation process, in the Code / Liquidation Regulations, but the Clause (9), inherently prescribes variants of English auction methods.

26. Further, the issue regarding adoption of SCM was raised in the Discussion Paper dated 27th August 2021 and the views of the stakeholders were sought on: ‘*Is there any need to specify specific methods of auction to be employed for sale of assets?*’ Majority of the stakeholders submitted that there is no requirement to mention specific methods of auction as the liquidator should have flexibility in choosing the method of auction depending on the nature of assets involved.

27. A liquidator, in consultation with SCC, has been duly empowered under the Code / Liquidation Regulations to take commercial decisions regarding the manner of sale (bulk sale or sale of smaller parcel of assets), mode of sale (public auction versus private sale), auction method and bidding mechanism (fixed versus moving bid increments) etc. and maximize realization proceeds from the liquidation estate. However, the liquidator's experience and expertise in managing complex liquidation process by structuring appropriate disposal strategy is critical in such situations¹.

¹ The Indian Insolvency and Bankruptcy Bill: Sixty Years in the Making: Ashish Pandey

28. Considering the international experience and foregoing analysis, it is submitted that the choice of type of auction to be used in the liquidation process for sale of assets should remain within the domain of the liquidator, in consultation with SCC, which should be exercised after taking into account the facts and circumstances of the matter while complying with the provisions of the Code and the Liquidation Regulations. Therefore, the specific auction methodologies, which also evolve with the passage of time, may not be specified in the Code or the Liquidation Regulations.

29. This is submitted for information of the Governing Board.

Part-B: Relinquishment of Security Interest

30. The Code enables a secured creditor in the liquidation proceedings to either: (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 section 52 of the Code. Regulation 32 of the Liquidation Regulations prohibits the liquidator to sell an asset which is subject to security interest, unless the security interest therein has been relinquished to the liquidation estate. Further, Regulation 21A of the Liquidation Regulations enables quick decision on relinquishment or realization of security interest by secured creditors by stipulating that the security interest shall be presumed to be part of the liquidation estate if the secured creditor does not intimate its decision regarding the same, to the liquidator within thirty days from the liquidation commencement date.

31. In some liquidation processes, wherein there were more than one secured creditor having *pari passu* charge over asset(s) of the CD, some secured creditor(s) having relatively smaller share in the value of the secured debt decided not to relinquish the security interest, while the remaining secured creditor(s) having majority of the share in secured debt decided to relinquish the same. The liquidators in such stalemate situations were unable to proceed with the sale of such encumbered assets for a considerable period, leading to depletion in value of assets and delay in completion of liquidation process.

UNCITRAL Legislative Guide on Insolvency Law

32. UNCITRAL Legislative Guide on Insolvency Law informs about the international practices if secured creditor does not relinquish the security interest:

“Some laws also provide that, where the holder of the security interest does not consent to the sale, the insolvency representative may request the court to authorize the sale. This may be granted provided the court is satisfied, for example, that the insolvency representative has made reasonable efforts to obtain the consent; that the sale is in the interests of the debtor and its creditors; and that the sale will not substantially prejudice the holder of the interest.”

SARFAESI Act, 2002

33. It is pertinent to note sub-section (9) of section 13 of the SARFAESI Act, 2002, which provides:

*“Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of **such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount** outstanding as on a record date and such action shall be binding on all the secured creditors.”*

(Emphasis supplied)

Jurisprudence

34. The Hon’ble NCLT, vide order dated 22.10.2019, in the matter of Edelweiss Asset Reconstruction Co Ltd vs Abhijeet MADC Nagpur Energy Pvt Ltd, observed that if a secured creditor wants to realize its security in accordance with section 13(9) of SARFAESI Act, 2002 then he must have 60% in the value of the secured debt and then his action shall be binding on all such secured creditors.

35. Similar principle was laid down in the matter of Mr. Srikanth Dwarkanath, Liquidator of Surana Power Limited Vs. Bharat Heavy Electricals Limited, wherein the Hon’ble NCLAT, vide order dated 18.06.2020, while relying on section 13(9) of the SARFAESI Act, 2002, had held that a secured creditor may proceed to realize its security interest for an asset over which it does not have an exclusive charge only with the consent of secured creditors holding at least 60% in value of the secured debt.

36. In line with evolving jurisprudence, there is an urgent need to provide clarity on the issue. It is important to note that if the deadlock is not resolved by an intervention, the assets will become part of liquidation estate through deemed relinquishment as mandated under regulation 21A of Liquidation Regulations, denying the secured creditors the right to make a choice of relinquishment or otherwise. Further, it may substantially delay the process if the intervention of AA is sought in each case, which may also unnecessarily clog the functioning of AA. Furthermore, the provision of deemed relinquishment was also introduced through amendment in the regulations. Therefore, bringing more clarity through regulations may be given a chance.

Update on Action taken

37. The Board had issued a Discussion Paper on “*Strengthening Regulatory Framework of Liquidation process*” on 27th August 2021, seeking public comments, *inter-alia*, on ‘*Should the decision of secured creditors holding 60% of the value of secured debt, to relinquish or realize the security interest be binding on other pari passu charge holders during liquidation process?*’ All the stakeholders, in response to the said proposal, had opined in favour as it will facilitate the process of sale of assets.

38. Further, the Advisory Committee on Corporate Insolvency and Liquidation in its 8th meeting held on 22nd September, 2021 agreed to the proposal that if secured creditors having 60% of the value in the secured debt decide to relinquish or realize the security interest, such decision shall be binding on the other pari-passu charge holders. However, the Governing Board in its 25th Meeting held on 24th September, 2021, decided that, “*The requirement of approval of a certain threshold of secured creditors for relinquishment may be provided in the Code. This may be taken up with Government for making necessary amendments in the Code.*”

Proposed Amendment

39. Regulation 21A, being a substantive provision, provides for deemed relinquishment of security interest, if no decision regarding relinquishment or realization of security interest is made within the prescribed time limit by secured creditors. In case of *pari-passu* charge, they may lose their right to make such decision, due to deemed relinquishment. Therefore, it is necessary to provide for the remedy in the Liquidation Regulations itself at the earliest time possible to prevent the secured creditor(s) in such cases from losing their substantive rights.

40. Further, since the amendments in the Code is a long-drawn-out process and the rights of secured creditors would remain compromised pending consideration of such proposal by the Government, it is proposed that the instant proposal of making amendment in the Liquidation Regulations to provide that if the secured creditors having 60% of the value in the secured debt decide to relinquish or realize the security interest, such decision shall be binding on the other *pari-passu* charge holders, is placed again before the Governing Board for its reconsideration. Accordingly, the draft amendment regulations are placed at **Annexure II**.

Part-C: Review of Circulars

41. In its 25th meeting held on 24th September 2021, the Governing Board advised that the IBBI may review all circulars issued till date by 31st March, 2022. Provisions in these circulars, which are required to be continued, may move to the respective regulations. It may weed out those provisions which are no longer required or relevant.

42. In pursuance of the foregoing directions, five circulars pertaining to liquidation process, issued by the Board till date have been reviewed. Out of these five circulars, four circulars as presented in Table-1 do not require any further action as they are of clarificatory nature and do not have any substantive provision which can be considered to be incorporated in the Liquidation Regulations and therefore, needed to be retained as it is.

Table 1: Circulars that may be retained

S. No.	Date of Issue	Subject	Brief of Circular	Remarks
1.	09 th January 2020	Deposit of unclaimed dividends and / or undistributed proceeds of liquidation process in accordance with regulation 46 of the IBBI (Liquidation Process) Regulations, 2016	It provides the bank account details of the Corporate Liquidation Account for deposit of unclaimed dividends and/or undistributed proceeds of liquidation processes.	Regulation 46 of the Liquidation Regulations provides the mechanism for operation of Corporate Liquidation Account. The said Circular only specifies the bank account details such as account number, IFSC, bank name, etc., wherein the deposit of unclaimed dividends and/or undistributed proceeds is to be made. Since the Corporate Liquidation Account is being maintained by the Board as a makeshift arrangement till the Corporate Liquidation Account is operationalised in the Public Accounts of India, the Circular may continue to exist.
2.	04 th March 2021	Filing of list of stakeholders under clause (d) of sub-regulation (5) of regulation 31 of the IBBI (Liquidation Process) Regulations, 2016	It provides for filing of the list of stakeholders of the corporate debtor under liquidation and modification thereof, in the specified format.	Regulation 31(5)(d) of the Liquidation Regulations mandates filing of the list of stakeholders on the IBBI's website. The said Circular provides the format of and mechanism for filing of such list on the portal.

				Being procedural in nature, the Circular may continue to exist.
3.	30 th September 2021	IBBI's Electronic Platform for hosting Public Notices of Auctions of Liquidation Assets under the IBBI (Liquidation Process) Regulations, 2016	It provides for uploading of public notice of every auction of liquidation asset.	A liquidator is required to issue public notice of auctions on the website designated by IBBI, in addition to other specified modes of publication, under sub-regulation (3) of regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) read with clause (5) of paragraph 1 of its Schedule I. The said Circular provides the mechanism for upload of auction notices on the portal. Being procedural in nature, the Circular may continue to exist.
4.	24 th November 2021	Filing of list of stakeholders under clause (d) of sub-regulation (5) of regulation 31 of the Insolvency and Bankruptcy Board of India	In partial modification of the Circular dated 04th March 2021, it removes the column "Identification No." from the particulars of the claim format stipulated therein.	Same as provided in SN 2 above.

	(Liquidation Process) Regulations, 2016	
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43. Table 2 below summarizes review of remaining circular. The review demonstrates the need to shift the provisions of the circular for being incorporated in Liquidation Regulations:

Table 2: Circular which may be weeded out with requisite amendment in Liquidation Regulations

S. No.	Date of Issue	Subject	Brief of Circular	Examination
1.	26 th August 2019	Applicability of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 notified on 25th July, 2019	The provisions of the IBBI (Liquidation Process) (Amendment) Regulations, 2019 are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25 th July, 2019.	Detailed examination provided in Annexure I.

44. Approval of the Governing Board is solicited for :

- (i) Changing the provision as contained in Liquidation Regulations to address the difficulty being faced by the market in taking a decision on realization and relinquishment under section 52 as proposed in the para 41 of the Agenda Note.
- (ii) To retain 4 circulars as proposed in para 42 above.
- (iii) To amend regulations for suitably incorporating contents of the circular dated 26th August 2019 as proposed in para 43 above.

Accordingly, the draft amendment regulations are placed at **Annexure II**.

Circular: Applicability of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 notified on 25th July, 2019

The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 ('Amendment Regulations'), *inter alia*, provides for completion of liquidation process within one year of its commencement notwithstanding pendency of applications for avoidance transactions, contribution towards the liquidation cost by the financial creditors, who are financial institutions and constitution of a Stakeholders' Consultation Committee. The Circular dated 26th August, 2019 provides that the provisions of the Amendment Regulations are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25th July, 2019.

2. In the matter of ABG Shipyard Limited, Liquidator (Mr. Sundaresh Bhat), had appealed against the order passed by the AA, wherein the AA, while relying upon the instant Circular, had declined to give benefit of provision of 90 days to pay the balance sale consideration as per amended clause 12 of Schedule I of the Liquidation Regulations. While allowing the appeal, the Hon'ble NCLAT, vide order dated 20.09.2021, observed that, *"In our view, the Circular dated 26.08.2019 could not interpret the Regulations in the manner it is done. Power of Board under Section 196(1) (p) or (t) to issue guidelines cannot be expanded to interpreting provisions made"*. It held that the Amendment Regulations are to be applicable to liquidation process which are pending, and the provision can be applied considering stage of the process, irrespective of the date whether the liquidation process started prior to 25.07.2019 or on or after 25.07.2019 when Clause 12 of Schedule I of the Regulations was substituted. It further held that, *"The Circular dated 26.08.2019, we hold is not legally enforceable to interpret applicability. Such Circular cannot be in the nature of substituting existing Regulation in the name of guidelines. The guidelines which are inconsistent with the subordinate legislation would not be enforceable."*

3. Considering the above, the blanket exclusion of all liquidation cases which commenced before 25th July, 2019 from all provisions of Amendment Regulations may not be appropriate. Hence, a review on application of the Amendment Regulations on such liquidation cases is imperative. While some of the provisions of the Amendment Regulations may be made applicable to all cases, there are provisions which may not be

applied to all the ongoing cases which commenced prior to 25th July, 2019. In this regard, it is submitted that the Liquidation Regulations may be appropriately amended as provided below:

S. No.	Amendment	Brief of regulation	To be extended to all ongoing cases which commenced prior to 25 th July, 2019 (Yes/No)	Reason(s)
1	Liquidation cost	It expands the definition of liquidation cost to provide that the costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern, costs incurred by the liquidator for preserving and protecting the assets of the CD and any other cost incurred by the liquidator which is essential for completing the liquidation process, to form part of liquidation cost.	Yes	The amendment is in the nature of clarification. No consequential amendment in Liquidation Regulations needs to be made.

2	Contributions to liquidation costs	The financial creditors, who are financial institutions, to contribute towards the liquidation cost, where the CD does not have adequate liquid resources to complete liquidation, in proportion to the financial debts owed to them by the CD.	No	Application of the said regulation to the cases wherein the liquidation order has been passed prior to 25 th July 2019, would imply sudden undue financial burden on the financial creditors, who are financial institutions. Hence, a clarification may be inserted in the Liquidation Regulations to provide that the regulation, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said Amendment Regulations.
3	Compromise or arrangement	It provides that where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation.	Yes	In the cases wherein liquidation order had been passed prior to 25 th July 2019, the time period for consideration of proposal of compromise or arrangement has already elapsed, hence, extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.

4	Liquidator's fee	It provides for a mechanism for payment of fee in view of the reduction in the period for completion of liquidation process from two years to one year.	Yes	The regulation already provides a clarification that the instant regulation, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations. Hence, no amendment in Liquidation Regulations needs to be made.
5	Public announcement	A stakeholder may submit its claim or update its claim submitted during	Yes	In the cases wherein the liquidation order had been passed prior to 25 th July 2019, the time period for submission of claims has already elapsed, hence, extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.
6	Submission of claim	the corporate insolvency resolution process, as on the liquidation commencement date.	Yes	

7	Presumption of security interest	<p>A secured creditor shall inform the liquidator of its decision to relinquish its security interest to liquidation estate or to realise its security interest within 30 days. Non-communication of the said decision would imply that the assets covered under the security interest shall be presumed to be part of the liquidation estate. Further, where a secured creditor proceeds to realise its security interest, it shall pay its share of CIRP, liquidation cost and workmen dues, as it would have shared in case it had relinquished the security interest.</p>	No	<p>Application of the said regulation to the cases wherein the liquidation order had been passed prior to 25th July 2019, would imply sudden undue burden on the secured creditors, who have decided not to relinquish their security interest. Further, in cases wherein the secured creditors have not intimated their decision regarding relinquishment of its security interest, applying the instant regulation on such cases may result in unintended relinquishment of security interest. Hence, a clarification may be inserted in the Liquidation Regulations to provide that the regulation, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said Amendment Regulations.</p>
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8	Stakeholders' consultation committee.	It provides constitution of a Stakeholders' Consultation Committee (SCC) having representation from secured financial creditors, unsecured financial creditors, workmen and employees, government, other operational creditors, and shareholder/partners, to advise the liquidator on matters relating to sale.	No	The instant regulation provides that the liquidator shall constitute an SCC within 60 days from the liquidation commencement date to advise him on matters relating to sale. Application of the said regulation to the cases wherein the liquidation order had been passed prior to 25th July 2019, would create confusion among the stakeholders regarding whether an SCC needs to be created or whether past decisions taken by the liquidator are void in the absence of advice of the SCC on such decisions. Hence, a clarification may be inserted in the Liquidation Regulations to provide that the regulation, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said Amendment Regulations.
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9	Sale as a going concern.	The amendments specify the process for (a) sale of corporate debtor as going concern, and (b) sale of business of corporate debtor as going concern under liquidation	Yes	The instant regulation only delineates procedural aspect regarding sale as a going concern and hence extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.
10	Valuation	It provides that whether a liquidator is of the opinion a fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint valuers	Yes	The instant regulation only delineates procedural aspect regarding valuation and hence extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations need to be made.
11	Distribution	It reduces the time period for distribution of proceeds by the liquidator from six months to 90 days.	Yes	The instant regulation only provides procedural aspect regarding distribution and hence extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.

12	Completion of liquidation	The amendment require completion of liquidation process within one year of its commencement, notwithstanding pendency of applications for avoidance transactions.	No	The instant regulation reduced the period for completion of liquidation process from two years to one year. Application of the said regulation to the cases wherein the liquidation order had been passed prior to 25th July 2019, would result in abnormality as such cases would have already exceeded two-year time mark by now. Hence, a clarification may be inserted in the Liquidation Regulations to provide that the regulation, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said Amendment Regulations.
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13	Final report prior to dissolution.	It provides that the liquidator shall submit an application along with the final report and the compliance certificate in form H to the AA for - (a) closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or (b) for the dissolution of the corporate debtor, in cases not covered under clause (a).	Yes	The instant regulation only details procedural aspect in the liquidation process and hence extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.
14	Model time-line for liquidation process	It provides a model timeline of liquidation process of a CD.	Yes	The instant regulation only provides a model timeline for liquidation process and hence extension of this regulation to all cases would not result in any complication. No consequential amendment in Liquidation Regulations needs to be made.

15	Reserve price	<p>The amendment provides that the liquidator may reduce the reserve price by up to 25% in case of failure of an auction and by 10% in subsequent auction. Further, the time for submission of balance sale consideration by highest bidder in a successful auction was extended from 15 days to 90 days.</p>	Yes	<p>In the matter of LML Limited (whose liquidation process commenced prior to 25.07.2019), AA, vide order dated 14.07.2021, had allowed the liquidator to reduce the reserve price by further 10% in the next auction, as the asset remained unsold even after reducing the price by maximum permissible limit.</p> <p>In another matter of ABG Shipyard Limited (whose liquidation process commenced prior to 25.07.2019), the Hon'ble NCLAT, vide order dated 20.09.2021, had allowed the benefit of provision of 90 days to pay the balance sale consideration to successful bidder as per amended clause 12 of Schedule I of the Liquidation Regulations.</p> <p>Considering the above jurisprudence, the extension of the instant regulation to the cases wherein the liquidation order had been passed prior to 25th July 2019, would result in smoother functioning of the process and obviate the need to approach the judiciary in such circumstances by providing additional time to the successful bidder for submission of balance sale consideration and additional price flexibility to the</p>
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				liquidators to conduct auction process. Hence, no consequential amendment in Liquidation Regulations needs to be made.
16	Forms	Editorial changes in Form B, C, and D were introduced. Further, Form H was introduced to provide for a Compliance certificate	Yes	Application of changes in the Forms would neither result in any burden on the stakeholder nor would it result in any complication. Hence, no consequential amendment in Liquidation Regulations needs to be made.

**THE GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, XX FEBRUARY, 2022**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION**

New Delhi, the XX February, 2022

Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2022

No. IBBI/2020-21/GN/REG080.- 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) (Amendment) Regulations, 2022.

(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 2A, the following Clarification shall be inserted, namely:-

“Clarification: Regulation 2A of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations”

3. In the principal regulations, in regulation 21A,

(i) in sub-regulation (1), after the proviso, the following second proviso shall be inserted, namely:-

“Provided further that, in case of pari passu charge, no secured creditor shall be entitled to exercise rights conferred on him under section 52 of the Code unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on the liquidation commencement date and such action shall be binding on all secured creditors having the said pari passu charge.”

(ii) the following Clarification shall be inserted, namely:-

“Clarification: Regulation 21A of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations”

4. In the principal regulations, in regulation 31A, the following Clarification shall be inserted, namely:-

“Clarification: Regulation 31A of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations”

5. In the principal regulations, in regulation 44, the following Clarification shall be inserted, namely:-

“Clarification: Regulation 44 of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations”

Ravi Mital, Chairperson
[ADVT]

The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 were published vide notification No. IBBI/2016-17/GN/REG005 dated 15th December, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, vide No. 460 on 15th December, 2016 and were last amended by Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021 vide notification No. IBBI/2021-22/GN/REG079 dated the 30th September, 2021 in the Gazette of India, Extraordinary, Part III, Section 4, vide No. 428 on 30th September, 2021.