

# KSR & CO COMPANY SECRETARIES LLP

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## KSR&CO

COMPANY SECRETARIES LLP

Rewarding Ideas | Raring Steps

## LIQUIDATION PROCESS - REJIGGED

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The Insolvency and Bankruptcy Code, 2016 (IBC) has brought in a paradigm shift in the corporate insolvency resolution and liquidation processes through a pro-active, time bound and structured process. With the amendments brought into force with effect from 25<sup>th</sup> July 2019, to IBBI (Liquidation Process) Regulations, 2016 and the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidation process will now be more structured and time efficient. We have given a summary of the amendments brought by the amendments to Liquidation Process Regulations.

### **Presumption of Security Interest**

A stakeholder in the corporate debtor in liquidation is required to submit his claim as on Liquidation Commencement Date (LCD) in the prescribed format (as per the class of stakeholders) on or before the last date mentioned in the public announcement. The claimant is also required to prove his claim through documentary corroboration. Along with submission of claim, a secured creditor shall inform in the prescribed format to the liquidator of its decision to relinquish its security interest to liquidation estate or to realise its security interest on its own. A failure on the part of the secured creditor to opt either to be part of liquidation process or to be outside the liquidation within 30 days of LCD, will result in the presumption of that the secured creditor has opted to be part of the liquidation process.

### **Constitution of Stakeholders Consultation Committee**

Similar to constitution of Committee of Creditors (CoC) under the Corporate Insolvency Resolution Process (CIRP), within 60 days from LCD, the liquidator is required to constitute a Stakeholders Consultation Committee (SCC). The SCC will act as both advisory and decision-making authority concerning liquidation. Unlike CoC, the SCC will have representation from all the stakeholders like the secured financial creditors, unsecured financial creditors, workmen and employees, other operational creditors, the government and the shareholders. Where the stakeholders fail to nominate their representative on the SCC, the liquidator is enabled to choose the stakeholder with highest claim amount in that class to be included in the SCC. The liquidator shall chair all the meetings of SCC. An advisory decision to the liquidator shall be decided in the SCC by a vote of not less than 66% of the representatives present and voting. However, the advice of SCC is not binding on the liquidator. If the liquidator takes a decision different from the decision arrived at in the SCC, he shall record the reasons for the same in writing.

## **Liquidation on a going concern basis**

The amended Regulations provides an option to the (Stakeholder) Consultation Committee (inadvertently the amendment refers to Committee of Creditors) to decide to conduct liquidation for (a) sale of corporate debtor as going concern or (b) sale of business of corporate debtor as going concern. The amended Regulations clearly state that if the corporate debtor is sold as a going concern, the liquidation process shall be closed without dissolution of the corporate debtor.

Under the amended IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, the Committee of Creditors (CoC) may recommend the sale of corporate debtor as a going concern while approving the Liquidation of the corporate debtor and if CoC so recommends, it is supposed to identify the group of assets and liabilities, which according to the commercial considerations of the CoC could be sold as going concern. CoC must apply its mind!

From these amendments it is clear that an attempt to introduce a scheme of arrangement within the meaning of Section 230 of the Companies Act, 2013 is different from attempting to sell the Corporate Debtor as a going concern. The amended Liquidation Process Regulations give a period of 90 days from LCD for attempting a scheme of arrangement within the meaning of Section 230 of the Companies Act, 2013.

## **Model-time line for liquidation process**

A model time line based activity chart has been introduced which starts from LCD and ends with liquidation of the corporate debtor assuming that the process does not involve a scheme for compromise or arrangement under Section 230 of the Companies Act, 2013. Regulation 44 has now been amended to stipulate that the liquidation must be completed within a period of one year from LCD. Prior to the amendment, this Regulation had provided two years for this purpose. However if the sale of the Corporate Debtor or the Business of Corporate Debtor is attempted on a going concern basis an additional period of 90 days beyond the “one year” period is provided.

## **Contribution to Liquidation Costs**

As per the amended IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, while approving a Resolution Plan or while making a recommendation for the liquidation of the corporate debtor, it is now incumbent upon the CoC to make, in consultation with the resolution professional, an estimate of the liquidation costs, duly taking into account the liquid assets available with the corporate debtor. If liquid assets available are insufficient to meet the estimated liquidation costs, then the CoC should provide for contribution to meet the excess of estimated liquidation costs over the liquid assets. The contribution to provide for the excess of liquidation costs over the liquid assets need to be shared between financial creditors who are financial institutions in the ratio of their share of claim. However, such contribution along with interest at bank rate thereon shall form part of liquidation cost, which is paid in priority.

## **Sale and realization**

The reserve price for the auction sale of the assets of the corporate debtor shall be realisable value arrived by the registered valuer appointed by the liquidator. Where the auction at the reserve price fails, the liquidator can reduce the reserve price by not more than 25 % for the subsequent auction. If the auction fails, then the liquidator is enabled to reduce the reserve price by not more than 10% at a time for every successive auction. The highest bidder is required to pay the balance consideration (i.e., after deducting the earnest money deposit made with the bid application) within a period of 90 days. However, for the period beyond the first 30 days from the closure of bid, interest at the rate of 12% will apply.

## **Liquidator's fee**

The liquidator is now eligible to be paid the same fee payable during CIRP, during the period of compromise or arrangement under Section 230 of the Companies Act, 2013 in addition to the fee fixed under the Regulations on the basis of realization of sale (net of liquidation costs) and distribution to the stakeholders.

## **Compliance Certificate**

The liquidator is required to submit a comprehensive compliance certificate in the prescribed format along with the final report to the Adjudicating Authority.

While there have been several decisions of the NCLAT on the point that sale as a going concern should be accorded priority and Liquidators must make a serious attempt to come out with a scheme of arrangement within the meaning of Section 230 of the Companies Act, 2013 or for sale as a going concern, the amendments have introduced a regulatory basis to the need for doing everything to keep the status of the Corporate Debtor as a going concern as far as possible even after the LCD.

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