

## Proposed Comments on Discussion Paper on Corporate Liquidation Process under IBC 2016

The Insolvency and Bankruptcy Board of India as per discussion paper dated 26th August, 2020 asked for comments on 2 issues being (i) determining the corpus of liquidation estate and (ii) the entitlement of stakeholders so that new regulations is brought. Further new concept of **NRRA** has been brought in this discussion paper which means **Not Readily Realisable Assets**. These are the assets **which are not easily realisable and have indefinite waiting time** (*Emphasis realisability & time*). Such assets fall generally in the category of sundry debtors, including refunds from Government and its agencies; contingent receivables, disputed receivables, sub-judice receivables, disputed assets (where, for example, legal ownership is not clear), and assets underlying avoidance transactions etc.

Liquidator as per regulation 44(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('Liquidation Regulations') has to liquidate the corporate debtor within a period of one year from the liquidation commencement date. But non realisation of **NRRA** always acts as stumbling block in timely completion of liquidation process. Further with the efflux of time not only value of assets depreciates but liquidation cost also increases in terms of Security, Legal expenses etc. It is against the objectives of the Code which envisage time bound closure alongwith realisation of maximum value of assets. The Bankruptcy Law Reforms Committee (BLRC) which conceptualised the Code was aware of it and purposed that Liquidator with the permission of adjudicating authority close down the case and **create a trust** whereas any net realisation from contingent assets (Equivalent to **NRRA**) is deposited and subsequently distributed to stakeholders. Here it is pertinent to note that Regulation 38(1) of Liquidation Regulations also

provides distribution of asset among stakeholders with the permission of the Adjudicating Authority.

Now IBBI invited public comments on **new proposed regulation whereas NRRAs is to be assigned** as per following two options:-

1. **Absolute Assignment - Option I:** - Under this option, assignment of NRRAs will be absolute and the assignee (party to whom the assets are assigned by liquidator (assignor) would have right over the assets and any action related thereto. The assignment would include the transfer of all the legal rights, remedies and power to bring the action to an end (for example, by settlement) without the interference of the assignor.
2. **Assignment with recompense facility - Option II:** - Assignment with recompense facility will allow the liquidator to assign the asset with **an initial price**. Any subsequent net recovery would be shared between assignee and the assignor as per terms of assignment.

However these assignments are subjects to following Checks & Balances:-

1. The assignor of NRRAs should not be disqualified u/s 29A of the code.
2. The Liquidator should consult Stakeholders Consultation Committee (SCC) but there advice shall not be binding on him as per regulation 31A of Liquidation Regulations. However he has to record the reasons in writing for contrary views as taken by him against SCC.
3. Liquidator must also follow all usual laid down Principles being acting in best interest, maximization of value, assignment through an action, 29A, Good Faith etc

Further IBBI has also mentioned in their paper of similar best International practices and stated that law doesn't prohibit such assignment as per various honourable Apex Court rulings in other statutes and interpretation of sec 5 (7) of the Code. However IBBI still desired to explicitly provide the same by incorporating new Regulation 30A & 38A. IBBI also feels that post amendment, a market may also develop for **NRRA buyers**.

In the background of all these, author being **Insolvency Professional in IBC practice** offers following comments:-

- 1) The thought process behind this is a welcome step from IBBI in consonance with opinion of honourable Apex Court in other statutes and best International practices. However all these are already there in the definition of section 5(7) of the Code whereas a "financial creditor" to mean "any person to whom a financial debt is owed and includes a person to whom such debt has been legally **assigned** or transferred to (**Emphasis assigned**). Do we need separate regulations as more regulations give rise to interpretational issue which always results in more litigation?
- 2) At present Liquidator although without success with the consent of SHC trying to recover money by way of assignment of debts. Let us understand that in the present economic conditions, most of the markets are buyers market & do we have buyers like ARC who are willing to invest in **NRRA especially an for contingent asset which comes pursuant to sec 43 to 66 of the Code**. I am afraid there is no such market & all these provisions shall remain good on paper only. The regulator must come out with scheme for creation of such companies like Information Utility (I.U.) who should be readily available as buyer to prospective assignor (Liquidator) as exists in

developed economies like UK, USA, Australia, etc

- 3) As per proposed regulation 38 A sub regulation (2), **NRRA** can be assigned with recompense arrangement. In case of recompense arrangement, money shall come after dissolution of CD as per sec 55 than regulation **must provide mechanism of keeping that money in an escrow account which shall be jointly operated by assignee (Liquidator and/or member of SHC) and assignor**. This is also in consonance with BLRC report.
- 4) Liquidator shall assign **NRRA** at a definite price to assignor. However, price in buyer's market is determined by buyer at the time of buying which may subsequently change on realisation as all these assets are subject to huge uncertainties e.g. in case of favourable court order against fraudulent transaction by promoter, huge recoveries may come or in case of unfavourable court order there may be Nil recovery. If realised amount is substantially on the higher side than regulator will always see the NRRA assigned price with suspicion. The **proposed regulation must also provide inherent mechanism to safeguard Liquidator or Valuers who acted in Good Faith**.
- 5) As per proposed regulation 38 A sub regulations (1), the concept of **beneficial interest** perhaps equivalent to **NRRA** has been explained with inclusive definition. It is very strange that discussion paper talks at length about **NRRA** but uses words **beneficial interest** in proposed regulation. Respectfully, IBBI must clarify this aspect because as per discussion paper assets which are not easily realisable and have indefinite waiting time qualifies only as **NRRA** which is not at all defined in the **beneficial interest**. I am afraid Courts later on may include all assets of Liquidation

estate as beneficial interest which is against the discussion paper & BLRC report.

Similar comments from other stakeholders are also invited in the comment box so that comments are submitted before 16<sup>th</sup> Aug 2020 to IBBI & Link to IBBI site where public comments have been asked is

<https://www.ibbi.gov.in/uploads/whatsnew/2020-08-26-184542-x70yo-1bc5a2ba5d43fda2a51fa372bf5bc76c.pdf>

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