CIRP AND LIQUIDATION DISCUSSION PAPER COMMENTS

cifl.org.in
insolvency@mnlumumbai.edu.in

OUR TEAM

Centre Coordinator
Prof Raghav Pandey

Contributors
Diya Dutta
Ishaan Wakhloo
Monika Saini
Parina Muchhala
Renuka Nevgi
Shiv Kumar Sharma
Shubham Dhamnaskar
Sriram Prasad

Designer
Omkar Chaudhari

Email:
insolvency@mnlumumbai.edu.in

cifl.org.in

CIFL

Centre for Insolvency and Financial Laws

TABLE OF CONTENTS

CIRP DISCUSSION PAPER COMMENTS

PART-A: CODE OF CONDUCT FOR THE COMMITTEE OF CREDITORS

A. WHETHER A CODE OF CONDUCT SHOULD BE SPECIFIED BY THE BOARD?

Yes. The publication of a Code of Conduct (**"Code"**) by the Board is a much-needed move to impose obligations on members of the Committee of Creditors (**"CoC"**), since they continue to remain the only unregulated stakeholders in the resolution process.

However, the Code in its current form cannot be implemented in true spirit by the Board as it may be disregarded by FCs for lack of penal or financial consequences as a result of their disobedience. In light of the same, it may also be useful for the Board to consider the following alternatives to guarantee effective implementation of the Code

1. **Specifying penalties/obligations in the event of a 'breach' of the Code's duties**

   Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 requires insolvency professionals to abide by the Code of Conduct specified in its First Schedule at all times, in the absence of which their registration may be revoked by the Board.[1] In this scenario, the insolvency professional is incentivised to follow the Code of Conduct because there is a penalty attached to its disobedience/breach.
   The same is not the case with the Code, for it is directive and without consequences. Therefore, the Code must be supplemented by specific consequences for breach to ensure that it is paid heed to by FCs. For this, in our view, the Board must consider providing the Code statutory form by drafting specific regulations pertaining to the conduct of the CoC.

2. **Release of the Code in consultation with/via the RBI**

   While drafting the regulations may be partially beneficial in regulating the conduct of the CoC, it may face a major implementational challenge nevertheless. The Board is not the primary sectoral regulator of the members of the CoC. Members of the CoC are banks and other financial institutions which fall squarely within the regulatory authority of the Finance Ministry and RBI. Even select NBFCs are regulated by the RBI. Section 35AA[2] of the Banking Regulation Act denotes the enormous scope of the RBI to regulate banks, even to the extent of ordering them to initiate insolvency or to handle large accounts. Thus, even if the Code were provided statutory backing by the Board, it would not be in a position to administer the penalties or consequences flowing from its breach. Since this would render the very enactment of the Code impractical, there is a need for differential treatment in terms of implementation of the Code.

Ideally, we believe that there is a need for the Finance Ministry or the RBI to release the Code, in consultation with the Board, to ensure that FCs actually follow its obligations and are appropriately penalised for a breach. The penalties should be administered by the RBI for effective implementation. Alternatively, should a suitable amendment to the Banking Regulation Act be required, we believe that the same should be undertaken to provide appropriate powers to the RBI.[3]

---

[1] Regulation 7(2)(h), Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, *available at* https://ibbi.gov.in//uploads/legalframwork/ec07dc410a49830271f64139b87e825a.pdf.
[2] Section 35 AA, Banking Regulation Act, 1949: – Power of Central Government to authorize Reserve Bank for issuing directions to banking companies to initiate insolvency resolution process.
[3] Sections 35 and 36, Banking Regulation Act, 1949.

B. ANY ITEM OF THE DRAFT CODE OF CONDUCT PLACED AT ANNEXURE THAT SHOULD BE OMITTED OR MODIFIED.

Similar/Repetitive points

The following points should be clubbed because they are either repetitive, or convey different aspects of a similar idea:

S. NO.	EFFECT OF PROPOSED POINTS	COMMENTS
1)	Points c, h, j Point c deals with the CoC's duty to "maintain objectivity" in decisions, whereas Point h involves the idea to "not influence the decision or the work of committee" for undue gain. In effect, the two points advance two aspects of the same idea, and for a common intention. While a member of the CoC is to maintain objectivity when rendering his own decision, he is also supposed to ensure that the same objectivity is guaranteed to other members (essentially, non-interference with their objectivity) to prevent undue gains on his part. When read with Point j, which discusses making decisions without bias or favour, one realises that these obligations are interlinked.	In our view, the two obligations could be combined under a common Article titled "Objectivity in decision making". The following obligations can be mentioned, of which we have provided a sample to ensure logical consistency in one single obligation: **"The committee of creditors must:** • **Maintain complete objectivity when making decisions;** • **Prevent coercion, undue influence or conflict of interest from influencing their decisions at any point of time;** • **Not interfere or influence the decisions or work of the other members of the CoC;** • **Avoid decision-making or conduct which leads to direct or indirect undue gains or advantages to them;** • **Must not act with *mala fide* or be negligent while performing assigned functions and duties."**[4] Alternatively, the Board may consider providing a broader Article on "Decision making" by laying down all general duties of members of the CoC when participating in the process of decision making. Cues can be taken from Points o, k and z, which highlight the need for effective participation, representing all impacted stakeholders and transparency during decision making. These Points may be combined for greater clarity.
2)	Points m, y, f and cc These convey the same obligation – that all members of the CoC must have knowledge of the IBC and allied regulations. Considering that they also have the same scope, we believe that they can be combined. However, FCs are also bound by relevant RBI circulars/directions, which implies that extending the scope of this obligation to such circulars will increase	The following, in our view, must be the crux of a single Article under the Code titled 'Adherence to applicable laws': **"The committee of creditors must:** • **Have complete knowledge of, adhere to and be updated with the provisions of the Insolvency and Bankruptcy Code, allied regulations, instructions and circulars issued by the Board from time to time;** • **Have complete knowledge of, adhere to**

[4] See, for example, Point 14, Schedule 1: Code of Conduct for Insolvency Professionals [Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016], *available at* https://ibbi.gov.in//uploads/legalframwork/ec07dc410a49830271f64139b87e825a.pdf

	responsibility on members. On the other hand, Point f appears to be an extension of Points m, y and cc, because it requires members to prevent utilising illegal means to achieve objectives.	**and be updated with the provisions of relevant and applicable circulars, guidelines, directions, instructions and regulations issued by the Finance Ministry and RBI from time to time.** • **Not do anything illegal or improper or against the objectives of the Insolvency and Bankruptcy Code, including any other relevant and applicable allied regulations, instructions and circulars issued by the Board, the RBI or the Finance Ministry from time to time."**
3)	<u>Points t and u</u> Point t provides an elaborate discussion about respecting the confidentiality of information, while Point u appears to be an extension of it, requiring members of the CoC to maintain privacy of information.	In our view, these two must be combined into a single Article called 'Privacy and Confidentiality' with the following obligations: • **"Members must ensure complete confidentiality of information that they receive or come across as part of the process at all times.** • **They shall respect the privacy of information sent or received and ensure that they do not share any information with any person who is not authorised to receive it."** The exception to disclose information (similar to Point 21, Schedule 1 of the Code of Conduct for Insolvency Professionals) must be retained.
4)	<u>Points q, r, s and bb</u> These are interlinked and provide for the duty of members of the CoC to adhere to timelines. The only slight difference is that some points mention specific tasks allotted to the CoC under the IBC which require to be done within the desired timelines.	The manner in which this common obligation can be combined within a single Article called 'Timeliness' is: **"The CoC must adhere to all the time limits prescribed in the Insolvency and Bankruptcy Code and the rules, regulations and guidelines thereunder for insolvency resolution."** In our view, there is <u>no specific necessity</u> to split and mention each specific obligation within this Article because there is a possibility that the scope of the Article might then be interpreted as being exhaustive. Rather, this allows the article to maintain an overarching, generic nature to ensure that it is applicable to all duties of the CoC under the Insolvency and Bankruptcy Code and allied regulations.
5)	<u>Point dd</u> Point dd which talks about endeavour to protect the CD as a running business and its assets and take necessary steps to protect the value of the assets of the CD.	This point requires rephrasing, to allow more discretion to members of the CoC to decide in the 'best interests' of the corporate debtor, rather than always protecting it as a running business. Too much emphasis on resolution undermines the commercial wisdom of the CoC. It was also one of

		the major factors that led to the downfall of the SICA.[5] Thus, in our view, the point can be reworded in the following manner: **"Members must endeavour to protect the best interests of the CD at all times."**
6)	<u>Points d and i</u> Points d and i discuss the obligation to disclose a conflict of interest. There is only a slight difference between Points d and i, wherein the latter specifies that the conflict of interest must be a 'pecuniary or personal relationship'. In our view, the scope of the Article should be expanded to include obligations related to independence and impartiality. We believe that this general standard must be present in this Article because it envisages independence obligations beyond mere disclosure of conflict of interest.	To ensure uniformity, the term 'conflict of interest' must be defined in depth below a general Article titled 'Conflict of interest', in the following manner: • **Members must act independently and impartially while making decisions.** • **All members must disclose the details of any conflict of interests to the stakeholders, whenever it comes across such conflict of interest during a process;** • **Explanation: for the purposes of this Article, the term "conflict of interest" shall refer to any direct or indirect pecuniary or personal relationship with stakeholders that can impact the resolution process.** The Board may also consider reference to the test of connection and relation (i.e. 'connected party' and 'related party') present within Section 29A to define 'conflict of interest.' The scope of the Code differs from Section 29A, as a result of which the substance of this section cannot be imported verbatim. However, we believe that reference to the form in which such test is laid out may be useful to assess presence of a conflict of interest between members of the CoC and all other stakeholders.

[5] Kristin Van Zwieten, The Demise of Corporate Insolvency Law in India: The Role of the Courts, pg. 195-196, *available at* https://ora.ox.ac.uk/objects/uuid:b19387d6-1a57-4e60-b46b-ca2c7a469afe/download_file?file_format=pdf&safe_filename=thesis.pdf&type_of_work=Thesis.

C. ANY ITEM THAT IS NOT PART OF THE DRAFT CODE OF CONDUCT PLACED AT ANNEXURE BUT SHOULD BE INCLUDED.

Additions to existing Points

3. *Point n*

In addition to nominating sufficiently authorised representatives, FCs must endeavour to nominate representatives having knowledge of the insolvency resolution process, insolvency ecosystem and all their duties under the Insolvency and Bankruptcy Code.

To that effect, in our view, an addition must be made in the following manner:

- "Members must nominate representative with sufficient authorization to participate in meetings and make decisions during the process.
- The appointed representatives must have sufficient knowledge of the insolvency resolution process and all their duties under the Insolvency and Bankruptcy Code and allied regulations.
- Provided that, when such appointment is not possible, members of the CoC must endeavour to follow the provisions of Section 24(5) of the Insolvency and Bankruptcy Code, 2016."

The addition of appointment of insolvency professionals as authorised representatives (by making a reference to Section 24(5)) might make its functions more objective and quicker, owing to the professional expertise of these professionals. Alternatively, considering that these professionals are also regulated by a separate Code of Conduct in the Insolvency Professional Regulations, there is greater incentive to prevent double liability.

D. ADDITIONAL COMMENTS:

4. Reliance on international precedent

Paragraph 10 of the Discussion Paper specifies that there are two international precedents – namely, the UK Association of Business Recovery Professionals Guidelines and Section 1102 of the US Bankruptcy Code, thus hinting at the idea that there exist similar structures to regulate the CoC in the US and UK. However, in our view, this is not the case – which is why neither of the two can be considered as guiding precedent to draft the Code.

The UK Association of Business Recovery Professionals is a 'membership body recognised for the purposes of authorising (licensing) insolvency practitioners under the Insolvency Act 1986'.[6] Essentially, it is an 'association' performing statutorily recognised functions governing the conduct of insolvency professionals, but is not the UK regulator itself.[7]

Additionally, a perusal of the text of 'guidance' issued by this Association reveals that it is only a general document providing information to people about the role and possible responsibilities of a member of the CoC.[8] It does not provide specific guidelines on the conduct of a member of the CoC. Even otherwise, the CoC formed is to consist of unsecured creditors and is mainly to 'assist the insolvency professional'[9]. It does not take decisions by itself, as is the case in India.[10] There is only one paragraph that generally describes the responsibilities of such members, and appears to be potentially relevant:

> *"It is important to consider that acting on the Committee is a responsible role and you would be required to act ethically and in good faith in all of your committee dealings. You would be expected to avoid any situations where a conflict of interest might arise. You would also be unable*

[6] https://insolvency-practitioners.org.uk/

[7] See, for example: "The IPA licenses and regulates Insolvency Practitioners under insolvency and anti-money laundering regulations, and works to raise professional standards through professional training, benchmarking, networking, best practice sharing and other engagement opportunities. The IPA is an organisation for those in insolvency practice or involved in insolvency-related work. It has around 2,000 individual and firm members and students. In terms of the number of insolvencies, it is the largest of the four Recognised Professional Bodies (RPBs) identified by the Secretary of State for Energy and Industrial Strategy (BEIS), under the Insolvency Act 1986 for the purposes of authorising and regulating insolvency practitioners (IPs) in the UK. It is the only one of the bodies solely involved in insolvency…" *available at* https://insolvency-practitioners.org.uk/about/who-are-we-and-what-we-do/.

[8] https://insolvency-practitioners.org.uk/uploads/documents/32600cf903fc5f2d0bdba4162e7afc58.pdf

[9] Section 49 & 68, Insolvency Act 1986 (UK).

[10] Section 23, Insolvency and Bankruptcy Code, 2016 (India).

to obtain any of the company or individual's assets without the prior agreement of the Committee."

Although useful, since the guide has not been prepared by the UK regulator itself, it becomes potentially misleading for the Board to rely on this. Not only does it give the impression that there are statutory guidelines regulating the CoC in the UK, but is also not detailed enough to provide reliable guidance to the Board to frame the guidelines. Lastly, as mentioned above, the role of this committee is not similar to the Indian CoC.

On the other hand, Sections 1102 and 1103 (dealing with the creation of the CoC) of the US Bankruptcy Code does not make a reference to the general behavioural obligations of members of the CoC at all.[11] Although, as acknowledged by the Discussion Paper, there is a reference to the responsibility of interest of others on members of the CoC within Section 1102(b)(1), there is no discussion on the manner in which such responsibility is to be discharged. Furthermore, considering the debtor-in-control model of insolvency in the US, the role of creditors in insolvency resolution is anyway lesser, which makes relying on such obligations less suited to the Indian context.

In effect, neither of the references provided within the Discussion Paper can be relied upon to argue in favour of 'international precedent' on regulating CoC members. We were also unable to locate other sources from which guidance can be sought. That being said, there continues to be a need to do so in India.

We believe, therefore, that the Code must be framed without reference to international precedent and must be solely grounded within the Indian context. In this respect, greater reliance should be sought from the cases cited within the Discussion Paper as opposed to the aforementioned documents. Under IBC, the Adjudicating Authority already has powers to monitor the functions of the CoC or interfere in the process of insolvency resolution if necessary.[12] Thus, respecting the commercial wisdom of the CoC

5. Structure of the Code

The draft Code requires a structural overhaul. This is crucial to ensure uniformity of drafting and interpretation. As highlighted by us above, the obligations mentioned in multiple places have either been repetitive or are redundant. In light of the same, we propose detailed 'Articles' (similar to the Insolvency Professional Regulations) having specific duties of members of the CoC, rather than the Point-form system adopted in the present draft. The Board may consider adding this additional Article at the beginning of the Code for greater clarity:

- *Definitions and Scope*

This Article must define key terms relevant to the Code, for instance "conflict of interest", "breach", "committee of creditors". In line with international best practice, the Code must also lay down its scope, in case Articles provide a reference to specific obligations (Points e, l, n, w, are examples of specific obligations).[13]

[11] *Available at* https://www.govinfo.gov/content/pkg/USCODE-2011-title11/pdf/USCODE-2011-title11.pdf.
[12] Section 54L, The Insolvency and Bankruptcy Code, 2016 (India).
[13] See, for example, Article 2(3), 'Draft Code of Conduct for Adjudicators in International Investment Disputes' by the ICSID and UNCITRAL Secretariat: "…Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates from the date they are first contacted concerning a possible appointment" *available at* https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf. Although this is a Code of Conduct for international arbitrators in investment arbitration disputes, the manner of drafting and the scope of obligations reflects one of the latest compilations of international best practice on the ethical obligations of stakeholders.

PART-B: REQUEST FOR RESOLUTION PLANS AND USE OF SWISS CHALLENGE IN CIRP

E. SHOULD THERE BE ANY RESTRICTIONS ON THE NUMBER OF REVISIONS IN THE RFRP?

The Insolvency law in India has evolved tremendously over the last few years but one thing that has been consistently emphasized upon throughout is the importance 'time boundness' in our framework. As reiterated recently in the Supreme Court cases of *Innoventive Industries Ltd.* v. *ICICI Bank*[14] & *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta*,[15] the timelines and detailed procedure under the IBC ensures a timely completion of Corporate Insolvency Resolution Process ("CIRP") and introduces transparency, certainty and predictability in the insolvency resolution process.

The significance of having a stringent timeline becomes of key essence especially in the CIRP because as the Corporate Debtor ("CD") is not at the best financial position when it defaults, the longer a CIRP period is, the higher the chances will be that the CD gets pushed towards liquidation (while reducing its liquidation value). Nearly 47 per cent or 1,349 cases closed under the insolvency law ended up in liquidation till the end of June this year, and off the ongoing cases, 75% have surpassed the time bar of 270 days as given under section 12 of the Code. According to IBBI, the major reasons for non-adherence to the prescribed timeline are the repeated requests for expression of interest, continued extension of time for submission of resolution plans, unsolicited revision of submitted plans, repeated negotiations with the resolution applicants, receipt of unsolicited plans, etc.[16]

The likelihood of resolution is much higher, if sufficient freedom is provided to the stakeholders in formulation and revision of resolution plans. The Code draws heavily from the UNCITRAL Legislative Guide on Insolvency Law ("**Model Law**"), and the Model Law permits modifications to a resolution plan. Even under clause (5) of Regulation 36B of the CIRP Regulations allows such modifications of the request for resolution plan subject to the 30-day timeline prescribed, with extensions if granted by the CoC. However, it leaves a grey area with regards to the number of revisions allowed. Due to absence of a threshold, the CoC gets bound to entertain revised plans under the garb of 'value maximisation', which inevitably furthers the delay. Two major setbacks that accrue out of this are that **(i)** such delay would add to erosion of stakeholders confidence in the process and added cost, and **(ii)** knowing that the committee keeps on accepting new plans the prospective resolution applicant ("PRA") could offer lesser than the optimum at the initial stages, which could further destruct the value of the corporate debtor.

Therefore, yes, an explicit cap should be put on such revisions to ensure that the CIRP remains timebound because if it is not completed within the prescribed timeline, the Corporate Debtor will bet sent into liquidation, defeating the entire purpose of having a resolution.

F. IF, YES, DO YOU SUGGEST ANY CHANGES IN THE PROPOSAL AT PARA 30 (II).

It is proposed by the Board that the number of revisions shall not exceed 2. No other jurisdiction has ever put an upper limit on the number of revisions allowed to a resolution plan, solely in order to facilitate flexibility in the framework, however, by doing so, India might be first to implement such a change. While in principle we are in agreement with the idea of putting a limit to the number of such revisions, we also believe that what is more necessary is to put a time-bar per revisions. Under Regulations 36B of the CIRP Regulations, a minimum of 30-day time frame is given to PRAs to submit a resolution plan and allows for revisions/modifications of the request for resolution plan, within the time limit prescribed. If a hard-and-fast rule of allowing only two revisions is mandated then this might encourage the PRAs to take more time than necessary for each of its

[14] (2018) 1 SCC 407
[15] 2021 SCC OnLine SC 194
[16] https://ibbi.gov.in/uploads/whatsnew/fbe59358a8c440d001f3b950be4a1c67.pdf

revision(s), especially when with the permission of the CoC they can extend their time limit.[17] Therefore, the *first* suggestion from our end would be to formalise the time frame per revisions before setting the maximum number of revisions – as that would cater to the object of the insolvency framework being a time bound one. Time bar could be set as 1 week per revisions, and the number of revision allowed is something that could be decided on an *ex ante* basis.

Secondly, in addition to what has already been proposed in the discussion paper, codified guidelines prohibiting any modification of the plan post CoC's approval should also be incorporated. The Code contains no provision imposing any direct or indirect ban on modification of a plan after CoC's approval, rather having section 60(50)(c) that gives NCLT the jurisdiction to entertain any question of law or facts, arising in relation to the insolvency resolution, and Rule 11 of the NCLT Rules, 2016 that gives it inherent powers – it becomes more vital to lay down an explicit prohibition. This is especially considering the September 2021 Supreme Court Judgement of *Ebix Singapore (P) Ltd.* v. *Educomp Solutions Ltd. (Committee of Creditors)*[18] wherein the Court held that no modifications can be made after getting the CoC's approval.

G. SHOULD SWISS CHALLENGE MECHANISM BE AVAILABLE IN THE CIRP REGULATIONS?

Yes, the Swiss Challenge Mechanism ("SCM") should be made available in the CIRP Regulations. As one of the key issues that requires attention is the submission of unsolicited plans, SCM will help in managing such unsolicited proposals and further reduce any scope of delay and uncertainty caused by it.

SCM is considered as a viable mode of public procurement and has been used with varying levels of success in many countries including South Korea, Philippines, Chile, Argentina, Indonesia, South Africa, Sri Lanka, Bangladesh, Taiwan, and even India. Several Indian states such as Andhra Pradesh, Rajasthan, Karnataka, Madhya Pradesh, Chhattisgarh, Gujarat, Maharashtra, Punjab and Bihar have allowed SCM to be used for public-private partnership projects.[19] For example, the Jaipur Development Authority had used the SCM to develop Mega Film City Venture,[20] and the Maharashtra Housing and Area Development Authority (**"MHADA")** had used SCM for a housing project in Thane.[21]

In September 2016, the Reserve Bank of India had also approved *the use of SCM for the sale of stressed assets by banks. The use of this method was suggested by the RBI to lower the quantity of non-performing assets sold by banks and enable fasted debt aggregation by securitisation and reconstruction companies.*[22]

The banks have also resorted to the Swiss challenge to offload their stressed assets under the SARFAESI Act, 2002. Thereafter, RBI has issued Draft Comprehensive Framework for Sale of loan exposures on 8th June 2020 and invited public comments on the same. Our courts in India have, too, seem to principally accept the mechanism as well. In the case of *Ravi Development v. Shree Krishna Prathisthan & Ors,*[23] the Supreme Court observed that SCM as a method of auction is acceptable, more democratic as compared to other options, and also emphasized upon the fairness and non-arbitrariness of SCM. Moreover, particularly with respect to SCM under the CIRP Regulations, Hon'ble NCLT (Mumbai Bench) in the matter of *Bank of Baroda* v. *Mandhana Industries Ltd.*,[24] issued directions for 'bidding' on the plan between the applicant and Respondent no. 18 that later must be examined by the CoC and voted upon. The AA, thus, on an application by one of the resolution

[17] Clause 6 Regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016
[18] Civil Appeal No. 3224 of 2020
[19] Vinayak Chatterjee: Swiss challenge, Indian style, Business Standard, *available at* https://www.business-standard.com/article/opinion/vinayak-chatterjee-swiss-challenge-indian-style-115120701266_1.html.
[20] JDA unveils plan for mega film city, The Times of India, *available at* https://timesofindia.indiatimes.com/city/jaipur/JDA-unveils-plan-for-mega-film-city/articleshow/5830082.cms.
[21] Awarding contracts the "Swiss way", PSA Legal, *available at* http://psalegal.com/wp-content/uploads/2017/01/INFRASTRUCTURE-BULLETIN-ISSUE-II11062009041747PM.pdf.
[22] Guidelines on the sale of stressed assets by banks, Reserve Bank of India, *available at* https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CIR563104EA2E56CC4305844C469BB753331C.PDF.
[23] (2009) 7 SCC 462
[24] C. P. No. 1399/I&BP/2017

applicants expressly ordered the RP to conduct Swiss Challenge under CIRP. All these precedents indicate towards the legitimacy that our judiciary has tacitly given to the mechanism.

H. IF YES, DO YOU SUGGEST ANY CHANGES IN THE PROPOSAL AT PARA 30 (VI).

The CIRP achieves value maximisation by allowing the entire market to compete to submit resolution plans; it is only after such a competitive process that the highest resolution applicant is discovered. Having the method implemented in the later stages of the CIRP will unnecessarily cause delay and lead to uncertainty. Therefore, we would suggest that *first*, the Swiss challenge should be allowed to operate in a mechanism where an initial plan is known at the start of the CIRP and then the Swiss challenge is run on the basis of the base plan – much like how it had been proposed for Pre-Packs.

Secondly, the limit to the number of rounds of swiss challenge should be restricted to two rounds, as having more rounds can hinder with the timeline and discourage prospective RAs to participate in the process. The key element of the SCM that makes it a more efficient method of auction is the right of first refusal. Therefore, having two rounds in the SCM method gives an opportunity to the highest bidder from the first round to get to match/outbid any bidder who has a higher bid in the second round. This right of first refusal tends to maximise the realizations from auctions, and is thereby a big positive for the stakeholders.

Lastly, whatever design of SCM get implemented, the rights and interests of promoters and RAs participating should be balanced carefully**.** For instance, to prevent unexpected takeovers by third-party resolution applicants ("RAs"), if a plan is submitted that offers a higher consideration than the plan offered by the promoters of the CD, the promoters should have an option to match such a plan – this would also minimise the fear of loss of control by the existing management of CD and incentivise it to initiate the process at an early stage. However, if the promoters have an absolute right to match the offer of a challenger, then no RA will be interested to participate in the process, as they know that the promoter would ultimately match their offers. Conversely, it will incentivise the promoter to submit an undervalued resolution plan at the outset, knowing fully well that it can later match the value in case a higher value is offered.

LIQUIDATION DISCUSSION PAPER COMMENTS

PART-A: ACCOUNTABILITY OF LIQUIDATOR

ISSUE-1: EXPANDING AND DEEPENING THE SCOPE OF SCC

The proposed amendment at paragraph 20 of the Discussion Paper ("DP") deals with involvement of Stakeholder Consultation Committee ("SCC") during the liquidation process. The proposed amendment aims to strengthen participation of stakeholders, including creditors, during the liquidation process. The desirability of facilitating high levels participation must be balanced against the need to ensure that the representation mechanism remains: (a) efficient, (b) cost-effective and (c) avoids creditors involving themselves in matters that will not have an impact on their interests (UNICITRAL Legislative Guide on Insolvency Law, Para 75). Considering the framework of the Insolvency and Bankruptcy Code ("IBC") 2016 and aims which the proposed amendment seeks to achieve, we put forward following general comments and thoughts on the issue:

1. **Option of giving "notice of issues" in lieu of mandatory consultation:**

   It is suggested that instead of mandating consultation with SCC for all significant matters, liquidator should be given an option to give "notice of issue". Through the notice liquidator can prospectively disclose its plan on any significant matter related to liquidation process. Based on the information received members of SCC, if thinks appropriate, can convene a meeting as provided under Regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 ('Liquidation Regulations').

The suggestion is based on following reasons:

a) Role Of Creditors During Resolution Vis-À-Vis Liquidation:

The Committee of Creditors ("CoC") formed during resolution process plays an important role under the IBC framework. The IBC provides statutory power to the CoC to reorganize the debts of a Corporate Debtor ("CD"). The IBC has adopted creditor in control model (BLRC Report) and the Resolution Professional ("RP") so appointed work under control and supervision of the CoC as per scheme of the IBC.

However, once resolution process ends and liquidation begins the creditors have limited role. The liquidator so appointed is a quasi-judicial officer, who works subject to order of the Adjudicating Authority (Section 35 (1)). The liquidation process aims to efficiently realize maximum value from the liquidation estate. For this reason, liquidator has been entrusted with vast discretions. Under the IBC the liquidator, while discharging duties, 'may consult' with any stakeholder (Section 35 (2)). Further, provided that such consultations will not be binding upon the liquidator (Proviso, Section 35 (2)).

Even the international practices suggest that creditors and other stakeholders have limited role during liquidation process. The UNICITRAL Legislative Guide on Insolvency Law says that "it may not be important for creditors to intervene in the proceedings or participate in decision-making" during the time of liquidation (Paragraph 84). Similarly, in US the Creditors' Committee appointed under Chapter 11 (resolution) and the Creditors' Committee appointed under Chapter 7 (liquidation) of US law has different roles. Committee formed under Chapter 7, have limited role of advising the trustee. In most of the cases, the Committee is not even constituted. In other developed jurisdictions like Australia, Singapore, UK, etc. (which are discussed in the DP) committees of stakeholders (creditors) have statutory recognition. Even in these countries, there are no requirements of mandatory consultation for all significant matters during the liquidation process.

b) Transparent Process Will Save Judicial Time:

Though mandatory consultation with SCC has its own pros and cons, it is undisputed that the liquidation process must be transparent. Timely disclosures from the liquidators to SCC can ensure information symmetry and trust of stakeholders. Furthermore, it can potentially save judicial time in scrutinizing validity of actions of the liquidator. As informed SCC acts as a tool to check powers of the liquidator. Thus, Regulation should ensure timely disclosure of important information from liquidator to SCC.

2. **SCC shall have power to ask for information:**

As per Regulation 31A of Liquidation Regulation, the SCC shall have access to all relevant records and information as may be required to provide advice on sale of assets of CD (Regulation 31A). The proposed amendment aims to broaden the scope of SCC. Thus, simultaneous amendment is required to be made in power of SCC to demand information from the liquidator. Furthermore, SCC should have power to inspect books of accounts and properties of company under the liquidation. This will help SCC in performing its duty and monitoring conduct of the liquidator.

Under the Company Act 2013, the Advisory Committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time (Section 287). Similarly, in jurisdiction like Australia, Committee of Inspection has right to request for information that the committee considers desirable about the conduct of the liquidation.

Thus, a clause in the Regulation can be added to this effect:

Regulation 31A (5): Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to perform its duty under the Regulations. The SCC shall also have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.

Provided that members of SCC shall maintain confidentiality of such information received and shall not use these to cause an undue gain or undue loss to itself or any other person.

3. **Discretion of liquidator-A Mandate of the IBC:**

In some cases, access to information to SCC may unduly affect the interest of other stakeholders or the liquidation process. Furthermore, in some cases consultation with SCC may affect the integrity of the liquidation process. Even the IBC explicitly provides for discretion of liquidator while consulting with stakeholders (Section 35 (2)). Therefore, the liquidator must have discretion to avoid sharing any information with members of SCC or consultation with members of the SCC. However, reason for the same must be recorded and disclosed by the liquidator to SCC as well to the Adjudicating Authority in its report.

4. **Sale of assets to a member of SCC:**

To avoid conflict of interest, generally, laws in all jurisdictions regulate sale of assets from liquidation estate to a member of a stakeholder committee formed under the relevant national laws. Even under the Company Act 2013, members of Advisory Committee can’t buy asset forming part of liquidation estate without leave of the Tribunal (Rule 39, Companies Winding up Rules, 2020). Similar, restriction is also placed in jurisdiction like Australia, UK, etc. To ensure that power vested upon the SCC is not being abused similar regulations can be adopted under the IBC framework

ISSUE-2: REFINING PROCEDURAL FRAMEWORK OF CONSTITUTION OF SCC

The proposed amendment at paragraph 27 of the DP deals with the criteria for nominating representative(s) of each class of stakeholders. Considering the framework of the Insolvency and Bankruptcy Code ("IBC") 2016, international practices and aims which the proposed amendment seek to achieve, we put forward following general comments and thoughts on the issue:

5. **The Proposed Amendment Rightly Rely on Principle of Majority Of Value Of Claims of Those Present And Voting**:

   a) Adhering to the voting principle of majority of value of claims:

   In most of the jurisdictions such as Australia, Singapore (as discussed in the DP) the principle of majority in vote and number is used to nominate representatives for committees during liquidation. In some jurisdictions, like UK, the principle of simple majority of value of claim is used. Functions and composition of consultation committee and scheme of legislations vary from one jurisdiction to another. Therefore, different jurisdictions rely on different principles. Even the UNICITRAL legislative guide acknowledges these differences (Paragraph 98). The IBC framework mostly relies on principle of majority of value of claims. For ensuring uniformity within the framework same principle can be adopted in the proposed amendment.

   b) Quorum For Valid Nomination:

   In the matter of SBS Transpole Logistics Private Limited (as discussed in the DP), the problem arose when stakeholders with majority of value of claim refrained from participating in the nomination process. In such situations, liquidator shall consider other nominations from members present and voting. There is no need to specify any quorum for valid nomination. If a stakeholder with majority of value of claim refrained from participating then it is safe to assume that he is not interested in becoming member of the committee. In such cases, member who has shown interest in representing class of stakeholders shall be considered by the liquidator.

6. **Special Cases of Nomination of Representative from Workmen:**

   As per the Liquidation Regulation, even workmen are allowed to nominate a representative for SCC. The nomination from workmen cannot be based on principle of majority of value of claim as claims of workmen are different from claims of creditors, shareholders, etc. In such cases, principle of majority in number may be considered. In our opinion, this will ensure better representation of workmen in the process.

7. **Special Cases of Vacancy, Removal and Appointment of New Members:**

   The proposed amendment at paragraph 27 of the DP, clarifies procedure for appointment of representatives for the SCC. However, it does not provide for special cases of 'vacancy, removal and appointment of new members at SCC'. The UNCITRAL Legislative Guide on Insolvency Law suggests that "Where the law provides for the formation of a creditor committee, details of the manner in which the committee is to be formed, the scope and extent of its duties, its governance and operation, including quorum and conduct of committee meetings, as well as replacement and substitution of members are often also addressed" (Paragraph 107). In developed jurisdictions like Australia, Singapore, UK, etc. law provides for procedure for filing vacancy, removal of members and appointment of new member. The provisions on the same lines can be adopted in India. This will be helpful in avoiding disputes which may arise in future regarding working of SCC.

PART-B: MATTERS RELATED TO SALE OF ASSETS

ISSUE-3: ENGAGEMENT OF MARKETING PROFESSIONALS FOR SALE OF ASSET(S)

8. The *Insolvency and Bankruptcy Code (2016)* has elucidated the powers and duties of a liquidator under *Section 35*. The Issue at hand deals with Section 35(1)(i) which empowers the liquidator to seek professional assistance and even provides for appointment of any professional. As discussed in the Paper, the primary cause of concern here relates to the delegation of powers by the liquidator, and the remuneration scheme for such marketing agents.

9. As per the Regulations, it is the duty of the liquidator to formulate the marketing strategy and Section 35(1)(i) of the Code which provides for appointment of a professional is merely to aid and assist the liquidator with the process. We believe that it is important here to emphasize on the fact that the liquidator is entitled merely to seek assistance from professionals, and not to delegate his duties to any such professionals or agents. The issue here is two-fold, the first issue being that the liquidator must not delegate his duties to other persons, as such delegation could not only compromise the integrity of the liquidation process but would also result in an overlap of the duties between the liquidator and such agent. The legislative intent here was to make sure that the control of the process stays with the liquidator and the control must not be transferred in totality to any other professional or agent. The second issue that sprouts out of such appointment of an agent is the multiplicity of charges on the proceeds from liquidation, as these agents are usually appointed on commission/success fee basis. Such charges would have a significant impact on the liquidation estate, thereby having a negative impact on the welfare of the stakeholders.

10. The suggested Amendment to place a bar on appointment of agents on commission basis seems fair, but perhaps there are certain other provisions that could be added to the regulations. Encouraging the use of services offered by the Platform for Distressed Assets (PDA) is a positive step and would definitely improve the efficiency of the liquidation process in most cases, but we must also keep in mind that there could be certain extraordinary circumstances where the use of online platforms might not be the most feasible alternative. For certain niche sectors, it might not be feasible to have online auctions or even a private sale directly through the liquidator. There are certain assets which either fall in a very niche market or are not very easily marketable, and this is where the need for agents usually arises. There are certain sectors where there are certain market practices which need to be respected and there are certain intermediaries that have to be dealt with in order to transact successfully, real estate being one such sector. For instance, real estate sales may require experienced brokers so as to maximize the value of assets and carry out the sale more efficiently. Keeping in mind such cases, there is a need to perhaps provide some relaxations or exemptions to the liquidator.

11. With regards to the remuneration of such agents, if at all appointed in exceptional cases, could be made the sole responsibility of the liquidator. By putting the burden of remuneration of such agents on the liquidator, the liquidation estate would stay clear of multiple charges by way of commissions and would also ensure that the liquidator doesn't frivolously appoint agents to delegate his duties.

12. With regards to the liquidator consulting the Stakeholders Consultation Committee while preparing the marketing strategy, there are a few things to note. Involving the Stakeholders and keeping them updated with the liquidation process is definitely a positive as it improves transparency by way of checks and balances, but there is also a need to maintain the balance between the involvement of the SCC and timely liquidation. The position of SCC under the Code is different from that of the Committee of Creditors. As under Regulation 31(10), the consultation by SCC is not binding on the liquidator. We are well aware that the Adjudicating Authority has emphasized[25] on the importance of timely liquidation time and again,

[25] *Kridhan Infrastructure Pvt. Ltd. v. Venkatesan Sankaranarayan, 2020 SCC OnLine NCLAT 639*

hence we must make sure that the liquidator is not burdened with obligations, causing inadvertent delays in the liquidation process.

ISSUE-4: PRE-BID QUALIFICATIONS FOR AUCTIONS

13. Pre-bid qualification of a potential bidder is typically the first barrier for the potential bidders when trying to participate in an auction and it exists for good reason. The Discussion Paper mentions how a greater level of competition in an auction increases the chances of realizing a higher value from the assets. It has also been mentioned that the imposition of unreasonable pre-bid qualification conditions such as an exorbitant EMD act as barriers to entry, which end up reducing competition and thereby impacting the realizations from the asset(s).

14. We agree that competition plays a key role when it comes to increasing the chances of higher realization from the asset(s), but we must not see liquidation auctions at par with other auctions such as government tenders as mentioned in the Paper. The differentiating factor between auctions for liquidation and other auctions is that the transaction needs to go through swiftly when it comes to liquidation auctions. As mentioned in the preceding suggestions, time is of the essence when it comes to liquidation and also that there would be a significant impact on realizations from the assets in case the transaction isn't completed successfully.

15. Pre-bid qualifications play an instrumental role in ensuring a swift and clean transaction during liquidation auctions, as these requirements tend to eliminate any casual bidders in the very initial stage and ensure that only serious bidders compete in the auction. Deciding upon the pre-bid qualifications is yet another balancing act, where the liquidator must make sure that the qualifications aren't too stringent that they scare away potentially serious bidders and at the same time the qualifications shouldn't be too lenient/absent as it would have an adverse impact on the success rate of the transaction. It is also important to note that the Government has indeed removed the EMD requirements for tender auctions, but with the incorporation of a bid security declaration. Such bid security declarations cannot possibly be incorporated in liquidation auctions, and hence we should not make the mistake of making comparisons between liquidation auctions and other auctions.

16. The proposed Amendment which states that the liquidator shall not prescribe EMD in excess of 10% of the reserve price of the assets could have some complex repercussions in our opinion. The hesitation to participate in the bidding due to high earnest money requirements primarily stems from the fear of forfeiture of such earnest money by the liquidator. The potential bidders also fear the risk of false or inaccurate disclosures regarding the assets being auctioned, which could come to their notice after the bidding process. In such a case, if the bidder wants to back out of the deal, it would be a tedious task to get a refund of the exorbitant earnest money.

17. The concerns of such potential bidders are legitimate, but we must also make sure that the success rate of the transactions should not be compromised just to accommodate more bidders. Potential bidders who will be bidding for assets of distressed companies are well aware that the risk profile is higher as compared to normal auctions, and hence only bidders with a higher risk appetite tend to participate in such auctions.

18. As highlighted earlier that even though it is not a fair comparison, the usual earnest money requirements stand at around 2-5%, but we would like to highlight that there are certain sectors which require up to 20% of the reserve price as earnest money prior to the bidding, such as the telecom sector. Keeping this in mind, the Amendment could be more fruitful if the liquidator is given the authority to propose a higher earnest money requirement in cases where he deems fit, subject to approval from the adjudicating authority.

ISSUE-5: POWER OF LIQUIDATOR IN AUCTION

19. As mentioned in the Discussion Paper, the liquidator must provide the reason(s) for rejection of the highest bid to the highest bidder and also record the same in the quarterly progress report. The Amendment proposed seems to be fair and in favour of transparency of the liquidation process. Even though the disclosure of reason(s) as to why the highest bid was rejected would not convince the bidder in most cases, such disclosure(s) would still be the least that the liquidator could do as a display of transparency in the liquidation process.

ISSUE-6: SWISS CHALLENGE AS A MODE OF AUCTION UNDER LIQUIDATION PROCESS

20. The Board is empowered to establish a guiding mechanism for time-bound disposal of assets of the corporate debtor u/s 196(1)(t) of the IBC. The fixation of a specific method of auction would bring in certainty and clarity regarding the procedure for sale of assets. Presently, the liquidator has discretion to select the method of auction which leaves the scope for challenge by the parties on grounds of efficiency and value maximization. The prescribed method could facilitate a timely and transparent auction process by eliminating all the ambiguities. We believe that the Swiss Challenge Method (SCM) is the most efficient mode of auction during liquidation and this is also supported by the fact that various domestic regulators use it as their preferred method of auction and in addition to that the Courts too have seen the method as a legitimate method of auction.

21. We believe that there is no reason to be apprehensive about adopting the SCM as the preferred method of auction. The SCM is almost a replica of the commonly used English Auction system where there is a single round of bidding, and the highest bidder wins. The key element of the SCM that makes it a more efficient method of auction, is the right of first refusal. Typically, there would be two rounds in the SCM method and the highest bidder from the first round gets to match/outbid any bidder who has a higher bid in the second round. This right of first refusal tends to maximize the realizations from auctions, and is thereby a big positive for the stakeholders.

22. Even the RBI via circular[26] dated 01.09.2016 has recommended the adoption of SCM for lowering the vintage of Non-Performing Assets and enabling faster debt aggregation by Securitization Companies/ Reconstruction Companies. Also, state governments including Maharashtra, Andhra Pradesh, Karnataka, Gujarat, Kerala, Rajasthan have also used SCM as a model while entering into contracts with private entities.

23. The Hon'ble Supreme Court of India endorsed SCM in the case of *Ravi Development case*[27] wherein it was observed that this method of auction is acceptable and is more democratic as compared to other options. In a similar view, the Madras High Court emphasized upon the fairness and non-arbitrariness of SCM in the case of *Sri Devi Karumariamman v. Central Bank of India*.[28] Therefore, the SCM method has also been given legitimacy by the Courts. If we assess foreign jurisdictions, the SCM is also seen as the favourable auction mechanism in countries such as Italy, United States territory of Guam and Philippines in order to ensure competition and transparency.[29]

24. A comparative analysis of SCM with other prominent methods such as English, Dutch and sealed-bid methods would demonstrate the suitability of SCM for liquidation. In the English method of auction, a base price is determined and the bids of ascending value are placed therefrom. Although this is a fairly transparent method, a disadvantage is that the asset is to be sold to the highest bidder. SCM gives some discretion to the liquidator while deciding which bid can be accepted. This discretion is required to assess

---

[26] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10588&Mode=0
[27] *Ravi Development v. Shree Krishna Prathisthan &Ors*, (2009) 7 SCC 462
[28] *Sri Devi Karumariamman v. Central Bank of India*, 2020 SCC OnLine Mad 21516
[29] https://documents1.worldbank.org/curated/en/142981468777252745/pdf/417300Unsolici1als0PPIAF0101PUBLIC1.pdf

the financial condition, viability, ability to discharge the liabilities attached to the company and so forth. The sealed-bid method is also known as a ‘blind auction’ because the other bidders are not aware about the highest bid. This may detrimentally affect their participation in the price discovery system. It is undesirable in liquidation due to the lack of transparency. The Dutch method is generally used for the large-scale sale of products. As opposed to the English method, this includes bidding in descending values. It is not suitable for liquidation because it would not help in maximization of value of assets. Therefore, the Swiss Challenge Method should be prescribed as an auctioning mechanism within the regulations so that the process is more definite, efficient, time-saving and transparent.

PART-C: SECURITY INTEREST RELATED

ISSUE-7: RELINQUISHMENT OF SECURITY INTEREST

25. With regards to enforcement of security interest by a secured creditor, there are two routes present. One is under SARFESI as seen in *Mr. Srikanth Dwarkanath, Liquidator of Surana Power Limited Vs. Bharat Heavy Electricals Limited*, where the Court held the requirement of 60% of the *pari-passu* creditors need to be in agreement to either relinquish or realize their security interest, as per Section 13 (9) of SARFESI. The other is through Regulation 37 of the Liquidation Process Regulations 2016, which gives the secured creditors who hold the *pari-passu* charge an option to enforce their interest through the Code itself. Furthermore, NCLT Mumbai, in *Edelweiss Asset Reconstruction Company Limited v Abhijeet MADC Nagpur Energy Private Limited* held that there are two ways to enforce security interest, under SARFESI and under Regulation 37. Hence, it is not mandatory to enforce the security interest under SARFESI. Therefore, of the two ways that exist to enforce security interest and in case of Regulation 37 and *pari-passu* creditors seeking enforcement under it, there is a grey area with regard to the procedure for enforcement.

26. Subsequently, the dispute between *pari-passu* charge holders needs to be addressed very clearly and cover both the routes of realisation of the security interest. As the Code provides for an "opt out" process, an absence of response from the secured creditors within thirty days would mean they are deemed to relinquish the asset. Therefore, the proposed regulation should be designed in such an manner, it covers the scenario, where an *pari-passu* charge holder with very less percentage of voting rights takes action under Regulation 37, and withdraws the asset from the liquidation estate.

27. As Regulation 37 provides an alternative to enforcement of security under SARFESI, it does not take into consideration a possible dispute between *pari-passu* charge holders. Hence, it is a grey area with regards to would a majority be needed to enforce the security under Regulation 37 and is so, what would the percentage of majority be? This grey area also needs to be resolved by the proposed amendment.

28. Such withdrawal of assets from the liquidation estate should be allowed only if there is a concrete decision from majority of the *pari-passu* charge holders, as they have important ramifications on the liquidation process. If many assets are withdrawn from the liquidation estate without the backing of the majority of the *pari-passu* charge holders, they would be "stuck" and hence they cannot be acted upon. This would hinder the ability of the Corporate Debtor to be sold as a going concern under liquidation.

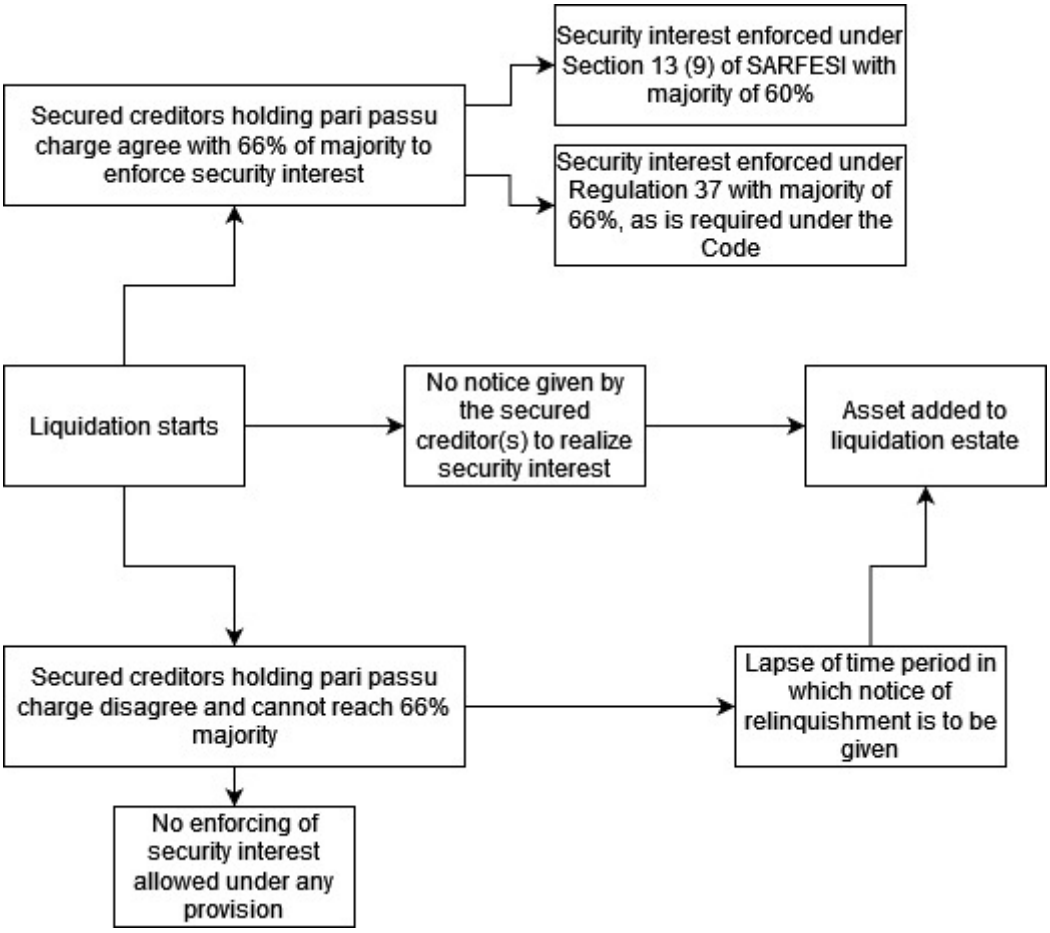
29. Hence, to bring more clarity to the situation, the proposed legislation should only allow for realization of assets through <u>any route,</u> after the *pari-passu* charge holders have a majority decision. If they fail to reach a majority decision, the asset should be deemed to be part of the liquidation estate.

30. On the issue of the percentage of majority, the amendment proposes the majority of 60%. This percentage has been directly lifted from Section 13 (9) of SARFESI, which details out one of the two available options for realisation or security interest. Furthermore, the limit of 60% was amended down in 2012 from the earlier limit of 75%. Hence, the majority of 60% is merely representative of the limit under SARFESI and is not justified under the Code.

31. Under the Code, there is no majority which functions on the limit of 60%. The Committee of Creditors, while approving a resolution plan require 66% majority. In approving a resolution plan, the CoC make a conscious economic decision as to the debt they hold. Similarly, relinquishment or realisation of an asset is a conscious <u>economic decision</u> with regards to the future of the debt and the corresponding security interest, the *pari-passu* charge holders hold. Under the Code, all economic decisions are subject to a 66% majority; hence, the proposed majority in the amendment should also be 66%.

32. Such a limit of 66% majority would also be compatible with Section 13 (9) of the SARFESI, where the majority required is 60% for the enforcement of the security interest under Section 13 (9).

33. Hence, the introduction of the proposed amendment to simplify the process as represented in the diagram below.



In such a model, if there is no majority of 66% reached between the *pari-passu* charge holders, there can be no realisation of the security interest and it will be automatically relinquished under the Code.

Specific Comments:

S. NO.	ISSUE	PROPOSED AMENDMENT	COMMENTS
1.	Expanding and deepening the scope of SCC	It is proposed to provide in the Liquidation Regulations that the liquidator shall consult SCC for all significant matters related to liquidation process, including appointment of professionals (and their remuneration), and sale of assets (including major aspects such as fixation of reserve price, manner of sale, etc.). (Paragraph 20)	• In our opinion, consultation with SCC on all significant opinion may affect flexibility and efficiency of the process. In order to ensure accountability of the liquidator along with efficiency of the process, the liquidator should be given an option to disclose its decisions through giving a "notice of issue". Based on the disclosure, if SCC is of opinion that consultation is required on the issue then it can request for meeting of SCC as per Regulation 31A of IBBI (Liquidation Process) Regulation 2016. • The meaning word "significant matters" related to liquidation process need to be defined. The scope of word will determine power of the SCC and responsibility of liquidator. Therefore, a definition providing inclusive list of matters which are covered under the ambit of word "significant matters" may be inserted as an explanation to the Regulation. Or alternatively, SCC may be given power to decide, prospectively, what all matters are significant for the liquidation process. The later approach ensures greater degree of participation and flexibility in the process. • An Amendment should be made in Regulation 31A(5) of Liquidation Regulation, empowering the SCC to request for "all relevant records and information as may be required to perform its duty under the Regulations. The SCC shall also have the

			right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time". This will help the SCC in performing its new functions and ensure supervision over activities of liquidator.
2.	Refining Procedural Framework of Constitution of SCC	It is proposed to provide in the Liquidation Regulations that the liquidator may facilitate the stakeholders of each class to nominate their representative(s), while adhering to the voting principle of majority of value of claims of those present and voting, for inclusion in the consultation committee (Paragraph 27)	• The proposed amendment rightly relies on principle of majority of value of claims of those present and voting, for inclusion in the consultation committee. However, for nomination of a representative from workmen an exception may be provided. The claims of workmen are different from claims of shareholders and creditors. In case of representation from workmen, principle of majority in number may be considered. • The Regulation should further provide procedure for special situations of : (a) vacancy, (b) removal and (c) appointment of new member at the SCC. This will be helpful in avoiding probable future disputes.
3	Engagement of Marketing Professionals for Sale of Asset(s)	i) The liquidator shall not engage a professional/agent for sale of asset(s) on commission / success fee basis ii) The liquidator shall prepare a marketing strategy for sale of assets of the CD in consultation with SCC.	i) In addition to the proposed Amendment, it must be explicitly mentioned that the liquidator must not delegate his duties under the garb of hiring professionals. A provision could be added to the Amendment, stating that the liquidator shall pay any agents hired by him in exceptional cases, solely out of the remuneration that he receives and not at the cost of the liquidation estate. The appointment of agents could be permitted in exceptional cases, with prior approval from the adjudicating authority. ii) We are of the opinion that mandating the liquidator to consult with the SCC while preparing the marketing strategy might cause excessive delays in the liquidation process.

			An alternative amendment could be to mandate disclosures to the SCC by the liquidator. This would ensure transparency, would keep the SCC updated and would also enable the SCC to raise any concerns that it may have. This disclosure system could improve overall efficiency and reduce the chances of any delays.
4	Pre-bid Qualifications for Auctions	**i)** Liquidator shall not require any payment of any fee or non-refundable deposit from potential bidders. **ii)** Prescribe EMD in excess of 10% of the reserve price of the asset(s).	**i)** We believe that the proposed Amendment is fair and would also encourage participation in the bidding process. **ii)** We are of the opinion that the EMD requirement should not be capped at 10% in an absolute sense. An additional clause could be added to empower the liquidator to prescribe an EMD greater than the suggested 10% in extraordinary cases, subject to approval from the Adjudicating Authority.
5	Power of Liquidator in Auction	Insertion of clarification that the liquidator shall provide reasons for rejection of the highest bid in the auction process.	No comments.
6	Swiss Challenge as a Mode of Auction under Liquidation Process	There is a need to deliberate whether a guided path is to be explicitly stipulated for the adoption of SCM for the auction under liquidation, especially in the context of absence of prohibition on adoption of any method of auction in the Liquidation Regulations currently.	i) The Swiss Challenge Method could be fixed as a guiding mechanism for auction in all the cases so as to ensure certainty and efficiency. However, the liquidator could be permitted to use any other method with the approval of the Adjudicating Authority in exceptional cases.
7	Security Interest Related	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	The minimum percentage required should be changed to **66%,** which is the lower limit required for all economic decisions by the CoC under the Code. As this is an economic decision as well, such a limit should be preferred. Furthermore, the language of the proposed amendment should be changed to "*To realise any security interest,* if the secured creditors having 66% 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."

			This change is to take care of any grey area that may arise where the dissenting and minority secured creditor may seek to enforce the security interest under Regulation 37 of the Liquidation Process Regulations 2016, which does not set out any minimum requirement to seek enforcement nor does address any possible dispute between *pari-passu* charge holders.