



Liquidation Consultation Paper



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LAWS**

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Part A: Accountability of Liquidator

1. Expanding and Deeping the Scope of Stakeholder Consultation Committee (“SCC”)
2. Refining Procedural Framework for Constitution of SCC

Existing Law:

- **IBC Section 35**

- Section 35 (1): **Subject to the directions** of the Adjudicating Authority,
- Section 35 (2): The liquidator shall have **the power to consult** any of the stakeholders: Provided that any such consultation **shall not be binding**

- **Regulation 31A:**

- Liquidator shall constitute SCC,
- Class of **stakeholder to nominate**, if not then stakeholder with highest claim
- The SCC may advise liquidator on “**appointment of professionals and sale of assets**”
- Can meet when liquidator wants or 51 per cent member request liquidator
- Advice by approval of 66 per cent of members
- Liquidator may follow or may not- **Reason to be recorded** in its report

Problems and IBBI's Proposal:

- Liquidator hardly consults with stakeholders;
- Many time liquidators power remain unchecked: fees to professionals, sale of assets, etc.
- **Suggestion:** Mandatory consultation with SCC for “all significant” matters related to liquidation.
- No process for nomination of members by stake holders.
- **Suggestion:** majority by value, present and voting [SBS Transport Case]

CIFL's Comments:

Issue I	Issue II
Discretion with liquidator	Cases of removal, vacancy, appointment of new members
Notice in lieu of "consultation"	Majority of value and Quorum
Power to ask for information	Nomination by workmen
Sale of assets to member of SCC	

Part B: Sale of Assets

- Regulation 33 and Schedule 1
- Ordinarily through Auction
- Sale of assets through private sale:
 1. Asset is perishable
 2. Value is likely to deteriorate significantly
 3. If the auction fails and private sale is possible at a price higher than the reserve price.
 4. Other reasons- prior permission of Adjudicating Authority

Auction:

Schedule 1, Cl. 1(2): The liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include-

1. releasing advertisements;
2. preparing information sheets for the asset;
3. preparing a notice of sale; and
4. liaising with agents.

Issues:

- Should the engagement of a professional/agent for sale of asset(s) on commission / success fee basis be prohibited?
- Should SCC be consulted for preparing a marketing strategy for sale of assets of the CD?

IBBI's Proposed Amendments:

Modify Schedule I of the Liquidation Regulations to provide that:

- (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

CIFL's Comment:

- 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.

Cl. 3: The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.

Issue: Should the prohibition on payment of fee or non-refundable deposit for participation in the auction during liquidation process be explicitly provided under Liquidation Regulations?

Amendment proposed by IBBI:

The liquidator shall not require payment of any fee or non-refundable deposit from potential bidders.

Provision for Method of Auctions:

- Reserve price is decided acc. to Regulation 35
- If the auction fails, the liquidator may reduce this price by 25%. If the auction fails at the reduced price, it is further reduced by 10%
- Online portal or physical auction
- Highest bid is visible to the other bidders
- Multiple rounds of auctions can be conducted to maximize the value of assets

Issue: Is there any need to specify specific methods of auction to be employed for sale of assets:

Recommendation by IBBI: 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.

CIFL's Comment:

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.

Part C: Security Interest Related

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?

Law at Present

There is no substantive law at present, rather various NCLAT Judgments define the law currently

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.

In Edelweiss Asset Reconstruction Co Ltd vs Abhijeet MADC Nagpur Energy Pvt Ltd, NCLT 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.

Grey Area:

Regulation 37 of the Liquidation Process Regulations does not have any such minimum percentage required and is independent of the SARFESI

Also, secured operational creditors may use this - then in case of a dispute - completely unregulated

IBBI's Proposed Amendment:

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

Problem with this - does not address Regulation 37 - what is a creditor holding 30% of the debt goes under Regulation 37 before other secured creditors may decide? The proposed amendment could be clearer

CIFL's Comment:

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.

Under the Code, there is no majority which functions on the limit of 60%. This is just a creation of SARFESI before the Code was enacted

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).

Envisaged Framework: (After CIFL Comments)

