

Discussion Paper on Corporate Liquidation Process

Resources are scarce and have competing requirements. Further, the market and organizational failures do happen in a dynamic market conditions, requiring the reallocation of capital from inefficient to efficient uses and redeployment from failing companies to the ones which have better ideas about the ways and means to enhance the efficiency of the scarce capital. The Insolvency and Bankruptcy Code, 2016 ('Code') provides a structured mechanism to rescue the failing but viable firm and liquidate the non-viable ones. It results in releasing of the idle resources for competing uses, thereby promoting entrepreneurship. During liquidation process, the liquidator forms an estate of assets of the Corporate Debtor (CD), holds it as a fiduciary for the benefit of all stakeholders and distributes the proceeds from the liquidation estate as per priority established under section 53 of the Code.

2. Two issues determining the corpus of liquidation estate and the entitlement of stakeholders under section 53 of the Code have been presented in this discussion paper for facilitating public discussion and their comments on these issues which need a de-nova examination and consequent changes in the regulations.

Issue-1: Assignment of Not Readily Realisable Assets (NRRA)

Statement of Problem

3. Where the Adjudicating Authority passes an order for liquidation of the CD, the powers of the board of directors, key managerial personnel and the partners, as the case may be, of the CD cease to have effect and are vested in the liquidator. The liquidator forms the liquidation estate consisting of assets of the CD, of which, some of its assets can be converted to cash quickly, but some of them may require an indefinite time for their realisation on account of peculiar nature of such assets or special circumstances. Such assets fall in the category of sundry debts, 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. Since value of these assets are not easily realisable and indefinite waiting time frame is associated with it, these are referred to as 'not readily realisable assets' (NRRA) in this paper.

4. Generally, both in terms of value and time, NRRA remain in the realm of uncertainty. Presence of such assets in the kitty is detrimental to attainment of the objective of time bound closure of liquidation process as envisaged under the Code. To avoid delay in closure of liquidation and realisation of maximum possible value by the stakeholders, the following provisions are relevant:

- i. Regulation 38(1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('Liquidation Regulations') provides that the liquidator may, with the permission of the Adjudicating Authority, distribute amongst the stakeholders, an asset that cannot be readily or advantageously sold due to its peculiar nature or other special circumstances; and
- ii. Regulation 44(1) of the Liquidation Regulations provides that the liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance

transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof.

5. The objectives of the Code are realised only if the liquidation process closes in a time bound manner, the liquidator moves on and the stakeholders recycle the assets stuck in the CD. Dissolution of the CD, while there is a possibility to recover some value which is lying in NRRA, is against the interest of stakeholders. On the other hand, if the dissolution is kept pending for want for realisation of such assets, the liquidation process cost gets accumulated on continuous basis, while the value of the assets keeps on depreciating with time. Presence of substantial NRRA in liquidation estate creates a situation of stalemate as realisable amount remains, at best, a guesstimate.

6. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Code, considered the problem in its report:

“5.5.10 Rules to close the Liquidation

The end of Liquidation requires complete dissolution of the entity. One indicator is that the assets held in the Liquidation trust have been sold and the realisations paid out to satisfy as much of the liabilities within the prioritisation of the waterfall in Section 5.5.8. At this stage, there are possible recoveries of the assets of the entity in the future. These are most likely to come from lawsuits to recover from identified vulnerable transactions and cases of fraudulent actions carried out by the directors of the erstwhile entity. However, these are highly uncertain. The trade-off is to keep the case open and accrue costs of Liquidation from Liquidator fees on one hand and on the other, to close the case, dissolve the entity, but retain the Liquidation trust, so that whatever recoveries are made can be deposited into the trust net of the Liquidator costs of managing these lawsuits.

The Liquidator may apply to the Adjudicator to close down the case with estimates of the time to recovery and possible value of recovery from the vulnerable transactions. If the Adjudicator rules in favour of the application, an order to close the Liquidation case will be issued. This will trigger a set of accompanying orders as follows:

- 1. An order to the relevant registration authority to remove the name of the entity from its register.*
- 2. An order releasing the Liquidator from the case.*
- 3. An order to submit all records related to the case to the Regulator.*

If the Adjudicator does not rule in favour of the application, the liquidation case remains open. The Code permits the Liquidator to apply for the closure again after a reasonable period of time has passed.”

7. A liquidator is required to take action to recover the amount receivable from the contingent assets (receivables), e.g., disputed receivables, disputed assets, a lawsuit pending against competitor for infringement of patents, pending claims under warranty, pending claims against project authority for cost overrun on account of not providing scheduled right of access, etc., which may accrue to a CD based on an occurrence of uncertain future events. The CD or liquidator does not have any control over the occurrence of such future events. The Code also casts duty on liquidator to examine avoidance transactions in which the CD was involved before the onset of insolvency process to ascertain whether any of the CD's property/assets that should be available for distribution among all his or her creditors was diverted improperly. Such transactions may usually be contested with a view to reclaim these assets from the recipient or beneficiary for the benefit of the creditors.

8. One of the greatest hurdles faced by a liquidator in taking up legal proceedings to maximise the wealth of the CD, is lack of funding for meeting the legal expenses involved in the process. Further, such litigation causes inordinate delay in completion of liquidation process. The liquidator may have been left with few or no assets and the creditors may be reluctant to risk losing more money in funding the litigation. Hence, the practical challenge before the liquidator is to arrange funds for taking legal action. The delays caused in pursuing such actions may result in loss to the stakeholders, depletion in value of resources and uncertainty in closure of the liquidation process. In such a scenario, there is no effective mechanism to pursue contentious receivables, once the liquidation process is completed.

9. On the other hand, if such assets are left unrealised and the CD is dissolved, the stakeholders are deprived of their due recovery, the assets remain locked and in an undistributed state. In most of these cases, there will be no party interested to take up the cases with appropriate authority and as a result, the value in such assets is lost in an unclaimed status.

Assignment of NRRRA

10. It is worth considering assignment of NRRRA for whatever amount, the market is willing to pay, and distribute the same among stakeholders and close the liquidation process. To benefit the stakeholders, particularly creditors, when the liquidation estate is insufficient to pay the debts, the liquidators can be provided with the right to assign certain statutory rights of action (such as avoidance transactions actions, contingent claims etc.) to the third parties, subject to certain safeguards. Looking at the best interest of the estate as a whole, the liquidator may go forward to assign these assets to realise some value out of them and expedite to complete the process within the prescribed timelines under the Code/Regulations to the best possible extent.

Options for Assignment

Absolute Assignment – Option I

11.1. 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.

Assignment with recompense facility – Option II

11.2. Assignment with recompense facility will allow the liquidator to assign the asset with an initial price. Any subsequent net discovery (i.e., value realised less costs incurred in the recovery process) of the value over and above the initial price would be shared between assignee and the assignor, as per terms of the engagement entered into to enforce the assignment. Where the liquidator assigns a right of action for a share of the ‘winnings’ terms which is less than absolute, he exposes the CD or himself open to a claim for adverse costs from the defendants in the event of unsuccessful claim. Thus, liquidator has to be cautious in the terms of assignment agreement and needs to take adequate safety measures with regard to unsuccessful action while opting for an assignment agreement with recompense facility (like sharing only in successful recovery and assignee bearing the costs of an unsuccessful action). The liquidator also has to provide for distribution in the terms of assignment, in case the share of assignment proceeds is received later than the dissolution of the CD.

Checks and Balances

Applicability of Section 29A of the Code

12.1. Section 29A of the Code keeps out a person, who is a wilful defaulter, undischarged insolvent, has an account classified as non-performing assets for a defined period, etc. and therefore, is likely to be a risk to successful resolution of insolvency of a company. The ineligible person under section 29A may have vested interest in buying these contentious assets during the liquidation process.

12.2. Proviso to section 35(1)(f) of the Code mandates that the liquidator shall not sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. Further, sub-regulation 8 of regulation 37 of Liquidation Regulations provides that even a secured creditor cannot sell or transfer an asset, which is subject to any security interest, to a person ineligible under section 29A of the Code.

12.3. In *State Bank of India vs. Anuj Bajpai, Liquidator* (2019), the NCLAT considered the issue whether a ‘Secured Financial Creditor’, while opting out of liquidation process under section 52(1)(b) of the Code is barred from selling the secured assets to the ‘promoters’ or its related party or the persons who are ineligible in terms of Section 29A of the Code. The NCLAT held that a secured creditor realising assets outside of liquidation process under the Code cannot sell the assets to persons ineligible under section 29A of the Code.

12.4. It is evident that the legislative intent and jurisprudence bar the ineligible persons from participating in taking any part of liquidation estate. Therefore, it is proposed that the ineligibility norms under section 29A of the Code may also apply to assignees of NRRA.

Consultation with Stakeholders Consultation Committee (SCC)

12.5. Unlike during CIRP, there is no Committee of creditors (CoC) to advise, monitor and assist liquidator in the decision-making process during liquidation. To overcome such deficiency to an extent by creating a mechanism for oversight and monitoring of the liquidation process, the constitution of SCC has been mandated under regulation 31A of Liquidation Regulations w.e.f. 25th July, 2019. The liquidator constitutes SCC, with representatives from all classes of stakeholders, within sixty days from the liquidation commencement date. The liquidator has three broad responsibilities, namely, claim adjudication, sale of assets / business and distribution of liquidation proceeds. In the process, he consults SCC for sale of assets and / or business. The liquidator may also be required to have deliberations on assignment of NRRA with SCC, who may have access to relevant records and seek following information as may be required for effective assignment:

- a. Whether there is a valid cause of action.
- b. What value is there in the cause of action.
- c. What action may be taken to recover that value.
- d. What is the probability to recover that value.
- e. Whether the proposed defendant might be prepared to settle.
- f. Whether it is in the best interests of creditors and CD as a whole.
- g. Whether the assignment is reasonable, fair and appropriate.
- h. How the market is tested for evaluation of NRRA.
- i. What other alternatives are available, etc.

12.6. In line with regulation 31A of Liquidation Regulations, the SCC may advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the SCC, present and voting. However, the advice of the SCC shall not be binding on the liquidator. Post such consultation with SCC, if the liquidator takes decision(s) that is contrary to the views expressed by SCC (with at least sixty-six percent majority), he shall record the reasons in writing for such contrary view and mention it in subsequent progress report / final report submitted to the AA.

Principles to be followed by Liquidator

13. The liquidator may be required to consider the following basic principles before the assigning these assets:

- a. Acting in the best interest of liquidation estate;
- b. Seeking maximum consideration for the assignment;
- c. Consulting the SCC;
- d. Assignment through an auction or if an auction is not possible, on an arm's length basis;
- e. Assignment shall be subject to section 29A of the Code;
- f. Liquidator to be reasonable, fair and should act in good faith.

International Practice

14. It is increasingly emerging as best international practice for liquidators to assign cause of action as an efficient and effective way of realising the value of such a cause of action.

United Kingdom

15. Schedule 1 and 4 of the Insolvency Act 1986 ("the Act") give administrator and liquidator, respectively, the power to sell the property of the company. Further, section 436 of the Act provides that the term "property" includes "*things in action*" and "*every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*". This power of sale of property is necessary to enable the liquidators to perform the role of realising the contingent assets of insolvent companies.

16. In *Seear v Lawson* (1880) 15 Ch. D. 426, 433, it was observed that:

"If the trustee gets a right of action, why is he not to realise it? The proper office of the trustee is to realise the property for the sake of distributing the proceeds among the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may be disinclined to run the risk of having to pay costs, or he may consider it undesirable to delay the winding up of the bankruptcy until the end of the litigation"

17. The House of Lords in *Circuit Systems Ltd. and Anr. v Zuken-Redac (U.K.) Ltd. and Norglen Ltd and Ors. v Reeds Rains Prudential Ltd and Ors.* (1997) confirmed that it is appropriate for a liquidator to assign a cause of action to a party who has sufficient funds to pursue that action:

"The law is traditionally hostile to the assignment of causes of action in return for a share of the proceeds. Such transactions were described as champerty (division of the field) and regarded as illegal and unenforceable. It is unnecessary to examine the reasons: judges said that it would encourage malicious suits, but treating such arrangements as criminal was also, before the introduction of legal aid, an effective way of preventing poor people from obtaining legal redress. The position of liquidators and trustees in bankruptcy is however quite different. The courts have recognised that they often have no assets with which to fund litigation and that in such case the only practical way in which they can turn a cause of action into money is to

sell it, either for a fixed sum or a share of the proceeds, to someone who is willing to take proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the courts have for the past century construed their statutory powers as placing them in a privileged position.”

Assignment of Causes of Action vested in the Office-Holder

18. On 26th March 2015, the Small Business, Enterprise and Employment Act, 2015 introduced new section 246ZD to the Act. Prior to this introduction, it was permitted for office-holders to assign causes of action which vested in the company but not personal causes of actions which vested in the office-holder. Section 246ZD of the Act provides for the liquidators and administrators to assign the rights of action where the liquidation or administration commenced on or after 1st October 2015:

“246ZD Power to assign

(1) *This section applies in the case of a company where—*

(a) the company enters administration, or

(b) the company goes into liquidation;

and “the office-holder” means the administrator or the liquidator, as the case may be.

(2) *The office-holder may assign a right of action (including the proceeds of an action) arising under any of the following—*

(a) section 213 or 246ZA (fraudulent trading);

(b) section 214 or 246ZB (wrongful trading);

(c) section 238 (transactions at an undervalue (England and Wales));

(d) section 239 (preferences (England and Wales));

(e) section 242 (gratuitous alienations (Scotland));

(f) section 243 (unfair preferences (Scotland));

(g) section 244 (extortionate credit transactions).”

Australia

19. Section 477(2)(c) of the Corporations Act, 2001 (Australia) provides:

Powers of liquidator

“...a liquidator of a company may...sell or otherwise dispose of, in any manner, all or any part of the property of the company”.

20. In *Jarbin Pty Ltd v Clutha Ltd* (2004) NSWSC 28, the Supreme Court observed that:

“It is now well established that a liquidator’s power of sale of the property of the company, under section 477(2)(c) Corporations Law, enables him or her to assign all, or part, of a cause of action of the company in return for a consideration, which might be a fixed payment, a share of any net proceeds of the action, or a consideration arrived at in some other way, and such assignment may be made without infringement of the law concerning maintenance and champerty.”

21. The Insolvency Law Reform Act 2016 had introduced a new schedule, Schedule 2 – Insolvency Practice Schedule (Corporations), (‘Schedule’) to the Corporations Act 2001. On 1st March, 2017, administrator and liquidators (external administrators) were allowed to assign any right to sue conferred on them by the Corporations Act, 2001. Prior to the amendment, although causes of action vested in the company were assignable but personal causes of action

such as avoidance transaction and insolvent trading claims were not capable of assignment. This position has changed after incorporating the Schedule which provides that:

“100-5 External administrator may assign right to sue under this Act

(1) Subject to subsections (2) and (3), an external administrator of a company may assign any right to sue that is conferred on the external administrator by this Act.

(2) If the external administrator’s action has already begun, the external administrator cannot assign the right to sue unless the external administrator has the approval of the Court.

(3) Before assigning any right under subsection (1), the external administrator must give written notice to the creditors of the proposed assignment.

(4) If a right is assigned under this section, a reference in this Act to the external administrator in relation to the action is taken to be a reference to the person to whom the right has been assigned.

Hong Kong

22. In *Re Po Yuen (To’s) Machine Factory Ltd* [2012] 2 HKLRD 752, Lordship sanctioned the litigation funding arrangement, stating there is nothing objectionable in a case “*where the creditors of the company are not prepared to fund attempts by a liquidator to make recovery of assets in a liquidation to the liquidator entering into a funding agreement with a third party.*”

23. In *Re Patrick Cowley and Lui Yee Man, Joint and Several Liquidators of the Company* [2020] HKCFI 922, the High Court clarified that a liquidator does not require Court sanction in order to enter into a third-party funding agreement. Paragraph 1 of Part 3 of Schedule 25 under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) , which provides that the liquidators have powers to “*sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels*”, makes it unnecessary for a liquidator in either a voluntary liquidation or a winding-up by the Court to obtain the Court’s sanction of a funding agreement, which involves the sale of a chose in action in return for a right to participate in the proceeds of successful litigation to enforce the chose in action.

Singapore

24. Singapore’s new Insolvency, Restructuring and Dissolution Act 2018 (“IRDA”), which came into effect on 30th July 2020, expressly empowers the liquidator to enter into third-party funding agreements in relation to transactions, undervalue (section 224 of IRDA), unfair preference transactions (section 225 of IRDA), extortionate credit transactions (section 228 of IRDA), fraudulent trading (section 238 of IRDA), wrongful trading (section 239 of IRDA) and assessment of damages against delinquent officers of the company (section 240 of IRDA).

“Powers of liquidator

144. (1) The liquidator may, after authorisation by either the Court or the committee of inspection -

...

(g) assign, in accordance with the regulations, the proceeds of an action arising under section 224, 225, 228, 238, 239 or 240.

(2) ...

(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.”

25. From the perusal of various commonwealth jurisdictions, it is observed that England, Australia and Singapore have clearly provided the assignment of cause of action in its legislation and authorises liquidators to assign avoidance transactions and trading claims to quickly realise an asset for the benefit of creditors.

Position in India

26. In India, the law does not prohibit the assignment of cause of action. The Supreme Court in *Re: Mr. 'G', A Senior Advocate (1954)* judgment held that the rigid British principles of champerty and maintenance are not applicable in India per se.

27. The Privy Council in *Ram Coomar Coondoo v Chunder Canto Mookerjee (1876)*, for the first time, permitted third-party litigation funding on the ground of promoting access to justice in India and noted that:

“Agreements of this kind ought to be carefully be watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.”

28. The concept of third-party funding is statutorily recognised under the Code of Civil Procedure, 1908 (CPC) in some states such as Maharashtra, Gujarat, Madhya Pradesh and Uttar Pradesh by respective state amendments to Order XXV of the CPC. The Hon'ble Supreme Court in *Bar Council of India v A.K. Balaji & Ors. (2018)* has clarified the legal permissibility of third-party funding in litigation and observed that:

“There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation”.

29. Section 132 of the Transfer of Property Act, 1882 provides that the transferee (assignee) of an actionable claim has to take it subject to all the liabilities and equities to which the transferor (assignor) was subject in respect thereof at the date of the transfer (assignment).

30. In *ICICI Bank Limited v. Official Liquidator of APS Star Industries Ltd. & Others (2010)*, the Hon'ble Supreme Court observed that:

“rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.”

31. In *Kapilaben & Ors vs Ashok Kumar Jayantilal Sheth & Ors (2019)*, the Hon'ble Supreme Court observed:

“...If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it. It is clear from the above that the promisor may employ a competent person, or assign the contract to a third party as the case may be, to

perform the promise only if the parties did not intend that the promisor himself must perform it....”

32. The general rule is that the benefit of a contract may be assigned to a third party without the consent of the other contracting party. Further, the adequate provisions have been provided in commonwealth jurisdictions which gives right to liquidator (office-holder) to assign personal actions vested in the office-holder, particularly with respect to avoidance transactions. Further, section 5(7) of the Code defines 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*”. The Code allows assignee of the debt to initiate insolvency process against the CD, on occurrence of default and receive dues in resolution. However, it is observed that there are no express provisions for assignment of cause of action under the regulations.

33. In order to address the same, it is proposed that the regulations may explicitly provide the assignment of right of cause of action by liquidator to third party in consultation with SCC in the best interest of stakeholders and to facilitate access to justice. Post requisite amendment in regulations, a market may develop for assignment for such assets.

Proposed Amendment

34. It is proposed to provide in the Liquidation Regulations that the:

- (i) liquidator may explore the possibility of assignment of NRRA through public auction to third parties. If auction is not possible, the assignment may be done on arm’s length basis.
- (ii) assignment of such assets by liquidator may be absolute or with recompense facility.
- (iii) assignment of such assets shall be subject to section 29A of the Code.
- (iv) liquidator shall be required to consult the SCC and if the advice of SCC is not adhered to, he shall record the reasons in writing for such contrary view and mention it in subsequent progress report/final report submitted to the AA.

Economic Analysis

35. Once the assignment of NRRA is permitted during liquidation process, the liquidator would have two options – either to realise such assets on his own or to assign them to third parties. The major economic rationale in support of assignments of such assets to third parties are as under:

- (i) Reduction in time taken for completion of the liquidation process.
- (ii) Higher recovery for stakeholders.
- (iii) Higher amount of surplus generated for the society / economy.

36. It is reasonable to expect that the assignee shall be able to realise the NRRA at lesser cost and possibly earlier than the liquidator might have, due to its expertise, and economies of scale. Therefore, the total surplus for the economy / society as a whole would be equal to or greater than the situation wherein such assets are realised by liquidator himself. Further, over a period of time, a market for such assets may develop, which, in turn, would lead to better price discovery and provide greater business & employment opportunities through assignees. The proposal is also in the interest of equity as the stakeholders, having a right on the liquidation estate will get their dues.

Amendment Regulations

37. A draft of the amendment regulations is given in Annexure A.

Issue-2: Assignment of Claims / Interests

Statement of Problem

38. During the liquidation process, a creditor files its claim and thereafter, waits for the liquidator to make realisation and distribute it as per the waterfall mechanism defined under section 53 of the Code. This whole process is time consuming and some stakeholders may like to assign their interests and move on. The same is allowed during CIRP under regulation 28 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations'):

“Transfer of debts due to creditors

(1) In the event a creditor assigns or transfers the debt due to such creditor to any other person during the insolvency resolution process period, both parties shall provide the interim resolution professional or the resolution professional, as the case may be, the terms of such assignment or transfer and the identity of the assignee or transferee.

(2) The resolution professional shall notify each participant and the Adjudicating Authority of any resultant change in the committee within two days of such change.”

39. The constitution of CoC under Section 21 of the Code, also governs treatment of assigned debt under sub-section (5) as:

“Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer”

40. Hence, assignment of debt has been permitted during CIRP. The Code permits treatment of assignee as creditor who has acquired debt through an assignment, and it is explicitly provided in Part II of the Code applicable to both CIRP and Liquidation process:

Section 5(7) of the Code states:

“financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to’

Section 5(20) of the Code states:

“operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred’

41. Further, a secured creditor is defined under section 3(30) of the Code as a creditor in favour of whom security interest is created. The term “Security Interest” defined under section 3(31) of the Code includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.

42. The Hon’ble Supreme Court in the matter of ICICI Bank Limited v Official Liquidator of APS Star Industries Ltd. & Ors. (2010) held that: *“...rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned.”*

43. Hon'ble Appellate Tribunal has made the following observations in respect of assignment of debt by creditors:

(a) In the matter of Fortune Pharma Private Limited (2018):

"...A legal transfer of 'debt' account from a 'creditor' (assignor) to a third party (assignee) provides the rightful ownership to the assignee. The 'debt assignment' is a transfer of debt with all the rights and obligations associated with it from a creditor to a third party, who is 'assignee'. The 'debt' is in the form of loan from a 'financial institution', the debtor is referred as a 'borrower' and if the debt is in the form of securities, such as bonds, the debtor is referred to as an 'issuer'. Undisputedly, the assignment is the transfer of one's right to recover the debt of another person as a contractual right. Rights of an 'assignee' are no better than those of the 'assignor'. It can be, therefore, held that 'assignor' assigns its debt in favour of the 'assignee' and 'assignee' steps in the shoes of the 'assignor'. The 'assignee' thereby takes over the right as it actually did and also takes over all the disadvantages by virtue of such assignment."

(b) In the matter of Synergies Dooray Automotive Limited (2018):

"In the result, we hereby declare that both 'Synergies Castings Limited' and 'Millennium Finance Limited' were eligible to execute the assignment agreements in question and all rights flow those agreements to 'Millennium Finance Limited'. After getting assignment of rights, the 'Millennium Finance Limited' is fully competent to participate in 'Committee of Creditors' in question and it cannot be called a related party as explained."

44. It is proposed that a provision similar to that in the CIRP Regulations may be provided under Liquidation Regulations to enable exit of stakeholders who cannot wait or who are in urgent need of liquidity.

Proposed Amendment

45. It is proposed to provide in the Liquidation Regulations that:

(1) if a creditor assigns or transfers the debt due to such creditor to any other person during the liquidation process period, both parties shall provide the liquidator, the terms of such assignment or transfer and the identity of the assignee or transferee.

(2) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, as provided under sub-regulation (3) of regulation 31.

Economic Analysis

46. Generally, the holding capacity of creditors vary greatly depending primarily upon their financial conditions. The creditors with low financial capacity or in the process of cleaning their balance sheet may be interested in getting their dues instantly, even at a discounted value, rather than waiting for a longer period to receive higher pay-out. The transferee, on the other hand, with greater financial capacity would be willing to wait and obtain the actual realisation from the liquidation estate. Therefore, the assignment of debt by a creditor under liquidation process to a third party would lead to pareto improvement in allocation of resources in the economy.

47. The proposed amendment would benefit the stakeholders involved in the liquidation process by providing them with an additional option of exit at earlier stage. It would also benefit the economy as a whole since the creditors including financial creditor with early exit can further lend those funds and thereby increasing availability of credit in the economy and promoting entrepreneurship.

Amendment Regulations

48. A draft of the amendment regulations is given in Annexure A.

49. It is considered to have discussion on the following points from the two issues:

- a. Should it be possible for the liquidator to sell or assign NRRA to any third party, as an alternative to liquidator pursuing such claims himself?
- b. Should the assignment have an option of recompense facility? If yes, what should be the mechanism to distribute funds to stakeholders post dissolution of the CD?
- c. Should SCC be consulted before assigning NRRA? If yes, should it be mandatory for liquidator to act as per SCC advice?
- d. What measures should be taken to ensure the assignment of NRRA results in maximum realisation?
- e. Should the assignment of claim / interest be provided under Liquidation Regulations with a provision similar to that in the CIRP Regulations?

Public Comments

50. The proposals in the preceding paragraphs aim at achieving the objectives of the Code by expediting the liquidation process and balancing the interest of all stakeholders. This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. The Board accordingly solicits comments on:

- a. points mentioned in Para 49; and
- b. any specific regulations in the draft Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020, placed at **Annexure A**.

51. Comments may be submitted electronically by 16th September, 2020. For providing comments, please follow the process as under:

- (i) Visit IBBI website, www.ibbi.gov.in;
- (ii) Select 'Public Comments'; and then select 'Discussion Paper – Liquidation Aug 2020';
- (iii) Provide your Name, and Email ID;
- (iv) Select the stakeholder category, namely, -
 - a) Corporate Debtor;
 - b) Personal Guarantor to a Corporate Debtor;
 - c) Proprietorship firms;
 - d) Partnership firms;
 - e) Creditor to a Corporate Debtor;
 - f) Insolvency Professional;
 - g) Insolvency Professional Agency;
 - h) Insolvency Professional Entity;
 - i) Academics;
 - j) Investor; or
 - k) Others.
- (v) Select the kind of comments you wish to make, namely,
 - a) General Comments; or
 - b) Specific Comments.
- (vi) If you have selected 'General Comments', please select one of the following options:
 - a) Inconsistency, if any, between the provisions within the regulations (intra regulations);
 - b) Inconsistency, if any, between the provisions in different regulations (inter regulations);

- c) Inconsistency, if any, between the provisions in the regulations with those in the rules;
- d) Inconsistency, if any, between the provisions in the regulations with those in the Code;
- e) Inconsistency, if any, between the provisions in the regulations with those in any other law;
- f) Any difficulty in implementation of any of the provisions in the regulations; and
- g) Any provision that should have been provided in the regulations, but has not been provided; or
- h) Any provision that has been provided in the regulations but should not have been provided.

And then write comments under the selected option.

(vii) If you have selected 'Specific Comments', please select para/regulation number and then sub-para/sub-regulation number and write comments under the selected para/sub-para or regulation/sub-regulation number.

(viii) You can make more comments or make comments on more than one para/sub-para or regulation / sub-regulation number, by clicking on **More Comments** and repeating the process outlined above from point 51 (v) onwards.

(ix) Click 'Submit', if you have no more comments to make

GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION
New Delhi,, 2020

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION
PROCESS) (FOURTH AMENDMENT) REGULATIONS, 2020**

IBBI/2020-21/GN/REG.....-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) (Fourth Amendment) Regulations, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In Insolvency and Bankruptcy Board of India (Liquidation process) Regulations, 2016, (hereinafter referred to as the principal regulations), after regulation 30, the following regulations shall be inserted, namely: -

“30A. Transfer of debt due to creditors.

(1) In the event a creditor assigns or transfers the debt due to such creditor to any other person during the liquidation process, both parties shall provide the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.

(2) The liquidator shall apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority and shall modify the entry in the manner directed by the Adjudicating Authority, in pursuance of sub-regulation (3) of regulation 31.”

3. In the principal regulations, after regulation 38, the following regulation shall be inserted, namely: -

“38A. Assignment of not readily realizable assets.

- (1) Where the liquidation estate has any beneficial interest including any right to sue that is conferred on the liquidator that is not readily or advantageously realizable, the liquidator may assign such interest under this regulation.

Explanation: For the purposes of this sub-regulation, beneficial interest means and includes sundry debts, refunds from the Government and its agencies; contingent receivables, disputed receivables, sub-judice receivables, disputed assets and assets underlying preferential, undervalued, extortionate credit and fraudulent transactions in pursuant to section 43 to 66 of the Code.

- (2) The liquidator may assign such interest with or without any recompense arrangement.
- (3) The liquidator shall not assign such interest to a person who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor.
- (4) The liquidator shall have a consultation with the stakeholders' consultation committee before deciding for assignment of such interest:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing and submit before the adjudicating authority in subsequent progress report, or final report as the case may be."

(Dr. M. S. Sahoo)

Chairperson

Insolvency and Bankruptcy Board of India

[ADVT]

Note: The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 were published vide notification No. IBBI/2016-17/GN/REG005 on 15th December, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 460 dated 15th December, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Third Amendment) Regulations, 2020 vide notification No. IBBI/2020-21/GN/REG062, dated the 5th August, 2020 in the Gazette of India, Extraordinary, Part III, Section 4, No. 312 on 5th August, 2020.