

Insolvency and Bankruptcy Board of India

24th November, 2020

Discussion Paper on Voluntary Liquidation Process

Introduction

Section 59 under Chapter V of Part II of Insolvency and Bankruptcy Code, 2016 (Code) read with the IBBI (Voluntary Liquidation Process) Regulations, 2017 (Voluntary Liquidation Regulations) provides that a Corporate Person (CP) may initiate voluntary liquidation proceedings if two conditions are met: (a) the CP has no debt or is in a position to pay all the debts; and b) the CP is not being liquidated to defraud any person. Such a declaration should be made by a majority of directors, partners or individuals constituting governing board, as the case may be, of the CP.

2. The process is initiated upon passing of a resolution / special resolution by the members / partners or contributories, as the case may be, of the CP. The resolution so adopted shall also indicate appointment of an Insolvency Professional (IP) to act as liquidator. In case, the company owes any debt, the creditors representing two-third in value of the debt shall also approve such a resolution. The CP is required to notify the Registrar and the Board within seven days of such resolution or the subsequent approval by the creditors, as the case may be. The liquidator makes a public announcement inviting claims, realises the assets of the CP and then makes an application before the Adjudicating Authority (AA) to order for dissolution of the CP. It may be noted that the law does not envisage any role of the AA at the stage of initiation of the voluntary liquidation process, unlike in the liquidation process. It envisages role of the AA in voluntary liquidation only under two circumstances: (a) where the affairs of the CP have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the AA for dissolution of the CP; and (b) where the liquidator is of the opinion that the liquidation is being done to defraud a person or the CP is not solvent and will not be able to pay its debts in full from the proceeds of the assets to be sold in liquidation, he shall make an application to the AA to suspend the process of liquidation.

Issue: Withdrawal of Voluntary Liquidation Process

Statement of Problem

3. The economic environment is dynamic. There could be instances where the CP initiated the voluntary liquidation process when the financial prospects were on the downside, however, a business opportunity may arise subsequently during the currency of the process. Further, the management of the CP may also consider selling the CP as a going concern in order to fetch higher realization or otherwise, subsequent to initiation of the voluntary liquidation process. In both the aforesaid circumstances, the CP would have to be revived. However, the provisions of the Code and Voluntary Liquidation Regulations are silent on the withdrawal or closure of the process after its initiation. Nevertheless, as on 31st October, 2020, voluntary liquidation processes of eight CPs have been withdrawn / suspended / cancelled.

4. The role of AA is relatively limited in voluntary liquidation process as compared to liquidation process being adopted for CD, since the majority of CP initiating voluntary liquidation process either have nil or negligible claims of creditors and are not party to any litigation. Further, unlike in the liquidation process where there is a Stakeholders Consultation

Committee (SCC) to advise / monitor the liquidator, there is no oversight / consultation committee in the voluntary liquidation process. Therefore, almost entire process has been left with the board of directors, partners, members, contributories, as the case may be, and the liquidator of the CP.

5. The CP is the major driving force behind the voluntary liquidation process, unlike the liquidation or corporate insolvency resolution processes. Under liquidation process of a corporate debtor (CD), various reports indicating the progress made in the process are submitted by the liquidator to the AA, whereas such reports are submitted mostly to the CP in voluntary liquidation process. Further, the CP decides the manner and mode of valuation, and sale of its assets in voluntary liquidation process, unlike in the liquidation process. Thus, the liquidator plays a limited role in voluntary liquidation process, as compared to that in liquidation process.

6. Of the eight voluntary liquidation processes withdrawn/suspended/cancelled till 31stOctober, 2020, the CP cancelled the process by passing a special resolution in five cases, the liquidator approached the AA for suspending the process in one case, and the CP approached the AA to cancel the process in the remaining two cases. The details of voluntary liquidations suspended/cancelled by the AA are as under:

S. No.	Name of the Corporate Person	Liquidation Commencement Date	AA order date	Reason for withdrawal/suspension
1	Central Inland Water Transport Corporation Limited	19-12-2017	28-09-2018	Claims pending against the CP exceeded the assets, so the CP was not solvent. Further, there were several litigations pending against the CP. Therefore, the AA suspended the liquidation.
2	Ikon Real-Tech Private Limited	25-04-2018	08-10-2018	No specific reason is mentioned in the Order.
3	Nirpender Logistics Private Limited	31-08-2017	23-01-2019	To revive the business.

Comparable provisions in the Companies Act

7. Chapter III of Part VII of the erstwhile Companies Act, 1956 and Part II of Chapter XX of Companies Act, 2013 (omitted by the Code on 15th November, 2016) provided for voluntary winding up. Neither of the Acts contained any express provisions for the withdrawal of voluntary winding up after its initiation. However, section 466 of the erstwhile Companies Act, 1956 (similar to section 289 in the Companies Act, 2013) provided for POWER OF TRIBUNAL TO STAY WINDING UP process. Sub-section (1) states that:

“The Tribunal may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Tribunal that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Tribunal thinks fit.”

8. In the matter of Dhankari Investment Ltd. Vs. Official Liquidator (2006), 132 CC 749 (Allahabad), the Hon’ble Allahabad High Court observed as under:

“This power includes the power to stay the voluntary winding up itself altogether, when the Court is satisfied that the causes for which the voluntary winding up resolution was passed, if any disclosed to the Court, no longer exist, the company is not indebted and commercially solvent and a bonafide effort has been made to revive the company. The Court will, however, not act on a mere change of opinion of the members/ contributories and would like to be satisfied with the change in conditions in which such resolution is passed. The power should be exercised sparingly and only where it is just, beneficial and expedient to do so taking into consideration the object of formation of the company, the resolution of the differences, if any; the availability of the assets, in support of the resolution to continue with the business, and the stage at which such resolution has been passed namely that the liquidator has not proceeded to sell the assets, and to pay the creditors and contributors.”

9. Further, in the matter of V. B. Purohit Vs. Gadag, Jambukeshwara and Anr. (1984) 56 CC 360 (Kar), the Karnataka High Court, while disposing of the application for staying the voluntary winding-up of the company, observed:

“...If the shareholders have resolved to revive the company and make one more effort to start a cement factory, opportunity should not be denied to them. In these circumstances, the prayers in this application are granted...”

10. In both the cases referred to above, applications had been made to the Court under section 466 read with section 518 of the erstwhile Companies Act, 1956. However, as stated in para 3 above, neither the Code nor the Voluntary Liquidation Regulations contain any provision regarding the intervention of the AA in the voluntary liquidation process, except for passing the order in case of dissolution, detection of fraud or insolvency of CP.

11. The CP operates in a dynamic market economy and the market situation may evolve from being unfavourable at the time of initiation of the voluntary liquidation process to advantageous and promising justifying continuation of the operations subsequently. If there is a business opportunity, closure of voluntary liquidation process midway may serve the interests of stakeholders and the economy better. The stakeholders understand well whether there is a business opportunity, or it makes sense to keep the CP alive rather than liquidating it. Saving a viable CP which may otherwise have been liquidated is consistent with the objectives of the Code. There is, however, no explicit provision in the statute to enable midway closure of voluntary liquidation process.

Analysis

12. In the absence of express provisions, jurisprudence guides the processes. The AA has in few cases already allowed the closure of the voluntary liquidation process. On the same analogy, Chapter III (relating to Liquidation Process) of Part II of the Code, read with the IBBI (Liquidation Process) Regulations, 2016, has no express provision for closure of the liquidation process after an order for liquidation has been made by the AA. However, there has been closure of at least ten liquidation processes by NCLT / NCLAT / Supreme Court, as on 31st October, 2020.

13. Considering the above, and in furtherance of objectives of the Code, it is considered to provide an option for closure of a voluntary liquidation process after its initiation, with the approval of AA, under the Voluntary Liquidation Regulations. This will provide the stakeholders a streamlined option on the ex-ante basis, rather than knocking at the door of the AA every time or closing a process suo-moto. This will also enable the Board to provide some

checks on any possibilities of abuse of the process, where one is closing on its own without informing the AA.

Check and Balances

14. Unlike in corporate insolvency resolution process and liquidation process of a CD, there is no supervision by a Committee of Creditors or Stakeholders' Consultation Committee during voluntary liquidation process. Furthermore, the involvement of AA comes primarily only at the stage of the dissolution. Therefore, the entire process is steered by the liquidator and CP.

15. In the matter of Dhankari Investment Ltd. vs Official Liquidator (supra), the Hon'ble High Court, while deciding the stay on voluntary winding up process altogether, had, *inter-alia*, noted that there is a need to consider '*the stage at which such resolution has been passed namely that the liquidator has not proceeded to sell the assets, and to pay the creditors and contributors*'. It is important to consider the stage at which the management of the CP is interested in rescinding the process. The liquidator may have realised and distributed some of the assets among a set of creditors, leaving the claims of others unpaid. Therefore, in order to create some checks and balances on the withdrawal of process, it is considered that the CP be allowed to rescind the process, by the same procedure as was followed to initiate it, that is, approval by a special resolution, passed by members / partners / contributories, as the case may be. This should be supplemented by (a) approval of creditors representing two-third in value of the debt if no asset of the CP has been realised by the liquidator, or (b) approval of all unpaid creditors, unless the dues of all unpaid creditors are settled before passing of the resolution. Further, it is suggested that the application for withdrawal to be filed by the liquidator before the AA should be accompanied with an affirmation by the liquidator that (a) due process for closure has been followed, and (b) the closure is not initiated to defraud any person.

International Practice and Jurisprudence

United Kingdom

16. Part IV of the of Insolvency Act 1986 provides for compulsory *Winding Up of Companies Registered under the Companies Acts*. Sub-section (1) of Section 147 provides that:

Power to stay or sist winding up

"The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed or sisted, make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit."

Singapore

17. Section 186 of the Insolvency, Restructuring and Dissolution Act 2018 provides for power to stay or terminate winding up. Sub-section (1) provides that:

"(1) At any time during the winding up of a company, the Court may, on the application of the liquidator or of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed or terminated, make an order —

(a) staying the proceedings either altogether or for a limited time, on such terms and conditions as the Court thinks fit; or

(b) terminating the winding up on a day specified in the order."

British Virgin Islands (BVI)

18. Section 207A of BVI Business Companies Act, 2004 provides for termination of voluntary liquidation. Sub-section (1) states that:

“(1) The Court may, at any time after the appointment of a voluntary liquidator under section 199, make an order terminating the liquidation if it is satisfied that it would be just and equitable to do so.”

Australia

19. Section 482 of the Corporation Act 2001 provides for power to stay or terminate compulsory winding up. Sub-section (1) provides that:

(1) At any time during the winding up of a company, the Court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order.

Proposed Amendment

20. It is for consideration to amend the Voluntary Liquidation Regulations to provide:

(i) The CP be allowed to seek approval of the AA for withdrawal from the process.

(ii) Such withdrawal is to be allowed only if it is backed by a special resolution of the members, partners or contributories, as the case may be, of the CP.

(iii) Where there has been no sale of assets, the withdrawal shall have approval of creditors representing two-thirds in value of the outstanding debt. Where sale has commenced, the withdrawal shall have approval of all unpaid creditors, unless the dues of all unpaid creditors are settled before passing of the resolution.

(iv) The liquidator shall approach the AA with an application for withdrawal, along with an affirmation by the liquidator that (a) due process for withdrawal of voluntary liquidation has been followed, and (b) the withdrawal is not initiated to defraud any person and the CP is solvent.

(v) After the application to withdraw the voluntary liquidation is approved by the AA, the liquidator shall forward a copy of the order of AA to the Board and the CP.

Justification

21. The proposed amendment –

- a. may help to save a potential viable company from dissolution, by providing an opportunity to the CP to withdraw from the voluntary liquidation process. Saving the CP would avoid destruction of value of resources of the CP and adverse effect on other stakeholders such as workmen, employees, raw material suppliers.
- b. provides an orderly framework for withdrawal from the process, by way of insertion of new regulation, which also ensures adequate checks and balances so that the process is not misused.
- c. provides a guided path to the stakeholders a streamlined option on the ex-ante basis.

Amendment Regulations

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

23. It is considered to have discussion on the following points:

- a) Should there be a provision for withdrawal from the voluntary liquidation process, if such withdrawal is approved by special resolution of members, partners or contributories, as the case may be, in Voluntary Liquidation Regulations? If so, whether such withdrawal is to be approved by AA.
- b) Should the withdrawal from voluntary liquidation process be permitted both prior to and post initiation of process of sale of assets of CP by the liquidator. If so, what conditions should be imposed to ensure proper checks and balances on such withdrawal?

Public Comments

24. The proposals in the preceding paragraphs aim at achieving the objectives of the Code by providing an orderly framework for withdrawal of voluntary liquidation process while 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 23; and
- b. any specific regulations in the draft Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Third Amendment) Regulations, 2020, placed at **Annexure A**.

25. Comments may be submitted electronically by 15th December, 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 – Voluntary Liquidation Nov 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 25 (v) onwards.

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

**THE GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, WEDNESDAY, ____, 2020**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION
New Delhi, the ____, 2020**

Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Third Amendment) Regulations, 2020

No. 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 (Voluntary Liquidation Process) Regulations, 2017, namely: -

1. (1) These Regulations may be called the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Third Amendment) Regulations, 2020.

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

2. In the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (hereinafter referred to as the principal regulations), for the chapter heading II, the following chapter heading shall be substituted, namely: -

**“CHAPTER II
COMMENCEMENT AND WITHDRAWAL OF LIQUIDATION”**

3. In the principal regulations, after regulation 4, the following regulation shall be inserted, namely: -

“4A. Withdrawal from Liquidation Process

(1) Where the process of sale of assets of the corporate person has not been initiated, the members, partners or the contributories, as the case may be, of the corporate person may resolve to withdraw from the process by passing a resolution with a special majority.

Provided that where the corporate person owes any debt to any person, creditors representing two-thirds in value of the debt of the corporate person shall approve the resolution passed under the sub-regulation within seven days of such resolution.

(2) For processes, other than sub-regulation (1) above, the members, partners or the contributories, as the case may be, of the corporate person may resolve to withdraw from the process by passing a resolution with a special majority after the said resolution is either approved by all unpaid creditors or dues of all unpaid creditors have been settled.

(3) The liquidator shall submit an application to the Adjudicating Authority for withdrawal from the process along with a statement that –

(a) due process for withdrawal of voluntary liquidation process has been followed;

(b) the withdrawal process is not initiated to defraud any person and the corporate person is solvent.

(4) After the application to withdraw from the process is approved by the Adjudicating Authority, the liquidator shall forward the copy of the order of Adjudicating Authority to the corporate person and the Board.”

Dr. M. S. Sahoo
Chairperson

[ADVT]

Note: The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 were published *vide* notification No. IBBI/2016-17/GN/REG010 on 31st March, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 130 dated 31st March, 2017 and were last amended by the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020 published *vide* notification No. IBBI/2019-20/GN/REG063 dated 05th August, 2020 in the Gazette of India, Extraordinary, Part III, Section 4, No. 311 on 05th August, 2020.