

New liquidation processes under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016

On 15 December 2016, the involuntary liquidation provisions in the Insolvency and Bankruptcy Code 2016 (the IBC) came into effect. Along with this, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 (the Regulations) were published and came into effect. The Regulations seek to improve the liquidation process with a view to spending less time and costs in the execution and maximising creditor recoveries. They set out the procedural aspects of the new liquidation processes including: the appointment, remuneration, powers and functions of a liquidator; details on how creditors can make claims; and information about the realisation and distribution process.

Efficiencies of time and costs

The key theme of the IBC is to make the liquidation process more efficient. The Regulations seek to do this in a number of ways:

- The appointment of an independent liquidator to manage the realisation and distribution process;
- The introduction of an early dissolution process for estates with limited assets;
- Regular progress reports (one every quarter) to be provided to Adjudicating Authority (being the National Company Law Tribunal (the Tribunal) in case of corporate debtors);
- Standardised claim forms for different creditor groups;
- Claims to be verified by the liquidator within 30 days of the last date set for receipt of claims;

- Distributions to be made within 6 months from realisation;
- Completion of the liquidation within 2 years of commencement;
- Procedural rules on sales;
- Ability for the liquidator to disclaim onerous contracts; and
- Payment of unclaimed amounts into the Public Account of India.

The Regulations seem to be inspired by the English approach to liquidation – placing a firm emphasis on the process being largely driven by the liquidator with little involvement from the Tribunal, again with an obvious eye on improving the efficiencies of the process.

Role of the liquidator

As set out in our previous briefing, much of the IBC relies upon the appointment of an insolvency professional and that professional implementing the new regime

Key issues

- Limited supervision by the NCLT to promote efficiency
- Liquidation process include:
 - Details on the powers and functions of liquidator
 - Regular progress reports
 - Standardised claims process and verification by liquidator
 - Completion of liquidation within 2 years
 - Secured creditor realisation
 - Set off

effectively. The liquidation process as detailed in these latest Regulations is no exception and devotes a number of chapters to the eligibility

requirements, fees, powers and functions connected to the role of liquidator. Unsurprisingly, a liquidator has to be independent of the debtor (so auditors, company secretaries, and legal or consulting firms involved in matters with the debtor contributing 10% or more of the gross turnover of such firms cannot take on the role for three financial years). Transparency on fees too feature in the Regulations. The liquidator's fees are determined by the committee of creditors. Where the fees have not been so determined, the Regulations provide for a sliding scale of fees calculated by reference to the amount of asset realisations and distributions. This is no doubt also aimed at ensuring that recoveries for creditors are maximised. The liquidator is also incentivised to make distributions quickly as part of his fee is payable only once the realised assets are distributed.

In terms of the powers and functions of a liquidator, there is an obligation to provide a number of reports and keep certain registers and books of account. The Tribunal performs a supervisory function here monitoring progress of the liquidation. The reporting begins with a Preliminary Report and asset memorandum to be produced within 75 days of the commencement of the liquidation, detailing the capital structure, estimates of the assets and liabilities of the debtor, and the method and manner of realisation of assets. Progress reports are then required at the end of each quarter with information relevant to the liquidation i.e. progress on realisation and claims, distributions, litigation, and fees etc. The liquidator is also required to keep records of consultations with stakeholders. Much of the role of the liquidator is dedicated as one may expect to the realisation and distribution of assets.

Claims

In order to simplify the claims process the Regulations introduce a pro forma claim form for each category of creditors: operational creditors (other than workmen and employees); financial creditors; workmen and employees; and other stakeholders. The forms are set out in Schedule II to the Regulations. Where the claim is not for a precise amount the liquidator makes an estimate of the claim. As part of the verification process the liquidator has only 30 days from the last day of creditors submitting their claims to either admit or reject claims.

There are brief details within the Regulations regarding debts in foreign currency (which are to be valued in Indian currency at the official exchange rate published by the Reserve Bank of India as of the date of the commencement of the process) and also for periodical payments (only amounts due and unpaid up to the liquidation can be claimed). Creditors may also submit claims for debts due in the future. There is a formula for working out how debts due at a future time are to be calculated – this follows the English approach set out in the Insolvency Rules 1986.

Sale of assets

Under the Regulations a liquidator may sell assets individually or collectively, ordinarily through a public auction process. For the public auction a liquidator has to follow a marketing strategy set out in Schedule I of the Regulations. In certain circumstances liquidators can sell assets privately (i.e. perishable assets, assets whose value is diminishing rapidly, or assets sold at the higher price than a reserve price from a failed auction, or with the prior permission of the Tribunal).

Secured creditors

Liquidation is very much a collective insolvency process, essentially focusing on realising assets and distributing the proceeds to unsecured creditors in an orderly and timely fashion. Of course most debtors also have secured creditors, so the Regulations have to take secured creditors into account too. In this regard the Regulations allow secured creditors to prove their security interest by reference to the relevant records publicly available with an information utility, or a certificate of registration of charge from the Registrar of Companies or the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

Notwithstanding the liquidation, secured creditors may seek to realise their security, but they first need to notify the liquidator in advance of the price of the proposed sale. If the liquidator knows of a party willing to pay more for the secured asset, then the secured creditor must sell to that person instead. Of course, secured creditors can choose to relinquish their security and receive proceeds from the distribution of assets, albeit with priority over unsecured creditors.

Set off

The Regulations provide for "mutual dealings" between the debtor and another party to be set off. There are no details on the extent to which claims are considered mutual for these purposes, nor is there any reference as to the date on which the set off under the Regulations is to take place. As we have experienced with the English practice, this can be a vexed issue, not least because parties who are able to benefit from the set off get a £ for £ recovery instead of a dividend payment.

Bringing the liquidation to a close

In addition to an anticipated liquidation lasting no more than 2 years, there are also a number of mechanisms within the Regulations that assist in ensuring that the process is executed in as an efficient a manner as possible. These include distributions of unsold assets, early dissolution, disclaimer provisions and a mechanism for unclaimed amounts.

Distributions

Although the Regulations envisage that distributions will be made in cash within 6 months of the realisation process, they also provide a mechanism which allows the liquidator to distribute unsold assets that cannot readily be sold to the stakeholders. In order to do this however, prior permission must be sought from the Tribunal.

Early dissolution

Where it is clear that the assets are going to be insufficient to cover the costs of the liquidation process and the affairs of the debtor do not require any investigation, at any time after the preparation of the Preliminary Report (see above), the liquidator can apply to the Tribunal for an early dissolution.

Disclaimer

The liquidator also has the power to disclaim onerous property. This again seems to take much of its inspiration from the English provisions, especially in its broad description of what constitutes onerous property which includes any property not readily saleable or unprofitable contracts. Unlike the English process, it is silent on the ability of interested parties to have the property vested in them. Under the Regulations there is also a 6 month time limit which is imposed upon the liquidator to make an election to disclaim the onerous

property (this can be extended as allowed by the Tribunal). The liquidator cannot make such an application if he has already been contacted by a person interested in the property and he has not already communicated his intention to disclaim the property within 1 month from the date of contact from such interested person. This particular aspect seems to be akin to the election for continuing contracts in a Chapter 11 reorganisation process, but appears to be a little at odds with the whole purpose of a liquidation.

Unclaimed assets

So that the liquidation process is not delayed, the Regulations allow for any unclaimed dividends to be paid into a Companies Liquidation Account in the Public Account of India. If they remain unclaimed, they can be transferred to the Central Government after a period of 15 years.

With India's current World Bank Rankings at 136 out of 189 jurisdictions, recovery rates of only 26 cents on the dollar and an average time taken for the process of 4.3 years, these changes introduced by the Regulations will hopefully improve the efficiencies of its liquidation process.

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