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ONE of the more arduous tasks in the liquidation process under the Insolvency and Bankruptcy Code, 2016 (IBC) has been the realisation of peculiar assets such as sundry debts, including refunds from Government and its agencies; contingent receivables, disputed receivables, sub-judice receivables, disputed assets (where legal ownership is not clear), and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions. Since these assets are not easily realisable and are often associated with an indefinite waiting time frame, they are referred to as 'not readily realisable assets' (NRRAs) as reflected by the Insolvency and Bankruptcy Board of India (IBBI) in their Discussion Paper on Corporate Liquidation Process dated August 26 this year.

NRRA in terms of value and time are quite uncertain which has led to difficulties in swiftly closing the liquidation process of a corporate debtor within the prescribed timeline of one year as mandated by Regulation 44(L) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('Liquidation Process Regulations'). The liquidator is expected to act with a sense of urgency in completion of the liquidation process to ensure that the creditors are able to realize the maximum possible value of the assets of the corporate debtor as the longer such assets are withheld from being realized, the more their value depreciates to the detriment of the stakeholders. Hence, the presence of the NRRA in the liquidation estate serves as a hindrance to this goal.

To facilitate quick closure of the liquidation process, ensure realisation of maximum possible value by the stakeholders, and accommodate creditors who may not be willing to wait for completion of liquidation process for

How new IBC provision makes liquidation process smoother



Regulation 37A inserted in Liquidation Process Regulations on November 13, 2020 allows liquidator to assign or transfer a NRRA

realization of debt, IBBI inserted Regulation 37A to the Liquidation Process Regulations on November 13, 2020. This newly inserted provision specifically allows for the liquidator to assign or transfer a NRRA to a person eligible to submit a resolution plan in the resolution process of the corporate debtor in accordance to Regulation 31A in a transparent manner.

IBBI in their Discussion Paper indicated that it is worth considering assignment of NRRA for whatever amount the market is willing to pay and distribute the same among stakeholders and close the liquidation process swiftly. Additionally, the liquidator can assign statutory rights of action to third parties to benefit the stakeholders when the liquidation es-

tate is insufficient to fulfil the debts.

So the course of action is that the liquidator is to first attempt to sell the assets at the first instance, failing which they may assign or transfer an asset to any person, in consultation with the stakeholders' consultation committee (SCC), and failing which they may then distribute the undisposed of assets amongst stakeholders in accordance to Regulation 38 of the Liquidation Process Regulations, with the approval of the Adjudicating Authority.

To undertake the assignment of NRAs, as suggested in the Discussion Paper, there exists two options i.e. absolute assignment and assignment with recompense facility.

In absolute assignment, assignment

of NRRAs will be absolute and the assignee would have right over the assets and any action related thereto. The assignment would also include the transfer of all the legal rights, remedies and power to bring the action to an end (such as settlement) without the interference of the assignor (liquidator).

Differing from this, 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 assignment. If the liquidator assigns a right of action for a share of the winnings or any similar terms which are less than absolute, the corporate debtor or the liquidator are exposed to a claim for adverse costs

in the event of an unsuccessful claim. Thus, the 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. Such a cautious approach may entail sharing only in a successful recovery and the assignee bearing the costs of an unsuccessful action. Additionally, the liquidator has to account for distribution in the terms of assignment, in case the share of assignment proceeds is received later than the dissolution of the corporate debtor.

For an effective assignment, the IBBI in their Discussion Paper recommended that the liquidator deliberates assignment of NRRA with the SCC, who may have access to relevant records and information such as the existence of valid cause of action, its value, action to be taken to recover

such value, probability of the defendant entering into settlement, assessing if the assignment is in the best interest of the creditors and corporate debtor, reasonableness and fairness of the assignment, market evaluation and other available alternatives.

Regulation 37A implemented the recommendation of the IBBI and mandated that the SCC is consulted in accordance to Regulation 31A prior to such assignment or transfer. Interestingly, while the SCC may advise the liquidator, the advice of the SCC is not

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binding on the liquidator. Thus, after the consultation with SCC the liquidator can take a decision contrary to the views expressed by SCC, provided the reasons for taking a contrary decision is recorded in the report submitted to the Adjudicating Authority.

Overall, the liquidator has to act in a fair, reasonable manner in good faith, in the best interest of the liquidation estate, seek maximum consideration for assignment, consult the SCC, not to transfer the asset to a person not eligible to submit a resolution plan as under Section 29A of IBC and undertake the assignment ideally through auction or otherwise on arm's length basis.

The amendment is undoubtedly a welcome move as the newly inserted provision of Regulation 37A allowing the assignment of NRRA further ensures a clean and efficient close of the liquidation process in an expedited manner with the effective dissolution of the entity and realization of the assets attained in its maximum without the burden of prolonged pending uncertain recoveries of NRRA.

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