

Amendment of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The Insolvency and Bankruptcy Board of India (“**IBBI**”) notified the IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022 on September 16, 2022 (“**Fourth Amendment**”) and the IBBI (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2022 on September 20, 2022 (“**Fifth Amendment**”). The Fourth Amendment and the Fifth Amendment are collectively referred to as the “**Amendments**”). We have summarised the Amendments below.

1. Opening of an email account

For the purposes of correspondence with stakeholders, the interim resolution professional (“**IRP**”) is now required to open an email account for conduct of the corporate insolvency resolution process (“**CIRP**”). In the event of replacement of IRP by another resolution professional (“**RP**”) or a liquidator, as the case may be, the email credentials are required to be handed over to such RP or the liquidator.

This is intended to enable a seamless transition from one professional to another and minimize the risk of claims going unaddressed.

2. Communication to creditors about the commencement of CIRP

The IRP is now also required to identify the creditors of the corporate debtor as per the last available books of accounts of the corporate debtor and inform them about the commencement of CIRP of the corporate debtor, along with the copy of the public announcement required to be made by the IRP under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”) for inviting claims from creditors. The communication is required to be sent through post or electronic means wherever the information for communication is available. In case it is not possible to send a communication to creditors, the public announcement made under the CIRP Regulations will be deemed to be the communicated to such creditors.

While this process is intended to ensure that most (if not all) creditors as per the last available books of the corporate debtor are made aware of the CIRP, it will increase the administrative burden on the RPs.

3. Meeting of committee of creditors

The CIRP Regulations enable the RP to convene a meeting of the committee of creditors (“**CoC**”) on receipt of a meeting request from members of the CoC. The Fourth Amendment has inserted an explanation and clarified that meetings of the CoC can be convened till the resolution plan is approved or an order for liquidation is passed, as the case may be, by the adjudicating authority. Such meetings of the CoC can decide upon matters which do not affect the resolution plan submitted before the adjudicating authority.

By virtue of this amendment, the ambiguity regarding the role of the CoC during the period between submission of a resolution plan to, and its approval by, the adjudicating authority has been clarified. This will enable the RP to obtain the views of the CoC prior to taking important decisions regarding the affairs of the corporate debtor.

4. **Timeline for reporting preferential, avoidance, fraudulent and extortionate transactions, and notification to prospective resolution applicant**

Under the CIRP Regulations, once the RP makes a determination that the corporate debtor has been a party to any preferential, avoidance, fraudulent or extortionate transaction, he/she is required to apply to the adjudicating authority for appropriate relief within a certain time period after the date of insolvency commencement date (“**ICD**”). The Fourth Amendment has reduced the timeline for filing such application from 135 (one hundred thirty five) days to 130 (one hundred thirty) days from the ICD. A copy of such application is required to be forwarded to prospective resolution applicants (“**PRA**”) for their consideration.

This will enable the PRA to take a considered decision while proposing the resolution value and enable maximization of value since the amounts to be recovered from the avoidance transactions applications are also assets of the corporate debtor.

5. **Information memorandum**

The following amendments have been made which relate to the information memorandum (“**IM**”):

- a) The timeline for submission of the IM to the CoC members has been increased from 54 (fifty four) days from the ICD to 95 (ninety five) days from the ICD. This will hopefully give sufficient time to the RP to prepare an accurate and complete IM.
- b) The IM must highlight the key selling propositions and contain all relevant information which serves as a comprehensive document conveying significant information about the corporate debtor including its operations, financial statements, to the PRA.
- c) The IM must also include:
 - the details of contingent liabilities as on the ICD;
 - geographical coordinates of fixed assets of the corporate debtor;
 - the company overview including snapshot of business performance, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the corporate debtor such as brought forward losses in the income tax returns, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities; and
 - details of business evolution, industry overview and key growth drivers in case of a corporate debtor having book value of total assets exceeding INR 100,00,00,000 (Indian Rupees one hundred crore), as per the last available financial statements.

Disclosure of such details in the IM will provide the CoC and PRA a more detailed assessment of the affairs of the corporate debtor including its assets and liabilities. It could also strengthen the marketing efforts for the corporate debtor and its assets and may increase the possibility of evincing a greater interest for resolution.

6. **Invitation for Expression of Interest**

The Fourth Amendment has reduced the timeline for publication of the expression of interest (“**EoI**”) in Form G from within 75 (seventy five) days from the ICD to within 60 (sixty) days from the ICD. Further, it is now mandatory to mention in Form G, the industry in which the corporate debtor operate and the location(s) of its operations.

7. Request for resolution plans for sale of assets

The Fourth Amendment has introduced a new provision which enables the RP, on approval of the CoC, to issue a request for a resolution plan for sale of one or more assets of the corporate debtor if the RP fails to receive a resolution plan for the corporate debtor as a whole.

While there have been some instances where asset-wise sale was proposed by the CoC, the same was not specifically covered in the CIRP Regulations. This provision will enable the RP to sell the selected business units or assets where bidders have not come forward to purchase the entire business of the corporate debtor. However, this new provision is not free from doubt. For example, in a situation where some of the assets are sold and some remain unsold, it is not clear whether the CIRP would be deemed successful or whether the corporate debtor would be ordered into liquidation where the liquidator has to sell the balance assets and repay the debts. Also, if there are different implementation schedules for sale of assets to different bidders and the implementation of one resolution plan is delayed, withdrawn or set aside for any reason, it is unclear how and when the CIRP will be deemed concluded. It is also not clear whether the entire CoC will vote on resolution plans for specific assets or whether only creditors that have security on specific assets will vote on such resolution plans and benefit from plans offered for such assets. Some of these issues will need to be clarified by the IBBI in due course.

8. Marketing of assets of the corporate debtor

The Fourth Amendment has introduced a new provision by virtue of which it is mandatory for the RP to prepare a strategy for marketing the assets of the corporate debtor in consultation with the CoC, where the total assets as per the last available financial statements exceed INR 100,00,00,000 (Indian Rupees one hundred crore). In other cases, the RP has the discretion to prepare such strategy.

The decision of implementing such strategy along with its cost is subject to the approval of the CoC and any CoC member can also take measures for marketing of such assets.

This will enable information regarding the corporate debtor to be disseminated to a wider audience and evince interest from multiple bidders. However, the timelines within which such marketing strategy needs to be formulated is not mentioned in the Fourth Amendment.

9. Assessment of compromise or arrangement

The Fourth Amendment has made it mandatory for the CoC to examine whether to explore a compromise or arrangement while deciding to liquidate the corporate debtor under the Insolvency and Bankruptcy Code, 2016 ("IBC"). The RP is required to submit the CoC's recommendation to the adjudicating authority while filing application for liquidation.

The RP and the CoC also have to keep exploring the possibility of compromise or arrangement during the period the liquidation application is pending before the adjudicating authority.

It is hoped that the effective utilisation of time while the liquidation application is pending will help in swift decisions thereby preserving the value of the assets.

10. Model timeline for CIRP

The amendments to the model timeline for CIRP are as follows:

Regulation	Description of Activity	Pre-amendment		Post-amendment	
		Norm	Timeline	Norm	Timeline
Regulation 35A(3) of the CIRP Regulations (Provision regarding timeline for determining and reporting avoidance transaction)	RP to file avoidance transaction applications to adjudicating authority for appropriate relief	Within 135 days of ICD	T+135	Within 130 days of ICD	T+130
Regulation 36(1) of the CIRP Regulations (Provision regarding timeline for submission of IM to CoC)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54 th day of ICD	T+54	Within 95 days of ICD	T+95
Regulation 36A of the CIRP Regulations (Provisions regarding invitation for EoI)	Publish Form G	Within 75 days of ICD	T+75	Within 60 days of ICD	T+60
	Invitation of EoI				
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90	At least 15 days from issue of EoI (Assume 15 days)	T+75
	Provisional list of PRAs by RP	Within 10 days from the last day of receipt of EoI	T+100	Within 10 days from the last day of receipt of EoI	T+85
	Submission of objections to provisional list	Within 5 days from the date of issue of provisional list	T+105	Within 5 days from the date of issue of provisional list	T+90
	Final List of PRAs by RP	Within 10 days of the receipt of objections	T+115	Within 10 days of the receipt of objections	T+100

'T' above stands for the ICD.

As per Regulation 36B(1) of the CIRP Regulations, the RP is required to issue the IM to PRAs within a maximum timeline of 90 (ninety) days from the ICD. However, pursuant to the Fourth Amendment, as per Regulation 36(1) of the CIRP Regulations, the RP is required to submit the IM to the CoC within a maximum timeline of 95 (ninety five) days from the ICD.

The above would imply that even though a RP has 95 (ninety five) days from the ICD to prepare and submit the IM as per Regulation 36 of the CIRP Regulations; by virtue of Regulation 36B(1) of the CIRP Regulations, it will be compelled to prepare the IM and submit it to the CoC and the PRA prior to 90 (ninety) days from the ICD. Therefore, by virtue of Regulation 36B(1) of the CIRP Regulations, practically a RP will not have the full benefit of the revised timelines.

11. Decision for liquidation

The Fourth Amendment provides that the CoC, while considering the liquidation of the corporate debtor, may consider certain factors including but not limited to non-operational status for preceding 3 (three) years, goods produced or service offered or technology employed being obsolete, absence of any assets, lack of any intangible assets or factors which bring value as a going concern over and above the physical assets like brand value, intellectual property, accumulated losses, depreciation, investments that are yet to mature. Such consideration may be recorded and submitted in the liquidation application submitted by the RP to the adjudicating authority.

12. Regulatory Fee

The Fifth Amendment provides that the following fees will be payable to IBBI:

- a) a regulatory fee calculated at the rate of 0.25% of the realisable value to creditors under the resolution plan approved under the IBC if the realisable value is more than the liquidation value;
- b) a regulatory fee calculated at the rate of 1% of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the IRP or the RP for assistance in a CIRP.

The above fees payable to IBBI will form part of the insolvency resolution process costs.

Conclusion

The Amendments reflect the intent and effort of IBBI to continuously evolve the CIRP towards furthering the main objective of the IBC being time bound insolvency resolution with maximisation of value. However, additional clarity is required in relation to certain provisions, as highlighted above, to ensure that RPs can timely discharge the additional responsibilities given to them, and also to ensure that the intent behind the Amendments is achieved.

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