Insolvency and Bankruptcy Board of India

Subject: Amendments in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Background

Following the recommendations of the Insolvency Law Committee, the Government promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 on 6th June, 2018 (Annexure A) with a view to balancing the interest of various stakeholders in the Code, especially interests of homebuyers and micro, small and medium enterprises, promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors (CoC) and streamlining provisions relating to eligibility of resolution. The key changes envisaged in the Ordinance requiring amendments in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are:

a. Any amount raised from an allottee under a real estate project is deemed to have the commercial effect of borrowing and hence an allottee is a financial creditor. He can initiate insolvency resolution of a corporate debtor and join the CoC.
b. If the number of creditors in a class exceeds a specified number, they would be represented by an authorised representative.
c. A pure play financial entity, which is not a related party to the corporate debtor, can submit resolution plans and can sit in the CoC.
d. An application admitted under section 7, 9 or 10 of the Code may be withdrawn by the applicant before publication of notice inviting Expressions of Interest, with the approval of CoC with 90% of the voting share.

2. A few recent pronouncements of the Hon'ble Adjudicating Authority (AA) have created some ambiguity about the process in the minds of stakeholders. A few examples are:

a. CoC as State: A few recent orders impress upon the CoC to act like the State. In the matter of Essar Steel, the AA observed: "the CoC is an instrumentality of State and hence they are under the statutory obligation to follow the basic principles of administrative law." In the matter of Binani Cements Ltd., the Hon'ble Adjudicating Authority observed: "The

question is whether an adverse decision can be taken by the CoC as against an applicant who has submitted a prospective bidding plan without giving an opportunity for hearing? In a case of this nature the applicant being a leading company in India who is capable of taking over a corporate debtor like the debtor in hand and can compete with other bidders denying an opportunity to hear the applicant is quite unjust and arbitrary." Expecting the CoC to act like the State may not always yield an efficient market outcome from insolvency proceedings. If every resolution applicant is to be heard and a reasoned order must be passed for rejection of a resolution plan, the process may take years, which the IBC endeavours to obviate. The CoC is a transient body that works on market principles with the sole objective of arriving at a sustainable resolution of insolvency of the firm in a time bound manner. It is expected to take commercial decisions in the same manner as a firm takes decisions for sale of its products or for issue of its securities.

b. Submission of Plan after Time: Closure of CIRP requires completion of each step in the process within the specified timelines, whether specified in the Code, rules, regulations or the process document. Regulation 36A obliges a resolution applicant to submit resolution plan(s) prepared in accordance with the Code and the regulations to the resolution professional within the time given in the invitation made under clause (h) of sub-section (2) of section 25. However, there is a feeling to allow submission or consideration of resolution plans after the timeline in the interest of maximisation of value. In the matter of PNB Vs. Bhushan Steel and Powers Limited, the AA held: "The Resolution Plan with Liberty House shall not be rejected on the ground of delay emanating from process document or any other document entirely circulated by the Resolution Professional or the CoC**.** The rejection shall be on substantive ground as against flimsy work**."** In the matter of Binani Cement Ltd., the AA observed: "Upon the above said factors we come to a legitimate conclusion that the process of selection and identification of one plan alone when there is other competing bidders is evidently available and who showed willingness to offer full satisfaction of the claim of all stakeholders claim denying opportunity to them from participating the bidding process even if CIRP period of 270 days ever expired is found filed with irregularity and in violation of the objective of the Code and Regulations.". Refusal to consider a resolution plan after the specified time may not be a flimsy ground, as this creates uncertainty and may make the process an unending one. More importantly, this disincentivises the stakeholders to submit resolution plans in time as they can come in any time even after the timeline is over.

c. Sanctity of Process Document: As per the Code and the CIRP regulations, the CoC is required to determine the process for receipt and consideration of resolution plans. It needs to set a timeline for each stage in the process, consistent with the timelines specified in the Code and the regulations. Regulation 36A obliges a resolution applicant to submit resolution plan(s) within the time given in the invitation. In the matter of Binani Cement Ltd, the AA observed: *"...*process document is not legally binding on RP…..... Whenever an offer comes which would be in the interest of all stakeholders then no doubt he is duty bound to accept the offer and to be placed before the CoC... Can a revised offer subsequent to the submission of a resolution plan amount to violation of section 25*(2)(h)*? Our answer is not*."*. In the same matter, it further observed: "Coming to the second objection in not considering the revised offer of the applicant that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC does not inspire our confidence..… The reason that the process document does not permit the resolution professional and the CoC in considering the revised offer of the applicant have no legal force at all. Even if the process document restricts CoC and the Resolution Professional which has been made by the CoC for their own convenience and for guidelines to the resolution applicant as well as to the Resolution Professional that is not a ground to deny a participant right in participating in the bidding process." This may allow submission and revision of resolution plans in a manner different from that provided in the process document. If the process document is not binding, every stakeholder would impose its own process and the process would never conclude.

d. Maximisation of Value: The Code envisages maximisation of the value of assets of the corporate debtor. Some, however, believe that the Code should maximise the value of assets of the financial creditors. It often uses the term bidding, giving an impression that the resolution plan, which gives the highest value to one set of stakeholders, namely, financial creditors, should be approved. A firm may fail for a variety of reasons. It may fail because of deficiencies in organisation, strategy, business model, management, financing, technology, operations, location, product portfolio, ulterior motive, etc. In cases where the firm is viable, the failure can be resolved. The resolution plan should address the deficiency so that the resolution is sustainable. For example, a firm is failing because its product is not selling. Any amount of payment to creditors would not make resolution sustainable. Section 29A was introduced to entrust the firm to credible persons so that resolution can be

sustained in their hands. Therefore, the endeavour should be to encourage resolution plan that maximises the value of the corporate debtor on a sustained basis rather than maximisation of value of a set of stakeholders.

3. Keeping the above in view, it may be useful to address the ambiguity to ensure that -

a. there is certainty of process. Whosoever wishes to submit a resolution plan should submit it in the manner and within the timeline provided in the process document. However, the process document should conform to the Code and regulations.

b. the process concludes within the specified time. The resolution applicants may not hang around for an indefinite time after participating in the process and blocking their resources to be used for resolution.

c. the cost of process is not prohibitive. A long, protracted, adversarial process adds to cost and wastage of time.

d. the principles of administrative law are not applied to commercial decisions to be taken by the stakeholders.

e. the resolution plan is sustainable. The focus should be maximisation of value of assets of the corporate debtor, as enshrined in the long title to the Code, and not of a set of stakeholders.

4. The Government issued a press release (Annexure B) along with the promulgation of the Ordinance. It stated that Regulations would bring in further clarity by laying down mandatory timelines, processes and procedures for corporate insolvency resolution process. Some of the specific issues that would be addressed include non-entertainment of late bids, no negotiation with the late bidders and a well laid down procedure for maximizing value of assets.

5. There have also been learning from the experience of so many corporate debtors undergoing resolution. In this background, the Board had four roundtables with stakeholders – one each at Hyderabad, Kolkata, New Delhi and Mumbai - to solicit their inputs on amendments required in the CIRP regulations. The summary of views at the four roundtables are at Annexures C to F. Keeping these in view, this note proposes certain amendments in the CIRP Regulations.

Appointment of RP

6. The Ordinance has amended the Code at several places to require written consent of the IP to act as IRP, RP or liquidator of a corporate debtor. For example, the amended section 22(3) of the Code reads:

"(3) Where the committee of creditors resolves under sub-section (2)-

(a) to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.".

It is, therefore, proposed to provide a Form for the proposed IP to give a written consent to act RP.

7. In the interest of timely completion of the processes under the Code, an IP should not have too much work in hand. In the matter of IDBI Bank Limited Vs**.** Lanco Infratech Limited, the AA declined to appoint an IP as IRP keeping in view the work he had in hand, particularly when most of the activities prescribed in the Code are time bound. Clause 22 of the Code of Conduct for IPs requires that an IP must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments. Form 2 of the AA Rules requires an IP to disclose if he is working as IRP/RP/Liquidator in any proceedings that would give an idea to the AA about the work he has in hand and whether he should be appointed as IRP in one more matter. It is, therefore, proposed that the Form for written consent may include a table where the proposed IP can elaborate the details of processes (number and type of processes - corporate insolvency resolution, fast track resolution, liquidation, voluntary liquidation, fresh start, individual insolvency resolution, bankruptcy, etc.) he has in hand so that the AA can take a considered view if he can take an additional process.

8. Section 16(5) provided that the term of the IRP shall not exceed thirty days from the date of his appointment. Now the amended section 16(5) provides that the term of the IRP shall continue till the date of appointment of the RP under section 22. It is expedient to explicitly provide that IRP will continue to discharge the responsibilities of IRP or RP, as the case may be, till RP is appointed.

Creditors in a Class

9. An explanation has been added to section 5(8)(f), according to which any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. This makes a home buyer a financial creditor (FC). There are a large number of FCs in the class of home buyers. Similarly, there are a large number of FCs in the class of fixed deposit holders. The Code provides a way for their representation in the CoC.

10. The newly inserted section 21 (6A) reads as under:

"(6A) Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or subsection (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6B) The remuneration payable to the authorised representative- (i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and (ii) under clause (b) of sub-section (6A) shall be as specified which shall be jointly borne by the financial creditors.".

11. It is necessary for the IRP to find out from the books if there are any class of creditors exceeding a threshold number. It is proposed to specify the threshold at 10 keeping in view the need for effective discussion in the meeting of the CoC. If the number is less than 10 in a class, they may attend the meetings of the CoC in person. If the number exceeds 10, they need to be represented by an authorised representative (AR). Further, there may be a separate IP to act as IR for each class of FCs.

12. It is the responsibility of the IRP to propose the name of an IP to act as AR to be appointed by the AA. The IRP may avoid conflict of interest while identifying such an IP. He may identify an IP, who is not his related party, and who is eligible to be an IP for the CIRP under the regulation. He may also obtain written consent of the IP to act as AR, for which a Form may be provided. He may identify three such IPs and give a choice to FCs in the class to prefer one. The Form for public announcement may be amended to enable the IRP to propose names of three IPs willing to act as AR. The FCs in the class will choose the IP.

13. The FCs in a class need to be provided a specific Form to submit their claims. Accordingly, regulation 8 may be amended to enable FCs, other than FCs in a class, to submit their claims. The Form C may also be amended accordingly. A new regulation may be inserted to enable FCs in a class (such as allottees of real estate projects, fixed deposit holders, debenture holders) to submit claims in a different Form. They may be required to submit proof of claim through electronic means as other FCs. The Form may provide for choice of AR amongst the three choices given by the IRP. Since the money paid by the home buyer does not have any explicit rate of interest, it may create difficulty in estimating the amount of claims as on the date of commencement of insolvency. A view needs to be taken if the principal should be considered as claim or an additional amount should be provided towards notional interest.

14. The IRP may propose the name of the IP, who secures maximum votes from FCs in the class by the last date specified regulation 12(1), for appointment as AR. He may file the name within two days of verification of claims received within the time specified under regulation 12(1). Receipt of claims / choices after the last date [(that is, under regulation 12(2)] shall not change the AR. The IRP may provide the list of creditors in the class to the AR. The disputes regarding claims of the FCs in the class shall be dealt by the IRP, and not the AR.

15. The IRP shall communicate with the FCs through the AR and not directly. The AR shall establish secured electronic means for communicating with the FCs in the class. He shall indicate time for voting)voting instructions(24 hours in advance and the voting shall remain open for at least 06 hours.

16. The Ordinance requires that the remuneration of the AR shall be as specified. It is proposed that an AR may be paid per meeting of the CoC as under:

No. of Creditors in the Class	Fee per Meeting)Rs.(
10-100	15,000
101-1000	20,000
More than 1000	25,000

17. The Ordinance requires that the remuneration of the AR shall be jointly borne by the financial creditors he represents. It may be difficult to collect from every FC an estimated proportionate amount of remuneration per FC for each meeting of the CoC. It is, therefore, proposed to include the remuneration payable to AR in the IRPC, to be recovered from the claims of the creditors subsequently.

18. Reasonable out-of-pocket expenses of or incurred by the AR shall be borne from the Insolvency Resolution Process Cost.

Public Announcement

19. The Form for public announcement may be modified to the extent provide in Para 13. For the sake of convenience, the public announcement may state where the claimants / creditors can obtain / download different Forms for submission of claims.

20. Regulation 6 provides for public announcement. It states that the applicant shall bear the expenses of public announcement which may be reimbursed by the CoC to the extent it ratifies them. A clarification to the regulation further states that the expenses on public announcement shall not form part of insolvency resolution process costs. Public announcement is a necessary component of CIRP; it is made by the IRP; and the expenses are being ratified by the CoC. It may be advisable to provide that the expenses on public announcement to the extent ratified by the CoC may be included in the insolvency resolution process costs. Accordingly, it is proposed to amend the regulation appropriately and delete the clarification.

21. Section 15 of the Code earlier provided that the public announcement shall contain “the last date for submission of claims”. Accordingly, regulation 12(1) requires that a creditor shall submit proof of claim on or before the last date mentioned in the public announcement. However, regulation 12(2) allows a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, to submit such proof to the IRP or the RP, as the

case may be, till the approval of a resolution plan by the CoC, probably on consideration that every claimant may not notice the public announcement or fail to submit claim by the last date. In the matter of Alchemist Asset Reconstruction Co**.** Ltd**.** Vs Moser Baer India Limited **[(**IB**)-**378**(**PB**)/**2017**], the AA observed:** *"*The aforesaid regulation comes in direct conflict with the provisions of Parliamentary Statute with the provision of section 15*(1)(*c *)* of the Insolvency & Bankruptcy Code*.* We do not think that by subordinate legislation the timeline provided by Insolvency & Bankruptcy Code could be eroded in such a manner as to cause delay in the Corporate Insolvency Resolution Process*."*. Section 15 of the Code, as modified by the Ordinance, now requires that the public announcement inviting claims shall contain "the last date for submission of claims, as may be specified".

22. After the public announcement, a claimant gets 11 days to submit claims. There are big and small, sophisticated and not-so-sophisticated claimants, spread across the globe who may not come across the public announcement and submit claims in time. On the other hand, if the claimants are allowed to submit claims till the approval of resolution plan, the resolution plan may not factor in all claims. Hence a balance between the time window for claims and submission of claims in time needs to be struck to ensure conclusion of CIRP. The regulations may be amended to provide for submission of claims till 95th day, that is, five days before issue of RFP, information memorandum and evaluation matrix to prospective resolution applicants.

23. Section 18 (b) of the Code casts a duty upon the IRP to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement. Regulation 13 provides that the IRP or RP, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims and thereupon maintain an updated list of creditors providing details of amount claimed by them, the claims admitted and the security interest, if any, in respect of such claims which shall be available for inspection, displayed on the website of corporate debtor, filed with AA and presented at the first meeting of the committee. It is noted that claimants approach the Board contesting the claims not accepted by the IRP/RP seeking directions to the concerned IRP/RP to accept their claim. Presently, the Code and regulations made there under envisage that an updated list of claims shall be uploaded on the website of the corporate debtor. In the light of tight timelines for submission of claims, as well as to streamline the process for greater predictability for all stakeholders, it may be necessary to mandate that the IRP/RP provides

details of rejected and contested claims along with reasons thereof and communication may be sent to such claimants by electronic means.

Voting Requirement

24. The voting threshold has been reduced by the Ordinance to promote resolution. Section 28 lists out various actions which a RP shall take during the CIRP with the prior approval of the CoC. Regulation 25 provides for manner of voting. It provides that at the conclusion of a vote at the meeting, the RP shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision or abstained from voting. If all members are not present at a meeting, a vote shall not be taken at such a meeting. This may be amended to allow the members of the committee who wish to vote to do so at the meeting whether or not all members are present.

25. Regulation 26 (2) mandates that once a vote on resolution plan is cast by a member of the committee, such member shall not be allowed to change it subsequently. There are times when FCs vote against or abstain from voting during the voting window. They may not have the approval before casting an affirmative vote and thus may cast a negative vote. A negative voting by a member has a cascading effect on other members, especially when they were members of a consortium/ JLF earlier. The entire CIRP process centers around CoC and the intention of regulation appears that once a positive vote is cast upon by a CoC member, it should not be allowed to change to a negative vote leading to failure of CIRP process. However, the wordings of the regulation do not appear to carry the spirit of the regulations and a plain reading of regulation suggests that be it positive or negative voting, no change is allowed.

a. In the mater of RBL Bank Limited Vs. MBL Infrastructures Limited, the AA observed: "……this is a unique case in which a resolution plan which has been originally failed for the want of requisite voting percentage as required under Sub-Section (4) of Section 30 of the Code when put up for reconsideration obtained the required voting share so as to approve the resolution plan by the CoC….

……

……...

the argument advanced on the side of the Ld. Counsel for IDBI and Bank of Baroda seems to have no legal force at all. The voting right has been exercised by them voluntarily without having any kind of compulsion. Can a financial creditor not to change its mind and to have a

review of earlier decision upon deliberation with the resolution applicant and vote in favour of a resolution plan who did not vote in favour when it was put to vote? It appears to us that they can. Even in parliamentary proceedings, in our democracy, a motion to reconsider a policy decision which was once failed for not obtaining majority vote, is not uncommon……Whether or not a member of CoC can change its mind on a decision once it has been adopted, is within their own power and choice. No specific bar in the Code or Regulation brought to our notice to have a different view than the view we have taken as above. Two dissenting financial creditors out of 20 financial creditors alone challenging the reconsideration of resolution plan. From a practical standpoint of a prudent man thinking also, if one person wish to change its mind who is not debarred from changing its mind, why not change stands considering the subsequent change in the circumstances or events. In the said background, we do not find any justifiable reason to hold that reconsideration of resolution plan is bad in law as contended by IDBI and Bank of Baroda.".

It is, therefore, proposed to amend regulations 25(4) and 26 (2) to provide that once a vote in favor of resolution is cast by a member of the committee, such member shall not be allowed to change it subsequently.

26. Regulation 29(2) requires approval of the CoC for sale of assets. Since this is a major decision, the approval may require 66% majority of votes.

Withdrawal of Application

27. Earlier, the Rule of the AA Rules permitted withdrawal of application before admission. The Hon'ble Supreme Court, in the matter of Uttara Foods and Feeds Private Limited vs. Mona Pharmachem, while allowing settlement between the parties, observed: "We are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached……. A copy of this order be sent to the Ministry of Law & Justice immediately." This was considered by the Insolvency Law Committee. Based on its recommendation, the Ordinance has now inserted section 12A, which reads as under:

"12A. Withdrawal of application admitted under section 7, 9 or 10. – The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed.".

28. The withdrawal is to be allowed in the manner prescribed. Since the CIRP is half way through, it may be advisable to provide the manner of withdrawal through regulations. It may, however, be left to Government to do it through Rules or allow this to be done through Regulations. Irrespective of its placement, the manner may be as under:

a. The Press release suggests withdrawal before invitation of EoI. It is proposed to specify the invitation of EoI by 75th day of the CIRP. If a view is to be taken by the CoC before invitation, it is proposed to allow submission of request for withdrawal to CoC by 67th day in a specified Form.

b. The request may state the terms of withdrawal which must not adversely impact the interests of stakeholders other than the applicant and the members of the CoC.

c. The request must be accompanied by a bank guarantee for the expenses incurred on CIRP (process and not running expenses of the corporate debtor) till the date of request.

d. If approved by the CoC with 90% majority votes, the applicant shall file an application with the AA in a specified Form along with the approval of the CoC, by 74th day so that the CoC does not move ahead with invitation of EoI.

Invitation for Resolution Plan

29. The objectives of the Amendment Ordinance, inter-alia, include promoting resolution over liquidation of corporate debtor and streamlining the provisions relating to eligibility of resolution applicants. The Press Release of Ministry of Corporate Affairs further elaborates these objectives by emphasizing that the Regulations will bring in further clarity by laying down mandatory timelines, processes and procedures for CIRP which would include prohibition on late bids, no negotiation with late bidders and a well laid down procedure for maximizing value of assets.

30. It is proposed to specify timelines for each activity. Based on the proposals in the succeeding paragraphs, a model timeline, assuming the IRP is appointed on the date of Commencement of CIRP and the time available is 180 days, may be specified as under:

Section of the Code / Regulation No.	Description of Activity	Timeline
Section 16 (1)	Commencement of CIRP and Appointment of IRP	T
Regulation 6 (1)	Public announcement inviting claims	T+3
Regulation 6 (2) (c)	Last date of submission of claims to IRP	T+14
Regulation 13 (1)	Completion of verification of claims received under regulation 12(1)	T+21
Regulation 14A	IRP to file name of Authorised Representative, if required	T+23
Regulation 17 (1)	IRP to file report to Adjudicating Authority certifying constitution of CoC	T+23
Section 22 (1) and regulation 17 (2)	Hold 1st meeting of CoC Confirm appointment of IRP as RP or replace IRP by another RP	T+30
Regulation 27	RP to appoint 2 valuers	T+60
Section 12 (A) and regulation 30A	Request to CoC for withdrawal of application	T+67
	Submission of withdrawal Application to AA	T+74
Regulation 36 (1)	RP submits Information Memorandum to CoC	T+67
Regulation 36A	Invitation of EoI	T+75
	Particulars of the Process from Invitation of EoI to Approval in Form G to IBBI	T+75
	Provisional List of Resolution Applicants	T+95
	Objections to Provisional List	T+100
	Final List of Resolution Applicants	T+115
Regulation 36B	Issue of RFP, Evaluation Matrix and IM)subject to RAs getting at least 30 days from issue of RFP and 15 days from issue of Evaluation Matrix(	T+100
Regulation 39 (4)	Submission of CoC approved Resolution Plan to AA	T+165

31. The RP shall issue an invitation for EoI on 75th day. It shall publish brief Particulars of Invitation in Form G that details the timeline and activities from Invitation of EoI till Approval

of Resolution Plan by the CoC. He shall publish Form G in the same manner as public announcement, and in any other manner, as may be considered expedient by the CoC. It shall state where detailed invitation is available. It shall not include restrictive criteria such as non-refundable fee. The detailed invitation shall carry:

a. a brief assessment of reasons by the CoC of default by the corporate debtor;

b. criteria for resolution applicant as approved by the CoC under section 25(2)(h). The criteria should have regard to the complexity and scale of operations of the business of the corporate debtor;

c. eligibility norm under section 29A to the extent applicable;

d. last date for submission of EoI, which shall not be earlier than 15 days from the issue of invitation;

e. statement that submission of wrong or misleading information in EoI shall attract penalties and forfeit non-refundable deposit; and

e. Some basic information to enable prospective RAs to submit EoI

32. The EoI shall be submitted in the specified Form by the date given in the date invitation. It shall not be conditional. It shall be accompanied by:

a. an undertaking that RA is eligible under section 25)2()h(,

b. evidence of meeting criteria under section 25)2()h(,

c. an undertaking that RA is eligible under section 29A and will remain eligible during the entire CIRP,

d. all relevant information required to assess eligibility under section 29A, and

e. agreement to maintain confidentiality.

33. The RP shall review the eligibility of the RA and conduct due diligence and may seek clarification, additional information and records from the RAs. He shall decide and issue a provisional list of eligible prospective RAs by 95^{th} day and keep the CoC informed. He shall invite objections with supporting evidence to his decision, if any, by 100^{th} day. One may contest its own eligibility or another's eligibility. The RP shall hear the parties and decide upon the final list of eligible prospective RAs by 115^{th} day and keep CoC informed. Both provisional and final list of eligible RAs shall be posted on the website of the corporate debtor. Hopefully, every dispute about eligibility of RAs shall be over by the time resolution plan is approved by the CoC.

34. Parallelly, the RP shall issue RFP, evaluation matrix and the Information Memorandum, as per schedule given in the Form G, by 100th day to (i) prospective RAs in the provisional list, and (ii) RAs who have contested the decision of the RP refusing its inclusion in the provisional list. The RFP shall explain each step and timeline for the same in the process. The Evaluation Matrix shall contain weightage of each element and manner of evaluation of resolution plans. There will be no modification of RFP or Evaluation Matrix and every modification will be considered as fresh RFP and Evaluation Matrix. The RAs shall get at least 30 days from issue of final RFP and 15 days from issue of final Evaluation Matrix to submit resolution plans.

35. The resolution plan shall provide for insolvency resolution cost not yet paid. It must demonstrate that it is feasible and viable and effectively addresses the causes of default. It has an effective implementation plan and the RA has capacity to implement it. It shall be accompanied by an affidavit that the RA is eligible under section 29A.

36. There have been different viewpoints regarding negotiations related to resolution plans. Regulation 39(3) provides that the committee may approve any resolution plan with such modifications as it deems fit. While one view is that negotiations should enable the best price discovery, it was also leading to a stage where there could be endless proposals on the value offered. The Indian Banks Association deliberated the bid evaluation process for transactions under the CIRP and in its letter dated 31st January, 2018 issued to all banks, directed that evaluation of bid will be a one stage process and no negotiations be done other than with the H1 bidder. However, if bids are considered unsatisfactory, CoC will have the right to reject all bids and call for fresh bids. This would also be in line with the CVC guidelines and provide natural comfort to the committee of lenders, especially those in the public sector. Thus, banks came to a pre-decided framework wherein they would negotiate only with the highest bidder under CIRP. Conventionally, the creditors negotiated with the top few bidders to get the best value for the insolvent company. Such a decision has been taken with a view that serious players may increase their bid, which ultimately helps in fetching a better value for the asset and it may also speed up the resolution process. However, in response to many counter allegations to the same, the banks were following the IBA direction since February, 2018. In this regard, DIPAM has issued Guidance Note V in May, 2018 for Determination of Reserve Price & Bidding Procedure for Strategic Disinvestment. While laying down the steps for E-auction and E-tender, the guidance provides for "At the appointed date, and after completion of Step E-5 for auction, only a specified number of bidders who have quoted the higher bids (say

H1, H2, H3) are allowed to tender one last financial bid (e-tender) on the e-platform. This is to invoke competition even if number of bidders in the e-auction process is less."

37. In two recent matters (Binani Cement Ltd. and Bhushan Power and Steel Ltd.), both of which received substantial media attention, while the CoC voted for and accepted one resolution applicant after due process, another applicant that later provided better value is seen to have changed the equation in the resolution process. In both cases, the new offer was more by about Rs.1000-1500 crore. All financial creditors tend to gain from the process. However, it appears that such a process is fraught with judicial interpretation and is not in sync with the procedural approach laid down by the Code. The commercial decision on resolution is that of the CoC. Taking away the powers of the CoC may not be commensurate with the objectives of the Code. The BLRC expressed that "...the appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

38. It is, therefore, proposed that the CoC shall evaluate resolution plans received in time from RAs in the final list as per valuation matrix so that the resolution is sustainable. If only one plan meets the requirements of evaluation matrix, it may negotiate with the RA to provide for IRPC under resolution plan, amount to be paid to operational creditors and dissenting financial creditors, if not provided as required, and for maximization of value. If more than two plans meet the requirements of evaluation matrix, it shall identify two best plans and negotiate with them to provide for IRPC under resolution plan, amount to be paid to operational creditors and dissenting financial creditors, if not provided as required. Thereafter, it shall seek to maximise the value through a transparent bidding or auction system as provided in the RFP. While approving the best plan, the CoC shall record reasons for approval along with the ability of the RA and the feasibility and viability of the plan.

Compliance Certificate

39. In the matter of Ved Cellulose Ltd., the Hon'ble NCLT directed: "the resolution professional (RP) to file a compliance certificate highlighting various steps contemplated and taken by him as per the legal requirements of the Insolvency and Bankruptcy Code and the provisions of the Regulations stand complied with." Such certificate is very helpful. The AA is not hearing on a pendency of lis involving adversarial litigation and hence there is no other party to bring up deficiency in the process. Further, it may not be possible for the AA to go through the bulky documents to verify compliance with every provision of law. The approval

of resolution plans would be expeditious and quicker, if such a certificate is available. In case there are any non-compliances, they could also get flagged for the assistance of AA so that findings could be recorded whether such lapse is curable or fatal. It is, therefore, proposed to provide for submission of resolution plan to AA, along with a compliance certificate in the specified Form.

Conflict of Interest

40. Regulation 3 ensures that an IP is eligible to be appointed as a RP for a CIRP of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor. While the independence from corporate debtor is addressed, the independence from the financial creditors is an aspect that has been approached through the disclosure mechanism. It is apprehended that in the absence of any express restrictions, ex-officials of banks/financial creditors even with clear conflict of interest can be appointed as resolution professional and affect the independence of the CIRP wherein these may be the very persons dealing with the particular loan account during the period of their employment with the financial creditor.

41. In the case of Mussadi Lal Kishan Lal Vs. Ram Dev International Ltd. The Hon'ble NCLT observed: "It is not disputed before us that the Resolution Professional, Mr. K.V. Somani, who is now proposed to act as such, has been on the panel of erstwhile State Bank of India, Hyderabad which is now merged with State Bank of India. The aforesaid statement has been made by the learned Counsel for the applicant. The State Bank of India is a member of the Committee of Creditors and the name of Mr. K.V. Somani has now been proposed by the CoC to act as Resolution Professional by replacing the earlier Resolution Professional, Mr. Rakesh Kumar Jain. In such like circumstances, the proposed Resolution Professional cannot be regarded as independent umpire to conduct CIR process as required by well settled practise and therefore, we cannot accept the request made by the learned Counsel for the CoC and reject the application. As Mr. K.V. Somani is empanelled with the State Bank of India of Hyderabad/State Bank of India as submitted by the Counsel for the petitioner. The application fails and the same is dismissed.". In another matter (Alchemist Asset Reconstruction Co. Pvt. Ltd. Vs. NIIL Infrastructure Pvt. Ltd.), the AA observed: "We are of the considered view that provisions of Section 27(2) the IRP permit the replacement of an RP another one resolution professional but we have doubts about the eligibility of an RP who is on the penal of the member of the CoC

because such and RP will not be able to act as an independent umpire while conducting the CIR process. “

42. The conflict of interest in respect of a resolution professional having a professional background of being associated by way of employment in a bank may be addressed by mandating such in-eligibilities in regulation 3. An IP who has been an employee of a bank/ financial creditor or having an association by way of empanelment by a bank/ financial creditor having voting share of 25% or more in a particular resolution process may not be eligible to be appointed as IRP/RP. It is for consideration if an IP in the panel of a bank should be prohibited to act as IRP / RP of a CIRP of a corporate debtor where the bank holds majority votes.

43. It is submitted for consideration of the Governing Board.

रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—18 REGISTERED NO. DL—(N)04/0007/2003—18

भारत का राजपत्र
The Gazette of India

असाधारण
EXTRAORDINARY
भाग II — खण्ड 1
PART II — Section 1
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं० 27] नई दिल्ली, बुधवार, जून 6, 2018/ज्येष्ठ 16, 1940 (शक)
No. 27] NEW DELHI, WEDNESDAY, JUNE 6, 2018/JYAISTHA 16, 1940 (SAKA)

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 6th June, 2018/*Jyaistha* 16, 1940 (*Saka*)

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2018
NO. 6 OF 2018

Promulgated by the President in the Sixty-ninth Year of the Republic of India.

An Ordinance further to amend the Insolvency and Bankruptcy Code, 2016.

WHEREAS the Insolvency and Bankruptcy Code, 2016 (the Code), *inter alia*, provides for insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons;

AND WHEREAS a need has been felt, *inter alia*, to balance the interests of various stakeholders in the Code, especially interests of home buyers and micro, small and medium enterprises, promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors and streamlining provisions relating to eligibility of resolution applicants;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:—

Short title and commencement.

1. (*1*) This Ordinance may be called the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

(*2*) It shall come into force at once.

Amendment of section 3.

2. In the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the principal Act), in section 3, in clause (*12*), for the word "repaid", the word "paid" shall be substituted. 31 of 2016.

Amendment of section 5.

3. In section 5 of the principal Act,—

(*i*) after clause (*5*), the following clause shall be inserted, namely:—

'(*5A*) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;';

(*ii*) in clause (*8*), in sub-clause (*f*), the following *Explanation* shall be inserted, namely:—

'*Explanation.*— For the purposes of this sub-clause,—

(*i*) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(*ii*) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (*d*) and (*zn*) of section 2 of the Real Estate (Regulation and Development) Act, 2016;'; 16 of 2016.

(*iii*) in clause (*21*), for the word "repayment", the word "payment" shall be substituted;

(*iv*) after clause (*24*), the following clause shall be inserted, namely:—

'(*24A*) "related party", in relation to an individual, means—

(*a*) a person who is a relative of the individual or a relative of the spouse of the individual;

(*b*) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(*c*) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(*d*) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(*e*) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(*f*) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(*g*) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(*h*) a person on whose advice, directions or instructions, the individual is accustomed to act;

(*i*) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

(*a*) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely:—

(*i*) members of a Hindu Undivided Family,

(*ii*) husband,

(*iii*) wife,

(*iv*) father,

(*v*) mother,

(*vi*) son,

(*vii*) daughter,

(*viii*) son's daughter and son,

(*ix*) daughter's daughter and son,

(*x*) grandson's daughter and son,

(*xi*) granddaughter's daughter and son,

(*xii*) brother,

(*xiii*) sister,

(*xiv*) brother's son and daughter,

(*xv*) sister's son and daughter,

(*xvi*) father's father and mother,

(*xvii*) mother's father and mother,

(*xviii*) father's brother and sister,

(*xix*) mother's brother and sister; and

(*b*) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;'.

Amendment of section 7.

4. In section 7 of the principal Act, in sub-section (*1*), for the words "other financial creditors", the words "other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government," shall be substituted.

Amendment of section 8.

5. In section 8 of the principal Act,—

(*a*) in sub-section (*2*),—

(*i*) in clause (*a*), for the words "if any, and", the words "if any, or" shall be substituted;

(*ii*) in clause (*b*), for the word "repayment", the word "payment" shall be substituted;

(*b*) in the *Explanation*, for the word "repayment", the word "payment" shall be substituted.

Amendment of section 9.

6. In section 9 of the principal Act,—

(*a*) in sub-section (*3*),—

(*i*) in clause (*c*), for the words "by the corporate debtor; and", the words "by the corporate debtor, if available;" shall be substituted;

(*ii*) for clause (*d*), the following clauses shall be substituted, namely:—

"(*d*) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(*e*) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.";

(*b*) in sub-section (*5*),—

(*A*) in clause (*i*), in sub-clause (*b*), for the word "repayment", the word "payment" shall be substituted;

(*B*) in clause (*ii*), in sub-clause (*b*), for the word "repayment", the word "payment" shall be substituted.

Amendment of section 10.

7. In section 10 of the principal Act, —

(*a*) for sub-section (*3*), the following sub-section shall be substituted, namely:—

"(*3*) The corporate applicant shall, along with the application, furnish—

(*a*) the information relating to its books of account and such other documents for such period as may be specified;

(*b*) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and

(*c*) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.";

(*b*) in sub-section (*4*),—

(*i*) in clause (*a*), after the words "if it is complete", the words "and no disciplinary proceeding is pending against the proposed resolution professional" shall be inserted;

(*ii*) in clause (*b*), after the words "if it is incomplete", the words "or any disciplinary proceeding is pending against the proposed resolution professional" shall be inserted.

Amendment of section 12.

8. In section 12 of the principal Act, in sub-section (*2*), for the word "seventy-five", the word "sixty-six" shall be substituted.

Insertion of new section 12A.

9. After section 12 of the principal Act, the following section shall be inserted, namely:—

Withdrawal of application admitted under section 7, 9 or 10.

"12A. The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed.".

Amendment of section 14.

10. In section 14 of the principal Act, for sub-section (*3*), the following sub-section shall be substituted, namely:—

"(*3*) The provisions of sub-section (*1*) shall not apply to—

(*a*) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(*b*) a surety in a contract of guarantee to a corporate debtor.".

Amendment of section 15.

11. In section 15 of the principal Act, in sub-section (*1*), in clause (*c*), for the word "claims", the words "claims, as may be specified" shall be substituted.

Amendment of section 16.

12. In section 16 of the principal Act, in sub-section (*5*), for the words "shall not exceed thirty days from date of his appointment", the words and figures "shall continue till the date of appointment of the resolution professional under section 22" shall be substituted.

Amendment of section 17.

13. In section 17 of the principal Act, in sub-section (*2*),—

(*i*) in clause (*d*), for the words "may be specified.", the words "may be specified; and" shall be substituted;

(*ii*) after clause (*d*), the following clause shall be inserted, namely:—

"(*e*) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.".

Amendment of section 18.

14. In section 18 of the principal Act, in the *Explanation*, for the word "sub-section", the word "section" shall be substituted.

Amendment of section 21.

15. In section 21 of the principal Act,—

(*i*) in sub-section (*2*),—

(*a*) in the proviso, for the words "related party to whom a corporate debtor owes a financial debt", the words "financial creditor or the authorised representative of the financial creditor referred to in sub-section (*6*) or sub-section (*6A*) or sub-section (*5*) of section 24, if it is a related party of the corporate debtor," shall be substituted;

(*b*) after the proviso, the following proviso shall be inserted, namely:—

"Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.";

(*ii*) in sub-section (*3*), for the word "Where", the words, brackets and figures and letter "Subject to sub-sections (*6*) and (*6A*), where" shall be substituted;

(*iii*) in sub-section (*6*), in the opening portion, the words "or issued as securities" shall be omitted;

(*iv*) after sub-section (*6*), the following sub-sections shall be inserted, namely:—

"(*6A*) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors,

such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) or sub-section (*6*), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(*6B*) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (*6A*), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (*6A*) shall be as specified which shall be jointly borne by the financial creditors.";

(*v*) for sub-sections (*7*) and (*8*), the following sub-sections shall be substituted, namely:—

"(*7*) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (*6*) and (*6A*).

(*8*) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.".

Amendment of section 22.

16. In section 22 of the principal Act,—

(*a*) in sub-section (*2*), for the word, "seventy-five", the word "sixty-six" shall be substituted;

(*b*) in sub-section (*3*),—

(*i*) in clause (*a*), after the words "resolution professional", the words "subject to a written consent from the interim resolution professional in the specified form" shall be inserted;

(*ii*) in clause (*b*), after the words "appointment of the proposed resolution professional", the words "along with a written consent from the proposed resolution professional in the specified form" shall be inserted.

Amendment of section 23.

17. In section 23 of the principal Act, in sub-section (*1*), the following proviso shall be inserted, namely:—

"Provided that the resolution professional shall, if the resolution plan under sub-section (*6*) of section 30 has been submitted, continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31.".

Amendment of section 24.

18. In section 24 of the principal Act, —

(*i*) in sub-section (*3*), in clause (*a*), for the words "Committee of creditors", the words, brackets, figures and letter "committee of creditors, including the authorised representatives referred to in sub-sections (*6*) and (*6A*) of section 21 and sub-section (*5*)" shall be substituted;

(*ii*) in sub-section (*5*), for the words "Any creditor", the words, brackets, figures and letters "Subject to sub-sections (*6*), (*6A*) and (*6B*) of section 21, any creditor" shall be substituted.

Insertion of new section 25A.

19. After section 25 of the principal Act, the following section shall be inserted, namely:—

Rights and duties of authorised representative of financial creditors.

'25A.(*1*) The authorised representative under sub-section (*6*) or sub-section (*6A*) of section 21 or sub-section (*5*) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

(*2*) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(*3*) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

(*4*) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

Explanation.—For the purposes of this section, the "electronic means" shall be such as may be specified.'.

Amendment of section 27

20. In section 27 of the principal Act, for sub-section (*2*), the following sub-section shall be substituted, namely:—

"(*2*) The committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.".

Amendment of section 28.

21. In section 28 of the principal Act, in sub-section (*3*), for the word, "seventy-five", the word "sixty-six" shall be substituted.

Amendment of section 29A.

22. In section 29A of the principal Act,—

(*i*) in clause (*c*),—

(*A*) for the words "has an account,", the words "at the time of submission of the resolution plan has an account," shall be substituted;

(*B*) after the words and figures "the Banking Regulation Act, 1949", the words "or the guidelines of a financial sector regulator issued under any other law for the time being in force," shall be inserted;

(*C*) after the proviso, the following shall be inserted, namely:—

'Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.—For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate

debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;";

(*ii*) for clause (*d*), the following clause shall be substituted, namely:—

"(*d*) has been convicted for any offence punishable with imprisonment—

(*i*) for two years or more under any Act specified under the Twelfth Schedule; or

(*ii*) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (*iii*) of *Explanation* I;";

(*iii*) in clause (*e*), the following proviso shall be inserted, namely:—

"Provided that this clause shall not apply in relation to a connected person referred to in clause (*iii*) of *Explanation* I;";

(*iv*) in clause (*g*), the following proviso shall be inserted, namely:—

"Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;";

(*v*) in clause (*h*),—

(*A*) for the words "an enforceable guarantee", the words "a guarantee" shall be substituted;

(*B*) after the words "under this Code", the words "and such guarantee has been invoked by the creditor and remains unpaid in full or part" shall be inserted;

(*vi*) in clause (*i*), for the words "has been", the word "is" shall be substituted;

(*vii*) the *Explanation* occurring after clause (*j*) shall be numbered as *Explanation* I, and in *Explanation* I as so numbered, for the proviso, the following provisos shall be substituted, namely:—

'Provided that nothing in clause (*iii*) of *Explanation* I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;';

(*viii*) after *Explanation* I as so numbered, the following *Explanation* shall be inserted, namely:—

'*Explanation* II.—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

(*a*) a scheduled bank;

(*b*) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(*c*) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;

42 of 1999.

(*d*) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; 54 of 2002.

(*e*) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(*f*) such categories of persons as may be notified by the Central Government.".

Amendment of section 30.

23. In section 30 of the principal Act,—

(*i*) in sub-section (*1*), after the words "resolution plan", the words, figures and letter "along with an affidavit stating that he is eligible under section 29A" shall be inserted;

(*ii*) in sub-section (*2*),—

(*A*) in clauses (*a*) and (*b*), for the word "repayment" at both the places where it occurs, the word "payment" shall be substituted;

(*B*) after clause (*f*), the following *Explanation* shall be inserted, namely:—

"*Explanation.*— For the purposes of clause (*e*), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law."; 18 of 2013.

(*iii*) in sub-section (*4*),—

(*a*) for the word "seventy-five", the word "sixty-six" shall be substituted;

(*b*) after the third proviso, the following proviso shall be inserted, namely:—

"Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.".

Amendment of section 31.

24. In section 31 of the principal Act,—

(*a*) in sub-section (*1*), the following proviso shall be inserted, namely:—

"Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section,

satisfy that the resolution plan has provisions for its effective implementation.";

(*b*) after sub-section (*3*), the following sub-section shall be inserted, namely:—

"(*4*) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (*1*), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (*1*) or within such period as provided for in such law, whichever is later.".

Amendment of section 33.

25. In section 33 of the principal Act, in sub-section (*2*), after the words "decision of the committee of creditors", the words "approved by not less than sixty-six per cent. of the voting share" shall be inserted.

Amendment of section 34.

26. In section 34 of the principal Act, —

(*a*) in sub-section (*1*), for the words and letter "Chapter II shall", the words and letter "Chapter II shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority in specified form," shall be substituted;

(*b*) in sub-section (*4*),—

(*i*) in clause (*b*), for the words "in writing.", the words "in writing; or" shall be substituted;

(*ii*) after clause (*b*), the following clause shall be inserted, namely:—

"(*c*) the resolution professional fails to submit written consent under sub-section (*1*).";

(*c*) in sub-section (*5*), for the word, brackets and letter "clause (*a*)", the words, brackets and letters "clauses (*a*) and (*c*)" shall be substituted;

(*d*) in sub-section (*6*), after the words "another insolvency professional", the words "along with written consent from the insolvency professional in the specified form," shall be inserted.

Amendment of section 42

27. In section 42 of the principal Act, after the words "of the liquidator", the words "accepting or" shall be inserted.

Amendment of section 45.

28. In section 45 of the principal Act, in sub-section (1), the words and figures "of section 43" shall be omitted.

Amendment of section 60.

29. In section 60 of the principal Act, —

(*a*) in sub-section (*2*), for the words "bankruptcy of a personal guarantor of such corporate debtor", the words "liquidation or bankruptcy

of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor" shall be substituted;

(*b*) in sub-section (*3*), for the words "bankruptcy proceeding of a personal guarantor of the corporate debtor", the words "liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor" shall be substituted.

Amendment of section 69.

30. In section 69 of the principal Act, for the words "On or after the insolvency commencement date, if", the word "If" shall be substituted.

Amendment of section 76.

31. In section 76 of the principal Act,—

(*a*) in the marginal heading, for the word "repayment", the word "payment" shall be substituted;

(*b*) in clause (*a*), for the word "repayment", the word "payment" shall be substituted.

Amendment of section 196.

32. In section 196 of the principal Act, in sub-section (*1*),—

(*i*) after clause (*a*), the following clause shall be inserted, namely:—

"(*aa*) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code;";

(*ii*) in clause (*c*), for the words "for the registration", the words "for carrying out the purposes of this Code, including fee for registration and renewal" shall be substituted.

Amendment of section 231.

33. In section 231 of the principal Act, for the words "Adjudicating Authority" at both the places where they occur, the words "Adjudicating Authority or the Board" shall be substituted.

Insertion of new section 238A.

34. After section 238 of the principal Act, the following section shall be inserted, namely:—

Limitation.

"238A. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.". 36 of 1963.

Amendment of section 239.

35. In section 239 of the principal Act, in sub-section (*2*),—

(*i*) after clause (*e*), the following clause shall be inserted, namely:—

"(*ea*) other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information under clause (*e*) of sub-section (*3*) of section 9;";

(*ii*) after clause (*f*), the following clause shall be inserted, namely:—

"(*fa*) the manner of withdrawal of application under section 12A;".

Amendment of section 240.

36. In section 240 of the principal Act, in sub-section (*2*),—

(*i*) clause (*g*) shall be omitted;

(*ii*) after clause (*j*), the following clause shall be inserted, namely:—

"(*ja*) the last date for submission of claims under clause (*c*) of sub-section (*1*) of section 15;";

(*iii*) after clause (*n*), the following clauses shall be inserted, namely:—

"(*na*) the number of creditors within a class of creditors under clause (b) of sub-section (*6A*) of section 21;

(*nb*) the remuneration payable to authorised representative under clause (*ii*) of the proviso to sub-section (*6B*) of section 21;

(*nc*) the manner of voting and determining the voting share in respect of financial debts under sub-section (*7*) of section 21;".

Insertion of new section 240A.

37. After section 240 of the principal Act, the following section shall be inserted, namely:—

Application of this Code to micro, small and medium enterprises.

'240A.(*1*) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (*c*) and (*h*) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.

(*2*) Subject to sub-section (*1*), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—

(*a*) not apply to micro, small and medium enterprises; or

(*b*) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification.

(*3*) A draft of every notification proposed to be issued under sub-section (*2*), shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions.

(*4*) If both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or shall be issued only in such modified form as may be agreed upon by both the Houses, as the case may be.

(*5*) The period of thirty days referred to in sub-section (*3*) shall not include any period during which the House referred to in sub-section (*4*) is prorogued or adjourned for more than four consecutive days.

(*6*) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament.

Explanation.— For the purposes of this section, the expression "micro, small and medium enterprises" means any class or classes of enterprises classified as such under sub-section (*1*) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.'. 27 of 2006.

Insertion of new Schedule.

38. After the Eleventh Schedule to the principal Act, the following Schedule shall be inserted, namely:—

"THE TWELFTH SCHEDULE
(*See* clause (*d*) of section 29A)

ACTS FOR THE PURPOSES OF CLAUSE (d) OF SECTION 29A

(1) The Foreign Trade (Development and Regulation) Act, 1922 (22 of 1922);

(2) The Reserve Bank of India Act, 1934 (2 of 1934);

(3) The Central Excise Act, 1944 (1 of 1944);

(4) The Prevention of Food Adulteration Act, 1954 (37 of 1954);

(5) The Essential Commodities Act, 1955 (10 of 1955);

(6) The Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(7) The Income-tax Act, 1961 (43 of 1961);

(8) The Customs Act, 1962 (52 of 1962);

(9) The Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(10) The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974);

(11) The Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(12) The Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986);

(13) The Environment (Protection) Act, 1986 (29 of 1986);

(14) The Prohibition of Benami Property Transactions Act, 1988 (45 of 1988);

(15) The Prevention of Corruption Act, 1988 (49 of 1988);

(16) The Securities and Exchange Board of India Act, 1992 (15 of 1992);

(17) The Foreign Exchange Management Act, 1999 (42 of 1999);

(18) The Competition Act, 2002 (12 of 2003);

(19) The Prevention of Money-laundering Act, 2002 (15 of 2003);

(20) The Limited Liability Partnership Act, 2008 (6 of 2009);

(21) The Foreign Contribution (Regulation) Act, 2010 (42 of 2010);

(22) The Companies Act, 2013 (18 of 2013) or any previous company law;

(23) The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015);

(24) The Insolvency and Bankruptcy Code, 2016 (31 of 2016);

(25) The Central Goods and Services Tax Act, 2017 (12 of 2017) and respective State Acts imposing State goods and services tax;

(26) such other Acts as may be notified by the Central Government.".

Amendment of section 434 of Act 18 of 2013.

39. In section 434 of the Companies Act, 2013, [as substituted by paragraph 34 of the Eleventh Schedule to the Insolvency and Bankruptcy Code, 2016], in sub-section (*1*), in clause (*c*), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.".

31 of 2016.

RAM NATH KOVIND,
President.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

UPLOADED BY THE MANAGER, GOVERNMENT OF INDIA PRESS, MINTO ROAD, NEW DELHI–110 002
AND PUBLISHED BY THE CONTROLLER OF PUBLICATIONS, DELHI–110 054.
MGIPMRND—449GI(CRC)—06-06-2018.

Press Information Bureau
Government of India
Ministry of Corporate Affairs

06-June-2018 15:16 IST

President Approves Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

The President today gave assent to promulgate the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

The Ordinance provides significant relief to home buyers by recognizing their status as financial creditors. This would give them due representation in the Committee of Creditors and make them an integral part of the decision making process. It will also enable home buyers to invoke Section 7 of the Insolvency and Bankruptcy Code (IBC), 2016 against errant developers. Another major beneficiary would be Micro, Small and Medium Sector Enterprises (MSME), which form the backbone of the Indian economy as the biggest employer, next only to the agriculture sector. Recognizing the importance of MSME Sector in terms of employment generation and economic growth, the Ordinance empowers the Government to provide them with a special dispensation under the Code. The immediate benefit it provides is that, it does not disqualify the promoter to bid for his enterprise undergoing Corporate Insolvency Resolution Process (CIRP) provided he is not a willful defaulter and does not attract other disqualifications not related to default. It also empowers the Central Government to allow further exemptions or modifications with respect to the MSME Sector, if required, in public interest.

In order to protect the sanctity of the CIRP, the Ordinance lays down a strict procedure if an applicant wants to withdraw a case after its admission under IBC 2016. Henceforth, such withdrawal would be permissible only with the approval of the Committee of Creditors with 90 percent of the voting share. Furthermore, such withdrawal will only be permissible before publication of notice inviting Expressions of Interest (EoI). In other words, there can be no withdrawal once the commercial process of EoIs and bids commences. Separately, the Regulations will bring in further clarity by laying down mandatory timelines, processes and procedures for corporate insolvency resolution process. Some of the specific issues that would be addressed include non-entertainment of late bids, no negotiation with the late bidders and a well laid down procedure for maximizing value of assets.

With a view to encouraging resolution as opposed to liquidation, the voting threshold has been brought down to 66 percent from 75 percent for all major decisions such as approval of resolution plan, extension of CIRP period, etc. Further, in order to facilitate the corporate debtor to continue as a going concern during the CIRP, the voting threshold for routine decisions has been reduced to 51%.

The Ordinance also provides for a mechanism to allow participation of security holders, deposit holders and all other classes of financial creditors that exceed a certain number, in meetings of the Committee of Creditors, through the authorized representation.

The existing Section 29(A) of the IBC, 2016 has also been fine-tuned to exempt pure play financial entities from being disqualified on account of NPA. Similarly, a resolution application holding an NPA by virtue of acquiring it in the past under the IBC, 2016, has been provided with a three-year cooling-off period, from the date of such acquisition. In other words, such NPA shall not disqualify the resolution application during the currency of the three-year grace period.

Taking into account the wide range of disqualifications contained in Section 29(A) of the Code, the Ordinance provides that the Resolution Applicant shall submit an affidavit certifying its eligibility to bid. This places the primary onus on the resolution applicant to certify its eligibility.

The Ordinance provides for a minimum one-year grace period for the successful resolution applicant to fulfill various statutory obligations required under different laws. This would go a long way in enabling the new management to successfully implement the resolution plan.

The other changes brought about by the Ordinance include non-applicability of moratorium period to enforcement of guarantee; introducing the requirement of special resolution for corporate debtors to themselves trigger insolvency resolution under the Code; liberalizing terms and conditions of interim finance to facilitate financing of corporate debtor during CIRP period; and giving the IBBI a specific development role along with powers to levy fee in respect of services rendered.

The above mentioned changes are expected to further strengthen the Insolvency Resolution Framework in the country and produce better outcomes in terms ofresolution as opposed to liquidation, time taken, cost incurred and recovery rate.

***

DSM/RM/KN

The Insolvency and Bankruptcy Board of India

Issues for Deliberation in Roundtables with Stakeholders (In pursuance of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 and other Developments) Along with comments from the stakeholders

a. Home Buyer as FC

The Ordinance has clarified that an allottee in a real estate project shall be a financial creditor. **How should an allottee prove evidence of debt?**

Suggestions:

There are already two categories of lenders – FCs and OCs. The third category now is the home buyers. The COC conduct of the will now be something like an AGM with the creation of this class of creditors. It would help to clearly lay down their rights and responsibilities as this would help in conduct of the meetings of the CoC.

It is also required that the quorum may only comprise of the public financial institutions and the banks, so that the process of the resolution is not derailed. Keeping the public interest in mind this may be useful.

Note: It was conveyed that the suggestion in effect may take away the rights which are being granted through the Ordinance.

- ***The Agreement for Sale shall act as an evidence of debt.***
- ***The Letter of Allotment***
- ***Receipts of the Payments made.***
- ***Proof burden lies with the home buyer.***
- ***From the builder's side – the bank statement of the receipts.***
- ***The platform of the IU can also be used for the purpose.***
  (The provisions of RERA shall also be useful).

While from an individual's perspective this may be fine, however, from the builder's perspective, the documentary evidence may also be created (e.g., the receipts may be created.

b. Withdrawal of application

Section 12A now inserted allows **withdrawal of application after admission**, in the manner as may be prescribed. A press release of Government states that such withdrawal will only be permissible before publication of notice inviting expression of interest. In matter, the Adjudicating Authority observed that expression of interest may not be required.

Is any facilitation required through regulations? Should there be a firm date for inviting expression of interest? If, what should be the date?

Suggestions:

There is no need for anything in the regulations.

No firm date is required for the EoI. In case of a single FC, there is a likelihood of the provisions being mis-used by the banker and they may use this to bargain for a better OTS.

c. Claim Submission Date

Section 15(1)(c) of the Code earlier required that the public announcement inviting claims shall contain the last date for submission of claims. Regulation 12 of the IBBI *(*Insolvency Resolution Process for Corporate Persons*)* Regulations, 2016 provides that a creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement till the approval of a resolution plan by the CoC. The Adjudictaing Authority in a matter held that regulation comes in direct conflict with the provisions of section 15(1)(c) of the Code. Section 15(1)(c) of the Code, as modified by the Ordinance, requires that the public announcement inviting claims shall contain the last date for submission of claims, **as may be specified**.

What kind of timeline should be provided for submission of claims?

Suggestions:

In many cases claims are permitted to be filed up to any date.

From the perspective of the Corporate guarantor, after the guarantee has been invoked, and there is a shortfall, the Creditor should be allowed to file claims. Further, the guarantor himself steps into the shoes of the creditor.

PA can provide for additional flexibility.

The RP can be permitted to send e-mails to the creditors prior to the finalization of the Resolution Plan.

Another PA may be permitted. Or it may be permitted through the email.

d. Term of IRP

Section 16 (5) of the Code earlier provided that the term of IRP shall not exceed 30 days from date of his appointment. As modified by the Ordinance, this section now provides **that the terms of the IRP shall continue till the date of the appointment of the RP under section 22**.

Should the IRP discharge the responsibilities of the RP till the RP comes in, and if so, what modification is required in the regulations?

Suggestions:

The view of the members was that the NCLT confirmation can be avoided. It should be implemented through the regulations.

The process of seeking NCLT approval may be waived off.

e. Compliance with laws

Section 17 as amended makes an IP responsible for complying with requirements of under any law on behalf of the corporate debtor.

How this can be facilitated?

Suggestions:

The Ordinance provides for one year in which the compliances have to be ensured by the RA. There are far too many compliances. It may be very difficult for the RP to ensure all of these. It was however clarified that the relevance of the one year is in the context of the RA and that he has been provided time to ensure that post approval time is available to get all the necessary approvals are in place.

f. Class of Creditors

Section 21 (6A) (b) now inserted provides that where a financial debt is owed to a class of creditors exceeding number **as may be specified**, the IRP shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors. Further Section 21 (6B) (ii) provides that that the remuneration payable to this authorised representative shall be **as specified,** which shall be jointly borne by the financial creditors.

What should be the threshold number? What should be the remuneration? How should IRP identify the IP?

Suggestions:

It was observed that the bankers are saying that in case of CIRP initiation through the OC, the fees should be paid by the OCs. Unless it is made mandatory, even in case of the representatives, the CoC shall not approve the payment of the fees to the home buyers' representative.

Another view was that the remuneration may not be prescribed and let the market decide the same.

There were different views on the threshold numbers: ranging from 10 to 50.

One view also was that let it be only one Representative- but there were concerns around whether one person can represent all.

There was also a view that there should be a cap on the number of representatives and to cap it at ten. Another view was that let the market decide on the matter.

Another view was that the remuneration may be linked to the way it is prescribed in the Liquidation Tabulation.

Another though unrelated view was that the representatives/nominees of the FCs should always carry correspondence/document confirming their such appointment through a Board Resolution or any other appropriate document.

g. Manner of Voting

The amended section 21(7) provides that the Board **may specify the manner** of voting and determining the voting share in respect of financial debts covered in subsection (6) and (6A).

What needs to be specified for the purpose of section 21(7)?

Suggestions:

The view which emerged was that the criteria should be based on the percentage of vote. Further the procedure of voting may be laid down in the regulations.

However, the time and cost factors in the matter may also need to be examined.

h. Mandate of creditors

Section 25A now inserted provides that the authorised representative shall carry out the instructions of the creditors.

How should be the mechanism for representation of large number of financial creditors (Homebuyers, FD holders, debentures holders, etc) in a class through an authorised representative be formalised?

Suggestions:
Already discussed.
The provisions of 25A have been added without removing the provisions of section 25. Therefore the two provisions are clashing at 25% and 50%.

i. Consent of IP
The Ordinance at several places requires written consent of IP in specified form to act as RP.

What should be included in the format?

Suggestions:
IPA ICSI said they shall provide inputs on the format.
Another suggestion was to include a provision to the existing Form 2.

j. Saving the Business in Liquidation
The Ordinance aims to promote resolution over liquidation. The liquidation regulations allow sale of corporate debtor as a going concern.

How can the business be saved even through liquidation?

k. Timeline and Procedures
Government Press Release states that the regulations will bring in further clarity by laying down mandatory timelines, processes and procedures for CIRP. Some of the specific issues that would be addressed include non-entertainment of late bids, no negotiation with the late bidder and well laid down procedure for maximising the value of assets.

What timelines and procedures should be provided in regulations to achieve the above objectives?

l. Developmental Role
Section 196 has been amended to explicitly allow the IBBI play a developmental role.

What specific measures the IBBI should undertake?

m. SEBI Regulations
SEBI has recently amended four regulations – Takeover, Delisting, LoDR, and ICDR.
Is any thing required to be done in IBC regulations in this context?

Suggestions:
No suggestions given on (j) to (m)

Others:

1. ***With respect to MSMEs, clarity may be also brought in, with respect to the MSMEs which are owned by the Individuals and Partnership firms.***

2. ***HR issues is a critical matter. The RP must be made conscious of the fact that the HR issues are very relevant with respect to the MSMEs. On the lines of the fact that the MSMEs have been given relaxations, the HR matters in the MSMEs must be treated with extra care. The RPs must work at resolving HR matters.***

3. ***The Code provides for certain matters to be voted at 90%; 66% and 51%. While the threshold voting has been indicated, it may help to say which matters require what voting pattern. The ICSI IPA indicated to provide a check list to provide clarity on the matter.***

4. ***Clarity is required as to whether the provisions of the Limitation Act are applicable with retrospective or prospective affect.***

5. ***Circular resolutions can help in hastening and quickening the entire process. Clarity may be provided as to which matters can be resolved through resolution by circulation.***

6. ***Requested for a wider consultation through circulation, prior to notifying the Regulations.***

7. ***Need for protection of the RP and his indemnity. The IPC provides for the protection of the Public Officer or Public Servant. Similar status may be provided to the resolution professional. Indemnity and privileges may be provided for the RPs involved in et CIRP.***
   Note: It was indicated that there is also a down side to the RP being made a public servant and the industry must be conscious of these.

8. ***The regulations provide that Insurance Policy covering the RP be part of the cost of the CIRP. Already the RPs are under tremendous pressure. Only 200 of the 1800 odd IPs have assignments today.***

9. ***A number of institutions are going to the NCLT against the RPs. Their reputation needs to be protected and adequate checks and balances need to be put in place for the same.***

10. ***There have been relaxations in the provisions of section 29A. Actually, there is a need for further relaxations and promoters being permitted to bid.***

11. ***Onus of Bidding as regards eligibility on the RAs: It may be a good idea to put in place a format/template – The representatives of IPAs indicated that the format shall be shared with the IBBI.***

12. ***The liability of the RP is to make a PA within a period of 3 days. However, given the ground realities it is very difficult for him to achieve the same.***

13. ***It should be made mandatory to take insurance cover for the RP and it should form part of the CIRP cost.***

14. ***SEBI LODR Regulations provide for the constitution of various committees: This ma, however, not be possible to be complied with under the CIRP period. It was clarified that SEBI has made certain amendments to the Regulations.***

15. ***There should be provisions in the regulations which provide for recording the reasons for the removal of the IRP. This would protect the RPs to some extent. The change process should be made more transparent. More so since in case an OC has initiated the process of the CIRP, the bankers through the CoC would want to replace such an IRP, and possibly appoint one from the panel maintained by them. In addition, an opportunity of being heard should be provided for.***

16. ***The change of the IRP/RP should be reflected on the website.***

17. ***There was also discussion around the cost factor. The insolvency professional's fee is being played around with. The focus can be on 3 Rs: Role, Responsibility and Remuneration.***

18. ***Order coming to the IRP is from the date of receipt. But the CIRP is from the date of the order.***

The Insolvency and Bankruptcy Board of India

Issues for Deliberation in Roundtable at [redacted] on 9th June, 2018 with Stakeholders (In pursuance of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 and other Developments)

1. **Evidence of debt by allottees of real estate project -** It may be necessary to clarify that claim submission has to be made to the IRP and not to the IP who functions as the authorised representative. Consequently, all disputes would also be raised through the IRP/RP.
2. **Withdrawal of application and** press release that such withdrawal will only be permissible before publication of notice inviting expression of interest. The committee of creditors comes into existence by the end of 30 days. It would still require 40-45 days for publication of notice since criteria under section 25(2) (h) would have to be crystallized, typically, banks as FC would need to get approvals for the same. A period of 75 days for withdrawal of application was considered appropriate.

However, there was a view that Board may also consider whether the settlement may be with the applicant FC, or in cases triggered by OCs, only with the consent of FCs. This was in view of previous cases where Apex Court had allowed consent under Article 142 of the Constitution of India, stating that no other claimants were there. There was the opinion that companies may satisfy the FCs and likely weaken the powers to the OCs for triggering insolvency. Further, non-satisfaction of claims of OCs may lead to a situation where another event relating to initiation of insolvency by an OC could arise.

There was a 3rd view that in case there are obvious claims on the books of the corporate debtor, it should be incumbent upon those who may not have submitted claims to be asked to do the same before a CIRP is closed. The Board could also examine whether a corporate which could otherwise fall under the section 29A disability is not given a means to escape insolvency through withdrawal. There was another view that since AA would finally order the closure, the scope for seeing fairness will be evaluated by AA and should not be critical at this juncture.

c. Claim Submission Date

Section 15(1)(c) of the Code earlier required that the public announcement inviting claims shall contain the last date for submission of claims. Regulation 12 of the IBBI *(*Insolvency Resolution Process for Corporate Persons*)* Regulations, 2016 provides that a creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement till the approval of a resolution plan by the CoC. The Adjudictaing Authority in a matter held that regulation comes in direct conflict with the provisions of section 15(1)(c) of the Code. Section 15(1)(c) of the Code, as modified by the Ordinance, requires that the public announcement inviting claims shall contain the last date for submission of claims, **as may be specified**.

What kind of timeline should be provided for submission of claims?

Kolkata: Claim submission should be allowed as it is, till the time the resolution plan has not been submitted to the AA after voting by the CoC.

d. Term of IRP

Section 16 (5) of the Code earlier provided that the term of IRP shall not exceed 30 days from date of his appointment. As modified by the Ordinance, this section now provides **that the**

terms of the IRP shall continue till the date of the appointment of the RP under section 22.

Should the IRP discharge the responsibilities of the RP till the RP comes in, and if so, what modification is required in the regulations?

e. Compliance with laws

Section 17 as amended makes an IP responsible for complying with requirements of under any law on behalf of the corporate debtor.

How this can be facilitated?

f. Class of Creditors

Section 21 (6A) (b) now inserted provides that where a financial debt is owed to a class of creditors exceeding number **as may be specified**, the IRP shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors. Further Section 21 (6B) (ii) provides that that the remuneration payable to this authorised representative shall be **as specified,** which shall be jointly borne by the financial creditors.

What should be the threshold number? What should be the remuneration? How should IRP identify the IP?

Kolkata: In keeping with the objectives of the amendments, the relief should be available to the buyers of homes with the smallest of builders. However, each new professional also increases the costs to the financial creditors themselves. Thus the threshold may be considered at 100. A slab could be considered in the following manner and remuneration decided accordingly.

Sr. No	No of home buyers/FD holders/Debenture holders	Remuneration
1	100- 5000	To be decided based on graded system
2	5000 to 10000	
3	10000 and above	

As regards identification of the IP by the IRP, it was deliberated that this may lead to conflict of interest and thus number of suggestions were considered including:

1. 2 IRPs being appointed by AA together in the manner being operationalised currently.
2. IRP to choose from a panel prepared by IBBI for this purpose.
3. IBBI issuing standard process guidelines.

Regarding remuneration, it was suggested that the remuneration of Rs.50,000/- per meeting as allowed by NCLT in Schemes of Compromise could be evaluated by IBBI. The fee of the IP has to be met by the respective financial creditor. Thus, the choice of either crediting a particular account may be provided for, or the amount so decided by the Board be deducted from the financial creditors from their claim amount, for which an authority for consent may have to be taken.

g. Manner of Voting
The amended section 21(7) provides that the Board **may specify the manner** of voting and determining the voting share in respect of financial debts covered in subsection (6) and (6A).

What needs to be specified for the purpose of section 21(7)?

Kolkata: The BLRC states that if a creditor chooses not to participate in the negotiations, despite having been so informed, the vote of creditors committee will be calculated without the vote of this creditor. However, the CIRP Regulations provide for voting by all FCs, whether present or not.

h. Mandate of creditors
Section 25A now inserted provides that the authorised representative shall carry out the instructions of the creditors.

How should be the mechanism for representation of large number of financial creditors (Homebuyers, FD holders, debentures holders, etc) in a class through an authorised representative be formalised?

Kolkata: E-voting is as an established manner of soliciting voting by companies to comply with the mandates under the Companies Act. The IP may initialise this functionality, seek the emails of the creditor and conduct e-voting for taking authorisations from them.

i. Consent of IP
The Ordinance at several places requires written consent of IP in specified form to act as RP.

What should be included in the format?

j. Saving the Business in Liquidation
The Ordinance aims to promote resolution over liquidation. The liquidation regulations allow sale of corporate debtor as a going concern.

How can the business be saved even through liquidation?

Kolkata: Sale of business as going concern should not lead to misuse of the resolution process. Those who bid during the resolution process many not be allowed to bid during liquidation at a price lower than the best price offered by the highest value proposition given by any bidder, that was available to the CoC and which was rejected during voting. The Board may consider providing clarity that the first attempt should be sale as going concern to be decided within first three months of the liquidation order.

k. Timeline and Procedures
Government Press Release states that the regulations will bring in further clarity by laying down mandatory timelines, processes and procedures for CIRP. Some of the specific issues that would be addressed include non-entertainment of late bids, no negotiation with the late bidder and well laid down procedure for maximising the value of assets.

Kolkata: in line with the suggestions that withdrawal of application may be allowed upto the 75th day from date of admission, it was suggested that the EOI must by issued by the 76th day.

What timelines and procedures should be provided in regulations to achieve the above objectives?

l. Developmental Role
Section 196 has been amended to explicitly allow the IBBI play a developmental role.

What specific measures the IBBI should undertake?

m. SEBI Regulations
SEBI has recently amended four regulations – Takeover, Delisting, LoDR, and ICDR.
Is any thing required to be done in IBC regulations in this context?

Others:

1. Kolkata: Regulation 23(3)(c) of CIRP Regulations provide that the resolution professional shall take due and reasonable care, among others, to record proceedings and prepare the minutes of the meeting of committee of creditors. This issue is being understood as video recording of the proceeds of the meetings, which is creating lot of discomfort amongst FCs.

The Insolvency and Bankruptcy Board of India

Issues for Deliberation in Roundtable at [redacted] on 11th June, 2018 with Stakeholders (In pursuance of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 and other Developments)

1. Withdrawal of application

i. Withdrawal of application by the 68th day.
ii. Who can be the applicant? Views were that only the applicant who triggered the process can take the case to CoC for withdrawal.
iii. The RP, on the instruction of the CoC members, shall move application before the AA in this respect.
iv. Certain considerations need to be met- payment for expenses incurred for the CIRP process.
v. There was a view whether CoC should record reasons for withdrawal.

2. Class of Creditors - Threshold number, remuneration, identification of the IP

i. Separate AR for distinct class of creditors
ii. Board may lay down the manner of identification in order to avoid conflict of interest of IP with IRP
iii. Total number of creditors for determining threshold may be 25.
iii. Regarding remuneration, slab may be specified by the Board considering the number of creditors involved.
iv. What if a FC does not want to pay? Should this be factored in?
v. Abridged version of IM/RP may be provided to FCs and SS1 /SS2 standards may be considered.
vi. Some suggested that the IRP/RP create a common webpage on the CD's website for all information to be uploaded, and computerised methodologies to answer group queries.

3. Manner of Voting

i. E-voting may be used by the AR and to initialise this functionality, the emails of the creditor may be sought and conduct e-voting for taking authorisations from them.
ii. Manner of e-voting to be based on the lines of voting by debenture holders/depository participants.

4. Timelines and procedures should be provided in regulations

i. There were mixed views. Some favoured for principle-based approach. Some favoured for rule-based process and agreed for further providing of timelines.
ii. It was suggested that request for EOIs be published by the 75th day, and the RP should be able to identify the list of prospective resolution applicants and by the 140th day, the resolution applicants are required to submit the resolution plans.
ii. Further, a request was made for providing a standardized affidavit format for
iii. Reiterate in CIRP Regulations that 29A eligibility is RP duty and not that of CoC.
iv. Standard Affidavit for RAs may be considered.
v. From the few three/four highest resolution applicants, a transparent auction for the highest bidder may be provided for.

The Insolvency and Bankruptcy Board of India

Issues for Deliberation in Roundtable at [redacted] on 14th June, 2018 with Stakeholders (In pursuance of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 and other Developments)

1. **Withdrawal of application**
   i. Withdrawal of application before the issue of EOI. RAs felt they could feel short changed, if process delayed further, they having come into the process and the process withdrawn.
   ii. Causes of trigger of CIRP should not exist anymore
   iii. 100% bank guarantee to be provided
   iv. Withdrawal process should ensure interests of all stakeholders are met – 100% payment of ALL dues- FC, and OCs.
   v. one view was that books of corporate should also be seen to ensure 100% dues are met
   v. Concern for section 29A - Some felt withdrawal and section 29A disability should be seen together and it should not be a back-door exit for CDs.
   vi. cost of IRPC to be met before submission to NCLT.

2. **Class of Creditors - Threshold number, IRP identification of the IP, remuneration of AR**
   i. Threshold number to be 10. Another view was 10% of number of FCs; another view was 50. Must be ensured that CoC does not become unmanageable.
   ii. IRP to propose name of three IPs in PA, as per current eligibilities. Majority from claims submitted can be taken.
   iii. Separate AR for separate class of FCs
   iv. Confidentiality of information- one view was that IM and RP could be shared with confidentiality agreement. Other view was that a precis could be shared to make it more meaningful to the creditors.
   v. Collection of fee in the form of authorisation to debit from their proceeds
   vi. Remuneration to be based on graded 3-4 scales. All OPE and costs for communication be borne out of IRPC.
   vii. Demand notice as provided by RERA could be considered for claims submission.

3. **Claim Submission Date -** This should end with the issue of EOI

4. **EOI process and Timelines -** Government Press Release regarding laying down mandatory timelines, processes and procedures for CIRP
   i. one view was that the current timeline is well addressed. Introduction of an additional timeline at 75 day for issue of EOI should be sufficient.
   ii. rejection of bidder at EOI stage with reasoned order by RP
   iii. RA to provide affidavit regarding eligibility
   iv. some views were that straightjacketing the process may be avoided

5. **Bidding process :** No entry of RA after EOI stage. Negotiation with only H1 reduced the flexibility to CoC. Auction will provide credibility to the process and reduce litigations.
   i. Swiss Challenge process was preferred option and gels well with government procedures, also ensures value maximisation
   ii. Auction with top 2/3 bidders is necessary to prevent legal challenges
   iii. Model timeline to be provided in regulations