Insolvency and Bankruptcy Board of India

Subject: Amendments to Corporate Insolvency Resolution Process Regulations.

In order to make a more conducive regulatory framework, the IBBI effectively engages with stakeholders in the regulation making process. With a view to crowdsource ideas, the IBBI invited comments from public, including the stakeholders and the regulated, on the regulations already notified under the Code. It was indicated that the comments received between 4th July, 2017 and 31st December, 2017 shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It was also indicated that it would be the endeavor of the IBBI to notify modified regulations by 31st March, 2018 and bring them into force on 1st April, 2018. A summary of comments received on CIRP is at Annexure A.

2. As part of the work of the ILC, MCA invited suggestions from public. In the meeting of the ILC held on 1st February, 2018, the comments/suggestions received were discussed and broadly categorized into regulatory issues to be addressed by the IBBI and other issues requiring amendments in Code/Rules. Accordingly, MCA vide its mail dated 6th February, 2018 forwarded a document of all issues, wherein the regulatory issues were classified by Vidhi Legal Policy with an advice to look into them. The list of issues having a bearing on CIRP is at Annexure B.

3. These comments and suggestions were placed before the Advisory Committee on Corporate Insolvency and Liquidation in its meeting held 10-11th February, 2018. The minutes of the meeting held on 10th February, 2018 and 11th February, 2018 are enclosed as Annexure C and D respectively. Based on these inputs and subsequent internal discussions, this note proposes amendments to the IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 (hereafter, Regulations), the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereafter, Rules) and the Code. A copy each of the Code, Rules and Regulations shall be placed on the table.

Amendments to CIRP and Fast Track Regulations

4. Regulation 3 deals with eligibility for appointment as a resolution professional. An IP is eligible if he

"(c) has not been an employee or proprietor or a partner:

(i) of a firm of auditors or company secretaries or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor contributing ten per cent or more of the gross turnover of such firm,

in the last three financial years."

This provision is intended to prohibit the auditors who exercise an independent oversight over a corporate. It does not serve much purpose if the company secretaries as such are prohibited while other professionals are prohibited only if they are auditors. It also requires clarity that a person is prohibited if he has been auditor at any time during the preceding three years. Accordingly, it is proposed to substitute the above sub-regulation by the following:

"(c) has not been an employee or proprietor or a partner:

(i) of a firm of auditors or secretarial auditors or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor contributing ten per cent or more of the gross turnover of such firm,

at any time in the preceding three financial years."

5. According to proviso to section 21(2) of the Code, a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors. Regulation 8 provides for submission of claims. It is proposed to require a self-certification from the financial creditor in Form C (Proof of Claim by Financial Creditors) that it is not a related party in relation to corporate debtor, as defined under section 5(24) of the Code. This will put onus on the financial creditor to disclose his status.

6. Regulation 17 (1) requires that the IRP shall file a report certifying constitution of the CoC to the AA on or before the expiry of thirty days from the date of his appointment. Regulation 12 (2) allows a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the IRP or the RP, as the case may be, till the approval of a resolution plan by the CoC. Accordingly, regulation 13(1) requires the IRP or the RP, to maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. The regulation 13(2) requires filing of list of creditors with the AA. It is

proposed to clarify that an updated list of creditors shall be filed with AA. This is, however, subject to the view that emerges after discussion on the issue at Para 17.

7. Regulation 38(1)(c) provides that the liquidation value due to dissenting financial creditors shall be paid before any recoveries are made by the financial creditors who voted in favour of the resolution plan. Though the enterprise value (resolution value) is usually higher than the liquidation value, the reverse is possible in some cases. Moreover, liquidation value, as estimated, may not be realisable and realised value is usually liquidation value minus cost of realisation. It may be difficult to pay out liquidation value in all cases, that too, before any payment to other financial creditors. In a sense, this becomes an incentive for a financial creditor to dissent. Further, it may be difficult to arrange liquid cash to pay upfront to dissenting creditors and such payment may impinge on resolution of the corporate debtor. However, the Advisory Committee felt that those who remain vested in the future of the debtor should give way to those who would like to exit. It is, therefore, proposed to leave the regulations as they are in this regard.

8. The Code read with regulations made thereunder provide the following timelines for CIRP:

Section of the Code / Regulation No.	Description	Days from	No. of Days	Cumulative Timeline
Section 10(4)	Filing of application with AA		-14	-14
Section 10(5)	AA Admits application. Appoints IRP		00	T
Regulation 6(1)	IRP makes public announcement inviting claims	Appointment of IRP	03	T+3
Regulation 6(2)(c)	Last date of submission of claims to IRP	Appointment of IRP	14	T+14
Regulation 13(1)	Verification of claims by IRP	Last date of claim submission	07	T+21
Regulation 17(1)	IRP to file report to AA certifying constitution of CoC	Appointment of IRP	30	T+30
Section 22 and Regulation 17(2)	Hold 1st meeting of CoC and confirm appointment of IRP as RP or replace IRP by another RP	Filing with AA	07	T+37
Section 22(3) and (4)	CoC to file application for appointment of RP, AA to forward the name to IBBI	From 1st meeting of CoC	Appr. 12	T+49
Section 27(4)	IBBI to confirm new IP within 10 days of AA request	Receipt from AA	10	T+59
	AA to appoint RP, RP joins	Receipt from IBBI	Appr. 03	T+62
Regulation 27	RP appoints 2 valuers	Appointment of RP	07	T+69
Regulation 36 (1)	RP submits Information Memorandum	Appointment of RP	10	T+72

No provision (Timeline not defined by law)	Issue of EoI, Identification of eligible Resolution Applicants, Supply of Information Memorandum to Resolution Applicants	Open	Appr. 33	T+105
Regulation 36(A)(1)	Submission of Resolution Plans by Resolution Applicants	Issue of RFP	30	T+135
Regulation 36(A)(2)	Submission of Resolution Plans by Resolution Applicants	Issue of Evaluation Matrix	15	T+135
No provision (Timeline not defined by law)	Evaluation by Resolution Plans, Consideration by CoC, Negotiations, Final Voting, etc.	Last date of Submission of Resolution Plans	Appr. 30	T+165
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	Commencement of CIRP	165	T+165
Section 12(1)	Approval of resolution plan by AA	Commencement of CIRP	180	T=180

A view is emerging that internal timelines within the CIRP may be provided through regulations for each of the activities, such as time for evaluation of resolution plans, time when EoI may be issued, time for verification and identification of eligible resolution applicants, etc. Another view is that quite a bit of time has already been earmarked. If the entire CIRP period is earmarked, no flexibility will be left for the stakeholders to meet any exigency, particularly when there are interlocutory applications before the AA. Though it is not clear in the Code if one can make only one round of invitation of resolution plan, allocation of the entire CIRP period would do away with the possibility of a second round of invitation. A third view is that the CoC may be obliged to plan the activity schedule for the entire CIRP period in its first meeting, keeping in view the timelines provided in the Code and the Regulations.

9. It should be endeavour to minimise costs associated with resolution, whether borne by the corporate debtor, the creditors, the resolution applicants, or the insolvency ecosystem. The Advisory Committee felt that the ecosystem should endeavour to minimise the costs and technology could be utilised for the benefit. For instance, video conferencing may the preferred manner of conducting CoC meetings instead of physical meetings, as is the case in Australia. Three issues are placed for consideration of the Governing Board, namely,

(i) The insolvency resolution process costs under regulation 31; costs of the interim resolution professional under regulation 33; and resolution professional under regulation 34 may be disclosed;

(ii) Notarisation or stamping requirements in claim Forms to the CIRP Regulations (Form B, Form C, Form D, Form E and Form F) may be done away with; and

(iii) Regulation 23 provides for participation through video conferencing (VC). VC video conferencing be specified as the preferred manner of conducting meetings of the CoC.

10. The amendments approved in respect of CIRP regulations may also be affected in Fast Track Regulations.

B. Amendments in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

11. 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 Rules requires the 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. There have been instances where the AA has declined to appoint an IP as IRP keeping in view the work he has in hand, particularly when most of the activities prescribed in the Code are time bound. (IDBI Bank Limited Vs**.** Lanco Infratech Limited). The IBBI has requested MCA to modify the form to make it elaborate so that the disclosure fully reflects the work an IP has in hand.

12. Section 22(3) of the Code requires that where the CoC resolves to replace the IRP, it shall file an application before the AA for the appointment of the proposed RP. Section 27 requires that where the CoC proposes to replace the RP with another RP, it shall forward the name of the IP proposed by them to the AA. However, there is no such requirement on the part of the IP to give consent to act as RP or to disclose the work he has in hand. It is proposed to request the MCA to provide in the Rules to require (a) consent from the IP proposed to be appointed as RP, and (b) disclosure by the IP about the work he has in hand.

13. Section 22(2) of the Code provides that if at any time during CIRP process, the CoC is of the opinion that a RP professional appointed under section 22 is required to be replaced, it may replace him with another RP. The CoC may, at a meeting, by a vote of 75% of voting shares, propose to replace the RP appointed under section 22 with another resolution professional and section 27(3) requires the CoC to forward the name of the IP proposed by them to the AA. It is proposed to amend the Rules to require the CoC to make an application for this purpose to the

AA for replacement of the RP along with the reason for replacement and any response of the existing RP on the reason. This is necessary to ensure independence of the RP.

14. Rule 4(3) provides that the financial creditor shall dispatch forthwith a copy of the application filed with the AA to the registered office of the corporate debtor. A similar provision exists for operational creditors under Rule 6(2). Rule 7(2) requires the corporate applicant to similarly dispatch a copy of the application to the corporate debtor. The Rules are silent on whether the application filed by the corporate applicant needs to be served on opposite parties, namely, to financial and operational creditors. The Advisory Committee felt that rule 7(2) does not serve much purpose. It rather suggested that the Rules may require corporate applicant to dispatch a copy of the application to opposite parties.

15. It is, however, felt that principles of natural justice need to be observed where the proposed action is likely to have an adverse consequence on the parties concerned. Where a corporate debtor initiates a resolution process, the creditors are unlikely to face any adverse consequence. Further, a company may have a few hundred or even a few thousands of creditors (It is in lakhs in case of a corporate having debentures or fixed deposit holders). It would not be possible to conclude the proceedings, particularly when it is a summary proceeding for the AA, after hearing so many creditors. Therefore, it may not be advisable to require a notice to the creditors. Further, since the corporate itself is in initiating the resolution, it may not be necessary to serve a copy of the application to the corporate debtor. Therefore, it may be advisable to delete rule 7(2) of the Rules.

16. Section 9(3) of the Code requires that the operational creditor shall, along with the application furnish a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. There has been reluctance on the part of the banks to give such a certificate particularly because it may not have complete information about the transactions between the debtor and creditor. The Advisory Committee suggested that the Rules may provide the format of certificate to be provided submitted by the Bank/FIs to make things clear.

Amendments in the Code.

17. Section 15 of the Code provides that the public announcement of the CIRP shall contain the last date for submission of claims. 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, may 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. This matter was considered by the NCLT in the matter of Alchemist ARC Ltd. and Moser Baer India Ltd. It NCLT observed: "…. *It also includes that the public announcement shall contain the last date of submission of claims. There is no provision in the Parliamentary Statute, i.e., the Insolvency and Bankruptcy Code, 2016, for extending the period beyond the last date for submission of claims. However, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 vide regulation 12(2) has provided that a Creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement. According to the provisions of regulation 12(2) such claim can be filed till the approval of a resolution plan by the Committee. The aforesaid regulation comes in direct conflict with the provisions of the Parliamentary Statute with the provisions of section 15(1)(c) of the Insolvency and Bankruptcy Code. We do not think that by subordinate legislation the timeline provided by the Insolvency and Bankruptcy Code could be eroded in such a manner as to cause delay in the corporate insolvency resolution process. Therefore, we are unable to persuade ourselves to issue directions to the Resolution Professional to entertain the claims made by the applicant. If such a course is to be adopted, then Resolution Professional has to invite fresh claims from the rest of the world by inserting a new public notice so as to enable all other left out claimants to file their claims before RP. It will cause considerable delay in the finalisation of the corporate insolvency resolution process*". The order was delivered on 31st January, 2018."

18. After public announcement, the claimants are getting only 11 days to submit claims. There are big and small, sophisticated and not-so-sophisticated, claimants spread across the world. All of them may not be in apposition to come across public announcement and submit claims. Further, submission of claims is necessary for ensuring that the resolution applicant knows the liabilities of the debtor. Hence a balance between the time window for claims and submission of claims in time to ensure an efficient CIRP needs to be struck. Probably, the Code may be amended to provide for acceptance of claims subject to certain conditions. Or, the Regulations may allow public announcement which will include a statement to the effect of regulation 12(2).

19. Section 16(5) of the Code provides that the term of IRP shall not exceed thirty days from the date of his appointment. However, section 22 mandates that the first meeting of the CoC committee shall be held within seven days of its constitution. Thereafter, a RP can be appointed. There is a gap after the expiry of term of IRP before RP joins. The Advisory Committee considered this and felt that jurisprudence has settled the matter. Nothing more may be done.

20. Section 29A prohibits certain persons from submitting a resolution plan who, on account of their antecedents may adversely impact the credibility of the process under the Code. The Advisory Committee felt that the small/medium sized companies may not receive enough interest from resolution applicants leading to liquidation and consequently destruction of value of businesses that could otherwise have been resurrected under resolution by the corporate debtor. The Committee suggested that the issue may be flagged with the ILC.

21. Operational creditors are assured of liquidation value under section 53, which is zero most often. It was suggested if they can be given better treatment in the waterfall. The Advisory Committee felt that this too early in the evolution stage of the Code to be revisited. The Code should evolve with time and experience gained in the process.

Other Issues

22. Member of the CoC as resolution applicant: Section 30(5) provides that the resolution applicant may attend the meeting of the CoC in which the resolution plan of the applicant is considered; provided that the resolution applicant shall not have a right to vote unless such resolution applicant is also a financial creditor. Thus, whether a financial creditor, who is also a resolution applicant, can participate in the meeting where resolution plans are discussed and can even vote. There was suggestion to debar such financial creditors from participating and voting in the CoC. The Advisory Committee deliberated over it and had three views and no consensus:

(i) A financial creditor, who is a member of CoC, should not be allowed to participate in the bidding by submitting the resolution plan as a resolution applicant, as it was an interested party with conflict of interest. It would be playing a role in formulation of the evaluation criteria and submitting the plan.

(ii) Financial creditors may be allowed to bid and vote as provided in the proviso to section 30(5).

(iii) A financial creditor that intends to present a resolution plan must declare its intention to the CoC beforehand and then recuse itself from deciding the parameters of the evaluation matrix.

23. **Contingent liabilities:** The issue, whether definition of claims under section 3(6) and definition of financial debt under section 8 includes contingent claims and liabilities respectively was deliberated in the Advisory Committee meeting. It was also discussed whether there is a need to clarify the stage (crystallisation) at which a contingent claim should be entertained under CIRP and liquidation process, and whether there is a scope to expand regulation 14 to include a sub-regulation on how to treat contingent claims. The Advisory Committee discussed that the Code is silent on contingent liabilities but the definition of claims under section 3(6) and that of financial debt under section 5(8) hint at contingent claims. On the issue of segregation between operational contingent liabilities and financial contingent liabilities, in light of section 5(8)(e), the Advisory Committee felt that the Code already defines some of the liabilities with presumably "operational liability like characteristics" under definition of financial debt. Contingent claims which have crystallised (where the amount has been paid on behalf of the CD) are eligible for inclusion in the claims. The Advisory Committee suggested that suitable insertion may be made for clarity in regulation 14 or any other suitable place.

24. Interim Finance: Section 20(2)(c) of the Code enables the IRP to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property, provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt. A view emerges is that it may not be appropriate for an IRP, which is appointed by a applicant and not by a collective body, to raise interim finance. Exercising powers related to raising further debt and binding the debtor without CoC approval may not be appropriate.

25. It is submitted for consideration of various issue outlined in this note and approval for amendments to Regulations.

Annexure A

Issues for consideration of the Advisory Committee relating to Public Comments- CIRP, Liquidation and Voluntary Liquidation

I. Under CIRP

(i) The minimum single default for triggering the insolvency proceedings may be increased (in the United States three or more creditors can start insolvency proceedings against a company if the company owes them more than USD 12,300 which is equivalent to INR 7.8 lakh @ USD= INR 63.88).

(ii) Should we put operational creditors at number 4, pari-passu with unsecured creditors under section 53? OCs are the ones most affected when a CD defaults and very critical for businesses.

(iii) What happens to a step-down subsidiary when a holding company defaults? Do they also automatically get covered under insolvency?

(iv) RP has to invite resolution plans under CIRP. Should IBBI make a provision on its web site for uploading of all expression of interest for information of prospective resolution applicant to give wide publicity/coverage. This also entails responsibility as provisions related to EOI may be subjective and IBBI may not concur to the language used therein.

(v) What should be the course of action if the bank/financial institutions refuse/do not provide the certificate that is required to be furnished by the operational creditor in terms of the provisions of section 9(3) (c) of the Code? Banks are not issuing this certificate.

(vi) Should there be any format for the bank/financial institution certificate to be provided by the Bank under Section 9 (3) (c) of the Code?

(vii) NCLAT has held that a certificate under section 9(3)(c) of the Code must be from a 'financial institution' as per section 3(14) of the Code, going by which interpretation a foreign company having no bank account in India will not be able to initiate proceedings.

(viii) Protecting the interest of minority shareholders from losing value is not addressed. They should also be given some privilege akin to creditors in settlement since promoter shareholders have benefited from managerial remunerations even without profit.

(ix) Should senior citizens get priority in receivables under the Code? Could regulations provide for the same?

(x) A normal investor does not come to know about admittance of a corporate debtor in IBBI. Should a centralized place and helpline be created? While PA is available, there is no automatic push/notification that allows people to get notified if a company goes under the IBC.

(xi) Conduct of meeting- there is a proposal to add the following sentence "no separate communication by post or any other means will be made" after regulation 24 (7).

(xii) Regulation 21(2) provide that the notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative. The proposal is that the Code does not provide for the definition of authorised representative. Does it require to be defined? Whether an advocate may be permitted to represent the participant under this provision?

(xiii) Can a potentially interested party follow the progress of a case. How can one get to know whether an information memorandum has been prepared or not and how to get access to it?

(xiv) As per the Regulation 5, Extortionate Credit transaction shall be considered extortionate under section 50(2) where the terms: (1) require the corporate debtor to make exorbitant payments in respect of the credit provided; or (2) are unconscionable under the principles of law relating to contracts. The proposal is that the following provisions may be provided as under

a. *5 (3): is against the agreed contract/payment methods between the corporate debtor and creditors/claimants*
b. *5(4): if the corporate* debtor has any claim or dues which are not settled by creditors/claimants (not clear)

(xv) The proposal is that the time limit stipulated under Section 16 (5) of IBC of 30 days is tough to meet and that, the time period for the term of IRP may be extended by another 30 days.

(xvi) If the IP appointed in a case triggered under section 10 of IBC is replaced by the committee of creditors, should there be a requirement for the CoC to provide for valid reasons (such as quality of output, delays, integrity, etc) for such replacement in light of law of equity?

(xvii) In case of a transaction triggered by an OC, as regards remuneration of expenses including the fee of the IRP can regulations provide that the CoC provide for ratification of reimbursement of expenses to the extent the same are not exorbitantly charged? In come instances certain expenses have to be borne out of his own expenses such as publication in the newspaper but there is no money with the CD to pay even for such expenses.

(xviii) Expenditure that has to be incurred as per law such as on PA should not be subject to ratification as otherwise, it will get published in non-standard newspaper and the purpose of PA will get defeated, resulting in nil or very less claim received by IRP.

(xix) Should there be any provision for a debtor to settle the debt with creditor before the public announcement through mediation in the presence of IRP in light of principle of natural justice?

(xx) Should there be any provision for the IRP to investigate the reason for sickness and elicit information from such executives who can provide details of mis-management and siphoning of funds etc. in relation to the corporate debtor in light of the whistle blower policy?

(xxi) The financial creditor while filing its claim in Form C of the schedule to the CIRP Regulations must make a declaration in the affidavit that it is not a related party in relation to corporate debtor as defined under section 5(24) of the Code.

(xxii) Section 16(5) of the Code provides that the term of interim resolution professional shall not exceed thirty days from the date of his appointment. However, the CIRP Regulation 17(1) mandate that the IRP shall file a report certifying constitution of the committee of creditors to the Adjudicating Authority on or before the expiry of 30 days from the date of his appointment. (not seems relevant). Is this not an anomaly in the Code and CIRP Regulations?

(xxiii) Is there a requirement of sending notice of the CoC meeting to operational creditor if their aggregate debts is more than 10% of total debts? This will however increase the number of members of CoC.

(xxiv) Can the IRP establish from the records of the company the satisfactory proof of claim in case of claims which are accounted in the books of accounts of the company?

(xxv) The IRP gets appointed when the application gets admitted, however certified copy of the order is received at a later date. There needs to be clarification regarding which date be considered for the appointment of IRP and and post compliance thereof.

(xxvi) Clarification is required if all the members of the committee are not present in the meeting and first meeting is conducted on 30th day (last day of IRP) then who will circulate the certified minutes to the members of committee within 48 hours?

(xxvii) In case the first meeting is conducted on 30th day (last day of IRP tenure) and meeting gets adjourned, clarification may be necessary regarding who would chair the adjourned meeting (as IRP will no longer be in control of the company).

(xxviii) On completion of tenure of IRP, the RP will be appointed within 10 days after recommendation received from IBBI. It will be useful to provide a clarification as to who will be incharge of the affairs and operation of the corporate debtors in the interregnum.

(xxix) The regulation 6(2)(b)(iii) states that public announcement shall be published "on the website, if any, designated by the Board for the purpose". Has the IBBI designated its website for public announcement, if yes, under what regulation or notification?

(xxx) Should it be considered that under CIRP cost/fee of valuers will be borne by applicant initially, which will be later reimbursed under IRP cost mandatorily to the applicant? one more proviso to be added stating that the CoC cannot change the appointed valuers by quoting any reasons unless the registered valuers are not

performing their duties as required under code (in light of banks removing them objecting the quote and wanting their empanelled valuers to be appointed).

(xxxi) Should there be a provision guiding the IP on how to deal with Disputed Claims?

(xxxii) A real estate project has been admitted for insolvency. Can the persons who have paid advance for flats invoke RERA to hold the insolvency resolution/liquidation process?

(xxxiii) Home buyer's concern: what will happen if the company does not revive in the given time, will they get their homes? In midst of insolvency Jaypee Infratech Ltd. have started work at the site and send demand letter to the buyers, what are the buyers expected to do? There is concern that this money will be lost.

(xxxiv) There is no protection to home buyers under the Code. Are they creditors?

(xxxv) In order to make CIRP independent of whims and fancies of FCs should it be made mandatory to provide reasons – 1. when FCs are changing the IRP/RP, 2. disapproving any expenses/costs; and 3. taking any decision not in consonance with the Code.

(xxxvi) IBBI may be requested to conduct workshops for financial creditors for making them understand the Code and regulations which will help in better and expeditious implementation and provide greater value from new acquirers as they still come to attend the CoC with consortium/JLF meeting mindset.

(xxxvii)Should one review the need for notarized affidavits (hassle and expenditure in finding a notary to sign the affidavit), since claimant's signed declaration has equal value in law, and it makes the process simple to complete all process electronically.

(xxxviii) Security services should be part of essential goods and services. Securing the physical assets/property/plant, etc is one of the most critical activities from day one.

(xxxix) The quorum for conduct of CoC meeting is defined as 33% of voting rights. the face-value reading of regulation means that if one of the participants eligible for voting is not attending the meeting, no voting can take place.

(xl) Section 43(2)(a) of the Code provides for transfer of properties on account of an antecedent debt. There are numerous cases of sale of assets at throwaway prices, which may not fall under above section. Code should provide for reversing such sale.

(xli) The person who has filed for bankruptcy should not enjoying the world till he paid every penny, as Vijay Mallya and his family is enjoying. Rather whole family property should be attached, and all director family should be responsible in case of a Private Company.

(xlii) There is no provision under the Code, which specifically provides the procedure to be adopted by operational creditor where the IRP does not accept the claim. IRPs may be acting arbitrarily.

(xliii) In many cases no audited balance sheet of the corporate debtor is available on the MCA portal nor with the company. In such cases promoters are not traceable. How to prepare the latest balance sheet in such cases is a challenge, and no auditor takes up the challenge. In exceptional cases should there be a waiver?

(xliv) Please provide a list of companies currently undergoing resolution. This will enable financial creditors to submit their claims timely. Besides, if an investor wishes to evaluate available renewable assets for investment, this information will enable him to contact the concerned RP and increase the bid value for a corporate under resolution.

(xlv) There is a loophole in the Code that is carried forward from the earlier winding up rules under the Companies Act. In many companies, the promoter-shareholders may or may not be a part of the Board of Directors and they appoint their salaried employees on the position.

(xlvi) What happens when one company of same promoter group is very healthy, and another is under insolvency? For instance, Reliance Capital vs Reliance Telecom. Would the inter-company dealings in such cases not prejudice the interest of the healthy company?

(xlvii) After regulation 25(5)(b) should a proviso be added stating that after the 24 hours mentioned in sub clause (b) the minutes to be signed by the chairman and the signed minutes will be conclusive evidence of the decision taken in CoC and to be filed with NCLT.

(xlviii) Regulation 12 provides time to the creditor to submit the proof of claim till the resolution plan is approved. However, the proviso to Regulation 7(1) restricts the submission of supplementary documents by the Operational creditor before constitution of committee. Should this anomaly be removed?

(xlix) How does one deal with open issues related to reconciliation, non-confirmation and impairment pending before the management with a contradictory view. This may increase the value of losses and eventual loss to creditors as well as shareholders.

(l) Several claims and proof of liabilities are lodged when insolvency proceedings begin by creditors appearing as contingent. This may jeopardise the 75% resolution and force company to liquidation. Is there any manner of salvaging them?

(li) The Code and regulations do not deal with detailed provisions regarding intangible assets. Valuation may not be available from prospective buyer or even in the case of liquidation. This may be prejudicial to creditors and translate into equivalent cash loss for them.

(lii) The term connected persons use the expression related party. the term related party has been defined in the Code which is in relation to corporate debtor; therefore, to avoid confusion an explanation need to inserted which shall give reference to the Code.

(liii) Should the regulations provide explicitly that change from IRP to RP should be accompanied by public announcement as also placing on website of IBBI?

(liv) The regulation 39(7) should be placed separately as regulation 41. It is placed under "Approval of Resolution Plan".

(lv) Under the eligibility for resolution professional in regulation 3(1) (c)(ii), the number of years to consider and employee/proprietor/ partner as independent may be increased from three to five years.

(lvi) Despite the fact that the the IRP/RP is required to keep the CD as a going concern, regulation 32 specifically excludes 'direct inputs to the outputs produced or supplied by the CD' from essential services. Should this be revisited?

(lvii) Words "all members" be replaced with "members with 85% voting rights"

(lviii) The Adjudicating Authority Rules, 2016 apply only to the corporate insolvency resolution process, what is the application procedure / forms to be followed/filed when the liquidator makes the application?

(lix) Promoters may use this channel to escape penalties/ prosecutions for deliberate violation of their statutory obligations like deposit of TDS, VAT, Service tax, etc., while siphoning off the funds. Corporate veil needs to be lifted in such cases.

(lx) Government is promoting to buy houses or flats for social security, Income tax benefit is given for housing and the interest subsidy is also given. This investment by government employees should be safe guarded. Provision to protect property buyers must be made. The buyer in this case has paid for the property and the property is being built with his money. The status of buyers is not coming clearly under the code. A buyer in these cases is more like a financial creditor who has provided funds to developer company.

(lxi) When CD triggers insolvency the creditors must be informed.

(lxii) The Form numbers specified in CIRP Regulations and under the Fast Track Regulations being same are confusing. The Forms under Fast Track may be suitably re-numbered.

II. IBBI (Voluntary Liquidation Process Regulations), 2017

(i) The entire Regulation 3 is meant for Corporate persons other than a Company. Then the entire regulations therein are not for Companies? Thus section 59(3) (a) (b), and (4) (5) of the Code and Voluntary Liquidation Process Regulation 2017 are not in consonance with each other. Code covers company whereas regulation excludes company.

(ii) Time for public announcement by the liquidator should be within ten days instead of five days from his appointment, as proviso to Section 59 (3) (c) of the Code requires approval by creditors within seven days of the resolution for appointing liquidator.

IV. IBBI (Liquidation Process Regulations), 2016

(i) The Adjudicating Authority Rules, 2016 apply only to the corporate insolvency resolution process. What is the application procedure / forms to be followed/filed when the liquidator makes the application for liquidation?

(ii) Upon completion of liquidation, the financial record of the corporate debtors should be destroyed or kept (regulation 5). Liquidator has to preserve certain records for 8 years, which is derived mainly from financials of corporate debtors, should regulations specify the other records?

(iii) Section 33(1)(b)(ii) states that AA will make the public announcement stating that the CD is in liquidation. However, regulation 12(1) states that Liquidator shall make the public announcement. Is there any clarification required?

VI. Issue with respect to NCLT

(i) Not mentioning of section number by the NCLT in the orders passed by them as it creates difficulty for determination of type of creditor during the searching of orders?

(ii) Issue with respect to late uploading of cause list by the NCLT for the next day on or after 10 pm which is very late to plan for the next day.

(iii) No timeline for disposal of appeals: while section 12 provides a period of 180 days for the corporate resolution insolvency process there are no timelines prescribed within which the NCLT is required to approve or reject a resolution plan.

(iv) Considering the delay in NCLT more number of benches may be established immediately.

(v) RP has filled 3 progress reports with the Adjudicating Authority since May, 2017 but has not been heard by the AA. As like Misc. App., there should be a separate entry with the Registry to place the Progress Reports for hearing before AA.

(vi) The PA is to be made within 3 days of the appointment, viz. the order. The orders are not uploaded by Hon'ble NCLT immediately, some orders are reserved.

Annexure B

Insolvency and Bankruptcy Board of India

Minutes of the 3rd meeting of the Advisory Committee on Corporate Insolvency and Liquidation held on 10th-11th February 2018 at IBBI, New Delhi.

The third meeting of the Advisory Committee on Corporate Insolvency and Liquidation was held on Saturday-Sunday, the 10th & 11th February, 2018 in the Conference Room, IBBI, New Delhi.

The following were present on 10th February, 2018:

Advisory Committee

1. Mr. Uday Kotak, Chairperson of the Committee
2. Mr. Gyaneshwar Kumar Singh, Member
3. Mr. M.V. Nair, Member
4. Mr. Somasekar Sundaresan, Member
5. Mr. Virender Ganda, Member
6. Ms. Usha Ananthasubramanian, Member
7. Mr. Sanjeev Ghai, Member
8. Ms. Ranjeeta Dubey, Secretary to the Committee

Other Invitees

9. Dr. Shashank Saxena, Member Governing Board

From IBBI

10. Dr. M. S. Sahoo, Chairperson
11. Ms. Suman Saxena, WTM
12. Dr. (Ms.) Mukulita Vijayawargiya, WTM
13. Dr. (Ms.) Mamta Suri, Executive Director
14. Mr. Ritesh Kavdia, Executive Director
15. Mr. Saji Kumar, Executive Director
16. All senior officers
17. Mr. Vikash Singh, Consultant
18. Mr. Anurag Bhabhra, Consultant
19. Mr. Vinod Kumar Vij, Research Associate
20. Ms. Shikha Sukhija, Research Associate
21. Ms. Megha Khandelwal, Research Associate

2. Dr. M. S. Sahoo, Chairperson, IBBI welcomed the members of the Advisory Committee and thanked them for accepting IBBI's request for deliberations over the weekend. The Chairperson of the Committee welcomed two new ex-officio members, Ms. Usha Ananthasubramanian, Chairman, IBA and Mr. Sanjeev Ghai, CEO of the IPA of ICAI (Cost).

3. A presentation on the transactions under corporate insolvency was made.

4. The Committee considered various issues dealt in the Agenda. It's recommendations on these issues are as under:

a) **Does definition of claims under section 3(6) and definition of financial debt under section 8 include contingent claims and liabilities respectively? Irrespective, is there a need to clarify the stage (crystallisation) at which a contingent claim should be entertained under CIRP and liquidation.**

The Code is silent on contingent liabilities but the definition of claims under section 3(6) and that of financial debt under section 5(8) hint at contingent claims. On the issue of segregation between operational contingent liabilities and financial contingent liabilities, in light of section 5(8)(e) the Committee felt that the Code already defines some of the liabilities with presumably "Operational liability like characteristics" under definition of financial debt.

b) **Is there a scope to expand Regulation 14 to include a sub regulation on how to treat contingent claims?**

Contingent claims which have crystallised (where the amount has been paid on behalf of the CD) are eligible for inclusion in the claims. The Committee therefore suggested that suitable insertion to reflect the point (a) above may be made in regulation 14 or any such suitable place.

c) **Is there a need to specify valuation criteria to put a value to such contingent claim in the IM (a) for deciding voting share, and (ii) to allow prospective resolution applicant make an informed decision?**

The Committee felt that specification of valuation, and subsequent consideration into the resolution plan may not be necessary. Such risks are there in similar market transactions like M&A and the potential buyer has to factor the same in pricing. The facilitation in identification and inclusion of such contingent liabilities by the IP in the IM is sufficient.

d) **Is there a scope for including the concept of "discharge from *(qualifying)* debt" for corporate persons, just like we have for personal insolvency and bankruptcy?**

The Committee suggested that any liabilities mentioned in the balance sheet of the CD is factored in the claims, either by the creditors or the RP. Hence such liabilities are de-facto discharged. A scope of "discharge from *(qualifying)* debt" did not exist.

e) **What are the likely implications of the restrictions on submitting resolution plans for corporate debtors, including for small and medium enterprises? In the light of the restrictions, how can high participation (whether in resolution or in liquidation), and high realisation of value, be achieved? What regulatory responses, if any, are required from IBBI?**

The Committee deliberated that Government has already introduced the restriction through amendment by inserting new section 29A. However, as the small/medium sized companies may not receive interest from other resolution applicants, they may be isolated, leading to liquidation. This will also lead to destruction of value of businesses

that could otherwise have been resurrected under resolution by the corporate debtor. The Committee suggested that the issue may be flagged with the Insolvency Law Committee.

f) **Interim Finance (IF): Should the development of a liquid market for Interim Finance (IF) market be facilitated? Who are the prospective players? Do foreign firms need facilitation for extending IF?**

The Committee raised concern regarding the Code allowing IRP to raise interim finance and suggested it should be restricted. This is risky and prone to abuse in the absence of constitution of the committee of creditors (CoC). For the RP, it suggested that market should be allowed to price the risk and finance at lower interest rates should not be facilitated. Facilitations could include provisioning dispensation as the loan is being made to a NPA account, restrictions on foreign capital, and with SEBI for Alternative Investment Funds.

g) **How should Interim finance market be incentivised? Should IBBI amend the IBBI (Liquidation Process) Regulations, 2016, particularly Regulation 27, to allow interest on IF till full repayment, after liquidation is set in?**

The Committee deliberated that while incentives should be considered, accrual of interest comes to an end after liquidation of a corporate debtor commences since the corporate debtor cannot enter into/ honour previous contracts after liquidation order. Thus, regulation 27 may not be amended. Instead, it recommended that in order to incentivise the financer, tax incentives could be considered. IBBI could take it up with the Government.

h) **Can concept of Class of Creditors existing in the US and UK insolvency law be introduced under the IBC? If yes, what can be different classes of creditors. which can be constituted?**

The Committee did not feel the need to suggest requirement of legislative intervention at this stage, in light of existing provisions under the Code, viz. section 18(a) which mandates IRP to collect all information relating to the assets, finance and operations of the CD. However, a best practice/ approach may be developed to ensure that interests of all classes of creditors are taken into consideration during corporate insolvency resolution process.

i) **Should Resolution Plan be made Public? Is there any legal impediment to placing it in public domain?**

The Committee considered that making commercial decisions public have wider ramifications which must be evaluated in detail. There may be two layers of information to the resolution plan i.e. confidential data and public data. The latter could be placed in public domain. For this, the RP could be advised to submit two variants of the Resolution plan, one being the actual plan and the other being an executive summary that could become a part of the public document. The elements of the executive summary could be worked out by the IBBI.
Alternatively, the Committee felt that IBBI could follow the CCI approach of having a public version and a private version and release the pubic version.

j) **Should a financial creditor and member of CoC who is also a resolution applicant participate in the meeting where other resolution plans are discussed and should the member be allowed to vote on a resolution plan? IBA had flagged this issue.**

Three views were expressed by the Committee:

(i) FC who is a member of CoC should not be allowed to participate in the bidding by submitting the resolution plan as a resolution applicant, as it is an interested party and the issue of conflict of interest may arise. It would be playing a role in formulation of the evaluation criteria and would then be submitting the plan as per the same. In light of many ARCs likely to submit resolution plans, the issue needed to be addressed.

(ii) The Code provides this facilitation to the FC as it has "skin in the game" and the FC is looking to provide the best value to the business which is what the insolvency ecosystem is geared to do. A FC would have the maximum interest in resolving the CD. FCs may continue to bid and vote as rightly provided in the proviso to section 30(5).

(iii) A third view was to allow the FC that intended presenting a resolution plan to declare such intention to the CoC beforehand and then recuse from meetings where resolution plan was discussed.

The Committee felt that this issue required further deliberations.

k) **Are there any costs in the Insolvency Resolution Process Costs that are unnecessary or avoidable? How can we minimise the implicit and the explicit costs of resolution, whether borne by the creditors, the debtor, the resolution applicants, or other parties? How can conflicts of interest, that could lead to higher costs, be minimised?**

The Committee advised that a handful of issues related to exorbitant costs should not be the harbinger of a strict regime on costs. Data on costs may be analysed to examine the major costs and arrive at what could be the avoidable costs. However, endeavour should be to minimise the IRP/RP cost by using latest technology i.e. Video conferencing as a preferred way of meeting instead of attending the meeting physically, taking a cue from Australia. IPAs may facilitate developing best practices. IBBI may design a disclosure form which may include the cost of CIRP. Notarisation or stamping requirements in the Forms could be done away with to reduce costs to claimants. Committee also expressed concern that data room facility being provided in some cases costed $5000. Such facilities, if provided domestically could bring down costs. IBA could take lead in setting up such facility. Changes brought about in UK Laws in April 2017 that did away with physical meetings, statutory forms, etc, may be evaluated for application to Indian conditions.

Further, the Committee felt that cost data should not be made public, lest they lead to further hike in fee. IBBI could consider IPs to report cost data through reporting requirements, but not make it public at this early juncture.

The Committee also suggested that IPAs be geared towards monitoring and also strengthen their capability for consultation on issues and best practices to be evolved.

l) **The minimum single default for triggering the insolvency proceedings may be increased (in the United States three or more creditors can start insolvency**

proceedings against a company if the company owes them more than USD 12,300 which is equivalent to INR 7.8 lakh @ USD= INR 63.88).

The Committee advised that increasing the minimum single default for triggering the insolvency proceedings, may not be deliberated at this stage. As more transactions go through CIRP and verifiable data is available, this issue could be taken up.

m) **Should we put operational creditors at number 4, pari-passu with unsecured creditors under section 53? OCs are the ones most affected when a CD defaults and very critical for businesses.**

The Committee felt that this issue was too very early in the stage to be revisited. It also felt that this being a part of the Code, may be dealt by the Insolvency Law Committee (ILC).

n) **What should be the course of action if the bank/financial institutions refuse/do not provide the certificate that is required to be furnished by the operational creditor in terms of the provisions of section 9(3) (c) of the Code? Banks are not issuing this certificate. Should there be any format for the certificate to be provided under Section 9 (3) (c) of the Code?**

The Committee felt that Banks may not be aware of the terms and conditions of the contract. The statement of accounts could be given but as the Code provides for a certificate, the Committee suggested that IBBI could consider designing a format for certificate to be submitted by the Bank/FIs. This may have to be provided under the IBBI (AAA) Rules, 2016 and a suggestion to MCA may be made.

o) **NCLAT has held that a certificate under section 9(3)(c) of the Code must be from a 'financial institution' as per section 3(14) of the Code, going by which interpretation a foreign company having no bank account in India will not be able to initiate proceedings.**

The Committee felt that this issue was largely addressed by the Supreme Court judgments on related subject.

p) **Protecting the interest of minority shareholders from losing value is not addressed. They should also be given some privilege akin to creditors in settlement since promoter shareholders have benefited from managerial remunerations even without profit.**

The Committee stated that it did not have the mandate to change the character of equity, which is essentially that of risk taking. The mandate of the Code is clearly to provide maximization of value from the point of view of creditors. If there was remaining value, it could go to equity holders also.

q) **Should senior citizens get priority in receivables under the Code? Could regulations provide for the same?**

The Committee clarified that the Code did not provide for this.

r) **A normal investor does not come to know about admittance of a corporate debtor in IBBI. Should a centralized place and helpline be created? While PA is available, there is no automatic push/notification that allows people to get notified if a company goes under the IBC.**

The Committee discussed that IBBI has suitably modified the PA to reflect the last date of submission of claims. As regards push notifications, the same may be taken up.

The Committee was of the opinion that one should not try to tinker with a young law and consider only those which affected transactions. The Committee suggested that NCLT is in the process of digitisation and computerisation and IBBI may interact with them to understand if they can link with their database.

The meeting concluded with thanks to the Chair.

Annexure C

Insolvency and Bankruptcy Board of India

Minutes of the 3rd meeting of the Advisory Committee on Corporate Insolvency and Liquidation held on 10th-11th February, 2018 at IBBI, New Delhi.

The third meeting of the Advisory Committee on Corporate Insolvency and Liquidation was held on Saturday-Sunday, the 10th & 11th February, 2018 in the Conference Room, IBBI, New Delhi.

The following were present on 11th February, 2018:

Advisory Committee

1. Ms. Usha Ananthasubramanian, in Chair
2. Mr. Gyaneshwar Kumar Singh, Member
3. Mr. M.V. Nair, Member
4. Mr. Somasekar Sundaresan, Member
5. Mr. Virender Ganda, Member
6. Mr. Mr. R.K. Nair, Member
7. Ms. Ranjeeta Dubey, Secretary to the Committee

From IBBI

8. Ms. Suman Saxena, WTM
9. Dr. Navrang Saini, WTM
10. Dr. (Ms.) Mukulita Vijayawargiya, WTM
11. Dr. (Ms.) Mamta Suri, Executive Director
12. Mr. Ritesh Kavdia, Executive Director
13. Mr. Saji Kumar, Executive Director
14. All Senior Officers
15. Mr. Vinod Kumar Vij, Research Associate
16. Ms. Shikha Sukhija, Research Associate
17. Ms. Megha Khandelwal, Research Associate

2. The Committee considered the issues dealt in the Agenda. It's recommendations on these issues are as under:

a) **Should a financial creditor and member of CoC who is also a resolution applicant participate in the meeting where other resolution plans are discussed and should the member be allowed to vote on a resolution plan? IBA had flagged this issue.**

This issue was discussed again on 11th February, 2018. The committee had three views; (i) FC who is a member of CoC should not be allowed to participate in the bidding by submitting the resolution plan as a resolution applicant, as it was an interested party as the issue of conflict of interest arose. It would be playing its role in formulation of the evaluation criteria and submitting the plan. As many ARCs were likely to submit resolution plans, the issue needed to be addressed. (ii) FCs may be allowed to bid and vote as was rightly provided in the proviso to section 30(5). (iii) Another view was to allow the FC that intended to present a resolution plan to declare its intention to the CoC

beforehand and then recuse itself from deciding the parameters of the evaluation matrix. The Committee felt that the issue requires further deliberations.

b) **While the synchronization of interests of stakeholders between resolution and liquidation and intra-resolution and intra-liquidation requires in-depth examination and probably an amendment to the Code, can an interim action by way of clarifications within the extant Code be made to nudge towards resolution of a viable corporate, particularly when more corporates are getting into liquidation because of legacy issues.**

Committee was of the view that decision of the CoC being a commercial decision is in the interest of all the creditors. The CoC is an empowered body whose money is at stake, it is well aware of its responsibilities, and hence there appeared to be no requirement to nudge it towards resolutions. If liquidation was a better alternative, nudging resolutions may not be useful.

c) **A client, who has given an advance, has practically entered into an agreement of forward sale or purchase, which has the commercial effect of borrowing. Such claims prima facie fit into the definition of 'financial debt' under section 5(8)(f) of the Code. It may nudge resolution if it is clarified that the claim of a client, which meets the requirements of section 5(8)(f), is a financial debt.**

The Committee felt that this and the home buyers' issues should get settled with the Supreme Court decisions of Jaypee Infratech Ltd.

d) **It may nudge resolution if it is clarified that all secured creditors rank equally among themselves and the kind of charge attached to the security does not classify them into different categories.**

While the Committee was inclined to concur, it fell short of approving it in light of the effect it could have to the lending culture.

e) **It is a matter of concern if many companies with a reasonable asset base and employment, and a network of vendors and customers end up in liquidation. However, the Committee of Creditors (CoC) decides which one to resolve and which one to liquidate. Is there a role for the IBBI beyond raising the issue to the Ministry to nudge resolution? How should it ensure that CoCs are guided positively towards resolution and not liquidation?**

The Committee reiterated that the role rested in the remit of FCs themselves and IBBI may work with IPs/CoCs to drill down the concept of resolution rather than liquidation. It felt that advocacy was the more important tool to nudge resolution and advised IBBI to take it forward.

f) **Regulation 39(3) of the CIRP Regulations provide that the CoC may approve any resolution plan with such modifications as it deems fit. Should negotiations before finalization of resolution plan be allowed?**

The Committee felt that negotiations offers the highest value to the CoC and hence must be allowed. However, it observed that IBA has recently given guidelines for acceptance

of bids from highest bidder. Some members felt that negotiation becomes meaningless in such an instance since there is no incentive for the highest bidder to enhance his bid. Another view was that IBA could look at e-bidding process since it provides maximum value as it ensures all bidders are aware of their position in bidding. Wherever cartelisation is suspected, CCI intervention could be sought. The Committee observed that while being mindful of CVC guidelines and transparency, CoC should have due diligence of resolution plans and 2/3 bids could be analysed and negotiated with.

g) **In transactions where IRP is replaced by RP, currently there is no provision for the incumbent RP to submit the required disclosures to NCLT regarding decision of the CoC to change IRP with an RP as is to be provided by the IRP. Should the RP be mandated to submit such information?**

The Committee felt that it was important to submit to the Adjudicating Authority the details of a resolution professional in the same manner as the details of IRP has been mandated. A check box may be provided in the Form 2 appended to the I &B (AAA) Rules, 2016 where the RP could indicate in a manner of self-certification that he will be able to give sufficient time to the new assignment he is taking. This may be provided by the Government. The Form 2 may provide the consent details to the Adjudicating Authority.

h) **There is no provision for the RP(replaced) to make a public announcement. Only IRP makes it. Where a different IP takes on as RP there is a gap in communication. Should the RP be mandated to issue a public announcement upon his taking over as RP since the submission of claims is an ongoing process and the claimants should be apprised of the change in IRP and details regarding resolution professional handing the CIRP.**

The Committee felt that publishing of information in newspapers was not warranted as the information was available on IBBI website/ website of the CD.

i) **How should IBBI approach liquidation of assets? The Board's regulations lay down, at a broad level, the processes to be followed in liquidation. Should the Board lay down more specific guidelines regarding the mechanisms for liquidation, or should it be left to the Liquidator who shall be responsible to set rules and laying down standards?**

The Committee advised that IBBI may come up with broad framework giving guidelines, adopting best practises and transparency in liquidation but should refrain from laying down the transaction rules in liquidation. This may be left to the liquidator/CoC.

j) **How can cartelisation be avoided in liquidation? What kind of market mechanisms can be facilitated to enable efficient realisation of value? Should the Board consider some existing platforms and suggest their replication?**

The Committee suggested that IBBI may analyse two or three models as available in the market and leverage IT platform before rolling out an auction platform. More players in the auction process will ensure greater competition. If reputed market participants can be brought into the auction process, the system could benefit from their expertise. The cost

of the platform should be reasonable. If fear of cartelisation exists, facilitation from CCI may be sought.

k) **The liquidation cost specified under the CIL Regulations have not been consolidated at one place, rather scattered all over the CIL Regulations. Should these be consolidated in one paragraph?**

The Committee felt that this may be considered.

l) **Should the Fast Track Resolutions take the definition of the companies from the small enterprises under the MSMED ACT, 2006 and not Companies Act, as it would be more inclusive.**

The Committee felt that it was too early to comment on this. Cabinet has approved the limits but the bill has to be tabled in Parliament.

m) **Regulation 38(1)(b), provides that it is necessary to safeguard the interest of other creditors. Accordingly, the regulations provide that liquidation value due to OCs be paid in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority. The ILC felt the need to amend regulation 38(1)(b) and 38(1A) of the CIRP Regulations to incorporate safeguards for "other creditors".**

The Committee felt that this issue requires greater deliberations and some jurisprudence may emerge.

n) **The ILC suggested whether a methodology for estimating claims should be provided.**

The Committee suggested that a methodology may not be provided. In case of a dispute the RP/claimant can approach the NCLT

o) **ILC deliberated that the Code may provide for bond/bank guarantee to be furnished by the Insolvency Professional as security for accepting CIRP/Liquidation assignment. Does this enjoin upon the IBBI to provide for a rating basis which the bonds will be priced? What information does it require from the IBBI for a bond to be priced?**

The Advisory committee suggested that a more holistic approach may be adopted in this case. The Joint Parliamentary Committee (JPC) had considered it before dropping if from the Code. It will be useful to go through the JPC Report and the rationale for not including it in must be perused before considering the proposal.

p) **Regulation 17 is silent on whether the updated list reflecting the CoC needs to be filed with the NCLT**.
The Committee advised that if regulations are not clear, these may be clarified.

q) **Should trading of listed companies during CIRP be suspended**?

The Committee felt that trading need not necessarily be suspended upon admission of a CIRP application by the NCLT in respect of the Corporate Debtor. However, this was the remit of SEBI.

r) **Dissenting creditor is able to extract his pound of flesh while those that keep invested in the company's future are eligible to receive payments only later.**

Committee felt this was as mandated under the Code. Those who remain vested in the future of the CD should give way to those who would like to exit.

s) **Conduct of meeting- should the following sentence be added "no separate communication by post or any other means will be made" after regulation 24 (7).**

The Committee felt that the issue was clear enough and that there was no need to provide another line.

t) **Regulation 21(2) provide that the notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative. The proposal is that the Code does not provide for the definition of authorised representative. Does it require to be defined? Whether an advocate may be permitted to represent the participant under this provision?**

The Committee advised that authorised representatives are those that are authorised by the Board. The Committee reiterated the need for FCs to send senior members with required mandate to CoC to enable them take a firm decision and avoid delays. IBA has issued directions to banks in this respect.

u) **Can a potentially interested party follow the progress of a case. How can one get to know whether an information memorandum has been prepared or not and how to get access to it?**

The Committee advised that data may be placed on the public domain that may help follow the progress of a case.

v) **If the IP appointed in a case triggered under section 10 of IBC is replaced by the committee of creditors, should there be a requirement for the CoC to provide for valid reasons (such as quality of output, delays, integrity, etc) for such replacement in light of law of equity?**

The Committee felt that a reason must be recorded.

w) **In case of a transaction triggered by an OC, as regards remuneration of expenses including the fee of the IRP can regulations provide that the CoC provide for ratification of reimbursement of expenses to the extent the same are not exorbitantly charged? In some instances, certain expenses have to be borne out of his own expenses such as publication in the newspaper but there is no money with the CD to pay even for such expenses.**

Committee did not concur to this.

x) **Should there be any provision for a debtor to settle the debt with creditor before the public announcement through mediation in the presence of IRP in light of principle of natural justice?**

The Committee suggested that NCLAT is apprised of this and thus no action needs to be taken.

y) **Should there be any provision for the IRP to investigate the reason for sickness and elicit information from such executives who can provide details of mis-management and siphoning of funds etc. in relation to the corporate debtor in light of the whistle blower policy?**

The Committee felt that there is no need to provide for this. The Code provides for certain transactions to be reported.

z) **The financial creditor while filing its claim in Form C of the schedule to the CIRP Regulations must make a declaration in the affidavit that it is not a related party in relation to corporate debtor as defined under section 5(24) of the Code.**

The Committee suggested that a clause of self-certification regarding related party disclosure be provided in the claim form of FCs.

aa) **Section 16(5) of the Code provides that the term of interim resolution professional shall not exceed thirty days from the date of his appointment. However, the CIRP Regulation 17(1) mandate that the IRP shall file a report certifying constitution of the committee of creditors to the Adjudicating Authority on or before the expiry of 30 days from the date of his appointment. Is this not an anomaly in the Code and CIRP Regulations?**

The Committee suggested that it was not necessary to revisit this. Jurisprudence had amply clarified that all activities of the IRP must be completed within 30 days. Guidance notes can be issued, but a clarification can only be through the Code and not regulations.

bb) **Should there be a provision guiding the IP on how to deal with Disputed Claims?**

The Committee felt that the Adjudicating Authority shall consider such issues.

cc) **Issues related to Home buyers**

The Committee suggested that issues related to home buyers could await the Supreme Court Decision on the same.

dd) **Security services should be part of essential goods and services. Securing the physical assets/property/plant, etc is one of the most critical activities from day one.**

The Committee felt that while security services are essential to protect and preserve the CD, this was covered under section 5(13)(c) of the Code.

ee) **The quorum for conduct of CoC meeting is defined as 33% of voting rights. the face-value reading of regulation means that if one of the participants eligible for voting is not attending the meeting, no voting can take place.**

The Committee did not concur to this. It felt that time provided was sufficient to vote for all.

ff) **In many cases no audited balance sheet of the corporate debtor is available on the MCA portal nor with the company. In such cases promoters are not traceable. How to prepare the latest balance sheet in such cases is a challenge, and no auditor takes up the challenge. In exceptional cases should there be a waiver?**

The Committee felt that IBBI could consider revising Form 6 of the I&B (AAA) Rules, 2016 to ensure that CD must prepare its financial returns before admission of the application with the AA.

gg) **The Code and regulations do not deal with detailed provisions regarding intangible assets. Valuation may not be available from prospective buyer or even in the case of liquidation. This may be prejudicial to creditors and translate into equivalent cash loss for them**.

The Committee felt that there are ICAI guidelines regarding intangible assets.

hh) **The regulation 39(7) should be placed separately as regulation 41. It is placed under "Approval of Resolution Plan".**

The Committee felt that there is no need for such change.

ii) **Under the eligibility for resolution professional in regulation 3(1) (c)(ii), the number of years to consider and employee/proprietor/ partner as independent may be increased from three to five years.**

The Committee felt that this should be in sync with other service providers for whom three years is given.

jj) **The Adjudicating Authority Rules, 2016 apply only to the corporate insolvency resolution process, what is the application procedure / forms to be followed/filed when the liquidator makes the application?**

The Committee suggested that since transactions were going seamlessly; there was no necessity of intervening.

kk) **When CD triggers insolvency the creditors must be informed.**

The Committee suggested that MCA could be requested to make relevant changes in the IBBI (AAA) Rules, 2016.

ll) **The Form numbers specified in CIRP Regulations and under the Fast Track Regulations being same are confusing. The Forms under Fast Track may be suitably re-numbered.**

The Committee felt that forms are related to separate regulations. This may not be considered.

mm) **Liquidation Process and Voluntary Liquidation process**
The Committee suggested that comments related to these regulations should be brought out later, since these do not seem to be affecting the transactions.