Insolvency and Bankruptcy Board of India

Subject: Amendments to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and related Matters

Part I: Amendments

This part proposes amendments to the CIRP Regulations, while the second part makes proposals for initiation of consultation with stakeholders.

A. Balancing Interests of Stakeholders

2. Failure by a firm to service debt, which is otherwise known as insolvency, is an outcome of the market. The Insolvency and Bankruptcy Code, 2016)Code(envisages market-led solutions to address insolvency. It offers resolution, wherever possible, and liquidation, wherever required, of the firm in default. The Code believes that a limited liability firm is a contract between equity and debt. As long as debt is serviced; equity, represented by a Board of Directors, has complete control of the firm. When the firm fails to service the debt, control of the firm shifts to creditors, represented by a committee of creditors)CoC(, for resolving insolvency.

3. Resolution invariably entails restructuring of business as well as liabilities of the firm as a going concern. The operational creditors (OCs) typically do not have the ability and willingness to restructure liabilities. The CoC may opt for liquidation to realise whatever is available, if it comprises OCs. The financial creditors (FCs), on the other hand, generally have the ability to restructure liabilities and to take business decisions, as may be required for resolution. The CoC, therefore, comprises FCs in the interest of resolution.

4. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Code, explained its rationale: "*The committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of*

postponing payments for better future prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors."

5. For design of the insolvency and bankruptcy resolution framework, the BLRC used *inter alia* two principles, namely, (a) the liabilities of all creditors, who are not part of the process, must also be met; and (b) the rights of all creditors shall be respected equally. In the words of the BLRC:

"IV. The Code will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency."

6. The Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law reiterates these principles:

"When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings. To the extent that it is excluded from the scope of such legal mechanisms, a debtor and its creditors will not be subject to the discipline of the mechanism, nor will they enjoy the protections provided by the mechanism."

7. It is important to note two recommendations of the UNCITRAL Legislative Guide:

*"**Equal treatment of similarly ranked creditors***

173. The insolvency law should specify that all similarly ranked creditors, regardless of whether they are domestic or foreign creditors, are to be treated equally with respect to the submission and processing of their claims.

Claims by related persons

184. The insolvency law should specify that claims by related persons should be subject to scrutiny and, where justified:10 (a) The voting rights of the related person may be restricted; (b) The amount of the claim of the related person may be reduced; or (c) The claim may be subordinated."

8. A defaulting firm may not have enough resources to meet the claims of every stakeholder fully. The Code, therefore, does not contemplate recovery, liquidation or sale of the firm. It provides for resolution through a resolution plan, that shares the fate of the firm with the stakeholders within a framework of fairness and equity and thereby balances interests of stakeholders. Accordingly, the Code, in its long title, envisages resolution for maximising the value of the assets of the firm to promote entrepreneurship, and availability of credit, and balance the interests of all the stakeholders.

9. In particular, section 30 (2) of the Code requires the resolution professional to examine each resolution plan received by him to confirm that each resolution plan provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53. Regulation 38 provides as under:

"*38. **Mandatory contents of the resolution plan.***

(1) A resolution plan shall identify specific sources of funds that will be used to pay the –

(a) insolvency resolution process costs and provide that the insolvency resolution process costs, to the extent unpaid, will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment 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; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.
(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.
(2) ……."

10. In the early days of implementation of the Code, the CDs having default since long are coming up for resolution. The liquidation value available in many such cases for OCs is insignificant. Provision of liquidation value (zero value) in resolution plans has raised concerns. In several matters the balancing of interests of stakeholders have come up before the Adjudicating Authority (AA) and the Appellate Authority (NCLAT). Instances have come up where the resolution plan has offered zero value to operational creditors because the liquidation value is zero for them under section 53 of the Code or has written off the income tax dues. The plan has given differential treatment to different classes of operational creditors or differential treatment to financial creditors and operational creditors. There are attempts to write off dues of Government and curtail the rights of shareholders. It is important to take note of what the AA and NCLAT felt while disposing of matters.

a. JR Agro Industries Vs. Swadisht Oils P. Limited (Order dated 24th July, 2018).

11. In this matter, the resolution plan provided differential treatment to OCs based the ageing of default amount: provided 100% to current dues (0 - 6 months old), and 5% for 24-month-old dues. The AA opined that there could be no discrimination among the same class of creditors. It observed:

"*We are of the considered opinion that there should be no discrimination among the same class of creditors. Explanation 1 of section 53 of the IB code provides that:*

"it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are 50 insufficient to meet the debts in full;:

All the operational creditors are rank equal. Therefore there should be no discrimination in distribution of the payment among the same class of creditors. Therefore the part of the

resolution plan which discriminates the distribution of liquidation value amongst operational creditors is unsustainable in law. This portion of the plan needs modification."

12. This plan also treated related party unsecured financial creditors differently from operational creditors. The AA observed: *"The resolution plan submitted by RLL is not in consonance with Regulation 38 (1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 since it pays almost Nil dues of the operational creditors instead pays to related financial creditor, i.e., M/s Jya Finance & Investment Co. Ltd. i.e., 22.73 cr. (page no.59 of application by RP), in preference to operational creditor, thereby siphoning the money back to the promoters of corporate debtor."* It accordingly held: "*Thus, we hold that the debt of Rs.36.6643 crore of Jay Finance & Investment Co. Ltd, which is admittedly a related party of corporate debtor should fall in the category of "equity shareholders are partners" as provided in section 53(1)(h) of the Code. Their claim will be treated at par with equity shareholders are partners, who are other unsecured creditors they rank below the operational creditors of the corporate debtor*."

13. Thus according to the AA, all unsecured creditors stand contractually on the same footing. However, the waterfall under section 53 puts unsecured financial creditors two steps ahead of unsecured operational creditors. This is inequitable and needs to be corrected. Consequently, the resolution plan should treat unsecured financial creditors and unsecured operational creditors uniformly. Further, a related party, by definition, is an interested party. Hence a related financial creditor does not enjoy the same treatment as an unrelated financial creditor at the stage of resolution. The same differential should continue at the stage of liquidation. Further, credit extended by a related party is in substance an equity contribution. It should rank subordinate to the claims of operational creditors and may, therefore, be bracketed with equity in the waterfall under section 53.

14. The resolution plan provided that any liability arising in respect of income tax from remission of any liabilities under the resolution plan shall be operational debt towards Central Government for period prior to cut off date, and Central Government shall be OC for such liability, and no amount shall be payable towards such operational debt to the Central Government. The AA observed: "*The resolution plan provides for not only writing off Operational creditors but also for writing off the Income Tax dues which is inconceivable. The amalgamation and the IT Relief without hearing Income Tax Authorities is illegal and is barred*

under Section 30(2)(e).” It held: “*By approving the Resolution Plan, we cannot allow exemption of any liability arising in respect of income tax. By approved resolution plan, the corporate debtor SOPL is merging with RLL. Therefore, any statutory liabilities of the transferor company shall be liability of the transferee company. Since income tax department is not party at this stage, therefore without hearing the department on this point, we cannot approve such resolution for granting exemption in respect of income tax liability that may crystalize in future. Thus clause 7.5 of the approved resolution plan cannot be accepted.”*

15. After holding as above (Para 11-14), the AA directed the Registrar to send a copy of the order to the IBBI and the Secretary, Ministry of Corporate Affairs and Central Government through Regional Director for consideration on the issues which have been pointed out in the order, so that the related party of the corporate debtor cannot misuse the provisions of section 53 of the Code to defraud their creditors. The IBBI has accordingly taken up the matter with MCA vide its letter dated 4th September, 2018.

b. State Bank of India Vs. Monnet Ispat & Energy Limited (Order dated 24th July, 2018)

16. In this matter, the resolution plan did not provide for any value for OCs. While approving the resolution plan, the AA observed: “*9. Although the liquidation value due to the operational creditor as per the Code is NIL, on the suggestion made by this Bench, the Resolution Applicant have come forward by filing an affidavit agreeing to pay Rs.25 crores within a period of one year from the date the final resolution plan becomes effective, to the operational creditors (other than employees and workmen) in the manner directed by this Bench.”.*

17. As regards Government dues, the AA observed:

“22. *As to the exemption of stamp duty in respect of reconstruction and amalgamation proposed in the resolution plan, for there being no express provisions conferring powers upon this Bench to exempt levying stamp duty, this Bench cannot give any exemption in respect to levy of stamp duty on the reconstruction and amalgamation proposed in the scheme*.

23. The Resolution Applicant is bound to pay all taxes and other government duties from the date this plan has come into effect. This plan will not become an exemption to the company from paying taxes to the government.”.

18. As regards, rights of shareholders, the AA observed: *“As to consolidation of the face value of these shares of Rs.3.3 per equity share into equity shares of face value of Rs.10 each, when*

this Bench has raised objection for consolidation, resulting into elimination of retail shareholders who hold 1,2 or 3 shares, the resolution applicant has filed an affidavit agreeing that they will not eliminate any of the existing shareholders, i.e, other than the promoter shareholders. This Bench accordingly modified the consolidation sought by the Resolution Applicant holding that the Resolution Applicant shall not eliminate any of the shareholder who are holding even 1,2 shares in the Corporate Debtor company."

c. Bank of Baroda and Binani Cements Limited & Ors. Vs. Vijay Kumar V. Iyer, RP (Order dated 4th May, 2018)

19. While disposing of several applications in the matter, the AA observed: *"So also in a case of this nature nobody taking care of operational creditors claim. At least minimum amount as required under the Code is not offered to those creditors in the plan of revival. But because of the supremacy of financial creditors who has control over the process, their claims neglected or rather ignored. It is time to recognise their voice also in the Committee of Creditors."*

d. Central Bank of India Vs. Resolution Professional of the Sirpur Paper Mills Ltd. & Ors (Order dated 12th September, 2018)

20. In this matter, the resolution plan was not approved by the AA as it was against regulation 38(1)(c) of the CIRP Regulations as the dissenting FCs have been provided with equal amount with those FCs who have agreed with the resolution plan. The resolution applicant submitted before the NCLAT that no discrimination can be made between the FCs in the resolution plan on the ground that one has dissented and voted against the resolution plan or the other has supported and voted in favour of the resolution plan. The right of dissent has been provided under 30(4) of the Code and hence a creditor who has dissented cannot be unsuited on the ground that he has dissented and is eligible only for liquidation value.

21. The NCLAT took note of section 240 of the Code empowering the IBBI to make regulations. It reiterated that the IBBI may make regulations, but it should be consistent with the Code and rules made thereunder, to carry out the provisions of the Code. Therefore, it held that the provisions made by the IBBI cannot override the provisions of the Code, nor can it be inconsistent with the Code. It held: "*Clause (b) and (c) of Regulation 38 (1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or Operational Creditor', Board by its Regulation cannot mandate that the Resolution plan should provide liquidation value to*

the 'Operational Creditors' (clause (b) of regulation 38 (1) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38 (1). Such regulation being against Section 240 (1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38 (1), without any reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal."

e. Sunil Jain Vs. PNB & Ors. (Order dated 24th April, 2018)

22. In this matter, the NCLAT has framed the following questions for consideration:

(i) Whether the rights of the shareholders can be curtailed by 'Resolution Plan'?

(ii) Whether taking away rights of the shareholders is a violation of the provisions of the Companies Act, 2013 and is covered by Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016? And if 1st question is answered in affirmative, in that case –

(iii) Whether the 'Resolution Plan', which has been approved, is fit to be rejected or not?"

The matter is yet to be disposed of.

23. A key reason for having FCs in the CoC is that they have the ability to restructure liabilities. They have the ability to forego some dues or take their dues a little later, if necessary, as compared to OCs. Therefore, the CoC must not allocate a higher share of gain or a lesser share of pain to FCs. It must not allow FCs to be paid before the OCs are paid or paid proportionately higher than the OCs are paid. Further, a firm gets credit from FCs and OCs. Neither credit is enough for a firm nor does the State have any reason to promote either. If OCs, for example, are not provided a level playing field, they would not provide goods and services on credit. If their interests are not protected, they will perish. This defeats the objective of promoting the availability of credit. Similar argument applies to classes of OCs. The CoC, therefore, must not discriminate amongst the creditors.

24. There are concerns about interests / rights of (a) OCs and inter se OCs, (b) FCs and inter se FCs, (c) between FCs and OCs, (d) dues of interested parties, (e) Government, and (f) shareholders. It may be advisable to wait for a view of the Government on (d), and case laws to settle (e) and (f). Probably, (a) to (c) may be addressed in the CIRP Regulations. Payment of liquidation value to OCs has profound effect both on the economy and the OC itself. It is proposed as under:

a. Delete regulation 38(1): This will do away with rights of dissenting and abstaining FCs. Consequently, delete regulation 2(f) defining dissenting creditor; delete regulation 39(1)(b) requiring undertaking for additional funds for 38(1), and delete 39(3A) providing for resources for 38(1).

b. Insert a new regulation 38(1): This will provide that the resolution plan shall not discriminate between operational creditors and financial creditors, and among the operational creditors or among financial creditors. It will further provide that *payment to OCs shall be made in priority to any financial creditor.*

B. Other Matters

Remuneration of Authorised Representative

25. The Insolvency and Bankruptcy (Second Amendment) Ordinance dated 6th June, 2018 provided that the remuneration payable to the authorised representative shall be as specified "which shall be jointly borne by the financial creditors". Accordingly, it was proposed in the board agenda to amend regulations to provide that "Insolvency resolution process costs" (IRPC) under section 5(13)(e) shall include the fee payable to authorised representative and the same shall be recovered from the claims of the creditors subsequently, in the interest of administrative efficiency. As approved by the Board, the regulations were amended on 4th July, 2018 to provide that the remuneration shall be included in the IRPC. The Amendment Act replacing the Ordinance now provides that the remuneration payable to the authorised representative shall be as specified which shall form part of the insolvency resolution process costs. Hence, recovery from financial creditors is no more required.

Voting Related

26. Regulation 21(3) (b) of the CIRP Regulations requires that the notice of the meeting of CoC shall state that a vote of the members of the committee shall not be taken at the meeting unless all members are present at such meeting. In sync with regulation 21(3)(b), regulation 25(3) before 4th July, 2018 provided that where all members are present, the resolution professional shall take a vote of the members. However, by an amendment Regulation 25 (3), which came in place of the earlier regulation, provides that the resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same. It is no more necessary to have all members to be present for voting to be taken. Therefore, regulation 21(3)(b) has become inconsistent with the new regulation 25(3). It is proposed to delete regulation 21(3)(b).

27. Regulation 16A(9) provides that the authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours. This envisages collection of votes on the agenda before the meeting of the CoC. However, regulation 25(5) of the CIRP Regulations, which allows voting after the meeting, reads as under:

"(5) The resolution professional shall-

(a) circulate the minutes of the meeting by electronic means to all members of the committee within forty-eight hours of the conclusion of the meeting; and

(b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for twenty-four hours from the circulation of the minutes."

28. Regulation 25(5) is not explicit about collection of votes from members in a class. Such members, who could not vote before the meeting, may also have a chance to cast vote after the minutes of the meeting are circulated, as other creditors are. Therefore, it is proposed to add a provision similar to regulation 16A(9) that the authorised representative shall circulate the minutes of the meeting to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours. Further, regulation 26(1) may be amended to allow the authorised representative to cast vote electronically, as per voting instructions received by him.

29. Regulation 5(2) of the Liquidation Regulations provides that the liquidator shall preserve a physical as well as an electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor. It is proposed to provide a similar obligation, through an amendment to CIRP regulations, on interim resolution professional and resolution professional to preserve a physical as well as an electronic copy of the records related to CIRP. For this purpose, the Board shall draw up a record retention schedule in consultation with IPAs and notify the same through a circular.

30. A draft of the amendment regulations, as proposed in Para 24, 26, 28 and 29 shall be sent on 25th September, 2018 for consideration and approval of the Governing Board, with or without modifications.

Part II: Other Proposals

31. This part presents various proposal / suggestion on which a discussion paper may be floated and Advisory Committee may be consulted.

Interim Finance

32. The MCA has conveyed, vide letter dated 12th July, 2018, an observation of the Hon'ble Minister of Corporate Affairs' Minister: *"The Regulations relating to interim finance to be modified to allow interest beyond one year after commencement of liquidation phase subject to approval of Committee of Creditors (CoC) with 90% voting."*

33. The CIRP process envisages payment of insolvency resolution process cost (IRPC) on priority. IRPC includes, as per the Code, the amount of interim finance and the cost incurred in raining such finance. The liquidation process similarly envisages payment of liquidation cost on priority. The liquidation cost includes, as per Liquidation Regulations, interest on interim finance for a period of 12 months or for the period from the liquidation commencement date till repayment of interim finance, whichever is earlier. The amendment in liquidation regulations was effected on 1st April 2018. This is in line with the recommendations of the Insolvency Law Committee made in its report dated 26th March, 2018.

34. It is normal law of economics that with increase in price, demand decreases while supply increases. If interim finance is made costlier, more people may be willing to lend. However, less people will be willing to borrow. Increase in cost may be counter-productive. There is also a technical issue that the CoC does not exist at the liquidation stage. It may be difficult to obtain approval of 90% of the CoC for interest beyond one year. Further, it may be advisable to watch for a while to assess the impact of the amendment providing for interest up to one year. This issue may be revisited based on experience and consultation with stakeholders.

Evaluation Matrix

35. Vide the aforesaid letter, the MCA has conveyed another observation of the Hon'ble Corporate Affairs' Minister: "Internal provisions to be made to prepare evaluation matrix before calling for EOI".

36. Under the amended CIRP Regulations, the resolution professional (RP) publishes the request for Expression of Interest (EOI) in Form G within 75 days of the insolvency commencement date, giving at least 15 days from the date of issue of EOI to the prospective resolution applicants (RA) for submission of interest. Thereafter, the RP collates the list of prospective RAs who have expressed their interest and prepares a provisional list of eligible prospective RAs within 10 days of the last date of submission of EOIs. Within 5 days of the release of the provisional list, the RP must issue the request for resolution plan (RFRP) including the evaluation matrix (EM) and Information Memorandum to the prospective RAs.

37. Regulation 36A provides for invitation for expression of interest. In the matter of State Bank of India Vs. Su Kam Power Systems Ltd., the AA, vide order 5th September, 2018, has struck down regulation 36A with the observation: "*We are further of the view that Section 25 (2) (h) added on 23.11.2017 by way of amendment does not contemplate floating of any expression of interest. It is beyond our understanding as to how the IBBI has taken upon itself the task of framing Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 using the expression 'invitation of expression of interest' along with Form 'G'. Such an assumption of power would be beyond the competence of IBBI as the source of power to frame Regulation under the IBC is drawn from Section 240 of IBC, 2016. Section 240(1) in categorical terms provides that the IBBI may by notification make regulation consistent with the Insolvency and bankruptcy Code, and further subject to the Rules framed by the Government under Section 239 of IBC, 2016 for carrying out the provisions of the Code. It has been repeatedly emphasised culminating in the rendered in aforesaid judgment that speed is the essence of CIR Process and inviting 'expression of interest' would impede to the speed. In the case of Innovative Industries Ltd. v. ICICI Bank Ltd. (2018) 1 SCC 407 passed by Hon'ble Supreme Court has highlighted that the speed is one of the salient features of the IBC, 2016. By use of the words 'expression of interest' the speed is retarted and time is wasted. In the present case on 04.06.2018 'expression of interest' was invited and last date for expressing interest to submit the resolution plan was 18.06.2018 without in fact inviting any resolution plan. Such a course is negation of the salient features highlighted by Supreme Court that the speed is essence of the IBC, 2016, therefore, we have no other option except to declare Regulation 36A as ultra-vires of Section 240(1) of IBC, 2016. The IBBI is directed to frame Regulation according to its competence and the source of power as given to it by the Code. We do not say anything more on this aspect.*"

38. The requirement of expression of interest was inserted after long consultation with stakeholders. It is understood that it is normal business practice for such transactions to have an expression of interest and then deal with a small set of people. While striking down regulation 36A, the IBBI did not get an opportunity to explain its position to the AA. It is being considered to file a writ before the Hon'ble High Court against the order of the AA. Since 36A, which provides expression of interest, is ultra vires, it may not be possible to act on the observations of the Hon'ble Minister immediately. In the meantime, stakeholders may be consulted on this proposal.

Conduct of CoC

39. The CoC has a statutory role. It discharges a public function. It holds the key to the fate of the firm and its stakeholders. It is the custodian of public faith during resolution process. It needs to pursue resolution and avoid recovery, liquidation, or sale of the firm. While pursuing resolution, it must maximise the value of the firm for the benefit of all stakeholders. However, at times, the CoC has been found wanting in some respects and invited displeasure of the AA.

40. By an order dated 7th June, 2018 in the matter of SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd., the AA observed: *".. An unenviable situation has been created by the conduct of the members of the CoC. Despite the fact that the Resolution Professional apprised the CoC that the period of 180 days is to expire on 12.02.2018 and sanction be granted for moving an application before the Adjudicating Authority for extension of the period. The CoC has behaved the way we have recorded in the preceding paras*.". It further observed: *"A strange phenomena has developed in so far as the functioning of the CoC is concerned. In a number of cases it has now been seen that Members of the CoC are nominated by Financial Creditors like Banks without conferring upon them the authority to take decision on the spot which acts as a block in the time bound process contemplated by the Insolvency and Bankruptcy Code, 2016. Such like speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal of the CIR process*.". It directed: "*In view of the above we direct the Resolution Professional to bring this order to the notice of the CoC so that appropriate steps be taken. A copy of this order be sent to the Insolvency and Bankruptcy Board of India for taking suitable action in respect of the conduct of the Members of CoC in the present matter as well as in the day to day functioning of the Members of CoC generally speaking.".*

41. Vide an order dated 4th July, 2018 in the other matter of Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Private Limited, the AA noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of IRP as RP since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from their competent authorities. It observed: "*We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations*.".

42. RBI and Banks have been advised to address the concerns. A circular has been issued to IPs on 10th August, 2018 that they shall, in every notice of meeting of the CoC and any other communication addressed to the financial creditors, require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors. The CoC should also benefit from the presence of members of the suspended board of directors of the CD and OCs in its meetings.

43. The Code has demarcated responsibilities of CoC and IP, while assigning certain responsibilities to them jointly. For example, the CoC needs to approve a resolution plan after considering its feasibility and viability, while the IP needs to file an application before the Adjudicating Authority in respect of fraudulent transactions seeking appropriate relief. The CoC must not encroach upon the role of IP and must not allow the IP to encroach upon its role.

44. It is not very clear as to what action the IBBI can take in the day to day functioning of the Members of CoC, and what regulations can be framed. It may be useful to consult stakeholders as to how to motivate the CoC and FCs to discharge their responsibilities under the Code and how can the IBBI facilitate them to do so, including through regulations.

Information Memorandum

45. A key duty of the RP is to reduce the information asymmetry for all stakeholders, and towards this, he is required to prepare an information memorandum under section 25(2)(g) read with section 29. Regulation 36(2) of the CIRP Regulations provides for the details to be included in the IM. Based on experience, it is useful to review the scope and content of information memorandum as well as the practice and extent of access to data room to prospective resolution applicants to improve information symmetry, in consultation with stakeholders.

Shareholders rights

46. In the matter of Sunil Jain Vs. PNB & Ors., the NCLAT is seized of the rights of shareholders. The explanation to section 30(2) of the Code inserted by the recent Amendment Act, provides: "*For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013(18 of 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."*

47. The Code allows initiation of resolution process on default of a threshold amount. If it is initiated early, the firm can probably meet the dues of all the creditors, and yet remain viable. In such cases, the CoC must not approve a resolution plan that curtails the rights of shareholders. Wherever such curtailment is absolutely required, it must be reasonable and not more than required, subject to the shareholders getting at least the liquidation value. It may be useful to consult stakeholders as to what extent the rights of existing shareholders can be curtailed through a resolution plan.

CIRP Costs

48. When an operational creditor triggers insolvency, it may not suggest the name of the IRP. In such cases, the AA appoints the IRP on the recommendation of the IBBI. This has two problems: (a) what should be the fee of the IRP and (b) who should bear it. Regulation 33 provides that the applicant shall fix the expenses to be incurred on or by the IRP. The Adjudicating Authority shall fix expenses where the applicant has not fixed such an expense. The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies the same. The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

49. Despite the regulations, there are practical difficulties. The IRP takes over the CD immediately, while the applicant is not seen around. If CoC finds that the initiation of insolvency is not in the common interest, it may not ratify. Thus, there is a stalemate. It is advisable to consult the stakeholders to find an appropriate solution to this issue.

50. In some instances it is seen that IRP/RP does not have enough funds to run the CD as a going concern. Or, the CoC does not approve the expenses promptly or may refuse to approve at all. For example, the CoC may not approve a forensic audit of the accounts when it believes that the audit may find some irregularities by one of them. Stakeholders may be consulted to explore the possibilities of keeping the CD as a going concern and meeting the fees of the RP as well as other professionals.

Filings on MCA portal

51. All MCA 21 filings of a corporate are made by Key Management Personnel (KMP) of a company. During the CIRP period, day-to-day management of the affairs of the corporate is vested in and the powers of board of directors are exercised by the IP. It is, therefore, imperative that the MCA portal displays that the board of the CD is suspended, and all filings are done by the IP. After CIRP is over, the authority to file returns shifts to the new management. It is necessary to consult stakeholders to streamline the change management at both stages of commencement and closure of the CIRP and ensure that uninterrupted and appropriate filings are made.

Approvals from other regulators

52. The resolution plan for Monnet Ispat and Energy Ltd. sought exemption in respect to approvals from SEBI. It also made the Gare Palma IV/7 mine a part of the resolution plan. The AA observed: *"20. As to the exemption sought by the Resolution Applicant in respect to approvals from SEBI, it is hereby clarified that whatever approvals are required to be taken as per law by the Corporate Debtor, the same shall be taken by the company, no blanket exemption can be given by this Bench in respect to compliance of law.*

21. As to Gare Palma IV/7 mine rights, this bench having held in a detailed order dated 16.1.2018 that this mine rights have not been conferred upon the corporate debtor, this mine should not have been made as part of this Resolution Plan. Moreover, as to mine leasing and licensing rights are concerned, Central Government will independently decide as to what rights

the Resolution Applicant will have on these mines. In view of this the Bench has not approved the plan in relation to any of the mines mentioned in this plan.".

53. It may be useful to develop common understanding and best practices about the various approvals required and to facilitate such approvals, in consultation with the stakeholders.

Website of a corporate debtor

54. Sections 13 and 15 of the Code provide for public announcement of the initiation of CIRP and call for the submission of claims. The IRP/RP verifies every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintains 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 keep it updated. Such list shall be available for inspection by the persons who have submitted proof of claims; and shall be available for inspection by members, partners, directors and guarantors of the corporate debtor; displayed on the website, if any, of the corporate debtor; filed with the AA; and presented at the first meeting of the CoC.

55. Stakeholders are spread across geographies. Some may be based closer to the IRP/RPs offices, others may not. The website is the most convenient and cost-effective means of accessing such information. However, placing such information has been made optional on the website. In some instances, it has been noted that corporate debtor does not have any website. The issue causes greater hardship if there are creditors in a class who have claims and verification of such claim may become an expensive exercise. It may be useful to consider having a dedicated web site for all announcements and display of lists.

Fraudulent transactions

56. The Code and regulations require filing of applications in respect of preferential, undervalued, fraudulent and extortionate transactions (PUFE) with the AA for appropriate orders. Under regulation 35A of the CIRP Regulations, the RP shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66 on or before the 75th day of the insolvency commencement date (ICD). Where the RP is of the opinion that the CD has been subjected to any transactions covered under such sections he shall make a determination, on or before the 115th day of the ICD, under intimation to the Board. Further, he shall apply to the AA for appropriate relief on or before the 135th day of the

ICD. While the RP may have filed a petition with the AA based on his determination, it may not be necessary that the AA consider and dispose of the application during the tenure of the CIRP. It is understood that applications have been filed so far in respect of about 100 CDs, while only one such application has bene disposed of by the AA and that one is under appeal before the NCLAT. If CIRP yields liquidation, the liquidator may have to pursue the application. However, after the RP leaves, it is not clear as to who would pursue the matter before the AA for arriving at the logical conclusion. An undue delay may benefit the erstwhile promoter/ management who may have initially been the cause of such transaction. There is a view in some quarters that the IBBI may put in place a mechanism to pursue such applications after the IP leaves and pursue further course of action depending on the order of the AA. The stakeholders may be consulted in this regard.

57. It is proposed to consult stakeholders on the issues flagged in Part II of this Board Note.

THE GAZETTE OF INDIA
EXTRAOPRDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, TUESDAY, ……, 2018

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION
New Delhi, the ……, 2018

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (FOURTH AMENDMENT) REGULATIONS, 2018

No. IBBI/2018-19/GN/REG……..— In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:-

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations), in regulation 2, in sub-regulation (1), clause (f) shall be omitted.

3. In the principal regulations, in regulation 21, for sub-regulation (3), following sub-regulation shall be substituted, namely: -

"(3) The notice of the meeting shall contain an agenda of the meeting with the following-
(i) a list of the matters to be discussed at the meeting;
(ii) a list of the issues to be voted upon at the meeting; and
(iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.".

4. In the principal regulations, in regulation 25,

(i) for sub-regulation (5), the following sub-regulation shall be substituted, namely: -

"5. The resolution professional shall-
(a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorized representative(s) within forty-eight hours of the conclusion of the meeting; and
(b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for twenty-four hours from the circulation of the minutes."

(ii) after sub-regulation (5), the following sub-regulation shall be inserted, namely:-

"(6) The authorised representative shall circulate the minutes of the meeting received under sub-regulation (5) to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

5. In the principal regulations, in regulation 26, after sub-regulation (1), the following sub-regulation shall be inserted, namely: -

"(1A) The authorised representative shall exercise the votes either by electronic means or through electronic voting system as per the voting instructions received by him from the creditors in the class pursuant to sub-regulations (6) of regulation 25.".

6. In the principal regulations, in regulation 38, for sub-regulation (1), the following sub-regulations shall be substituted, namely: -

"(1) A resolution plan shall have due regard to the following principles: -
(a) the claims of all creditors shall be respected equally; and
(b) the operational creditors shall have priority in payment over financial creditors.".

7. In the principal regulations, in regulation 39, -
(a) in sub-regulation (1), clause (b) shall be omitted;
(b) sub-regulation 3A shall be omitted;

8. In the principal regulations, after regulation 39, the following regulation shall be inserted, namely: -

"39A. The interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be notified by the Board in consultation with Insolvency Professional Agencies.".

(Dr. M. S. Sahoo)
Chairperson
[ADVT.-_____]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published in the Gazette of India Extraordinary vide notification No. IBBI/2016-17/GN/REG004 on 30th November, 2016 and was subsequently amended by—

(1) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG013, dated the 16th August, 2017;

(2) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG018, dated the 5th October, 2017;

(3) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG019, dated the 7th November, 2017;

(4) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG022, dated the 31st December, 2017;

(5) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Amendment) Regulations, 2018 vide notification No. IBBI/2017-18/GN/REG024, dated the 6th February, 2018; and

(6) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018 vide notification No. IBBI/2017-18/GN/REG030, dated the 27th March, 2018.

(7) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 vide notification No. IBBI/2018-19/GN/REG031, dated the 3rd July, 2018.