

Insolvency and Bankruptcy Board of India

3rd November, 2019

Discussion Paper on Corporate Insolvency Resolution Process

This discussion paper deals with two issues, namely, essential supplies and the fee payable to insolvency professionals (IPs) in a corporate insolvency resolution process (CIRP).

Essential Supplies

Problem Statement

2. The Insolvency and Bankruptcy Code, 2016 (Code) is a paradigm shift in the law.¹ A threshold amount of default entitles a stakeholder to trigger CIRP of the corporate debtor (CD) and if triggered, the CD moves away from ‘debtor-in-possession’ to ‘creditor-in-control’; management of CD and its assets vest in an IP, who runs the CD as a going concern, and a committee of creditors (CoC) is constituted to evaluate options for the CD. The IP invites feasible and viable resolution plans from capable and credible resolution applicants for resolution of insolvency of the CD. If the CoC approves a resolution plan within the stipulated time with 66 percent majority, the CD continues as a going concern. The Code tries, by divesting the erstwhile management of its powers and vesting it in a professional, to continue the business of the CD as a going concern until a resolution plan is drawn up. Then the management is handed over under the plan so that the CD can pay back its debts and get back on its feet. All this is done within a period of six months with a one-time extension of up to 90 days or else the chopper comes down and the liquidation process begins.²

3. The Code envisages a market mechanism to rescue a failing, viable CD as it may not always be possible to prevent genuine failures in the face of competition and innovation, despite the best efforts and the most desirable behavioural changes. If there is a resolution applicant who can continue to run the CD as a going concern, every effort must be made to try and see that this is made possible.³ The Code is a beneficial legislation which puts the CD back on its feet, not being a mere recovery legislation for creditors.⁴ It envisages resolution of insolvency and not a recovery proceeding to recover the dues of the creditors.⁵ It, however, does not prohibit realisation by creditors under a resolution plan. It does not envisage sale or liquidation of the CD for recovery of loan.⁶ In fact, it attracts penalty if the process under the Code is abused for purposes other than the purposes of the Code.⁷

4. The Code envisages resolution of the CD as a going concern, as closure of the CD destroys organisational capital and renders resources idle till reallocation to alternate uses and makes the possibility of resolution remote. It, therefore, facilitates continued operation of the CD as a going concern during CIRP. It makes available a cadre of competent and empowered IPs to manage the affairs of the CD under resolution as a going concern, to protect and preserve the value of its property, help in retrieval of value lost through fraudulent and preferential transactions and assist the CoC to arrive at the best resolution plan. It mandates the CD, its promoters and any other person associated with its management to extend all assistance and

¹ *M/s. Innovative Industries Ltd. v. ICICI Bank & Anr.*, (2018) 1 SCC 407.

² *Ibid.*

³ *Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Ors.*, (2019) 2 SCC 1.

⁴ *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, (2019) 4 SCC 17.

⁵ *Prowess International Pvt. Ltd. v. Parker Hannifin India Pvt. Ltd.*, [CA (AT) No. 89-2017].

⁶ *Binani Industries Limited v. Bank of Baroda & Anr.*, [CA (AT) No. 82,123,188,216 & 234 -2018].

⁷ *Unigreen Global Private Limited.*, [CP No. IB- 39 (PB)-2017].

cooperation to the IP. It envisages information utilities to make available authentic information required for completing the process expeditiously. It enables raising interim finances and includes the cost of interim finance in insolvency resolution process cost, which has super priority. It envisages moratorium on institution or continuation of suits or proceedings against the CD during the resolution period. It prohibits suspension or termination of supply of essential services to the CD to keep it going. It prohibits any action to foreclose, recover or enforce any security interest during CIRP and thereby prevents a creditor(s) from maximising its individual interest.

5. The Code provides for initiation of a process for resolution; it does not enable initiation of liquidation process directly. It promotes resolution over liquidation.⁸ After CIRP is initiated, if the market discovers that the process should not have been initiated, the Code allows termination of process with the approval of the CoC by 90 percent of voting power before constitution of CoC, after constitution of CoC but before invitation of Expression of Interest, or after invitation of Expression of Interest in exceptional cases, on an application made by the applicant.⁹ During the process, the stakeholders endeavour to rescue the CD through a resolution plan. The CoC may at any time decide to liquidate a CD, even before preparation of information memorandum, where running the entire CIRP is an empty formality and liquidation maximises the value. Liquidation process commences only on failure of resolution process to revive the CD.

6. Even after an order for liquidation is issued, the law enables compromise or arrangement based on an application of a member, a creditor or the liquidator. In several matters, the NCLAT has directed to attempt a compromise or arrangement.¹⁰ Many recent orders of the NCLAT have directed the liquidators to make efforts to sell the CD as a going concern or the business of the CD as a going concern to protect the interests of stakeholders.¹¹ On failure of compromise or going concern sale, the liquidator may proceed to sell the assets in bits and pieces.

7. Thus, the primary focus of the Code is revival and continuation of a failing, but viable CD. It is possible to revive a firm if it remains a going concern during CIRP. To keep the CD as a going concern, section 14(2) of the Code mandates continuation of essential services, as may be specified by the Board, to the CD during moratorium period. Section 5(13) includes any cost incurred by the resolution professional in running the business of the CD as a going concern in the insolvency resolution process cost (IRPC). It also enables the Board to specify any other cost within the IRPC. Section 30(2) requires that resolution plan shall provide for payment of IRPC in priority to payment of other debts of the CD. Thus, the IRPC, including (a) the dues to suppliers of essential goods and services supplied, and (b) the cost incurred by the resolution professional in running the business of the CD as a going concern, during the moratorium period, is required to be paid in priority over any payment to any creditor, as a part of the resolution plan.

8. Regulation 32 of the CIRP Regulations specifies that essential goods and services referred to in sub-section (2) of section 14 shall mean (i) electricity; (ii) water; (iii) telecommunication services; and (iv) information technology services, to the extent these are not a direct input to

⁸ *Preamble to the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.*

⁹ *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.*

¹⁰ *Y. Shivram Prasad v. S. Dhanapal & Ors., [CA (AT) (Insolvency) No. 224 & 286-2018].*

¹¹ *Edelweiss Asset Reconstruction Company Ltd. v. Bharati Defence and Infrastructure Ltd., [CP-292-I&B-NCLT-MAH-2017]*

the output produced or supplied by the CD. When a supply is not a direct input, it is not expected to be supplied in large quantities. The four essential supplies are basic requirements for any CD to remain as a going concern, irrespective of its business and not meant to make commercial profit. Supply of these cannot be discontinued during CIRP and dues payable to suppliers of these shall be paid in priority as part of IRPC.

9. The CIRP Regulations illustrate that water supplied to a CD is essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity. Thus, supply of water for generation of hydro-electricity is not essential supplies. It needs to be supplied in large quantities, though it is not necessary for all CDs. However, the cost incurred on water for generation of hydro-electricity during CIRP is part of IRPC and needs to be paid on priority. In the absence of prohibition on termination of water supply for generation of hydro-electricity, it may be difficult to keep the CD as a going concern. In such cases, the RP usually negotiates with suppliers of such services, and at times seeks intervention of the Adjudicating Authority to secure the services, to explore the possibility of survival of the CD.

10. Everything a CD needs is essential. A CD does not need anything which is not essential. If water is not available, a CD cannot generate hydro-electricity. If the supplier is mandated to supply water, to many CDs undergoing CIRP to keep their business going, it may have difficulty to meet its own expenses. Will it not commit a default forcing it to undergo CIRP? If, however, water is not supplied to a CD in generation of hydro-electricity, the said CD may not continue as a going concern and may have to be liquidated.

Jurisprudence

11. There are several decisions rendered by Adjudicating Authority (AA) and Appellate Tribunal relating to supply of essential services during CIRP. It has been held that essential service is a service for survival of humankind, and not for making business and earn profits without making payment for the services used. When a CD is using it for making profit, it must make payment for the services/goods utilised in manufacturing purpose.¹² In certain cases, the Electricity Board was directed by the AA to restore electricity supply to the CD during the moratorium period.¹³

12. The issue whether payments need to be made for the supply of essential goods and services during the moratorium period has also been considered by the AA. It has been held that the IP on behalf of CD will have to pay month to month charges towards consumption of such goods and services during moratorium period and that the law does not stipulate that the suppliers of such services will be supplied free of cost till completion of the moratorium period.¹⁴

13. In a few matters, apart from the four essential services specified under the CIRP Regulations, certain other goods and services which are critical for keeping the CD as a ‘going concern’ have been considered by AA as those which cannot be terminated or suspended during moratorium. In the case of a CD involved in the business of print media, printing ink, printing plates, printing blankets and solvents were held as vital for the functioning of the CD.¹⁵

¹² *ICICI Bank v. Innoventive Industries.*, [MA 157 in CP 01/I&BP/2016]

¹³ *Super Multicolor Printers Private Limited.*, [CA No.72/2017 in CP (IB) No.8/CHD/2017]

¹⁴ *Innoventive Industries v. Maharashtra State Electricity Distribution Company Ltd.*, [CA (AT) (Insolvency) No. 156 of 2017 & I.A. No. 612 of 2017]; *Dakshin Gujarat VIJ Company Limited v. ABG Shipyard Limited.*, [CA (AT) (Insolvency) No. 334 of 2017]

¹⁵ *Canara Bank v. Deccan Chronicle Holdings Limited.*, [CP No. IB/41/7/HDB/2017]

Similarly, termination of mining lease¹⁶ and vacating the leasehold premises¹⁷ from where the CD is running its office were held as obstruction in keeping the CD as a going concern.

14. Thus, the suppliers of the four essential services are under obligation to continue supply during CIRP, even though they do not get the payment for the same during the CIRP period. For other critical supplies, the resolution professional is expected to make all endeavors to keep the CD as a going concern. The AA has been helping the resolution professional in certain cases.

Views of ILC

15. The issue has been receiving the attention of Insolvency Law Committee (ILC) for some time. In its report dated 26th March, 2018, the ILC had observed that in order to enable the CD to continue as a going concern while undergoing CIRP, the AA be empowered to allow expansion of the scope of essential goods and services beyond what is specified in CIRP Regulations on the application by IRP/RP.

16. While recommending so, the ILC had noted that the ambit of the definition of “essential goods and services” in regulation 32 is limited to supplies which are essential for any CD, irrespective of the business it is carrying on. Thus, ILC was of the view that for determining goods and services essential for a particular business, there should be some flexibility in the Code. The ILC, therefore, had suggested that this flexibility may be infused by adding a proviso to section 14(2), which states that for continuation of supply of essential goods or services other than as specified by IBBI, the IRP/ RP shall make an application to the AA and the AA will make a decision in this respect based on the facts and circumstances of each case.

17. In its meeting held on 29th August, 2019, the ILC further discussed the issue and noted that the AA has allowed the supply of certain items which have not been mentioned in the CIRP Regulations. To reduce the litigation in this matter, the ILC has suggested that the list of essential supplies in the Regulations be expanded to include supplies which are significant to, and have a direct relationship with, the production of goods or supply of services by the CD to remain as a going concern. It is of the view that payment for such supplies during CIRP should be made part of IRPC, while past dues of such suppliers would continue to be treated as operational debt as on insolvency commencement date.

Proposed Amendment

18. Any generic formulation of essential supplies which have a direct relationship with the business of CD appears difficult. It is not legally permissible to make payment of pre-insolvency outstanding dues to the supplier of such supplies, as a pre-condition for continued provision of such supplies during moratorium. Nevertheless, there appears justification to allow some flexibility to protect the CD against disruption of its essential services during moratorium, as otherwise, it may not be possible to continue the CD as a going concern.

19. It is, therefore, proposed to amend Regulation 32 of the CIRP Regulations to provide a second category of essential services, which the IRP/RP considers essential for running the CD as a going concern, subject to the condition that the CD pays for current consumption of these supplies during the CIRP. A draft of the amendment regulations is given in *Annexure*.

¹⁶ M/s. Tiffins Barytes Asbestos & Paints Limited., [MA 632/2018 in CP 39/2018]

¹⁷ Srei Infrastructure Finance Ltd. v. Sundresh Bhatt., [CA (AT)(Insolvency)No. 781/2018]

Economic Analysis

20. The proposed amendment would help to ensure that the CD undergoing CIRP continues as a going concern without any destruction in its value on account of termination or interruption of certain supplies which are critical to its functioning during moratorium depending on the nature of business undertaken by it. It provides for payment against such supplies to be made and, therefore, does not put any extra burden on the suppliers. This balances the interest of the CD vis-à-vis the suppliers, while helping revival of the CD, which is the primary objective of the Code. This will relieve the AA from dealing with applications for continued supply of essential services, facilitating expeditious competition of CIRPs.

Fee Payable to IRP/RP during CIRP

Statement of Problem

21. The provisions of the Code and the Regulations made thereunder cast various statutory and legal duties and powers on the IRP/RP during CIRP of a CD, including exercise of the powers of the Board of Directors of the CD, managing its operations as a going concern, protecting and preserving the value of the property of the CD and compliances of applicable laws on behalf of the CD. He conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. He needs to be compensated for his professional services commensurate to his ability, duties and responsibilities. To assist him in carrying out his responsibilities, the Code read with the Regulations allow an IP to appoint accountants, legal or other professionals, as may be necessary.

22. The IRPC under section 5(13) of the Code includes ‘the fees payable to any person acting as a resolution professional’. It also includes any other cost as may be specified by the Board. Regulation 31 of the CIRP Regulations defines IRPC to include ‘expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33’ and ‘expenses incurred on or by the resolution professional fixed under Regulation 34’. Explanations to Regulations 33 and 34 clarify that such ‘expenses’ shall include fee to be paid to IRP/RP/IPE/professionals engaged. Further, IRPC is required to be paid in priority both in case of resolution [Section 30 (2)(a)] and liquidation [Section 53(1)(a)].

23. Unlike fees of liquidator, the Board has not specified an indicative table of fees linked to any parameter, which would determine the fees payable to IRP/RP, where it is not ratified/fixed by the CoC. However, the Board has, through the IBBI (Insolvency Professionals) Regulations, 2016 [IP Regulations], circulars and orders, provided guidance in the matter of fixation of remuneration of RP and other professionals appointed by him. It broadly provides that the fees and costs charged by an IP must be transparent and a reasonable reflection of the work necessarily and properly undertaken. The relevant extracts are as under:

(a) Code of Conduct in the First Schedule of IP Regulations

*“Para 25- An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a **reasonable reflection of the work necessarily and properly undertaken** and is not inconsistent with the applicable regulations.*

Para 26- An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

Para 27- An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as

applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.”

(b) Circular No. IP/005/2018 dated 16th January, 2018, on “*Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional*”

“3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.”

(c) Circular No. IBBI/IP/013/2018 dated 12th June, 2018 on “*Fee and other Expenses incurred for Corporate Insolvency Resolution Process*”

“6. Keeping the above in view, the IP is directed to ensure that:- (a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable; (b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;”.

(d) Para 4(c) of the Order 18 dated 3rd May, 2018 of the Disciplinary Committee

“Ms. Ruia has very emphatically claimed that the legislature has not limited the fee payable to an IRP / RP. It is difficult to appreciate that any amount of fee can be charged by a professional just because the law does not limit it. The law [Clause 25 of the Code of Conduct for Insolvency Professionals under the First Schedule to the IBBI (Insolvency Professionals) Regulations, 2016] clearly specifies ‘remuneration to be charged as a reasonable reflection of the work necessarily and properly undertaken’ by an IP. It is neither feasible nor desirable to define what is ‘reasonable’. At least an IP, who exercises the powers of the Board of Directors, cannot feign inability that she does not understand what is ‘reasonable’ in the circumstances. There are several ways to look at reasonableness. One way, as rightly observed by the Hon’ble Adjudicating Authority, is comparison with the compensation payable to the MD & CEO. However, Ms. Ruia does not find that comparison appropriate on grounds that the MD & CEO gets some perquisites and role of IRP is different. The law requires an IRP to run the corporate debtor as a going concern, which is also the responsibility of the MD & CEO. Though the responsibilities of an IRP and those of a MD & CEO overlap to a large extent, the role of IRP is different from that of the MD & CEO. The question is: Is the difference so much to justify an IRP fee of Rs.5 crore, which is 100 times of the compensation of the MD & CEO of the same corporate debtor? Another way would be to compare with the fee charged by another IP in case of a similar CIRP. Yet another way would be to look at the fee earned by herself in a similar CIRP. One can even look at the opportunity cost (value from next best alternative) of Ms. Ruia. Unfortunately, she compares with an incomparable, the fee of a liquidator, and she states that the Code prescribes fee for the liquidator. The legal position, however, is that the fee of a

¹⁸ Order No. IBBI/DC/04/2018 3rd May, 2018 in the matter of Ms. Bhavna Sanjay Ruia.

liquidator is fixed by the CoC. Only in rare cases, where it has not been done, the regulations have linked it to performance. Further, while computing fee payable to a liquidator, Ms. Ruia uses incorrect figures and assumptions. While she claims that the corporate debtor has total assets of Rs.2,761 crore, she uses an asset base of Rs. 6,861 crore for computation of fee of the liquidator. Further, while the fee of a liquidator is linked to performance, that is, realised value, Ms. Ruia uses book value of assets of the distressed corporate debtor, for computation of fee of a liquidator. If realisable value of the actual assets of the corporate debtor is considered, the fee of a liquidator would be a fraction of what has been claimed by Ms. Ruia. This is beside the fact that the role of a liquidator is quite different from that of an IRP / RP.”

24. The Board has been receiving specific directions from the AA seeking its assistance in the matter of fixation of fee payable to IRP/RP in cases *inter-alia* involving:
- (i) disputes between IRP and applicant regarding fee,
 - (ii) disputes between RP and CoC regarding fee, and
 - (iii) exorbitant fees claimed as IRPC.

25. Some of observations of the AA referring the issue of fixation of IRP/RP fees to the Board are as under:

Date of the order	Case Details	AA Bench	Gist of Order
14.02.2019	M/s Jindal Saxena Financial Services Pvt. Ltd. Vs. M/s. Mayfair Capital Pvt. Ltd.	New Delhi	<i>Notice of the application be issued to the IBBI through its Secretary to assist the bench with regard to the fixation of fee of the IRP/RP/Liquidator.</i>
18.02.2019	M/s Rachna Sarees Vs. Charming Apparels Pvt. Ltd.	New Delhi	<i>CA 658/2018 has been filed by the IRP stating that the cost incurred by him including his professional fees, has not been reimbursed by the CoC. Ld. Counsel appearing for one of the claimants in the CoC, HDFC Bank submits that the amount claimed as the CIR cost during the interim period is grossly inflated and includes Rs. 20 lakhs as the IRP's professional fees. Since there is no consensus on the fees, it would be appropriate to refer the matter to the IBBI. Both parties are directed to appear before the Board on 5th March, 2019 at 11:00 am. for settlement of the IRP's fees as per their schedule if any.</i>
14.05.2019	ICICI Bank Ltd. Vs. Gitanjali Gems Ltd.	Mumbai	<i>As a consequence, this Bench is of the opinion that a guideline can be obtained from IBBI, New Delhi that whether any Regulation or any notification about the fixation of remuneration of RP has been issued as a guiding factor. I, therefore, refer this problem i.e. fixation of CIRP cost, etc. to IBBI, New Delhi. If deem fit, the said Regulatory Authority can examine the</i>

			<i>reasoning and the basis on which the members of the CoC have approved the claim of expenditure.</i>
10.06. 2019	Sh. Amit Kumar Malik Vs. M/s Kindle Developers Pvt. Ltd.	New Delhi	<i>CA 712/2019 has been filed by the erstwhile IRP. His grievance is that his expenses and professional fees have not been reimbursed. The total outstanding amount claimed is Rs. 35,53,000/- Notice be issued to the CoC, RP and IBBI by the applicant returnable on 18th July, 2019. Dasti.</i>
17.07. 2019	M/s. Ayam Weldmesh Pvt. Ltd. Vs. M/s. Nice Projects Ltd.	New Delhi	<i>It is submitted on behalf of the CD that pursuant to termination of CIR Process, they are ready and willing to pay a reasonable fee to the IRP for his tenure of 5 days. The CD has offered Rs. 50,000 as professional fees and Rs. 25,000 towards other bills of expenses. This is not acceptable to the RP. Both parties are directed to appear before the IBBI to quantify as to what would be a reasonable quantum of fees in this case. It is also considered expedient if IBBI could propose and tabulate a reasonable fee structure as reimbursements of fees are often in dispute. Both parties are directed to appear before the IBBI on 25th July, 2019 at 11 am.</i>
22.07. 2019	M/s. Eonn Plast Pvt. Ltd. Vs. M/s. HS Power Projects Pvt. Ltd.	New Delhi	<i>The IRP has claimed Rs. 2.5 lakhs, out of which the invoices of Rs. 49,000/- only have been reimbursed to her. The IRP is dissatisfied about her professional fees. We leave it to the IBBI to quantify a reasonable amount as her fees, keeping in view that hardly any steps were taken by her other than publication. There is nothing on record to corroborate valuation. Both parties are directed to appear before the IBBI on 6th August, 2019 at 11:00 am.</i>

26. International Position

The insolvency framework prevalent in other jurisdictions vary. For instance, while the US follows a ‘debtor in possession’ model, in India the model followed under the Code is ‘creditor in control’. Accordingly, there are differences in the roles and responsibilities of the insolvency professional in those jurisdictions and in India. Nevertheless, an international perspective of the parameters for determination of the fee payable to trustee, administrator, liquidator in some of those jurisdictions may be relevant.

(i) Canada: The remuneration of the trustee (insolvency professional) is normally fixed by the creditors in its meeting through an ordinary resolution. Where the remuneration of the trustee is not so fixed by the creditors, the insolvency law fixes a cap for maximum amount of remuneration allowed to him, which is set as 7½ per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid. The court has the authority to increase or reduce the amount of remuneration, on an application made to it [Section 39 Bankruptcy and Insolvency Act, 1985].

(ii) USA: The United States Bankruptcy Code: In a case under chapter 7 or 11, the Court may allow reasonable compensation to trustee (insolvency professional) subject to a ceiling linked

to varied percentages of the moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims [Section 326].

(iii) United Kingdom: The Insolvency (England and Wales) Rules 2016: The remuneration of an administrator, liquidator or trustee in bankruptcy (insolvency professional) is fixed on the basis of one or a combination of various bases. These bases are: (i) as a percentage of the value of the property which the administrator has to deal or value of the assets which are realised, distributed etc., or (iii) by reference to the time given in attending to matters, or (iii) fixed amount [Rule 18.16]. Where a set fee is requested, it has to be explained how the set fee has been calculated to justify the creditors about the fairness and reasonableness of the amount. The remuneration or expenses can be challenged on the basis that they are "excessive in all circumstances". On hearing the application, the court has the power to either dismiss the application, change the basis, or reduce the amount charged, including reducing the amount of a set fee previously approved [Rules 18.35 & 18.36]. A procedure has also been provided whereby the administrator, liquidator or trustee can seek an increase in the remuneration [Rule 18.24 & 18.25].

Proposed Approach

27. The Board has dealt with the references from the AA in the matters as given in Para 25 on the facts and circumstances of each case in the manner as follows:

- a. In the matter of Sh. Amit Kumar Malik Vs. M/s Kindle Developers Pvt. Ltd, considering the merits of the case, IBBI prayed before the AA to issue suitable directions to the Applicant / Committee of Creditors (CoC) to comply with their fiduciary duties under the Code.
 - b. In the matter of M/s Rachna Sarees Vs. Charming Apparels Pvt. Ltd, an order was passed by the Board disposing the issue of full and final settlement of IRP's fees.
 - c. In the matter of – (i) M/s Jindal Saxena Financial Services Pvt. Ltd. Vs. M/s. Mayfair Capital Pvt. Ltd.; (ii) ICICI Bank Ltd. Vs. Gitanjali Gems Ltd.; (iii) M/s. Ayam Weldmesh Pvt. Ltd. Vs. M/s. Nice Projects Ltd.; and (iv) M/s. Eonn Plast Pvt. Ltd. Vs. M/s. HS Power Projects Pvt. Ltd., IBBI constituted Expert Committees comprising of 3 members including two market experts and one officer of IBBI in order to ensure necessary compliance with directions of Adjudicating Authority for each case. The respective committees considered the facts of the particular case viz. nature and state of affairs of business activity in which CD is engaged and in general noted the volume of activities carried out by IP. Accordingly, the quantum of fees and expenses so recommended as reasonable, by the committees were submitted by IBBI to the Adjudicating Authority.
28. Keeping in view of the increasing disputes relating to fees of IRP/RP being raised before the AA, it appears necessary to consider whether there is any need for specifying fees for IRP/RP during CIRP, similar to that of liquidator in the Liquidation Regulations, in cases where the CoC does not ratify/fix their fee and if so, the parameters to fix such fees. Taking cue from the international practices mentioned above and the practices in vogue among insolvency professionals, the following approaches are proposed to fix the fee of IRP/RP in case the fee is not fixed/ratified by the Committee of Creditors:
- (a) Fixed amount of fee, equal to the emolument drawn by the highest paying official of the CD prior to ICD.

- (b) An hourly rate for the professional services to be paid on a statement of effort prepared by the IRP/RP.

Economic Analysis

29. The proposal to fix the fees charged by IRP/RP during CIRP, in case their fee is not fixed/ratified by the CoC would prevent avoidable litigation and also ensure that excessive costs are not imposed upon the CD as an outcome of the resolution process under the Code. It will provide more certainty to the process and, therefore, would be in the interest of all stakeholders of the CD and make the resolution process expeditious.

Public Comments

30. The following issues as above need deliberation:

- a. Is there a need for expanding the scope of ‘essential goods and services’ under regulation 32 of the CIRP Regulations?
- b. If yes, whether the proposed amendment providing for the Adjudicating Authority to determine such goods and services, based on the application made by IRP/RP, on a case to case basis is appropriate?
- c. If no, do you suggest any other mechanism?
- d. Is there a need for fixing the fee of IRP/RP during CIRP, in case their fee is not fixed/ratified by the Committee of Creditors?
- e. If yes, whether the proposed approach at points (a) of Para 28 is appropriate?
- f. or, whether the proposed approach at points (b) of Para 28 is appropriate?
- g. If no, do you suggest any other mechanism?

31. This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. The Board accordingly solicits comments on:

- a. points (a) to (g) of Para 30 of this discussion paper; and
- b. any specific regulations in the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2019, placed at **Annexure by 25th November, 2019**.

32. Comments may be submitted electronically by xxx. For providing comments, please follow the process as under:

- (i) Visit IBBI website, www.ibbi.gov.in;
- (ii) Select ‘Public Comments’;
- (iii) Select ‘Discussion paper on CIRP’
- (iv) Provide your Name, and Email ID;
- (v) Select the stakeholder category, namely,-
 - a) Corporate Debtor;
 - b) Personal Guarantor to a Corporate Debtor;
 - c) Proprietorship firms
 - d) Partnership firms
 - e) Creditor to a Corporate Debtor;
 - f) Insolvency Professional;
 - g) Insolvency Professional Agency;
 - h) Insolvency Professional Entity;
 - i) Academics;
 - j) Investor; or
 - k) Others.

Kindly note that the selected discussion paper/regulations can be found by clicking the pdf icon right next to the ‘select discussion paper/regulations’ option.

(vi) Select the kind of comments you wish to make, namely,

- a) General Comments; or
- b) Specific Comments.

(vii) If you have selected ‘General Comments’, please select one of the following options:

- a) Inconsistency, if any, between the provisions within the regulations (intra regulations);
- b) Inconsistency, if any, between the provisions in different regulations (inter regulations);
- c) Inconsistency, if any, between the provisions in the regulations with those in the rules;
- d) Inconsistency, if any, between the provisions in the regulations with those in the Code;
- e) Inconsistency, if any, between the provisions in the regulations with those in any other law;
- f) Any difficulty in implementation of any of the provisions in the regulations;
- g) Any provision that should have been provided in the regulations, but has not been provided; or
- h) Any provision that has been provided in the regulations but should not have been provided.

And then write comments under the selected option.

33. If you have selected ‘Specific Comments’, please select para/regulation number and then sub-para/sub-regulation number and write comments under the selected para/sub-para or regulation/sub-regulation number.

34. You can make comments on more than one para/sub-para or regulation / sub-regulation number, by clicking on more comments and repeating the process outlined above from point 27 (v) onwards.

35. Click ‘Submit’, if you have no more comments to make.

Annexure

**GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY
NEW DELHI, OCTOBER, 2019**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION**
New Delhi, the _ October, 2019

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2019.

No. IBBI/2019-20/GN/REG050.- 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, 2019.
(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 32;
 - (i) for the words “The essential goods” , the words, figures and brackets “(1) The essential goods” shall be substituted;
 - (ii) after sub-regulation (1), the following sub-regulation shall be inserted, namely:-

“(2) Where the insolvency resolution professional or resolution professional, as the case may be, determines that any particular goods or service is essential for continuing the corporate debtor as a going concern, he may submit an application before the Adjudicating Authority for declaring such goods or services as essential supplies and directing that they shall not be terminated or suspended or interrupted during moratorium period.

(3) The application under sub-regulation (2) shall be accompanied with a statement by the insolvency resolution professional or resolution professional, as the case may be, that payment for such essential supplies provided after insolvency commencement date shall be made in full as insolvency resolution process cost.”

Dr. M. S. Sahoo
Chairperson

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published *vide* notification No. IBBI/2016-17/GN/REG004, dated 30th November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 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 published *vide* notification No. IBBI/2017-18/GN/REG013, dated the 16th August, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 318 on 16th August, 2017;
- 2) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017 published *vide* notification No. IBBI/2017-18/GN/REG018, dated the 5th October, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 386 on 5th October, 2017;
- 3) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017 published *vide* notification No. IBBI/2017-18/GN/REG019 dated the 7th November, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 on 7th November, 2017;
- 4) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017 published *vide* notification No. IBBI/2017-18/GN/REG22, dated the 31st December, 2017 in the Gazette of India, Extraordinary, Part III, Section 4, No. 01 on 1st January, 2018;
- 5) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018 published *vide* notification No. IBBI/2017-18/GN/REG024, dated the 6th February, 2018 in the Gazette of India, Extraordinary, Part III, Section 4, No. 49 on 6th February, 2018;
- (6) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018 published *vide* notification No. IBBI/2017-18/GN/REG030, dated the 27th March, 2018 in the Gazette of India, Extraordinary, Part III, Section 4, No. 124 on 28th March, 2018;
- 7) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 published *vide* notification No. IBBI/2018-19/GN/REG031, dated the 3rd July, 2018 in the Gazette of India, Extraordinary, Part III, Section 4, No. 253 on 4th July, 2018;
- 8) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018 published *vide* notification No. IBBI/2018-19/GN/REG032, dated the 5th October, 2018 in the Gazette of India, Extraordinary, Part III, Section 4, No. 372 on 5th October, 2018;
- 9) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2019 published *vide* notification No.

IBBI/2019-20/GN/REG040, dated the 24th January, 2019 in the Gazette of India, Extraordinary, Part III, Section 4, No. 21 on 24th January, 2019; and

10) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 published *vide* notification No. IBBI/2019-20/GN/REG048, dated the 25th July, 2019 in the Gazette of India, Extraordinary, Part III, Section 4, No. 267 on 25th July, 2019.

11)The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2019 published *vide* notification No. IBBI/2019-20/GN/REG____, dated the _____, 2019 in the Gazette of India, Extraordinary, Part III, Section 4, No. _____ on _____, 2019.