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AMENDMENTS TO REGULATIONS FOR CORPORATE INSOLVENCY RESOLUTION – TOO PRESCRIPTIVE OR NECESSARY FOR INCREASING EFFICIENCY?

26 July 2018

The Insolvency and Bankruptcy Board of India (**IBBI**) notified the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 (**Amendment Regulations**) on 4 July 2018 to amend the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) for the third time this year. Primarily, the Amendment Regulations seek to align the CIRP Regulations with the revised Insolvency and Bankruptcy Code, 2016 (**IBC**) post issuance of the Insolvency and Bankruptcy Code (Amendment) Ordinance 2018 (**Ordinance**). However, the Amendment Regulations also contain other changes governing the bid process and have rendered the CIRP Regulations significantly prescriptive.

The Amendment Regulations are applicable to corporate insolvency resolution processes (**CIRPs**) commencing on or after the date of their notification (i.e. 4 July 2018). Therefore, ongoing CIRPs that have commenced prior to 4 July 2018 will continue to be governed by the provisions of the unamended CIRP Regulations.

A brief snapshot of the key amendments is given below:

Amendment	Particulars	Implications
Withdrawal of IBC proceedings	<ul style="list-style-type: none"> CIRP Regulations have been amended to set out the procedure for withdrawal of IBC proceedings, which was first introduced in the Ordinance. The applicant who filed the application for initiation of CIRP, must file the withdrawal application with the interim resolution professional (IRP) / resolution professional (RP), before issuance of invitation for expression 	<ul style="list-style-type: none"> The Amendment Regulations clarify that a withdrawal application may only be filed before the issuance of invitation for EOI. This provides deal certainty for prospective bidders since they will not have to bear the risk of a withdrawal of the IBC proceedings after substantial time, effort and costs have been expended for undertaking the acquisition. The Amendment Regulations have clarified that withdrawal can only be initiated by the applicant who initiated the CIRP. This may result in the

	<p>of interest (EOI) by the RP. This withdrawal application is required to be accompanied by a bank guarantee towards the estimated expenses incurred by the IRP and RP (Withdrawal BG).</p> <ul style="list-style-type: none"> ▪ The IRP/ RP is then required to forward the withdrawal application to the Committee of Creditors (COC) which must decide on the application in a time-bound manner. ▪ If the withdrawal application is approved by the COC with 90% voting share, the RP must submit the withdrawal application before the National Company Law Tribunal (NCLT) who may approve the withdrawal application. 	<p>initiator of the CIRP “holding out” for a better recovery even if 90% of the COC are willing to withdraw. However, initiators must take note of the new requirement that they must also supply the Withdrawal BG.</p> <ul style="list-style-type: none"> ▪ The Amendment Regulations do not clarify the grounds on which the NCLT may refuse withdrawal. Accordingly, we will need to await judgments on this issue to understand the NCLT’s views on this point.
Authorised Representative	<ul style="list-style-type: none"> ▪ The Ordinance provided for appointment of an authorised representative for any class of creditors exceeding the number prescribed. This number has been set in the Amendment Regulations at ten. ▪ Voting share of a financial creditor in a class is in proportion to the financial debt (at 8% p.a. interest unless a different rate has been agreed to). ▪ The IRP is required to examine the corporate debtor’s books of accounts and records to ascertain the classes of creditors and mention the classes in the public announcement inviting claims (PA) to be issued within three days of his appointment. 	<ul style="list-style-type: none"> ▪ Pursuant to IBBI’s circular dated 13 July 2018, in any CIRP where approval of the resolution plan by the COC is at least fifteen days away, the RP is required to obtain the choice of the IP from creditors in a class, to act as their authorised representative. Therefore, representation through financial creditors in such cases is immediately effective. ▪ Neither the Ordinance nor the Amendment Regulations have defined the term “class”. Although, it appears from the Ordinance that the mechanism for authorised representative was intended for home allottees only, the use of the term “class” has given it wider import. In the absence of this definition, it is not clear if an authorised representative will also need to be appointed to represent other creditors (e.g. secured

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	<ul style="list-style-type: none"> ▪ The IRP is required to identify three insolvency professionals (IP) to act as authorised representatives for financial creditors in each class and mention their names in the PA. A creditor in a class must indicate his choice of IP from amongst the three alternatives while submitting his claim. The IRP is then required to select the IP who is the choice of the highest number of financial creditors in the class to act as the authorised representative of that class. ▪ Delay in appointment of the authorised representative will not affect the validity of any decision taken by the COC. ▪ The fee payable to the authorised representatives has been prescribed. Such fee along with the authorised representative's out of pocket expenses form part of the insolvency resolution process costs (IRP Costs). 	<p>creditors, commercial paper holders, etc).</p> <ul style="list-style-type: none"> ▪ IRPs may find it difficult to ascertain classes of creditor within three days of their appointment, as mandated. ▪ The Amendment Regulations do not include a requirement on the IRP to provide the rationale for shortlisting the IPs mentioned in the PA. However, we expect that practically, IRPs may provide such rationale in order to assist the financial creditors in making their choice. ▪ Given that the Amendment Regulations prescribe the fees that may be charged by the authorized representative, it remains to be seen whether a deep and viable market for authorized representatives is formed.
Timeline for submission of claims	The last date for submission of a claim by a creditor has been changed to the ninetieth day after the insolvency commencement date. Previously, creditors were allowed to submit claims until the approval of the plan by the COC.	This change is beneficial to resolution applicants since the liabilities of the corporate debtors will be crystallized well ahead of any resolution plan approval. However, ideally the Amendment Regulations should have also clarified the status of creditors who file claims post this deadline.
Revised Procedure under CIRP	<ul style="list-style-type: none"> ▪ The Amendment Regulations have prescribed a detailed procedure for identification of resolution applicants and approval of the plan. Set 	<ul style="list-style-type: none"> ▪ It appears odd to suggest that an EOI must be "unconditional" given that at this stage only basic information about the corporate debtor would have been provided to prospective resolution applicants. Quite

	<p>out below are the key changes.</p> <p>EOI Stage</p> <ul style="list-style-type: none"> ▪ EOI submitted by bidders must now be unconditional. ▪ Any EOI received after the deadline must be rejected. ▪ The Amendment Regulations clarify that RP cannot ask for any fee or non-refundable deposit along with the EOI. ▪ The EOI must be accompanied by specified documents including undertakings regarding Section 29A compliance, eligibility to submit EOI, accuracy and veracity of information provided and confidentiality and relevant records and information to enable assessment of Section 29A compliance. ▪ The RP must conduct due diligence to ensure bidders' compliance with Section 29A and COC's eligibility criteria based on the material on record. ▪ Within the specified time period after receipt of EOIs, the RP is required to issue a provisional list of eligible resolution applicants to the COC <i>and all prospective resolution applicants</i>. Objections to inclusion or exclusion of a prospective bidder from such list may be made along with supporting documents within a prescribed time-period. <p>Resolution Plan Stage</p>	<p>typically, at an EOI stage resolution applicants would require further financial modelling to arrive at a resolution package that is sustainable for the corporate debtor and its stakeholders.</p> <ul style="list-style-type: none"> ▪ It appears that a bidder is not eligible to enter the bid process after the EOI deadline. This condition may simplify the bid process and bring greater certainty but appears contrary to recent judgments which have allowed late bidders on the grounds that the IBC is meant to maximise recovery in the hands of stakeholders. How courts and stakeholders apply these new norms will remain to be seen. ▪ The exhaustive "connected persons" disclosure under Regulation 38(3) has been replaced by a Section 29A affidavit and by empowering RPs to seek clarification, information and documents. It remains to be seen whether RPs will continue to ask for information in the nature of the erstwhile Regulation 38(3) disclosure. Furthermore, the judgment in <i>Essar Steel</i> established that the COC needs to determine eligibility of a resolution applicant. The Amendment Regulations appear to indicate otherwise. Market practice is likely to continue to be that the COC will take the final decision on eligibility. If this remains the case then all information provided by prospective resolution applicants (or at least the successful resolution applicant) to satisfy the RP of its Section 29A eligibility will get shared with the COC. In the case of real estate companies, since the COC will also now include allottees, resolution applicants' group structures and other
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	<ul style="list-style-type: none"> ▪ The request for resolution plan (Request) must allow at least thirty days for plan submission. Any modification in the Request or the evaluation matrix is deemed to be a fresh issue and submission of the resolution plan pursuant to such modified Request or evaluation matrix will be subject to the above thirty day timeline. ▪ The RP may, with COC approval, re-issue the Request if the plans received in response to an earlier Request are not satisfactory. Such revised Request must be made to all prospective resolution applicants in the final list. ▪ COC must evaluate resolution plans strictly as per the evaluation matrix to identify the best resolution plan. ▪ Reasons for approving or rejecting a resolution plan must be recorded. ▪ The RP must submit a compliance certificate to the NCLT (in the prescribed format) along with the COC-approved resolution plan. <p>Timeline</p> <ul style="list-style-type: none"> ▪ The Amendment Regulations have prescribed a model timeline, to ensure that every CIRP is completed within one hundred and eighty days. This model timeline, along with a comparison against timelines applicable prior to the notification of the Amendment Regulations, is set out in Exhibit A. 	<ul style="list-style-type: none"> ▪ information may well become widely circulated. ▪ Sharing the list of provisional resolution applicants with all resolution applicants will ensure transparency and fairness. The provisions for objections are probably intended to decrease the volume of "Section 29A eligibility" litigations presently slowing down the resolution process. The timelines imposed on RPs to prepare the provisional list of resolution applicants and to decide on objections appear challenging particularly given the wide ambit of Section 29A. However, if properly implemented, this should result in a faster and more streamlined resolution process. ▪ The Amendment Regulations appear to indicate that the undertaking accompanying the EOI should itself state that any false disclosure by prospective resolution applicants will result in ineligibility to submit resolution plan, forfeiture of any refundable deposit and potential consequences under the Code. Accordingly, resolution applicants must take due care and counsel advice when submitting EOIs. ▪ Changes governing COC's decision-making are meant to ensure transparency and accountability in COC's evaluation of resolution plans and restrict COC's discretion while approving or rejecting a resolution plan. Adherence to these conditions should provide the COC with robust defences in case of challenges regarding COC's decisions. ▪ The provision of a format for the RP compliance certificate reinforces the RP's duty to
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		ensure that the approved plan complies with the IBC.
Contents of Resolution Plan	The resolution plan must demonstrate that (i) it addresses the cause of default, (ii) it is feasible and viable, (iii) it has provisions for its effective implementation, and (iv) it has provisions for approvals required and timeline for the same, and (v) the resolution applicant has the capability to implement the resolution plan.	Although some of these conditions were usually prescribed under the process document issued by the RP, these are now mandatorily required to be inserted pursuant to law.
Other key changes	<ul style="list-style-type: none"> ▪ The resolution plan now may provide for cancellation or delisting of shares of the corporate debtor, if required. ▪ RPs are required to opine on and determine preferential, undervalued, extortionate or fraudulent transactions within timelines and in the manner specified. ▪ In case appointment of the RP is delayed, IRP must perform the functions of the RP. 	<ul style="list-style-type: none"> ▪ The changes regarding cancellation and delisting appear to have been introduced to bring the CIRP Regulations in line with the recent amendments to SEBI's delisting regulations. This may assist NCLT and regulators taking a view that any reduction or cancellation of capital contemplated in a resolution plan is being made under the IBC and not under the Companies Act, 2013 ("Companies Act"), and therefore, no compliances under the Companies Act ought to be required. ▪ The imposition of timelines for finding avoidance transactions means that RPs have even more to do in less time. Equally, it gives stakeholders further visibility on likely recoveries from such process.

The Amendment Regulations are prescriptive in nature and impose strict timelines. While, in many instances this will improve deal certainty, it may, in some instances, curtail the ability of RPs to maximise recoveries in the hands of stakeholders. The Amendment Regulations is yet another substantive amendment to the CIRP process, and it continues to indicate the Government's commitment to overhaul India's credit regime and clean-up bank balance sheets. These amendments promise to have far reaching implications on CIRPs initiated post 4 July 2018.

EXHIBIT A

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Particulars under the model timeline				Comments
Regulation	Description of activity	Latest Timeline		
Section 16(1)	Commencement of CIRP and appointment of IRP	T	-
Regulation 6(1)	Public announcement inviting claims	Within 3 days of appointment of IRP	T+3	-
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 days from appointment of IRP	T+14	-
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90	Earlier, a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, could submit such proof to the IRP or the RP, as the case may be, till the approval of a resolution plan by the COC.
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the last date of the receipt of claims	T+21	-
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97	-
Section 21(6A) (b) / Regulation 16A	Application for appointment of authorised representative	Within 2 days from verification of claims received under Regulation 12(1)	T+23	No such timeline provided previously.
Regulation 17(1)	Report certifying constitution of COC			The IRP was earlier required to file a report certifying constitution of COC on or before the expiry of 30 days from

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				the date of his appointment.
Section 22(1) / Regulation 19(1)	1 st meeting of the COC	Within 7 days of filing the report, with 5 days' notice	T+30	Earlier, a 7 day notice period was applicable.
Section 22(2)	Resolution to appoint RP by the COC	In the first meeting of the COC	T+30	-
Section 16(5)	Appointment of RP	On approval by the NCLT	-
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40	Earlier, the term of the IRP could not exceed 30 days from the date of his appointment. Now, the term of the IRP continues till the date of appointment of the RP.
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47	Prior to the Amendment Regulations, there was no limitation of appointing the valuer no later than the 47 th day from the insolvency commencement date.
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EOI	W	No such timelines provided previously.
	COC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of COC, whichever is later.	W+7	
	Filing application of withdrawal, if approved by COC with 90% majority voting, by RP to NCLT	Within 3 days of approval by COC	W+10	

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Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75	No such timelines provided previously.
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115	
	RP to file applications to NCLT for appropriate relief	Within 135 days of commencement	T+135	
Regulation 36 (1)	Submission of information memorandum to each member of the COC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54	Prior to the Amendment Regulations, there was no limitation of submitting the information memorandum no later than the 54 th day from the insolvency commencement date.
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75	No such timelines provided earlier.
	Invitation of EOI			
	Submission of EOI	At least 15 days from issue of EOI (Assume 15 days)	T+90	No such timelines provided earlier.
	Provisional List of resolution applicants by RP	Within 10 days from the last day of receipt of EOI	T+100	
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105	
	Final List of resolution applicants by RP	Within 10 days of the receipt of objections	T+115	

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Regulation 36B	Issue of request for resolution plan (RFRP), including evaluation matrix and information memorandum	Within 5 days of the issue of the provisional list	T+105	No such timelines provided earlier.
	Receipt of resolution plans	At least 30 days from issue of RFRP (assume 30 days)	T+135	
Regulation 39(4)	Submission of COC approved resolution plan to NCLT	As soon as approved by the COC	T+165	-
Section 31(1)	Approval of resolution plan by NCLT		T+180	-

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