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NEW AMENDMENTS TO CIRP REGULATIONS – RELIEF FOR BIDDERS AND DISSENTING FINANCIAL CREDITORS

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The Insolvency and Bankruptcy Board of India (IBBI) amended the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) for the fourth time in 2018 on 5 October 2018 through the IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018 (Amendment Regulations). The Amendment Regulations have come into force on 5 October 2018. The key highlights of the Amendment Regulations are set out below:

Amendment	Implication
<ul style="list-style-type: none"> ➤ Regulation 38(1) of the CIRP Regulations has been amended to: <ul style="list-style-type: none"> ▪ remove provisions regarding payments towards insolvency resolution process cost (IRP Cost) (erstwhile Regulation 38(1)(a)) and liquidation value to dissenting financial creditors (erstwhile Regulation 38(1)(c)); and ▪ modify the provision regarding payment of liquidation value to operational creditors to state that such payment will be given priority in payment over financial creditors (previously, this payment had to be made within 30 days of the order of the National Company Law Tribunal (NCLT) approving the resolution plan). ➤ The following conditions specified in Regulation 39 regarding the mandatory payments under Regulation 38(1), have been removed: <ul style="list-style-type: none"> ▪ the obligation on the COC to specify, while approving a resolution plan, the amounts payable under Regulation 38(1) 	<ul style="list-style-type: none"> ▪ The removal of the 30-day payment period for operational creditors' liquidation value will come as a relief for resolution applicants (RAs). Most committee of creditors (COC) allow RAs to make upfront payments within certain days of the NCLT approval and sometimes give more than 30 days from NCLT approval. Further, resolution plans may also contain conditions precedent and RAs are understandably reluctant to make any payment pending the completion of such conditions. Pegging this payment to the financial creditor payment achieves the intended objective of protection of operational creditors without adversely impacting the RAs. ▪ The removal of the dissenting financial creditors' right to receive their liquidation value has been mentioned in IBBI's press release on the Amendment Regulations (Press Release) as being a consequence of the change related to operational creditor payment but that is hard to understand. It is important to note that unlike the IRP Cost and operational creditors, the obligation to pay liquidation value to dissenting financial creditors' protection was

<p>from the resources under the resolution plan; and</p> <ul style="list-style-type: none"> ▪ the obligation (inserted through the July 2018 amendment) requiring a prospective resolution applicant to submit an undertaking that it will provide for additional funds required for Regulation 38(1) payments. <p>➤ The definition of “dissenting financial creditors” has been removed from the list of definitions under Regulation 2.</p>	<p>provided only under the CIRP Regulations and not under the Insolvency and Bankruptcy Code, 2016 (Code). In view of this provision, certain resolution plans provided that dissenting financial creditors will only be paid their liquidation value. But the National Company Law Appellate Tribunal in the case of Central Bank of India v Resolution Professional of Sirpur Paper Mills Limited and Ors [NCLAT order dated 12 September 2018] has held that no distinction should be made between payments to financial creditors on the ground that they have dissented or consented to the resolution plan. IBBI’s removal of this provision appears to have been prompted by this judgment.</p> <ul style="list-style-type: none"> ▪ The rationale for deletion of the IRP Cost related provision from Regulation 38 is not provided in the Press Release. However, since the Code itself states that IRP Cost needs to be paid in priority to all other debt of the corporate debtor, IBBI may have felt that Regulation 38(1)(a) was superfluous. ▪ The Amendment Regulations have come into force immediately and there is no clarity on whether these changes are equally applicable to resolution plans which have been approved by the COC but pending NCLT approval or where resolution plans have been approved by the NCLT but pending implementation.
<p>Regulation 21(3) has been amended to remove the requirement for all members of COC to be present at the COC meeting in order for a vote to be taken.</p>	<p>This change has brought Regulation 21 in line with Regulation 25 which anyway allowed COC members (who had not voted during the COC meeting) to vote on the relevant matters later.</p>
<ul style="list-style-type: none"> ▪ Regulation 25 has been amended to require the RP to circulate COC meeting minutes to the authorised representative of a class of creditors. Further, a new provision has been inserted requiring such authorised representative to circulate the meetings to the creditors in the class 	<p>These changes are procedural in nature and allow creditors in a class to vote through their authorised representative after a COC meeting if they were unable to vote on any matter prior to such meeting.</p>

<p>and provide a 12-hour voting window with notification of such window and voting instructions at least 24 hours before the window opens.</p> <ul style="list-style-type: none"> As a corollary to the changes to Regulation 25, Regulation 26 has been amended to require the authorised representative to vote as per the voting instructions received by him from the creditors in class. 	
<p>A new condition has been added under Regulation 39A requiring the interim resolution professional (IRP) and RP to maintain physical and electronic copies of records related to corporate insolvency resolution process (CIRP) as per the record retention schedule to be communicated by the IBBI in consultation with insolvency professional agencies.</p>	<p>The objective of this change appears to be to promote greater transparency and accountability in the performance of obligations by the IRP / RP.</p>

Comment

The amendments to Regulation 38 of the CIRP Regulations are likely to have a significant impact on financial proposals under resolution plans and decision making by COC although courts may need to interpret the scope of the applicability of the new provisions to pending resolution plans.

- Ashwin Bishnoi (Partner) and Shruti Singh (Principal Associate)

For any queries please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com