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Analysing developments impacting business

IBBI AMENDS THE CIRP REGULATIONS TO ALIGN THEM WITH LONG-STANDING STAKEHOLDER DEMANDS

21 September 2022

Introduction

The Insolvency and Bankruptcy Board of India (IBBI) on 16 September 2022 promulgated the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022 (CIRP Amendment Regulations) amending the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

The key amendments introduced by the CIRP Amendment Regulations are as follows:

- a) Regulation 4C inserted: The interim resolution professional (IRP) is now required to open a designated email account to be used for correspondence with all stakeholders. Such email account is to be opened for each corporate insolvency resolution process (CIRP) which the IRP deals with. The account created by the IRP for the corporate debtor shall remain constant and the IRP shall hand over the credentials to another resolution professional (RP) in the event of his replacement or to the liquidator, as per the case.
- b) Regulation 6A inserted: The IRP is mandated to send a communication along with a copy of public announcement made under Regulation 6 of the CIRP Regulations to all creditors of the corporate debtor via post or electronic mail. In the event such communication is not possible, the public announcement shall be deemed to have been communicated to the creditors.
- c) Explanation to Regulation 18(2) inserted: The RP may convene a meeting on receiving a request from 30% of the members of the committee of creditors (CoC). The newly appended explanation states that such meetings may be convened to decide on matters not affecting the resolution plan submitted before the adjudicating authority and can be held until the approval of the resolution plan under section 31 of the Insolvency and Bankruptcy Code, 2016 (Code) or liquidation order under section 33 of the Code.
- d) Explanation to Regulation 35A(2) inserted: Regulation 35A(2) of the CIRP Regulations deals with preferential and other transactions in relation to the corporate debtor and requires the RP to make a determination in regard to preferential transactions (section 43 of the Code), avoidance of undervalued transactions (section 45 of the Code), extortionate credit transactions (section 50 of the Code) or fraudulent trading/wrongful trading (section 66 of Code)

(collectively referred to as 'Transactions'), within one hundred and fifteen days from the insolvency commencement date. In the event such determination is made, the RP in terms of the explanation shall be required to apply to the adjudicating authority for appropriate relief on or before one hundred and thirty days from the insolvency commencement date.

- e) Regulation 35A(3A) inserted: The RP shall forward a copy of the application with respect to the above stated Transactions for the consideration of the prospective resolution applicants.
- f) Regulation 36(1) amended: The timeline for submission of the Information Memorandum (IM) to the CoC has been increased from erstwhile within two weeks of appointment, but not later than fifty fourth day from the insolvency commencement date, whichever is earlier to before ninety-five days from the insolvency commencement date.
- g) Regulation 36(2) amended: The IM is required to include selling propositions and significant information of the corporate debtor including its operations and financial statements which shall include to mean-
 - i. any contingent liabilities;
 - ii. geographical coordinates of fixed assets;
 - iii. details of business performance, key contracts, key investment and other factors along with brought forward income tax losses, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities; and
 - iv. details of business evolution, industry overview and key growth drivers, in the event the corporate debtor has assets worth more than one hundred crores rupees.
- h) Regulation 36A(1) amended: The period to publish the expression of interest by the RP has been shortened from erstwhile seventy five days to sixty days.
- i) Regulation 36(B)(6(A)) inserted: The RP may with the approval of the CoC issue a second request for resolution plan (RFRP) for sale of one or more of assets of the corporate debtor, in the event he does not receive any resolution plan in response to the RFRP of the corporate debtor as a whole.
- j) Regulation 36C inserted: In the event the value of total assets of the corporate debtor exceeds one hundred crore rupees, the RP in consultation with the CoC shall mandatorily prepare a strategy for marketing of assets. However, the implementation of such strategy shall be subject to the approval of the CoC. In addition, the CoC members may also take measures for marketing the assets of the corporate debtor.
- k) Regulation 37(m) inserted: The resolution plan to include measures for sale of one or more assets of the corporate debtor to more than one successful resolution applicants along with the manner of dealing with the remaining assets.

- l) Regulation 39BA inserted: The CoC while deciding to liquidate the corporate debtor shall simultaneously explore for a compromise or arrangement. The CoC's recommendations, if any, with respect to the above shall be submitted by the RP for consideration of the adjudicating authority along with the liquidation application. The RP and the CoC to continually explore such arrangements during the pendency of the liquidation application.
- m) Regulation 40A inserted- The Regulation 40A detailing the timeline for completion of the various steps of a CIRP has been correspondingly amended to reflect the changes brought by the CIRP Amendment Regulations.
- n) Regulation 40D inserted: While considering the liquidation of the corporate debtor, the CoC to consider factors including non-operational status for preceding three years, goods produced or service offered or technology employed being obsolete, absence of any assets, lack of any intangible assets or factors which bring value as a going concern over and above the physical assets like brand value, intellectual property, accumulated losses, depreciation, investments that are yet to mature. All such observations to be recorded and submitted in the application of liquidation to the adjudicating authority.
- o) Form G amended: The Form G which stipulates the format for invitation for expression of interest pursuant to regulation 36A of the CIRP Regulations has been suitably amended to capture more extensive information regarding the corporate debtor for the perusal of the prospective resolution applicants.

Comment

- a) The most impactful amendment proposed by the CIRP Amendment Regulations is to allow the RP/CoC to issue a second RFRP in case no plans are received for the corporate debtor as a whole. While this is a laudable step, its practice may need formulation of other guidelines which prescribe objective criteria for taking such a process forward. These guidelines would need to provide clarity *inter alia* on:
 - i. How does a CoC/RP deal with several resolution applicants?
 - ii. How would such a process be different from an asset sale under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002?
 - iii. What happens to the corporate debtor after its crown jewels have been sold?
 - iv. Is this process not liquidation in the garb of resolution?

Moreover, while the IBBI has drawn comfort for this provision from *inter alia* the definition of a 'resolution plan' contained in the Code, it would be interesting to see the individual approach if a challenge to this provision is made contending that the delegated legislation is taking away from the inherent objective of the Code.

- b) The inclusion of provisions for a single email account for communication with stakeholders shall have the effect of streamlining the CIRP. The requirement of RP sending a communication to OCs along with a copy of the public

announcement appears to be a fallout of the Hon'ble Supreme Court's judgement in State Tax Officer v. Rainbow Papers Limited (Civil Appeal No. 1661 OF 2020). This step may however lead to further challenges as it creates an additional liability on the RP to reach out to the creditors, where in most cases the RP's hands are tied due to lack of sufficient information.

- c) The amendment to Regulation 18(2) of the CIRP Regulations would be very helpful in clarifying earlier judicial precedents which held that the CoC becomes *functus officio* post approval of the plan by the CoC. However, the earlier judgements were based on interpretation of both provisions of the Code and CIRP Regulations.
 - d) The amendment to Regulation 35A of the CIRP Regulations may also have clarified that the RP may submit to the CoC that there are no avoidance transactions identifiable and suitable status report could have been filed to the adjudicating authority.
 - e) Introduction of provisions to include contingent liabilities, financial statements, asset coordinates and company overview in the IM is a welcome change and shall aid the prospective resolution applicants in formulating their offers in relation to the assets of the corporate debtor. Another important addition has been the provision for marketing the assets of the corporate debtor wherein the value of total assets exceeds INR 100 crores. While this is a positive step towards ensuring timely resolution, it is to be seen whether the CoC would approve of such marketing strategies, the deployment of which shall drive up the cost of the resolution process. Further, changes in the timeline for filing application for preferential and other transaction along with increase in timeline for submission of IM shall ensure information availability to all prospective resolution applicants.
 - f) In order to ensure efficiency and minimal loss in value of the corporate debtor during liquidation, the CIRP Amendment Regulation also mandate the CoC to explore compromise or arrangements while simultaneously applying for a liquidation order. The CIRP Amendment Regulations when coupled with the performance based incentive for RP/liquidators introduced via the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2022 has the effect of consolidating maximum efforts from all stakeholders including the RP and CoC for timely resolution of the corporate debtor and ensuring increased competitive participation by the resolution applicants in the CIRP process.
- Siddharth Srivastava (Partner); Mohit Kishore (Principal Associate); Shikha Mohini (Associate)

For any queries please contact: editors@khaitanco.com

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