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IBBI INTRODUCES AMENDMENTS TO BOLSTER RESOLUTION PROCESS UNDER IBC

30 September 2022

The Insolvency and Bankruptcy Board of India (**IBBI**) in exercise of the powers conferred *inter-alia* under section 196(1)(t) read with section 240 of the Insolvency and Bankruptcy Code, 2016 (the **IBC** or **Code**) has notified the (i) IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations 2022 (**Third Amendment Regulations**); (ii) IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations 2022 (**Fourth Amendment Regulations**); and (iii) IBBI (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations 2022 (**Fifth Amendment Regulations**). The Third Amendment Regulations, Fourth Amendment Regulations and Fifth Amendment Regulations (collectively **Amendment Regulations**) have come into force from 13 September 2022, 16 September 2022 and 20 September 2022, respectively.

The key amendments introduced vide the Amendment Regulations to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) are as follows:

I. **Third Amendment Regulations**

Addition of Regulation 34B (Fee to be paid to interim resolution professional and resolution professional): Pursuant to addition of Regulation 34B to the CIRP Regulations, the following key changes have been introduced:

- (i) the interim resolution professional (**IRP**) / resolution professional (**RP**) appointed on or after 1 October 2022 are entitled to receive minimum fee as provided under Schedule I of the CIRP Regulations. However, the committee of creditors (**CoC**) can fix higher amount of fee for the IRP / RP, taking into consideration market factors such as size and scale of business operations of the corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process;
- (ii) for the resolution plans which have been approved by the CoC on or after 1 October 2022, the CoC in its discretion can decide to pay performance-linked incentive fee (subject to a cap of INR 5 (five) crores). The RP can receive performance linked incentive based on: (a) timely completion of the CIRP before 330 (three hundred and thirty) days (subject to maximum of 1% of the realisable value under the resolution plan); and/or (b) value maximisation in the event realisable value under the resolution plan is higher than the liquidation value (subject to maximum 1% of the amount by which the realisable value exceeds the liquidation value); and
- (iii) the fee of the IRP and RP is to be treated as insolvency resolution process cost and is to be paid out of the funds available with the corporate debtor or contributed by the applicant or members of the CoC and/or raised by way of an interim finance.

II. Fourth Amendment Regulations**(i) Streamlining communications**

Addition of Regulation 4C (Process e-mail): To streamline the communication between the IRP / RP and the various stakeholders in the corporate insolvency resolution process (**CIRP**), the IRP is now required to open a process e-mail account and use it to communicate with the stakeholders of the corporate debtor. Further, if the IRP is replaced by any other RP, then the outgoing IRP must share details of process e-mail account with newly appointed RP. Similarly, if the RP is replaced by another RP or liquidator then such outgoing RP must share details of the process e-mail account with newly appointed RP or liquidator.

(ii) Deemed communications

Addition of Regulation 6A (Communication to creditors): The IRP is now required to send a communication (by post or electronic means) along with a copy of public announcement, to all the creditors as per the last available books of accounts of the corporate debtor. However, if it is not possible for the IRP to send respective communication to the creditors, then a public announcement (made under Regulation 6 of the CIRP Regulations) made by the IRP shall be 'deemed' to be communicated to the creditors.

(iii) Convening meetings of CoC

Addition of 'Explanation' to Regulation 18(2) (Meetings of the committee): Regulation 18 (2) of the CIRP Regulations, provides that the RP can convene the meeting of the CoC, on request from the CoC members. To provide more clarity, the explanation to Regulation 18(2) of the CIRP Regulations now provides that the meeting of the CoC can be convened till: (a) the approval of resolution plan under Section 31(1) (Approval of Resolution Plan) of the Code; or (b) till an order for liquidation is passed by adjudicating authority under Section 33 of the Code. However, in such meetings the CoC can only take decisions on matters which do not affect the resolution plan submitted before the adjudicating authority for approval.

(iv) Information sharing with prospective resolution applicants on avoidance transactions

Addition of sub-regulation (3) to Regulation 35A (Preferential and other transactions): The RP is now required to share a copy of the application that it has filed before the Adjudicating Authority against any avoidance transaction (ie preferential, fraudulent, undervalued), with the prospective resolution applicants for their consideration whilst submitting the resolution plans.

(v) Additional disclosures in the Information Memorandum

Amendments to Regulation 36 (Information Memorandum): The RP while preparing the information memorandum has to, inter alia, include the following information about the corporate debtor:

- (a) key selling propositions and all relevant information which serves as a comprehensive document conveying significant information about the corporate debtor including its operations, financial statements etc.;
- (b) contingent liabilities of the corporate debtor, geographical co-ordinates of the fixed assets in possession of the corporate debtor, a snapshot of the business performance, such as key contracts, investments, and such other details which bring out the value of the corporate debtor as a going concern, over and above the assets of the corporate debtor; and
- (c) details of 'business evolution, industry overview and key growth drivers' of the corporate debtor, where the book value of total assets of the corporate debtor is in excess of INR 100 (one hundred) crores, as per the last available financial statements.

(vi) **Strategies for marketing of the assets of the corporate debtor**

Addition of Regulation 36C (Strategy for marketing of assets of the corporate debtor): The RP is now required to mandatorily prepare a strategy for marketing of the assets of the corporate debtor in consultation with the CoC, if the corporate debtor (as per the last available financial statements) has assets of more than INR 100 (hundred) crores. In other cases (ie where the assets of the corporate debtor are less than INR 100 (hundred) crores) the RP may at its discretion prepare such strategy in consultation with the CoC. However, in both the cases the decision of implementing the strategy along with the costs will be subject to approval of the CoC. Additionally, the member(s) of the CoC can also put forth strategies to enable for effective marketing of the assets of the corporate debtor.

(vii) **Sale of assets by RP, if no resolution plan received**

Addition of sub-regulation (6A) to Regulation 36B (Request for resolution plans): The RP (with approval of CoC) can now reissue request for resolution plan for sale of one or more assets of the corporate debtor, if pursuant to the first request for resolution plans, the RP does not receive a resolution plan for the corporate debtor.

(viii) **Part sale of assets under a resolution plan**

Addition of sub-regulation (m) to Regulation 37 (Resolution plan): A resolution plan can now provide for: (a) measures to enable part-sale of the assets of the corporate debtor 'to one or more successful resolution applicants submitting resolution plans for such assets'; and (b) the manner of dealing of the remaining assets.

(ix) **Facilitating a compromise/arrangement**

Addition of Regulation 39BA (Assessment of Compromise or Arrangement): The CoC is now allowed to explore strategies to enable a compromise or arrangement, while deciding to liquidate the corporate debtor under Section 33 (Initiation of Liquidation) of the Code. If the CoC arrives at a recommendation to enable a compromise or arrangement, the RP shall present such recommendation before the Adjudicating Authority, at the time of filing of an application under Section 33 (Initiation of Liquidation) of the Code. The CoC is required to further continue exploring the possibilities surrounding the compromise or arrangement 'during the period the application to liquidate the corporate debtor is pending' before the concerned Adjudicating Authority.

(x) **Decision for Liquidation**

Addition of Regulation 40D (Decision for liquidation): The CoC while recommending for liquidation of the corporate debtor may consider factors including but not limited to non-operational status for preceding 3 (three) years, goods produced or services 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. Further, such factors are to be recorded in the application for liquidation to be filed by the RP with the Adjudicating Authority.

(xi) **Changes in the timelines**

(a) Shorter time-period for applying for reliefs under Regulation 35A (Substitution of sub-regulation (3) to Regulation 35A (Preferential and other transactions)): The RP is now required to file an application before the adjudicating authority for seeking appropriate reliefs against preferential and other transactions, as contemplated under Regulation 35A within a period of 130 (one hundred thirty) days from the insolvency commencement date (ICD), as against the earlier prescribed period of 135 (one hundred thirty five) days.

- (b) Modified timeline for submission of information memorandum to the CoC (Amendment to sub-regulation (1) to Regulation 36 (Information memorandum)): The RP is now required to submit the information memorandum to each member of the CoC, within a period of 95 (ninety-five) days from the ICD as against the earlier period of 54 (fifty-four) days.
- (c) Shorter time-period for applying for invitation for expression of interest (Amendment to sub-regulation (1) to Regulation 36A (Invitation for expression of interest)): The RP is now required to publish the invitation for expression of interest in Form G ie, within 60 (sixty) days from the ICD as against the earlier time of 75 (seventy-five) days from the ICD.

III. **Fifth Amendment Regulations**

(a) **Regulatory Fee**

Addition of Regulation 31A (Regulatory Fee): A fee calculated at the rate of 0.25% of the realisable value (if more than liquidation value of the corporate debtor) to creditors under the resolution plan will have to be paid to IBBI where the resolution plan is approved under Section 31 (Approval of Resolution Plan) of the IBC on or after 1 October 2022. Further, the IRP / RP needs to pay IBBI a fee calculated at rate of 1% of the insolvency resolution process costs arising out of hiring any professional or other services by the IRP or RP, within a period of 30 (thirty) days after end of each quarter or upon closure of the CIRP, whichever is earlier.

Comments

The Amendment Regulations are aimed at providing incentives to the IRP / RP for time bound resolution of the corporate debtor. While creating incentives for the IRP / RP, the Amendment Regulations also require them to prepare a plan for marketing the assets of the corporate debtor and disclose more information in the information memorandum including corporate debtor's contingent liabilities, business, key contracts, investments and financial statements etc. The additional disclosures required to be made in the information memorandum is expected to aid the prospective resolution applicants in their due diligence and assessment of risks associated with the business of the corporate debtor. This will ultimately help them in assessing their prospects in submitting resolution plan for the corporate debtor more accurately and can lead to more interest in distressed asset investment in CIRP.

Further, the introduction of provisions relating to part-sale of assets both by the resolution applicant under a resolution plan and by the CoC, will also create more flexibility for early resolution of the corporate debtor including through monetisation of corporate debtor's assets which can lead to better price discovery and value maximisation for the creditors. Overall, the changes to the CIRP Regulations are timely and is expected to aid and assist resolutions through CIRP instead of pushing corporate debtor into liquidation.

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