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SUMMARY OF KEY CHANGES TO CIRP REGULATIONS PROPOSED IN IBBI'S NOVEMBER DISCUSSION PAPER

8 November 2023 The Insolvency and Bankruptcy Board of India (IBBI) on 1 November 2023 released a discussion paper inviting comments on certain proposed changes to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) (Discussion Paper). A summary of the key changes proposed to the CIRP Regulations is as follows:

- A. Prior approval of COC for insolvency resolution process cost: With the objective of providing clarity on the power of the committee of creditors (COC) to oversee the corporate insolvency resolution process (CIRP), the Discussion Paper proposes insertion of a new regulation (Regulation 31B) which will require the resolution professional (RP) to take prior approval of the COC before incurring any expenses in running the business of the corporate debtor (CD) as a "going concern".

Comment: The existing Regulation 34 of the CIRP Regulations already recognises the principle that COC is responsible for fixing the expenses to be incurred by the RP during CIRP. The insertion of Regulation 31B would help reconcile and make it abundantly clear that COC is the pivotal decision-making authority.

- B. Monthly COC meetings: In line with the objective of the Insolvency and Bankruptcy Code, 2016 (IBC) of timely resolution of the CD and to ensure maximisation of assets by avoiding value erosion, the Discussion Paper proposes that the RP may convene COC meeting as and when the RP considers it necessary but the gap between two COC meetings cannot be more than 30 days.

Comment: By establishing a monthly mandate for convening the COC meetings, IBBI envisages to instil greater stakeholder confidence, provide a steady platform for addressing any concerns and thereby improve efficiency. This will also ensure timely progress of the CIRP.

- C. Disclosure of fair value in the Information Memorandum: To enhance the bidding process and quality of bid by the resolution applicants, the Discussion Paper proposes that the fair value of the CD should also be included in the information memorandum.

Comment: The framework, as it stands currently, can discourage serious bidders as submitting the proposal is a shooting in the dark process with limited to no visibility on the CD's net worth. Therefore, IBBI is of the view that by disclosing the fair value of the CD, issues of information asymmetry can be dealt with, and serious

resolution applicants may be encouraged to participate in the process, thus attracting competitive bids and better values.

- D. Clarity in minimum entitlement to dissenting financial creditors: Presently, the IBC and the CIRP Regulations provide that the dissenting financial creditors are entitled to –
- (i) a minimum payment of liquidation value calculated in accordance with sub-section (1) of section 53 of the IBC, and
 - (ii) such payments are to be made in priority to the assenting financial creditors.

Further, the liquidation value has been defined to mean realizable value of the assets of the CD on the insolvency commencement date. The challenge with this definition is that it does not take into account value erosion of the CD during CIRP which if taken into account will ultimately result in a lower liquidation value of the CD. This has led to a situation where at times the resolution amount proposed by a resolution applicant is less than the 'liquidation value', the lenders are then not incentivised to approve such plans as the realisable value for them will be greater in case of liquidation of the CD. In order to plug the gap and to align the interests of stakeholders, the IBBI has proposed the following amendments to the CIRP Regulations:

- Inclusion of definition of 'amount due in the event of liquidation' –
"lower of the (i) amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53; or (ii) the liquidation value as defined under these regulations been distributed in accordance with the order of priority in sub-section (1) of section 53."
- Amendment to existing Regulation 38(1) to state that dissenting financial creditors shall be paid the 'amount due in the event of liquidation' and in priority over the assenting financial creditors.
- Inclusion of a clarification to Regulation 38(1)(b) that at no stage of implementation of resolution plan, assenting financial creditors shall be paid higher percent of its dues, than the dissenting financial creditors.

Comment: The amendment proposal will ensure that the financial creditors act in accordance with the object of the IBC (i.e., revival of the CD) and are not incentivised to liquidate the CD. However, *re* the timing of payment to the dissenting financial creditors, the incongruity comes from the order in *Jaypee Kensington Boulevard Apartments Welfare Association and Others v NBCC (India) Limited and Others* ((2022) 1 SCC 401), wherein the Supreme Court held that dissenting financial creditors are required to be paid in cash and upfront. It would be interesting to see how the courts react to such amendment wherein the resolution applicant is allowed to make staggered payment (though in priority to assenting financial creditors) to the dissenting financial creditors.

- E. Mandatory contents of resolution plan: To ensure smooth and uninterrupted implementation of the resolution plan, the IBBI has proposed that a resolution plan may be submitted in two parts, wherein Part A of the plan will deal with the inflow of money (i.e., payment under the resolution plan (total value of the resolution plan), payment of insolvency resolution process cost, implementation and

payment schedule, feasibility and viability of the resolution plan etc.). Part B will provide for distribution of the monies to the various stakeholders.

Comment: This segregation attempts to safeguard the implementation / takeover of the CD by the resolution applicant against any dispute that may arise on the distribution of monies amongst various stakeholders under the resolution plan. In the event of any dispute on distribution, the resolution applicant would be able to keep the disputed amount in an escrow account and such monies can be distributed after the litigation attains finality.

CONCLUSION

The changes proposed in the Discussion Paper try to provide clarity on several aspects and attempt to mitigate certain practical complications faced in CIRP which can result in making the process more robust, and effective.

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