

# DISCUSSION PAPER ON AMENDMENT TO INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (CORPORATE INSOLVENCY RESOLUTION PROCESS) REGULATIONS, 2016

## DISCUSSION PAPER, DATED 14-2-2020

This discussion paper solicits comments on the following issues, namely: -

Issue 1: Replacement of Authorised Representative

Issue 2: Voting by class of creditors at two stages

Issue 3: Voting on two or more compliant resolution plans simultaneously

### **2. Replacement of Authorised Representative**

**2.1** Section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016 (Code) read with Regulation 16A (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations) provide that where the corporate debtor has at least ten financial creditors in a class, the interim resolution professional (IRP) shall offer a choice of three insolvency professionals and a creditor in the class may indicate his choice of an insolvency professional, from amongst the three, to act as its authorised representative (AR). The insolvency professional, who is the choice of the highest number of creditors in the class, is selected as the authorised representative of the creditors of the respective class by the IRP and such AR is appointed by the Adjudicating Authority (AA) prior to the first meeting of the Committee of Creditors on an application by the IRP. The AR collects voting instructions from the respective class of creditors, attends the meetings of the committee of creditors (CoC) and casts vote in respect of the said class in accordance with the instructions he receives from the creditors.

**2.2** Section 21 (6A) (b) of the Code read with regulation 16A of the Regulations provide for mechanism of representation of financial creditors through ARs, as detailed above, and are, therefore, matters of procedure. It is necessary that in an ongoing corporate insolvency resolution process (CIRP), creditors belonging to a class are represented by an AR, irrespective of the stage of the process. The resolution professional, who exercises the powers and performs the duties as vested or conferred on the IRP under section 23 (2) of the Code, shall facilitate representation through ARs.

### **Statement of Problem**

**2.3** Presently, there is no express provision for replacement of an AR after he is appointed by the AA. A class of creditors may not be satisfied with the performance of an AR. The creditors may therefore seek an alternate AR to represent their claims and to deal with their issues and grievances.

### **Proposed Amendment**

**2.4** It is proposed that the Regulations may enable the creditors in a class to replace an AR with 66% of voting power of the class, similar to voting required for replacement of an RP in a CIRP. The creditors in a class with 10% voting powers may seek replacement of the AR by making a request to the RP, any time after 30 days of the appointment of the AR. The RP will conduct a voting of the class and if 66% of voting power supports removal of the AR, the RP shall file an application with the AA for removal of the AR. The RP will then offer a choice of three IPs to act as the AR and seek preference of creditors of the class. He will apply to the AA for appointment of the AR who is the choice of the highest number of creditors in the class.

### **Economic Analysis**

**2.5** The relationship of AR and creditors in a class is based on mutual trust and hence warrants highest degree of transparency, fairness and responsibility on the part of AR towards members of such class. The provision to replace AR would give class creditors an opportunity of fair choice and representation in the CoC by a person of their collective choice.

## **Amendment Regulations**

**2.6** A draft of the amendment regulations is given in Annexure.

### **3. Voting at two stages by Authorised Representative in a class of creditors**

**3.1** Sub-section (6A) of section 21 of the Code provides that, where a financial debt is owed to a class of creditors, an AR shall attend the meetings of the CoC and vote on behalf of each such financial creditor to the extent of his voting share. Sub-Section (1) of section 25A of the Code further provides that the AR shall have the right to participate and vote in the meetings of CoC on behalf of financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means. Sub-section (2) of section 25A requires the AR to circulate the agenda and minutes of the meeting of CoC to the financial creditor he represents.

**3.2** The Code, *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 (effective 16th August 2019), inserted sub-section (3A) in section 25A which states that an AR shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote.

**3.3** Regulation 16A (9) of the Regulations requires the AR to circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours. Further, Regulation 25(6) of the Regulations requires the AR to circulate the minutes of the meeting received under sub-regulation (5) of the said Regulation 25, to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours. Therefore, the Regulations enable a creditor in a class to give voting instructions to the AR at two stages, namely, (i) after circulation of agenda and (ii) after circulation of minutes.

### **Statement of Problem**

**3.4** The above provisions enabled the AR to cast vote during the CoC meeting based on the voting instructions received from creditors in a class after receipt of the agenda item by them, in the first stage. Later, after the meeting of CoC, based on the minutes of meeting circulated, the AR gets another opportunity to cast the votes of remaining such creditors who may issue voting instructions after receipt of minutes of meeting. However, pursuant to the amendment of section 25A (3A) of the Code whereby the majority decision of creditors in a class casting votes is treated as the decision of that entire class, the following issues relating to exercise of voting by AR may arise:

- (i) It may not be practically feasible for the AR to vote during the CoC meeting merely based on the voting instructions received from creditors in a class after receipt of agenda item, as the requisite 51% may not always be determined at the first stage.
- (ii) The creditors in a class who had voted earlier based on agenda item, should become entitled to vote afresh based on the minutes of the meeting, if the minutes of the meeting reflect some modifications from the agenda item already circulated.

### **Proposed Amendment**

**3.5** In view of the above, it is proposed that the voting by AR may be recorded after the circulation of the minutes of the meeting. Wherever required, the AR may seek views of creditors in the class after circulation of agenda for the meeting, but before the meeting. Such voting instructions received by the AR may be treated as a preliminary view of such creditors to enable the AR to make submissions before the CoC during the meeting. The actual voting of AR may be based on the voting instructions received afresh from such creditors after the circulation of the minutes of the meeting.

### **Economic Analysis**

**3.6** Voting by the creditors in a class at two stages - after circulation of agenda and after circulation of

minutes - creates confusion. With proposed amendment, the AR may seek preference of creditors before the meeting to enable him to present the views of creditors correctly in the meeting. They may cast votes on the agenda items, as modified in the meeting, after the minutes of the meeting are circulated.

### **Amendment Regulations**

**3.7** A draft of the amendment regulations is given in Annexure.

### **4. Voting on two or more compliant resolution plans simultaneously**

**4.1** Section 30(3) of the Code envisages that a resolution professional shall present to the CoC for its approval such resolution plans which confirm the conditions referred to in sub-section (2) of section 30. Therefore, the Code provides that all eligible resolution plans are to be placed before the CoC for its approval. Further, Section 30(4) states that the CoC may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board. This further seem to indicate that all resolution plans submitted by successful resolution applicants, which meet the conditions under sub-section (2) of section 30, can be put to vote simultaneously.

**4.2** Regulation 39 (3) of the Regulations, on the other hand, provides that the CoC shall evaluate the resolution plans received strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit.

### **Statement of Problem**

**4.3** A mere reading of Section 30(3) along with regulation 39(3) clearly reflects that, while the Code envisions that multiple resolution plans can be placed before the CoC for voting, the Regulations seem to restrict the choice to only the best resolution plan based on evaluation matrix. The assessment of resolution plans based on the evaluation matrix may be subjective on certain parameters. Therefore, exclusion of otherwise compliant resolution plans, merely on the basis of application of evaluation matrix, and without subjecting them to voting of all creditors may not always yield the best resolution.

### **Proposed Amendment**

**4.4** It is proposed that Regulations be amended to include that where more than one compliant resolution plans are available, both the plans should be put to vote simultaneously. The plan that receives the highest affirmative votes, subject to receiving the requisite 66%, may be regarded as approved by the CoC. In an unlikely event of two or more resolution plans securing equal number of votes, the creditors (including those in a class) may be asked to vote for one of those. This voting for one of the plans may be conducted simultaneously with the voting for plans making it clear that this will be used as a tie breaker only when there is equality of votes.

### **Economic Analysis**

**4.5** A compliant resolution plan treated as best in terms of the evaluation matrix may not always be favourably voted by the CoC. The Hon'ble Supreme Court, in the matter of *K. Sashidhar v. Indian Overseas Bank & Ors.* had held that non recording of reasons for approval or rejection of a resolution plan by the concerned FCs during the voting in the meeting of CoC would not render the final collective decision of CoC nullity *per se*. Accordingly, the requirement in the Regulations [Reg. 39(3)] for recording of reasons for approval or rejection of resolution plan by CoC was substituted [w.e.f. 25th July 2019] with the requirement of only recording the deliberations on the feasibility and viability of the resolution plan. Thus, if a resolution plan considered best in terms of the application of evaluation matrix is not voted in favour by the CoC based on their commercial wisdom, then the CoC will be required to consider the next best resolution plan. This would only delay the process as it may require calling for a fresh CoC meeting provided the statutory maximum time limit has not expired.

**4.6** Therefore, it is in the interest of all stakeholders and to maintain the intent of the Code for time bound resolution that, the CoC is given an option to exercise their right to vote on all compliant resolution plans simultaneously according to their order of preference.

### **Amendment Regulations**

**4.7** A draft of the amendment regulations is given in Annexure.

### **5. Public Comments**

It is considered necessary to solicit public comments on the following points relating to the aforesaid three issues:

- (i) Whether a provision for replacement of AR is required? (Issue 1)
- (ii) If yes, whether the proposal in para 2.4 is adequate or any change is required? (Issue 1)
- (iii) Whether the voting by AR may only be recorded after circulation of minutes? (Issue 2)
- (iv) If no, suggestions on any other method for recording of votes by AR. (Issue 2)
- (v) Whether all the compliant resolution plans may be put to vote together. (Issue 3)
- (vi) If yes, whether the proposal in para 4.4 is adequate or any change is required? (Issue 3)

**6.** The Board accordingly solicits comments on the following:-

- (a) discussions points mentioned in Para 5 above; and
- (b) any specific regulations in the draft Insolvency and Bankruptcy Board of India (Corporate Insolvency Resolution Process) (Amendment) Regulations, 2020, placed at **Annexure**.

**7.** After considering the feedback, the Board proposes to make regulations in this regard, in exercise of its powers and functions under clauses (aa) and (d) of sub-section (1) of section 196 of the Code, to the extent necessary.

### **8. Submission of comments**

**8.1** Comments may be submitted electronically by 8th March, 2020. For providing comments, please follow the process as under:

- (i) Visit IBBI website, [www.ibbi.gov.in](http://www.ibbi.gov.in);
- (ii) Select 'Public Comments';
- (iii) Select 'Discussion paper - CIRP Feb20'
- (iv) Provide your Name, and Email ID;
- (v) Select the stakeholder category, namely, -
  - (a) Corporate Debtor;
  - (b) Personal Guarantor to a Corporate Debtor;
  - (c) Proprietorship firms;
  - (d) Partnership firms;
  - (e) Creditor to a Corporate Debtor;
  - (f) Insolvency Professional;
  - (g) Insolvency Professional Agency;
  - (h) Insolvency Professional Entity;
  - (i) Academics;
  - (j) Investor; or
  - (k) Others.
- (vi) Select the kind of comments you wish to make, namely,
  - (a) General Comments; or
  - (b) Specific Comments.
- (vii) If you have selected 'General Comments', please select one of the following options:
  - (a) Inconsistency, if any, between the provisions within the regulations (intra regulations);

- (b) Inconsistency, if any, between the provisions in different regulations (inter regulations);
- (c) Inconsistency, if any, between the provisions in the regulations with those in the rules;
- (d) Inconsistency, if any, between the provisions in the regulations with those in the Code;
- (e) Inconsistency, if any, between the provisions in the regulations with those in any other law;
- (f) Any difficulty in implementation of any of the provisions in the regulations;
- (g) Any provision that should have been provided in the regulations, but has not been provided; or
- (h) Any provision that has been provided in the regulations but should not have been provided.

And then write comments under the selected option.

**8.2** If you have selected 'Specific Comments', please select para/regulation number and then sub-para/sub-regulation number and write comments under the selected para/sub-para or regulation/sub-regulation number.

**8.3** You can make comments on more than one para/sub-para or regulation/sub-regulation number, by clicking on more comments and repeating the process outlined above from point 8 (vi) onwards.

**8.4** Click 'Submit', if you have no more comments to make.

**9.** This is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018.

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*(Source: Taxmann)*