

Insolvency and Bankruptcy Board of India

8th May, 2019

Discussion Paper on Corporate Insolvency Resolution Process along with Draft Regulations

This discussion paper assimilates the suggestions received on public portal, suggestions by mail /letters, suggestions received in round tables and the emerging jurisprudence.

Withdrawal under section 12A

2. Section 12A of the Code provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7, 9 or 10 of the Code, on an application made by the applicant with the approval of 90% voting share of the committee of creditors. Regulation 30A(1) of the CIRP Regulations requires that an application for withdrawal under section 12A shall be submitted to the Interim Resolution Professional (IRP) or Resolution Professional (RP), as the case may be, in Form FA of the Schedule to the said Regulations, before issue of expression of interest (EoI) under regulation 36A. Form FA provides for filing of application to the Adjudicating Authority (AA) for withdrawal of corporate insolvency resolution process (CIRP) through the IRP or RP, by an applicant who triggered CIRP.

2.1 There are several judgements on withdrawal under section 12A of the Insolvency and Bankruptcy Code, 2016 (Code).

2.2 In the matter of *Francis John Kattukaran Vs. The Federal Bank Ltd. & Anr.*, the Committee of Creditors (CoC) by a unanimous vote approved withdrawal of application following which the RP moved an application under section 12A of the Code. The NCLAT held that the RP cannot file an application for withdrawal of an application made under section 7, 9 or 10 of the Code. It held that regulation 30A cannot override the substantive provisions of section 12A. Accordingly, the applicant can only move an application for withdrawal of the application before the Adjudicating Authority, while the RP can't do so.

2.3. In the matter of *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal & Ors.*, withdrawal of application was not allowed, though agreed to by the corporate debtor (CD) as well as the creditors, because of the stipulation in regulation 30A of the CIRP Regulations that does not permit withdrawal after issue of invitation for EoI. The Hon'ble Supreme Court held that this regulation must be read along with section 12A. Accordingly, the stipulation in regulation 30A can only be construed as directory depending on the facts of each case. The Hon'ble Supreme Court reiterated this decision in the matter of *Swiss Ribbons Pvt. Ltd. Vs. Union of India* that regulation 30A(1) is not mandatory but directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for EoI under regulation 36A.

2.4. In the matter of *Swiss Ribbons Pvt. Ltd. Vs. Union of India*, the Hon'ble Supreme Court also considered the withdrawal of application where CoC is yet to be constituted. It held that in such cases, a party can approach the NCLT directly and the NCLT, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, may allow or disallow an application for withdrawal or settlement, after hearing all the concerned parties and considering all relevant factors on the facts of each case.

2.5. In view of the above rulings, it is proposed to amend CIRP Regulations to allow withdrawal of an application filed under sections 7, 9 or 10 of the Code at any time, (a) before constitution of CoC, (b) after constitution of CoC but before invitation of EoI, or (c) after invitation of EoI in exceptional cases, on an application made by the applicant.

Financial support to liquidator by members of CoC

3. It is observed that in some cases, the Liquidator faces an acute shortage of liquid funds during the liquidation process. In some cases, the assets of the CD are not enough to cover even the liquidation cost. In some other cases, the Liquidator faces scarcity of funds to meet liquidation cost till the sale of the assets. There are many activities, such as public announcement, that must be performed in all cases, irrespective of the size of the assets or resources of the CD.

3.1 In the matter of *Hind Motors*, the AA noted that the CD has no liquid assets and hence it is difficult to meet the expenses of liquidation. Accordingly, it clarified that the expenses of the public announcement and for service of process etc. incurred by the liquidator shall be reimbursed by the Union Bank of India presently and the same shall be part of liquidation cost.

3.2 It has been suggested by stakeholders that the cost of liquidation may be borne by the financial creditors upfront and the same may be recovered from sale of assets. This may, however, be burdensome for retail individual creditor. It is, therefore, proposed that secured institutional financial creditors may be obliged to bring in interim finance to run the CD as a going concern or liquidate the CD, if there are no liquid assets available to defray these expenses.

3.3 It is, therefore, proposed that the regulations may require the CoC to consider an agenda item, while rejecting a resolution plan or deciding to liquidate the CD, providing for liquidation expenses. It must consider the estimated amount of liquidated costs, the availability of liquid assets to meet liquidation costs, and balance amount required for meeting liquidation costs and require the secured institutional financial creditors to bring in upfront balance amount of liquidation cost, in an escrow account with a scheduled bank, within seven days of the liquidation order. The money brought in by the secured institutional financial creditors plus interest @ bank rate thereon shall be included in the liquidation cost. (Consequential amendments are also required in the Liquidation Regulations.)

Clarificatory Amendments

4. These amendments, which are clarificatory in nature, are proposed:

4.1 Model time-line for CIRP: Regulation 40A of the CIRP Regulations incorporates a table providing for the model time-line for a CIRP. Certain editorial changes are proposed to remove a few discrepancies in the model time-line. Regulation 27 of the CIRP Regulations requires that valuers shall be appointed by the RP within seven days of his appointment but not later than forty seventh day of the insolvency commencement date. However, the relevant item in the model time-line states ‘not later than 40th day of commencement’ under the heading “Norm”. Two provisions, namely, section 22(1) and regulation 19(1) have been clubbed in one row. These two provisions should be “Regulation 17(2)” and “Regulation 19(1)” and these two should appear in two separate rows. The first column has two cells, namely, regulation 13(1) and regulation 13(2) relating to claim verification. However, regulation 13(1) only deals with claim verification. These two cells should be merged with heading ‘Regulation 13(1)’.

4.2 Form H: The CIRP Regulations were amended, vide notification dated 24th January, 2019, to omit reference to dissenting financial creditors in Para 7 of Form H appended to that Regulations, as regulations relating to dissenting creditors were deleted from the CIRP Regulations, vide notification dated 5th October, 2018. Similar reference to dissenting financial creditors appearing in Para 9 in Form H is also required to be omitted.

4.3. Insolvency resolution process costs (IRPC): Regulation 31 of the CIRP Regulations enumerates the components of IRPC specified by the Board under section 5(13)(e) of the Code. There are a few inaccuracies in the references made to a section and a sub-regulation in clauses (aa) and (ab) of regulation 31. Clause (aa) lists: “*fee payable to the authorised representative under sub-regulation (7) of regulation 16A*”. The reference to sub-regulation (7) needs to be corrected as sub-regulation (8). Clause (ab) lists: “*out of pocket expenses of authorised representative for discharge of his functions under section 25*”. The reference to section 25 needs to be corrected as section 25A.

Public Comments

5. The proposals in the preceding paragraphs aim at bringing greater clarity regarding withdrawal of application admitted under sections 7, 9 or 10 of the Code and to facilitate provision of financial support to liquidator by specific members of the CoC.

6. This discussion paper is issued in pursuance to regulation 4 of the Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018. The Board accordingly solicits comments on:

- a. any specific para in this discussion paper; and
- b. any specific regulations in the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019, placed at Annexure A by **30th May, 2019**.

7. Comments may be submitted electronically by 30th May, 2019. For providing comments, please follow the process as under:

- (i) Visit IBBI website, www.ibbi.gov.in;
- (ii) Select ‘Public Comments’ and then select ‘Discussion Paper on CIRP’;
- (iii) Provide your Name, and Email ID;
- (iv) 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.
- (v) Select the kind of comments you wish to make, namely,
 - a) General Comments; or
 - b) Specific Comments.
- (vi) 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; and
- 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.

- (vii) 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.
- (viii) 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 7 (v) onwards.
- (ix) Click 'Submit', if you have no more comments to make.

**GAZETTE OF INDIA
EXTRAORDINARY
PART III, SECTION 4
PUBLISHED BY AUTHORITY**

**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
NOTIFICATION**

New Delhi,, 2019

**THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY
RESOLUTION PROCESS FOR CORPORATE PERSONS) (SECOND
AMENDMENT) REGULATIONS, 2019**

No. IBBI/2019-20/GN/REG____.- In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019.
(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations),-

(a) for regulation 30A, the following regulation shall be substituted, namely: -

“Withdrawal of application.

30A. (1) An application for withdrawal of an application filed under section 7, 9 or 10 of the Code may be made,-

- (a) before the constitution of the committee, by the applicant through the interim resolution professional; or
- (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule, to the Adjudicating Authority:

Provided that where the application is submitted to the resolution professional under clause (b) after the issue of expression of interest under regulation 36A, the applicant shall state in writing any special circumstance that necessitates withdrawal of application.

- (2) The application in sub-regulation (1) shall be accompanied by a bank guarantee

- (a) towards estimated expenses incurred on or by the interim resolution professional till the date of filing of the application under clause (a) of sub-regulation (1); or
- (b) towards estimated expenses incurred for purposes of clauses (c) and (d) of regulation 31 till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is made under clause (a) of sub-regulation (1), the interim resolution professional shall submit such application to the Adjudicating Authority on behalf of the applicant, within seven days of its receipt.

(4) Where an application for withdrawal is made under clause (b) of sub-regulation (1), the committee shall consider such application, within seven days of its receipt.

(5) Where the application under sub-regulation (4) is approved by the committee with ninety per cent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5). ”;

3. In the principal regulations, in regulation 31,-

- (a) in clause (aa), for “sub-regulation (7)”, “sub-regulation (8)” shall be substituted;
- (b) in clause (ab), for “section 25”, “section 25A” shall be substituted.

4. In the principal regulations, after regulation 39A, the following sub-regulation shall be inserted, namely:-

“Meeting liquidation cost.

39B (1) Where the committee decides to liquidate the corporate debtor under section 33 and the corporate debtor does not have sufficient assets in liquidation estate to meet the liquidation cost, the committee shall make a best estimate of the amount required for meeting such cost, after taking into account such assets available, before the expiry of the period referred to in clause (a) of sub-section (1) of section 33.

(2) Every member of the committee who is a financial creditor, other than individual member, in whose favour security interest has been created, shall within seven days of the passing of the liquidation order, deposit the amount referred to in sub-regulation (1), in proportion to its voting share, in a designated escrow account to be opened in a scheduled bank .

(3) The Adjudicating Authority may while passing the liquidation order authorise the liquidator to operate the account referred to in sub-regulation (2) to meet the liquidation cost.”

5. In the principal regulations, in regulation 40A, in the Table,-

(a) for the entries relating to ‘Regulation 13(1)’ and ‘Regulation 13(2)’, the following entries shall be substituted, namely:-

“Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days’ from the receipt of the claim	T+21
	Verification of claims received under regulation 12(2)		T+97”;

(b) for the entries relating to ‘Section 22(1)/Regulation 19(1)’, the following entries shall be substituted, namely: -

“Regulation 17(2)	1 st meeting of the CoC	Within 7 days’ of filing of report certifying constitution of the CoC	T+30
Regulation 19(1)	Notice period for 1 st meeting of the CoC	Atleast 5 days’ notice	T+25”;

(c) for the entries relating to ‘Regulation 27’, the following entries shall be substituted, namely: -

“Regulation 27	Appointment of valuer	Within 7 days’ of appointment of RP, but not later than 47 th day of commencement.	T+47”;
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6. In the principal regulations, in the Schedule, for Form FA, the following Form shall be substituted, namely:-

**FORM FA
APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY RESOLUTION
PROCESS**

(Under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

To
The Adjudicating Authority

[Through the Interim Resolution Professional / Resolution Professional]

[name of corporate debtor]

Subject: Withdrawal of Application admitted for corporate insolvency resolution process of [name of corporate debtor]

I, [name of applicant], had filed an application bearing [particulars of application, i.e, diary number/ case number] on [Date of filing] before the Adjudicating Authority under [Section 7 / Section 9/ Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].

2. I hereby withdraw the application bearing [particulars of application, i.e, diary number/ case number] filed by me before the Adjudicating Authority under [Section 7 / Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016.

3. I authorize the interim resolution professional/resolution professional to file this application of withdrawal with the Adjudicating Authority on my behalf.

4. I attach the required bank guarantee as per sub-regulation (2) of regulation 30A and approval of the committee of creditors, if applicable.

(Signature of the applicant)

Date:

Place:

[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorized for the purpose by the entity]

7. In the principal regulations, in the Schedule, in Form H, in paragraph 9, for the entries relating to Regulation 38(1), the following entries shall be substituted, namely: -

“Regulation 38 (1)	Whether the Resolution Plan provides for the amount due to the operational creditors to be given priority in payment over financial creditors.”.		
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Dr. M. S. Sahoo
Chairperson
Insolvency and Bankruptcy Board of India
[ADVT]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published in the Gazette of India Extraordinary vide notification No. IBBI/2016-17/GN/REG004 on 30th November, 2016 and was subsequently amended by—

- 1) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG013, dated the 16th August, 2017;
- 2) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG018, dated the 5th October, 2017;
- 3) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG019, dated the 7th November, 2017;
- 4) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017 vide notification No. IBBI/2017-18/GN/REG022, dated the 31st December, 2017;
- 5) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Amendment) Regulations, 2018 vide notification No. IBBI/2017-18/GN/REG024, dated the 6th February, 2018;
- 6) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Second Amendment) Regulations, 2018 vide notification No. IBBI/2017-18/GN/REG030, dated the 27th March, 2018,;
- 7) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 vide notification No. IBBI/2018-19/GN/REG031, dated the 4th July, 2018,;
- 8) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2018 vide notification No. IBBI/2018-19/GN/REG032, dated the 5th October, 2018; and.
- 9) The Insolvency and Bankruptcy Board of India (Insolvency resolution Process for Corporate Persons) (Amendment) Regulations, 2019 vide notification No. IBBI/2019-20/GN/REG040, dated the 24th January, 2019.