

Recent amendments in IBC Regulations

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- Vinod Kothari and Company, consultants and advisors
 - Based out of Kolkata, New Delhi & Mumbai
- We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Key highlights of recent amendments (1/2)

<p><u>IRPCP (3rd Amendment) Regulations, 2022</u> [w.e.f. 13th Sept, 2022]</p>	<ul style="list-style-type: none">• Minimum fee to be paid to IRP/RP on the basis of quantum of claims• Performance-linked incentive fee for timely resolution introduced.
<p><u>IRPCP (4th Amendment) Regulations, 2022</u> [w.e.f. 16th Sept, 2022]</p> <p>[Based on recommendations in <u>Discussion Paper</u> (June, 2022)]</p>	<ul style="list-style-type: none">• Communication to all creditors besides public announcement• Resolution plan for partial sale of assets of CD• Information memorandum related changes - timelines, contents, etc.• Marketing strategy mandatory in certain cases• Assessment of compromise/arrangements while deciding for liquidation, and exploring possibilities while application for liquidation is pending• Indicative factors for consideration of CoC before applying for liquidation
<p><u>IRPCP (5th Amendment) Regulation, 2022</u> [w.e.f. 1st Oct, 2022]</p>	<ul style="list-style-type: none">• Regulatory fee to IBBI on the basis of realisable value in CIRP in certain cases, and also on the basis of cost incurred on professionals and services
<p><u>Voluntary Liquidation Process (2nd Amendment) Regulations, 2022</u> [w.e.f. 16th September, 2022]</p>	<ul style="list-style-type: none">• In addition to declaration of solvency, declaration for preservation of records to be provided by the directors• List of documents to be preserved and manner of preservation

Key highlights of recent amendments (2/2)

Liquidation Process (2nd Amendment) Regulations, 2022
[w.e.f. 16th September, 2022]

- Constitution and role of SCC has been made wider
- Provision w.r.t replacement of liquidator
- Timelines for certain actions under auction process has been specified
- Designation of auction portal
- Provisions w.r.t. dealing with avoidance transactions after dissolution/closure of liquidation
- Manner of preservation and list of records to be preserved

Insolvency Professionals (Amendment) Regulations, 2022 [w.e.f. 4th July, 2022]

- Additional responsibility on IP w.r.t. exercising reasonable care and diligence and taking all necessary steps to ensure that the CD complies with the applicable laws
- Any amount towards any loss, including penalty incurred on account of non-compliance of any provision of the laws applicable on the CD shall not be included in CIRP /Liquidation Cost
- Disclosure of relationship to IPA

Insolvency Professionals (2nd Amendment) Regulations, 2022
[w.e.f. 13th September, 2022]

- An IP shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes

Insolvency Professionals (3rd Amendment) Regulations, 2022
[w.e.f. 1st October, 2022]

- Increase in fee payable to IBBI

Major themes

- Value maximisation in CIRP:
 - Partial or piecemeal resolution
 - Marketing plan for assets
- Compromise/arrangement possibility right from the time of resolution
- Early liquidation and factors for considering liquidation at resolution stage
- Payment of fees to IBBI based on realisable value
- Greater role to SCC in liquidation
- Replacement of liquidator based on SCC vote
- Avoidance application - a copy to be shared with acquirer
- Treatment of avoidance proceedings on dissolution/closure of liquidation proceedings
- IM - statutory contents made wider
- Going concern sale:
 - exclusively only at the first auction
 - from the second auction, simultaneously explore other modes of sale
- Designated auction portals
- Auction timelines are hardwired into the law
- IPs under greater responsibility
 - to be responsible for all compliances; cost of non-compliance not to be part of the process costs
 - not to share ib fees of professionals appointed under any process
- Preservation of documents under voluntary liquidation

Genesis of Partial resolution by splitting the entity

Standing Committee of Parliament (32nd Report): [Aug., 2021]

“More Flexible Resolution Plans

7. Sec 5(26) of IBC defines a resolution plan as a plan proposed by RA for insolvency resolution of the CD as a going concern. RPs, CoCs, and certain orders of the NCLT indicate that the term ‘going concern’ implies that the resolution plan must result in disposal of the entire business & and operation of CD under I plan. Actual experience has shown that bidders may be interested in selected business units or assets, rather than entire business.... However, the RP does not currently have the flexibility within the IBC to dispose of the CD across multiple bidders.

The Parliamentary Committee noted that the Regulations already permit partial sale; however, in view of the enabling provisions missing in the Code, the Committee wanted insertion of provisions in the Code

- Motives for partial resolution (Discussion paper dated 27th June, 2022)
 - Assets of CD are located at different locations and consist of both functional & non-functional assets
 - RAs interest in functional/assets at I location are not interested in other assets
 - Additional investment in other assets becomes too high and hence RAs are unwilling to put a resolution plan
 - Non-receipt of resolution plan leads to slipping in liquidation where realization is far less than what is expected in CIRP stage
- The Discussion paper expressed concerns as to what will happen with remaining liabilities; however, no specific recommendations about the same

Partial resolution by splitting the entity - Reg. 36B(6A), reg 37 (I) (m)

- Two amendments:
 - Reg 36B (6A) - if the RP does not receive resolution plans in response to RFRP, he may, with approval of the CoC, issue RFPF for assets of the CD
 - Reg 37 (I) (m) - Res Plan may provide for sale of one or more assets of CD to one or more successful RAs, and the manner of dealing with the remaining assets
 - Sale of assets as a part of the resolution process was never barred
 - Reg 29 specifically dealt with sale of assets outside the ordinary course of business, with 66% CoC vote
 - Reg 29 sale is sale outside of resolution plan
 - Jet Airways case - NCLAT has affirmed sale
 - Reg 37 (I) (a), (b), (ba) provide for transfer of business, part of business, sale of assets, corporate restructuring including demerger - as a part of resolution plan
 - Hence, difficult to see how the present amendments achieve anything new
- Reg. 29 permits
 - sale of unencumbered assets
 - outside ordinary course of business
 - sale being necessary for better realisation in view of facts and circumstances of the case
 - book value of all assets sold during CIRP should not exceed 10% of total claims admitted
 - approval of CoC by 66%
 - bona fide purchaser to have free and marketable title notwithstanding shareholder agreements, constitutional documents, etc.
 - Piecemeal Resolution plan:
 - In case of entities with diverse businesses, it opens up possibility of resolution plan for one business succeeding, without waiting for the others

Evaluation of economics of split sales

- Multiple going concerns, that is, a conglomerate business, with multiple stand-alone businesses
 - interconnection is not ruled out; however, they may operate individually
 - Diverse businesses may have diverse operational economics; the sum of the parts may be better than the whole
 - There are cases where one business has become burdensome, relative to others; its economic model has become stale
- Business or operating segments is a very common situation in many businesses
- More complex businesses may have:
 - Undertakings in different countries, housed in different vehicles
 - undertakings housed in common vehicle
- Sale of assets:
 - Unencumbered
 - Encumbered to specific creditors
 - Encumbered to all or several creditors
- Approaches:
 - multiple undertakings, multiple RAs, all at one time
 - multiple undertakings, multiple RAs, at multiple times
 - single undertaking, multiple assets, multiple RAs
 - i.e. piecemeal sale of assets
- How will the process run?
 - Regulations provide for first inviting resolution plans for the entire business
 - therefore, split sales is only the next option
 - Resolution plan to provide for manner of dealing with remaining assets - this seems to envisage getting AA orders for partial resolution
- Effectively, is this any different from:
 - piecemeal sale of assets/business, already permitted
 - or demerger of the entity in different undertakings?

Partial resolution plans - envisaging how it will work?

- If one of the businesses is healthy and asset positive, it will be easiest to hive it off
- In adjoining example:
 - Business B goes and gives a net value to the remaining undertaking
 - It will be a value destroying proposition to sell the entire undertaking to a common acquirer
- Slump sale of assets may have been envisaged, but that will
 - involve either GST or stamp duty, and capital gains
- De-merger u/s 72A (4) would have been tax neutral - however, consent of all creditors required
- Resolution plan providing for demerger will save need for creditors' separate meetings
- Where it is so intuitive, why wait for a consolidated Res plan first?
- Where it is not so intuitive, why not invite both types of res plans from the inception?

Conglomerate Limited				
	Business A	Business B	Corporate	Total
Assets	1000	2000	500	3500
Secured creditors	1500	800	800	3100
Unsecured creditors	500	800	1000	2300
NAV	-1000	400	-1300	-1900

Reorganising by splitting of an entity - global position

- United States
 - Chapter 3 - Case administration
 - Sec. 363(b)(1)
 - The trustee, after notice and hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate (certain exceptions are there)
 - Chapter 11 - Reorganisation
 - Sec. 1123
 - A reorganisation plan should provide adequate means for its implementation, including, transfer/sale of all or part of the property
- United Kingdom
 - Has provisions for pre-packaged sale in administration (see, [SIP 16](#)), subject to restrictions on sale to connected persons
 - Pre-packaged sale may be sale of all or part of the company's business or assets
 - Where the sale involves a substantial disposal to a connected person, there are additional statutory obligations placed upon the purchaser and administrator - see [SIP 13](#)
 - UNCITRAL Legislative Guide too, talks about various forms of reorganisation, including sale of non-core assets

Asset marketing strategy - a motherhood law?

- Reg 36C provides for marketing strategy for assets:
 - mandatory for balance sheet value of assets of >Rs 100 crores; optional in other cases
 - What is marketing strategy:
 - Discussion paper spends a bit of a space on the issue
 - Seemingly referring to engaging professional services for marketing
 - including use of advertising platforms
 - Reg 36C is mandatory:
 - Is it mandating what was purely intuitive? Is law putting prescriptive wisdom?
 - Unlikely that RPs/CoCs would have gone without any strategy in asset sales
 - However, there will possibly have to be more structured approach to marketing
- Potential contents of a marketing strategy:
 - Identification of assets and market of the CD, core business strengths and value drivers, potential RAs
 - Devising communication strategy:
 - Press publicity
 - News media/social media
 - IBBI portal?
 - Results-based marketing professional services
 - Contents of the IM and how contents may result into value maximization

Information memorandum - increased timelines and contents

- Reg. 36 of CIRP Regs. provides for submission of IM to members of CoC
 - within 2 weeks of appointment of RP or T+54 days, whichever is earlier
 - now, amended to T+95 days
 - subject to NDA
- DP states: IM, *per se*, not necessary at the time of issuing EoI, but necessary for resolution applicants
- Reg. 36B(1) requires sharing of IM with PRAs within 5 days of issue of provisional list
 - Hence, maximum timeline for preparation of IM becomes T+90 days
 - Gap of 5 days; hence, inconsistency
- Applicability
 - CIRP where IM already issued - will it need modifications?
- Addition to the contents of IM
 - key selling propositions
 - 'comprehensive document' conveying 'significant information'
 - operations, financial statements
 - liabilities, including 'contingent liabilities'
 - as per books of accounts? as per claims?
 - geographical coordinates of fixed assets
 - company overview - over and above the assets of CD - which bring out the value as a going concern
 - snapshot of business performance, key contracts, key customers, brought forward losses, key employees, supply chain linkages, utility connections, pre-existing facilities, etc.
 - details of business evolution, industry overview and key growth drivers in case of CD having assets exceeding Rs. 100 crores (book value as per last available financial statements)

Exploring possibility of compromise/arrangements during resolution phase

- Reg. 39BA inserted in CIRP Regs.
 - relevant where the CoC decides liquidation
 - CoC shall simultaneously examine whether to explore compromise/arrangement
 - Recommendation of CoC to be submitted to AA along with application for liquidation
- In case recommendation is to explore compromise or arrangement
 - possibility shall be explored during interim period when the application for liquidation is pending before AA
- Amendment in Liquidation Regs. - second proviso inserted in reg. 2B(1)
 - where there is recommendation under reg. 39BA of CIRP Regs., proposal should be filed within (LCD+30) days
 - Timelines to complete the process within (LCD+90) days remain unchanged.
- How will it work?
 - once liquidation order is passed, liquidation proceedings will not move if the proposal is filed
 - On acceptance of proposal, CD enters into sec. 230 proceedings
- Data shows only 8 cases closed by way of compromises/arrangements (upto May, 2022) , average time taken 466 days, realisation 87% of liquidation value - [Pg 4 of DP]
- DP acknowledges that timeline of 90 days is perceived as 'directory' by AAs.
- Proposal was also to reduce timeline of 90 days to 30 days
 - however, remains unchanged; though proposal to be filed within LCD+30 days
- Whether the amendments provide a tangible solution?
- Applicability where application for liquidation already filed?
 - Can CoC examine possibility of sec. 230 now?

Early liquidation and relevant factors

- Reg. 40D inserted in CIRP Regs.
 - CoC, while deciding on liquidation, may consider various factors (see below)
 - to be recorded and submitted in the application for liquidation
- Relevant factors include (not limited to):
 - non-operational status for preceding 3 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
- Various past rulings allowing liquidation before attempting for resolution
 - In *M/s Chivas Trading Pvt. Ltd. v. M/s Abhayam Trading Ltd.*, NCLT allowed liquidation on grounds of lack of business opportunity.
 - In *CA Rajendra K. Bhuta v. Best Deal TV Pvt. Ltd.*, CoC resolved to liquidate the company as the business activities had closed down and all employees had left the company.
 - In *VIP Finvest Consultancy Pvt. Ltd. v. Bhupen Electronic*, the company was liquidated as it was non-operational for decades, it did not have any employees and hence no resolution plan was received by CoC.
 - In the matter of *Esskay Motors Pvt. Ltd.*, CoC decided to liquidate the company as the revival of company was not possible and in the wisdom of CoC, inviting bids from interested parties would only prolong the process without yielding any fruitful result.

Stakeholders Consultation Committees in liquidation

- SCCs have become a part of the liquidation process since the 2019 amendments
- Even if the Covid period was a temporary break, it was necessary to have evaluated the present working of the SCCs in existing liquidations:
 - Important distinction between CoCs and SCCs
 - CoCs are mainly comprised of banks/ARCs; people who have been in resolution business
 - These are the creditors whose claims are large, and they can easily correlate their recoveries with the resolution process
 - Mostly, they are first-ranking creditors
 - SCC members come from diverse priority levels; mostly, will have very little chance of any recovery
 - They will mostly have no prior experience of resolution process
- Questions:
 - Decision-making is directly related to incentives of the decision; will a creditor (operational creditor, government claims, employees), with very little chance of any realisation, make meaningful contribution to the decision-making process?
 - Is SCC a decision-making body, or advisory body?
 - In any decision-making forum, the incentive to deciding is the consequence of indecision
 - Creditors lose their last chance to be masters of the process by not agreeing to resolution; are they still properly considered master of the process?
 - Incentives of SCC members at different priority levels are completely misaligned:
 - Note that it includes promoters without voting rights and shareholders too

Constitution of Stakeholders Consultation Committees

- Some parts of Reg 31A as it stands after amendment easy to understand; however, the whole process of constitution of the SCC seeks quite difficult to understand; may be even more difficult to implement
- Clear part:
 - Until SCC is constituted, CoC will continue
 - first meeting is to be called within 7 days - hence, obviously, it is the meeting of the CoC members now on SCC
- However, within 60 days of LCD, liquidator needs to constitute a proper SCC
 - reg 31A (1) says: “comprising of all creditors of the corporate debtor”
 - While there is a provision for appointment of representatives, it seems all the creditors are a part of the SCC
- Amended regulation neither talks the size of the SCC, nor the number of representatives from each class of creditors
- Classes: 31A (3)
 - Financial creditors
 - How can financial creditors have just one class? There are secured and unsecured creditors, retail creditors such as debentureholders, etc
 - workmen
 - employees
 - government departments
 - other operational creditors
 - shareholders/ partners - no voting share
- These representatives, in turn, are to be appointed by the respective classes: “liquidator may facilitate”
 - practically, there is no other way the stakeholders in a class know each other - therefore, the liquidator shall have to
 - This seems like a complete election process for each class, virtually unmanageable

Scope of SCC powers: have we moved from consultation to compulsion?

- Reg 31A (1) confers consultation powers to SCC:
 - Remuneration of professionals - even advocates engaged for litigation are professionals
 - sale of assets - manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process
 - These are core liquidator functions. If all these are driven by SCC, basic question on what is the professional doing?
 - Fees of the liquidator:
 - This is to be read with reg 4 (1A) - the liquidator's fees are to be fixed by the SCC
 - Question - will a liquidator take up the job with no clarity on his fee?
 - Valuations
 - Vulnerable transaction proceedings be continued after close of liquidation, and the manner of distribution of proceeds
- Decision-making at the SCC:
 - Voting share shall be in proportion to the claim
 - irrespective of priority
- 31 (4A) provides that the representative of a class has voting rights of the “stakeholders it represents”, meaning the whole class
 - This is conflicting with sub-reg (2), which is talking about the stake of the voting member
 - It cannot be that a class has both a class representative as well as individual member
- in case of shareholders, this will exclude the voting share of the promoters/directors
- If a class representative is voting on the strength of the whole class, does he consult the constituents of the class as well?

SCC meetings - reg 32B

- Reg 32B makes a sweeping import of the provisions of Reg 18 to 26 of CIRP Regulations to meetings of the SCC too
- 18 - calling of meeting as and when necessary; requisitioned meetings
- 19 - notice of meeting
- 20 - service of notice by electronic means
- 21 - contents of the notice
- 22 - quorum - minimum 33% voting rights
 - this would create tremendous difficulties, where shareholders constitute a larger class
- 23 virtual meetings
- 24- conduct of virtual meetings
- 25 - committee meetings in case of actions listed in Sec 28 (1) of the Code
 - these matters are all related to resolution; hence, difficult to see how they can be useful in liquidation
- 25A -class representative
 - the whole concept does not apply in resolution
- 26 - voting through electronic means

Wider constitution and role of Stakeholders Consultation Committee (SCC) (1/3)

<i>Point of comparison</i>	<i>Before Amendment</i>	<i>After Amendment</i>	<i>Remarks</i>
Constituents and participants	Classes of creditors depending upon the extent of proportion of the claims of such class to the liquidation value	All creditors of CD irrespective of proportion of claim: financial creditors, workmen, employees, government departments., other operational creditors, etc. Promoters and partners, directors allowed to attend meetings without voting rights. To be reconstituted within 30 days of these amendments	Those creditors who have remote prospects of receiving any distribution also included in SCC. Wider the SCC, more are the chances of conflict, delays, etc. Attendance of promoters and directors in SCC meetings may hamper the progress of liquidation on instances of non-cooperation and compromise the confidentiality. Not being stakeholders, permitting them to attend SCC is counter intuitive.
Interim SCC	No interim SCC. Decisions of liquidator taken before constitution of SCC had to be placed in 1st meeting for information	Sub-reg. (1A) inserted. Till constitution of SCC, CoC formed during CIRP shall act as SCC with the same voting rights.	SCC, as before, is to be constituted within T+60 days.
Representation	Liquidator to facilitate nomination by each class. In case the stakeholders fail to nominate, representatives to be selected by majority voting (present and voting).	Explicit reference to stakeholders included - that is, liquidator to facilitate nomination by each class, namely, financial creditors in a class, workmen, employees, government departments, other operational creditors, shareholders, partners	The process of nomination could be time-consuming for huge classes (such as workmen), hence delaying liquidation. Representatives for a small class (such as secured financial creditors) may not be necessary.

Wider constitution and role of Stakeholders Consultation Committee (SCC) (2/3)

<i>Point of comparison</i>	<i>Before Amendment</i>	<i>After Amendment</i>	<i>Remarks</i>
Voting share	SCC included representatives of all class of stakeholders, irrespective of the amount of their claims and decisions were taken basis approval of prescribed percentage of votes by the representatives of SCC, present and voting	Voting share of a member is in proportion of his claim to total admitted claim Representative shall vote in proportion of the voting share of the stakeholders it represents. FC who is a RP not allowed to vote Secured creditor not relinquishing not allowed to vote	
Matters on which SCC to advice	<ul style="list-style-type: none"> - appointment of professionals and their remuneration - sale of assets, including manner of sale, pre-bid qualifications, reserve price, marketing strategy 	<ul style="list-style-type: none"> - remuneration of professionals - sale of assets, including auction - fees of liquidator - valuation of assets - proceedings relating to preferential/undervalued/extortionate credit transaction or wrongful trading 	'advisory' role of SCC enhanced to a large extent
Majority decision	By a vote of not less than 66% of the representatives of the SCC, present and voting	By a vote of not less than 66% of the representatives of the SCC, voting	Omission of 'present' to have implications on voting process

Wider constitution and role of Stakeholders Consultation Committee (SCC) (3/3)

<i>Point of comparison</i>	<i>Before Amendment</i>	<i>After Amendment</i>	<i>Remarks</i>
Meeting	<ul style="list-style-type: none"> - Liquidator to convene the meeting when he deemed necessary - On a request received from at least 51% of representatives, liquidator to mandatorily convene the meeting 	<ul style="list-style-type: none"> - Liquidator to convene the first meeting within (LCD+7) days - On a request received from member(s) having at least 33% voting rights, liquidator to mandatorily convene the meeting - Rules of meetings of CoC (reg. 18-26 of CIRP Regs.) shall apply to meetings of SCC [new insertion - reg. 32B] 	<ul style="list-style-type: none"> ● Reg. 19-21 of CIRP Regs: Length of notice - 5 days (can be upto 24 hrs); service by electronic means, contents of notice ● Reg. 22- Quorum- members representing at least 33% of VRs (can be reduced by CoC) ● Reg. 23 - participation through VC ● Reg. 24 - RP as chairman, roll call, minutes to be circulated within 48 hrs of the meeting ● Reg. 25-25A - voting by CoC, AR ● Reg. 26 - voting by electronic means, circulate records within 24 hrs of conclusion of voting
Decision-making by liquidator	<p>Advice of SCC not binding on liquidator</p> <p>Record reasons while deviating from the decision of SCC</p>	<p>Additionally,</p> <p>Submit the record of decision to AA and IBBI within 5 days of decision</p> <p>Include in progress report</p>	<p>Additional obligations upon liquidator may be counter intuitive as the advice of SCC is not binding</p>
Power to propose replacement of liquidator	<p>No such explicit power granted to SCC</p>	<p>SCC can propose replacement of liquidator by a majority vote of not less than 66% and apply to AA for the replacement. Reasons to be recorded</p>	<p>Grounds for replacement of liquidator are not specified.</p>

Treatment of avoidance proceedings on dissolution/closure of liquidation proceedings

- Existing provisions under reg. 44(1) allow liquidation within 1 year 'notwithstanding' pendency of avoidance applications before AA
- Still, one of the most grey areas; diverse rulings
- Lack of clarity on the fate of avoidance proceedings, as also acknowledged in DP
- In the matter of *Venus Recruiters Private Limited v. Union of India*, Delhi HC held that RP cannot wear the hat of former RP and pursue an avoidance application after CD has changed hands. However, in case of liquidation, liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions.
- Reg. 44A inserted in Liquidation Regs.
 - Manner in which avoidance proceedings will be pursued after dissolution/closure of liquidation proceedings
 - Manner in which the proceedings shall be distributed
 - To be filed by the Liquidator in the application with final report, **on the advice of SCC**
- Advice of SCC - going by reg. 31A(9), ascertained by a vote of not less than 66% of the representatives of SCC, voting
 - earlier, it was 'present and voting'
 - what if, there is no 'advice'?
- Provision silent on role/remuneration of liquidator/possibility of another IP/professional handling the avoidance proceedings
 - however, seemingly flexible
- However, the amendment reinforces the view that the closure/dissolution of liquidation proceedings will not stop owing to pendency of avoidance proceedings.
- Applicability to ongoing liquidations:
 - No explicit provision; however, should be allowed being an enabling one

Going concern sale; auction related timelines

- Going concern sale under reg. 32A
 - 'exclusively' only at the first auction
 - second auction onwards, other modes to be explored as well
 - that is, GCS cannot be an 'exclusive' mode 2nd auction onwards; although can be one of the 'options'
 - DP (Liq.) states: *If the first auction notice has been issued for sale of the corporate debtor as a going concern only, it is proposed that the second auction notice shall also include the possibility of selling the assets in other manner(s) though it may give an option of selling CD as a going concern as well*
 - Earlier, the language indicated, if the liquidator was unable to sell the CD/business of CD as a going concern within 90 days, he shall proceed under other options.
- Reg. 44(1) provides time of 1 year for completion of liquidation
 - Proviso allowed extra time of 90 days if sale was attempted under reg. 32A(1) (GCS)
 - Proviso has been omitted, that is, no extra time if GCS is attempted

- Empanelment of auction portals
 - Liquidator would be allowed to sell assets only through empanelled auction portals
 - Date to be notified by a circular
- Timelines for various stages in auction (subject to reg. 2B - compromises/arrangements):

Public notice for an auction	Max. LCD+ 45 days (unless SCC advises to extend)
Second notice (in case 1st auction fails)	15 days from last failed auction (unless the SCC advises to deviate)
Completion of any auction process	35 days from the issue of public notice
Minimum time for submission of eligibility documents by bidders	14 days from issue of public notice
Minimum time for inspection/due diligence to qualified bidder	7 days from the date of declaration of qualified bidder
Timelines for depositing EMD	At least 2 days before the date of auction

Greater responsibility on IPs, performance-linked fee

■ IP Amendment Regulations

- disclosure of relationship with CD and professionals engaged, raise bills in own name [previous IBBI Circular of 2018]
- Exercise reasonable care and diligence, take necessary steps to ensure CD complies with applicable laws [reg. 27A]
- Reg. 27B: *“An insolvency professional shall not include any amount towards any loss, including penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting the insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process, under the Code”*
 - Previous IBBI Circular in Jan, 2018, ***It is also clarified that the insolvency professional will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct.***
- IP 2nd Amendment Regulations, para 26A inserted in code of conduct: *“An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes”*
- IP 3rd Amendment Regulations - increased/additional regulatory fee to IBBI

■ CIRP 3rd Amendment Regulations

- Reg 34B inserted, read with schedule II
- Min. fee prescribed for IPs (basis quantum of claims admitted): Max. 5 lakhs
 - Applicable for IRPs/RPs appointed on or after 1st Oct, 2022,
 - for period from date of appointment to date of submission of application for approval of plan/liquidation/withdrawal/closure of CIRP (whichever is earlier)
 - fee to be decided by applicant/committee post expiry of the period
- CoC may fix higher amount of fee
 - for the reasons to be recorded,
 - consider market factors such as size and scale of business operations, business sector, level of operating economic activity, and complexity related to process.
- Performance linked incentive fee, for resolution plan approved by CoC on or after 1st October, 2022
 - upto Rs. 5 crores in accordance with structure below or “CoC may extend any other performance-linked incentive structure as it deems necessary”
 - **for timely resolution:** slab based, max. 1% of realisable value, for resolution within or upto 165 days, 0 for above 330 days
 - **for value maximisation:** @1% of (realisable value - liquidation value)
 - to be paid after approval of plan by AA, on payment of amount to creditors by RA
 - realisable value= value payable to creditors in the resolution plan

Increased/additional regulatory fee to IBBI

- Two-fold amendments
 - Amendments in IP Regs.
 - Amendment in CIRP Regs.
- IP Regs.:
 - Reg. 7(2)(c) - Increased from Rs. 10000 to Rs. 20000, every 5 years
 - For IPEs, Rs. 2 lakhs
 - Reg. 7(2)(ca) - Increased from 0.25% to 1% of the professional fee earned as IP in preceding FY
 - Reg. 7(2)(cb) - Fee under reg. 31A of CIRP Reg. to be paid within 30 days, after end of each quarter or upon closure of the process, whichever is earlier
- CIRP Regs. (5th Amendment), insertion of reg. 31A
 - Fee based on 'realisable value' to creditors
 - 0.25% of realisable value
 - applicable only on plans approved
 - only where realisable value > liquidation value
 - applicable only on plans approved after 1st Oct, 2022
 - Fee based on cost
 - 1% on 'costs' , as below
 - Cost booked as IRP costs in respect of hiring of professionals and other services taken by IRP/RP for assistance in CIRP



Insolvency Resolution Process of Corporate Persons Regulations- Other Amendments



IRPCP (4th Amendment) Regulations, 2022 - other amendments (1/2)

Amended provision	Remarks/Concerns
<p><u>Reg. 4C: Process e-mail</u> IRP to open a separate email account for communicating with stakeholders. Subsequently, the credentials of which shall be handed over to RP or liquidator, as the case may be</p>	<ul style="list-style-type: none"> • IBBI Circular (3rd Jan, 2018) allowed using process email - to continue using until 6 months from conclusion of role. • Reg. 4C is mandatory
<p><u>Reg. 6A: Communication to creditors</u> IRP to send communication regarding appointment along with public announcement to all the creditors as per last available books of accounts of CD</p>	<ul style="list-style-type: none"> • Scope of “all the creditors”; note, shareholders are also ‘claimants’ • Meaning and scope of last available books of accounts • Timeline for making communication -note, public announcement is to be made not later than 3 days from appointment • where not possible to send, public announcement shall be deemed to be the communication
<p><u>Exp. To Reg. 18(2): Meeting of CoC</u> CoC can request the RP to call a meeting till the resolution plan is approved or liquidation order is passed only to decide on matters which do not affect resolution plan submitted to AA</p>	<ul style="list-style-type: none"> • Rulings holding RP as ‘<i>functus officio</i>’ post application for approval of resolution plan. See M/S Venus Recruiters v. UOI, (Delhi HC) and M/S Regen Powertech v. Veeral Controls, (NCLT). • Similar ambiguity as to status of CoC. See M/S Orbit Electro v. Siddharth Shah, - NCLAT held that AA cannot direct reconsideration of an approved Resolution Plan to CoC as after the approval, the CoC becomes <i>functus officio</i>. See also, PNB v. Kiran Shah, (NCLAT) • DP states the purpose: “keep the CoC informed on the progress of CIRP, approval of resolution plan, and matters relating to operations of the CD”

IRPCP (4th Amendment) Regulations, 2022 - other amendments (2/2)

Amended provision	Remarks/Concerns
<p><u>Reg. 35A(3): Preferential and other transactions</u> Application to AA for appropriate relief w.r.t. vulnerable transaction to be made within 130 days from ICD A copy of application filed with the AA for seeking appropriate relief for vulnerable transactions is to be forwarded to the prospective RAs as well</p>	<ul style="list-style-type: none">DP states time for filing avoidance application coincides with the time for filing plan, hence the amendment
<p><u>Reg. 36(A)(1): Invitation for EOI</u> Invitation for submission of expression of interest to be published within 60 days from ICD</p>	Earlier, ICD+75
<p><u>Reg. 36C: Strategy for marketing of assets of CD</u> A strategy for marketing of the assets of the CD is to be made in consultation with the CoC where total assets as per the last available financial statements exceed 100 Cr. Voluntary in other cases</p>	



Liquidation Process 2nd Amendment Regulations- Other Amendments



Liquidation Process 2nd Amendment Regulations, 2022 - other amendments (1/2)

Amended provision	Remarks/Concerns
<p><u>Reg. 4(1A): Liquidator's fee</u> If fee of liquidator is not fixed by CoC, the same may be fixed by SCC in its 1st meeting</p>	<ul style="list-style-type: none"> Permits SCC to fix fee where no such fee has been fixed by CoC under reg. 39D of the CIRP Regs.
<p><u>Reg. 12(2)(c): Public announcement by liquidator</u> Public announcement to provide that the liquidator shall also consider claims submitted during CIRP if not separately submitted during liquidation</p>	<ul style="list-style-type: none"> Where a stakeholder fails to submit claim during liquidation, his claims collated during CIRP shall be deemed to be submitted u/s 38. Should be indicated in the public announcement
<p><u>Reg. 12A: Process email id</u> Liquidator to operate the email a/c handed over by RP</p>	<p>So, no new ID is to be created, and old ID to be continued</p>
<p><u>Reg. 15(1): Progress report</u> Progress Reports, in the format stipulated by IBBI, to be submitted to the AA and the IBBI</p>	<p>Obligation upon liquidator to apprise AA as well as IBBI of the progress in liquidation. Existing obligation u/s 208. Further specific format to be prescribed by IBBI</p>
<p><u>Proviso to Reg. 15(4)</u> Omitted</p>	<p><u>Proviso to Reg. 15(4) imposed</u> restriction on access to the statement indicating expected realization of assets in the Progress Report. Hence, the details now may be shared without AA approval in accordance with reg. 5(3).</p>

Liquidation Process 2nd Amendment Regulations, 2022 - other amendments (2/2)

Amended provision	Remarks/Concerns
<p><u>Proviso to Reg. 30: Verification of claims</u> Liquidator to also verify the claims submitted during CIRP but not submitted during liquidation</p>	<p>This corresponds to the insertion of reg. 12(2)(c).</p>
<p><u>Reg. 34(1): Asset Memorandum ('AM')</u> Cases where fresh valuation is not required, AM to be formulated within 30 days of LCD on the basis of IM</p>	<p>Timeline for preparation for preparation of AM is reduced from LCD+75 days</p>
<p><u>Reg. 34(1A): Asset Memorandum</u> Cases where fresh valuation is required, AM to be formulated within 75 days of LCD</p>	<p>Before amendment, timeline for preparation of AM was 75 days in all cases</p>
<p><u>Reg. 34(5): Asset Memorandum</u> AM shall be shared with IBBI and members of consultation committee having voting rights after receiving undertaking of confidentiality</p>	<p>Earlier, AM was not accessible to any person during the course of liquidation, unless permitted by AA</p> <p>Such members of SCC have to give undertaking regarding maintaining confidentiality of information. However, confidentiality concerns still persist.</p>
<p><u>Reg. 45A: Preservation of records</u> List of documents has been provided which the liquidator has to preserve to give a complete account of the liquidation process. Electronic copy of all records to be preserved for at least 8 years and physical copy for at least 3 years from the closure of liquidation</p>	

Snapshot of Voluntary Liquidation Process 2nd Amendment Regulations, 2022

Amended provision	Remarks
<p data-bbox="112 419 1223 515"><u>Reg. 3(5): Declaration by directors upon initiation of liquidation</u></p> <p data-bbox="112 525 1223 675">The declaration by directors shall also provide that CD has made provision for preservation of its records after its dissolution</p>	
<p data-bbox="112 743 698 782"><u>Reg. 41: Preservation of records</u></p> <p data-bbox="112 796 1223 1053">List of documents has been provided which the liquidator has to preserve to give a complete account of the liquidation process. Also, the liquidator, in application u/s 59(7) provide details and manner of preservation of records.</p>	<p data-bbox="1253 743 1839 782"><u>Reg. 41: Preservation of records</u></p> <p data-bbox="1253 796 2410 946">Earlier, no detailed list. Reports submitted, registers and accounts to be preserved for at least 8 years after the dissolution of the CD, either with himself or with an IU</p>
<p data-bbox="112 1143 749 1182"><u>Reg. 41(3): Preservation of records</u></p> <p data-bbox="112 1196 1223 1346">Electronic copy of all records to be preserved for at least 8 years and physical copy for at least 3 years from the closure of liquidation</p>	



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