

Insolvency and Bankruptcy Hotline

August 13, 2018

NEW TIMELINES UNDER CIRP REGULATIONS: HITS AND MISSES

The Insolvency and Bankruptcy Board of India (“**Board**”) has, by way of a notification dated July 3, 2018¹ (“**Notification**”), amended the CIRP Regulations. Amongst the many amendments, the more notable ones relate to prescribing what may seem to be *model timelines* that would now apply to any corporate insolvency resolution process (“**CIRP**”). Under the un-amended Insolvency and Bankruptcy Code (“**Code**”) and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**Regulations**”), there were many overlapping timelines and open ended clauses which led to multiple possible interpretations, causing confusion amongst stakeholders and consequent litigation delaying the entire process. This situation prompted the Board to introduce the new timelines under the Regulations which would help in avoiding such delays and provide more clarity to ensure timely completion of the process. Some of the timelines suggested are helpful and can be adhered to, however there still exists some ambiguity with respect to certain regulations. We have discussed the key changes to the timelines below.

SUBMISSION AND VERIFICATION OF CLAIMS:

Change

Earlier Position

Under the new timelines, creditors who fail to submit their claims within 14 days of the appointment of an interim resolution professional, can now submit their claims within 90 days of the insolvency

Creditors could submit their claims up to the final approval of the resolution plan by the committee of creditors.

commencement date² and the resolution professional needs to verify these claims within 7 days of the last date of receipt the claims.

Restricting the timeline for submission of claims is a welcome move, because earlier many creditors would submit their claims towards the end of the resolution process, leading to a delay in the completion of the process and litigations disputing the inclusion of such claims. As per the new timelines, submission of claims and expression of interests (“**Eol**”) by the prospective applicants shall be done by the 90th day from the insolvency commencement date. However, the verification of the claims has to be done by the 97th day, so prospective applicants might not have clarity regarding the total claim amount before submitting their Eol.

Concerns: In cases where there are several hundred creditors it might be difficult for the resolution professional to verify all the claims within 7 days from the last date of receipt as he will be simultaneously carrying out other processes. There are two ambiguities that may possibly arise, firstly whether the claims need to be verified within 7 days of their receipt or within 7 days of receipt of the last claim, secondly, whether the obligation is to verify the first set of claims within 7 days from the expiry of the date set out in the public announcement and thereafter to verify the next set of claims within 7 days from the expiry of the 90th day of the insolvency commencement date. Further, unlike other provisions, the Board has not set out any mechanism for the creditors who fail to submit the claims within 90 days. This can lead to another round of litigations regarding admission of claims, specifically because breach of other timelines lead to a “*deemed rejection*” of the delayed submission

APPOINTMENT OF REGISTERED VALUERS:

Change

Earlier Position

Registered valuers (determining the fair value and liquidation value of the corporate debtor) will need to be appointed by the *resolution professional* within 7 days of his appointment, or latest by 47th day from insolvency commencement date.

Registered valuers were appointed within 7 days of the appointment of the *interim resolution professional*

As per this change a valuer can only be appointed once the engagement of the resolution professional has been confirmed by the COC. Per the timelines prescribed a resolution professional must be appointed within 30 days of the insolvency commencement date and thus the registered valuers should be appointed within 7 days of his appointment, that is, by the 37th day, however, the timelines suggest that the registered valuer should be appointed

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latest by the 47th day from the insolvency commencement date. There seems to be disconnect among the regulations regarding appointment of the resolution professional and appointment of the registered valuer.

This change can lead to an unnecessary delay in the appointment of registered valuers further delaying the valuation process. Considering that the valuation must be done as on the insolvency commencement date, such a delay in appointment of the valuer is unwarranted. This might in turn delay the preparation of the information memorandum and result in a delay in seeking EoI's from prospective applicants.

PREFERENTIAL AND OTHER TRANSACTIONS:

Change Earlier position

Timeline for *preferential and other transactions*: No fixed timeline

- forming an opinion: within 75 days
- making a determination: within 115 days
- application before adjudicating authority: within 135 days

The Code does not provide any guidance as to what will amount to “*forming an opinion*” and how that will be different from “*making a determination*”. The resolution professional can form an opinion only after preparing and analyzing forensic reports on such transactions. This process is quite complex and time consuming. It might not be practical to form an opinion within 75 days as the resolution professional will be carrying out other processes simultaneously and may effectively have only 6 weeks after his appointment. The Board could provide more clarity on this regulation and try to consolidate the process and provide a single timeline for determination in this respect by the resolution professional.

EXPRESSION OF INTEREST:

The Notification has introduced a formal process for invitation of EoI's, which includes a fixed format for publishing the invitation of an EoI under Form G, timelines for submission of EoI's and release of a provisional list and final list of prospective applicants. Earlier, there was no fixed format or set timelines for invitation of EoI's, which led to a lot of unnecessary litigation. Now that there are statutory guidelines in this respect it will considerably reduce the scope of litigation. Form G contains basic information about the corporate debtor, timelines for the submission of EoI's, eligibility criteria, timelines for the resolution process starting from the submission of EoI, details of the resolution professional and other relevant information.

Post receiving the EoI's, the resolution professional is required to evaluate the entries as per the eligibility criteria provided under the Code and release a provisional list of shortlisted participants for the bidding process. Thereafter, an invitation for submission of resolution plans, which will contain the information memorandum and evaluation matrix will be sent to the prospective resolution professionals, including the resolution applicants who have contested the decision of their non-inclusion. The resolution professional needs to release the final list of resolution applicants within 15 days of releasing the provisional list after taking into consideration all the objections. No mechanism for challenging the non-inclusion of a resolution applicant has been provided, therefore, the applicants who have not been included in the provisional list or the final list may approach the adjudicating authority challenging their non-inclusion. There is a possibility that while such applications are pending before the adjudicating authority, the last date of submission of the resolution plan might pass. Considering that any submission post the last date mentioned in the invitation is deemed to be rejected, the contesting applicant can request for an interim injunction to extend the last date of submission of resolution plans. This would further lead to a delay in the resolution process, which might defeat the purpose of introducing the timelines and rejection of late submissions.

EVALUATION MATRIX:

The Notification, requires resolution professionals to issue an evaluation matrix and information memorandum along with the request for submission of resolution plans, listing down all the criteria based on which the resolution plans will be evaluated by the committee of creditors.³ This could ensure more transparency in the evaluation process, reducing possibilities of challenging the evaluation mechanism. However, issuing an evaluation matrix is a catch 22 situation – this may result in resolution professionals making generic statements, in which case there will be no real change from the situation today, or specific statements, in which case, the resolution professional has a difficult task to ensure that qualified bidders are not accidentally left out of the process. In the event of the latter, the CoC may have to explain any deviations from the matrix, if any.

REJECTION OF LATE EOI'S AND RESOLUTION PLANS:

Another welcome change is the statutory backing provided for the automatic rejection of late submissions⁴ of EoI's and resolution plans⁵. The late submission of process documents has resulted in a lot of litigation and delay in the completion of the resolution process for some of the biggest NPA's.⁶ Resolution applicants had often taken advantage of the fact that there was no statutory backing to reject late submissions. Resolution applicants would revise their plans after analyzing bids submitted by their competitors getting an unfair advantage and derailing the entire process, this should become difficult henceforth.

CONCLUSION

Like most breakthrough legislations, there are teething operational issues which are being constantly explored and eliminated. The Code is ever evolving and adapting to the challenges being faced. We are also witnessing a gradual change in the attitude of promoters who are trying to standardize their assets rather than adopting an entrenched adversarial position. The Board is in a constant endeavor to remove hurdles and ambiguities which result in frivolous litigations and delays in the insolvency resolution process. In furtherance of this goal the Board has *inter alia* introduced the model timeline, formalized the process of EoI's and requests for resolution plans.

However, overlapping and certain unreasonable timelines have increased the pressure on the resolution professional to carry out all the mandatory processes within the prescribed timeline. In cases where the interim resolution professional and the resolution professional are different, meeting the timelines prove to be difficult as most of the timelines are linked to the insolvency commencement date and most of the processes now need to be carried out by the resolution professional. The resolution professional itself is appointed within 30 days of the insolvency commencement date, making it practically difficult to meet the already stringent timelines. the Board has

made a good effort in streamlining the whole resolution process and attempting to remove the lacunas in the Regulations, however meeting these timelines may not be practically possible in all the cases. The Board should continue to plug these gaps to ensure that the insolvency resolution process becomes more feasible, effective, efficient and time bound.

– **Aditya Desai, Arjun Gupta, Ashish Kabra & Simone Reis**

You can direct your queries or comments to the authors

¹ Notification No. IBBI/2018-19/GN/REG031, dated 3rd July, 2018. (w.e.f. 04-07-2018)

² Reg. 12(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

³ Reg. 39 (3) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

⁴ Reg. 36A (6) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

⁵ Reg. 39 (1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

⁶ Bhushan Power & Steel, Binani cements etc.

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