# REGULATION MAKING POWER OF IBBI: AN ANALYSIS

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The Insolvency and Bankruptcy Board of India (**"IBBI"**) was established on 01.10.2016 in terms with Section 188 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**). Under Section 240(1) of the Code, the IBBI has been empowered to make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of the Code. From a bare reading of the said Section, it is apparent that:

(a) the Regulations made by IBBI are for the purposes of ensuring a smooth functioning and implementation of the provisions of the Code;

(b) such Regulations must be consistent with the Code.

In the present article, we have analysed certain provisions that have been promulgated by the IBBI as a part of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ['**CIRP Regulations**'] and Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ['**Liquidation Process Regulations**']; which are clouded by the ambiguity about whether IBBI had the requisite power to promulgate the same.

## Sub-Ordinate Legislation: Principles governing legality

The grounds on which a subordinate legislation can be challenged are no longer *res integra*. Such grounds have been enumerated by the Hon'ble Supreme Court of India in the matter of *State of T.N. & Anr. Vs. P. Krishnamurthy & Ors.*,[i] as hereunder:

(a) Lack of legislative competence to make the subordinate legislation;

(b) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act;

(c) Violation of fundamental rights guaranteed under the Constitution of India;

(d) Violation of any provision of the Constitution of India;

(e) Repugnancy to the laws of the land, that is, any enactment; and

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might hold that the legislature never intended to give authority to make such rules).

It is the above tenets of law in mind that have been set out as the guiding principles while analysing the following provisions of CIRP Regulations and Liquidation Regulations.

## A. CIRP Regulations

### *I. Regulation 12(2) of the CIRP Regulations.*

Regulation 12(2) relates to the time within which a creditor can submit its claim. When it was promulgated, it read as "*A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution*

*professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee*".

This provision came up for interpretation before the Hon'ble National Company Law Tribunal ('**NCLT**') in the case of *Alchemist Asset Reconstruction Co. Ltd. v. Moser Baer India Limited.*[ii] The NCLT vide its Order dated 31.01.2018 held as follows

> "*It is appropriate to mention that Public announcement of Corporate Insolvency Resolution Process is required to be made by the Insolvency Resolution Professional by incorporating the information indicated in section 15(1). It also includes that the public announcement shall contain the last date of submission of claims. There is no provision in the Parliamentary Statute i.e. Insolvency & Bankruptcy Code for extending the period beyond the last date for submission of claims. However, Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 vide regulation 12(2) has provided that a Creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement. According to the provisions of regulation 12(2) such claim can be till the approval of a resolution plan by the Committee.* ***The aforesaid regulation comes in direct conflict with the provisions of Parliamentary Statute with the provision of section 15(1)(c) of the Insolvency & Bankruptcy Code. We do not think that by subordinate legislation the timeline provided by Insolvency & Bankruptcy Code could be eroded in such a manner as cause delay in the Corporate Insolvency Resolution Process. Therefore we are unable to persuade ourselves to issue directions to the Resolution Professional to entertain the claim made by the applicant.*** *If such a course is to be adopted, then Resolution Professional has to invite fresh claims from rest of the world by inserting a new Public Notice so as to enable all other left out claimants to file their claim before Resolution Professional. It will cause considerable delay in the finalization of Corporate Insolvency Resolution Process.*"

It appears as a result of the above, the IBBI commenced the internal process of amending the provision and hence, the said issue was placed in the agenda for a meeting held on 15.03.2018;[iii] though, the decision on the subject was deferred.[iv] Eventually, an amendment was made in the Code to Section 240 and the following provision was incorporated with effect from 06.06.2018:

> "*(ja) the last date for submission of claims under clause (c) of sub-section (1) of section 15;*"

At the same time, Section 15(1)(c) of the Code was also amended by the same amendment:

| Prior to Amendment | Post the Amendment |
|---|---|
| (c) the last date for submission of claims | (c) the last date for submission of claims*, as may be specified*; |

In pursuance of the above amendments to the Code, the following amendment was carried out in CIRP Regulations to Regulation 12(2) with effect from 04.07.2018:

| Prior to Amendment | Post the Amendment |
|---|---|
| A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be*, till the approval of a resolution* | A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, *on or before the ninetieth day of the* |

| | |
|---|---|
| *plan by the committee*. | *insolvency commencement date*. |

Hence, taking cue from the observations of the Hon'ble NCLT, necessary steps were taken to enable the IBBI to legislate in this regard.

*II. Regulation 30A of CIRP Regulations*

By way of Regulation 30A, the IBBI has prescribed the manner in which an Application, after having been admitted by the Adjudicating Authority, can be withdrawn purportedly in terms with Section 12A of the Code.

Initially, there was no provision in the Code which permitted for withdrawal of an Application filed under Section 7, 9 or 10 of the Code after the Application had been admitted. Thereafter, the Hon'ble Supreme Court,[v] recommended an amendment of the Code, to vest the competent authorities with the necessary inherent powers. This recommendation was thereafter also supported by the Insolvency Committee.[vi]

In furtherance of such recommendation, Section 12A[vii] was inserted in the Code with effect from 06.06.2018.[viii] Section 12A enables the applicant to withdraw an application with the approval of 90% voting share of the Committee of Creditors (**CoC**) (implying to be applicable only after the same has been admitted by the Adjudicating Authority and the CoC having been constituted), in such manner as may be prescribed. Thus, from a bare reading of Section 12A it is clear that the same can come into play only after the constitution of the CoC (therefore, after the admission of the application) [as elucidated in the Report of the Insolvency Law Committee]. In respect of the same, Regulation 30A was incorporated in the CIRP Regulations. However, after the Hon'ble Supreme Court passed the judgment in the case of *Swiss Ribbons (P.) Ltd. Vs. Union of India*,[ix] Regulation 30A was further modified to enable filing an application under Section 12A even before constitution of the CoC. A comparative analysis of the amendments is provided hereinbelow:

<table>
<tr><th>Amendment dated 03.07.2018</th><th colspan="2">Amendment dated 25.07.2019</th></tr>
<tr><td rowspan="2">"(1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A."</td><td colspan="2">"(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority -</td></tr>
<tr><td>(a) before the constitution of the committee, by the applicant through the interim resolution professional;</td><td>(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:<br><br>Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation"</td></tr>
</table>

The earlier Regulation 30A had came under the scanner before the Hon'ble Supreme Court in the matter of *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal and Ors.*[x] and it was observed as under:

> "*The only reason why the withdrawal was not allowed, though agreed to by the Corporate Debtor as well as the Financial Creditor -State Bank of India and the Operational Creditor-Respondent No.3, is because Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest.*
> *According to us, this Regulation has to be read along with the main provision Section 12A which contains no such stipulation.*
> *Accordingly, this stipulation can only be construed as directory depending on the facts of each case.*"

Furthermore, various other requirements have been prescribed under Regulation 30A for being able to file an application under Section 12A, including in respect of the format to be adopted (Form FA). It further requires as a pre-condition to be (i) accompanied by a Bank Guarantee of the amount of the CIRP Cost, (ii) making application through Resolution Professional and (iii) submission of application within three days of receipt thereof or within three days of receipt of the approval from the CoC, as the case may be. Section 12A, it is relevant to note, ends with the expression "*in such manner as may be specified*". Though like various other provisions, there are no corresponding enabling provisions in this regard in Section 240 of the Code.

Hence, these requirements can be tested in light of the decision rendered by the Hon'ble Supreme Court of India in the matter of *Kunj Behari Lal Butail & Ors. Vs. State of H.P. & Ors.*[xi] wherein it was held that "*a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.*"

Thus, whether the present Regulation 30A of the CIRP Regulations passes the test of permissible delegated legislation in light of the express language of Section 12A of the Code (requiring vote of the CoC) remains to be seen.[xii]

### *III. Regulation 36A of the CIRP Regulations*

Section 25(2)(h) of the Code empowers a Resolution Professional to invite prospective Resolution Applicants to submit Resolution Plans subject to the criteria which may be laid down by the Resolution Professional. Furthermore, under Section 240(2)(sa) of the Code, the IBBI has been empowered to make Regulations in respect of "*other conditions under clause (h) of sub-section (2) of section 25*".

In furtherance of Section 25(2)(h) read with Section 240(2)(sa), Regulation 36A[xiii] was incorporated vide Notification bearing No. 2017-18/GN/REG024 (with effect from 06.02.2018). This Regulation 36A was thereafter substituted by the IBBI vide Notification bearing number 2017-18/GN/REG031 dated 03.07.2018 (with effect from 04.07.2018).[xiv] The said Regulation 36A requires the Resolution Professional to publish an "Invitation for Expression of Interest" in Form - G prior to the calling of a resolution plan under Section 25(2)(h).

Regulation 36A came under the scanner in the matter of *State Bank of India Vs. Su Kam Power Systems Limited,*[xv] wherein the Hon'ble NCLT vide Order dated 05.09.2018 opined as extracted hereinbelow:

> *"We are further of the view that Section 25(2)(h) added on 23.11.2017 by way of amendment does not contemplate floating of an expression of interest. It is beyond our understanding as to how the IBBI has taken upon itself the task of framing Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 using the expression 'invitation of expression of interest' along with Form G. Such an assumption of power would be beyond the competence of IBBI as the source of power to frame regulations under IBC is drawn from Section 240 of IBC, 2016. Section 240(1 in categorical terms provides that the IBBI may by notification make regulation consistent with the Insolvency and Bankruptcy Code, and further subject to the Rules framed by the Government tinder Section 239 of IBC, 2016 for carrying out the provisions of the Code ... By use of the words 'expression of interest the speed is retarded and time is wasted. In the present case on 04.06.2018 expression of interest was invited and last date for expressing interest to submit the resolution plan was 18.06.2018 without in fact inviting any resolution plan. Such a course is negation of the salient features highlighted by Supreme Court that the speed is essence of the IBC 2016,* ***therefore, we have no other option except to declare Regulation 36A as ultra vires of Section 240 of IBC, 2016****..."*

The Hon'ble NCLT further directed the IBBI to frame Regulations according to its competence and the source of power as given to it by the Code. It is not clear whether the earlier Regulation 36A was before the Hon'ble NCLT or as modified with effect from 04.07.2018. However, the reasoning given in the said order, applies to the modified Regulation 36A of the CIRP Regulations.

Interestingly, thereafter, the IBBI approached the Hon'ble High Court of Delhi challenging the Order dated 05.09.2018.[xvi] The Hon'ble High Court vide its Order dated 26.09.2018 refused to interfere with the Order dated 05.09.2018; however, also held that the same would not come in the way of the matters where 'Expression of Interest' had already been issued. However, the said order was assailed in appeal before the Division Bench of the Hon'ble High Court of Delhi wherein the Hon'ble Bench vide order dated 05.10.2018[xvii] stayed the operation of the Order dated 05.09.2018 passed by the Learned NCLT to the extent it declares Regulation 36A of the CIRP Regulations as *ultra vires*.

Both the writ petition and the appeal are pending and hence, the matter is *sub-judice* before the Hon'ble High Court.

## B. Liquidation Process Regulations

### *I. Regulation 44 of the Liquidation Process Regulations*

The Code, unlike the process of corporate insolvency resolution, does not define any time period within which a liquidator is required to conduct and/ or conclude the process of liquidation. Section 196(1)(t)[xviii] read with Section 240(2)(zv)[xix] of the Code empower the IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under the Code, including mechanism for time bound disposal of the assets of the Corporate Debtor, as the case may be.

We hereby are discussing the exercise of power by IBBI whereby the time limit for completion of the process of liquidation (though not prescribed in the Code) has been prescribed under the Liquidation Regulations (which has also been modified once)[xx]:

| As Originally Existing | As Amended with effect from 25.07.2019 |
|---|---|
| (1) The liquidator shall liquidate the corporate debtor within a period of two years. | (1) The liquidator shall liquidate the corporate debtor within a period of *one year* from the liquidation commencement date, *notwithstanding pendency of any application for avoidance of transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof:*<br><br>*Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days.* |
| (2) If the liquidator fails to liquidate the corporate debtor within two years, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation. | (2) If the liquidator fails to liquidate the corporate debtor within *one year*, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation. |

Thus, applying the basic tenets of administrative law in respect of delegated legislation, what comes into question is the power of the IBBI to stipulate for such time period. It is of relevance to consider that the said provision does not provide for a timeline which is final as the Adjudicating Authority have been vested with the power to extend the same in appropriate cases.

As a sequel to the above discussion, what comes into fore is the latest amendment to the Liquidation Process Regulations in respect of incorporation of Regulation 47A (*Exclusion of period of lockdown*), which has been discussed in the later part of this article.

*II. Regulation 2B of the Liquidation Regulations*

Regulation 2B of the Liquidation Regulations inserted with effect from 25.07.2019[xxi] provides for a time limit within which a scheme of compromise or arrangement under Section 230 of the Companies Act, 2013 ('**Act**') may be undertaken and completed during the liquidation process.

At the very outset, it is pertinent to note that no such time limitations are prescribed for under Section 230 of the Companies Act, 2013. Thus, the notion of the availability of the remedy under Section 230 of the Act in matters of liquidation under the Code as well, was held by the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") vide its Final Order dated

29.01.2019 in the matter of *S.C. Sekaran Vs. Amit Gupta*.[xxii] In the said matter, the Hon'ble NCLAT held as under:

> "*In view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' and 'Swiss Ribbons Pvt. Ltd.', we direct the 'Liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the I&B Code. The Liquidator will access information under Section 33 and will consolidate the claim under Section 38 and after verification of claim in terms of Section 39 will either admit or reject the claim, as required under Section 40.* ***Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.***"

Thus, the Code does not provide for execution/ entering into of any Compromise or Arrangement between the parties as envisaged under Section 230 of the Act. Furthermore, the IBBI is not empowered under the Code or the Act to frame regulations in regard to matters under Section 230 of the Act. In such a situation, it is reasonable to conclude that a scheme of compromise or arrangement does not fall within the matters related to insolvency and bankruptcy. On the said subject, the IBBI has proceeded insert a Proviso to Regulation 2B(1)[xxiii] in the Liquidation Regulations. The Amended Regulation 2B reads as follows:

> "*2B. Compromise or arrangement.*
>
> *(1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of section 33.*
>
> ***Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.***
>
> *(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.*
>
> *(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230:*
>
> *Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.*"

In pursuance of the above, a fresh disability has been introduced restraining any person ineligible under 29A (*Persons not eligible to be Resolution Applicant*) of the Code from participating in any manner in a scheme of compromise or arrangement as well. Before going into the reasons for the said amendment, it is relevant to consider that when Regulation 2B was introduced, a corresponding amendment was done by the same notification to the definition of 'Liquidation Cost' as defined under Regulation 2(ea) of the

Liquidation Regulations. A proviso was added to the said definition which stipulates that the costs incurred by the liquidator in relation to compromise or arrangement under Section 230 of the Act shall not form a part of the Liquidation Costs.

Hence, a clear demarcation was created between the cost incurred towards any compromise and arrangement undertaken during the currency of the Liquidation Process and the costs incurred towards all other activities involved in the Liquidation Process. Hence, it can be construed that a distinction was drawn between the Liquidation Process and a scheme of compromise or arrangement proposed under Section 230 of the Act after the passing of Liquidation Order by the Adjudicating Authority under Section 33 of the Code. As a result, the Liquidator is now (in light of the judgment of Hon'ble NCLAT in *S.C. Sekaran case*) required to make attempts at compromise under Section 230 of the Act and thereafter, proceed to liquidate the Corporate Debtor as per Regulation 32 of the Liquidation Regulations.

At this juncture, it is also relevant to consider the proviso to Section 35(1)(f)[xxiv] of the Code, it is evident that any person who is ineligible to be a Resolution Applicant as contemplated under Section 29A of the Code would also be ineligible to buy the immovable and movable properties or actionable claims of the Corporate Debtor in Liquidation. This proviso was incorporated in the Code with effect from 23.11.2017.

It is arguable that this provision is intended to apply only to the process of liquidation under the Code which is distinguishable from the process of compromise under the Act. It is also of import to consider that while the Hon'ble NCLAT had directed in a manner to oblige liquidators to first endeavour to achieve a settlement under Section 230 of the Act; however, there is no prohibition on entering into a compromise even after the process of liquidation is commenced.

Having said that, what is due for emphasis is that the remedy of compromise is a statutory remedy arising out of the Act and the process of liquidation is provided for under the Code. This is so because in case of a compromise or arrangement as contemplated under Section 230 of the Act, there is no sale of the assets of the Corporate Debtor as contemplated under Section 35(1)(f) of the Code. What is achieved is a "compromise" or an "arrangement" between the company, its creditors and members / stakeholders with a view to keep the company afloat. This is akin to the remedy available under Section 12A of the Code which allow the promoters and equity shareholders of the Corporate Debtor to regain control over the management of the Corporate Debtor (even though such persons may be ineligible to be Resolution Applicants in terms of Section 29A of the Code).

Therefore, from all of the above, the intent of the legislature could be construed to mean that in case there is a mutual settlement between the parties (as contemplated under Section 230 of the Act or Section 12A of the Code), then there is no requirement for imposition of a disability akin to Section 29A of the Code. This view though has its basis in the Final Order dated 24.10.2018 passed in *Jindal Steel and Power Limited* v. *Arun Kumar Jagatramka and Anr.*,[xxv] relevant extract whereof is reproduced below:

> "*11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for*

*Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below.....*

*12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'.*"

This Final Order has been appealed against before the Hon'ble Supreme Court and the matter is pending adjudication.[xxvi] The outcome of the abovementioned proceedings would have a direct bearing on the legitimacy of the said amendments as well. Thus, the Hon'ble Apex Court would have to opine whether a finding of the said nature would have the effect of virtually amending Section 230 of the Act and providing disqualifications therein (when none are prescribed in the Act itself thereby clarifying the legislative intent). Though, the question pertaining to power of IBBI to prescribe such time period and disqualifications, in the absence of them being provided for or enabled to do so under the Code; will have to be assessed in appropriate proceedings.

*III. Regulation 37(8) of the Liquidation Process Regulations*

As a consideration of the above discussion, another provision that requires some analysis is Regulation 37(8) of the Liquidation Regulations [which was inserted with effect from 06.01.2020[xxvii]], which is extracted hereinbelow for ease of reference:

"*37. Realization of security interest by secured creditor.....*

*(8) A secured creditor shall not sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor.*"

This provision becomes applicable when a Secured Creditor in light of Section 52(4) of the Code is seeking to exercise its rights. The relevant provision is reproduced hereinbelow for ease of reference:

"*52. Secured creditor in liquidation proceedings.....*

*(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.....*"

This would entail that the Secured Creditor right to proceed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') or their right to enter into a compromise or arrangement under Section 230 of the Act.

Thus, room for doubt is created in the said provision that is whether the said amendment proceeds to the extent of affecting the rights of secured creditor under the independent

statutes like the Act and the SARFAESI Act. It is stated at the cost of repetition that IBBI has not been empowered with providing for regulations/ guidelines under such independent Acts. It is of import to consider that the Proviso to Section 35(1)(f) of the Code provides for the power of the liquidator and in fact carves out the exception in respect of the right of a Secured Creditor under Section 52 of the Code to sell or transfer an asset which is subject to security interest of such creditor.

*IV. Regulation 40C of CIRP Regulations and Regulation 47A of the Liquidation Regulations*

Recently, in view of the COVID-19 Pandemic[xxviii], the following amendments have been carried out by IBBI in respect of exclusion of the time period of the lockdown:

a) Regulation 40C[xxix] of the CIRP Regulations inserted with effect from 29.03.2020:

> "*40C. Special provision relating to time-line.*
>
> *Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.*"

b) Regulation 47A[xxx] of the Liquidation Process Regulations with effect from 17.04.2020:

> *"47A. Exclusion of period of lockdown.*
>
> *Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process."*

At the outset it is relevant to state that no amendment has been carried out by the Parliament in the Limitation Act, 1963 or the Code and no ordinance has also been passed in this regard, with respect to exclusion of period of the lockdown, yet. However, one order has been passed by the Hon'ble Supreme Court in this regard.[xxxi] The Hon'ble NCLAT has passed Order dated 30.03.2020 in Suo Moto Company Appeal (AT) Insolvency 01 of 2020, wherein the following directions have been passed on the subject of exclusion of the period of lockdown,:

> "*Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of Appeals/ cases, which has already been taken care of by the Hon'ble Apex Court by extending the period of limitation with effect from 15th March, 2020 till further order/s in terms of order dated 23rd March, 2020 in Suo Motu Writ Petition (Civil) No(s).03/2020, inasmuch as certain steps required to be taken by various Authorities under Insolvency and Bankruptcy Code, 2016 or to comply with various provisions and to adhere to the prescribed timelines for taking the 'Resolution Process' to its logical conclusion in order to obviate and mitigate such hardships, this Appellate Tribunal in exercise of powers conferred by Rule 11 of National Company Law Appellate Tribunal Rules, 2016 r/w the decision of this Appellate Tribunal rendered in "**Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. in Company Appeal (AT) (Insolvency) No.185 of 2018**" decided on 8th May, 2018 do hereby order as follows: -*

(1) ***That the period of lockdown ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the Corporate Debtor may be located, shall be excluded for the purpose of counting of the period for 'Resolution Process under Section 12 of the Insolvency and Bankruptcy Code, 2016****, in all cases where 'Corporate Insolvency Resolution Process' has been initiated and pending before any Bench of the National Company Law Tribunal or in Appeal before this Appellate Tribunal.*

(2) *It is further ordered that any interim order/ stay order passed by this Appellate Tribunal in anyone or the other Appeal under Insolvency and Bankruptcy Code, 2016 shall continue till next date of hearing, which may be notified later.....*"

In respect of the above order, it is relevant to note that Section 12 of the Code provides for strict timelines to be followed within which the process of corporate insolvency resolution is required to be concluded. However, this provision of timeline has been held to be directory and not mandatory by the Hon'ble Supreme Court.[xxxii]

At this stage it is noteworthy that Section 240 of the Code does not provide for such powers to the IBBI to exclude any such period from the CIRP process or from the Liquidation process.

Thus, when the time period has been prescribed by the Parliament in the statute and in the absence of any enabling provision (under Section 240 of the Code), the questions arises that with respect to the CIRP Regulations, whether the IBBI could have been sought to exclude the period of lockdown by way of a subordinate legislation. This is more pressing, especially considering the fact that the Hon'ble NCLAT has already passed directions to the same effect and prior in time and hence, what was the need for passing such an amendment to the CIRP Regulations.

On the count of Liquidation Regulations, as explained above, the Code does not prescribe any timelines. Regulation 44 of the Code also enables the Adjudicating Authority to in appropriate circumstances allow extension of time, if liquidation is not completed within a period of one year. Without going into the legitimacy of this regulation, the question that begs for consideration is in respect of the power of the IBBI to promulgate such an exclusion of time period.

**Analysis of Power of Making Regulations**

The power of IBBI also needs to be perused from another perspective. Section 196(1)(t) of the Code provides as follows:

"*196. Powers and functions of Board. -*

*(1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely: - .....*

*(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for*

*time bound disposal of the assets of the corporate debtor or debtor; and.....*"

In furtherance of the same and in pursuance of Section 240 of the Code, the IBBI promulgated Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018 ['**Mechanism for Issuing Regulations**'] on 22.10.2018, the following aspects whereof are worth noting:

(a) The Mechanism for Issuing Regulations were to come into immediate effect (from the date of publication in the Official Gazette), unless otherwise provided therein.

(b) They do not apply in respect of organisational matters pertaining to IBBI.

(c) Regulation 3 states that IBBI may made regulations in compliance of Regulation 4 and 5. Regulation 4 provides for Public Consultation, having the following characteristics:

(i) IBBI is required to publish the draft of proposed regulations and invite public comments.

(ii) A period of 21 days shall be granted for public to submit comments.

(iii) The comments with the analysis of the IBBI, is required to be uploaded on the website.

(iv) The general rule for enforcement of the regulations was required to be 30 days from the date of notification, unless otherwise specified.

(v) The Mechanism for Issuing Regulations further requires the IBBI to seek necessary advice. If required and to conduct economic analysis of the proposed draft regulations.

(d) Furthermore, the Mechanism for Issuing Regulations specifies that these rules shall apply to any proposed amendment.

(e) It also envisages an exemption from following the procedure under Regulation 4 and 5, in case of an urgency, in which case the approval of the Governing Body is required to be taken.

(f) However, the said regulations also provide a provision for review of the promulgated regulations every three years.

Thus, from a bare perusal of the above, it is clear that IBBI as a body has itself prescribed for the necessary checks and balances to ensure that transparency is retained the system and comment of all stakeholders are taken into account before issuing a regulation. As a natural corollary, if the exemption procedure was being adopted, then the same ought to have been recorded in the Amendment Regulations.

In respect of the amendments discussed in the present piece, the public comments have not been invited, except the amendments dated 25.07.2019 (CIRP Regulations) and 06.01.2020 (Liquidation Process Regulations). Accordingly, it may have to be assumed that the

Governing Board's approval would have been taken in this regard. However, the said factum has not found any place in any of the afore-referred amendment notifications.

What is intriguing is that the portal of IBBI presently does have six discussion papers[xxxiii] that were issued by IBBI calling for public comments. Though, the corresponding public comments, received by the IBBI, have not been uploaded as it is and an analysis of the comments received has been uploaded. Having said that, it is important to state for the sake of completeness that the IBBI has devised a fresh mechanism by it's circular dated 04.05.2020;[xxxiv] whereby it has enabled any stakeholder to provide it's comments on any of the existing regulations.

## Conclusion

Upon analysing the conspectus of data provided hereinabove, the IBBI has without a doubt performed as an active regulator and thereby, ensuring constant updating and modifications of the regulations issued by them, in light of the orders passed by the Adjudicating Authority and the Appellate Tribunal from time to time. However, there are few situations where the IBBI have exercised jurisdiction which it appears to not have been vested with, under the parent statute (whereby the IBBI was constituted). Hence, it shall be the outcome of various pending proceedings (including the one initiated by IBBI itself pending before the Hon'ble High Court of Delhi) which shall lend guidance in this regard and bring clarity on the scope of jurisdiction vested with IBBI and its corresponding exercise by it..

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[i] *State of T.N. & Anr. Vs. P. Krishnamurthy & Ors.* reported at (2006) 4 SCC 517

[ii] Company Petition (IB) No. 378 (PB)/ 2017

[iii] Agenda is available at https://ibbi.gov.in/Agenda_04C_150318.pdf.

[iv] Decision is available at https://ibbi.gov.in/Decision_04C_150318.pdf

[v] Judgment dated 13.11.2017 in *Uttara Foods And Feeds Private Limited Vs. Mona Pharmachem* [Civil Appeal No. 18520 Of 2017]

[vi] The Insolvency Law Committee in its report published in March, 2018 recommended as under:

> "*On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent.*"

[vii] "***12A. Withdrawal of application admitted under section 7, 9 or 10. –***
*The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.*"

[viii] This amendment was inserted vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 dated 17.08.2018

[ix] *Swiss Ribbons (P.) Ltd. & Anr. Vs. Union of India 7 Ors.* in Writ Petition (Civil) No.99 of 2018, in which case the Hon'ble Court held as under:

> "*52. … A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers Under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case*"

[x] Judgment dated 14.12.2018 in Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal - Special Leave to Appeal (C) No(s). 31557/2018

[xi] *Kunj Behari Lal Butail & Ors. vs. State of H.P. & Ors.* reported at (2000) 3 SCC 40

[xii] Our earlier piece on different modes available for an exit for a promoter, discusses the said provision in detail.

[xiii] *36A. Invitation of Resolution Plans*

*(1) The resolution professional shall issue an invitation , including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.*

*(2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.*

*(3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be.*

*(4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process-*

*(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub regulation (1);*

*(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).*

*(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule: (a) on the website, if any, of the corporate debtor; and (b) on the website, if any, designated by the Board for the purpose.*

[xiv] Comparative analysis of the Regulation 36A as amended from time to time is provided hereinbelow:

| **Prior to Amendment 03.07.2018** | **Post amendment 03.07.2018** |
|---|---|
| *36A. Invitation of Resolution Plans* | *36A. Invitation for expression of interest.* |
| *(1) The resolution professional shall issue an invitation , including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.* | *(1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans.* |
| *(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule: (a) on the website, if any, of the corporate debtor; and (b) on the website, if any, designated by the Board for the purpose* | *2) The resolution professional shall publish Form G- (i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations; (ii) on the website, if any, of the corporate debtor; (iii) on the website, if any, designated by the Board for the purpose; and (iv) in any other manner as may be decided by the committee.* |
| (2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans. | **-N.A-** |
| (3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be. | **-N.A-** |
| (4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process- (a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1); (b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2). | **-N.A-** |

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| **-N.A-** | (3) The Form G in the Schedule shall - (a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and (b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation. |
| **-N.A-** | (4) The detailed invitation referred to in sub-regulation (3) shall- (a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25; (b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants; (c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and (d) not require payment of any fee or any non-refundable deposit for submission of expression of interest. |
| **-N.A-** | (5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3). |
| **-N.A-** | (6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected. |
| **-N.A-** | (7) An expression of interest shall be unconditional and be accompanied by- (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25; (b) relevant records in evidence of meeting the criteria under clause (a); (c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable; (d) relevant information and records to enable an assessment of ineligibility under clause (c); (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process; (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and (g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29. |
| **-N.A-** | (8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with- (a) the provisions of clause (h) of sub-section (2) of section 25; (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest. |
| **-N.A-** | (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under subregulation (8). |

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| **-N.A-** | (10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. |
| **-N.A-** | (11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list. |
| **-N.A-** | (12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee. |

[xv] Order dated 05.09.2018 passed in Company Petition (IB) No. 540 (PB) of 2017 titled as *State Bank of India Vs. Su Kam Power Systems Limited*

[xvi] *Insolvency and Bankruptcy Board of India V. State Bank of India & Ors.* in Writ Petition (C.) No. 10189 of 2019

[xvii] *Insolvency and Bankruptcy Board of India v.State Bank of India & Ors.* In LPA 566 of 2018

[xviii] "*(t). make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor*"

[xix] "*the intervals in which the periodic study, research and audit of the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities under clause (r), and mechanism for disposal of assets under clause (t), of sub-section (1) of section 196;*"

[xx] Vide Notification No. IBBI/2019-20/GN/REG047 dated 25.07.2019 (with effect from 25.07.2019)

[xxi] Vide Notification No. IBBI / 2019-20/GN/REG 047 dated 25.07.2019 (with effect from 25.07.2019)

[xxii] *S.C. Sekaran Vs. Amit Gupta* in Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018

[xxiii] Vide Notification No. IBBI/2019-20/GN/REG/ 053 dated 06.01.2020

[xxiv] "*35(1)(f). subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:*

***PROVIDED*** *that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.*"

[xxv] Company Appeal (AT) No. 221 of 2018

[xxvi] *Arun Kumar Jagatramka v. Gujarat NRE Coke Ltd. (In Liquidation)* - Civil Appeal No. 5316 of 2019

[xxvii] Vide Notification No. IBBI/2019-20/GN/REG053, dated 06.01.2020 (with effect from 06.01.2020).

[xxviii] COVID-19 was declared as a pandemic by World Health Organisation on 11.03.2020. Thereafter COVID-19 was declared as a Notified Disaster by the Government of India vide its Notification dated 14.03.2020. In pursuance of the same, the Government of India vide its Notification dated 24.03.2020 declared a complete lockdown in the country for 21 days with effect from 25.03.2020 and subsequent extensions have been issued thereafter vide Notification dated 14.04.2020, 01.05.2020 and 17.05.2020 thereby declaring lockdown till 31.05.2020.

[xxix] Vide Notifications No. IBBI/2020-21/GN/REG059 Dated 20.04.2020 with effect from 29.03.2020

[xxx] Vide Notification No. IBBI/2020-21/GN/REG060 dated 20.04.2020 with effect from 17.04.2020

[xxxi] The Hon'ble Supreme Court of India in its order dated 23.03.2020 in Suo Moto Writ Petition No. 03/2020 passed the following order:

> "*To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings. We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.*"

[xxxii] Judgment dated 15.11.2019 passed by the Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.*

[xxxiii] (1) Discussion Paper on Bankruptcy Process for Personal Guarantors to Corporate Debtors along with Draft Regulations dated 26.04.2019

This resulted in the issuance of The IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

(2) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 dated 07.05.2019.

This resulted in issuance of the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 on 25.07.2019.

(3) Discussion paper on Insolvency Professional Agencies & Information Utilities Regulations dated 08.05.2019

(4) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 dated 12.05.2019

This resulted in issuance of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2019 and the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations

(5) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 dated 03.11.2019

This resulted in the issuance of the IBBI (Liquidation Process) (Amendment) Regulations, 2020 on 06.01.2020

[xxxiv] Press Release dated 04.05.2020 issued by the IBBI inviting comments from public on the Regulations notified under the Code.

> "*5. Keeping in view the above, the IBBI invites comments from public, including the stakeholders and the regulated, on the regulations already notified under the Code. The comments received between 13th April, 2020 and 31st December, 2020 shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It will be the endeavor of the IBBI to notify modified regulations by 31st March, 2020 and bring them into force on 1st April, 2021.*
>
> *6. It is clarified that this is in addition to the extant approach of inviting public comments on draft regulations before notifying them.*"