

Sale of Assets of a Corporate Debtor under the IBC: Multiple CIRPs?

23 January 2023

Partner: Karishma Dodeja, Associate: Sakshi Singh

This analysis covers:

1	Introduction to Regulation 36B(6A) of the CIRP Regulations	2
2	Legislative Intent behind the introduction of Regulation 36B(6A)	2
3	Key Considerations	3
4	Conclusion	5

The Insolvency and Bankruptcy Board of India (IBBI) amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations) on 16 September 2022¹ (the amendment to the CIRP Regulations, **Amendment**). The Amendment introduced a slew of changes to the CIRP Regulations. One of the key amendments was the introduction of provisions in respect of the sale of one or more assets of the corporate debtor by way of resolution plans. Previously, there could be only one (1) resolution plan by one (1) resolution applicant for the whole corporate debtor – this will change considering the recent amendment given that there could be multiple resolution plans and multiple resolution applicants for various assets of the corporate debtor. Consequently, this opens the possibility of multiple resolution processes being run for individual assets of a corporate debtor. We have explored this aspect in greater detail below.

1 Introduction to Regulation 36B(6A) of the CIRP Regulations

Under Regulation 36B(1) of the CIRP Regulations, the resolution professional (RP) is required to issue a request for resolution plans (RFRP) to prospective resolution applicants (PRA) in the provisional list¹ or to such applicants which have contested the decision of the RP against their non-inclusion in the provisional list. The RP issues the RFRP further to the RP's invitation for expressions of interest (EOI) for the corporate debtor (Corporate Debtor) as a whole (i.e., inclusive of all assets² of the Corporate Debtor).

If resolution plans received in response to an RFRP are not satisfactory, the RP is permitted, with the approval of the committee of creditors (CoC), to "re-issue" the RFRP subject to the condition that such request is made to all PRAs in the final list³ of PRAs under Regulation 36B(7) of the CIRP Regulations. Such re-issuance of the RFRP would mean that this is a continuation of the earlier process (i.e., a request for resolution plans for the Corporate Debtor as a whole).

Under the newly introduced Regulation 36B(6A) of the CIRP Regulations (reproduced below) (introduced on and effective from 16 September 2022), if the RP does not receive a resolution plan in response to the RFRP (as against resolution plans being found unsatisfactory), he is permitted, with the approval of the CoC, to issue an RFRP for sale of one of or more assets of the Corporate Debtor.

"If the resolution professional, does not receive a resolution plan in response to the request under this regulation, he may, with the approval of the committee, issue request for resolution plan for sale of one or more of assets of the corporate debtor."

Accordingly, given Regulation 36B(6A), it appears that, PRAs are permitted to submit resolution plans for purchase of one or more assets of the Corporate Debtor if resolution plans are not received for the Corporate Debtor as a whole.

2 Legislative Intent behind the introduction of Regulation 36B(6A)

A key aspect of the corporate insolvency resolution process (CIRP) of a Corporate Debtor is the resolution of all its "assets" (i.e., treatment or settlement of all its assets and liabilities by way of a resolution plan). However, given that a Corporate Debtor may own a combination of functional and non-functional assets located at various locations, the pool of PRAs which may be interested in all such assets will be relatively narrow. PRAs may prefer submitting resolution plans only for specific functional assets or assets located at a specific location.⁴

¹ Under Regulation 36A(10), the resolution professional is required to issue a provisional list of eligible PRAs within ten (10) days of the last date for submission of expression of interest to the CoC and to all PRAs who submitted the EOI.

² The term "assets" is not defined under the IBC. However, according to Section 18 of the IBC, the interim resolution professional is required to take control and custody of any "asset" over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets. Section 18 also specifies the assets that are excluded from this list.

³ Under Regulation 36A(11), the prospective resolution applicant may raise objection to inclusion or exclusion of a prospective resolution applicant in the provisional list within five (5) days from the date of issue of the provisional list. On considering the objections received, the resolution professional shall issue the final list of prospective resolution applicants to the committee of creditors within ten (10) days of the last date for receipt of objections.

⁴ *Discussion Paper on Changes in the Corporate Insolvency Resolution Process to Reduce Delays and Improve the Resolution Value*, Insolvency and Bankruptcy Board of India, 27 June 2022.

According to the thirty-second (32nd) report of the Standing Committee on Finance, it was observed that bidders may be interested in selected business units or assets rather than the entire business of the Corporate Debtor. If this was permitted, it would lead to a superior commercial outcome as against a single bidder acquiring the entire Corporate Debtor.⁵

The press release dated 17 September 2022 (**Press Release**) issued by the IBBI notes that the Regulation 36B(6A) has been introduced with the intent and objective of maximisation of value in CIRP. Regulation 36B(6A) provides that a resolution plan can include the sale of one or more assets of the Corporate Debtor to one or more PRAs submitting resolution plans for such assets.

On 18 January 2023, the Ministry of Corporate Affairs invited comments on the proposed amendments to the IBC (**MCA Paper**). The MCA Paper confirms that resolution plans may be invited for individual or collective assets of the Corporate Debtor but clarifies that at last one (1) resolution plan should provide for insolvency resolution of the Corporate Debtor as a going concern which may include provisions for its corporate restructuring and other mandatory requirements in terms of the IBC and the CIRP Regulations.

Accordingly, it is clear that as part of the larger intent to resolve the Corporate Debtor as against liquidating it and to maximise the value for all stakeholders, the PRAs should be granted the option to submit resolution plans on an asset-wise basis if there are no resolution plans for the Corporate Debtor as a whole.

3 Key Considerations

- a. Precursor to Asset-Wise Resolution: Regulation 36B(6A) provides for issuance of an RFRP and not the invitation for EOI. There could be situations where EOIs itself are not received for the Corporate Debtor as a whole. In this situation, it should be possible to take the view that EOIs may be invited for purchase of one or more assets of the Corporate Debtor in addition to seeking EOIs for the Corporate Debtor as a whole. At a preliminary stage of the CIRP, the CoC should be granted maximum flexibility in terms of gauging interest from PRAs. This will also ensure that any time spent in running multiple rounds (i.e., first requesting PRAs for resolution plans for the Corporate Debtor as a whole followed by the option to purchase one or more assets of the Corporate Debtor) is saved given that the CIRP is required to be time-bound.
- b. Trigger for Asset-Wise Resolution: As highlighted earlier, if no resolution plans are “received” for the Corporate Debtor as a whole, the RP may, with the approval of the CoC, issue an RFRP for sale of one or more assets of the Corporate Debtor. This does not address a situation where resolution plans are received but are not to the satisfaction of the CoC. In this situation, the RP is permitted, subject to the approval of the CoC, to “re-issue” the RFRP for the Corporate Debtor as a whole but is not permitted to issue a fresh RFRP for sale of one or more assets of the Corporate Debtor. Arguably, if resolution plans are received for the Corporate Debtor as a whole but are not to the satisfaction of the CoC, it does not mean that there is no interest for the Corporate Debtor as a whole. However, given that the key decision-making body (the CoC) is not satisfied with the outcome of the CIRP, it should be possible to take the view that in this case as well, the CoC should be able to request for resolution plans for the Corporate Debtor or for one or more of its assets. Consequently, this would make the CIRP highly complex in terms of there being multiple resolution plans and PRAs, varying eligibility criteria and evaluation matrices/ methodologies, attribution of liabilities to the Corporate Debtor and its assets and potential inter-creditor issues arising out of sale of

⁵ *Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions*, Standing Committee on Finance (2020-2021) (Thirty-Second (32nd) Report), Ministry of Corporate Affairs, August 2021.

assets secured in favour of certain creditors. However, it should be possible to commercially devise measures to solve these issues.

- c. CoC Approval Threshold: Regulation 36B(6A) does not specify whether the approval of the CoC holding fifty-one percent (51%) or sixty-six percent (66%) of the voting share will be required for issuance of an RFRP in terms of the said regulation. According to Section 21(8) of the IBC, save as otherwise provided in the IBC, all decisions of the CoC are required to be taken by a vote of not less than fifty-one percent (51%) of the voting share of the CoC. Given this, it appears that an approval of the CoC holding fifty-one percent (51%) of the voting share should suffice. However, given that approval of the CoC holding sixty-six percent (66%) voting share is required for approving resolution plans and to undertake a sale of unencumbered assets under Regulation 29 of the CIRP Regulations, it should be possible to take the view that the higher threshold of sixty-six percent (66%) of the voting share, will apply.
- d. Attribution of Liabilities: PRAs are required to submit resolution plans for a Corporate Debtor on a going concern basis. The key aspect of this requirement is to provide for the settlement or treatment of the outstanding liabilities of the Corporate Debtor. This is easy in the case of resolution of a Corporate Debtor as a whole. However, in case of part sale of assets of a Corporate Debtor, attribution of liabilities unless they specifically attach to assets (such as, costs and expenses arising out of or related to the asset), including, the corporate insolvency resolution costs⁶, is complex. It should be possible to determine a methodology to attribute liabilities across assets. One aspect to consider in terms of devising the methodology would be to obtain a fair value and liquidation value of each asset of the Corporate Debtor. However, given that the CIRP Regulations do not offer any guidance on this aspect and it remains fairly untested, there is a risk that PRAs could seek to challenge any such methodology or that it might not squarely and equally apply to sale of all assets of the Corporate Debtor. In this case, PRAs may simply seek to submit a resolution plan amount for the relevant asset while granting the CoC the flexibility to decide and determine the manner of distribution of this amount subject to the IBC.
- e. Measures for Insolvency Resolution: According to Section 5(26) of the Insolvency and Bankruptcy Code 2016 (IBC), a “resolution plan” is defined as a plan proposed by a resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the IBC. According to Regulation 37(m) of the CIRP Regulations,

“A resolution plan is required to provide for measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to, the sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets and manner of dealing with remaining assets.”

Curiously, Regulation 37(b) of the CIRP Regulations already provided that a resolution plan may provide for sale of all or part of the assets whether subject to any security interest or not. The distinction between this provision and Regulation 37(m) is that the latter contemplates submission of individual resolution plans for one or more assets of the Corporate Debtor, whereas the former provides that the sale of one or more

⁶ According to Section 5(13) of the IBC, corporate insolvency resolution process cost means:

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board

assets of a Corporate Debtor could be proposed as a measure in a resolution plan for a Corporate Debtor as a whole.

A key aspect of the Amendment is the requirement of a resolution plan for an asset of a Corporate Debtor to also provide for the manner of dealing with the remaining assets. The CIRP Regulations do not provide any guidance on this aspect. It should be possible in this case to argue that the manner of dealing with the remaining assets will be in accordance with the RFRP as approved by the CoC. The usage of the word “manner” is unusual given that a resolution plan for an individual asset will not and should not be expected to address the remaining assets of the Corporate Debtor. This requirement (to address the remaining assets of the Corporate Debtor) may be indicative of the larger intent of the IBC which is to resolve the Corporate Debtor as a whole. Interpretation of this provision and market practice on this aspect remain to be seen.

A slightly technical issue that arises out of the Amendment is whether a resolution plan for an individual asset is required to be on a going concern basis. We believe that this may not strictly apply in the case of asset-wise resolution to the extent that the resolution plan fully complies with the IBC.

Partial Resolution cum Partial Liquidation: The most important issue is whether this Amendment will lead to a holistic and complete resolution of the Corporate Debtor. There could be situations where PRAs may submit resolution plans only for certain assets of the Corporate Debtor. Logically, the remaining assets should be subject to Liquidation. However, the current construct of the IBC does not envisage partial resolution and liquidation of assets of a Corporate Debtor. As highlighted earlier, according to the MCA Paper, one of the resolution plans for one or more assets of the Corporate Debtor should provide for resolution of the Corporate Debtor entity itself as a going concern. The MCA Paper also mentions that CIRP will conclude once the National Company Law Tribunal approves resolution plans for *all* assets of the Corporate Debtor (including, for the insolvency resolution of the Corporate Debtor as a going concern). However, this still does not address the situation highlighted above where no resolution plans are received for certain assets of the Corporate Debtor. Accordingly, this issue will be required to be tested before the courts.

4 Conclusion

The Amendment caters to the needs of the market and the PRAs. We believe that this is a step in the right direction and that this will facilitate faster and better commercial outcomes for stakeholders. The Amendment provides impetus to reviving a languishing distressed assets market. In fact, the MCA Paper provides much-needed clarity on certain issues arising out of the Amendment. However, interpretation of law and market practice remains to be seen.

If you require any further information about the material contained in this newsletter, please get in touch with your Trilegal relationship partner or send an email to alerts@trilegal.com. The contents of this newsletter are intended for informational purposes only and are not in the nature of a legal opinion. Readers are encouraged to seek legal counsel prior to acting upon any of the information provided herein.

ⁱ Notification no. IBBI/2022-23/GN/REG093 dated 16 September 2022 (with effect from 16 September 2022).