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Guidance on Common Issues Observed by IIIPI During Monitoring/ Inspections of IPs

(.....Continued from the previous edition)

Part – 1: Corporate Insolvency Resolution Process (CIRP)

1.7 Observations related to Information Memorandum

Observations	Relevant Provisions of Law	Remarks
<p>i. It has been observed that the Information Memorandum (IM) was not prepared within the stipulated timelines and the reason for the same was not been duly recorded in the minutes.</p> <p>ii. Delay in preparation of IM within the timelines specified under the Code.</p> <p>iii. It is observed that the Information Memorandum was placed before the CoC without obtaining a confidentiality undertaking from the recipients of IM.</p> <p>iv. It has been observed that the copyright for the IM provided is exclusively owned by IPE. The copyright mark on the IM indicates that IPE is the owner of all the intellectual property rights associated with the IM document leading to a conflict of interest.</p> <p>v. Updating of IM is not placed before the CoC.</p> <p>vi. Revision/updating in IM not done on changes made in the content like revised claims, and updating of financial Statements.</p> <p>vii. It has been observed that CIRP - 7 was not filed by IP recording the reasons for non-issuance from 92 days from Public Announcement and thereafter in every 30 days till actual issuance.</p>	<ul style="list-style-type: none"> Section 29 of the Code Regulation 36 and 40B of IBBI (CIRP) Regulations, 2016 Circular No. IBBI/2020-21/GN/REG070, dated 15th March, 2021 	<p>i. The Information Memorandum (IM) is crucial in the Corporate Insolvency Resolution Process (CIRP) for transparency and stakeholder engagement. Insolvency Professionals (IPs) must meticulously document the sharing of the IM with the Committee of Creditors and prospective resolution applicants, including confidentiality declarations. Failure to prepare or share the IM is not just a procedural lapse but has substantive implications, potentially undermining the resolution process's effectiveness.</p> <p>ii. IP shall intimate through revising the IM, any change in list of claims and mention the liabilities for the nonsubmitted claims for the benefit of the PRA/SRA to consider any future liability or to propose settlement in Resolution Plan.</p> <p>iii. IP should ensure filing of CIRP-7 in delay in issuance of IM in every 30 days till issuance of IM.</p>

1.8 Observations related to Expression of Interest, Request for Resolution Plan (RFRP)

Observations	Relevant Provisions of Law	Remarks
<p>i. Delay in placing the agenda before the COC for issuance of Expression of Interest (EOI).</p> <p>ii. No agenda placed before the COC for EOI even after a substantial period of CIRP had elapsed.</p> <p>iii. The minimum timelines of 15 days to submit EOI to PRA are not provided.</p> <p>iv. The non-eligible EOI accepted by IP without the approval of COC in the eligibility parameters and reinviting the EOI.</p> <p>v. The EOI submitted after the last dates provided in Form G was accepted by the IP..</p> <p>vi. Non-refundable deposit was sought along with EOI/RFRP.</p> <p>vii. It has been observed that CIRP Form 7 was not filed by IP recording the reasons for delay in issuance of RPRP in every 30 days from the last filing till completion of event.</p>	<ul style="list-style-type: none"> Section 29A of the Code. Regulation 36A, 36B and 40B of IBBI (CIRP) Regulations 2016 Circular No. IBBI/2020-21/GN/REG070, dated 15th March 2021. 	<p>i. The observations may signify substantive hinderance in timely resolution. Concurrently, obtaining non-refundable Earnest Money Deposits (EMD) is not in letter and spirit of the Code. The absence of prescribed timelines for EOI submissions to the Professional Resolution Applicant (PRA) questionable on the fairness and transparency the process. Further, ineligible EOIs without COC approval may exacerbate substantive gaps, risking resolution outcomes and defeat the objective of the code.</p> <p>ii. IP to ensure filing of CIRP-7 in delay in issuance of RFRP in every 30 days till issuance of RFRP.</p> <p>iii. IP to seek approval from CoC for accepting EOI after the last date provided in Form G.</p> <p>iv. IP to ensure that RFRP shall not require any non-refundable deposit for submission of or along with resolution plan.</p>



1.9 Observations related to the Resolution Plan:

Observations	Relevant Provisions of Law	Remarks
<p>i. It has been observed that the distribution amount to the stakeholders as per the approved resolution plan was different from the last updated list of creditors as the Resolution Plan was revised by the SRA however the plan did not include updated list of creditors and the same was placed before the AA for approval and therefore the order contained wrong details of distribution.</p> <p>ii. Resolution plan consists of list of creditors with admitted claim of uninvoked bank guarantee with no clarity on its dealing.</p> <p>iii. The RP accepted the Resolution plan of the suspended Board of Directors who are ineligible as per Sec 29A of the Code.</p> <p>iv. The Resolution Plan submitted consisted of provision that advance amount was provided by SRA to keep CD as a going concern and the same shall be adjusted in distribution. However, if the resolution plan is not approved, no ratification was sought for Interim Finance from the CoC. Also, no such treatment of that amount was provided in the resolution plan.</p>	<ul style="list-style-type: none"> Section 29A, 30 & 31 of the Code Regulation 37-39 of IBBI (CIRP) Regulations 2016 	<p>i. Ensuring that the resolution plan presented to the Adjudicating Authority (AA) accurately reflects the updated list of creditors is procedurally essential, as discrepancies could impact the approved distribution and unnecessary litigation which may impact the implementation of the approved Plan.</p> <p>ii. Additionally, as a best practice incorporating uninvoked bank guarantees as contingent claims, rather than including them in the resolution plan as it may have a substantive impact on the distribution to the creditors.</p> <p>iii. The evaluation of the eligibility of Prospective Resolution Applicants (PRAs) under Section 29A of the Code has a significant impact on the objectivity of the Resolution Professional (RP). The IP shall ensure all compliances for evaluating the Resolution Plan and minutise the summary of all decisions taken in cases where assistance have been taken by the IP and maintain written contemporaneous records for all decisions taken, the reason for taking the decision, and the information and evidence in support of such decisions.</p>

1.10 Observations related to Delegation of Authority Vs. Outsourcing of Work:

Observations	Relevant Provisions of Law	Remarks
<p>i. It has been observed that the IP authorized his team member (part of IPE providing support services) for chairing the CoC meetings and being the signatory for all the applications filed before AA. Such an act of delegation of authority in exceptional cases without obtaining any approval u/s 28 of the Code from the COC may amount to outsourcing as these are among the key duties defined for IP under the Code.</p> <p>ii. It has been observed that IP appointed professionals for claim verification, Section 29A compliance, etc wherein in the absence of written contemporaneous records for exchange of communication between the RP and professional appointed demonstrating that the decision making was all time lies with IP and the appointed professional was only providing assistance/support to the IP , may amount to outsourcing. For example: The appointed professional carries out their work independently, with no feedback loop to the IP, and the IP adopts the Professional's findings without any documented independent review. This situation could be considered outsourcing, as there's no proof that the IP remained in control of the process.</p> <p>iii. It has been observed that relationship disclosure not filed wherein delegation of authority is sought u/s 28 of the Code for specific tasks. Delegation of specific task is an engagement of other person with/ without separate fees, which requires independence and should not inherit the risk of any conflict of interest.</p>	<ul style="list-style-type: none"> Section 18, 25 and 28(h) of the Code Regulation 7(2) (bb) of IBBI (IP) Regulations, 2016 Clause 23B of Schedule I of IBBI (IP) Regulations, 2016 	<p>i. Firstly, instances where delegation of authority lacks formal acknowledgment by the insolvency professional (IP) for pivotal tasks like chairing CoC meetings may substantially raise concerns of outsourcing, compromising the IP's pivotal role.</p> <p>ii. Secondly, appointments of professionals for crucial tasks without documented evidence of IP oversight risk diluting decision-making authority, substantially may be considered as outsourcing.</p> <p>iii. Additionally, failure to disclose relationships when seeking delegation of authority undermines procedural transparency.</p> <p>iv. Unclear delegation terms or unsanctioned professionals may pose both procedural and substantive risks.</p> <p>v. IP shall ensure Delegation of authority shall not amount to outsourcing and shall maintain complete independence without any conflict of interest.</p>

<p>i. Delegation of Authority was sought for professional appointed as Authorized Representative of IP. The Code does not provide any concept of an Authorised representative of IRP/RP which may amount to misleading communication to stakeholders.</p> <p>ii. Delegation of authority sought was not role/task specific but in general. Therefore scope/ role/relation of the professional in the CIRP process cannot be ascertained. The role of IRP/RP is significant in the entire CIRP and delegation to another person without specifying any role may amount to outsourcing of work.</p>		<p>vi. IP shall be able to always demonstrate in cases where assistance have been taken by IP, through written contemporaneous records for all decisions taken, the reason for taking the decision, and the information and evidence in support of such decisions.</p> <p>vii. If there is no significant difference (25%) between the two valuation reports, a third valuation is not required. Moreover, it is the duty of the Resolution Professional (RP), as per Regulation 35 of the CIRP Regulations, to obtain the valuation reports(not COC) and ensure that they comply with the provisions of the Code.</p>
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1.11 Observations related to Pre/during CIRP cost:

Observations	Relevant Provisions of Law	Remarks
<p>i. It has been observed that pre-CIRP dues were paid by the IP during CIRP.</p> <p>ii. It has been observed that due to delay in receipt of order of admission, suspended Board paid the CIRP dues, and no steps were taken by IP against the act.</p> <p>iii. Appointment of professionals was done by CoC, however, the cost of such professionals was made part of the CIRP cost.</p> <p>iv. Amount not ratified yet made part of the CIRP cost.</p> <p>v. It is generally observed that the costs disclosed in Form II, Form III, CIRP2 and CIRP5 are mismatched with respect to the costs appearing in the minutes of the meetings of the CoC.</p>	<ul style="list-style-type: none"> Regulation 31A, 33, 34 and 34A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read with the Circular No. IBBI/IP/ 013 dated 12th June, 2018 	<p>i. Firstly, instances where pre-CIRP dues are paid during CIRP raises questions regarding payment approvals and oversight in case paid by the suspended board of directors after ICD but before IP took control and custody, may have substantive impact the objectivity and the scheme of IBC.</p> <p>ii. Procedural lapses, like failing to seek CoC approval for regulatory fee ratification, etc., however the same was either obtained from FC/SRA and deposited by IP to IBBI. The incorporation CIRP expenses without proper Approval in every COC may amount to Substantive lapse.</p>

<p>vi. In the event of withdrawal under section 12 A of the Code before the constitution of CoC it has been observed that the IPs did not submit cost details as required by Form II to be submitted with IIPI.</p> <p>vii. The operational cost of the CD never placed nor apprised to the CD and the same is not disclosed in any of the Disclosure/ Compliance form II/ III, CIRP2/5.</p> <p>viii. The regulatory fee not placed before the CoC for ratification.</p> <p>ix. Pre-CIRP cost towards the appointment of professionals made by COC forming part of the CIRP cost which is in violation of the circular dated 12th June 2018.</p> <p>x. No approval from COC for interim funding by SRA</p> <p>xi. Keyman Insurance cover cost of the Suspended Board of Directors forming part of CIRP cost, Insurance was obtained from one of the COC (FC) members. This may be questionable.</p> <p>xii. Huge expenditure on venue conducting regular COC meeting outside the premises of CD/COC/RP/IPE.</p> <p>xiii. It has been observed that AA directed the IP to publish a Public Announcement in a specific newspaper, however, IP did not comply with the directions and later again published the public announcement in newspaper as directed by AA leading to an unnecessary increase in cost.</p>	<p>iii. Discrepancies, coupled with mismatches between disclosed costs and CoC meeting minutes, suggest substantive lapse in financial transparency and accountability.</p> <p>iv. The IP has to ensure all pre CIRP cost shall be considered and admitted through Claims only.</p> <p>v. The pre CIRP cost towards appointment of professionals shall not form of the CIRP cost.</p> <p>vi. The appointment of professionals by COC shall not form part of the CIRP cost.</p> <p>vii. The IP shall ensure to place all CIRP and operational cost before the COC for its approval in every meeting.</p> <p>viii. The IP shall present all agenda items in the subsequent meeting immediately after any decision of cost or cost is incurred, without delay.</p> <p>ix. The IP as a best practice shall ensure that the CD shall not be burdened with unnecessary/ exorbitant costs and shall endeavour to avoid costs on a venue for conducting COC meetings, if possible. The RP may prefer COC meeting in CD or his own office.</p> <p>x. The IP shall ensure that the Fees have been paid through the banking channel in the name of the professional appointed including valuer.</p> <p>xi. The IP shall include the fees Under Regulation 31A under CIRP and must intimate to the COC for the same.</p>
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1.12 Observations related to Valuation

Observations	Relevant Provisions of Law	Remarks
<p>i. It has been observed that non-registered valuers-entity was appointed in the first place, and later on replaced with Registered valuers which leads to delay in the appointment of valuers.</p> <p>ii. It has been observed that IPs have issued engagement letters in the name of firms/ LLPs/ Companies which are not IBBI registered valuer/ registered valuer entities and later on have disclosed the relationship disclosures on the website of the IPA in the name of individual registered valuer registered with IBBI, being partners of the firms so appointed by the IPs.</p> <p>iii. Common engagement letter issued to registered valuers not belonging to a registered valuation entity with a total fee to be paid. It reflects the conflict of interest as the lumpsum fee is mentioned.</p> <p>iv. It has been observed that there was a delay in the appointment of registered valuers.</p> <p>v. It has been observed that a non-registered entity was appointed, however, the valuation report was signed by the registered valuer. The written contemporaneous records did not uniformly capture the details of the Registered Valuers.</p>	<ul style="list-style-type: none"> Regulation 27 of IBBI (CIRP) regulations 2016. CIRCULAR No. IBBI/RV/019/ 2018 dated 17th October 2018 Circular No. IBBI/RV/022/ 2019 dated 13th August 2019. 	<p>i. IP to be vigilant while analysing the financial statements and record available as to which all categories of assets required appointment of valuers. It is the duty of the IP to appoint valuers and cost needs to be ratified by the COC. IPs must issue written engagement letters to IBBI Registered Valuers or Registered Valuers Entities, detailing essential information such as name, Registration number, class of asset, scope of work, fees, and timelines.</p> <p>ii. As a best practice IP should call for quotations and records reasons to selecting the valuers. The IP should obtain the no relation/conflict of interest undertaking from the valuers so appointed and preserved in its records. Substantively, ensuring consistency in disclosing valuer details in CoC minutes, IIPI disclosures, and IBBI forms enhances transparency and accountability. No appointment of Registered Valuer/ valuation conducted by a non-registered valuer may also have a substantive impact.</p>

vi. The written contemporaneous records demonstrating the fact that IRP/RP made the appointment for the valuers after considering the reasonableness of fees, arm-length basis and no conflict of interest disclosure, were maintained by the IRP/RP.		iii. IP are advised to be guided by Circular No. IBBI/RV/019/2018 dated 17th October 2018 and Circular No. IBBI/RV/022/2019 dated 13th August 2019 issued by IBBI on Registered valuer.
vii. The third valuer was appointed on the request of the COC and the cost is included in the CIRP cost.		iv. The IP shall ensure that the Fees has been paid through banking channel in the name of professional appointed including valuer.
viii. The name of the valuers was suggested by the COC.		
ix. Non-appointment of valuers for all categories of Assets like Land & Building, Plant and Machinery, Securities and Financial Assets, Intellectual Property Rights/Brands in the name of the CD, a shortfall in analysing the balance sheets and other records available with IRP/RP, especially wrt Securities and financial assets.		
x. Appointment of a single Valuer for each class of asset.		

(to be continued...)

