SEBI Regulations amended for listed companies undergoing insolvency resolution process under the Insolvency and Bankruptcy Code

1. Introduction

The Insolvency and Bankruptcy Code, 2016 ("**IBC**") was enacted as a comprehensive code to consolidate laws relating to reorganisation and insolvency resolution of corporates, partnerships as well as individuals. The Insolvency and Bankruptcy Board of India ("**IBBI**") has also framed the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") to address several aspects pertaining to corporate insolvency resolution process ("**CIRP**").

Whilst the IBC itself amended provisions of various laws such as the Companies Act, 2013, The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, for the effective implementation of the IBC, a need was felt for amending various regulations of the Securities and Exchange Board of India ("**SEBI**") for facilitating an effective and time bound insolvency resolution of listed companies undergoing a CIRP. In this regard certain amendments were made to the regulations framed by SEBI ("**SEBI Regulations**"). However, considering that there is a fundamental change in the management and governance of a listed entity during a CIRP as well as pursuant to the approval of a resolution plan, on March 28, 2018, SEBI issued a discussion paper wherein proposals were made for further amending certain SEBI Regulations.

Pursuant to the said discussion paper, on May 31, 2018, SEBI issued 4 (four) notifications amending the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Regulations**"), the SEBI (Delisting of Equity Shares) Regulations, 2009 ("**Delisting Regulations**"), the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**") and the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009 ("**ICDR Regulations**") respectively.

This update discusses the changes that have been introduced in the above-mentioned regulations.

2. Takeover Regulations

Pursuant to an amendment effective from August 14, 2017, acquisitions made under a resolution plan approved by the National Company Law Tribunal ("**NCLT**") under the IBC were exempt from the obligation to make an open offer under regulations 3 and 4 of the Takeover Regulations. No further exemptions were made available to acquisitions pursuant to a resolution plan approved by the NCLT under the IBC. One of the provisions of the Takeover Regulations (proviso to regulation 3(2)), prohibits an acquirer from acquiring or entering into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding i.e. 75% (seventy five percent).

Shareholding of public shareholders can reduce to below 25%.

Pursuant to the notification dated May 31, 2018, the Takeover Regulations have been amended to state that an acquisition of shares by an acquirer, pursuant to a resolution plan under section 31 of IBC would be exempted from the obligation under the proviso to regulation 3(2) of the Takeover Regulations.

In light of the aforesaid amendment, henceforth, a resolution plan can provide that a resolution applicant proposing to acquire a listed company undergoing CIRP can acquire more than 75% (seventy five percent) of the share capital of the company, thereby reducing the shareholding of the public shareholders to below 25% (twenty five percent).

3. Delisting Regulations

The Delisting Regulations, *inter alia*, stipulate the procedure to be followed for delisting including making a public announcement, making an offer to public shareholders, opening an escrow account for depositing the consideration payable and determining the offer price through a book building process. Pursuant to the notification dated May 31, 2018, the Delisting Regulations have been amended to state that the Delisting Regulations shall not apply to any delisting of equity shares of a listed entity that is made pursuant to a resolution plan approved under section 31 of the IBC.

For the aforesaid exemption to apply, the resolution plan should provide for the following:

- specific procedure to complete the delisting of such shares; or
- an exit option to the existing public shareholders at a price specified in the resolution plan.

Delisting Regulations will not apply in case of a delisting pursuant to a resolution plan. However, shareholders should receive atleast the liquidation value due to them (if any).

Further, with respect to the price to be paid to the shareholders, in line with the objective of the IBC and treatment of stakeholders as contemplated in the IBC, it has been stipulated that the exit to the shareholders should be at a price that is not less than the liquidation value as determined under regulation 35 of the CIRP Regulations after paying off dues in accordance with section 53 of the IBC. In this regard it is pertinent to note that often times, in case of a company undergoing CIRP, the liquidation value due to shareholders would be nil and hence, shareholders may not be paid any amount as exit price. If, however, the existing promoters or any other shareholders are proposed to be provided an opportunity to exit under the resolution plan at a price higher than the price determined in terms of the above,

then the existing public shareholders also have to be provided an exit opportunity at a price that is not less than the price at which such promoters or other shareholders, directly or indirectly, are provided exit.

The details of delisting of shares along with the justification for exit price in respect of the proposed delisting have to be disclosed to the recognized stock exchanges within 1 (one) day of the resolution plan being approved under section 31 of the IBC.

Apart from the aforesaid amendment, regulation 30 of the Delisting Regulations have also been amended pursuant to the notification dated May 31, 2018. Regulation 30(1) of the Delisting Regulations states that an application for listing of equity shares that have been delisted under Chapter III of the Delisting Regulations (Voluntary Delisting) or under Chapter VII of the Delisting Regulations (Delisting by Operation of Law) cannot be made unless a period of 5 (five) years has passed since delisting and that an application for listing of equity shares that have been delisted under Chapter V of the Delisting Regulations (Compulsory Delisting) cannot be made unless a period of 10 (ten) years has passed since delisting. However, pursuant to the recent amendment, sub-regulation (2A) has been introduced in regulation 30 stating that an application for listing of delisted equity shares may be made in respect of a company which has undergone CIRP under the IBC.

4. LODR Regulations

The key changes introduced to the LODR Regulations are discussed below.

Exemption from obtaining shareholders' approval for certain matters

Pursuant to the notification dated May 31, 2018 ("**LODR Amendment**"), various matters (*discussed below*) which earlier required approval of shareholders would no longer require such approval, if the same is in respect of a resolution plan approved by the NCLT under the IBC.

It may not be out of place to mention here that regulation 39(6) of the CIRP Regulations already provides that a provision in a resolution plan which would otherwise require the consent of the members of the corporate debtor under the terms of the constitutional documents, shareholders' agreement, or other document of a similar nature, would take effect notwithstanding that such consent has not been obtained. Further, section 31(1) of the IBC provides that once a resolution plan is approved by NCLT, it will be binding on the shareholders of the corporate debtor. The Ministry of Corporate Affairs also issued a circular (General Circular No. IBC/01/2017) dated October 25, 2017 ("**MCA Circular**") clarifying that the approval of shareholders of the corporate debtor for a particular action required in the resolution plan for its implementation which would have been required under the Companies Act, 2013 or any other law, if the plan was not being considered under the IBC will be deemed to have been given on its approval by NCLT. Thus, even before the LODR Amendment, no separate approvals were being taken from shareholders for matters requiring approval of shareholders under the Companies Act, 2013 or other laws. Recently, pursuant to an ordinance amending the IBC, the clarification in the MCA Circular has been incorporated in the IBC. The LODR Amendment, therefore reinforces this position.

Need for obtaining shareholders' approval for various matters specifically done away with.

- **Material related party transactions**

  Pursuant to the LODR Amendment, the requirement of obtaining the approval of shareholders for material related party transactions is not applicable if such material related party transaction is in respect of a resolution plan approved by NCLT, provided that such event is disclosed to the recognized stock exchanges within 1 (one) day of the resolution plan being approved.

- **Disposal of shares in a material subsidiary**

  Pursuant to the LODR Amendment, the requirement of obtaining approval of the shareholders by a special resolution for the following matters is not applicable if the same is under a resolution plan that has been approved by the NCLT and such an event is disclosed to the recognized stock exchanges within 1 (one) day of the resolution plan being approved:

  a. disposal of shares in a material subsidiary resulting in reduction of shareholding to less than 50% (fifty percent);
  b. ceasing to exercise control over the subsidiary; and
  c. sale, disposal or leasing of assets amounting to more than 20% (twenty percent) of the assets of the material subsidiary on an aggregate basis during a financial year.

- **Reclassification of promoters**

  When a new promoter replaces a previous promoter, reclassification requires approval of shareholders. The LODR Amendment provides that the said requirement would not apply if reclassification of the existing promoter is as per a resolution plan approved by the NCLT. Certain other relaxations have been provided in relation to reclassification of existing promoters which are discussed below.

Relaxation from the norms for reclassification of existing promoters

Regulation 31A was introduced in the LODR Regulations to set out the procedure for reclassification of a status of a shareholder. Prior thereto, there were instances where promoters of a listed company sought to reclassify themselves from the category of 'promoter' to 'public'; however, there were no objective criteria for the same. In order to bring about objectivity to the process, SEBI prescribed specific criteria for allowing reclassification of the status of a shareholder.

Norms for reclassification of promoters and criteria for being deemed a professionally managed company relaxed for companies undergoing CIRP.

As per the criteria laid down by SEBI, when a new promoter replaces an existing promoter, apart from approval of shareholders, it has to be ensured that such promoter along with persons acting in concert do not hold more than 10% (ten percent) of the paid-up equity capital of the entity and do not continue to have any special rights. Further, such promoters and their relatives cannot act as a key managerial person for a period of more than 3 (three) years. Also, reclassification cannot be used as a tool for achieving compliance with minimum public shareholding requirements.

In regulation 31A, SEBI has also laid down criteria where reclassification of the status of existing promoters into public is proposed as a result of an entity becoming

professionally managed. As per the existing criteria, an entity would be considered as professionally managed if no person or group along with persons acting in concert taken together hold more than 1% (one per cent) paid-up equity capital of the entity. The promoter seeking reclassification along with his promoter group entities and the persons acting in concert cannot have any special right through formal or informal arrangements. Further, the promoters seeking reclassification and their relatives can act as key managerial personnel in the entity only subject to shareholders' approval and for a period not exceeding 3 (three) years from the date of shareholders' approval.

Pursuant to the LODR Amendment, the aforesaid criteria which are contained in sub-regulations (5), (6) and clause (b) of sub-regulation (7) of regulation 31A of the LODR Regulations would not apply if re-classification of an existing promoter or promoter group of the listed entity is as per a resolution plan approved by NCLT. To avail of the exemption the existing promoter should not remain in control of the listed company and the underlying rationale for reclassification has to be disclosed to the stock exchanges within 1 (one) day of the resolution plan being approved.

The above relaxation granted pursuant to the LODR Amendment is significant and a welcome change. Many resolution plans for listed companies undergoing a CIRP contained a provision which sought to reclassify an existing promoter into public, however, all the criteria prescribed by SEBI were not being met. Hence, special relaxation was sought from SEBI in these cases even though the resolution plan may have taken away all special rights of the existing promoters and significantly reduced their shareholding.

Relaxation from the norms for restructurings

Regulations 37 and 94 of the LODR Regulations provide that a listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, is required to file the draft scheme, with the stock exchange(s) for its approval, before filing such scheme with any Court or NCLT. Further, on March 10, 2017, SEBI issued a circular no. CFD/DIL3/CIR/2017/21 with respect to conditions to be complied with by a listed entity undertaking a scheme of arrangement. Some of the conditions included obtaining a valuation report and a fairness opinion. Also, in certain cases approval of a majority of the public shareholders was required. Further, additional conditions were stipulated for a merger involving an unlisted company.

Mergers, demergers and capital reductions under a resolution plan would not require an NOC from the stock exchanges.

The IBC was enacted with the stated objective of being an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution. The Supreme Court in the case of *M/s Innoventive Industries Limited Appellant v. ICICI Bank* has held that the IBC is an exhaustive code on the subject matter of insolvency in relation to corporate entities and is complete in itself.

On the implementation of the IBC, questions arose with respect to whether the processes under the SEBI Regulations and Companies Act, 2013 would have to be separately followed in case of a restructuring being implemented under a resolution plan approved by NCLT including a merger, demerger and capital reduction. It has been argued that considering that IBC is a complete code in itself, the procedural requirements prescribed under the SEBI Regulations and Companies Act, 2013 would not be required to be followed separately in case of a restructuring under a resolution plan which has been approved by the NCLT.

The LODR Amendment has now provided clarity on the issue. Schemes of arrangement that are pursuant to a resolution plan that has been approved by the NCLT and that have been disclosed to the recognized stock exchanges within 1 (one) day of the resolution plan being approved, have been exempt from the application of the procedures and requirements laid down for the same in regulations 37 and 94 of the LODR Regulations. The amendment would help in avoiding unnecessary duplication of procedure.

Resolution Professional to fulfil all roles and responsibilities of the Board and committees

Under the IBC, once a corporate insolvency resolution process commences against a corporate debtor and an interim resolution professional is appointed, the powers of the board of directors ("**Board**") of the corporate debtor stands suspended and such powers are exercised by the resolution professional. The management of the affairs of the corporate debtor vests in the resolution professional.

Pursuant to the, LODR Amendment, SEBI has amended the LODR Regulations to state that the provisions of regulations 17 to 21, relating to the formation of Board and the committees, shall not be applicable during the insolvency resolution process period in respect of a listed entity that is undergoing CIRP under the IBC. However, the roles and responsibilities of the Board and the committees as prescribed under respective regulations shall have to be fulfilled by the interim resolution professional or resolution professional as the case may be.

Resolution Professional to fulfill roles and responsibilities of the Board and committees.

The roles and responsibilities of the Board under regulation 17 of the LODR Regulations which are required to be fulfilled by the resolution professional include reviewing compliance reports pertaining to all laws, laying down a code of conduct for the Board and senior management, amongst others.

Regulations 18 to 21 of the LODR Regulations which have been made inapplicable to a listed entity that is undergoing CIRP require listed companies to form an audit committee, nomination and remuneration committee, stakeholders relationship committee and risk management committee. However, as mentioned above, the roles and responsibilities of the committees have to be fulfilled by the resolution professional.

Disclosure requirements

The LODR Amendment also requires the following disclosures to be made with respect to the CIRP of a listed entity (corporate debtor) under the IBC:

a. Filing of application by a corporate applicant for initiation of CIRP, also specifying the amount of default;
b. Filing of application by financial creditors for initiation of CIRP against the corporate debtor, also specifying the amount of default;
c. Admission of application by the NCLT, along with amount of default or rejection or withdrawal, as applicable;
d. Public announcement made pursuant to order passed by the NCLT under section 13 of the IBC;
e. List of creditors as required to be displayed by the corporate debtor under regulation 13(2)(c) of the CIRP Regulations;

Salient features of resolution plan approved by NCLT to be disclosed. Commercial secrets need not be disclosed.

f. Appointment/ replacement of the resolution professional;
g. Prior or post-facto intimation of the meetings of committee of creditors;
h. Brief particulars of invitation of resolution plans under section 25(2)(h) of the IBC in the form specified under regulation 36A(5) of the CIRP Regulations;
i. Number of resolution plans received by resolution professional;
j. Filing of resolution plan with the NCLT;
k. Approval of resolution plan by the NCLT or rejection, if applicable;
l. Salient features, not involving commercial secrets, of the resolution plan approved by the NCLT; and
m. Any other material information not involving commercial secrets.

5. ICDR Regulations

Chapter VII of the ICDR Regulations, *inter alia*, stipulates the conditions for a preferential issue of equity shares and convertible securities including pricing requirements, disclosure requirements, requirement of obtaining consent of shareholders by way of a special resolution and the maximum tenure of a convertible security.

Pursuant to an amendment effective from August 14, 2017, preferential issue of equity shares made in terms of a resolution plan approved by the NCLT under the IBC was exempted from complying with the provisions of Chapter VII of the ICDR Regulations except the lock-in provisions. However, the said exemption was applicable for issuance of equity shares, and it was not clear whether a similar exemption was available for a preferential issue of convertible securities. Pursuant to the recent notification dated May 31, 2018, it has been clarified that the exemption would be applicable to 'specified securities' which has been defined in the ICDR Regulations as equity shares and convertible securities.

Preferential issue of convertible preference shares and convertible debentures would be exempt from the preferential issue guidelines in the ICDR Regulations except lock-in provisions.

In light of the said amendment, any preferential issue of equity shares or convertible securities such as convertible preference shares or convertible debentures if made in terms of a resolution plan approved by NCLT would not have to comply with the conditions stated in Chapter VII of the ICDR Regulations except the lock-in provisions.

This update has been contributed by Adity Chaudhury (Partner) and Deeya Ray (Associate).

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You can send us your comments at:
argusknowledgecentre@argus-p.com

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