Dated 29 December 2017

Comments on the Insolvency Regulations-IWIRC

International Women's Restructuring and Insolvency Confederation (**IWIRC**) respectfully submits the within comments in response to the notification of the Ministry of Corporate Affairs of the Government of India dated 6 July 2017 (the "**Submission**") under which the Insolvency and Bankruptcy Board of India invites comments from the public on the Insolvency and Bankruptcy Code, 2016 (the "**IBC**") and various regulations notified thereunder (collectively the "**regulations**").

About IWIRC

Founded in 1993, IWIRC is a US-headquartered international non-profit organization with 50 networks worldwide committed to the connection, promotion and success of women in the insolvency and restructuring professions. In connection with its focus, IWIRC is widely-regarded as a pre-eminent international organization in the restructuring and insolvency space. Examples of thought-leadership activities that it has engaged in include:

Policy Contributions: IWIRC has been invited each year, for more than a decade, to participate as a Non-Governmental Organization (NGO) in the United Nations' Committee on International Trade Law Working Group V on Insolvency. In biannual meetings of this Working Group IWIRC provides professional insight and experience on the need for robust insolvency policy to promote international trade in mature and growing economies. Along with representatives of sixty United Nations' member states and other prominent NGOs and Intergovernmental Organizations (IGO), five of our IWIRC members participate each year from various countries in developing model law and legislative guides. IWIRC members regularly participate in initiatives such as the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 and the revision of U.S. rules of local procedure.

Worldwide Educational Conferences: IWIRC holds global educational conferences for its members and other insolvency professionals that are well-attended and provide members with speaking opportunities and the opportunity to hear from industry leaders. IWIRC is also regularly invited to provide panellists to conferences held worldwide by other prominent organizations in the insolvency, legal and financial industries and to partner with other organizations to provide educational programming.

Helping Each Other: IWIRC is not just a social and educational organization. We are more than 1200 women who provide each other with access to information about the laws and practices in countries around the globe and referrals to each other for business opportunities. When one of us has a question, multiple members respond immediately with answers, papers, articles and introductions to ensure that our members make an excellent impression on employers and clients and gain the knowledge they are seeking from those with expertise.

Publications: IWIRC publishes quarterly newsletters and its various chapters publish newsletters that reach thousands of insolvency professionals. Our publications contain topical information on industry issues, developments in the legal and financial world and case law, and highlight the professional accomplishments of our members.

Awards: Each year IWIRC bestows awards on local chapters and members who go above and beyond in displaying the best that our network has to offer, whether promoting women in the industry or raising the profile of the organization and its members.

IWIRC has a long history in Asia. Following the first Asian network in Hong Kong (2005), we now have a very strong IWIRC presence in the region with networks in China (November 2008), Singapore (April 2009), Japan (May 2012) and India (April 2014), and most recently Malaysia (January 2017). Wherever we travel, we find women professionals to add to our networks and create new networks. In recognition of its growing visibility in Asia, IWIRC hosted its Inaugural PacRim Conference in Singapore in August 2017 which was attended by a mix of senior restructuring and insolvency professionals from Singapore, Hong Kong, India, Indonesia, the PRC and Australia, among others.

Disclaimer

The comments and suggestions set out in the Submission are based on interactions between the authors of the Submission on the one hand and various professionals in the restructuring and insolvency industry in India, Singapore, Hong Kong and the US who are part of or connected with the IWIRC network on the other hand with a view to eliciting "best practices" that we believe would be most suited to the Indian context. The authors have prepared the Submission in their personal capacity as members of IWIRC - and the views and recommendations expressed herein do not reflect the individual views of the authors of or contributors to the Submission or their respective firms.

The Submission provides comments only on certain aspects of the Indian regulations and is not intended to constitute comprehensive comments on the full set of regulations.

We have provided general recommendations on the issues highlighted in this document. We will be happy to provide drafting suggestions on a more detailed level to implement these policy recommendations.

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Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 read with Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2017 (IU Regulations)		
Concept: The IBC contemplates the creation of information utilities to collect, collate, authenticate and disseminate financial information of debtors in centralized electronic databases. It is mandatory for financial creditors to provide certain financial information of debtors to multiple utilities on an ongoing basis, which can be accessed by other creditors, Resolution Professionals, liquidators and other stakeholders in insolvency proceedings. The objective is to remove information asymmetry and reliance on the debtor for critical information that is needed to swiftly resolve insolvency, and to use technology based information infrastructure instead of paper based resources as were traditionally used. The IU Regulations were brought into force on 31 March, 2017.		
SR. NO.	**Regulation No./Principle**	**COMMENT**
1.	Eligibility Conditions Regulations 3(d), 6(2)(d) and (e)	The current qualification criteria for IUs includes: (i) Net worth of INR 500 million (approx. US$ 7,722,605) (ii) Application fee for registration of INR 5 million (approx. US$ 77,226) (iii) Annual fee of INR 5 million (approx. US$ 77,226) It is not clear why such high financial entry barriers have been imposed on IUs. The primary function of an IU is the storage and management of data which is technology-intensive, and not analysis of data as such. Therefore, the more relevant qualifying criterion to test if an IU is 'fit and proper' is the technological capability of its infrastructure and not its financial net worth. In addition, mechanisms such as an exit management plan allowing migration of data to other registered IUs can address the risks arising in the scenario of an IU's bankruptcy. We understand that the working group committee for the IU Regulations drew an analogy with the benchmark set for credit information companies (CICs) in India which perform a comparably similar function. The prescribed minimum authorised capital for CICs is INR 300 million and the minimum paid up capital is INR 150 million, as mandated by the CIC Act 2005. However, the working group committee decided to set higher thresholds for IUs under the IBC framework. We are of the view that such high entry barriers could lead to a concentrated market without healthy competition. This would increase the potential for high pricing and compromise the incentive to provide quality services. We are of the view that this does not further the IBC's objective of creating an open competitive industry to reduce the costs, delays and complexities of debt enforcement.

		IWIRC Comment: We recommend that: (a) the financial eligibility thresholds be relaxed; (b) the eligibility norms be amended to focus more on assessing the technological capability of the IU's infrastructure and past performance, integrity and management capability of the firm / promoters setting up the IU.
2.	Ownership structure	The current IU regulations provide that: (i) No single person may (directly or indirectly or through persons acting in concert) hold more than 51% shareholding up to 3 years from the registration of the IU. (ii) Only an Indian company, (i) which is publicly listed, or (ii) which has a dispersed shareholding in which no individual, directly or indirectly, holds more than 10% of the share capital, may hold up to 100% share capital or voting power of an IU for a 3 year period following registration. Generally speaking, as information repositories, IUs do not pose significant systemic risks to the Indian economy. Ownership structures are regulated as a matter of public policy in more sensitive industries such as banks (as they accept public funds), depositories (as they store title of securities), stock exchanges (as they provide a market for securities trade), insurance, defense or telecom. In similarly placed industries, such as CICs, there is no such restriction. Other than to address concerns about data manipulation and security, the IU industry does not require excessive regulation and therefore, restrictions on ownership may stifle competition among IUs. **IWIRC Comment**: We recommend that the above ownership restrictions for IUs be relaxed to allow the growth of a competitive industry with multiple participants. Subject to other eligibility conditions being met, an IU may be wholly-owned or closely held.
3.	Indian control and management	The current IU regulations provide that more than half of the directors of an IU must be Indian nationals or residents of India. As set out above, restrictions on ownership are more suitable to sensitive industries. In similarly placed industries, such as CICs, there is no such restriction. As such, limiting the management and control of IUs to Indian hands or with Indian residents may stifle competition among IUs without any corresponding benefit. **IWIRC Comment**: We recommend that the requirement of more than half of the directors of an IU being Indian nationals or residents of India be deleted.

4.	18(4) – Registration of Users	The current IU regulations provide that a person registered once with the IU is prohibited from thereafter registering with any other IU. This lack of mobility is unnecessarily restrictive for users who will be prevented from exercising their freedom of choice if, for example, they are dissatisfied with the services of an IU and/or there are new IUs offering lower prices or better quality services who enter the market at a later stage. This will indirectly, stifle competition amongst IUs without any corresponding benefit. **IWIRC Comment**: We recommend that the prohibition against a user transferring its registration to other IUs be deleted.
5.	Acceptance and Verification of information Regulation 20	Under the IBC framework, one of the 'core services' to be provided by an IU is "*authenticating and verifying the financial information submitted by a person*". Under the IU Regulations, an IU will accept information submitted in the prescribed form by a registered user and notify such user of the "terms and conditions" of authentication and verification of the submitted information. The working group report for the IBC contemplated authentication of information by the debtor, but the IU Regulations do not clearly specify how any information submitted (which would include information submitted by a creditor in respect of a debtor) will be verified or whether the debtor will be permitted to participate in/contest the verification process. In this context, a white paper circulated by the Indian government in respect of a proposed Data Privacy law makes the following points in relation to the storage of data: ➢ A person whose information is held by a data controller should have access to the information and should have the ability to seek its correction/ amendment. ➢ A data controller should have reasonable security safeguards in place to protect information held by it. ➢ Consent of the subject must be taken before data is accepted by a data controller. These principles should equally apply to the storage of data in an IU. Any unfavourable information regarding a debtor that is inaccurately recorded in the IU could have long-term adverse consequences on the credit profile of a debtor and in turn, its business, prospects and ability to raise capital. It is therefore critical to set clear verification processes and gating thresholds for the submission of any information to the IU and accordingly, a user must be required to submit clear documentary evidence in support of any information that it submits to an IU. In addition, a debtor should, at a minimum, be immediately notified if any user has submitted information in respect of it to an IU.

		In case of information relating to a default, the working committee group for the IU Regulations had contemplated that once an IU has received information of default from a creditor it must intimate the debtor. Another recommendation of the committee was that authentication of information should be through the host bank (the details of which were provided to the IU at an earlier stage). However, the IU Regulations do not set out any procedure for authentication and verification of the default having occurred. **IWIRC Comment**: We recommend that the IU regulations: (a) set out a clear and detailed process for authentication and verification of any information submitted by a user that an IU must follow upon receipt of such information; (b) require the IU to immediately inform the debtor whenever any information in respect of that debtor is submitted by a user. In a non-default scenario, we suggest that the verification process should involve authentication by the borrower within a fixed period of time; and (c) set out a clear process for authentication and verification of information submitted by a user in respect of a default by a debtor. In a default scenario, allowing the debtor to participate in the verification of the default information may be counter-productive and defeats the purpose of IUs in the insolvency process. However, the IU regulations should clearly specify the minimum requirements for submission of default information, such as clear documentary or other evidence in support of the information, and a process for verification through the debtor's bank to the extent necessary.
6.	Interoperability and information of Default to creditors on other IUs Regulation 21(2)	The current IU regulations do not provide for information of a default by a debtor recorded by an IU to be communicated to other IUs. While Regulation 24 allows access to information stored in other IUs, it does not entail an active intimation of default by such IUs to registered users of other IUs. This is a gap in the law which could prevent critical information in respect of a debtor being disseminated to all interested parties simply because such parties happen to be registered as users with a different IU. **IWIRC Comment**: We recommend that the IU regulations: (a) require that an IU must, immediately upon recording a default event in respect of a debtor (i.e. following authentication and verification of the fact of default submitted by a user) communicate such information to all other IUs on a confidential basis; and (b) oblige each IU to immediately communicate any information received under (a) above from another IU to all creditors (including guarantors and sureties to the debt) of that debtor who are registered as users with it.

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<tr><td>7.</td><td>Storage of Information

Regulation 22</td><td>The IU regulations do not include specific provisions in relation to data privacy. Data privacy is of particular concern given data breaches, identity thefts, fraud on various information systems occurring worldwide.

(i) Under Section 65B of the Indian Evidence Act 1872, certain mandatory requirements must be followed for any information in electronic form to be considered admissible as evidence in a court of law (such as (i) the information being fed regularly into the computer in the ordinary course, (ii) proper operation of the computer throughout the material period etc.).

IWIRC Comment: We recommend that the IU regulations should specifically state the requirement for IUs to comply with Section 65B of the Indian Evidence Act 1872 to ensure admissibility of information.

(ii) The current IU regulations do not factor in certain mandatory rules for storage of personal information under applicable information technology and data privacy laws in India. A person’s financial information (as lodged with an IU) is likely to qualify as ‘sensitive data or personal information (SDPI)’ as defined under the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (IT Rules). A body corporate possessing SDPI of a person is subject to various obligations under the IT Rules. For instance,

➢ the ability of a body corporate to disclose SDPI to third parties is limited.
➢ the body corporate possessing SDPI is obliged to maintain reasonable security practices and procedures with respect to the SDPI.

IWIRC Comment: The IU regulations should specifically mandate IUs to comply with the relevant obligations under applicable data privacy laws in India for storage of information.</td></tr>
<tr><td colspan="3">Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016</td></tr>
<tr><td colspan="3">Concept: The IBC contemplates the appointment of insolvency professionals. Having qualified the eligibility criteria laid down in the regulations, the insolvency professionals may be appointed as Interim Resolution Professional, Resolution Professional, Liquidator or Bankruptcy Trustee in the CIRP. The insolvency professionals are registered and governed by the Insolvency Professional Agency which are statutory bodies created within the scheme of the Code. The IP Regulations were brought into force on 29 November, 2016.</td></tr>
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SR. NO.	Regulation No./Principle	COMMENT
1.	11 – Disciplinary Proceedings	The IP regulations contemplate disciplinary proceedings if the Insolvency and Bankruptcy Board of India (**IBBI**) finds that sufficient cause exists to take action against an Insolvency Professional (**IP**) based on a complaint against the IP by any person. The regulations provide the IP with significant responsibilities in relation to the conduct of the insolvency resolution process. IPs face significant challenges in discharging these responsibilities as the interpretation of the legal regime governing their conduct is still evolving and there are also inherent practical difficulties in managing multiple stakeholders as part of the IBC process. We are of the view that a balance needs to be achieved between the need to regulate the conduct of the IP on the one hand, and giving it sufficient "headroom" to act efficiently when discharging its responsibilities. At present, the only protection provided by the IP regulations is for actions taken by an IP in 'good faith' and with 'reasonable care and due diligence'. On the other hand, the IBBI has wide powers to initiate disciplinary proceedings against an IP and re-examine decisions taken by it. We are of the view that such a provision, as presently written, is very open-ended and may be misused by other stakeholders with competing interests to interfere with the IP's role and obstruct the insolvency resolution process. While disciplinary proceedings may be necessary in fit cases, the grounds for initiating such proceedings should be specific and limited such as, in cases of gross negligence, gross misconduct, fraud and intentional non-disclosure of a related party nexus. Beyond these limited instances, a person may bring their grievance or claim against an IP under tort or private action but not by way of a statutory disciplinary proceeding. The provision on defences available to the IP can also be expanded to cover specific grounds such as reasonable diligence, reliance on ordinary course statutory filings, audit reports, valuation reports or authenticated documents. **IWIRC Comment:** We recommend that the IP regulations be amended as follows: (i) there should be a restricted list of grounds on which disciplinary proceedings can be initiated against an IP such as gross negligence, gross misconduct, fraud, misapplication of funds, and intentional non-disclosure of a related party nexus; (ii) certain mitigating factors be introduced such as self-reporting by an IP of an error / deficiency in the process as soon as noticed or brought to its notice, and taking steps for rectification (similar to the approach in the UK and the Cayman Islands);

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<tr><td></td><td></td><td>(iii) the regulations should protect the IP from liability if it has exercised “reasonable judgment” in reviewing authenticated or verified information/materials prior to making a decision (similar to the approach in the US). A non-exhaustive list of examples should be provided to illustrate the exercise of reasonable judgment in a particular situation. E.g., reliance on ordinary course statutory filings such as corporate disclosures and records, audit reports and financial statements, or valuation reports prepared by an independent accountant/financial advisor etc.; and
(iv) in addition, the IBBI may provide a code of ethics and best practices for IPs as guidance, with a view to maintaining standards by setting out required practice and harmonising practitioner’s approach to particular aspects of insolvency.

More generally, it is noted that the availability of professional indemnity insurance that is tailored for RPs will be very helpful in the Indian context to help RPs manage the risks inherent in discharging the significant responsibilities given to them under the IBC (such insurance products are available for insolvency practitioners performing similar roles in jurisdictions with more established debt restructuring laws such as the UK).</td></tr>
<tr><td>2.</td><td>Information Memorandum</td><td>The interim resolution professional or the resolution professional is responsible for preparing an information memorandum providing relevant details of the assets and operations of the debtor for submission to each member of the committee of creditors (CoC) and any potential resolution applicant.

Certain matters outlined in the regulations need to be provided before the first meeting of CoC and the remaining matters are required to be provided within 14 days of the first meeting of the CoC.

We are of the view that the timelines are too aggressive, especially for large corporations who may have multiple business lines and/or assets in India and abroad.

IWIRC Comment: We recommend that the timelines for submission of the information memorandum by the IP be allowed to be extended if the circumstances so warrant, subject to prior approval of 75% majority of the creditors committee. The regulations should also prescribe a maximum time limit for the extension.</td></tr>
<tr><td colspan="3">Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016</td></tr>
<tr><td colspan="3">Concept: The Code contemplates a time bound resolution process which can be initiated by a creditor on the occurrence of a default. These Regulations specify the manner of conducting the CIRP and lay down details regarding receipt and verification of claims of creditors, formation of committee of creditors, and manner of holding meetings of committee of creditors and voting in such meetings, etc. The regulations were brought into force on 1 December, 2016.</td></tr>
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SR. NO.	Regulation No./Principle	COMMENT
1.	Debtor's Right to be Heard	Following is the process outlined in the Code for filing and admission of application for initiation of the corporate insolvency resolution process: 1) Upon payment default of INR 1 lakh (approx. US$ 1545) or more by the corporate debtor, a financial creditor or operational creditor is entitled to make an application to National Company Law Tribunal (**NCLT**), Adjudicating Authority for initiation of CIRP, providing the evidence of default. The application may also be filed by the corporate debtor itself or its employees/ workmen. 2) The NCLT must to be satisfied that there has been a default in repayment of debt (not disputed), the application is complete and that there is no disciplinary proceeding pending against the proposed insolvency resolution professional. 3) Within 14 days of receipt of the application, if the NCLT is satisfied of the payment default, it will accept the application, else reject it allowing 7 days to the applicant to rectify mistakes if any. Once the insolvency application is admitted, the interim resolution professional takes over the management of the affairs of the debtor and powers of the board of directors get suspended. The corporate insolvency resolution process, does not at any stage allow the corporate debtor, the right to be heard or to make a representation to the NCLT prior to the application being admitted, other than to dispute the claim of an operational debt. The interpretation provided by NCLAT in one of the recent cases is that the NCLT is bound to issue a limited notice to the debtor before admitting an insolvency case to adhere to principles of natural justice. However, this does not mean that the NCLT is required to afford reasonable opportunity of hearing to the debtor in every situation before passing its order for admission of the matter. **IWIRC Comment:** We are of the view that since the consequences of an insolvency application being admitted are substantial (potentially resulting in cross-defaults, breach of existing contracts, triggering rights of third parties to foreclose, negative effects on the financials of the debtor, no ability for promoters to conduct reorganization or retain/bid for the assets), the initiation of an insolvency proceeding should carry a higher burden on the applicant creditor. While it is not desirable to allow

		a debtor to obstruct or protract an insolvency petition by involving the court in detailed proceedings at the admission stage, parties should be discouraged from taking serious measures under the IBC framework only to exert pressure on the debtor, or as a tool to avoid the usual process for collection of debt. One way in which frivolous claims may be checked is by imposing the requirement for an applicant financial creditor to submit a bond or guarantee until the admission of the insolvency application. Under the U.S. bankruptcy laws for instance, the posting of a bond may be required by a bankruptcy court in order to allow the continuation of a bankruptcy filing by creditors.
2.	Settlement of Disputes	The regulations do not outline the procedure to be followed for withdrawal of an insolvency application once admitted if a settlement of the dispute is reached between the corporate debtor and creditor. In *Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP* (2017), the NCLAT ruled that a case can only be withdrawn before admission of the insolvency application and no withdrawals would be permitted thereafter. This was then appealed at the Supreme Court which in exercise of its power under article 142 of the Indian constitution allowed the settlement to be taken on record and permitted the withdrawal of the application. **IWIRC Comment:** We are of the view that the regulations should codify the preferred approach on this point so that market participants have full certainty on the interpretation of the law. The regulations should outline in detail the process to be followed for withdrawal of an application. After the admission of an insolvency petition, the applicant creditors and the debtor may be allowed to settle and withdraw the insolvency application only if consented to by the financial and operational creditors who have also filed their claims upon initiation of the proceedings to ensure that their interests are not prejudicially affected.
3.	Treatment of Creditors	The IBC provides for only two classes of creditors – financial creditors and operational creditors. (1) In the Jaypee Infratech insolvency case, it is not clear whether homebuyers will be treated at par with financial creditors or operational creditors, or seen as a separate category of creditors. It is apparent that the regulations do not provide a suitable framework for the protection of homebuyers to whom the amount of debt outstanding was INR 18,000 crores (approx.) (approx. US$ 2,780 million) as compared to the banks (financial creditors) to whom the outstanding debt was INR 8,000 crores (approx. US$ 1,236 million). This case and other companies involved in consumer-facing businesses indicate that there is a need to clarify the status of certain categories of consumers in insolvency proceedings. **IWIRC Comment**: Ideally, the interests of “retail consumers” should be insulated from the risk of insolvency by protection under consumer law rather than as a new class of creditors under the IBC framework. In certain jurisdictions, money advanced

by a consumer pending the delivery of a good or service that bear a high-value amount (such as real estate) is considered to be held by a debtor in a “trust” capacity or held under a separate “deposit” arrangement and is thereby protected and ring-fenced in an insolvency. Under the IBC framework, we recommend that in certain consumer-facing sensitive industries where retail consumers typically pay large “advances” to purchase goods and services, the regulations be amended to provide such consumers special protection in the resolution plan, including priority over creditors if the resolution plan entails part payment or if there is liquidation.

(2) One of the requirements under the IBC framework is that a resolution plan must provide for operational creditors to receive at least the liquidation value. In our view, a minimum guarantee of liquidation value to the operational creditors is insufficient to incentivize such creditors to continue to engage in business with the debtor and thereby preserve the debtor as a going concern. This is particularly as liquidation value in most cases is likely to be low or zero in an insolvency scenario. In most industries, the vendors, contractors, employees are indispensable for the business operations. Therefore, the regulations should include additional provisions to protect the interests of operational creditors under resolution plans.

IWIRC Comment: In a number of other common law jurisdictions, interests of different categories of creditors are typically protected by class voting. In the absence of such a mechanism under the IBC framework, different mechanisms could be adopted to protect the interests of operational creditors such as:

(a) providing operational creditors the right to receive a minimum entitlement in a resolution plan that is based on a metric different from liquidation value (or be paid in full where practicable) in order to preserve the debtor as a going concern; or

(b) providing that where operational creditors hold substantial amounts in the aggregate debt of a company (for eg. more than 50% of the total aggregate debt), such creditors shall be entitled to participate and vote in the meetings of the committee of creditors.

(3) While unsecured creditors have the same voting rights as secured creditors in the committee of creditors (i.e. voting rights are in proportion to their outstanding claim), there is concern (particularly among foreign lenders/bondholders) on whether their interests will be adequately protected. Decisions of the creditors’ committee require a 75% majority vote and are binding on the corporate debtor and all its creditors (even dissenting creditors). In India, secured bank lending has traditionally been the primary source of debt to Indian corporates, and unsecured creditors (typically international bondholders) have a relatively smaller debt size. There is no protection provided to unsecured creditors if the final resolution plan approved by the committee of creditors, consisting primarily of secured creditors, does not provide “fair” treatment to the unsecured creditors, and further the NCLT does not have the power to review the equities of a resolution plan.

		IWIRC Comment: We recommend that the regulations be amended to specify certain minimum standards for "fair" treatment of unsecured creditors to avoid being crammed-down in the final resolution plan (and it should be the fiduciary duty of the resolution professional to ensure this)[1]. (4) It is not clear under the provisions of the IBC or regulations whether customers of a corporate debtor who have made advance payments towards provision of goods or services not received, will be treated as operational creditors or financial creditor with respect to their claim for refund of advances.
4.	Cross Border Insolvency	The regulations provide that the Indian Government may enter into agreements with foreign countries for enforcing the provisions of the IBC. An insolvency professional may make an application to the NCLT that assets of the corporate debtor or guarantor are situated in a jurisdiction outside of India and that evidence or action related to these assets is required under the resolution plan / liquidation process. The NCLT, on receipt of the application, is authorized to issue a letter of request to such country with whom the Indian government has entered into a bilateral agreement seeking details of these assets. **IWIRC Comment**: Given the complexities of any cross-border insolvency, the regulations should incorporate a more detailed and sophisticated process for recognition of insolvency proceedings in reciprocating countries and coordination of concurrent proceedings as provided under the UNCITRAL Model code.
5.	Foreign Currency Debt	The regulations provide that any claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the insolvency commencement date. This effectively means that any contractual or other market-based exchange rate agreed between the parties will be overridden which could (depending on how the exchange rates have moved) cause unfair prejudice to either the debtor or the international creditor. We are of the view that the regulations should provide some discretion for the creditor to request that a different exchange rate be imposed to cover a situation where the exchange rate has moved so significantly that the original

[1] Under the new Singapore law, debtors are required to ensure that the scheme is "fair and equitable" in relation to classes of creditors who are crammed down. In essence, the Companies Act statutorily implements the absolute priority rule. Under the absolute priority rule, shareholders are compensated only after creditor claims are settled to the satisfaction of the court.

		"commercial bargain" (by way of their pre-agreed exchange rate) between the debtor and creditor is effectively rendered worthless by the deeming provision of the regulations. **IWIRC Comment**: We recommend that a creditor should be permitted to apply to the NCLT to rule that a different exchange rate should apply if the application of the IBC-determined exchange rate is "unreasonable" (Similar to the approach in the Cayman Islands).
6.	Applicability of Moratorium on Guarantor Assets	Upon admission of the insolvency application by the NCLT, a moratorium of 180 days applies (this can be extended for an additional 90 days). The moratorium prohibits the creditors from any action to recover or enforce any security interest created by the debtor in respect of its property. There have been divergent judgements on the rights of creditors to enforce against personal properties of the promoter/ guarantor during the moratorium period. In a writ petition in Allahabad High Court (*Sanjeev Shriya v. State Bank of India & Ors*), the court has stayed the proceedings against the guarantor in DRT in light of insolvency proceedings continuing against the corporate debtor before the NCLT. In another case before the NCLT, Chennai bench (*V Ramakrishnan v. State Bank of India*), the financial creditor was restrained from selling assets of the guarantor during the moratorium period. The NCLT stated that in case a guarantor's personal property is sold to realise part of the dues from the company, it would create a charge on assets of the debtor, which would amount to encumbering the properties of that debtor which, in turn, breaches the prohibition in this regard applicable while the debtor is going through insolvency proceedings. NCLT and NCLAT have held (*Alpha & Omega Diagnostics (India) Ltd. v Asset Reconstruction Company of India Ltd. & Ors*), that where the properties are not owned by the debtor, they would not fall within the ambit of the moratorium declared under the regulations. Therefore, a security or guarantee provided by a third party and a guarantor's personal property can be proceeded against by a financial creditor to recover its outstanding dues even during the moratorium period. **IWIRC Comment:** In view of the divergent judgements and to reduce uncertainty, the regulations should be amended to clearly specify the scope of the moratorium on assets of a third party provided as security to the creditor. We recommend as follows: (i) the regulations should be amended to clarify that the moratorium on enforcement in respect of the assets of the debtor does not apply to any security interest that a creditor has in respect of the assets of any third party, whether a promoter or creditor a guarantor (similar to the approach followed in the UK). The security package obtained by a creditor at the time of the original financing represents the "commercial bargain" it strikes at the time of the

		original transaction (which it, among other things, reflects in the interest rates charged on the financing) and the taking of security from third parties is an extremely common practice designed specifically to de-risk a creditor in respect of credit-related events involving the primary debtor. Having the IBC framework impair this "commercial bargain" will have the indirect effect of creating significant uncertainty in the Indian lending market and thereby discourage investors from lending into India. (ii) the regulations should be amended to clarify the treatment of the Trust and Retention Accounts (TRA) of a debtor for the benefit of a creditor as a quasi-security under their loan documentation. It is presently unclear whether the debtor and/or creditors are prohibited from accessing any cash in the TRA accounts of the debtor during the moratorium period, and whether the debtor's ongoing obligations towards maintaining the TRA account for the benefit of the creditors stands suspended during the moratorium. If courts are given the power to issue moratorium orders against third parties or to allow debtors and/or creditors to access cash in TRA accounts, then the basis on which such an order can be granted by the NCLT should be clearly specified in the regulations to reduce uncertainty and maintain consistency in the approach followed by different benches of the NCLT (For eg. under the new debtor-in-possession regime for debt restructuring in Singapore, an application to the court for a moratorium in respect of group companies can be made by the debtor on certain specific grounds).
7.	Treatment of guarantor in creditor committee meetings	The issue of whether guarantors should be allowed to participate in creditor committee meetings has come up in certain recent insolvency proceedings. We understand there have been certain cases, in which the appointed resolution professionals have admitted claims from corporate guarantors during the insolvency resolution proceedings, even when the guarantee was not invoked or was invoked after the date of admission of the insolvency resolution application. **IWIRC Comment:** There is a need for clarification to be provided in the regulations on the following: a) Whether financial creditors can submit their claims arising from corporate guarantee that have not been invoked as on the insolvency commencement date; and b) If the corporate guarantee has been invoked during the insolvency resolution process, can such claims be subsequently admitted by the resolution professional. Accordingly, we are of the view that the regulations be amended to provide the following:

		(a) A guarantor who has paid out under a guarantee invoked during the insolvency resolution period is subrogated to the right of the original creditor. Therefore, the composition of the committee of creditors should be revised to include such a guarantor for the purpose of participation in creditor committee meetings and exercise of voting rights; (b) A guarantor under a guarantee which has not been called upon but is likely to be called upon is, from a practical perspective, an interested party in the debt restructuring process and should be permitted to participate in creditor committee meetings during the insolvency resolution process[2]; and (c) Until a guarantor has paid under a guarantee that is called upon, it should have no right to have funds set aside for its claim in the resolution plan (consistent with the approach in Japan, the US and the UK among others)[3].
8.	Participation by promoters in resolution plan	A recent Ordinance and Amendment Bill bars promoters from submitting a resolution plan or directly or indirectly bidding for the assets of the company in insolvency proceedings. The proposed Section 29A provides persons not eligible to be resolution applicant. This includes '(c) *A person whose account has been classified as non-performing asset and period of one year or more has lapsed from date of such classification and who has failed to make the payment of all overdue amounts with interest thereon and charges relating to non-performing asset before submission of the resolution plan, including the promoter of such person. Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relation to the non-performing asset accounts before submission of resolution plan; and* *(j) any person who has any connected person not eligible (under (a) to (i) of Section 29A)*'. **IWIRC Comment**: (1) We are of the view that the restriction on promoters is unnecessarily restrictive – - A number of financial investors are unwilling and unable to manage the day-to-day operations of an Indian company and would therefore typically look for flexibility to partner with either the existing promoters or another strategic

[2] In the U.S. the courts allow anyone with an interest to participate in proceedings and certainly a guarantor with a claim that may be called would have such an interest.

[3] In Japan, the guarantor cannot participate in the proceedings until the full payment of the guaranteed claims. It is necessary NOT to dilute other creditors' interests by the "double bites" by the guaranteed claims. In the US, under BC section 502e an actual claim must exist or arise before or as a result of a bankruptcy. For claims that have not yet arisen, like certain guaranty claims that may not be called or haven't been called, funds may not be set aside. Nonetheless the courts allow anyone with an interest to participate in proceedings and certainly a guarantor with a claim that may be called would have such an interest.

		investor as part of their bid. In addition, our experience of the R&I industry across the globe shows that it will be extremely challenging to legislate for all the routes through which an existing promoter could indirectly acquire beneficial ownership of the company/assets through the creative use of nominee structures etc. - The restriction does not distinguish between 'delinquent' promoters and those persons who are only deemed or named promoters but not in operational control of the debtor. It is common for companies (particularly infrastructure companies) to have financial investor, investor consortiums, foreign investors or Government as majority shareholders or deemed/named promoter in view of their shareholding, board representation or investor protection rights, while the operational control of the company is in the hands of original promoters. The restriction in Section 29A as worded would have the unintended effect of barring such investor or Government promoters from submitting a rescue plan, not just for the company in which they are shareholders but also for any other debtor in insolvency proceedings. - We are of the view that existing creditors should be given the ability to decide the most suitable investor or bidder (which could include a promoter) from among the resolution applicants. However, the regulations should further enhance the disclosure requirements in relation to resolution applicants, so that existing creditors have all necessary facts while assessing the resolution plans, regarding the track record, performance, integrity and management capability of the bidders/investors (as an example, SIP 16 in the UK recommends certain enhanced disclosure requirements by directors and insolvency practitioners in connection with a pre-pack to help weed out collusion between such purchasers and existing management although such disclosures are only made available for review after the transaction has concluded)[4] . (2) There is a need for further clarification to be provided in the regulations in respect of the 'overdue amounts' that promoters need to pay to be eligible to bid, i.e. whether this means the last defaulted instalment or the entire loan account which may have been recalled by one or more lenders before submitting the resolution plan.

[4] The disclosure requirements include, among others: Any connection between the purchaser and the directors, shareholders or secured creditors of the company; The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred, Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business, any options, buy-back arrangements or similar conditions attached to the contract of sale).

9.	Interim Financing during the moratorium period	We are of the view that the availability of interim financing for working capital purposes could be critical to a company's survival during the IBC process. We are of the view that the regulations should be amended as follows: (a) The regulations currently provide for any such financing to be secured but for both the financing and the grant of security to be subject to the approval of 75% of the financial creditors. We are of the view that this approval requirement is impracticable given that financial creditors in India are typically a diverse group of stakeholders and they are unlikely to be able to reach a consensus in the short timing. In exceptional cases, where the resolution professional acting in its fiduciary capacity is of the view that interim financing is required urgently in order to preserve the company as a going concern, then the NCLT should have the discretion to impose "super-priority" financing if requested by the resolution professional, subject to certain threshold requirements being satisfied in respect of the protection of existing creditors (similar to the approach taken under the new debt restructuring law in Singapore[5]). (b) Further, the regulations should be amended to clarify that any "super-priority" is not just restricted to priority in a liquidation but also priority in payments under cash sweep waterfalls etc. prior to a liquidation.
10.	Resolution Plan [6]	1. **Diligence by resolution applicants**: One of the key requirements for a robust rescue financing market to develop in India is for such financiers to be able to conduct due diligence on the business, financial condition and prospects of the debtor. We therefore suggest as follows: (a) In relation to the preparation of an information memorandum, we suggest that the disclosure requirements be enhanced to include, among other things, a report on the valuation of each of the company's significant assets and forecasts of profitability and cashflow from operations of the debtor and its subsidiaries as a going concern, instead of merely the liquidation value (certain similar concepts have been adopted under the new bSingapore debt restructuring law)[1];

[5] Under the new debt restructuring law in Singapore, a court can approve financing that is "super-priority" in term of being equivalent to or higher than existing security interests, provided that there must be adequate protection of the existing security interest, in the form of relief resulting in realisation of the "indubitable equivalent" of the existing security interest, which is a concept borrowed from the US DIP financing regulations).

[6] See Annex 3 for regulations on content of Resolution plan.

[1] Under the new Singapore debt restructuring law, if a stay is granted under the law, the legislation requires the court to also order that the applicant submit sufficient information relating to the company's financial affairs to enable the company's creditors to assess the feasibility of the intended or proposed

		(b) Given that the IBC is still relatively new, we understand that there is currently no clear market practice on a number of issues including the process for such potential providers to conduct diligence. Under the IBC, the decision-making on the diligence process is entrusted to RPs acting with the consent of 75% of the financial creditors. Given that the rescue financing industry in India is still at a nascent stage, RPs, financial creditors and other transaction parties may not be well-versed with the diligence requirements of potential rescue financiers and we are aware of a few cases where practices that would be "off-market" from an international perspective may have been adopted. We are of the view that this is a key information gap that needs to be addressed in order to build the confidence of distressed debt investors including international investors in India and thereby develop a robust distressed debt market. To this end, we recommend that the IBBI provide a guidance note to RPs and financial creditors setting out best practices for the conduct of diligence by potential investors and explaining the underlying rationale for their information requests. Key points to highlight in this note are as follows: (i) potential investors are likely to expect to review the immediate cash requirements in the business by reviewing both the short and medium term cash flow forecasts. They are also likely to want to sense-check these against assumptions made by management in a best/worse case scenario. Potential investors may also request to review key contracts, and material revenue and cost streams to validate management forecasts; (ii) potential investors are likely to want to test the assumptions around reliability of supply chain given there are often a number of connected parties in the supply chain for Indian companies; (iii) while investors would be generally amenable to sign up to a confidentiality agreements/non-disclosure agreements to access the debtor's information, it is important that the form of such document should be customary as used in the international market. Among other things, the term of the NDA should be limited (rather than indefinite) with the customary carve-outs for any disclosure required under law;

compromise or arrangement. The law also sets out such information which the Court may specify for submission:
• a report on the valuation of each of the company's significant assets,
• where the company acquires or disposes of any property or grants security over any property, information relating to that transaction within 14 days of such a transaction,
• periodic financial reports for the company and its subsidiaries,
• forecasts of profitability and cashflow from operations of the company and it's subsidiaries.

		(iv) in keeping with the IBC's "freedom-of- the-market" approach, there should not be any eligibility criteria imposed on investors over and above any criteria applicable to them under prevailing foreign investment laws in India (eg. in certain recent cases, resolution professionals/ financial creditors have required any potential fund investors to have funds committed for investment into India) as this will unnecessarily restrict the development of a robust distressed market in India; (v) investors are likely to want to impose ongoing obligations to ensure that the funds are being used as intended including monitoring cash critical payments and drip-feeding of any rescue financing subject to compliance with conditions at various stages and ongoing operational monitoring of the operations of a debtor including through the appointment of an international "Chief Restructuring Officer" or similar. (c) Separately, in order to incentivise international investors, foreign exchange restrictions (including the restrictions on interest rate and tenor under the ECB guidelines) need to be relaxed. 2. **Availability of Pre-packs:** We suggest that creditors be provided the ability to submit a "pre-pack" agreed debt restructuring scheme within the IBC process, i.e. prior to the expiry of the moratorium period, to achieve time and cost savings. (As an example, the new Singapore debt restructuring law introduces a faster and more cost-effective route for a scheme to be implemented where a company is able to work out an arrangement with major creditors (given a small amount of dissenting creditors) without the need to call for any creditor meeting(s) with the approval of the court)[7].

[7] Under the Singapore law, the court may approve such "pre-pack" schemes without any meeting being held, provided:

- the company has provided each creditor meant to be bound by the compromise with a statement setting out the details of the compromise
- the company has publicised the application for court approval of the pre-pack scheme
- the company has sent a copy of the application to each creditor that will be bound under the pre-pack scheme
- the court is satisfied that had a meeting of the creditors (or class meeting) been summoned, it would have been passed by the requisite majority number (unless modified by court) and value).