PRESENTATION ON CORPORATE FAST TRACK INSOLVENCY RESOLUTION PROCESS

FOR

WIRC of Institute of Company Secretaries of India

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BY

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WHY FAST TRACK

LOW RANKING IN EAST OF DOING BUSINESS

- As per World Bank estimate, India's rank with respect to insolvency resolution is a dismal low of 136 out of 189, compared to Singapore 27, Australia 14, UK 13 and USA 5
- As per another World Bank estimate, it takes more than 4 years to wind up a company, twice the time it takes in China as against 1.5 years in high-income members of OECD
- India recovers only 25.7 cents on a dollar, which is among the worst in the emerging economies, while it is 80.4 cents in US and 88.6 cents in the UK
- Regulations on land and labour prevents selling off property and laying off workmen
- In BIFR cases, creditors cannot take action against defaulter until restructuring plan of the sick company is in place.

AS PER BLRC REPORT DATED 04.11.2015

- Maximum period for Insolvency resolution is for a very complex entity and most cases are of less complex entities, where shorter time frame should be prescribed
- Merit in creating explicit provisions for shorter time periods for resolution.

FAST TRACK RESOLUTION PROCESS – A SNAPSHOT

- Application for fast track insolvency resolution may be made in respect of corporate debtor:
    - With income or assets below specified threshold; or
    - Having notified class of creditors or amount of debt; or
    - Falling under the category notified by the Central Government
- Fast Track Insolvency process to be completed within 90 days from commencement date
- **Provision for 1 extension only for a period of 45 days**
- Process may be initiated by a creditor or corporate debtor by furnishing proof of default or any other specified details
- Process largely the same as that for regular insolvency resolution, except for some modifications prescribed under the regulations

FAST TRACK RESOLUTION-APPLICABLE FRAMEWORK

- Sections 55 to 58 of the Insolvency and Bankruptcy Code (IBC 2016) read with Notification No. 1697 dated 14th June, 2017
- Relevant Provisions of Chapter II and Chapter VII of Part II of Code
- Insolvency and Bankruptcy Board of India (IBBI) (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

ELIGIBLE CORPORATE DEBTORS

An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely :-

(a) a small company as defined under section 2 (85) of CA, 2013 ;

(b) a Startup (other than the partnership firm) as defined in the GOI Notification issued by the Ministry of Commerce and Industry No. G.S.R. 501(E), dated 23rd May, 2017

(c) an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs. One Crore.

SMALL COMPANY UNDER CA 2013

“Small company" (defined in Section 2(85))means a company, other than a public company,—

(*i*) Whose paid-up share capital does not exceed Rs. 50 lakhs or such higher amount as may be prescribed which shall not be more than Rs. 5 Crores; **[and]**

(*ii*) Whose turnover as per its last profit and loss account does not exceed Rs. 2 Crores or such higher amount as may be prescribed which shall not be more than Rs. 20 Crores

Provided that nothing in this clause shall apply to—

- (*A*) a holding company or a subsidiary company;
- (*B*) a Section 8 company or
- (*C*) a company or body corporate governed by any special Act

START UP AS DEFINED BY NOTIFICATION ISSUED BY GOI

An entity shall be considered as a Startup:

a) if it is incorporated as a private limited company (as defined in the CA 2013) or registered as a partnership firm* (under section 59 of the Partnership Act, 1932) or a LLP (under the Limited Liability Partnership Act, 2008) in India; and

b) up to 7 years from the date of its incorporation/ registration; however, in the case of Startups in the biotechnology sector, the period shall be up to 10 years from the date of its incorporation/ registration; and

c) if its turnover for any of the financial years since incorporation/ registration has not exceeded ₹ 25 crores; and

d) if it is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'Startup'.

* *Partnership firm is specifically excluded for Fast Track Resolution under Chapter IV*

SOME QUESTIONS ON ELIGIBILE CORPORATE DEBTOR

- Last P&L – does it necessarily mean forming part of financial statements ?
- Definition of Turnover
- What about Section 25 Companies registered under CA 1956 ?
- Meaning of Total Assets

FAST TRACK RESOLUTION – TIME FRAME SECTION 56 OF IBC

Time frame of 90 days from the Insolvency Commencement Date for insolvency resolution under Fast Track Insolvency Process (FTIP), as against 180 days for CIRP

Resolution Professional (RP) may apply to the Adjudicating Authority for extension of time for the resolution process by a further period of 45 days (as against 90 days for CIRP) supported by resolution passed by Committee of Creditors (COC) by 75% voting share.

Only one extension as above will be permitted.

WHO CAN INITIATE FTIP – SECTION 57

Either a Creditor or a Corporate Debtor may initiate FTIP by making an application along with –

- The proof of the existence of default as evidenced by records available with an Information Utility or such other means as may be specified by the Board and
- Such other information as may be specified by the Board to establish that the corporate debtor is eligible for FTIP

APPLICABLE PROVISIONS OF CIRP

- Section 58 stipulates that the process for conducting CIRP under Chapter II and the provisions relating to offences and Penalties under Chapter VII shall apply to FTIP as the context may require.

- Some differences in FTIP vis a vis CIRP :-
  - Regulation 17(2) of IBBI (FTRIP) Regulations, 2017 stipulates that if the IRP is of the opinion that the fast track process is not applicable to the corporate debtor as per notifications under section 55(2), he shall file an application to the Adjudicating Authority along with the report in sub-regulation (1), to pass an order converting the fast track process to corporate insolvency resolution process under Chapter II of Part II of the Code.
  - Regulation 17(3) stipulates that if the Adjudicating Authority passes an order converting Fast Track to CIRP then the Insolvency resolution process shall be carried on in accordance with Chapter II of Part II.
  - Regulation 34 requires IRP to appoint only one registered valuer in the case of FTIP as against two registered valuers to be appointed in CIRP
  - Regulation 30 defining Fast Track Process costs specifically covers
    - Amount of any interim finance and costs incurred in raising such finance
    - Any costs incurred at the expense of Government to facilitate the process

    (such a specific inclusion is not to be found in CIRP)

Adjudication, Offences and Penalties

- Appeals against order passed by NCLT can be filed before NCLAT and then if still aggrieved before Supreme Court
- Penalties prescribed for :-
  - Concealment of property
  - Undertaking transactions through defrauding Creditors
  - Misconduct in the course of conducting corporate resolution process
  - Falsification of books of corporate debtor
  - False representation to Creditors
  - Contravention of moratorium or resolution plan
  - Non disclosure of dispute or repayment of debt by operational creditor
- Quantum of Penalty –
  - Imprisonment 1 to 5 years and Monetary Penalty – Rs. 1 lakh to Rs. 10 lakhs
  - For Insolvency Professional – Imprisonment up to 6 months and Monetary Penalty range Rs. 1 lakh to Rs. 5 lakhs

CHALLENGES & WAY FORWARD

- *Are 90/ 135 days enough?*
  - Unlike the US Chapter 11 process, where the resolution plan is initially proposed by the company itself, in the India Code, any creditor can propose a resolution plan. It is, therefore, likely to be flooded with a mass of resolution plans
  - IP would need some time to understand the company, its cash flows, essential operational creditors, etc, before it can prepare an Information Memorandum (IM), needed to prepare a resolution plan, even if it were a
  - Depends on whether a lively and robust insolvency professionals' market develops in India
  - **Failure to adhere to 90/ 135 or 180/ 270 timeline results in commencement of liquidation process**
- *Financial Creditors vis-à-vis Operational Creditors Bargain*:
  - **Operational creditors denied a seat at the Creditors committee table**
  - NCLT, when reviewing the resolution plan, needs to ensure that operational creditors are treated fairly

THANK YOU!!!