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SUPPLEMENT
PROFESSIONAL PROGRAMME

INSOLVENCY-LAW AND PRCTICE

(Supplement covers amendments/developments from August 2021 to November 2022)

MODULE 3

PAPER 9.8

Content

Lesson 4

Insolvency Resolution of Corporate Persons

The Insolvency and Bankruptcy Code, 2016 (Code) aims at resolving the woes of insolvent companies through the corporate insolvency resolution process (CIRP), wherein the assets or business of the corporate debtor are transferred as a going concern to the most eligible party approved by the Committee of Creditors. Such an eligible party is willing to take up the management of the Corporate Debtor as well as to service its debts. The parties that are willing to take over the corporate debtor are called resolution applicants and they participate in the CIRP by submitting a document called a resolution plan. It is a comprehensive document which covers, *inter alia,* overview of the eligible party, how does the party plan to take over the corporate debtor, debt repayment schedule etc. The resolution plans are first analysed by the resolution professional to ensure that they meet the conditions prescribed under the Code, pursuant to which, they are placed before the committee of creditors for their discussion, evaluation and approval. The resolution plan, so approved by the committee and scoring the highest points, is then filed by the resolution professional with the Adjudicating Authority.

Salient features of the amendment to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016(CIRP Regulations)

- With the objective to maximise value in resolution, the amendment to the CIRP Regulations enables the resolution professional (RP) and the Committee of creditors (CoC) to issue request for resolution plan a second time for sale of one or more of assets of the corporate debtor (CD) in cases where no resolution plan has been received for the corporate debtor as a whole. It enables for a resolution plan to include sale of one or more assets of CD to one or more successful resolution applicants submitting resolution plans for such assets and providing for appropriate treatment of the remaining assets.
- To improve the value received in the resolution plan, the amendment to the CIRP Regulations enables marketing of assets of the CD. It provides for formulating a strategy for marketing of assets of CD in consultation with the CoC to disseminate information about the asset to a wider and targeted audience of potential resolution applicants. The amendment also enables a longer time for the asset in the market as the invitation for expression of interest in Form G has been advanced to 60th day from insolvency commencement date (ICD). Changes have also been made to Form G to provide more relevant information to persons for expressing interest.
- To improve information availability to stakeholders, the amendment provides for the following changes to:

- Changes timeline for filing application for preferential and other transactions on or before 130 th day of ICD. It provides that a copy of application made regarding preferential and other transactions be shared with the prospective resolution applicants to enable them to account for such information while proposing the resolution plan.
- Changes the timeline for submission of information memorandum to on or before 95th day from the ICD from 54th day. It also mandates that information memorandum should also include further relevant information such as operations of CD, financial statements, contingent liabilities, geographical coordinates of fixed assets, company overview. It also includes details of business evolution for CDs with asset size of more than Rs.100 crore.

- With the aim to reduce delays in the process and enhance efficiency of available time the amendment enables the CoC to examine whether it wants to explore option of compromise or arrangement and file such recommendation with AA while applying to AA for liquidation order. In cases where it decides to explore, it should explore the option during the period, order for liquidation is awaited from the AA. The amendment also introduces guiding factors that may be considered by CoC while making an early decision to liquidate the CD. It also provides that the reasons be recorded based on these factors and presented to AA as part of the application for liquidation.
- To make the resolution process more transparent and robust the amendment provides for:
  - A common email address be used throughout the CIRP, and Liquidation of a CD and this email needs to be handed over to the succeeding IP conducting the process.
  - The IRP/RP to communicate to the creditors of corporate debtor (CD), as per the last available books of accounts, the public announcement and invite claims through post or electronic means.
  - It has been clarified that a meeting of COC can be convened till resolution plan is approved or an order for liquidation is passed and matters which do not affect the resolution plan can be decided upon.
- The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022 shall be decided by the applicant or committee in accordance with the said amendment regulations.
- An insolvency professional shall be paid minimum fixed fee in the range of one lakh rupee to five lakh rupees, per month, depending on the quantum of claims admitted, as specified under Table-1 of Schedule-II of the said amendment regulations. However, the applicant or committee may decide to fix higher amount of fees than the said minimum fixed fee, after taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

- For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide to pay, after approval of such resolution plan by the Adjudicating Authority on commencement of payment to creditors by the resolution applicant, performance-linked incentive fee, not exceeding a total of five crores of rupees;
    a. for timely submission of resolution plan to the Adjudicating Authority, as specified under Table-2 of Schedule-II to the said amendment regulations, and/or
    b. for value maximisation, at the rate of one per cent of the amount by which the realisable value is higher than the liquidation value, or
    c. other than a. or b. above, as the committee may deem necessary.
- The fee may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and the same shall be included in the insolvency resolution process cost.
- Regulatory Fee: (1) A regulatory fee calculated at the rate of 0.25 per cent of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value: Provided that this sub-regulation shall be applicable where resolution plan is approved under section 31, on or after 1st October 2022.
- A regulatory fee calculated at the rate of one per cent of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the interim resolution professional or resolution professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, in the manner as specified in clause (cb) of sub-regulation (2) of regulation (7) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

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Lesson 8

Voluntary Liquidation of Companies

IBBI (Voluntary Liquidation Process) Regulations, 2017apply to the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016.

To enable better participation of stakeholders and streamline the liquidation process to reduce delays and realise better value, Insolvency and Bankruptcy Board of India amended the Liquidation Regulations with the following major modifications:

- The Committee of Creditors (CoC) constituted during Corporate Insolvency Resolution Process (CIRP) shall function as Stakeholders Consultation Committee (SCC) in the first 60 days. After adjudication of claims and within 60 days of initiation of process, the SCC shall be reconstituted based upon admitted claims.
- The liquidator has been mandated to conduct the meetings of SCC in a structured and time bound manner with better participation of stakeholders.
- The scope of mandatory consultation by liquidator, with SCC has been enlarged. Now, SCC may even propose replacement of liquidator to the Adjudicating Authority (AA) and fix the fees of liquidator, if the CoC did not fix the same during CIRP.
- If any claim is not filed during liquidation process, then the amount of claim collated during CIRP shall be verified by the liquidator.
- Wherever the CoC decides that the process of compromise or arrangement may be explored during liquidation process, the liquidator shall file application only in such cases before Adjudicating Authority for considering the proposal of compromise or arrangement, if any, within thirty days of the order of liquidation.
- Specific event-based timelines have been stipulated for auction process.
- Before filing of an application for dissolution or closure of the process, SCC shall advice the liquidator, the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading, shall be pursued after closure of liquidation proceedings.
- The Amendment Liquidation Regulations and Amendment Voluntary Liquidation Regulations further lay down the manner and period of retention of records relating to liquidation and voluntary liquidation of a corporate debtor or corporate person, respectively.

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Lesson 17

Professional and Ethical Practices for Insolvency Practitioners

In exercise of the powers conferred by section 196(1) (t) read with section 240 of the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, vide notification of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2022 dated 9th February, 2022.

Amendments are pertaining to the Meetings of the Committee (Regulation 18) & Preservation of Records (Regulation 39A) respectively. The details amendment are as follows:

Meetings of the Committee (Regulation 18)

(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.

(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty-three per cent of the voting rights. (3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

Preservation of Records (Regulation 39A)

(1) The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of all such records which are required to give a complete account of the corporate insolvency resolution process.

(2) Without prejudice to the generality of the obligations under sub-regulation (1) stated above, the interim resolution professional or the resolution professional, as the case may be, shall preserve copies of records relating to or forming the basis of: -

(a) his appointment as interim resolution professional or resolution professional, including the terms of appointment;

(b) handing over / taking over of the assignment;

(c) admission of corporate debtor into corporate insolvency resolution process;

(d) public announcement;

(e) the constitution of committee and meetings of the committee;

(f) claims, verification of claims, and list of creditors;

(g) engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;

(h) information memorandum;

(i) all filings with the Adjudicating Authority, Appellate Authority and their orders;

(j) invitation, consideration and approval of the resolution plan;

(k) statutory filings with Board and insolvency professional agencies;

(l) correspondence during the corporate insolvency resolution process;

(m) insolvency resolution process cost; and

(n) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading.

(3) The interim resolution professional or the resolution professional shall preserve: (a) electronic copy of all records (physical and electronic) for a minimum period of eight years; and (b) a physical copy of records for a minimum period of three years; from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

(4) The interim resolution professional or the resolution professional shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations.

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CASE LAWS

1. In the matter of *Vallal RCK Vs. M/s Siva Industries and Holdings Limited and Ors. [Civil Appeal Nos. 1811-1812 of 2022]* the Hon'ble Supreme Court in its judgment dated 3rd June, 2022 observed that Section 12A was brought on the basis of the Insolvency Law Committee's Report. Though by the Amendment Act No. 26 of 2018, the voting share of 75% of CoC for approval of the resolution plan was brought down to 66%, section 12A of the Insolvency and Bankruptcy Code, 2016 (Code) which was brought by the same amendment, requires the voting share of 90% of CoC for approval of withdrawal of corporate insolvency resolution process (CIRP).

The provisions under section 12A of the Code have been made more stringent as compared to Section 30(4) of the Code. Whereas under section 30(4) of the Code, the voting share of CoC for approving the resolution plan is 66%, the requirement under section 12A of the Code for withdrawal of CIRP is 90%.

When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC.

This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts.

The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, and irrational and de hors (outside) the provisions of the statute or the Rules.

2. In the case of *NOIDA vs. Anand Sonbhadra [Civil Appeal No. 2222, 2367-2369 of 2021] Judgement dated 17th May, 2022, Hon'ble* Supreme Court inter-alia observed that a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards the construction in the real estate project.

What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33),

involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions.

'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.

In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.

The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'. The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.

The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the Central Government.

Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing.

The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

The appeal failed, Supreme Court held that the Appellant is not a Financial Creditor.

However, the Apex court indicated that the Centre can bring a prospective amendment to classify NOIDA as a financial creditor. Hon'ble Justice K.M. Joseph in his initial remark noted that hardly six years old, the Insolvency and Bankruptcy Code (hereinafter referred to as the 'IBC") continues to be a fertile ground to spawn 2 litigation.

3. In the case of *Sunil Kumar Agrawal (Appellant)vs. New Okhla Industrial Development Authority (Respondent) 12th January, 2023,* National Company Law Appellate Tribunal,

Principal Bench, New Delhi Company Appeal (AT) (Ins.) No. 622 of 2022, Hon'ble National Company Law Appellate Tribunal inter-alia observed that Section 14 of the Code deals with the moratorium and Section 14(1)(d) of the Code says that there would be a prohibition from the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. However, explanation appended to Section 14(1) (d) says that with the prohibition of recovery of any property by an owner or lessor, a license, permit, registration, quota, concession, clearance or a similar grant or right either given by the Central Govt., State Govt. local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency but there would be a condition for its continuation if there is no default in payment of the dues of such license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium period. The similar grant or right has to be read in respect of the licence, permit, registration, quota, concession, clearance but it cannot be read as the premium amount or lease rent which has been so ordered by the Adjudicating Authority to be paid by the Appellant to the Respondent.

4. In the matter of *Ms. Ashish Ispat Private Limited Vs Primuss Pipes & Tubes Ltd.*, NCLAT held that when a withdrawal application u/s 12A of the Code is filed prior to constitution of CoC, the requirement of 90% vote of CoC is not applicable, and the Adjudicating Authority has to consider the application without requiring any approval from CoC. Approval of 90% shall be applicable only when Committee of Creditors is constituted and withdrawal application u/s 12A of IBC has been filed post that.

5. Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors.* held that:

- The AA has limited jurisdiction in the matter of approval of a resolution plan. In the adjudicatory process concerning a resolution plan under IBC, NCLT does not have scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC.
- There is no scope for the NCLT or the NCLAT to proceed on basis of perceptions or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.
- There is no prohibition in the scheme of IBC and CIRP Regulations, that CoC cannot simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available plans. i.e. CoC can vote upon multiple resolution plans at the same time.

6. The Supreme Court in the matter of *Lalit Kumar Jain Vs. Union of India & Ors*. upheld the validity of notification dated November 15, 2019 enforcing the provisions related to personal guarantor to corporate debtor under the Code. Approval of resolution plan of a

corporate debtor undergoing CIRP does not per se operate as a discharge to its surety/guarantor of their liabilities under the contract of guarantee. The nature and extent of liability would depend upon the terms of guarantee.

7. In the matter of *Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Others,* Supreme Court held that:

- Any debt due to government (Central/State/Local Authority) including statutory dues is covered under the term "Creditor" and in any other case by the term "Other Stakeholders" as provided u/s 31(1) of IBC,2016 and hence an approved resolution plan is also binding on government.
- After the approval of Resolution Plan no surprise claim should flung upon the successful resolution applicant. Once a resolution plan is approved by an Adjudicating Authority, the claim forming part of Resolution Plan stands frozen and claims not forming part of Resolution Plan stands extinguished and no one would be entitled to initiate or continue any proceeding in respect of the claim which is not part of the approved Resolution Plan.
- An approved Resolution Plan is binding upon the Corporate Debtor, its employees, members, creditors, government (Central/State/Local Authority) and any other stakeholder.

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