

Reform Update-Resolving Insolvency-India (Both Delhi and Mumbai)

1. Reform: Operationalization of the Insolvency and Bankruptcy Code (the “code”). All the elements of the corporate insolvency eco-system, namely, the National Company Law Tribunal (NCLT), the National Company Law Appellate Tribunal (NCLAT), the Insolvency Professionals (IP), the Insolvency Professional Agency (IPA), the Insolvency Professional Entity (IPE), and the Insolvency and Bankruptcy Board of India are operational. Eleven benches of the NCLT, 977 insolvency professionals, 3 IPAs and 2 IPEs are in operation all over the country.

Impact: Operationalization of the new Insolvency and Bankruptcy Code passed by the Parliament has reduced the time taken for insolvency proceedings as well as improve India's performance on the Strength of Insolvency Framework index.

Effective date: Nov-Dec 2016

URL: Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016; Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016; Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016; Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016.

2. Chapter II on “Corporate Insolvency Resolution Process” has been notified and is operational since December 1, 2016. According to Section 14(2) of the Insolvency Code, “The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or Suspended or interrupted during moratorium period.” The order of moratorium shall have effect. From the date of the initiation of the insolvency resolution process till its completion. The new framework puts in place the following important reforms:
 - I. Since the matters would be adjudicated by NCLT, the requirement of attorney fee and stamp duty are no more applicable under the Code. The costs would comprise the application fee with the Tribunal (ranging from INR 2000 - 25,000), costs for notification and publication of announcement in local newspapers (INR 25,000), and professional engagement fee of the insolvency representative which is market determined.
 - II. A Corporate Debtor can initiate reorganization or liquidation proceedings (refer section 10 and section 33 of the Insolvency & Bankruptcy Code, 2016 (the Code) and section 271 of the Companies Act, 2013).
 - III. The Code (Sections 7, 8 and 9) read with the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for the insolvency resolution process to be initiated by a creditor. The proceedings under section 7 or 9 of the Code, as the case may be, can result in liquidation under conditions laid down under section 33 of the Code. Sub-section 3 of section 33 read with the Liquidation Regulations, 2016 lays down that the Tribunal can pass a liquidation order on decision of Committee of Creditors to liquidate the corporate debtor, anytime during the corporate insolvency resolution process or in the event that the resolution proceedings fail [which can be as early as the

first meeting of the Committee]. The framework, therefore, allows for both liquidation and reorganization options to the creditor.

- IV. The framework specifically allows for continuation of existing contracts supplying essential services and goods to performing contracts to the corporate debtor, essential for its survival. According to Section 14(2) of the Code, “The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.” The order of moratorium shall have effect from the date of the initiation of the insolvency resolution process till its completion. Section 20 of the Code may also be referred to.
 - V. The Code specifically provides for the possibility of the debtor obtaining credit after commencement of insolvency proceedings (post-commencement finance). The Code (Section 20(2) (c), 25(2) (c) and 28(1) (a)) provides that a resolution professional can raise interim finance to function during the insolvency proceedings.
 - VI. Section 30(2) (a), 53(1) (a) read with Section 5(13) and Section 5(15) of the Code prioritizes post commencement credit. Section 53(1) (a) of the Code prioritizes insolvency resolution process costs and liquidation costs paid in full while distributing the proceeds from sale of the liquidation assets. Section 5(13) (a) of the Code provides that ‘insolvency resolution process cost’ means the amount of any interim finance and cost incurred in raising such finance. Section 5(15) of the Code provides that ‘interim finance’ means any financial debt raised by the resolution professional during the insolvency resolution process period.
 - VII. The Code divides creditors into two classes - financial creditors and operational creditors. The Code requires (Section 21) that a Committee of Creditors be constituted of all financial creditors (in certain circumstances, of operational creditors). The resolution (reorganization) plan has to be approved by creditors representing 75% voting power, where a creditor has voting power in proportion to the value of debt.
 - VIII. The Code requires that dissenting creditors receive as much under the reorganization plan as they would have received in liquidation. Regulation 38(1) (c) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 makes it mandatory requirement of the resolution plan to provide for liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favor of the resolution plan. Section 30(2)(b) of the Code provides for repayment of the debts of operations creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53. Regulation 35(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 defines liquidation value as the estimated realizable value of the assets of the corporate debtor, if it were to be liquidated on the insolvency commencement date.
- The Resolution Professional is appointed by Tribunal as per the resolution of the Committee of Creditors [section 22 of the Code]. Section 22 (2) of the Code provide that the Committee of Creditors may, in the first meeting, by a majority vote of not less than 75% of the voting share of the financial creditors, either resolve to appoint the interim

resolution professional as a resolution professional or to replace him with another resolution professional.

- IX. As per Section 29(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the sale of assets of the debtors requires the approval of the Committee of Creditors, set up under Chapter V of the same regulations. Section 28(1) (k) provides that resolution professional shall not transfer rights or financial debts or occasional debts under material contracts otherwise than in the ordinary course of business without the prior approval of the Committee of Creditors. All decisions of the committee of creditors (including a decision to sell the assets) must be taken by 75% of the financial creditors by value. (Section 21 (8) of the Code).
- X. Section 42 of the Code provides that a creditor may appeal to the Adjudicating Authority against the decision of the liquidator rejecting the claims within fourteen days of the receipt of such decision.

Impact: Consequently, the assessment on the question on should be changed from No to Yes as per below:

- I. The cost is 0.19% of the estate. (The value of estate is INR 12,866,614 and the cost is taken as INR 25,000, so the % value become 0.19%).
- II. A score of '1' should be assigned in the following question:
What procedures are available to a DEBTOR when commencing insolvency proceedings?
- III. A score of '1' should be assigned in the following question:
Does the insolvency framework allow a CREDITOR to file for insolvency of the debtor?
- IV. A score of '1' should be assigned in each of the following questions:
 - a) Does the insolvency framework explicitly provide for the continuation of existing contracts supplying essential goods and services to the debtor”?
 - b) Does the insolvency framework explicitly provide for the possibility of the debtor obtaining post-commencement credit to finance its on-going needs during the proceedings?
- V. A score of '1' should be assigned in each of the following questions:
 - a) Does the insolvency framework provide for the possibility of the debtor obtaining credit after commencement of insolvency proceedings?
 - b) Does the insolvency framework assign priority to post-commencement credit?
- VI. A score of '1' should be assigned in each of the following questions:
 - a) Which creditors vote on the proposed reorganization plan?
 - b) Are the creditors divided into classes for the purposes of voting on the reorganization plan, does each class vote separately and are creditors in the same class treated equally?
- VII. A score of '1' should be assigned in the following question:
Does the insolvency framework require that dissenting creditors in reorganization receive at least as much as what they would obtain in a liquidation?
- VIII. A score of '1' should be assigned in each of the following questions:
 - a) Does the insolvency framework require approval by the creditors for sale of substantial assets of the debtor?"

- b) Does the insolvency framework require approval by the creditors for selection or appointment of the insolvency representative?
- IX. A score of '1' should be assigned in the following question:
Does the insolvency framework provide that a creditor has the right to object to decisions accepting or rejecting creditors' claims?

Effective Date: 15th December 2016

URL: http://www.mca.gov.in/Ministry/pdf/Notification_14122016.pdf

3. Reform: Chapter II on "Corporate Insolvency Resolution Process" has been notified and is operational Since December 1, 2016. According to Section 20(2) (c) and Section 25(2) (c) of the Code, the Interim resolution professional shall have the authority to raise interim finance to function during the insolvency proceedings, subject to prior approval from the Committee of Creditors.

Impact: The newly notified provisions of the Code explicitly allow the possibility of obtaining credit after the commencement of the insolvency proceedings. Consequently, the assessment on the question on "Does the insolvency framework explicitly provide for the possibility of the debtor obtaining post-commencement credit to finance its on-going needs during the proceedings?" should be changed from No to Yes.

Effective Date: 15th December 2016

URL: http://www.mca.gov.in/Ministry/pdf/Notification_14122016.pdf

4. Reform: All rules and regulations with respect to the Code for facilitation of corporate insolvency resolution process and liquidation process were notified.

Impact: The assessment on the questions on "What procedures are available to a DEBTOR when commencing insolvency proceedings" and "Does the insolvency framework allow a CREDITOR to file for insolvency of the debtor"; should be changed from liquidation only to both liquidation and reorganization.

Effective Date: 30th Nov and 15th Dec 2016

Legal basis: Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

5. Section 5 of the Code defines 'insolvency resolution process cost' as the amount of any interim Finance and cost incurred in raising such finance. And defines 'interim finance' as any financial Debt raised by the resolution professional during the insolvency resolution process period.

Impact: The newly notified insolvency framework under the Code assigns priority to post-commencement credit. Consequently, the assessment on the question on "Does the insolvency framework assign priority to post-commencement credit?" should be changed from No to Yes.

Effective Date: 15th December 2016

Legal basis: Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

6. Reform: As per Section 29(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the sale of assets of the debtors requires the approval of the Committee of Creditors, set up under Chapter V of the same regulations.

Impact: The assessment on the question on "Does the insolvency framework require approval by the creditors for sale of substantial assets of the debtor"; should be changed from No to Yes.

Effective Date: 30th November 2016

Legal basis: Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

7. With regard to the question "Based on the procedure you selected in Question 4.1, how much will the entire process cost" the response would be 0.78% as NCLT is not a court in the traditional sense, the requirement of attorney fee and stamp duty are no more applicable under the Code. In this case, the costs would comprise application fee with the Tribunal (INR 2,000-25,000) and professional.

Impact: The cost is 0.19% of the estate. (The value of estate is INR 12,866,614 and the cost is taken as INR 25,000, so the % value become 0.19%).