PUBLIC COMMENTS ON THE PROPOSED CHANGES TO THE CORPORATE INSOLVENCY RESOLUTION AND LIQUIDATION FRAMEWORK UNDER THE IBC, 2016

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I. PRELUDE

The Insolvency and Bankruptcy Code, 2016 was a revolutionary reform in the Indian economy which was introduced to get rid of the bad debts while simultaneously trying to revive the businesses and operations. The aim of the legislation was to ensure a time bound resolution in order to maximise the assets of various stakeholders. As has been evidenced by the experience of the industry and the tribunals across the country, the timelines for resolution of insolvency applications have failed to meet the specified time limit because of delay at various stages. The proposed changes in the consultation paper are a step in the right direction in order to further strengthen our insolvency regime and to ensure less value leakage of the assets.

II. ISSUE 1

1. PRESENT PROVISIONS

By virtue of Section 7(4), the Adjudicating Authority (AA) is mandated to ascertain the existence of a default within 14 days of the receipt of the application from the records of an Information Utility (IU) or based on other evidence furnished by the financial creditor. In cases where the application is incomplete, the Adjudicating Authority may return the same for rectification within 7 days of the receipt of notice. However, often, it takes longer which in turn delays the entire timeline.

2. CHANGES PROPOSED

The consultation paper proposes that financial creditors as prescribed by the Central Government may be required to submit only IU authenticated records to establish default for the purpose of admission of a Section 7 CIRP application. Where such IU authenticated records are not available, and for all other financial creditors, current options of relying on different documents for establishing default for admission of a Section 7 CIRP application may remain available. This will make the admission process significantly quicker and less cumbersome. Consequently, the AA would only be required to consider IU authenticated records as evidence of default for Section 7 applications filed by such financial creditors as prescribed. This will also dissuade AAs from taking time to determine ancillary matters such as the amount of default and allow them to speedily

admit Section 7 CIRP applications on the basis of IU authenticated records evidencing the existence of default.

3. SUGGESTIONS

As has been pointed out in the consultation paper, the Information Utilities framework has indeed become more robust with time. The only IU registered with the IBBI, i.e., the National e-Governance Services Limited or 'NeSL', has access to the MCA-21 database and the Central Registry of Securitisation Asset Reconstruction and Security Interest of India or 'CERSAI' portals, which while ensuring availability of and access to reliable data for stakeholders, also enables speedy authentication of financial information. The data contained therein is the best evidence in insolvency cases because it collates data from statutory compliances of the financial institutions and other stakeholders. Furthermore, the IU is obligated to get the information authenticated by all concerned parties before storing such information.[1]

The provision for acceptance of authenticated records from Information Utilities have been in place for quite some time now. However, many a times the Tribunals disregard the mandate of the Code which says that once a legally due 'debt' and the existence of 'default' of that debt has been ascertained, the Adjudicating Authority shall admit the application. There ought to be no other recourse available to the Adjudicating authority.

However, at times the Tribunal rejects Section 7 application directing the parties to settle despite there being clear existence of 'default'[2]. The same trend can be seen in application filed by operational debtors wherein the Tribunals abdicate their jurisdiction and direct petitioners to settle.[3] At other times, the Tribunal engage in long-drawn pre-admission inquiry such as directing a forensic audit which frustrates the object of the Code which is value maximisation.[4]

Thus, it is suggested that such change must also be coupled with wider training or a refresher course of sorts to the members of the judiciary (both judicial and technical) currently discharging their duties in various NCLTs and NCLATs across the country in order to ensure larger

[1] Section 214, Insolvency and Bankruptcy Code, 2016.
[2] E S Krishnamurthy v. Bharath Hi Tech Builders; Civil Appeal No 3325 of 2020 (Supreme Court).
[3] Sodexo India Services Pvt. Ltd. v. Chemizol Additives Pvt. Ltd Comp. App. (AT) (Ins) No. 1094 of 2020.
[4] Allahabad Bank v. Poonam Resorts Limited CA (AT) (Ins) No. 1303-1304/2019.

acceptability of the records from Information Utilities. The members must be made familiar with the format of data presentation in the document furnished by the IU.

III. ISSUE 2

1. PRESENT PROVISIONS

Sections 43-51, 66 and 67 of the Code have laid down various transactions that may be avoided by the resolution professional or liquidator and the actions that are taken against the erstwhile management for fraudulently or wrongfully trading during the CIRP or liquidation process. These terms are aimed at enhancing the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors. It has been previously suggested that there is a lack of clarity regarding certain aspects for avoidable transactions and wrongful trading.

2. PROPOSED CHANGES

The amendments that were suggested by the ILC needs to be implemented through the Code. S. 19(1) is to be amended to ensure that the interim resolution professional or the resolution professional can avail requisite cooperation for collection of information for the conduct of the CIRP and filing of applications against avoidable transactions and wrongful trading. S. 25(2) is also to be amended to explicitly provide that the resolution professional will be responsible for investigating the affairs of the CD. S. 47 is to be amended to disallow members or partners of the CD from filing applications to avoid an undervalued transaction.

Further, clarity is needed regarding whether proceedings for avoidance of transactions and wrongful trading can continue after approval of resolution plan in CIRP. The Code does not provide any specific timeline for the completion of such proceedings. It is also important that a clarification through an explanation is added to S. 26 to clarify that proceedings for avoidance of transactions and wrongful trading can continue after the approval of a resolution plan by the AA in CIRP. It is also proposed that the look-back period in Ss. 43(4), 46(1) and 50(1) must be amended to include that the threshold for the look-back period may be changed from the date of commencement of CIRP to the date of filing of the application for initiation of CIRP in respect of the CD that has been admitted.

3. SUGGESTIONS

When amending Section 25 (2) of the IBC, 2016, we find it necessary to further include the *modus operandi* of how the investigation is to be conducted by the Resolution Professional, preferably as an Annexure within the Act itself, or as a set of Guidelines issued by the concerned body. We consider this essential, because, while conferring investigative power to the Resolution Professional, the scope of such power must be clearly delineated to prevent any dispute as to the way the investigation is conducted as such, which may have the propensity to delay the entire Corporate Insolvency Resolution Process.

While it is commendable to include the manner of undertaking proceedings for avoidance of transactions and wrongful trading in the Resolution Plan, we believe that it should not be made mandatory, as some proceedings may also continue even after the approval of the Resolution Plan by the Adjudicating Authority. Instead, we suggest that the proceedings regarding the same which continue after the approval of the Resolution Plan be made part of the CIRP, but not mandated to be included in the Resolution Plan which has already been approved.

IV. ISSUE 3

1. PRESENT PROVISIONS

Currently, delays are observed at the stage of approval of resolution plans by the AA. These delays affect the closure of the CIRP, erodes the value of the corporate debtor and dis-incentivises potential resolution applicants from participating in the process. These delays go against the purpose of the IBC, which is to provide for a quick process of restructuring and efficient value maximization. In the case of *Ebix Singapore Pvt. Ltd. v. CoC of Educomp Solutions Ltd. & Anr*., the court held that there is a need for speedy resolution and the negative effect of delays on the efficacy of the judicial process.

2. PROPOSED CHANGES

The IBC should, therefore, provide a fixed time period for approval or rejection of a resolution plan by the AA. The Code is proposed to be amended to provide the AA with 30 days for approving or rejecting a resolution plan under S. 31. Where the resolution plan is not approved or rejected within this time period, the AA shall record reasons in writing for the same. This timeline shall be subject to the overall time period specified for the CIRP in S. 12 of the IBC.

3. SUGGESTIONS

While it is necessary to curb inordinate delays by the Adjudicating Authority in approving Resolution Plans, setting a fixed time (especially one as short as 30 days) may be detrimental. Instead, framing a streamlined procedure on evaluating a Resolution Plan by the AA, as well as expressly delineating the specific grounds on which challenges to a Resolution Plan may be brought about by other stakeholders would, in our opinion, work more effectively in reducing the overall delay in completing the CIRP.

If at all a shorter time frame of 30 days is found to be most appropriate, the provision could be framed in such a way so as to grant deemed approval on expiry of the 30-day period with a provision for appeal to the NCLAT thus enabling a faster resolution of the issue.

V. ISSUE 4

1. PRESENT PROVISIONS

S. 59 of the Insolvency and Bankruptcy Code (IBC) deals with the Voluntary Liquidation of Corporate Persons.[5]

59. (3): -

(a) a declaration from majority of the directors of the company verified by an affidavit stating that— ...

(c) within four weeks of a declaration under sub-clause (a), there shall be—

> *(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or*
>
> *(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, and appointing an insolvency professional to act as the liquidator:*

[5] Section 59, Insolvency and Bankruptcy Code, Acts of Parliament No. 31 (2016).

Provided that the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

The above-mentioned provisions deal with the requirements for initiation of the voluntary liquidation process. Under these provisions, initiating voluntary liquidation would require a general meeting to pass a special resolution. If the corporate person (CP) is in default, this resolution must also be approved by creditors representing two-third in value of the debt. However, there are no explicit provisions that allow midway closure of the voluntary liquidation process. This being a dangerous lacuna is sought to be addressed by the proposed amendment. The proposal is to implement the same standards as discussed above in the case of closure of the process as well.

2. PROPOSED CHANGES AND EFFECT

The IBBI has sought to incorporate provisions that would allow companies to rescind their application for voluntary resolution, provided that certain conditions are met. This would allow CPs to withdraw from the process at any time after initiation. Currently there is no provision for statutory closure of the process. In the absence of any specific provision, the methods of withdrawal adopted lack uniformity. Formalising this process would address the inherent potential for abuse and fraud in the current process.

This withdrawal would require a special resolution of the members or partners or shareholders. If sale of assets has commenced, then this resolution must be approved by creditors representing two-thirds in value of the outstanding debt. In cases where such sale has happened, then the approval of all unpaid creditors is sought.

The new amendment is a welcome one as it will allow corporate players to act according to the dynamic economic environment of the market. This would create necessary leeway in circumstances where the financial prospects of the company improve after the liquidation process has begun. Allowing such a provision would be beneficial for the stakeholders as well as the economy. Maintaining a potential viable CP is consistent with the objectives of the Code.

The amendment would also free them from having to approach the Adjudicating Authority (AA). A uniform standard would prevent companies from abusing the gap in law and would protect the interests of stakeholders.

3. CASE LAWS

In the absence of legal provisions petitions for closure pf liquidation processes have been dealt with based on certain principles. The NCLT, NCLAT and the Supreme Court have all allowed the closure of liquidation processes based on furthering the objectives of the IBC. In the matter of *Dhankari Investment Ltd. v. Official Liquidator*[6], the Allahabad High Court had held that the power under S. 466 of the Companies Act, 1956 included the power of to stay voluntary winding up based on the fulfilment of certain conditions.

In *V.B. Purohit v. Gadag, Jambukeshwara and Anr.*[7], the Karnataka High Court allowed for a stay on the voluntary winding up of a company and held that if the shareholders have resolved to revive a company, then it should not be denied to them. There is no provision under the IBC to approach the AA in the voluntary liquidation process. In the absence of express provisions, jurisprudence in the above vein has guided the AA to allow the closure of the voluntary liquidation process in many cases.

4. INTERNATIONAL JURISPRUDENCE

The insolvency law of Singapore provides for the power to stay or terminate winding up based on terms and conditions that the court thinks fit.[8] Under UK law, S. 147 of the Insolvency Act, 1986 provides for staying winding up of the company.[9] However, there is no provision for withdrawal of voluntary liquidation. In fact, in the UK, member as well as creditor initiated voluntary liquidation cannot be halted. The BVI Business Companies Act, 2004 of the British Virgin Islands provides for termination of voluntary liquidation.[10] However, this power also arises from the order of the Court.

5. ADDITIONAL SUGGESTIONS

While the provision would help companies and stakeholders, it is prima facie a rigid one. Since the law specifies the conditions for the withdrawal and negates the involvement of the AA, it removes the scope for judicial discretion. This may not always be in the interest of justice. The

[6] Dhankari Investment Ltd. v. Official Liquidator the Allahabad High Court, (2006) 132 CC 749 All.
[7] V. B. Purohit v. Gadag, Jambukeshwara and Anr., (1984) 56 CC 360 Kar.
[8] Section 186, Insolvency, Restructuring and Dissolution Act, 2018 (UK).
[9] Section 147, Insolvency Act, 1986 (UK).
[10] Section 207A, BVI Business Companies Act, 2004 (UK).

provision may encourage under-the table dealings and adversely affect minority stakeholders. While the standards being adopted are merely a codified version of accepted practice, the lack of judicial discretion may cause harm. In order to avoid this pitfall, the amendment while codifying the standards for withdrawal should also incorporate approval from the AA as the final step. This would also be in accordance with international standards as discussed above.

There is also a lack of clarity as to the determination of creditors for approval. This could either be the same list of creditors who had approved the liquidation, or it could be determined by the liquidator. The proposal also does not discuss the role of the liquidator after such withdrawal has been made. There is uncertainty as to the role of the liquidator as well as how he would recoup the costs incurred. This could be addressed by providing specifics as to how the liquidator would be discharged of their function and how they may recover costs. The determination of creditors for two-thirds approval may be done by the liquidator as he invites claims from the stakeholders.

VI. ISSUE 5

1. PRESENT PROVISION AND ITS ATTRIBUTES

Section 224 of the IBC states that an insolvency fund is to be maintained for the insolvency resolution, liquidation and bankruptcy of persons as under the Code. Such a provision was previously made in the Companies (Second Amendment) Act, 2002, for the rehabilitation of sick companies. Efficient ones would be penalised at the benefit of inefficient ones. The structure resulted on a tax on turnover rather than on income which tended to disincentivise growth. This provision was therefore repealed. Further, it was also present in the Companies Act, 2013 and was described as the Rehabilitation and Insolvency Fund for revival and liquidation of sick companies. The grants made by the Central government, amount deposited by companies, amount given to the Fund and income from investment of the amount in the fund may be included in the fund.

The present provision of the insolvency fund was set up to meet the costs of the insolvency process.[11] The present design of the IBC fund does not explain the contributions made to it and provides little ways of utilising the amounts contributed. Further, this fund is voluntary and may be made by the Central Government or by any person who voluntarily wants to make such a contribution. Receiving funds on a voluntary basis does not account for any consistency and it is

[11] Restructuring and Liquidation, Ministry of Corporate Affairs.

highly possible to fall short of funds when it is needed. Furthermore, only the people who have contributed are allowed to withdraw the amount. This limited the utilisation of the fund for other matters. Contributions to these funds generally enable companies to have rights over the amounts that are contributed. An application of the Fund to the insolvency/rehabilitation process should be subject to the orders of the Tribunal. The Tribunal may allow an over-draft from the Fund in the rehabilitation process. It is usually managed by an independent administrator appointed by the government.

2. THE PROPOSED CHANGES

In the suggested framework, amendments are in suit for Section 224 for the Central Government to provide a detailed framework for contribution to the IBC fund and the utilisation of the IBC fund for various purposes that include insolvency resolution, asset reallocation, companies that are undergoing liquidation and other purposes.

3. SUGGESTIONS

It is suggested that the IBC must detail various sources for contribution to the IBC fund. In addition to this, it is essential that specific uses of the fund are determined by the Central Government and meticulously planned. Making the provision of the money from this fund more widespread to cover workmen's dues or other expenses, will make it all purpose. Furthermore, the provisions state that the fund is to be governed by an independent administrator appointed by the government. It is suggested that this person should be familiar with the insolvency process and be appointed from within the IBBI, if permitted.

Moreover, it is important to answer the question of what will constitute 'insolvency resolution, liquidation and bankruptcy'. These functions must be spelt out in clear terms to prevent any misuse. Further, for the proper development of the Insolvency Fund, some incentives are required for voluntary contributors. For this, it is suggested that contributors to the Insolvency Fund be incentivised by foregoing the fee for various governmental/departmental forms that companies in particular would have to submit from time to time; this can be done for a specific duration and on the basis of the contribution that such companies provide (for instance, the form fees for a company could be waived for a period of one year from the date of their contribution to the Insolvency Fund; provided the amount contributed is more than INR 1 Lakh).

Moreover, we suggest that Section 224(3) of the IBC, which allows for only persons who have contributed to the fund to withdraw it, to the extent of their contribution, be removed, thereby expanding its utilisation. Therefore, it is suggested that an all-inclusive format and adjudication is applied.