



Shardul Amarchand Mangaldas

CENTURY of EXCELLENCE

THE INSOLVENCY AND BANKRUPTCY CODE, 2016, AS AMENDED

Recent Developments and Implementation of the Code



IMPLEMENTATION SINCE THE NOTIFICATION OF THE CODE

➤ From December, 2016 to March, 2018: **

- ❑ **Approximately ~525 cases** have been admitted against corporate debtors in India, of which OCs account for 43% of the cases:
 - ~ 310 cases were filed by operational creditors under Section 9 of the Code
 - ~129 cases were filed by corporate debtors themselves under Section 10 of the Code
 - ~262 cases were filed by financial creditors under Section 7 of the Code

- ❑ Corporate debtors falling in the **following sectors have faced maximum CIRP filings:**
 - Metal and mining
 - Power & Electricity
 - Engineering and Construction
 - Food & Hospitality
 - Healthcare

- ❑ Majority cases have been filed in the **main cities i.e. Mumbai and Delhi.**

- ❑ **About 1812** insolvency professionals have registered with the IBBI, majority of whom are practicing chartered accountants, cost accountants and company secretaries.



AMENDMENTS UNDER THE CODE

- **AMENDMENT TO THE CODE PURSUANT TO ORDINANCE DATED NOVEMBER 23, 2017**

- **Introduction of Section 29A – Disqualification of certain persons from submitting a Resolution Plan**

- ❑ RP (with approval of the CoC), can specify eligibility conditions for prospective resolution applicants
- ❑ Following persons disqualified from submitting a plan:
 - ❑ *Wilful defaulters*
 - ❑ *Persons **convicted of criminal offences** punishable with 2 years or more*
 - ❑ *Have been **disqualified by SEBI** to trade / access securities market*
 - ❑ *Have been disqualified to act as directors*
 - ❑ ***Whose accounts have been NPA for 1 year or more or are promoters of accounts which are NPA for 1 year or more***
 - ❑ *Persons who **have issued enforceable guarantees** in favour of the creditor who initiated the insolvency proceedings*
 - ❑ ***Connected persons** to the above – including promoters, holding company, subsidiary company, associate company or a related party of the above*
- ❑ Liquidator restricted from selling company's assets to disqualified applicants

- **Assessment of the feasibility and viability of the Plan**

- ❑ CoC obligated to consider the feasibility and viability of a resolution plan before approving the same
- ❑ Feasibility and viability – no definition or scope set out under IBC
- ❑ In practice, plan evaluation advisors are being appointed to evaluate feasibility and viability



➤ Computation of Fair Value by RPs

- ❑ Resolution Professionals required to appoint registered valuers to conduct a *fair value* estimation of the Corporate Debtor
- ❑ This is in addition to the estimation of the liquidation value
- ❑ The liquidation value not required to be disclosed as part of the Information Memorandum.
- ❑ Fair value and liquidation value to be provided to the CoC after the receipt of the resolution plans → upon signing to a confidentiality undertaking
- ❑ Members of the CoC to ensure the fair value and liquidation value are not misused

➤ Invitation of Resolution Plans

- ❑ Resolution Professional to issue an invitation document to prospective applicants (**RFP**)
- ❑ Broad requirements for the RFP (Form G) specified under the amended regulations
- ❑ RFP to be made available by the RP on Corporate Debtor's website
- ❑ Mandates the resolution plan to provide for measures to maximise the value of the assets of the Corporate Debtor
- ❑ Obligation on the resolution applicants to submit their plan within the timelines specified by the RP in its RFP.
- ❑ RP is required to furnish the resolution plan to the NCLT at least 15 days prior to the expiry of the CIR process period.

➤ Evaluation Matrix

- ❑ RP to circulate the evaluation matrix to prospective applicants – at least 30 days prior to the resolution plan due date
- ❑ Evaluation matrix to form part of the RFP
- ❑ Obligation on the CoC to ensure that the plan provides for the manner in which all stakeholders are dealt
- ❑ No specific evaluation matrix set out under the IBC - quantitative and qualitative criteria being finalized by CoC – to ensure fair process



- **AMENDMENTS TO THE CODE PURSUANT TO ORDINANCE DATED JUNE 6, 2018**

- **Reduced voting threshold for COC to encourage resolution**

- ❑ Reduced from 75% to 66% for all major decisions such as approval of resolution plan, extension of CIRP period etc.
- ❑ Reduced from 75% to 51% for routine decisions to be taken by the COC

- **Allottees recognised as 'financial creditors':**

- ❑ Ordinance promulgated to, inter alia, '*balance the interests of various stakeholders in the Code, especially interests of home buyers.*'
- ❑ Definition of 'financial debt' has been amended to state that:
 - amounts raised by an '*allottee*' under a '*real estate project*' shall be deemed to be an amount having the commercial effect of borrowing
 - the terms '*allottee*' and '*real estate project*' shall have the meaning given to them under RERA, 2016
- ❑ Can initiate insolvency for a corporate entity under Section 7 of the Code and shall have a right to participate and vote in COC meetings.
- ❑ M. Sahoo has recently stated that 'secured or unsecured tag is not a matter determined under IBC' in relation to the home-buyers. creation of security interest is matter of contractual relationship between a creditor and a borrower.

- **Participation in COC Meetings through an authorized representative.**

- ❑ The amendment allows that if a class of financial creditors is more than a specified number, IRP shall approach NCLT for appointment of an IP as authorized representative of such class
- ❑ This allows participation of security holders, deposit holders, allottees etc. through an authorised representative



➤ **Non-applicability of moratorium period to enforcement of guarantee**

- ❑ Section 14 (1) shall not apply to 'a surety in contract of guarantee to a corporate debtor'

➤ **Clarification on the term of the IRP**

- ❑ Term of IRP to continue till date of appointment of RP by the COC

➤ **Withdrawal of admitted applications**

- ❑ Withdrawal of applications admitted under section 7, 9 or 10 of IBC with approval of ninety percent voting share of committee of creditors
- ❑ Press release - withdrawal allowed only before the publication of notice inviting Expression of Interest (EOI). This is not added in the Code itself.
- ❑ Amended CIRP regulations states the position under press release but is only applicable to CIRP commencing after the amended CIRP comes into effect.

➤ **RP to continue till approval of resolution plan**

- ❑ If RP has submitted the approved resolution plan under sec. 30 (6) to NCLT, RP shall continue to manage the operations after expiry of CIRP period until an order is passed under section 31

➤ **Introduction of section 238A:**

- ❑ The ordinance clarifies that with respect to proceedings under the Code, the provisions of Limitation Act shall apply



➤ **Amendments to Section 29A and Section 30:**

- ❑ Amendments to Section 29A applicable to plans not submitted as on date of the Ordinance, 2018.
- ❑ Primary Onus of eligibility under Section 29A of the Code shifted to the Resolution Applicant - shall submit an affidavit certifying its eligibility along with resolution plan. This is subject to judicial interpretation.
- ❑ Promoters of MSMEs not disqualified from bidding unless wilful defaulters.
- ❑ Section 29A (c) amended to state that:
 - ✓ NPA disqualification shall be seen as on date of submission of the plan.
 - ✓ NPA disqualification shall not apply to pure play financial entities which are not related to the CD.

However this related party aspect shall not apply to a regulated financial entity, who is a FC and is related solely on account of conversion of debt to equity, prior to insolvency commencement date.

- ✓ Resolution applicant holding an NPA on account of acquiring pursuant to a prior approved resolution plan under the Code, has been provided with a three-year cooling-off period from the date of such acquisition.
 - ❑ Section 29A (h) amended to include any guarantee and not just an 'enforceable' guarantee. Such guarantee should have been invoked and remains unpaid.
 - ❑ Explanation I (iii) relating to 'connected person' shall not apply for applicant which is a financial entity are not related to the CD
- **One-year grace period provided for the successful resolution applicant to fulfill various statutory obligations required under different laws**



- **Insertion Sec 5(24A) - definition 'related party' with respect to an individual, inter alia, includes:**
 - ✓ **relative** of the individual or of the spouse
 - ✓ a person on whose advice, directions or instructions, the individual is accustomed to act
 - ✓ a LLP/ partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual
 - ✓ a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual
 - ✓ person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual

- The term **relative** has been defined the Ordinance to include a wide range of relatives, like
 - ✓ members of HUF
 - ✓ husband / wife;
 - ✓ Son / daughter and following two generations of son/daughter
 - ✓ Father, mother; and their respective father and mother; their respective brothers and sisters
 - ✓ Brother, sister; and their respective sons and daughters
 - ✓ For son/daughter,/sister/ brother, their spouses are also be included



AMENDMENTS TO CIRP REGULATIONS

- Came into force- **July 03,2018**. Effective for CIR process commencing on or after July 03, 2018.
- **Introduces for eligibility criteria for authorized representative:**
 - ✓ Not a IRP's relative or related party
 - ✓ Eligible as IP under Regulation 3
 - ✓ Willing to act as authorized representative
- **Changes to requirements pertaining to notice to COC**
 - ✓ Minimum 5 days notice in writing for calling of COC meeting, unless reduced by COC.
 - ✓ COC may reduce to minimum 24 hours unless there is an authorized representative in which case minimum 48 hours required.
- **Regulation 30A- Withdrawal of Application – Application under section 7,9 or 10 of the Code shall be submitted to IRP or RP.**
 - ✓ Before Issue of Invitation to Expression of Interest (Eoi).
 - ✓ With Bank guarantee towards estimated cost relating to CIRP cost incurred by RP/IRP.
 - ✓ Application to be considered by COC within 7 days of receipt of application or constitution of COC, whichever is later.
 - ✓ If approved with 90% Voting share then application submission shall be done by RP to the NCLT within 3 days.



➤ **Amended Regulation 35A dealing with preferential and other transaction**

- ✓ By 75th day- RP has to form opinion on CD's subjection to Preferential transaction, under valued transaction, extortionate transaction or fraudulent transaction
- ✓ By 115th day - determination of opinion on such avoidance transaction
- ✓ Before 135th day - After determination, application should be made to adjudicating authority for appropriate relief.

➤ **Amended Regulation 36A introducing EOI concept**

- ✓ By 75th day- Publication of brief particulars of Invitation for EOI. Any EOI received after a specified time shall be rejected
- ✓ RP to conduct due diligence within 10 days on EOI applicants based on material on record for compliance with eligibility criteria, Section 29A etc.
- ✓ After due diligence, provisional list of Prospective Resolution Application must be issued within 10 days of last date of submission
- ✓ After receiving objections within 5 days of provisional list, final list to be issued within 10 days of last receipt of objections.

➤ **RP to issue IM, Evaluation Matrix and request for resolution plan (RFP), within 5 days of issuance of Provisional list.**

- ✓ RFP to provide minimum 30 days to submit the plan and shall not require any non-refundable deposit for submission along with plan
- ✓ Any modification in RFP or evaluation matrix shall be considered a fresh issue and the 30 day clock starts again

➤ **Submission of plan with eligibility affidavit under section 29A, undertaking for providing with additional funds under regulation 38 (1), undertaking by that if information rendered turns incorrect then applicant shall be ineligible to continue CIRP.**



IBBI'S DIRECTIONS TO THE INSOLVENCY PROFESSIONALS

➤ Disclosure of interest

- ❑ IBBI has issued recent circulars directing RPs to disclose their relationships, if any, with the Corporate Debtor, FCs, resolution applicants and interim finance providers (where applicable)
- ❑ Similar disclosures to be furnished by professionals appointed by the RP

➤ Professional conduct of RPs

- ❑ IBBI has directed RPs to exercise reasonable care and diligence to ensure that the Corporate Debtor complies with all applicable laws, during the CIRP
- ❑ Failure to comply will stand to the account of the RP
- ❑ RP cannot outsource any of his responsibilities and duties under IBC to any other person including not require any other person to certify the eligibility of a resolution applicant, except to the extent of engaging advisors
- ❑ Communications by the RP with to the stakeholders should state his/her name, address and email and IBBI registration no.

LEGAL DEVELOPMENTS: RECENT JUDGEMENTS OF RP's INTEREST



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➤ Recovery from sales hit by moratorium

- ❑ *Issue:* Whether the financial creditor can continue recovering from the sale proceeds post commencement of CIR process?
- ❑ NCLT (Chandigarh) in the matter of *M/s. Super Multicolor Printers (P) Ltd. & Prakash Dev Sharma v. Senior Executive Engineer, Himachal Pradesh Electricity Board & Punjab National Bank* held that the recovery from the sales during moratorium is prohibited; the financial creditor was directed to refund the amount already recovered after commencement of CIR process.

➤ Execution of warrant of attachment hit by moratorium

- ❑ *Issue:* Whether execution of warrant of attachment by Tahsildar for recovery of the non-agricultural tax maintainable during CIR process?
- ❑ NCLT (Ahmedabad) in the matter of *Shailen Shah v. Tahsildar Akole District Ahmednagar & Ors.* held that in view of the moratorium granted under Section 14 of the Code, status quo is given in relation to further execution of such warrant of attachment.

➤ Non-existence of certain debtors

- ❑ *Issue:* The resolution professional found that certain debtors of the corporate debtor are not in existence.
- ❑ NCLT (Mumbai) in the matter of *Union Bank of India v. Paramshakti Steel Ltd.* advised the resolution professional to initiate all steps which is available under the Code to proceed against the promoter/director of this corporate debtor by the next date of hearing and further police assistance can be provided to the resolution professional to unravel this fraud if required.



➤ Complaints against Insolvency Resolution Professional

- ❑ The complaints filed against the insolvency resolution professional are first to be investigated by the Insolvency and Bankruptcy Board of India (IBBI).
- ❑ *Issue:* Whether an FIR lodged against the insolvency resolution professional by a third person is maintainable under the Code?
- ❑ NCLT (Principal Bench) in the matter of *M/s Alchemist Asset Reconstruction Co. Ltd. v. M/s Hotel Gaudavan Pvt. Ltd.* held that such a complaint is not maintainable. If post investigation, the IBBI finds that a criminal case has been made against the insolvency resolution professional then solely the IBBI can file a complaint in respect such offences committed by him.

➤ Duties of the Corporate Debtor towards the Resolution Professional

- ❑ *Issue:* Whether the resolution professional was being threatened by the corporate debtor for visiting the factory premises?
- ❑ NCLT (Kolkata) in the matter of *Punjab National Bank v. Mintri Tea Company Pvt. Ltd.* directed the Director General of Police, West Bengal, Superintendent of Police, Bankura and in-charge of Mejia P.S. to give proper and effective assistance to the resolution professional in valuation of the company. Further, the bench held that if there occurs any interference in the work of the resolution professional, action shall be initiated against the corporate debtor.



LEGAL DEVELOPMENTS: OTHER RECENT JUDGEMENTS

➤ **Case of Jaypee Infratech – Preferential Transactions (NCLT, Allahabad)**

- ❑ The RP of Jaypee Infratech approached NCLT, Allahabad alleging that 858 acres was “fraudulently and wrongfully” mortgaged to secure loans of the parent company Jaiprakash Associates.
- ❑ The NCLT held that such mortgage to lenders of the Parent Company appeared to have been committed to defraud creditors of Jaypee Infratech and classified it as ‘fraudulent, preferential and undervalued transaction’ directing for reversal of such transactions.
- ❑ The NCLT Order is currently being appealed at NCLAT by the Parent Company.

➤ **Case of Power Himalayas – Re-visiting a plan previously rejected by NCLT to ensure resolution (NCLAT)**

- ❑ NCLT, Chandigarh had rejected a resolution plan approved by the COC on the ground that, inter alia, there was discrimination in the matter of payment to promoters and operational creditors under the plan and that two of the directors had been allowed to be retained.
- ❑ Pursuant to such order, the successful resolution applicant made changes, however NCLT rejected the revised plan stating that it had no power to revisit its order or to allow revised Resolution Plan.
- ❑ The NCLAT reversed the order of NCLT stating that original application was rejected wrongly by NCLT and in any case NCLT should have accepted the amended plan as that amounts to maximization of assets.
- ❑ Further held that merely retention of two directors does not violate IBC and if the Directors are employees, it is always open to the Resolution Applicant to allow them to continue as employees, who are otherwise Operational Creditors and the Resolution Applicant is bound to pay them



➤ **Case of Dakshin Gujarat VIJ Company Ltd - Payment for essential services during CIRP (NCLAT)**

- ❑ Issue was whether the order of 'Moratorium' will cover the current charges payable by the CD for supply of water, electricity etc. or not.
- ❑ The NCLAT observed that there is no prohibition or bar on payment of current charges of essential services. Such payment is not covered by the order of "Moratorium".
- ❑ If any cost is incurred towards the supply of the essential services during the "Moratorium", it may be accounted towards 'Insolvency Resolution Costs', but law does not stipulate that the suppliers of essential goods including the electricity or water to be supplied free of cost, till completion of the 'Moratorium'.

➤ **Case of Devendra Padamchand Jain (RP) – NCLT can remove RP if unsatisfied with his functioning (NCLAT)**

- ❑ Being unhappy with the services of the RP, NCLT removed him and appointed another IP as liquidator.
- ❑ The RP appealed against the order of NCLT stating that NCLT has no jurisdiction to replace him and a RP can be replaced only for the reasons mentioned in section 34 of the Code
- ❑ The NCLAT held that the NCLT has jurisdiction to remove the RP, if it is not satisfied with his functioning, which amounts to non-compliance of section 30 (2) of the Code.



Shardul Amarchand Mangaldas

***Disclaimer:** This presentation is not a legal advice. This is just an indicative list of amendments based on our analysis of the Insolvency & Bankruptcy Code, 2016 (as amended) and the related regulations issued therein and does not constitute legal advice on the same.*

For any questions or further clarifications, please feel free to contact:

Mr. Sapan Gupta

Partner and National Practice Head, Banking and Finance

sapan.gupta@AMSShardul.com

+91 22 49335564; +91 9867667000

THANK YOU

Shardul Amarchand Mangaldas & Co

Advocates & Solicitors

Amarchand Towers 216 Okhla Industrial Estate Phase III New Delhi 110 020

T +91 11 4159 0700 4060 6060 F +91 11 26924900

New Delhi Mumbai Gurgaon Bengaluru Chennai Ahmedabad Kolkata