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INDIA NETWORK

E-Newsletter

A Glimpse of Special Moments

19th July 2018
Study Circle - Discussion on IBC in the wake of recent amendments
New Delhi

The India network of IWIRC met on 19th July for a "Study Circle - Discussion on IBC in the wake of recent amendments" in New Delhi, conducted by Mamta Binani (Resolution Professional & Immediate Past President of ICSI). Mamta took the attendees through the recent and significant changes to the Insolvency & Bankruptcy Code, 2016. All participants shared their insights on various practical issues experienced by them under the IBC and discussed the evolving practices. IWIRC India looks forward to organizing more such events for knowledge sharing and professional networking.

Legal Updates

By Upasana Rao, Partner, Trilegal
Dhruv Chatterjee, Senior Associate, Trilegal
Urvi Agarwal, Associate, Trilegal

Inclusion of Homebuyers in the Committee of Creditors

Pursuant to a recent amendment the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 to the Insolvency and Bankruptcy Code, 2016 (Code), homebuyers in 'real estate projects' (as defined under the Real Estate (Regulations and Development) Act, 2016) have been included within the meaning of 'financial creditors', and advances provided by homebuyers to real estate developers will be considered 'financial debt' under the Code.

The question whether advances paid by homebuyers to real estate developers should be categorised as a financial or operational debt (or instead, a separate category of debt), assumed significance in a spate of insolvency petitions against failing real estate projects. Earlier in 2017, regulations under the Code had been amended to classify homebuyers as 'other creditors' who would have the right to file claims before the liquidator, but did not elaborate on the rights available to them. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 to the Code has now definitively resolved this ambiguity by classifying any 'amounts raised from an allottee under a real estate project' as financial debt. Homebuyers now have the right to initiate insolvency an insolvency suit (individually or collectively) against real estate developers under Section 7 of the Code, and the right to be represented in the committee of creditors (CoC) bringing them at par with banks and other financial creditors in real estate projects. The Supreme Court of India also validated the amendment held in a recent matter (against *Jaypee Infratech*) , holding that homebuyers' interests ought to be protected in the same way as financial creditors as provided in the amendment to the Code.

However, the amendment does id not clarify the status of whether advances dues owed to homebuyers in the event of liquidation of a debtor, and whether advances towards real estate projects will be treated as secured debt or unsecured debt under the Code. Consequently, it is likely that homebuyers would be considered below secured financial creditors in the priority for distribution of liquidation proceeds. Therefore, the interests of the homebuyers in real estate projects may not be adequately addressed in a scenario where a resolution plan is not accepted by the committee of creditors and the real estate company is put through liquidation. This dilemma was also noted by the Supreme Court noted along the same lines in the matter of *Chitra Sharma*, when it observed that liquidation process will not benefit the homebuyers.

The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 have also been amended to address some operational issues regarding representation of a large class of creditors, such as homebuyers, within the committee of creditors CoC and including the voting mechanism to be deployed within the CoC. The regulations require the appointment of an authorized representative for each class of creditors and prescribe the fees required to be paid to such authorized representatives. While the regulations clarify that the authorized representative will not have any role in the receipt or verification of claims of the creditors of the class being represented. , the authorized representative *inter alia* is required to circulate the minutes of the meeting of the committee of creditors received from the resolution professional amongst the creditors in the class and organise the voting window. The regulations further provide a list of documents which can be utilized to prove a claim which inter alia include an agreement of sale, letter of allotment and payment receipts. Therefore, every large class of creditors, including homebuyers, will be able to effectively participate in the committee meetings through efficient representation.

Enforcement of an Operational Debt in light of a pending Arbitral Award

In **K. Kishan vs. Vijay Nirman Company Pvt. Ltd** , *Civil Appeal No 21825 of 201*, a division bench of the Supreme Court overturned the decision of the NCLT and NCLAT, both of whom, had held that an arbitral award (i) will be treated as a 'record of operational debt'; and (ii) may be admitted as a claim under the Insolvency and Bankruptcy Code, 2016 (**Code)** even though a challenge to the arbitral award is pending under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**. The Supreme Court held that the Code cannot be invoked in respect of an operational debt where an arbitral award has been passed, but the same has not yet been finally adjudicated under Sections 34 and 37 the Arbitration Act, against the operational debtor.

The Court relied on its judgment in **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited** where it had opined that the Code cannot be used by operational creditors to extract debt "prematurely" and had provided guidelines for establishing a "disputed debt".

Cross Border Insolvency Framework in India

The provisions of the Insolvency and Bankruptcy Code, 2016 (**Code**) empowers the Central Government to enter into reciprocal agreements with the government of any other country on matters relating to cross-border insolvency. With a view to introduce a more comprehensive cross border insolvency framework, the Insolvency Law Committee (**Committee**) constituted by the Ministry of Corporate Affairs issued a report in this regard in June 2018 for public comments. Subsequently, in October 2018, after considering public comments, the Committee published a final report and a draft chapter setting out the framework for cross border insolvency to be incorporated in the Code (**Indian Draft Law**) which. The Indian Draft Law is largely based on the UNCITRAL Model Law on Cross Border Insolvency (**UNCITRAL Model Law**) with some variations.

In line with the UNCITRAL Model Law, the Indian Draft Law proposes the following principles with respect to cross border insolvency, namely:

(i) direct access for foreign insolvency professionals and foreign creditors to participate in or commence insolvency proceedings under the Code against a defaulting debtor in India;
(ii) recognition of foreign proceedings and provision of moratorium and discretionary remedies by Indian courts;
(iii) co-operation between Indian and foreign courts & Indian and foreign insolvency practitioners;
(iv) co-ordination between two or more concurrent insolvency proceedings in different countries.

The framework has been proposed only for corporate debtors in the first instance, and not in respect of the bankruptcies of individuals. The proposal contemplates that foreign representatives can seek recognition of a foreign 'insolvency' proceeding (i.e. proceeding pursuant to a law relating to insolvency with similar objectives as the corporate insolvency resolution process provided under the Code), and it is not clear whether all forms of reorganization and schemes of arrangement used to restructure debt would be considered for this purpose.

The Committee highlighted the need for 'reciprocity' as the Indian insolvency framework is still nascent. This would enable Indian courts to offer assistance to a foreign representative or recognize and enforce a foreign court's judgements or orders only when that other jurisdiction has also adopted the UNCITRAL Model Law or entered into reciprocal arrangements with India.

Foreign creditors are already able to initiate, participate in and file claims directly in insolvency proceedings under the Code regardless of reciprocity.

Relaxation for the Power Sector

By a circular dated 12 February 2018, the Reserve Bank of India (**RBI**) issued a framework regulation for the resolution of stressed assets by banks (**Framework Regulations**) in which it overhauled and discontinued all previously available mechanisms for corporate debt restructuring (CDR), strategic debt restructuring (SDR), change of ownership outside SDR, scheme for sustainable restructuring of stressed assets (S4A), etc which were implemented under the mechanism of a Joint Lenders' Forum (**JLF**).

Under the Framework Regulations, a loan default occurs on the first day on which the borrower is unable to repay the debt and becomes a a non-performing asset (**NPA**) if the default continues for 90 days. The lenders and borrower are required to implement a resolution plan within a period of 180 days from the first day of default, failing which the matter is required to be referred to the insolvency process under the Insolvency and Bankruptcy Code 2016.

In this context, the Independent Power Producers Association of India approached the Allahabad High Court seeking relief from the operation of the Framework Regulations for the power sector given the high exposure to stressed assets owing to a number of external factors including cancellation of coal blocks, failure to execute power purchase agreements; and land and environmental issues

On 27 August 2018, the Allahabad High Court declined to grant any interim relief to private power companies and instead asked the Central Government to c undertake a "consultative process" with RBI under Section 7 of the Reserve Bank of India Act which allows the Government to give directions to the RBI in "public interest". Further, the order stressed that the right of lenders to commence insolvency proceedings under Section 7 of the IBC against such power projects would not be affected.

On 11 September 2018, the Supreme Court granted interim relief to stressed power firms (including the Association of Power Producers and Independent Power Producers Association of India) directing the lenders to maintain status quo with respect to actions against power companies. The matter in relation to the application of the February 12 circular to power producer companies will be heard further by the Supreme Court on November 11, 2018.

Moratorium Not to Apply to Guarantors

There have been divergent judgments as to whether guarantors will be included in the scope of moratorium as defined in Section 14 of the IBC. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 clarified this issue that the moratorium under Section 14 of the IBC will not be applicable to a surety in a contract of guarantee and the scope of the moratorium is limited to the assets of the corporate debtor. Hence, there is no restriction against enforcement actions taken against the assets of a guarantor to a corporate debtor during the period of moratorium.

Withdrawal of proceedings

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 introduced provisions to allow the withdrawal of an admitted insolvency application, subject to the approval of 90% voting share of the committee of creditors.

Valuation

The Insolvency and Bankruptcy Board of India (**IBBI**) has introduced a process for evaluating the fair value of the assets of a corporate debtor in a resolution process. Resolution professionals are required to appoint two registered valuers to determine the fair value and the liquidation value in the corporate insolvency resolution plan. IBBI has also directed that every valuation under the Code is required to be conducted by a 'registered valuer' i.e. a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017 with effect from 1 February 2019.

The appointed registered valuer appointed is required to submit an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards. Thereafter, these values are provided to every member of the committee of creditors on a confidential basis, thereby bringing transparency in the process and enabling maximization of value of its assets.

Member Articles

Insolvency and Bankruptcy Code (Second Amendment) Act, 2018

By Dhir & Dhir Associates

The Insolvency and Bankruptcy Code, 2016 is a legislation that has been evolving with various amendments since its enactment. One such recent amendment is the promulgation of Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 which replaced the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

Below are the key changes brought in by the second amendment, which will further balance the interest of all stakeholders and ensure the maximization of the value of assets of the corporate debtors in line with the scope and object of the IBC 2016:

- The rights of the homebuyers have found legislative recognition and considered as 'Financial Creditors' (FC). Now, in corporate insolvency resolution process, they shall be a part of the Committee of Creditors (CoC) and will be represented in the manner specified in the ordinance, and in the event of liquidation, they will fall within the relevant hierarchy of creditors in terms of section 53 of IBC.

- The amendment provides relief to micro, small and medium enterprises (MSMEs). It does not disqualify the promoter of MSMEs from bidding for his enterprise undergoing Corporate Insolvency Resolution Process, provided he is not a wilful defaulter and does not attract any other disqualifications not related to default.

- A resolution applicant may withdraw a resolution application, after admission, with the approval of 90% voting share of the CoC.

- The Code specifies that all decisions of the CoC to be taken by a majority of at least 75% of the FCs. The amendment lowers this threshold to 51%. For certain key decisions, the voting threshold has been reduced from 75% to 66%.

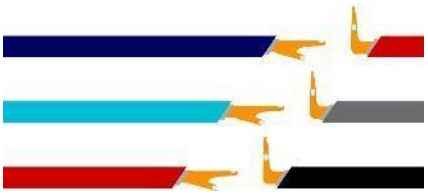
- The amendment specifies that, in certain cases, such as when the debt is owed to a class of creditors, the FCs will be represented on the CoC. These representatives will vote on behalf of the FC as per prior instructions received from them.

- The existing Section 29(A) which specifically listed down the persons who were ineligible to be resolution applicants, has also been fine-tuned to exempt pure play financial entities from being disqualified on

account of NPA. Similarly, a resolution application holding an NPA by virtue of acquiring it in the past under the Code has been provided with a three year cooling-off period, from the date of such acquisition. Further, the Resolution Applicant shall submit an affidavit certifying its eligibility to bid. Moreover, a minimum one-year grace period is provided for the successful resolution applicant to fulfil various statutory obligations required under different laws was also provided.

- The Act, excludes the guarantors from the purview of moratorium under the code.

These amendments will facilitate effective implementation and obtain desired results. The IBC 2016 has undergone several amendments within a short span of time in a bid to eradicate any loopholes and/or ambiguities that may hamper the smooth and efficient functioning of the Code. The code has completely changed the entire architecture of insolvency and bankruptcy laws and proved to be a milestone in the Indian legal framework.



To Act or Not to Act: The Legal Conundrums of an Indian Employer Amidst #MeToo

By Swarnima, Partner, Trilegal

Just as Harvey Weinstein's infamous downfall hit a year's mark, the #MeToo movement has been refueled in India. With women breaking their silence across the nation, big-wigs across spheres have been called-out. The allegations – be it in the realm of Bollywood, media, politics or the good old IT sector – mostly cover *workplace* harassment. Amidst the debate on the pros and cons of the #MeToo campaign, what has fallen out of sight is, how employers are grappling with the #MeToo movement - and the fundamental legal issues of the movement.

Sufficiency of an Online Post for an Internal Committee (IC) Inquiry

The law allows workplace sexual-harassment complaints to be filed electronically. However, is a #MeToo post on Twitter good enough for company's IC to initiate an inquiry? The short answer is no. For the IC to initiate proceedings, the law necessarily requires a written complaint to *be filed with the IC*. An IC would not have the ability to *suo motto* initiate an inquiry unless the complainant is willing to send a written complaint to the IC

Another facet to the movement is addressing anonymous posts. The law requires a complaint to be *filed by an aggrieved woman* (only a few exceptions such as mental/physical incapacity). By laying out a precise complaint mechanism, the scheme of the law provides no scope for ICs to act on anonymous #MeToo posts against the company's employees.

Dealing with Time-Barred Complaints

While the chief goal of the #MeToo movement is to etch out the magnitude of the issue and provide a platform for community healing, some victims have been encouraged to approach the concerned ICs. What calls for scrutiny here is the timing of the alleged incident. What is the fate of the innumerable complaints dating back to a few years ago? Can ICs probe into an incident if it allegedly took place, for example, in 2010?

Many are not mindful that the law prescribes a timeline of 3 months to file complaints. Although ICs can extend this timeline, the extension cannot exceed *another 3 months*. In the 4 odd years that the current law has seen the light of the day, the judiciary has tried, a ton of cases under it. A common theme that emerges is that Indian courts are heavily inclined towards adhering to the timeline prescribed under law. Based on what the Delhi High Court held in 2014, this inclination appears to stem from a notion that a balance needs to be struck and applied equally to both, the complainant and the accused - especially in matters barred by limitation. The only exception to this is where owing to the company's failure to constitute an IC a complaint could not be filed within 3 months. In such cases, while computing the limitation period, courts have discounted the period where there was no forum.

Time-barred complaints could pose to be a double-edged sword to employers. There is ample scope for admonishment on media if a company fails to act on complaints (filed with the IC) citing reasons of limitation. If a company accepts a time-barred complaint, there is always a risk of being challenged under law to admitting and initiating inquiry into time-barred complaints. One feasible way to redress time-barred complaints is for employers to internally deal with the complaint - not through the IC inquiry mechanism, but by initiating a separate disciplinary inquiry against the accused-employee. There is precedent from a recent case of 2016, where a company apportioned the allegations between the IC and its HR department. While allegations falling within the 3-month' limit were tried by the IC, the time-barred allegations were referred to trial by a disciplinary authority (not under law, but as per the company's service rules). The Bombay High Court expressed no apparent concerns on the company's divide-and-inquire process of handling the complaint - however, this may well be the case because the accused did not challenge the process adopted by the company. Although such process could be regarded as untested waters from a strict judicial perspective, it is an approach that companies could consider. For this, it becomes imperative to ensure that the HR policies are structured to offer the much-needed flexibility.

Events

2ND IWIRC ASIA RESTRUCTURING AND INSOLVENCY CONFERENCE TO BE HELD ON THURSDAY, 8 NOVEMBER 2018 IN HONG KONG

The inaugural **Asia Woman of the Year in Restructuring Award (WOYR Asia) sponsored by Vannin Capital**, to honour a woman in Asia for her recent contributions to or lifetime achievements as part of the restructuring and insolvency industry, will be announced as part of the 2nd IWIRC Asia Restructuring and Insolvency Conference to be held on Thursday, 8 November 2018 in Hong Kong.

IWIRC INDIA CONFERENCE

Evolution of the Insolvency and Bankruptcy Code 2016 (IBC 2016)
4.00 pm to 6.30 pm, 24th January, 2019
Inspire, The Le Méridien, New Delhi

The Knowledge Convergence Session will have renowned keynote speakers deliberate on the aspects of the IBC 2016 and highlight the challenges encountered in its implementation.

Save the Date – Bankruptcy Roundtable Session in Mumbai

14th December 2018, Mumbai
More details to follow

IWIRC India

Committee Chair

Ms. Maneesha Dhir
Managing Partner, Dhir & Dhir Associates
T: +91 11 4241 0000
contact@dhirassociates.com

Ms. Kosturi Ghosh
Partner, Trilegal
T: 91 80 4343 4646
kosturi.ghosh@trilegal.com

Committee Members

Ms. Mamta Binani
Company Secretary
T: +91 33 3028 8956
mamtabinani@gmail.com

Ms. Upasana Rao
Partner, Trilegal
T: +91 11 4163 9393
upasana.rao@trilegal.com

Ms. Astha Srivastava
Senior Associate, Aureus Law Partners
T: +91 11 4108 0803
astha.srivastava@aureuslaw.com

Ms. Riddhi Dalal
Chartered Accountant, KPMG India Pvt. Ltd.
T: +91 22 3989 6000
riddhi_dalal@hotmail.com

Ms. Poonam Rawat
Chief Operating Officer, Dhir & Dhir Associates
T: 0114241 0000
poonam.bisht@dhirassociates.com

Ms. Srishti Dhir
President, Alchemist Asset Reconstruction Company Ltd
T: +91 11 4656 2580
srishti@alchemistarc.com

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