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COVID-19 Special Issue.



Gearing Up for A Fresh Start?

COVID 19 & Its Impact on Resolution Applications: A Dire Need for Legislation to save the purpose of the Code?

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Amid the large-scale disruptions both social and economic, COVID 19 can also be said to be impacting the companies undergoing insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (Code). The Finance Minister has been quick to address the imminent threats that could impact the ongoing proceedings under the Code by excluding the period of lockdown for completion of the insolvency resolution process. Similarly, to ensure continuity of operations of the Company particularly the Medium and Small-Scale Enterprises (MSMEs), whose operations have been prejudicially impacted in the wake of COVID 19 pandemic, the government has increased the threshold for initiating proceedings under the Code from Rs. 1 lac to Rs. 1 crore. Besides, the Finance Minister has also indicated that in case the disruptions on account of COVID 19 and the operations of the Company continue to remain under lockdown, for a further extended period, the Government may consider suspending the applicability of Sections 7, 9 and 10 of the Code.

Epidemic invariably impacts any insolvency regime; now who all are important stakeholders in any insolvency regime: - Undoubtedly there is a Debtor, various classes of creditors including trade creditors, employees, statutory authorities (receivables of the government exchequer), guarantors, shareholders at all. All the above parties are stakeholders in a company and thus automatically became a part of the insolvency proceedings of any Company.

ANATOMICALLY THERE ARE SEVERAL REPERCUSSIONS THAT ONE WILL NEED TO LOOK AT AND IDENTIFY THE NECESSARY STEPS TO ADDRESS THE SAME AS OTHERWISE THERE COULD BE A MISUSE OF THE CODE IN THE GARB OF THE COVID 19 SITUATION.

Without any second thoughts, the object and purpose of the Code as clearly stated in the preamble of the Code is resolution in case of a Company while maximizing the value of assets of the Company and balancing the interest of all stakeholders. This makes it evident that the bedrock upon which the entire resolution process is premised is



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the “Resolution Applicants”. So, what happens to Resolution Applicant in this particular situation of a pandemic disrupting the entire socio-economic scenario. Resolution Applicants both Indian Entities, as well as foreign entities, have suffered economically on account of COVID 19.

WHEN WE TALK ABOUT A RESOLUTION APPLICANT, THERE CAN BE THREE CATEGORIES OF SUCH RESOLUTION APPLICANTS I.E.

(a) Prospective Resolution Applicant;

(b) Successful Resolution Applicant i.e. Resolution Applicant whose plan has been approved by the Committee of Creditors (CoC) and whose plan is pending approval of the Adjudicating Authority and

(c) Resolution Applicant whose resolution plan stands approved by the Adjudicating Authority.

All the above stated three categories of Resolution Applicant shall be directly impacted by COVID 19.

Let's start with the Prospective Resolution Applicants; with the present economic scenario, it is most likely that the Companies which are undergoing resolution process as on date shall have few prospective Resolution Applicants. The Resolution Professional/Interim Resolution Professionals undoubtedly have a challenge going forward to have interested parties coming forward as Prospective Resolution Applicants. If the current market trends continue, companies shall be restrictive in their approach to invest for resolution of any other company or in the alternative bargain hard thereby causing grave



prejudice to the stakeholders of the Company undergoing insolvency resolution process. In such a case is there a requirement to provide some cooling off period in case of companies which are already undergoing insolvency resolution process over and above the exclusion of the lockdown period to ensure that best possible bids are received in case of companies which are already pending insolvency resolution process under the Code.

As far as a successful Resolution Applicant is concerned, such a Resolution Applicant may on account of distress in the economy seek to withdraw from its plan since the

compliance of the plan might result in liquidity issues at the end of the Successful Resolution Applicant.

It is noteworthy that the Successful Resolution Applicant may seek to enforce the Force Majeure clause and/or seek frustration of the contract i.e. the approved Resolution Plan for termination of its obligations in entirety. However, such back stepping by the Successful Resolution Applicant shall result in the invocation of the Performance Bank Guarantee (PBG) thereby causing financial implications on the Successful Resolution Applicant. The law as regards the invocation of Bank Guarantee is clear and unequivocal in as much as the



invocation of Bank Guarantee is not liable to be interfered with other than on account of fraud and irretrievable injury. Further what shall be the fate of such a Company whose Successful Resolution Applicant now seeks withdrawal, whether such a company should be sent to liquidation and be granted exclusion and/or extension to meet the avowed object of resolution as envisaged under the Code, is something which shall be required to be addressed on a case to case basis.


Similarly, in cases where a Resolution Plan stands approved by the Adjudicating Authority, whether the Resolution Applicant can now refuse to perform its obligation on account of the adverse impact of COVID 19. Whether such Resolution Applicant will have no choice other than foregoing the amount of PBG as available with the creditors. The only consequence of non-implementation of the approved resolution plan and /or contravention of an approved Resolution Plan is liquidation in terms of the provisions of the Code. The Adjudicating Authority in the earlier instances of non-compliance with the provisions of the approved Resolution Plan particularly in the case of Liberty House blacklisted Liberty House on account of its failure to implement the resolution plan. In such a scenario there appears to be the requirement of enabling both the Resolution Applicant as well as the creditors/stakeholders to balance the interest of all concerned in the context of financial disruptions caused on account of COVID 19. The peculiarity of the situation warrants due consideration by the legislature as well as the Tribunal. Whether in light of COVID 19 modification of approved resolution plans can be considered by the Adjudicating Authority or the

Company be protected by allowing seeking resolution with other Resolution Applicant instead of statutory liquidation is something which shall be required to be seen at the appropriate stage by both the legislature as well as the Adjudicating Authority.

THE QUESTIONS IN HAND

What happens to the Corporate Debtor in such a case, can such a Corporate Debtor be still given an opportunity of resolution? Can such a Corporate Debtor be still resolved by re-inviting resolution plans? What are the options available to the Resolution Applicant in such a case, can he seek invocation of the force majeure clause, as well as termination on account of applicability of Doctrine of frustration or the Resolution Applicant, has no option other than foregoing its PBG before its exit from the Company which it had proposed to resolve under the Code.

COVID 19 raises various aspects that are likely to plague the Resolution Applicants sooner or later. There cannot be a single silver bullet to address all the likely situations and we will have to deal with each matter on a case to case basis such as granting cooling-off period, modification of the approved resolution plan by extending the period for implementation of the obligations under the plan, relegating the Corporate Debtor back to resolution process by inviting fresh bids by granting exclusion, etc.

All these above approaches shall help in keeping the mandate of the Code alive till the time the legislature brings in the requisite statutory regime and/or the judiciary clarifies the scope and applicability of various provisions of the Code in the context of COVID 19. 



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