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WITNESS

Volume 8 Issue 7 | February 2017

₹65 US \$6 UK £4

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P46

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10TH FEBRUARY 2017
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Rendezvous



Badrinath Durvasula,
Sr. Vice President,
Adani Group

P44

Counsel Corner



Anubhav Kapoor
General Counsel & CS,
Tata Technologies

P36

BUDGET 2017

Will it Transform, Energise & Clean India?

P08

Global Arbitration in Focus

Kirit S. Javali, Partner,
Jafa & Javali Advocates

P58

expert
speak

Mohit Goel
Partner, Sim & San

Bharadwaj Jaishankar
Associate Partner, Sim & San

P32

expert
speak

David Manasyan
Solicitor
Zaiwalla & Co

P21

expert
speak

K.P.S Kohli
Associate Partner
Dhir & Dhir Associates

P42

Let's
arbitrate

S. Ravi Shankar
Senior Partner
Law Senate

P34



The Insolvency & Bankruptcy Code 2016 – The Dawn of a New Era

■ KPS Kohli

W

ith the promulgation of the Insolvency and Bankruptcy Code, 2016 (“IBC”), India gains a comprehensive legislation which deals with insolvency and bankruptcy of companies, limited liability partnerships (“LLPs”), individuals and partnership firms. IBC seeks to repeal archaic laws and amend many legislations notable being the Companies Act, 2013 and the Recovery of Debts Due to Bank and Financial Institutions Act, 1993.

THE CODE

IBC provides for resolution of insolvency and bankruptcy through institutional framework in a time-bound and highly efficient manner.

For initiating proceedings under IBC, an application has to be filed before an Adjudicating Authority i.e. National Company Law Tribunal (“NCLT”) for companies and LLPs and Debts Recovery Tribunal (“DRT”) for individuals and partnership firms. Appeals from NCLTs and DRTs would lie before National Company Law Appellate Tribunal (“NCLAT”) and Debts Recovery Appellate Tribunal (“DRAT”), respectively and further appeal on question of law to the Supreme Court of India. The IBC also provides for establishment and incorporation of Bankruptcy Board of India, which would in turn provide for registration of Information Utilities and Insolvency Professional Agencies and enrollment of Insolvency Professionals.

Further, Part – II of the IBC contain provisions for insolvency resolution and liquidation of corporate persons i.e. companies and LLPs. Part – III carries provisions for insolvency resolution and bankruptcy for individuals and partnerships. Part – III of IBC is yet to be notified, whereas, Part – II has been partially notified.

INSOLVENCY RESOLUTION & LIQUIDATION FOR CORPORATE PERSONS

Part – II of IBC contains mechanisms for Corporate Insolvency Resolution Process (“CIRP”), Fast Track Insolvency Resolution Process (“FTIRP”), Liquidation Process and Voluntary Liquidation of Corporate Persons. But, till date only provisions pertaining to CIRP and Liquidation Process have been notified on 30.11.2016, effective from 01.12.2016 and on 09.12.2016, effective from 15.12.2016, respectively.

CIRP AND LIQUIDATION PROCESS

CIRP is a time bound process for resolution of insolvency of corporate debtor i.e. a company or LLP. It is a 180 days process beginning from insolvency commencement date i.e. admission of CIRP application and may be extended by a further period not exceeding 90 days (“Resolution Period”). A CIRP can be initiated by:-

1. Financial Creditor;
2. Operational Creditor;
3. Corporate Debtor itself.

The threshold limit to initiate CIRP is upon default of rupees one lakh by a corporate debtor, but the Central Government by notification may specify the minimum amount of default up to rupees one crore. The NCLT has to admit or reject within 14 days of the receipt of CIRP application filed either by financial creditor or operational creditor or corporate debtor. If CIRP application is not complete or the requisite requirements are not met by the financial creditor or operational creditor or corporate debtor, CIRP application is to be rejected. After admission of CIRP, NCLT declares a moratorium, causes a public announcement, calls for submission of claims and appoints an Interim Resolution Professional (“IRP”).



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The declaration of moratorium bars institution or continuation of any litigation against the corporate debtor and mandates maintenance of status quo on the assets by the corporate debtor. During the moratorium, the creditors are refrained from enforcing any security interest.

During the Resolution Period, the entire management of the corporate debtor is placed in the hands of IRP and the powers of board of directors or partners are suspended. Further, IRP collects the information relating to assets, finances and operations of the corporate debtor. Thereafter, the IRP has to constitute a Committee of Creditors who will elect a Resolution Professional ("RP") by a majority vote of not less than seventy five percent of voting shares. The Committee may appoint the IRP as RP or appoint some other RP. The RP will protect and preserve the assets of the corporate debtor, invite prospective lenders, investors and propose a resolution plan to the Committee of Creditors. Any action taken by RP without the consent of the Committee shall be void.

Although, the focus is not on liquidation but on running the company as a going concern, but liquidation process shall be initiated, inter-alia, in case:-

a. the NCLT does not receive a resolution plan within the period prescribed or expiry of maximum period permitted for completion of the CIRP, or;

b. the NCLT is of the opinion that the resolution plan does not fulfill the conditions of Section 30(2) of IBC, or;

c. the Committee of Creditors by a seventy five percent majority resolve to liquidate the corporate debtor, or;

d. the terms of approved resolution plan are violated.

JOURNEY SO FAR

Till the end of January 2017 five CIRPs have been admitted under the IBC. The NCLT, Mumbai has admitted two CIRPs, one by a financial creditor and other by a corporate debtor. The NCLTs at Kolkata, Hyderabad and Delhi have also admitted one CIRP each, all filed by corporate debtors.



There are apprehensions about IBC's provisions, which lead a corporate debtor to sure liquidation if the creditors could not approve a resolution plan before the expiry of Resolution Period.

IBC provides for early detection and resolution of insolvency as a CIRP application can be filed on the first default of rupees one lakh. Once a CIRP application is admitted, the Resolution Period starts ticking within which at least seventy five percent creditors of the corporate debtor have to agree to a resolution plan, which is to be approved by the NCLT. In case any creditor chooses to stay out of CIRP, it has to be paid upfront within 30 days. The CIRP promises opportunity to pragmatic creditors to quickly recover their dues to the extent possible.

However, considering the current financial environment, it is to be seen how the creditors, especially the public sector lenders, who have huge exposures in sectors like infrastructure, power, etc. will take decisions on haircuts, which in some cases would be huge. Otherwise, a corporate debtor will eventually go into liquidation.

The partial implementation of IBC has also put the guarantors in perilous situations, as a corporate debtor is protected by the moratorium during the CIRP, but no such moratorium is available to the individual guarantor as Part - III of IBC is yet to be notified.

In the last two months, the journey of IBC is slow. Even the timeline of 14 days for admission of CIRP application has been exceeded in almost all CIRP applications. Now it is to be seen if the CIRP applications admitted till 31.01.2017 resolve the insolvency within the Resolution Period or the corporate debtors are liquidated. [w](#)



With nearly ten years' experience, **Mr. Kohli** is the Associate Partner of the firm and specializes in Telecommunications, IT, Arbitration, Corporate and Commercial. He has worked with various notable conglomerates and regularly advises clients on complex legal matters. An alumni of National Institute of Law, Mr. Kohli offers hands-on legal advice and overall strategic inputs in a wide range of matters that addresses the client's interests and make them trust his legal acumen. He represents the firm in reputed forums as a speaker and also regularly publishes articles/research papers in various publications.