File No. 30/38/2021-Insolvency
Government of India
Ministry of Corporate Affairs

Date: 23rd December 2021

NOTICE

Invitation of comments from public on proposed changes to the Corporate Insolvency Resolution and Liquidation Framework under Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code ("**IBC/Code**") was enacted in 2016 to consolidate the laws related to reorganisation and insolvency resolution in India and to ensure a time-bound resolution of insolvency, resulting in maximisation of value of the assets of concerned stakeholders, promotion of entrepreneurship, and ensuring greater availability of credit and balancing the interests of all stakeholders concerned. While the provisions relating to insolvency and liquidation of corporate persons were brought into force in December 2016, those relating to insolvency resolution and bankruptcy of personal guarantors to corporate debtors came into effect in December 2019.

The IBC is one of the deepest financial sector reforms that has been introduced in India in the last decade. It is a modern economic legislation that seeks to rectify the issues in the erstwhile insolvency regime which was plagued by delays, low recoveries, and high costs. The Code provides a market-based mechanism for timely stress resolution of financial distress and a value-maximising exit that is facilitated by qualified professionals.

The provisions of the Code and its subordinate legislation have been periodically reviewed to keep pace with dynamic developments in the market. In November 2017, within just a year of the implementation of provisions relating to corporate insolvency, the Central Government constituted the Insolvency Law Committee ("**ILC**") to take stock of the functioning of the newly enacted Code and to make suitable recommendations to ensure its effective implementation. The ILC has released four reports since then wherein it has made various recommendations for strengthening the Code and its subordinate legislation (March 2018, October 2018, February 2020, and July 2021). The Central Government and the Insolvency and Bankruptcy Board of India ("**IBBI**") have taken swift action on many such recommendations that have now been translated into amendments in the law.

I. Recent developments

The ILC has continued to evaluate stakeholder comments and assess the implementation of the provisions of the Code. At the beginning of 2021, the ILC had its first meeting for the year on 28th January, 2021. It had five more meetings on 3rd, 4th, 6th, 10th and 13th of February 2021, during which the ILC analysed and provided its recommendations on existing and emerging issues highlighted by stakeholder comments.

Further, stakeholder consultations have been undertaken from 11th August 2021 to 6th September 2021 on the theme of '*Reimagining of the Insolvency and Bankruptcy Code, 2016'*. Marking the completion of five years since the enactment of the Code, these consultations were facilitated to take stock of issues and measures for strengthening the Code as highlighted by stakeholders such as financial creditors, industry chambers and associations, professionals and various thought leaders.

As the IBC enters the sixth year of its implementation after a year characterised by pandemic-related disruptions, efforts are continued to ensure effective outcomes under the Code.

II. Proposed Changes

Based on the issues raised in the ILC and from various stakeholder consultations, the following changes are proposed to the Code to further its objectives of time bound resolution of stressed assets while maximising its value and balancing the interests of all stakeholders -

1. *Enabling a swift admission process*

1.1. Although the Code provides that the Adjudicating Authority ("**AA**") should dispose of an application for initiation of a corporate insolvency resolution process ("**CIRP**") within 14 days from the receipt of the application, the admission or rejection of such applications sometimes takes longer in practice. Delays in admission are value destructive and hinder the chances of successful resolution. Consequently, various efforts have been made recently to enable quicker disposal of applications for initiation of CIRPs under the Code. For instance, the bench strength of National Company Law Tribunal ("**NCLT**") has been increased and the Code has been amended to require the AA to record reasons for delay in disposal of Section 7 applications. In furtherance of such efforts, it was also considered if steps may be taken to build greater reliance on Information Utilities ("**IUs**") by certain categories of financial creditors, in order to enable quicker disposal of CIRP applications.

1.2. The Bankruptcy Law Reforms Committee ("**BLRC**") Report, 2015 conceptualised the IU framework to help reduce information asymmetries and provide quick access to verified financial information. Reliance on IU records was envisaged to reduce the time and costs taken to resolve insolvency. Consequently, Section 215(2) of the Code requires financial creditors to submit financial information and information relating to creation of security interest to IUs. However, Section 7(3) allows financial creditors to also rely on such other record or evidence of default as specified in the regulations for establishing default (apart from record of default recorded with IUs).

1.3. With the passage of time, the IU framework has become more robust. The 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 not only increases the availability of and access to reliable data for stakeholders, but also enables them to speedily authenticate financial information. Since December 2017, the Reserve

Bank of India has directed all financial creditors regulated by it (scheduled commercial banks, financial institutions, etc.) to put in place appropriate systems for submission of financial information to IUs.[1] Such sustained use of IUs has led to the creation of a wider and more robust database of IU authenticated records. There is, thus, an increasing trend in the amount of information stored and recorded with IUs.

1.4. Given that banks and financial institutions have developed the practice of submitting information to IUs, it is felt that mandating such creditors to rely only on IU records to establish default may expedite disposal of their applications. **Thus, it is proposed that financial creditors as prescribed by the Central Government may be required to submit only IU authenticated records to establish default for the purposes 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.

2. *Streamlining avoidable transactions and wrongful trading*

2.1. Sections 43-51, 66, and 67 of the Code lay down various transactions that may be avoided by the resolution professional or liquidator (collectively referred to as "**avoidable transactions**"), and the actions that can be taken against erstwhile management for fraudulently or wrongfully trading during the CIRP or liquidation process (referred to as "**wrongful trading**"). These provisions are primarily aimed at enhancing the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors. Stakeholders have suggested that there is lack of clarity regarding certain aspects of proceedings for avoidance of transactions and wrongful trading. The following changes are proposed to the law to crystallise the procedure of filing and disposing avoidable transactions and wrongful trading –

(a) *Amendments pursuant to last ILC report:* The ILC had, in its report released in February 2020 ("**2020 Report**"), suggested certain amendments to provisions related to avoidable transactions and wrongful trading. For instance, it had recommended amendments to promote cooperation by parties with the resolution professional or liquidator for investigation of avoidable transactions and wrongful

[1] Notification No: DBR.No.Leg.BC.98/09.08.019/2017-18 dated December 19, 2017 issued by Reserve Bank of India <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11189&Mode=0> accessed 2 December 2021.

trading; allowing creditors to initiate such proceedings; clarifying power of liquidator to file for wrongful trading; etc. (see Chapter 3 of the 2020 Report - http://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf). **It is proposed that amendments pursuant to these recommendations of the ILC may be carried out in the Code.** This includes the following proposed amendments -

(i) Section 19(1) may 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. The categories of persons who are required to cooperate under Section 19 may also include any other person deemed necessary by the interim resolution professional.

(ii) Section 25(2) may be amended to explicitly provide that the resolution professional will be responsible for investigating the affairs of the corporate debtor for identification of avoidable transactions or wrongful trading. Similar powers of the liquidator may also be provided for in Section 35(1)(l).

(iii) The provisions related to avoidable transactions and wrongful trading may be amended to permit creditors (individually or in groups) or the committee of creditors ("**CoC**") to apply to the AA for avoiding such transactions or trading, if the resolution professional or liquidator fails to make such application.

(iv) Section 47 may be amended to disallow members or partners of the corporate debtor from filing applications to avoid an undervalued transaction.

(v) Section 66 does not mention the 'liquidator' due to a clerical error and thus, may be amended to expressly state that the liquidator is also permitted to file applications under this section.

(b) *Continuation of proceedings after approval of resolution plan:* It is felt that clarity is required regarding whether proceedings for avoidance of transactions and wrongful trading can continue after approval of a resolution plan in CIRP. It is important to note that the Code does not provide any specific timeline for the completion of such proceedings. Section 26 of the Code provides that filing of an avoidance application under Section 25(2)(j) by the resolution professional "*shall not affect the proceedings of the corporate insolvency resolution process*". In its 2020 Report, the ILC had discussed the interpretation of Section 26 and noted that "*as stated in Section 26 of the Code, the filing of an application for avoidance of transactions (excluding improper trading) by the resolution professional shall not affect the CIRP of the corporate debtor.*" **In line with this, it is proposed that a clarification by way of an explanation may be added to Section 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.**

(c) *Manner of continuation:* Amendments to the Code may also be required to clarify the manner of conducting proceedings for avoidance of transactions and wrongful trading after the approval of a resolution plan. **Thus, it is proposed that the Code may be amended to provide that the resolution plan should mandatorily specify the manner of undertaking proceedings for avoidance of transactions and wrongful trading if such proceedings are to be continued after approval of the plan. The plan may also be required to specify if the resolution professional would pursue such transactions/ trading or if any other person would do so after the approval of the plan.** Details such as the eligibility requirements for a person to be appointed in this regard, the mechanism for sharing relevant details of any pending proceedings with the prospective resolution applicants, etc. may be laid down in the subordinate legislation. **Further, the resolution plan may also be required to provide the manner of distribution of expected recoveries from proceedings related to avoidance of transactions and wrongful trading.** The AA may take this into account when giving final orders in proceedings for avoidance of transactions and wrongful trading.

(d) Change in look-back period: The provisions on avoidable transactions in the Code provide certain look-back periods. The threshold for such look-back periods is the date of commencement of the CIRP, i.e., the date of admission of a CIRP application. In practice, the admission or rejection of an application takes longer than the 14-day time limit provided in the Code. Given this, the look-back period for avoidable transactions may not be able to capture a significant portion of transactions that occurred before the filing of a CIRP application. Such pre-filing transactions may not be sufficiently captured in the look-back period in cases where the admission of an application is delayed. This may also give corporate debtors a perverse incentive to delay admission of CIRP so as to reduce the scope of avoidable transactions. Thus, it is felt that the threshold for the look-back period for avoidable transactions may be altered so that a longer net can be cast to effectively capture pre-filing transactions. **It is proposed that the look-back period in Sections 43(4), 46(1) and 50(1) may be amended as follows -**

(i) 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 corporate debtor that has been admitted; and

(ii) the period between the date of filing and the date of commencement of CIRP may additionally be included in the suspect period for such transactions.

3. *Time period for approval of resolution plans*

3.1. Delays are observed at the stage of approval of resolution plans by the AA. Often, applications are filed either by prospective resolution applicants and other stakeholders

questioning the distributions contemplated under a resolution plan approved by the CoC or the commercial wisdom exercised by the CoC. This delays the closure of the CIRP, erodes the value of the corporate debtor and dis-incentivises potential resolution applicants from participating in the process. Such delays go against the objective of the Code to provide value-maximising outcomes for stakeholders. As recently as in September 2021 the Hon'ble Supreme Court in the case of *Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. & Anr.* (Civil Appeal No. 3224 of 2020), emphasized the need for speedy resolution and the negative effect of delays on the efficacy of the judicial process. The Hon'ble Supreme Court noted that "*the NCLT and the NCLAT should endeavour, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith.*"

3.2. In line with the views of the Hon'ble Supreme Court, is envisaged that the approval of a resolution plan that has already been approved by the CoC should not be inordinately delayed. **Thus, it is proposed that the Code should provide a fixed time period for approval or rejection of a resolution plan by the AA. Consequently, the Code is proposed to be amended to provide the AA with 30 days for approving or rejecting a resolution plan under Section 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 Section 12 of the Code.

4. *Closure of the Voluntary Liquidation Process*

4.1. Section 59 provides for a voluntary liquidation process for solvent corporate persons who have not committed a default. While the provisions of Section 59 of the Code provide for the initiation and conduct of a voluntary liquidation process and the dissolution of the corporate person, they are silent on the midway closure of the process. However, there may be scenarios that warrant such closure. For instance, business opportunities that can make the corporate person profitable or viable may arise after the initiation of a voluntary liquidation process. Given this, closure of the process has been ordered by the Adjudicating Authority in a few instances cases in practice.

4.2. Notably, although the Companies Act, 1956 and 2013 did not contain express provisions for ordering the closure of a voluntary winding up, inherent powers of the courts/tribunal were utilised for passing such orders. It is felt that since corporate persons operate in a dynamic market economy, the viability of its business may evolve after the initiation of a voluntary liquidation process. Thus, the law should provide certainty on the manner of closing a voluntary liquidation process prior to dissolution. Given that the process is voluntary, and the corporate person is solvent, the intervention of the AA may not be warranted. **The closure of the process may thus be carried out by the corporate person subject to the same requirements as for initiation of the process, i.e., by way of a special resolution or members' resolution and approval of creditors representing two-thirds in value of the debt where the corporate person owes debt to any person. If such approvals are made, the liquidator may**

be required to make a public announcement of the closure of the process and intimate concerned authorities such as the IBBI and the registrar.

5. *IBC Fund*

5.1. Section 224 of the Code provides for the formation of the Insolvency and Bankruptcy Fund ("**IBC Fund**") "*for the purposes of insolvency resolution, liquidation and bankruptcy of persons under the Code*". It is felt that the current design of the IBC Fund does not incentivise contributions to it and provides very limited ways of utilising the amounts contributed. Firstly, contribution to the Fund is voluntary and may be made by the Central Government in the form of grants and by any person who voluntarily wants to make such contribution. Receiving contributions voluntarily may be difficult in practice and certain incentives or mandates may be required to enable regular contributions. Secondly, the purposes for which the IBC Fund will be utilised are limited. Section 224(3) only allows persons who have contributed to the fund to withdraw it, to the extent of their contribution. This limits the possible utilisation of the IBC Fund.

5.2. **Consequently, it is proposed that suitable amendments may be made to Section 224 to allow the Central Government to prescribe a detailed framework for contribution to and utilisation of the IBC Fund.**

5.3. Based on a study of similar comparable funds created by Central Government and regulators, this framework may capture and detail various sources for contribution to the IBC Fund. It may also capture amounts lying in the Companies Liquidation Account of the Companies Act, 1956 or the Companies Liquidation Dividend and Undistributed Assets Account under the Companies Act, 2013. Similarly, specific and wider uses of the IBC Fund may also be identified. For instance, the IBC Fund can support some expenses of resource-strapped insolvency proceedings, such as payment towards workmen's dues, or for carrying forward avoidance proceedings, etc.

6. Comments Sought

Public comments are hereby invited on these proposed modifications mentioned in para 1.1 to 5.3 above.

Suggestion/comments, if any, along with brief justification may be submitted online therein at the below mentioned **weblink latest by 5:30 PM on 13th January 2022:**

https://ibbi.gov.in/webfront/public_on_proposed_changes_2016.php

Stakeholders may please note that comments should not be sent separately through e-mail or hard copy and should be sent only through the weblink created for the purpose.

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