

11th April, 2020

CHANGES IN INDIAN INSOLVENCY CODE IN TIMES OF PANDEMIC - COVID-19

A. EQUIREMENT OF CHANGES

1. The continuing havoc created by the pandemic-COVID-19 to the financials stature of the companies, apart from the human lives, demanded urgent modifications/ amendments in the Insolvency laws of India, i.e. Insolvency and Bankruptcy Code, 2016 (in short "IBC").
2. Thus on 24.03.2020, Mrs. Nirmala Sitharaman, Ld. Finance Minister came forward to make announcement giving relief to the business houses and assist them to bypass the current un-certainty instead of facing insolvency actions.

B. DECODING THE ANNOUNCEMENT AND WAY FORWARD

1. That vide notification dated 24.03.2020, an immediate change was brought in the minimum threshold limit for filing of Insolvency proceedings which was increased from current Rupees One Lacs to Rupees One Crores, under Section 4 of the IBC.
2. The notification applies to all stakeholders and is effective from 25.03.2020
3. No mention of outer time period for applicability of the increased threshold and it shall apply till the same is reduced by the Government under Section 4.
4. Hence, Section 7 (Initiation of corporate insolvency resolution process by financial creditor), section 9 (Application for initiation of corporate insolvency resolution process by operational creditor) and section 10 (Initiation of corporate insolvency process by corporate applicant) applications can be filed under the IBC only if the amount of default by the Company/ Corporate Debtor is Rupees One Crore or more.
5. The Ld. Finance Minister also in contingency plan stated that if current situation continues beyond 30.04.2020, the Government may also consider suspending the Sections 7, 9 and 10 of the IBC for a

period of 6 months. However, no notifications has been issued till date.

6. The Insolvency Bankruptcy Board of India (in short "IBBI") has vide notification dated March 29, 2020, also amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 granting certain relaxations.
 - a. Regulation 40C has been inserted with regard to meeting of the timelines for Corporate Insolvency Resolution Process (in short "CIRP").
 - b. Period of lockdown shall not be counted for the purposes of calculation of timeline for any activity in relation to a CIRP.
 - c. Effective date of Amendment to be 29.03.2020

C. THE SHORT COMINGS THEREOF

1. The Finance Minister though stated the threshold was increased "so that we can prevent the triggering of defaults against MSMEs", however the notification nowhere mentions that it is only applicable to MSMEs.
2. It is not clarified as to whether the Notification is prospective or retrospective and if the increased threshold would also apply to applications that have already been filed but stand not admitted till 24.03.2020 under IBC before the Hon'ble National Company Law Tribunal for initiation of insolvency proceedings.
 - It is well-established that a statute/ amendment / notification which merely affect procedure are presumed to be retrospective in its application. [Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602]
 - The Procedural laws are related to forum and limitation whereas, those related to remedial, such as right of action and appeal is substantive in nature
 - Though every litigant has a vested right in subst-



Abinash Agarwal

Senior Associate, MCO Legals

B.Com (Hons)

Zakir Husain College

Delhi University

LL.B, Faculty of Law

Delhi University

Expertise:

Corporate Litigation &
Corporate/Commercial Arbitration

✉ abinash.a@mcolegals.co.in

antive law but no such right exists in procedural law.

3. The Amendment by IBBI is effective from 29.03.2020 but the lockdown was effective from 25.03.2020. Thus, there seems to be no intelligible differentia for exclusion of the period of lockdown from March 25, 2020 to March 28, 2020 is missing.

D. LIKELY FUTURE

1. Due to lockdown, the performance of contracts and payments thereof shall be manifestly disrupted, resulting in trigger event for creditors, both financial and operational, to initiate insolvency proceedings.
2. This amendment is likely to also help medium and small industries who have been hit the hardest by the lockdown.
3. But the increase of the threshold limit shall also adversely impact the interest of the Operational Creditors.
4. The date of operation of the notification, as to whether retrospective or prospective have to be addressed by the Government to prevent the Companies, already facing severe financial stress from going into Insolvency Proceedings.
5. The contingent plan as proposed by Ld. Finance Minister for suspension of the Section 7, 9 and 10 of IBC is to be seriously considered by the Government.
6. One angle that the Government may consider is guiding the Creditors and Debtors to pre-mediation process such that it can result in breather for the already stressed companies into finding a swift resolution and abatement of the Insolvency proceedings.
7. However, once the economy is back on track, it shall be the duty of the Government to lower the threshold limit, such that the same does not remain a blunt blade in the hands of operational creditors.