INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Subject: Constitution of Insolvency Law Committee

Vide its order dated 16th November, 2017 (Annex A), MCA has constituted a 14-member 'Insolvency Law Committee' under the Chairpersonship of Secretary, MCA. The Committee includes Chairperson, IBBI.

2. It is proposed to make the following suggestions for consideration of the Committee for amendment of the Code:

(a) The framework for corporate insolvency resolution is broadly in place, except for individuals who are guarantors to corporates undergoing CIRP. The work relating to individual insolvency and bankruptcy has commenced. It is being contemplated to implement the same in phases as it would be very difficult to implement the regime for the entire country at one go. The Code enables bringing into force different provisions in the Code on different dates. It may be amended to enable bringing into force a provision on different dates for different classes of persons, namely, guarantors to corporates undergoing CIRP, partnership firms and proprietorship firms, and other individuals. This would enable commencement of resolution of individuals who are guarantors to corporates undergoing CIRP immediately and thereby facilitate comprehensive resolution of a corporate debtor. This will facilitate implementation of individual insolvency regime for a smaller set of individuals, namely, individuals engaged in business before embarking on the entire population of the country.

(b) The Code requires the insolvency proceedings against a corporate debtor to be filed before the NCLT in whose territorial jurisdiction the registered office of the corporate debtor is located. A corporate debtor may have many group companies in respect of which insolvency proceedings may be commenced. As group companies may be registered in jurisdiction of different NCLTs, proceedings in respect of group companies would be filed in different NCLTs which could result in lack of harmony in proceedings of companies in the same group. Further, a creditor of the same corporate debtor files an application not knowing that another creditor has filed a similar application which is yet to be disposed of.

It will help if every creditor comes to know as and when an application for CIRP of a corporate debtor is filed. This is easily done if the applications are filed online and displayed immediately on the web site of NCLT.

(c) The Code endeavors to maximise the value of assets through resolution of viable firms and liquidation of unviable firms. This requires an obligation on decision makers, namely, CoC, to invariably opt for resolution, in cases where enterprise value exceeds the liquidation value, that is, where the firm has some organisational capital. Otherwise, some firms may be liquidated even where enterprise value exceeds liquidation value, and thereby organisational capital would be destroyed. Further, a corporate is an amalgam of various stakeholders. The law prescribes governance norms to ensure that a corporate maximizes the value of its assets, today and tomorrow, and balances the interests of all the stakeholders, and usually assigns the responsibility for compliance with those norms primarily to a professional, the Company Secretary, and a custodian, the Board of Directors. The Code, however, envisages that if the equity owners fail to service debt, the corporate in default undergoes CIRP. The Code requires a CIRP to (a) maximise value of assets of the corporate, and (b) while doing so, balance the interests of all the stakeholders, and assigns the responsibility primarily to the IP, and the CoC, as the custodian of the assets of the corporate debtor. Every corporate undergoing CIRP may not have enough resources at the commencement of CIRP to satisfy the claims of all stakeholders fully. It is necessary to cast an obligation on CoC to consider and balance the interests of all stakeholders while maximizing the value of assets of the corporate debtor.

(d) There is a temptation among stakeholders to settle a proceeding after it has been initiated. The debtor often offers to repay the default / loan amount and close the proceeding and thereby truncates the resolution. If a particular creditor walks away with his dues on priority, it does so at the cost of remaining creditors or stakeholders and thereby distorts balance of interests which is a key objective of the Code. In order to prevent this possibility, the Code imposes a moratorium and enables any creditor to trigger CIRP even if the corporate debtor has defaulted to another creditor. Further, if one creditor triggers the process, gets its dues and walks away on priority, every creditor will follow the suit one after another and there will never be a resolution, the very purpose for which the Code has been enacted. It is therefore necessary to make it clear in the Code that a CIRP once initiated it cannot be undone. It has to reach logical conclusion.

(e) Section 5(26) of the Code defines resolution plan to mean a plan for insolvency resolution of the corporate debtor as a going concern. Section 30(2)(c) of the Code requires a resolution plan to provide for management of affairs of the corporate debtor after approval of the resolution plan. These two provisions need to be harmonized to facilitate resolution of insolvency by continuation of affairs of the corporate debtor, but not necessarily as part of the corporate debtor itself. A resolution plan may provide for extinction of a corporate debtor by way of merger, takeover, amalgamation or otherwise. Section 25(6) may be amended to provide that a resolution plan may provide for continuation of affairs of the corporate debtor, not necessarily as a going concern.

(f) The normal term of CIRP of a corporate debtor as well as of the RP is 180 days. While the resolution plan is approved by CoC within the timeline, the approval of adjudicating authority may take some more time beyond 180 days. Further, the resolution plan may provide for transfer of control to a third party in some cases on a certain date in future. It needs to be provided that the RP shall continue to run the corporate till the approval of resolution plan by the adjudicating authority and if it entails transfer of control to a third party, till such transfer, to avoid uncertainty to the going concern.

(g) The Code requires that a resolution plan shall comply with all applicable laws for the time being in force. A resolution plan may entail transfer of control / management from the existing promoters or controlling shareholders to a third party. The existing promoters / controlling shareholders may block the approval under the Companies Act, 2013 to such transfer. This effectively reduces the flexibility of the CoC to consider resolution applicants other than existing promoters. This may come in the way of viable and credible resolution plans with appropriate valuations. A resolution plan approved by the NCLT may also face implementation problems if attempts are made by existing promoters or controlling shareholders to obstruct it. MCA has clarified that no further approval of shareholders is required for implementing a resolution plan. This clarification may be incorporated into the Code.

(h) A resolution plan may entail combination (merger / amalgamation) and may require approval under the competition law. Since most of such firms do not have substantial presence in the market, such approval may be dispensed. In fact, the alternative to resolution

of the firm is its liquidation. If the corporate is liquidated, competition suffers the most. In the interest of competition, the firm needs to survive.

(i) The Code requires the resolution professional to invite prospective bidders, investors and other persons to put forward a resolution plan based on information memorandum prepared by him. In many cases, a resolution plan may be available for consideration of CoC at a much earlier stage. It is in the interest of everybody to close a CIRP at the earliest. The Code may allow closure of CIRP without making an invitation for a resolution plan.

(j) Maximization of value of assets requires that an undeserving person must not take over a corporate debtor under CIRP. Therefore, the Code may prohibit identified categories of undeserving persons from submitting a resolution plan. It may empower IBBI to prevent such categories of persons through regulations as and when a need arises in future.

(k) Section 30 (4) requires approval of resolution plan by the CoC. It may have a clear obligation to undertake due diligence to ensure that the corporate is handed over to a deserving person under the resolution plan. This section may be amended to provide that the CoC shall approve a resolution plan on being satisfied that (a) the resolution plan is realistically drawn up and is implementable, (b) the resolution applicant is credible and has the capability to implement the plan, and (c) has complied with other requirements, if any, as may be specified by the IBBI.

(l) The Code forbids a related party to whom a corporate debtor owes a financial debt to be appointed as a member of the CoC. A financial institution may hold some equity or preference shares of corporate debtor and may face disqualification from being invited on the CoC. Provision is needed to exclude such financial institutions from the purview of being a related party. Similarly, a related party may apply for resolution after transferring a debt to a non-related financial creditor and thereby control the resolution process. If such a transfer has happened within a year prior to admission for resolution, the financial creditor may not be considered independent. Further, the Code requires the CoC to comprise of financial creditors. At times, the financial creditors may run into thousands or even lakhs in case the corporate debtor has issued debentures or fixed deposits. It becomes operationally difficult to have a meeting of the CoC given such huge numbers and many of them may not be able to effectively participate in the meetings of the CoC as they are

dispersed all over the world. The Code may enable participation of such large number of creditors through an authorised persons.

(m) The Code has adopted principle based definition for terms like financial creditor, operational creditor, etc. These may be rule based to provide clarity. This would avoid determination if a claimant is a financial creditor or not. The Code uses claimant, creditor, and stakeholder interchangeably. It similarly uses asset and property interchangeably. These create confusion. A term may be used consistently across the entire Code.

(n) The Code needs to provide a complete framework to deal with cross border insolvencies.

(o) The Code deals with insolvency and bankruptcy of companies, LLPs, firms and individuals. The entities or association of persons such as HUF, Trusts, Societies, who also take loan, may be covered under the Code to make the regime comprehensive.

(p) The Code enables only individuals to act as insolvency professionals. It may be difficult for an insolvency professional in certain circumstances to handle individually a very large and complicated transaction comprehensively. The insolvency profesionals may be allowed to form firms (partnerships / companies) that allow multiple skills to combine and undertake transactions, and where the liabilty and responsibility for the transactions could be joint and several for the firm as well as the professionals.

(q) The IBBI is empowered to take enforcement actions against the service providers, namely, IPs, IPAs and IUs. However, the persons behind these entities are not explicitly amenable to enforcement actions of the IBBI. Hence, it may be useful to empower the IBBI explicitly to investigate and take enforcement actions against the service providers and their associated persons. Further, in certain circumstances, it may not be a feasible option to cancel the registration of a service provider like IU or IPA. The Code may enable the IBBI to supersede the Governing Board of such service providers for a specified period and during that period, an administrator continues to provide services.

(r) The Code requires that the NCLT shall appoint IPs suggested by creditors after verifying from IBBI. This unnecessarily delays the proceeding. The details of IPs registered with IBBI are available in public domain. If NCLT needs to verify, it can do from the web.

Further, operational creditors may not always suggest an IP. In that case, IBBI needs to recommend the name of an IP. There is no way for IBBI to know the volume and complexity of the transaction and matching the right IP for the purpose. It should be made mandatory for the user to identify the IP suitable for its purpose, instead of asking a regulator to identify one. The State or regulator does not identify a Company Secretary or an Advocate for any user.

(s) The IBBI has regulatory oversight of the service providers, and not the stakeholders like debtors and creditors. Without co-operation of stakeholders, it may be difficult to meet the timelines provided under the Code to complete a process or a transaction. Further, they could be mischievous in certain circumstances. They may be obliged to co-operate in completing the processes and transactions. Non-compliance of the same may explictly attract a penalty from the IBBI.

(t) The various provisions in the Code cast obligations on the debtors, creditors and resolution applicants. The examples are section 199, 206, 215, 216, etc. It may be necessary to make a general provision (similar to section 450 of the Companies Act, 2013) to provide for penalty for failure to comply with any provision of the Code for which no separate penalty has been provided. If any person contravenes any of the provisions of this Code or fails to comply with any condition or restriction subject to which any approval, registration, recognition or direction in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided in this Code, such person may be punishable with imprisonment for a term which shall not be less than two years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees..

(u) It is costly to require individual insolvency and bankruptcy to go through court or tribunal process. Besides, the reach of DRT is limited. In case there is no dispute, the matters may be handled by a professional, mediator or conciliator. Only where there is a dispute between the parties, the matter may be referred to tribunal.

(v) The Code empowers the Central Government to make rules and the IBBI to make regulations on several procedural matters. It is, however, observed that certain provisions of the Code empower the Central Government as well as the IBBI to ‘prescribe’ and

'specify;' respectively in the same space (example: section 7(2) and (3)). It is advisable to empower the IBBI to make regulations on all procedural matters under the Code except on the matters of policy. The Central Government may make rules on matters of policy.

(w) The regime requires developmental effort in initial days. The Code may specifically empower IBBI to play developmental role, similar to the SEBI Act, 1992.

(x) A regulator needs to have a regular, independent and adequate source of income for its sustenance, while reliance on grants from Government should be minimum. Ideally, it should recover its costs through fees from the regulated entities and regulated transactions. The Code, however, enables levy of fees from regulated entities and not on regulated transactions. The Code may be amended to allow IBBI to levy fees on transactions also. This is akin to levy of fees on issue of securities in primary market, transactions of securities in secondary market, etc. It is difficult to recover full costs from levy of fees in the initial years. A regulator starts levying fees at a low rate initially and increases it to appropriate level over time. It levies fees on a lower base (number and volume of transactions being less in initial years) which increases as the market matures. On the other hand, it needs to incur huge capital expenses in the initial years. When faced with a low income and high expenses in the initial years, a regulator generally needs lump sum exogenous contribution. The Code may provide for a one time lump sum corpus contribution to meet the initial capital expenses and a part of running expenses for few years. It may have a regular source of income in the long run.

(y) Various transactions under the Code require valuation of assets. MCA has notified rules on registration of valuers under the Companies Act, 2013 and delegated authority to register and regulate valuers to IBBI. An explicit enabling provision in the Code would make regulation more effective. In particular, the Code may explicitly empower the IBBI to undertake enforcement actions against valuers, on lines of enforcement of insolvency professionals.

(z) There are several provisions which need minor tweaking for efficient implementation of the Code. For example, section 16(5) of the Code states that the term of the Insolvency Resolution Professional shall not exceed 30 days from date of his appointment. Section 22(1) requires the first meeting of the Committee of Creditors shall be held within seven

days of the Constitution of Committee of Creditors. These two provisions need to be harmonised.

No. 35/14/2017-Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhawan, New Delhi
Dated: 16.11.2017

ORDER

Subject: - Constitution of Insolvency Law Committee

The provisions related to corporate insolvency resolution and liquidation of the Insolvency and Bankruptcy Code, 2016 (the Code) were commenced in the month of December, 2016. As on date, more than 300 cases have been admitted for resolution by the Adjudicating Authority i.e., National Company Law Tribunal. References/suggestions from various stakeholders have also been received for further improvement in the processes prescribed in the Code.

2. With a view to examine the suggestions received and related matters, the Government hereby constitutes an Insolvency Law Committee consisting of the following members:-

1.	Secretary, Ministry of Corporate Affairs	Chairperson
2.	Chairperson, IBBI	Member
3.	Additional Secretary (Banking), Department of Financial Services	Member
4.	Shri Sudarshan Sen, Executive Director, RBI	Member
5.	Sh. T.K. Viswanathan, Former Secretary General, Lok Sabha and Chairman, BLRC	Member
6.	Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.	Member
7.	Sh. Rashesh Shah, Chairman & CEO, Edelweiss Group	Member
8.	Shri Sidharth Birla, past President FICCI and Chairman Xpro India Limited	Member
9.	Shri Bahram Vakil, Partner, AZB & Partners	Member
10.	Sh. B Sriram, MD, Stressed Assets Resolution Group, State Bank of India	Member
11.	President, Institute of Chartered Accountants of India	Member
12.	President, Institute of Cost Accountants of India	Member
13.	President, Institute of Company Secretaries of India	Member
14.	Joint Secretary (Policy/Insolvency), Ministry of Corporate Affairs	Member Secretary

3. The Committee shall take stock of the functioning and implementation of the Code, identify the issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the Code, and make suitable recommendations to address such issues, enhance efficiency of the processes prescribed and for effective implementation of the Code. The Committee may also make any other relevant recommendation as it may deem necessary.

4. The Committee may also invite or co-opt practitioners, experts or individuals who have knowledge or experience in insolvency, law or economics and representatives from other Regulators or Ministries. The Committee may also consult other stakeholders as part of its deliberations.

5. The non-official members of the Committee shall be eligible for travelling, conveyance and other allowances as per extant government instructions, wherever the sponsoring agency is unable to bear their expenditure. Secretarial support to the Committee will be arranged by Ministry of Corporate Affairs/Insolvency and Bankruptcy Board of India.

6. The Committee shall submit its recommendations within two months from its first meeting.

7. This issues with the approval of competent authority.

(Ashish Kushwaha)
Director

To

All members

Copy to:-

i. PS to CAM
ii. Sr. PPS to Secretary, MCA
iii. Governor, Reserve Bank of India
iv. Secretary, Department of Financial Services, Ministry of Finance,
v. PS to AS
vi. PS to JS(B)