

Insolvency and Bankruptcy Hotline

July 25, 2019

THE INSOLVENCY CODE BEING REWRITTEN: FOR BETTER OR FOR WORSE?

Amendments to the Insolvency and Bankruptcy Code, 2016 have been cleared by the Cabinet.

The proposed amendments seek to

- Extends the timeline for completion of the corporate insolvency resolution process to 330 days including litigation and judicial processes.
- Emphasises the need for speedy disposal of matters by NCLT at the application stage.
- Provides a mechanism through which a class of creditors may exercise their votes in the Committee of Creditors.
- A single window clearance system is proposed for restructuring applications to be approved along with resolution plans.
- Provides for a mechanism to pay dissenting financial creditors and operational creditors.
- Intends to provide the COC with the power to modify the distribution of resolution proceeds based on commercial considerations.

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ("Code") and regulations under the Code have been amended on various occasions in its short lifespan. Some of these amendments have been in pursuance of judicial interpretations and recommendations while others have been in line with the suggestions provided by the Insolvency Law Committee. The Code has also witnessed sector specific amendments to resolve practical impediments faced by certain sectors, such as homebuyers. The Cabinet has, on July 17, 2019 cleared another set of amendments to the Code which should be tabled before the Parliament in this session for its approval.

Although the exact text of the amendments is yet to be made public we understand that there are eight amendments which are being proposed to be made to the Code. Please click [here](#) for a detailed analysis of the proposed amendments. We have in the below sections provided an overview of the amendments and the impact thereof.

Timing of the amendments

As announced by the Insolvency and Bankruptcy Board of India ("IBBI"), the entire Code is due for an overhaul by the middle of next year, in furtherance of which the IBBI has released various discussion papers with the proposed amendments to the Code as well as the regulations therein. The Insolvency Law Committee, which comprises of members from diverse fields, has been set up to provide recommendations for necessary amendments to the Code. However, in spite of these coordinated and structured efforts to make amendments to the Code, the current amendment seems to be reactionary which might lead to further clarificatory litigation.

Some of the amendments seem to directly counter the outcome of the decision of the National Company Law Appellate Tribunal ("NCLAT") in the *Essar Steel* case which is pending adjudication before the Supreme Court. As reported, some of the amendments might also be retrospective in nature thereby impacting ongoing resolutions.

It is important for the Code to go through amendments, which provide more clarity on the rights of stakeholders and increase its efficiency. However, these amendments should not result in confusion amongst the stakeholders and result in loss of investor confidence. A consolidated amendment to the Code after taking into account comments from stakeholders would help make the necessary changes without providing piecemeal arrangements.

Payment to creditors

There are proposed amendments which would affect the manner in which payments are to be made to dissenting financial creditors and operational creditors. Further, as per the amendments, the manner in which resolution proceeds are to be distributed amongst various creditors can be decided by the committee of creditors as per commercial considerations.

These amendments seek to re-introduce provisions which were present in an earlier version of the Code and had been removed by way of an amendment, in light of certain observations of the NCLAT.

The judiciary has unequivocally stated that they would want a fair treatment of all classes of creditors where creditors without any intelligible differentia are to be treated in the same manner and creditors belonging to different classes should be treated in a "similar" and not "same" manner. However, the present amendments have again sought to (a) make a differentiation between dissenting and approving financial creditors and (b) provide a floor price to be paid to operational creditors which might lead to no payment being offered to such creditors. Any amendments to the

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mechanism for distribution of resolution proceeds to creditors should have been done basis the exposition propounded by the judiciary. However, it seems that the current amendments might leave room for doubt and could go through another round of clarificatory litigation.

Timelines under the Code

There are many timelines provided under the Code, however, many of these have been deemed to be directory and not mandatory while others are not being complied with due to judicial intervention.

The proposed amendments seem to provide an extended timeline for completion of the resolution process which would include litigations and judicial processes. We continue to experience how resolutions are put on hold due to judicial scrutiny or re-initiated due to non-compliance with the provisions of the Code. Unless, the amendments comprehensively deal with these situations in an inviolable manner, the rehashed timelines might not serve the intended purpose.

Way Forward

All stakeholders involved or affected by the Code are on the same side, which is for more accountability and clarity. Like any other nascent legislation, the Code has faced its own unique problems with effective implementation. However, it has been encouraging to see the government as well as the domestic and international community repose its faith in the Code. Therefore, it might be advisable to avoid stop gap arrangements which might be detrimental in the long run and focus on more systemic issues.

– Arjun Gupta & Vyapak Desai

You can direct your queries or comments to the authors

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