

Insolvency and Bankruptcy Hotline

May 07, 2018

ARE YOU LATE IN SUBMITTING YOUR RESOLUTION PLAN? NOT REALLY!

The Principal Bench of the National Company Law Tribunal ("**NCLT / Tribunal**") has directed the resolution professional ("**RP**") and committee of creditors ("**CoC**") of Bhushan Power and Steel Limited ("**Company / BPSL**") to consider the resolution plan submitted by Liberty House Group Pte. Ltd. ("**Liberty House**"). The CoC had earlier refused to entertain the resolution plan submitted by Liberty House on the ground that it was submitted after the last date of submission.

BRIEF FACTS

The NCLT on July 26, 2017 admitted the petition filed by Punjab National Bank against BPSL under section 7 of Insolvency and Bankruptcy Code, 2016 ("**Code**") for initiating Corporate Insolvency Resolution Process ("**CIR Process**") owing to a default in payment of more than INR 4,000 Crores of financial debt.

A snapshot of key dates and events in the CIR Process is provided herein below:

Date	Event
26 July 2017	Petition under Section 7 of the Code admitted against the BPSL.
28 July 2017	Public Announcement was uploaded on the website of the Company and published in newspapers.
9 August 2017	Last date for submission of proof of claims.
1 September 2017	First meeting of CoC
21 September 2017	Public Notice inviting "Expression of Interest / EOI" was published in the Economic Times (All India Edition).
6 October 2017	Last date for submission of EOI i.e. relevant documents by potential applicants to establish qualification requirements.
30 October 2017	Information Memorandum was prepared by the RP as required under Section 29 of the Code.
13 November 2017	Liberty House sent its formal Expression of Interest dated November 11, 2017 along with email dated November 13, 2017.
17 November 2017	Meeting of CoC whereby it authorised Resolution Professional to issue process document setting out the deadline, process and criterion for submission of resolution plans Pertinently, process document which also contained deadline for submission of resolution plans was only shared with resolution applicants who submitted their EOIs and other documents to establishing their eligibility in time. It was not shared with Liberty House.
23 November 2017	The Code was amended by way of Ordinance which was later confirmed by the parliament through Insolvency and Bankruptcy Code (Amendment) Act, 2017 dated January 18, 2018.
1 January 2018	Last date for submission of Resolution Plan fixed by CoC
3 January 2018	Last date for submission of Resolution Plan was revised to January 28, 2018.
26 January 2018	Last date for submission of Resolution Plan was further revised to February 8, 2018.
8 February 2018	Last date for submission of Resolution Plan. Resolution Plan submitted within time by the resolution applicants were opened by the RP.

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Liberty House asserted that it was interested in submitting a resolution plan. It however, did not seek a copy of the process document.

14 February 2018

The resolution plans which were submitted within time by resolution applicant were opened on February 8, 2018 and the financial proposal was shared with the CoC.

20 February 2018

Liberty House submitted its resolution plan.

22 February 2018

Meeting of CoC convened for considering the resolution plans. In this meeting the CoC refused to open the resolution plan submitted by Liberty House on account of its delayed submission.

In the present case, Liberty House clearly missed two deadlines. One for submission of Expression of Interest ("EoI") and other for submission of resolution plan. It conveyed its expression of interest by its email of November 13, 2017 which was more than a month after the last date for submitting EoI. Further, it submitted its resolution plan on February 20, 2018 which was twelve days after the last date for submission of the resolution plan.

Consequently, the CoC in its meeting, refused to consider the resolution plan submitted by Liberty House on account of delay. Liberty House therefore, approached the NCLT under Section 60(5)(c) of the Code to seek appropriate orders against the CoC and RP. CoC and RP contested Liberty House's application. The application was also contested by another resolution applicant, namely, Tata Steel Limited ("TSL").

CONCURRENT CHANGES IN LAW

During the CIR Process, certain amendments were made to the Code in November 2017 and IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") in October, November and December 2017. The provisions relevant to the facts of the present case are Section 12, Section 25(2)(h), Section 29A of the Code and Regulation 38 and Regulation 39 of CIRP Regulations.

Section 12

Section 12 entails that CIR Process shall be completed within a period of one hundred and eighty (180) days from the date of admission of the application, with an extension of ninety (90) days, if approved by the CoC and Adjudicating Authority i.e. NCLT.

Section 25(2)(h)

Section 25(2)(h) provided that the resolution professional shall undertake to (*inter-alia*), "*invite prospective lenders, investors and any other persons to put forward resolution plans.*" However, after the amendment, it provides that the resolution professional shall undertake to (*inter-alia*), "*invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.*"

It is pertinent to note that the notice inviting EoI was published prior to the amendments.

Section 29A

The amendments also introduced Section 29A in the code. This provision prohibited certain classes of identified persons or any other person acting jointly with such person or the promoter or any person in management of such person from submitting the resolution plan. On account of this insertion, the RP asked Liberty House to furnish an affidavit in compliance of the new Section 29A and the time limit for furnishing such affidavit was also extended till December 18, 2017. However, no affidavit was furnished by Liberty House.

Regulation 38

Regulation 38 of the CIRP Regulations provides for mandatory contents of a resolution plan. After the amendment, sub-clause (3) was inserted in Regulation 38, which required a resolution plan to also disclose details regarding resolution applicant. On account of this insertion, the RP sought an affidavit in compliance of the new Regulation 38(3) also.

Regulation 39

Prior to its amendment in December 2017, Regulation 39 of the CIRP Regulations provided that "*a resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code and these Regulations to the resolution professional, thirty days before expiry of the maximum period permitted under section 12 for the completion of the corporate insolvency resolution process.*"

However, it was later amended to state that, "*a resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and these regulations to the resolution professional within the time given in the invitation made under clause (h) of sub-section (2) of section 25.*"

Thus, when the notice under Section 25(2)(h) was issued by the RP there was no statutory requirement to submit the resolution plan within the time given in such invitation. A resolution applicant was only required to submit the plan 30 days prior to the end of insolvency period i.e. on 150th / 240th day of the CIR Process as per Regulation 39 of CIRP Regulations.

NCLT JUDGMENT

The Tribunal held that the amended provisions would not apply to the facts and circumstances of the present case as the public advertisement inviting expression of interest was made much prior to the amendments. The Tribunal held that Section 12 provides the time limit for completion of CIR Process to be 180 days and if extended 270 days. While Regulation 39, as it stood prior to amendment, postulated that resolution applicant shall endeavour to submit resolution plan 30 days before the expiry of maximum period permitted under Section 12. The CIR Process in the present case was coming to end only on April 22, 2018. Thus, the time limit for submission of resolution plan would

be till March 2018. Accordingly, Liberty House was well within time to submit its resolution plan on February 20, 2018.

It is only when the amended Section 25(2)(h) and Regulation 39 apply to CIR Process that the timelines prescribed by the RP and CoC shall be sacrosanct. The Tribunal noted that after the amendments, the RP had not issued any other public notice notifying the criteria which might have been laid down by the CoC. Thus, if no new public notice in terms of the amendment was issued, then the original public notice would prevail that was issued under the erstwhile regime. Under such regime, a resolution plan could have been submitted 30 days prior to end of insolvency period. The Tribunal thus, directed to the RP and the CoC to consider the resolution plan of Liberty House and not reject it on the ground of delay.

Separately, the Tribunal also ruled that the time period of litigation shall be excluded from the 180/270 days prescribed for completion of CIR Process.

CONCLUSION

Interestingly, in a different case of Binani Cements, a bidder Ultratech Cement Limited increased its bid after a competitor Dalmia Bharat Cements turned out to be the top bidder. UltraTech Cement had first given its plan on February 22, 2018 and revised its offer to beat Dalmia Bharat on March 8, 2018. This was within the stipulated 240 days, i.e. 30 days before the end of insolvency period as per the unamended Regulation 39. Reports suggests that Ultratech appealed the authorities stating that its situation was no different from Liberty House where its second bid was submitted well within the timeline.

While the Code is grappling with initial teething issues, amendments are constantly made to ensure there are no slips between the cup and the lip. A question thus arises as to how far such amendments can apply to on-going CIR Processes. Some newly inserted provisions like Section 29A of the Code, Regulation 36A, 39(4) of CIRP Regulations provides for certain conditions in which those provisions will apply to on-going cases. However, it will now have to be seen whether issuance of fresh public notices would allow application of the amended regulations to resolution process which commenced prior to the amendments. The present judgment seems to suggest that and allows parties to submit their resolution plans within 150th/240th day as opposed to timelines stipulated by RPs in cases where no fresh public notices was issued post amendments.

— **Ashish Kabra & Mohammad Kamran**

You can direct your queries or comments to the authors

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