

## Chapter - 6

### OVERVIEW OF INSOLVENCY AND BANKRUPTCY CODE 2016

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#### Insolvency and Bankruptcy Code (Amendment) Act, 2018

##### 1. Definitions – (Section 3)

**Default** means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid paid by the debtor or the corporate debtor, as the case may be.

##### 2. Definitions – (Section 5)

###### Clause 5A

"corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

###### Clause 8

"financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- a) money borrowed against the payment of interest;
- b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
- f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

###### Explanation –

- i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;
- g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

- h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

## Clause 12

"insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;

"Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;"

## Clause 24(A)

"related party", in relation to an individual, means—

- a) a person who is a relative of the individual or a relative of the spouse of the individual;
- b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;
- c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;
- d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;
- e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;
- g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;
- h) a person on whose advice, directions or instructions, the individual is accustomed to act;
- i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause,—

- a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely:—
  - i) members of a Hindu Undivided Family,
  - ii) husband,

- iii) wife,
- iv) father,
- v) mother,
- vi) son,
- vii) daughter,
- viii) son's daughter and son,
- ix) daughter's daughter and son,
- x) grandson's daughter and son,
- xi) granddaughter's daughter and son,
- xii) brother,
- xiii) sister,
- xiv) brother's son and daughter,
- xv) sister's son and daughter,
- xvi) father's father and mother,
- xvii) mother's father and mother,
- xviii) father's brother and sister,
- xix) mother's brother and sister, and

b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;'

### 3. Initiation of corporate insolvency resolution process by financial creditor - (Section 7)

#### Filing of application before adjudicating authority:

- i) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.
- ii) A default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government of the corporate debtor.

### 4. Insolvency resolution by operational creditor – (Section 8)

#### On receipt of demand notice by corporate debtor:

Corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about-

- i) existence of dispute, if any, and if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
- ii) repayment payment of unpaid operational debt—
  - by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
  - by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

## 5. Application for initiation of corporate insolvency resolution process by operational creditor – (Section 9)

### Providing of documents/ information:

The operational creditor shall, along with the application furnish the following documents—

- i) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- ii) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- iii) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and by the corporate debtor, if available
- iv) such other information as may be specified.
- v) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- vi) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.";

### Order of an adjudicating authority:

The Adjudicating Authority shall, within fourteen days of the receipt of the application, by an order -

- i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if -
    - the application made is complete;
    - there is no repayment payment of the unpaid operational debt;
    - the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
    - no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
    - there is no disciplinary proceeding pending against any resolution professional proposed, if any.
  - ii) Reject the application and communicate such decision to the operational creditor and the corporate debtor, if -
    - the application made is incomplete;
    - there has been repayment payment of the unpaid operational debt;
    - the creditor has not delivered the invoice or notice for payment to the corporate debtor;
    - notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
    - any disciplinary proceeding is pending against any proposed resolution professional:
- Provided that Adjudicating Authority, shall before rejecting an application which is incomplete, gives a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

## 6. Initiation of corporate insolvency resolution process by corporate applicant - (Section 10)

### Furnishing of information:

The corporate applicant shall, ~~along with the application furnish the information~~ relating to—

- i) ~~its books of account and such other documents~~ relating to such period as may be specified;
- &
- ii) ~~the resolution professional~~ proposed to be appointed as an interim resolution professional.

The corporate applicant shall, along with the application, furnish—

- i) the information relating to its books of account and such other documents for such period as maybe specified;
- ii) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and
- iii) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case maybe, approving filing of the application.";

### Admission/rejection of application:

The Adjudicating Authority shall, ~~within a period of fourteen days~~ of the receipt of the application, by an ~~order~~—

- i) ~~admits~~ the application, if it is complete; ~~and no disciplinary proceeding is pending against the proposed resolution professional~~
- ii) ~~rejects~~ the application, if it is incomplete; ~~or any disciplinary proceeding is pending against the proposed resolution professional~~

Provided that ~~Adjudicating Authority~~ shall, ~~before rejecting~~ an application, ~~gives a notice~~ to the applicant to ~~rectify the defects in his application within seven days~~ from the date of receipt of such notice from the Adjudicating Authority.

## 7. Time-limit for completion of insolvency resolution process (Section 12)

### Filing of application for extension of period:

The ~~resolution professional~~ shall file an application to the Adjudicating Authority to extend the ~~period~~ of the corporate insolvency resolution process ~~beyond one hundred and eighty days~~, if instructed to do so by a resolution passed at a meeting of the committee of creditors ~~by a vote of seventy-five~~ ~~Sixty-six~~ per cent of the voting shares.

## 8. Withdrawal of application admitted under section 7, 9, or 10 (Section 12A)

The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

## 9. Moratorium (Section 14)

The provisions of sub-section (1) of section 14 shall not apply to—

- a) such transaction as maybe notified by the Central Government in consultation with any financial regulator;

- b) a surety in a contract of guarantee to a corporate debtor."

## 10. Public Announcement of Corporate Insolvency Resolution Process (Section 15)

Interim Resolution Professional shall make the Public Announcement immediately after his appointment. "Immediately" refers to not more than three days from the date of appointment of the Interim Resolution Professional.

As per Section 15 of the Code, public announcement shall include the following:-

- Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
- Name of the authority with which the corporate debtor is incorporated or registered.
- Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
- Penalties for false or misleading Claims.
- The last date for the submission of the ~~claims~~ claims, as may be specified
- The date on which the Corporate Insolvency Resolution Process ends.

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent, it ratifies them.

## 11. Appointment, tenure and Power of interim resolution professional (Section 16)

### Term of appointment

The term of the interim resolution professional shall ~~not exceed thirty days from date of his appointment.~~ shall continue till the date of appointment of the resolution professional under sec. 22

## 12. Powers of Interim Resolution Professional (Section 17)

The interim resolution professional vested with the management of the corporate debtor shall—

- act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
- take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
- have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
- have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
- be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor."

## 13. Committee of creditors (Section 21)

As per the Section 21 of the Code, the interim resolution professional shall after collection of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors:

- The committee of creditors shall comprise of all financial creditors of the corporate debtor.

Provided that a ~~related party to whom a corporate debtor owes a financial debt~~ financial creditor or the authorised representative of the financial creditor referred to in sub-section

(6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date

- b) Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.
- c) Where any person is a financial creditor as well as an operational creditor,-
  - such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
  - such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.
- d) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.
- e) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may—
  - i) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
  - ii) represent himself in the committee of creditors to the extent of his voting share;
  - iii) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
  - iv) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.
- f) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities.
- g) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors.

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

- h) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.
- i) The resolution professional shall make available any financial information so required by the committee of creditors within a period of seven days of such requisition.

#### 14. Where a financial debt (Section 6A)

- a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;
- b) is owed to a class of creditors exceeding the number as maybe specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorized representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;
- c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

#### 15. The remuneration payable to the authorised representative (Section 6B)

- i) under clauses(a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debtor the relevant documentation; and
- ii) under clause (b) of sub-section (6A) shall be as specified which shall form part of the insolvency resolution process costs.";
- iii) (iv) for sub-sections (7) and (8), the following sub-sections shall be substituted, namely:—
  - (7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A).
  - (8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified."

#### 16. Appointment and functions of resolution professional (Section 22)

According to Section 22 of the Code, the committee of creditors, may, in the first meeting, by a majority vote of not less than ~~75%~~ 66% of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

#### 17. Functions of Resolution professional (Section 23)

Section 23 states the following functions of resolution professional-

- a) The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.

"Provided that the resolution professional shall, if the resolution plan under sub-section (6) of section 30 has been submitted, continue to manage the operations of the corporate debtor

after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under section 31."

## 18. Meeting of committee of creditors (Section 24)

Section 24 specifies the conduct of meeting of Committee of creditors.

### a) Conduct of meeting:

- i) The members of the committee of creditors may meet in person or by such electronic means as may be specified. All meetings of the committee of creditors shall be conducted by the resolution professional.
- ii) The resolution professional shall give notice of each meeting of the committee of creditors to-
  - ~~members of Committee of creditors;~~ committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)
  - members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
  - operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.
- iii) The directors, partners and one representative of operational creditors, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings.
  - Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

## 19. Rights and duties of authorised representative of financial creditors. (Section 25A)

- a) **Right to participate and Vote on behalf of FC:** The authorised representative (AR) under section 21(6) & 21(6A) or section 24(5) shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor(FC) he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
- b) **Duty of AR to circulate agenda & minutes to FC:** It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.
- c) **AR to act on instruction of FC:** The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.
- d) **To ensure recording of instruction by IRP/RP:** The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to

ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case maybe.

## 20. Replacement of resolution professional by committee of creditors (Section 27)

Section 27 provides manner of replacement of resolution professional with another resolution professional by committee of creditors. Process of replacement of resolution professional is as follows:

a) **Committee of creditors is of the opinion** that a resolution professional as appointed, is required to be replaced, it may replace him with another resolution professional.

b) **By majority:**

~~The committee of creditors may, at a meeting, by a vote of 75 % of voting shares, propose to replace the resolution professional appointed with another resolution professional.~~

The committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form

c) **Forwarding of name to Adjudicating Authority :**

The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

d) **Further forwarding name to Board:**

The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

e) **Continuation of office:**

Where any disciplinary proceedings are pending against the proposed resolution professional, the resolution professional appointed shall continue till the appointment of another resolution professional under this section.

## 21. Approval of committee of creditors for certain actions of resolution professional, during the corporate insolvency resolution process (Section 28)

The resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors -

- a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;
- b) create any security interest over the assets of the corporate debtor;
- c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
- d) record any change in the ownership interest of the corporate debtor;
- e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

- f) undertake any related party transaction;
- g) amend any constitutional documents of the corporate debtor;
- a. delegate its authority to any other person;
- h) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- i) make any change in the management of the corporate debtor or its subsidiary;
- j) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
- k) make changes in the appointment or terms of contract of such personnel as specified by the
- l) committee of creditors; or
- m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.
- Approval of the committee of creditors
- a) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions.
- b) No action shall be approved by the committee of creditors unless approved by a vote of ~~seventy five percent~~ Sixty six percent of the voting shares. Where any action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.
- Report the actions of the resolution professional to the Board
- The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this Code.

## 22. Persons not eligible to be resolution applicant (Section 29A)

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- a) is an undischarged insolvent;
- b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

Provided further that nothing in this clause shall apply to a resolution applicant where such

applicant is a financial entity and is not a related party to the corporate debtor.

The expression "related party" here shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

- d) has been convicted for any offence punishable with imprisonment—
- i) for two years or more under any Act specified under the Twelfth Schedule; or
  - ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;"

- e) is disqualified to act as a director under the Companies Act, 2013;

"Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;"

- f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

- g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

"Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;"

- h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;
- i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- j) has a connected person not eligible under clauses (a) to (i)

Explanation I.— For the purposes of this clause, the expression "connected person" means—

- i) any person who is the promoter or in the management or control of the resolution applicant; or
- ii) (any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

'Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;'

'Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

- a) a scheduled bank;
- b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
- c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999.
- d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;
- f) such categories of persons as maybe notified by the Central Government.'

### 23. Resolution plan (Section 30)

#### a) Submission of resolution plan:

A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

#### b) Examination of Resolution Plan:

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

- i) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
- ii) provides for the ~~repayment~~ payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
- iii) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- iv) the implementation and supervision of the resolution plan;
- v) does not contravene any of the provisions of the law for the time being in force;

Ministry of Corporate Affairs issued a clarification in view of the requirement under section 30(2)(e) of the Code for the resolution professional to confirm that each resolution plan received by him does not contravene any of the provisions of the law for the time being in force.

Accordingly clarification was sought whether approval of shareholders/ members of the corporate debtor/ company is required for a resolution plan at any stage during the process for its consideration and approval as laid down under section 30 & 31 of the Insolvency and Bankruptcy Code and after approval during its implementation, for any actions contained in the resolution plan which would normally require specific approval of shareholders/ members under provisions of Companies Act, 2013 or any other law.

Through the issue of this circular, it has been clarified that the approval of shareholders / members of the corporate debtor/company for a particular action required in the resolution plan for its implementation, which would have been required under the Companies Act, 2013 or any other law if the resolution plan of the company was not being considered under the Code, is deemed to have been given on its approval by the Adjudicating Authority.

vi) **conforms to such other requirements** as may be specified by the Board.

**"Explanation.— For the purposes of clause (v), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.";**

**c) Approval from Committee of creditors:**

- The **resolution professional** shall **present to the committee** of creditors for its approval such **resolution plans** which confirm the conditions as mentioned above.
- The **committee** of creditors **may approve a resolution plan by a vote of not less than 75% 66% of voting share** of the financial creditors.
- The committee of creditors may approve a resolution plan by a vote of not less than seventy-five per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:
- Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code Ord. 7 of (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under 2017. section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:
- Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the pro- viso to clause (c) of section 29A:
- Provided also that nothing in the second proviso shall be construed as extension of period for the pur- poses of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section."

- "Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018."

**d) Right of resolution applicant to attend the meeting of the committee of creditors:**

- The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:
- Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

**e) Submission of approved resolution plan to adjudicating authority:**

The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

**24. Approval of resolution plan adjudicating authority (Section 31)**

- If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

"Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."

- Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements, it may, by an order, reject the resolution plan.
- After the order of approval of resolution plan—
  - the moratorium order passed by the Adjudicating Authority shall cease to have effect; and
  - the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.
- The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

**25. Initiation of liquidation (Section 33)**

**Intimation of the decision of the committee of creditors to liquidate to Adjudicating authority:**

Where the resolution professional, at any time during the corporate insolvency resolution

process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

## 26. Appointment of liquidator (Section 34)

Section 34 of the Code provides for appointment of liquidator.

### i. Resolution professional to act as liquidator:

It states that where the Adjudicating Authority passes an order for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall, subject to submission of a written consent by the resolution professional to the Adjudicating Authority in specified form, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

### ii. Powers of Board of Director (BOD)/ Key Managerial Personnel (KMP) vested with liquidator:

On the appointment of a liquidator, all powers of the BOD, KMP and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested with the liquidator.

### iii. Personnel to extend cooperation to liquidator:

The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

### iv. Order to replace the resolution professional:

The Adjudicating Authority shall by order replace the resolution professional, if—

- the resolution plan submitted by the resolution professional was rejected for failure to meet the requirements; or
- the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing or
- the resolution professional fails to submit written consent under sub-section (7).

For the purpose of clause (a) and clause (c), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

The Board shall propose the name of another insolvency professional along with written consent from the insolvency professional in the specified form within ten days of the direction issued by the Adjudicating Authority.

### v. Adjudicating Authority to appoint insolvency professional as the liquidator:

The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

### vi. Charge of fees for conduct of liquidation proceedings:

An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the

liquidation estate assets, as may be specified by the Board.

**vii. Payment of fees:**

The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate.

**27. Appeal against the decision of liquidator (Section 42)**

A creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision.

**28. Avoidance of undervalued transactions. (Section 45)**

- (1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) of section 43 determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter
- (2) A transaction shall be considered undervalued where the corporate debtor—
  - a) makes a gift to a person; or
  - b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.