

MCA invites public comments on the changes proposed to overhaul IBC, 2016

Introduction

The Ministry of Corporate Affairs (MCA) has recently released a consultation paper outlining proposed changes to the Insolvency and Bankruptcy Code, 2016. The purpose of these changes is to improve transparency, reduce delays, and ensure efficient decision-making in insolvency proceedings.

The proposals aim to address various issues faced by stakeholders, including creditors, debtors, and insolvency professionals, in the current system. Overall, the MCA's proposed changes aim to create a more efficient and effective insolvency framework for all stakeholders involved. The key highlights of the proposed changes are as follows:

1. Introduction of an E-platform in Insolvency Proceedings to streamline the insolvency process

The MCA has considered that the introduction of an e-platform for insolvency proceedings may provide for a better case management system, automated processes to file applications with the Adjudication Authorities (AAs), delivery of notices, enabling interaction of Insolvency Professionals (IPs) with stakeholders, etc.

The e-platform will provide regulators and Adjudicating Authorities with better oversight by consolidating information and making it easily accessible.

2. More reliance on data with Information Utilities (IUs) while considering applications

Presently, section 7 and 9 of the code provides that in addition to the record of default available with the IUs, other evidence can also be furnished to establish that a default has occurred. Now, it has been proposed that the code may be amended to only allow the Adjudicating Authority to use the record of default from the Information Utilities when evaluating applications under sections 7 and 9 of the Code.

3. An application filed under section 7 'must' be admitted if default is established

Section 7 of the Code provides for an application by a financial creditor for the commencement of the CIRP in respect of a Corporate Debtor (CD). The Supreme Court has interpreted the use of 'may' in section 7(5) to indicate that the AA has the discretion to admit or reject despite existence of a default.

Now, it has been proposed that application filed under section 7 'must' be admitted if default is established, the AA is only required to be satisfied about the occurrence of a default and fulfilment of procedural requirements for this specific purpose (and nothing more). Where a default is established, it is mandatory for the AA to admit the application and initiate the CIRP.

4. Clarification on the applicability of 14 days given u/s 7

The timeline of 14 days provided in section 7 has also been interpreted to apply only for ascertainment of default. However, it is also intended to apply to the AA's decision to admit or reject the application under section 7(5).

Accordingly, it is proposed that a suitable amendment may be made to clarify the applicability of the timeline.

5. Taking away right of the promoters in suggesting an IRP

As of now, along with the application for initiating Corporate Insolvency Resolution Process, the Corporate Debtor (CD) can propose an insolvency professional to be appointed as an Interim Resolution Professional (IRP). Now, MCA is planning to delete the right of the CD to propose an IRP. In such instances, the IRP should be appointed by the AA on the recommendation of the IBBI.

6. Empowerment of the AA to enforce penalties in case of frivolous or vexatious applications

It is proposed that the AA will now have the authority to penalize individuals who file frivolous or vexatious applications or who fails to comply with the provisions of the Code or any rules or regulations made thereunder.

Further, the minimum penalty that the AA may impose for the contraventions mentioned above should not be less than one lakh rupees per day, which may extend to three times the loss caused or unlawful gain, whichever is higher.

7. Empowerment of the AA to bar a promoter from being a resolution applicant in certain cases

To ensure that the promoters of the corporate debtors comply with their obligations and to prevent them from committing repeated or substantial contraventions, the MCA has considered that section 29A of the Code may be amended to empower the AA to bar such a promoter from being a resolution applicant and submitting a resolution plan in the CIRP of any CD.

8. Allowing of Un-related FCs of a CD to informally approve a resolution plan through an out-of-court process

It has been proposed that the provisions for Fast Track CIRP of Corporate Debtors (CDs) may be amended to allow unrelated Financial Creditors (FCs) to informally select and approve a resolution plan without involving the Adjudicating Authority (AA), and only seeking final approval from the AA or a moratorium if needed.

To prevent misuses, various checks have also been provided by the committee, which needs to be complied. Further, this process will be available for CDs with a specific asset size as determined by the Central Government.

9. Extension of the applicability of Pre-packaged Insolvency Resolution framework

Pre-Packaged Insolvency Resolution Process was introduced during the Covid-19 pandemic to provide an efficient alternative insolvency resolution process for corporate persons classified as MSMEs. Now, it has been proposed that section 54A be amended to provide that the framework shall apply to prescribed categories of CDs in addition to the MSMEs.

10. Relaxations in the requirements for Pre-Packaged Insolvency Resolution Process

- (a) The sixty-six per cent threshold for unrelated FCs may be lowered to fifty-one percent. This will facilitate quicker and more efficient decision-making.
- (b) Requirement of furnishing a declaration regarding avoidance transactions or improper trading under section 54C(3)(c) to be omitted. Its not easy for MSMEs to identify these transactions.
- (c) Provisions of change in management pursuant to section 54J or conversion to CIRP or liquidation under sections 54O or 54N to be omitted. bona fide CDs attempting to resolve insolvency through this process should not be concerned, is the main intent behind this proposed change.

11. Initiation of CIRP only with respect to those real estate projects, which have defaulted

It has been proposed that where an application is filed to initiate the CIRP in respect of a Corporate Debtor who is the promoter of a real estate project, and the default pertains to one or more of its real estate projects; the AA, at its discretion, shall admit the case but apply the CIRP provisions only with respect to such real estate projects, which have defaulted.

This will serve a dual purpose. First, the stressed projects, which caused the CD's insolvency, can be resolved separately. Second, a suitably tailored resolution can be achieved based on the status of the real estate project and the objectives of the relevant stakeholders, which will primarily include the allottees of that project.

12. *CoC to approve multiple resolution plans for individual or collective assets of the CD*

It has been proposed that the Code may be amended to allow the CoC to approve multiple resolution plans for the individual or collective assets of a CD, including restructuring and ongoing management requirements. However, at least one of the Resolution Plans must address the CD's insolvency as a going concern.

Once the resolution plans for all assets and insolvency of the CD are approved and finalized by the CoC and AA, the CIRP process will end.

13. *Introduction of an equitable scheme of distribution of proceeds through a separate waterfall mechanism.*

The Code is proposed to be amended to provide a fair distribution of proceeds from a resolution plan through a separate waterfall mechanism in the CIRP. Creditors will receive proceeds up to the CD's liquidation value as per section 53 in order of priority, surplus will be distributed among all creditors in the ratio of their unsatisfied claims, and any remaining amount will go to shareholders and partners of the corporate debtor. This will ensure fairness and equity for all stakeholders.

14. *Reinstatement of CIRP during liquidation*

It has been proposed to amend the code to allow the reinstatement of the Corporate Insolvency Resolution Process (CIRP) during liquidation, where the liquidator continues the business operations and there is a possibility of reviving the company as determined by the Committee of Creditors.

15. *Inclusion of the assets of guarantor in pool of assets available for CIRP for efficient resolution of Corporate Debts*

It has been proposed to include assets of a guarantor in the pool of assets available for the Corporate Insolvency Resolution Process (CIRP) for efficient resolution of Corporate Debts.

Let's understand this with an example, while a building, plant, or machinery may belong to the CD, the land on which it is situated may belong to a guarantor. In such cases, restricting the resolution process of the CD to its assets results in inefficient outcomes.

16. *Creation of a special window for selling assets acquired under SARFAESI Act.*

The Code may be amended to allow a secured creditor, who has taken possession of a secured asset of the guarantors of a CD under the SARFAESI Act, to sell such assets through a special window created under the CIRP process.

However, the amendment will ensure that the rights of the guarantors as applicable to such sales as enshrined under the SARFAESI Act, 2002, in respect of such secured assets shall be protected under the Code.

17. *Treatment of all unsecured creditors equally under Section 53*

Since the recoveries made by OCs under liquidation are seemingly inadequate, even compared to unsecured FCs. It's proposed that Unsecured creditors (FCs, OCs and government/authorities) will now be treated equally in distribution under a plan or liquidation, excluding workmen and employees, to improve their position in priorities.

18. *Disclosure of the valuation estimate of assets in the Information Memorandum*

Presently, the information memorandum shared with the resolution applicants for preparing the resolution plan does not contain a valuation estimate of the assets. Now, Section 29 is proposed to be amended to require the inclusion of an estimated valuation of the corporate debtor's assets in the information memorandum.

19. *Protection of the resolution applicant post implementation of the resolution plan concerning civil liabilities*

In practice, it is observed that authorities either continue proceedings concerning the claims covered by the resolution plan or initiate fresh proceedings for past claims. The Code is proposed to be amended to prevent any government or authority from starting or continuing proceedings for claims that arose before the start of the CIRP, once the resolution plan is approved. These claims will be extinguished, unless otherwise stated in the resolution plan.

20. *Revision of the CoC's voting threshold for major decisions*

To address the absenteeism, its proposed that the voting threshold for major decisions in the CoC should be two-thirds of members present and voting, with at least 51% of the total voting share of the CoC approving the decision.

21. *Appointment of the administrator in certain CIRP cases*

The government is considering adding a provision to the Code that allows for the appointment of an "Administrator" in certain CIRP cases involving public interest.

This Administrator would have the same powers as an IP, IRP, RP, or liquidator, but the CoC would not have the power to remove or replace them.

22. *Making of the Interim Moratorium provisions non- applicable to Personal Guarantors*

Earlier, the NCLT has, on occasion, expressed concerns regarding the misuse of initiation of the Individual Insolvency Resolution Process (IIRP) by Personal Guarantors (PG) to take advantage of the interim moratorium. It is being considered that section 96 may be amended to be made inapplicable to Personal Guarantors.

Further, for better coordination between the IIRP of a PG and the CIRP of a CD to whom the PG has extended a personal guarantee, who are concurrently undergoing insolvency resolution, a common RP may be appointed.

23. *Mandating meeting of creditors for cases involving Personal Guarantors to Corporate Debtors*

It was felt that the meeting of the creditors should be necessary in the case of PGs as such cases are complex in comparison to other cases of individual insolvencies. It is being considered that section 106 may be amended to provide that the meeting of creditors is compulsory for cases involving PGs to CDs.

24. *Allowing of direct dissolution for CDs who don't have meaningful or recoverable assets*

Presently, the liquidation process is required to be conducted even if the CD has no meaningful or recoverable assets. Running an entire liquidation process in such a situation becomes cumbersome and is not cost-effective.

Now, the Code is proposed to be amended to allow the CoC to request the AA to dissolve a CD if the liquidation process is not feasible or beneficial for stakeholders. The AA will consider the request and dissolve the CD if it is deemed just and reasonable.

25. *Enhancement in the role of CoC; allow CoC to supervise liquidator's functioning*

The liquidation process' swiftness and efficiency depends on the liquidator. The Code does not envisage any supervisory role of creditors during the liquidation process. The CoC should oversee and assist the liquidator to ensure the commercial interests of the CD are protected and to improve monitoring of the liquidator's actions.

26. *Insertion of the provisions w.r.t replacement of the liquidator by CoC*

Unlike CIRP, there is no provision to replace liquidators, even if the circumstances warrant, during the liquidation process. The Code is proposed to be amended to allow the CoC to replace the RP conducting the CIRP with a liquidator by a vote of 66% of voting shares.

27. *Stay of continuation of proceedings during the liquidation process*

Section 33 (5) of the Code bars the institution of suits or legal proceedings by or against the CD without the leave of the AA during the liquidation process. However, it does not bar the continuation of any pending suit or legal proceeding once the moratorium imposed during the CIRP is terminated.

Section 33 (5) should be amended to prohibit any legal proceedings during liquidation, except for those under section 52 (i.e., Secured creditor in liquidation proceedings). The approval of the AA should also be required to continue any legal proceedings involving a CD undergoing liquidation.

28. *Automatic inclusion of all assets owned by the company in liquidation, unless all creditors holding pari passu resists*

In instances where multiple secured creditors have a *pari passu* charge over an asset of the CD, some creditors may decide not to relinquish the security interest, while the remaining secured creditors may favour such relinquishment. In such cases, the liquidator will not be able to proceed with the sale of encumbered assets.

The Code may be changed to automatically include all assets owned by the company in liquidation, unless all creditors holding *pari passu* charge over the secured assets of the CD declare to realise their security interest outside the liquidation process.

29. *Improvement in the regulation of service providers*

To improve the regulatory process regarding service providers, the IBBI (Insolvency and Bankruptcy Board of India) may be given the power to register and regulate a special class of valuers to provide valuation services during processes under the Code.

Conclusion

Proposed changes have been put forth to significantly enhance the transparency and time efficiency of insolvency proceedings, with the goal of maximizing the overall output and ensuring a fair and efficient process for all parties involved. Overall,

these proposed changes are designed to create a more efficient and effective system that ensures the best possible outcomes for all parties involved.