

JUNE 2020

ISSUE BRIEF

KNOWLEDGE

WEB-SERIES

SESSION II

REVISITING IBC IN THE TIMES OF COVID 19

Jointly Organised by



SUMMARY

On 13 June 2020, Hammurabi & Solomon Partners & the India Strategy Group jointly convened a knowledge web-series (“KWS”) to discuss partial suspension of IBC, the issues arising from such suspension and challenges thrown up by COVID-19 to the Insolvency & Bankruptcy process in India. This report tries to capture the discussions with the distinguished speakers and to highlight the dos and don'ts in this regard.

The knowledge web-series (“KWS”) was convened with the aim to discuss, deliberate, and analyze implications of recent legal developments – legislative, regulatory/policy as well as judicial pronouncements.

DISTINGUISHED SPEAKERS



Padma Shri Mr. T K Vishwanathan

Chairperson, Banking Law Reforms
Committee, Govt. of India



Ms. Shweta Bharti

Senior Partner,
Hammurabi & Solomon Partners



Mr. VSV Rao

Executive Director,
IFCI Limited



Mr. Rajbeer S Sachdeva

President (Group-Legal),
JK Organisation



Mr. Pravesh Khetrpal

General Counsel,
Feedback Infra



Mr. Neeraj Malhotra

Senior Advocate

KEY POINTS

Background leading to the partial suspension of Insolvency and Bankruptcy Code, 2016 (IBC)

The impact of the ongoing pandemic has had far reaching impact on the economy. The Government of India in order to boost business enterprises in such difficult times has directed the banks, financial institutions, as well as Non-Banking Financial Institutions to provide certain relaxations in order to ease the economic hardships being faced by the businesses. In response to this, the Reserve Bank of India (RBI) has provided an effective measure by freezing asset classifications. The RBI has also extended the one-time settlement scheme for Ministry of Micro, Small & Medium Enterprises (MSMEs) giving them the chance to reconstruct their debts. The Government of India has also widened the meaning of MSMEs so that a larger number of businesses fall under its ambit and are protected under the specific schemes. The Government has proposed an alternative insolvency framework for MSMEs. The RBI has also announced certain measures to support import and export.

In the backdrop of this an Ordinance titled “Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020” was promulgated on 05.06.2020. The said Ordinance inserted a new Section 10 A which suspended filing of applications for Corporate Insolvency Resolution Process (CIRP) under Sections 7,9, and 10 of the IBC for any default arising on or after 25.03.2020 for a period of six months (which may be extended upto a period of one year). The suspension of Sections 7, 9, 10 of the IBC meant a) there would be no resolution process, b) there would be no constitution of Committee of Creditors (CoC) c) no moratorium. This situation now places the debtor in possession and puts the creditor in a place of distress.

Issues arising from the partial suspension of IBC

The suspension of IBC means that if any default occurs after 25 March, 2020 no application can be filed for the default occurring in the said period. The issue occurs in concluding whether exclusion of defaults refers to only those defaults that have occurred due to COVID-19 or defaults under other factors too mentioned in Section 10A. The question also arises as to determining what defaults are due to COVID 19 are which ones are not.

Section 3.12 stipulates that debt and measures need to be formulated to differentiate whether its COVID related or not. The distinguished speakers discussed an ambiguity in the amendment, and that clarification is required regarding the fact that this provision provides protection for all times or not. There is also a dilemma whether the period of 6 months should be calculated from March 25th or from the date of default. The adjudicating authorities will have to differentiate between COVID-19 and non COVID-19 cases through the interpretation of Section 10 A along with the preamble. The impact also depends on the financial position of the company considering whether they had the means to pay the debts off or not.

The fate of resolution applicants who want to amend their timeline plans

The distinguished speakers discussed that the Insolvency and Bankruptcy Board amended the insolvency process through Section 40C which excluded the period of lockdown for calculating the process of Insolvency Resolution Process. The NCLT, Ahmedabad in Digjam, held that extensions can be granted to meet the timeline to pay debt. That for the applicability of the Force Majeure Clause, the difference between the onus of performance and impossibility of performance is required to be made. If it cannot be proved that the performance hasn't become impossible then it is not to be allowed to walk out completely because Resolution Contracts do not have the Force Majeure Clause.

Need for formation of Pre-Packs

As per views expressed by the distinguished speakers, If the debtors are not restructured timely, the preservation of value of assets is hampered, which depresses the enterprise's value as well. The effect of ordinance is also the suspending of filing new petitions by financial creditors under IBC. There should be a need for the formation of Pre-Packs which will be built in the system which will help in making the hardship easier and the Going Concern principle more viable.

TAKEAWAYS

Conclusion

One view remains that when the threshold amount has been increased from Rs. 1,00,000 to Rs. 1,00,00,000, why is there still a need to suspend the IBC? However, the matter of fact remains that IBC has been suspended partially. Even though the CIRP cannot be initiated, the Banks, financial creditors have alternate methods to seek redressal like approaching the Debts Recovery Tribunal against non-Covid defaults. The Corporate Debtors can seek voluntary liquidation or winding up mechanism under the Companies Act. Operational Creditors can file Recovery Suits under Commercial Courts Act or initiate Arbitrations as well.

Click below to watch the KWS session

<https://www.youtube.com/watch?v=EtCbZdOzJIU>

KNOWLEDGE WEB-SERIES

Revisiting IBC in the times of COVID-19

Understanding the challenges thrown up by COVID-19 to the insolvency & bankruptcy process in India

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Click below to listen to KWS session Podcast

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PODCAST

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Hammurabi & Solomon Partners was founded in the early 2001 and is ranked amongst the top #15 law firms in India. Our journey has been marked by stellar growth and recognition over the past 2 decades with over 16 partners handpicked from the top of their fields. Paving our way into the Indian legal landscape we believe in providing complete client satisfaction with a result driven approach.

We have always aimed at being the change-maker for a newer India and the world around us. With our portfolio of services - law, public policy, regulation and justice converge to enable solutions to our client needs within the legal framework to operate in India with ease and predictability.

Our main aim is to provide world-class legal services with a unique client-centric approach. We aim at providing the utmost quality and result-oriented solutions with our out of the box thinking and teamwork. We focus on being very approachable and highly reliable legal advice with a practical and relevant approach, we tailor solutions with each client's needs.

Our firm implements a holistic approach towards client satisfaction by offering higher level of services, in-time solutions and exercising greater insights to understand the clients' sectors.

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HEAD OFFICE

405A & 405B, Rectangle One - 4th Floor
Saket District Centre, Saket
New Delhi - 110017

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