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Subject – Insolvency Laws and Practice

Head Office : Shraddha, 3rd Floor, Near Chinai College, Andheri (E), Mumbai – 69.

Tel : (022) 26836666

Answer to Q.1.

(a) As per Section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default**,** a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under Chapter II of the Part II of the Insolvency and Bankruptcy Code, 2016. It may be noted that in terms of Section 5(20) of the Insolvency and Bankruptcy Code, 2016 operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

Application to initiate the Corporate Insolvency process may be filed before the Adjudicating Authority. In terms of Section 5(1) of the Insolvency and Bankruptcy Code, 2016, Adjudicating Authority means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

According to Section 9 of the Insolvency and Bankruptcy Code, 2016, Application for initiation of corporate insolvency resolution process by operational creditor shall be filed in such form and manner and accompanied with such fee as may be prescribed.

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

- A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
- An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- 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, if available;
- 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
- Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(5 MARKS)

(b) Adjudicating Authority (National Company Law Tribunal) appoint Interim Resolution Professional in case Resolution Professional is not appointed by the Operational Creditor.

Section 14 of the Insolvency and Bankruptcy Code, 2016 deals with Moratorium.

Section 14(1) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Section 14(2) states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

As per Section 14(3) the provisions of sub-section (1) shall not apply to –

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

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

Section 14(4) provides that the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. It may be noted that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(5 MARKS)

(c) Section 18 of the Insolvency and Bankruptcy Code, 2016 deals with the duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely: -

(a) Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to-

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) Constitute committee of creditors;

(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) File information collected with the information utility, if necessary; and

(f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including-

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) To perform such other duties as may be specified by the Board.

It may be noted that the term "assets" shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

(5 MARKS)

(d) i) Yes. As per rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the demand notice needs to be furnished to the corporate debtor in Form 3 or copy of an invoice attached with a notice in Form 4.

(2 MARKS)

ii) As per regulation 33 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the applicant is required to fix the expenses incurred or to be incurred by the interim resolution professional.

In case, the expenses are not fixed by the applicant, the Adjudicating Authority shall fix the expenses.

Such costs/expenses shall be borne by the applicant which shall be reimbursed by the committee of creditors to the extent ratified by it. Further, the amount of the expenses ratified by the committee of creditors shall form part of insolvency resolution process costs.

(3 MARKS)

Answer to Q2.A.

<u>Voluntary Liquidation of Corporate Persons</u>

Section 59(3) of the Insolvency and Bankruptcy Code, 2016 provides that voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions:

(a) A declaration from majority of the directors of the company verified by an affidavit stating that

(i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

(ii) the company is not being liquidated to defraud any person;

(b) The declaration under sub-clause (a) shall be accompanied with the following documents:

(i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;

(ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;

(c) Within four weeks of a declaration under sub-clause (a), there shall be –

(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator.

The proviso appended to sub-section (3) of section 59 lays down that if the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

Thus, as per section 59(3) voluntary liquidation could only be undertaken if corporate debtor discharged its debts to satisfaction of creditors and if there was no litigation pending against corporate debtor.

In the instant case since both these ingredients are not satisfied, hence the option for voluntary liquidation of the company could not be advised.

(6 MARKS)

Answer to Q2.B.

Section 141 of the Code provides that a bankrupt from the bankruptcy commencement date shall:

a) not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;

b) without the previous sanction of the bankruptcy trustee, be prohibited from creating any charge on his estate or taking any further debt;

c) be required to inform his business partners that he is undergoing a bankruptcy process;
d) prior to entering into any financial or commercial transaction of such value as may be prescribed, either individually or jointly, inform all the parties involved in such transaction that he is undergoing a bankruptcy process;
e) without the previous sanction of the Adjudicating Authority, be incompetent to maintain any legal action or proceedings in relation to the bankruptcy debts; and
f) not be permitted to travel overseas without the permission of the Adjudicating Authority.
Any restriction to which a bankrupt may be subject under this Section shall cease to have effect if the bankruptcy order against him is modified or recalled under Section 142 of the Code or he is discharged under Section 138 of the Code.

(4 MARKS)

Answer to Q2.C.

According to Section 22 of the IBC, 2016, the first meeting of the committee of creditors (COC) shall be held within seven days of the constitution of the COC. The COC in the first meeting by a majority vote of not less than 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.
A meeting of the COC shall quorate if members of the COC representing at least 33% of the voting rights are present either in person or by video/audio means.
The adjourned meeting shall quorate with the members of the committee attending the meeting.

As per the facts of the question and the provisions of the law, the requisite quorum was present in the meeting as all 40 financial creditors attended the meeting and 5 abstained from voting.
The Act requires that not less than 66% of the financial creditors shall resolve to appoint resolution professional.
However, in the given case, 71.4% [(25/35)*100] voted in favour of Mr. Naveen. Hence, the said appointment is valid.

(6 MARKS)

Answer to Q3.A.

IBBI in exercise of powers under section 196 read with section 208 of the Insolvency and Bankruptcy Code, 2016 has issued a Circular dated 3rd January, 2019 stating that,

1. The Insolvency and Bankruptcy Code, 2016 (Code) read with regulations made thereunder cast specific duties and responsibilities on an insolvency professional. An insolvency professional is required to perform certain tasks under the Code while acting as an Interim Resolution Professional, a Resolution Professional, a Liquidator or a Bankruptcy Trustee for various processes. For example, an insolvency professional is required to manage the operations of the corporate debtor as a going concern. He is also required to invite resolution

plans, examine them and present to the committee of creditors for its approval such resolution plans which comply with the provisions of the Code. To assist him in carrying out his responsibilities, the Code read with regulations allow an insolvency professional to appoint accountants, legal or other professionals, as may be necessary.

2. It has been observed that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be resolution applicants. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person. Further, this adds to cost of the resolution applicant and delays submission of resolution plans. The Code read with regulations do not envisage such a certification from a third person.

3. It is hereby directed that an insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code. He shall not require any certificate from another person certifying eligibility of a resolution applicant.

(6 MARKS)

Answer to Q3.B.

The National Company Law Appellate Tribunal (NCLAT), in the matter of Binani Industries Limited v. Bank of Baroda & Anr. while approving the revised resolution plan submitted by Ultratech Cement Limited in the insolvency resolution process initiated against the corporate debtor- Binani Cement Limited, laid down certain principles that a resolution plan should comply with.

These include, inter alia that:

(a) Functionally, the resolution plan shall resolve insolvency, maximise the value of assets of the corporate debtor, and promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders. The resolution plan is not a sale, or auction, or recovery or liquidation but a resolution of the Corporate Debtor as a going concern

(b) A resolution process under IBC is not an auction. Feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

(c) A resolution process under IBC is not recovery. Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. The 'I&B Code' prohibits and discourages recovery

(d) A resolution process is not a liquidation. The IBC does not allow liquidation of a Corporate Debtor directly and permits liquidation only on failure of the resolution process.

(e) The IBC aims to balance the interests of all stakeholders and does not maximise value for financial creditors. Therefore, the dues of operational creditors must get at least similar treatment as compared to the due of financial creditors.

(f) Any resolution plan if shown to be discriminatory against one or other financial creditor or the operational creditor, can be held to be against the provisions of IBC.

The Supreme Court, dismissed an appeal against the NCLAT order. The NCLAT order is significant since it clarifies the underlying principles that a resolution plan should comply with.

(6 MARKS)

Answer to Q3.C.

1) No, we do not agree with the said statement.
2) In fact the UNCITRAL Model Law on Cross Border Insolvency do harmonize the Insolvency Laws enacted by the individual countries.
3) Globally, cross-border insolvency laws are based on one country providing assistance to the other in taking control of the assets and eventual disposition of such assets of the debtor company. Such aims are achieved by the mutual recognition of each country's insolvency regime.
4) Some countries have adopted the UN Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency, adopted in 1997. The model law is designed to provide a harmonized approach to the treatment of cross-border insolvency proceedings, facilitate cooperation between the courts and office holders involved in the insolvency in different jurisdictions, and provide for the mutual recognition of judgements and direct access of foreign representatives to the courts of the enacting state.
5) The Legislative Guide on Insolvency Law is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.
6) The UNCITRAL Model Law on Cross-Border Insolvency, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

(6 MARKS)

Answer to Q3.D.

i) Regulation 24 (7) of the CIRP regulations provides that the RP shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.

Regulation 25 (5) (a) of the CIRP Regulations provides that the RP shall circulate the minutes of the meeting by electronic means to all members of the committee and the authorized representative, if any within forty-eight hours of the conclusion of the meeting.

In view of CIRP regulations, as a best practice:

• Minutes of Committee of Creditors meetings should record members who voted in favor, who voted against, and who abstained from voting in relation to each agenda item.

• Any dissent should also be recorded.

• Often there is a practice of sending draft minutes to the members for finalization of minutes. However, it is advisable that such a practice may not be followed by RP for the purposes of Code keeping in mind Regulation 24(7) and 25(5) of CIRP Regulations.

• The practice of seeking comments on draft minutes may result in non compliance of timelines provided under Regulation 24 (7) and 25 (5).

In this regard, only final minutes may be circulated by RP and any material comments by members of Committee of Creditors may be dealt by Committee of Creditors in next meeting.

ii) Section 12 (2) of the Code provides that RP 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 sixty-six per cent of the voting shares.

However, in this regard, it may be noted that NCLAT in Quantum Limited vs. Vs. Indus Finance Corporation Limited (decided on 20th February 2018) allowed an application filed after 180 days.

In view of aforesaid, it appears that RP should ensure that the resolution approving the extension by Committee of Creditors should have been passed before the expiry of 180 days, although the application for extension may be filed after 180 days.

(6 MARKS)