Amendment Digest: Insolvency and Bankruptcy Code (Amendment) Act, 2019

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 (**"Amendment"**) was notified in the Gazette of India on 6th August, 2019. The Amendment has brought about several key changes in the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) through various substitutions and insertions.

Section 5(26)

Section 5(26) of the IBC defines "resolution plan". The traditional understanding of a "resolution plan" was an infusion of capital in the Corporate Debtor ("**CD"**) to pay off its debts and keep the CD as a "going concern". However, it was not clear whether restructuring under a resolution plan may also include mergers, demergers or amalgamations, since this may raise competition concerns. The amendment clarifies that mergers, demergers or amalgamations would be valid restructuring mechanisms under a resolution plan.

Section 7(4)

Section 7 of the IBC lays down the process for initiation of corporate insolvency resolution process (**"CIRP"**) by a financial creditor (**"FC"**). Section 7(4) gives the Adjudicating Authority (**"AA"**) 14 days' time to ascertain the existence of default. However, this time period has been held by the Supreme Court as only directory, and not mandatory in nature. It seems like the Amendment, though affirming the view of the Supreme Court, seeks to create a stricter timeline for CIRP. The Amendment now imposes a burden upon the AA to record reasons if it does not ascertain the existence of default within 14 days.

Section 12(3)

Section 12 of the IBC lays down the time limit for completion of CIRP. Ideally, CIRP should be completed within 180 days. Section 12(3) says that an extension of 90 days can be granted by the AA in addition to the 180 days' period, therefore, taking the maximum time that was allowed to be 270 days. However, in reality, most of the CIRP could never be completed within this time period of 270 days because of intervening litigations. Take for example, the CIRP of Essar Steel India Ltd, which has been pending since 2 years, mainly

because of lengthy litigations. To make the timeline more strict, the Amendment put up a ceiling of 330 days within which CIRP must be completed. This 330 period will also include the extension of 90 days and the time taken in litigations.

Section 25A

Section 25A of the IBC was itself an outcome of an amendment in 2018. This section was introduced to lay down the rights and duties of authorised representative of FCs. Since even homebuyers are considered as FCs, there may be a large number of FCs of a CD if the CD is a real estate developer. Therefore, a representative for a particular class of FCs casts vote on their behalf in the committee of creditors (**"CoC"**). To simplify the voting process, the Amendment binds the representative to vote in a manner as instructed by more than 50% of the voting share of the financial creditors he represents, which will bind the minority FCs in that class. However, this mode of representation would not be applicable for matters pertaining to section 12A, which talks about withdrawal of CIRP application.

Section 30

Section 30 of the IBC talks about submission of resolution plan by the resolution applicant. Section 30(2) lays down the touchstones through which a resolution plan must pass to be submitted to the CoC for approval. Section 30(2)(b) talks about priority of payment to operational creditors (**"OC"**) in a proposed resolution plan. It prescribed a minimum threshold wherein payment under CIRP was compared to the waterfall under section 53, which talks about priority of payment in an event of liquidation.

This comparison had led to several controversies, because following the waterfall mentioned under section 53 might lead to inequitable results for some of the creditors. This led to possibility of judicial intervention and possibility of modification of resolution plan, as happened in the Essar Steel case. In that case, the NCLAT found the proposed resolution plan to be discriminatory against some creditors and therefore would have rejected the resolution plan, which would have led to liquidation. However, a modified resolution plan was quickly proposed which was accepted by the NCLAT. But this made some other creditors unhappy, as they ultimately got reduced shares than they were getting from the original resolution plan. Such creditors have approached the Supreme Court and the matter is yet to be decided.

However, the legislature was quick to react, and it seems that the Amendment is directed towards overturning this decision of the NCLAT. The Amendment clearly explains that manner of distribution in accordance with section 30(2)(b) would be "fair and equitable", thereby nullifying the possibility of judicial intervention in the admission of resolution plan. The Amendment also gives the new modifications in section 30(2)(b) a

retrospective effect. In fact, the approval of the resolution plan in the Essar Steel Case pending before the Supreme Court would now be subject to the amended section 30(2)(b).

Before taking approval from the AA, the CoC must approve of the resolution plan under section 30(4). Originally, 75% of voting share of FCs was required for approval of resolution plan by the CoC. The Amendment now brings it down to 66%. Moreover, the Amendment now makes the comparison of proposed payment in CIRP with that in liquidation under section 53(1) a matter of consideration for the CoC. Therefore, again overturning NCLAT's decision in Essar Steel case which held that the CoC cannot look into the manner of distribution of proposed payment while determining the viability and feasibility of a resolution plan.

Section 31(1)

Section 31 of the IBC talks about the approval of the resolution plan by the AA. The Amendment clarifies that if the resolution plan is approved by the AA, the payments made under it would be binding on CD and its employees, members, creditors, and also on governments or local authorities to whom statutory dues are owed.

Section 33(2)

Section 33 of the IBC talks about initiation of liquidation. Originally, it was understood that liquidation commences in two ways. One, if no one submits a resolution plan; or two, if the AA rejects the resolution plan. However, the Amendment adds a third way, i.e. liquidation as per the decision of the CoC. The amended section 33(2) allows the CoC to initiate liquidation of the CD with a vote of 66%, at any time after its constitution and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

Concluding Remarks

The Amendment as a whole targets four things. One, with section 5(26), it broadens the definition of resolution plan to achieve practical standards of restructuring. Two, with section 25A, it attempts to ensure smoother conduct of CoC proceedings by simplifying the representation of classes of FCs. Three, and perhaps second in importance, with section 7(4) and 12(3), by acknowledging the reality of lengthy litigations it has tried to stricter the timelines of CIRP while maintaining judicial discipline at the same time. Lastly, and perhaps most importantly, with section 30, 31(1) and 33(2), it specifically overturns the decision of the NCLAT in Essar Steels case and therefore limits judicial intervention by the AA while at the same time expanding the ambit of commercial wisdom of CoC. However, this also raises a controversy. When a comparison of payment proposed under resolution plan is made with the liquidation waterfall, what is ignored is that the two stem out

from different sources and are governed by different principles. The former is governed by short term incentive of keeping the entity as a "going concern", whereas the latter is governed by long term incentive of providing recovery on a "best efforts basis".

Though the Amendment was welcomed by many, some were also left disappointed by the absence of provisions for cross-border insolvency. Presently, section 234 and 235 of the IBC are the only provisions which talk about cross-border insolvency. However, the same become redundant in absence of a bilateral arrangement between India and a foreign country. India has not entered into any such bilateral arrangements till date. In fact, it was even acknowledged by the high powered Insolvency Law Committee that the present provisions fails to provide a comprehensive framework for cross border insolvency. The Committee also suggested that a new part based upon the UNCITRAL Model Law be added in the IBC. The need for a comprehensive cross border insolvency framework was further highlighted by the chaos revolving around Jet Airways case, wherein a parallel insolvency proceedings was initiated in Netherlands. When it comes to cross border insolvency, this is one aspect which the Amendment fails to address.