

What Is A Valid Resolution Plan under the IBC?



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Undoubtedly, there is a fresh air and breather amidst the country's NPA clouds as the insolvency and bankruptcy menaces now look upto their new demigod – The IBC 2016 Code. However, with the new code set in, it is important to understand through a fine eye to the various elements of the code that actually can be game changers not only for the applicants but the overall economic scenario at large. Amongst several others – one definitely remains The Resolution Plan.

IBC allows financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e. corporate debtor itself; or an authorized member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) to initiate corporate insolvency resolution process in case a default is committed by corporate a debtor. And hence, there remain several cases filed by all of them. As on date 1 over 50 cases have already made their Public Announcements and many cases are at a stage, where applicants have submitted their Resolution Plans as well.

A Resolution Plan is one of the key and differential element of the IBC. A very precise and multi-dimensional understanding of the concept of Resolution Plan is inevitable keeping in mind all attached legal, compliance strings. Whether the mandatory condition that must be stipulated to prepare the Resolution Plan or other key elements, regulations like

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016– it needs a detailed analysis to have a foolproof plan.

The Ingredients

The necessary ingredients for a Resolution Plan are detailed under section 30 of the Code. Amongst others, as per Section 30(2)(e) of IBC, a Resolution Plan submitted by Resolution Applicant should not be in contravention to any of the provisions of the law for the time being in force. The above clearly brings out that under the provisions of IBC, there are no dispensations which have been granted under this law and there should not be any mechanism/modus in the Resolution Plan which tantamount to bypassing or breaching any provision of any other law. In case the Resolution Plan drawn up by the Resolution Applicant envisages any relief or concessions from any State/Central Government/Authority, it is restricted only to the extent the same is permissible under the respective laws/statutes/policies.

Regulation 37 of the IBBI (IRP for CP) lays down various measures which may be included in the Resolution Plan. If any such measure included in the resolution plan then all the necessary clearances or permission which may be required for such transfer of the asset will have to be obtained from the concerned department may be Forest department clearance, environmental clearances etc. In case the land/assets have been leased to the Corporate Debtor, then necessary permissions have to be obtained from the lessor. If the transfer of assets has stamp duty implications under the Stamps Act

1899, then any relief shall only be within the four walls of that Act.

In case a resolution plan envisages substantial acquisition of shares, then the necessary compliances with the SEBI Takeover Code norms and SAST Regulation which is applicable will have to be adhered to. Any additional equity to be issued either to existing shareholders on the Right basis or preferential allotment to any Strategic Investor etc. or any proposed capital reduction the same has to be compliant with the relevant provisions of Companies Act, as may be applicable. The above is in contrast with the provisions as contained under SICA which empowered the BIFR to grant exemption from complying with the SEBI Takeover norms and also the provisions of Companies Act w.r.t. preferential allotment of shares or reduction of capital without complying with the applicable provisions of the Companies Act 2013.

Further, if the proposal envisages merger or consolidation, it has to be ensured that such merger within the ambit of provisions of the Competition Act. For instance, in case of mergers where the combined Indian assets are worth over Rs.2000 crore or total Indian turnover is more than Rs.5000 crore prior approval of the Competition Commission of India (CCI) is required. Further, if the target Company has assets in excess of Rs.350 crore and a turnover exceeding Rs.1000 crore then too prior approval/permission from CCI is mandated. As such, the resolution applicant has to be mindful of the above provisions of the law while preparing a Resolution Plan. In case the resolution plan envisages any preferential allotment of shares to the creditors or proposed strategic

investor, or conversion of debt or obligation into long-term instruments then the applicant has to ensure compliance with the relevant provisions of Companies Act 2013.

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Regulation 38, covers the mandatory condition of the resolution plan. It stipulates that the resolution plan shall identify the source of funds that will be used for the payment and order /priority of such payment. A resolution plan should provide for insolvency resolution process cost and should ensure that it should be paid in priority of another creditor. With respect to the payment made to be made to the operational creditor, it should be ensured that liquidation value due to

operational creditors shall be made and such payment shall be made in priority to any financial creditor which shall, in any event, be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority. With respect to the payment made to the dissenting financial creditors (Creditors who voted against the resolution plan) regulation stipulates that Resolution plan should ensure that liquidation value due to such creditors shall be provided and such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan Besides these source of fund and their priority, a resolution plan should also provide for term of the plan and implementation schedule. It should also provide for the management and control of the business of the corporate debtor.

There appears to be no automatic statutory consequence of a failure of the Resolution Plan. However, Section 33(4) read with Section 33(5) provides

that any contravention in the provisions of the Resolution Plan can be brought to the notice of NCLT for the purpose of seeking liquidation of the Corporate Debtor and if the NCLT (AA) determines that the Corporate Debtor has contravened the provisions of the Resolution Plan, it shall pass a liquidation order. Therefore, the above provision can be read to mean that in case of failure/noncompliance of a Resolution Plan, the Corporate Debtor can face liquidation orders under the provisions of the IBC.

From the above analysis, it is abundantly clear that Resolution Professional has to perform his duty very cautiously and meticulously. Performing his duties and making sure that the submitted resolution plan does not contravene the provision of the law for the time being in force is like, walking on a tightrope and making sure he does not fall. He needs continuous legal/ financial/secretarial support from his 'team' and external advisors.