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Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code (Amendment) Bill, 2020, received the assent of the President of India on March 13, 2020. It will now be called *the Insolvency and Bankruptcy Code (Amendment) Act, 2020* and would be deemed to have come to force on December 28, 2019.

1. Amendment of Section 5 of the Principal Act

Clause (12) of the Principal Act shall be omitted

In clause (15), after the words "during the insolvency resolution process period" occurring at the end, the words "and such other debt as may be notified" shall be inserted.

2. Amendment of Section 7 of the Principal Act:

In section 7 of the principal Act, in sub-section (1), before the Explanation, the following provisos shall be inserted, namely:

Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less.

3. Amendment of Section 11 of the Principal Act,

the Explanation shall be numbered as Explanation I and after Explanation I as so numbered, the following Explanation shall be inserted, namely:—

Explanation II.—For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

4. Amendment of Section 14 of the Principal Act-

in sub-section (1), the following Explanation shall be inserted, namely:—

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any law for the time being in force, shall not be suspended

or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period

5. Amendment of Section 16 of the Principal Act:

in sub-section (1), for the words "within fourteen days from the insolvency commencement date", the words "on the insolvency commencement date" shall be substituted.

6. Amendment of Section 21 of the Principal Act:

In section 21 of the principal Act, in sub-section (2), in the second proviso, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.

7. Amendment of Section 23 of the Principal Act:

in sub-section (1), for the proviso, the following proviso shall be substituted, namely:

Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.

8. Amendment of Section 29A of the Principal Act;

in clause (c), in the second proviso, in Explanation I, after the words, "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted;

in clause (j), in Explanation I, in the second proviso, after the words "convertible into equity shares", the words "or completion of such transactions as may be prescribed," shall be inserted.

9. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 is hereby repealed.

Notwithstanding such repeal, anything done or any action taken under the Insolvency and Bankruptcy Code, 2016, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the said Code, as amended by this Act.

The detailed amendments can be found in the below link:

The Insolvency and Bankruptcy Code (Amendment) Act, 2020

IBBI

The Insolvency and Bankruptcy Board of India ("**IBBI**") vide *Notification dated March 25, 2020* has notified the following regulations to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2020.

They shall come into force on the March 25, 2020.

In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in regulation 40B, for sub-regulation (4), the following sub-regulation shall be substituted, namely: -

"(4) The filing of a Form under this regulation after due date of submission, whether by correction, updation or otherwise, shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay after 1st October, 2020.

Example: A Form is required to be filed by 30th October, 2020. It shall be filed along with a fee as under:

If filed on	Fee (in Rupees)
October 29, 2020	0
October 30, 2020	0
October 31, 2020	500
Any day in November, 2020	1000
Any day in December, 2020	1500

IBBI

IBBI vide *a press release dated March 29, 2020* amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") on March 29, 2020.

In the CIRP Regulations, after regulation 40B, the following regulation shall be inserted, namely: -

"**40C. Special provision relating to time-line.**

Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process".

RBI

Developmental and Regulatory Policies in view of COVID-19

Reserve Bank of India vide its *Notification dated March 27, 2020* sets out various developmental and regulatory policies that directly address the stress in financial conditions caused by COVID-19. They consist of:

i. expanding liquidity in the system sizeably to ensure that financial markets and institutions are able to function normally in the face of COVID-related dislocations;

ii. reinforcing monetary transmission so that bank credit flows on easier terms are sustained to those who have been affected by the pandemic;

iii. easing financial stress caused by COVID-19 disruptions by relaxing repayment pressures and improving access to working capital; and (iv) improving the functioning of markets in view of the high volatility experienced with the onset and spread of the pandemic. The policy initiatives in this section should be read in conjunction with the MPC's decision on monetary policy actions and stance in its resolution.

Some of the measures are listed below.

1. Liquidity Management

As stated earlier, the first set of measures is intended to ensure that adequate liquidity is available to all constituents so that COVID-19 related liquidity constraints are eased.

Cash Reserve Ratio

As a one-time measure to help banks tide over the disruption caused by COVID-19, it has been decided to reduce the cash reserve ratio (CRR) of all banks by 100 basis points to 3.0 per cent of net demand and time liabilities (NDTL) with effect from the reporting fortnight beginning March 28, 2020. This reduction in the CRR would release primary liquidity of about ` 1,37,000 crore uniformly across the banking system in proportion to liabilities of constituents rather than in relation to holdings of excess SLR. This dispensation will be available for a period of one year ending on March 26, 2021.

2. Regulation and Supervision

Alongside liquidity measures, it is important that efforts are undertaken to mitigate the burden of debt servicing brought about by disruptions on account of the fall-out of the COVID-19 pandemic. Such efforts, in turn, will prevent the transmission of financial stress to the real economy, and will ensure the continuity of viable businesses and provide relief to borrowers in these extraordinarily troubled times.

A. Moratorium on Term Loans

All commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India Financial Institutions, and NBFCs (including housing finance companies and micro-finance institutions) ("lending institutions") are being permitted to allow a moratorium of three months on payment of instalments in respect of all term loans outstanding as on March 1, 2020. Accordingly, the repayment schedule and all subsequent due dates, as also the tenor for such loans, may be shifted across the board by three months.

B. Deferment of Interest on Working Capital Facilities

In respect of working capital facilities sanctioned in the form of cash credit/ overdraft, lending institutions are being permitted to allow a deferment of three months on payment of interest in respect of all such facilities outstanding as onMarch 1, 2020. The accumulated interest for the period will be paid after the expiry of the deferment period.

The same will not be treated as change in terms and conditions of loan agreements due to financial difficulty of the borrowers and, consequently, will not result in asset classification downgrade. The lending institutions may accordingly put in place a Board approved policy in this regard.

C. Easing of Working Capital Financing

In respect of working capital facilities sanctioned in the form of cash credit/ overdraft, lending institutions may recalculate drawing power by reducing margins and/or by reassessing the working capital cycle for the borrowers.

Such changes in credit terms permitted to the borrowers to specifically tide over the economic fallout from COVID-19 will not be treated as concessions granted due to financial difficulties of the borrower, and consequently, will not result in asset classification downgrade.

In respect of certain paragraphs 5, 6 and 7 of the Statement, the rescheduling of payments will not qualify as a default for the purposes of supervisory reporting and reporting to credit information companies (CICs) by the lending institutions. CICs shall ensure that the actions taken by lending institutions pursuant to the above announcements do not adversely impact the credit history of the beneficiaries.

3. Financial Markets

The decision in respect of financial markets is essentially of a developmental nature, intended to improve depth and price discovery in the forex market segments by reducing arbitrage between onshore and offshore markets. This measure assumes greater importance in the context of the increased volatility of the rupee caused by the impact of COVID-19 on currency markets.

The detailed measures can be found in the below link:

RBI measures in view of COVID-19

MINISTRY OF CORPORATE AFFAIRS

Filing of forms in the Registry (MCA-21) by the Insolvency Professional (Interim Resolution Professional ("IRP") or Resolution Professional ("RP") or Liquidator) appointed under Insolvency Bankruptcy Code, 2016 ("IBC 2016")

The Ministry of Corporate Affairs ("**MCA**") vide *Circular dated March 06, 2020* issued clarification for statutory compliances in respect of companies under Corporate Insolvency Resolution Process ("**CIRP**")

Following clarification has been issued for statutory compliances in respect of companies under CIRP:

1. The IRP/ RP/ Liquidator would have to first file the NCLT order approving him as the IRP/ RP/ Liquidator in Form INC-28 by selecting the drop down box in field 5(a)(iii) by selecting the appropriate section of IBC 2O16.

2. The IRP/ RP/Liquidator while affixing his Digital Signature Certificate ("**DSC**"), shall choose his designation as Chief Operating Officer "**CEO**'' in the declaration box for the purpose of filing only and choose "Others" from the Drop down Menu.

3. The Master Data for change in the status of the company from "Active"/ "Inactive" to CIRP/ Liquidation or CIRP/Liquidation to "Active" shall be effected on the basis of Formal Change Request Form submitted by IBBI to e-governance Cell, MCA(HQ).

4. The IRP/ RP/ Liquidator shall be responsible for filing all the e-forms in the MCA portal and sign the form in the capacity of CEO in order to meet filing protocol in the existing forms architecture.

5. All filings of e-forms including AOC-4 and MGT-7 shall be filed through e-form GNL-2 by way of attachments till the company is under CIRP. In the existing field no.3 of form no.GNL-2, IRP/ RP/ Liquidator will choose radio button "Filings under IBC".

6. Against date of event and Board Resolution in INC-28 and GNL-2, date of order of National Company Law Tribunal/ National Company Law Appellate Tribunal /Court may be mentioned.

7. In respect of companies which are marked under CIRP in the Registry, Annual Return (e-form No.MGT-7) and Financial Statement (e-form AOC-4) and other documents under the provisions of the Companies Act, 2013, in accordance with directions issued by the NCLT/ NCLAT/Courts, shall be filed as attachments with e-form GNL-2 against the payment of one-time normal fee only, till such time the company remains under CIRP. Separate GNL-2 forms shall be filed for each such document, by the IRP/RP.

Concerned IRP/RP of every company which was under CIRP prior to the issue of this circular, shall also file e-form INC-28 for such companies and thereafter proceed to file other documents/fact/ information as required under the Act and Rules there under through e-form GNL-2.

The *MCA vide a Notification dated March 24, 2020* specifies Rs. 1,00,00,000 (Rupees One Crore) as the minimum amount of default for the purposes of section 4 of the Insolvency and Bankruptcy Code, 2016 which applies to matters relating to insolvency and liquidation of corporate debtors.

MCA vide a *Notification dated March 24, 2020* released a circular regarding special measures to be taken under Companies Act, 2013 and Limited Liability Partnership Act, 2008 in view of Covid-19 outbreak

A. No additional fees shall be charged for late filing during a moratorium period from April 1, 2020 to September 30, 2020 in respect of any document, return, statement etc. required to be filed in MCA-21 registry, irrespective of its due date, which will not only reduce compliance burden, including financial burden of companies/LLPs at large, but also enable long-standing non-compliant companies/LLPs to make a fresh start.

B. The mandatory requirement of holding meetings of the Board of the companies within the intervals provided in Section 173 of the Companies Act, 2013 (120 days) stands extended by a period of 60 days till next two quarters i.e September 30, 2020. Accordingly, as a onetime relaxation the gap between two consecutive meetings of the Board may extent to 180 days till the next two quarters, instead of 120 days as required in the CA- 13

C. The Companies (Auditor's Report) Order, 2020 shall be made applicable from the financial year 2020-21 instead of being applicable from the financial year 2019-20 as notified earlier. This will significantly ease the burden on companies and their auditors for the financial year 2019-20.

D. As per para VII (1) of Schedule IV to the Companies Act, 2013, Independent Directors (IDs) are required to hold at least one meeting without the attendance of Non-independent directors and members of management. For the financial year 2019-20, if the IDs of the company have not been able to hold such a meeting, the same shall not be viewed as a violation. The IDs may share their views amongst themselves through telephone or email or any other mode of communication, if they deem it to be necessary.

E. Requirement under section 73(2) (c) of Companies Act, 2013 to create the deposit repayment reserve of 20% of deposits maturing during financial year 2020-21 before April 30, 2020 shall be allowed to be complied with till June 30, 2020.

F. Requirement under rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 to invest or deposit at least 15% amount of debentures maturing in specified methods of investments or deposits before April 30, 2020 shall be allowed to be complied till June 30, 2020.

G. Newly incorporated companies are required to file a declaration for commencement of business within 180 days of incorporation under section 10A of the Companies Act, 2013. An additional period of 180 more days is allowed for this compliance.

H. Non-compliance of minimum residency in India for a period of at least 182 days by at least one other director of every company, under section 149 of the Companies Act, 2013 shall not be treated as a non-compliance for the financial year 2019-20.

Supreme Court of India

Arbitration:

MANKASTU IMPEX PRIVATE LIMITED …Appellant

Vs

AIRVISUAL LIMITED …Respondent

Facts of the case:

The Appellant company incorporated in India and conducts business under the name 'Atlanta Healthcare' and is in the business of air quality management and supply of air purifiers, car purifiers, anti-pollution masks and air quality monitors. The respondent is a company incorporated under the laws of Hong Kong and is in the business of manufacture and sale of air quality monitors as well as air quality information. A memorandum of understanding ("**MoU**") dated September 12, 2016 was entered into by both parties under which the respondent agreed to sell to the Appellant the complete line of respondent's air quality monitors products for onward sale and the appellant was appointed as the exclusive distributor for the sale of products in India. Additionally, non-exclusive rights were given to the appellant for distribution in Sri Lanka, Bangladesh and Nepal. This agreement was to continue for a period of five years from the starting date, which to commence from the date of delivery of the first lot of Air Quality monitors in India.

On October 14, 2017, the Appellant received an email from Mr. Charl Cater of IQAir AG informing the Appellant that the respondent is a part of IQAir AG and attached was a letter by the CEO of IQAir AG stating that IQAir AG had acquired all technology and associated assets of the respondent. Further, the product of AirVisual Node has been discontinued and the IQAir AG is in the process of relaunching a new and improved version which will be rebranded as IQAir AirVisual Pro. The letter also stated that IQAir AG will not assume any contracts or legal obligations of the respondent and will work on a case to case basis with resellers to negotiate new contracts and that the IQAir AirVisual products will be made available under separate dealer agreements.

The Appellant sent a reply invoking the terms of the MoU wherein it is stated that the respondent held exclusive rights in India for five years and in event of any take out/buy, it was obligatory on part of the respondent to ensure that the party taking over shall honour the contract on the same terms.

After some further correspondence between the Appellant and IQAir AG, the Appellant issued a notice and invoked the arbitration clause provided in clause 17 of the MoU. The Appellant then filed a Appellant under section 9 of the arbitration and conciliation act before the delhi high court seeking directions against the respondent and IQAir AG to honour the terms of the MoU.

Proceedings:

The Delhi High Court vide interim order restrained the respondent from selling any products in India and the proceeding is still pending in that suit.

Meanwhile, in response to the notice issued by the Appellant in which the Arbitration clause was invoked, IQAir, under its asset purchase agreement with the respondent, it has not assumed any contractual and legal obligations and that the terms of the MoU were not enforceable against IQAir AG and also stated that Clause 17 provides the arbitration be administered and seated in Hong Kong. It was in this backdrop that the Appellant filed a petition under section 11(6) of the Arbitration and Conciliation Act.

According to the Appellant, the proposed arbitration between the Appellant and the respondent being an arbitration between a company registered in India and a body corporate which is incorporated under the laws in Hong Kong, is an "International Commercial Arbitration" as per the act and therefore the Appellant seeks appointment of arbitrator.

The counsel for Appellant submitted that the MoU clearly stated that it is governed by the laws of India and the courts at New Delhi have jurisdiction and that Hong Kong was merely the venue of the arbitration and not the seat of the arbitration and reiterated when the venue becomes a seat provided in Union of India v Hardy Exploration.

The counsel for respondent submitted that since the place of arbitration is not in India, section 11(6) of the arbitration and conciliation act has no application to the present dispute as the clause 17.2 of the MoU states that the place of arbitration shall be Hong Kong and all disputed arising out of the MoU will also be administered in Hong Kong. Quoting BGS SGS SOMA JV v NHPC Limited, it was stated that arbitration proceedings meant that the venue is really the seat of arbitration proceedings.

The contention of the Appellant is that in the absence of the clear stipulation as to the proper law and curial law of the arbitration, laws of India should be taken as the proper law and curial law under the MoU and under no circumstances 17,1 be diluted. The counsel for Appellant used the perusal of clause 17.1 which means both the Appellant and respondent have agreed to it.

It is well settled that seat of arbitration cannot be used interchangeably as venue of arbitration. The Seat should be determined by conduct of parties and other clauses in the agreement.

Judgment: In the present case, the arbitration agreement entered into by both the parties provides Hong Kong as the place of arbitration which by itself does not mean that Hong Kong is the seat of arbitration and thus, will have to be read along with Clause 17.2 which provides that any dispute arising out of the MoU shall be administered and resolved in Hong Kong. This clearly suggests that the parties have agreed that the arbitration be seated in Hong Kong.

Although Clause 17.1 stipulates that the MoU is governed by the laws of India and the courts of New Delhi shall have jurisdiction, the words "without regard to its conflicts of law provisions and courts at New Delhi shall have the jurisdiction" have to be read with clause 17.3. According to clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court, during or after the pendency of any arbitral proceedings. That translates to if the seat of arbitration is found to be outside of India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. Thus, the petition under Section 11(6) is not maintainable and is dismissed.

Analysis: In the above mentioned case, the jurisdiction of arbitration proceedings has been clarified to an extent. In case of MoUs and the seat of arbitration versus the venue of arbitration is explained and cleared in this judgement. It interprets the MoU in great detail and comes to a judgement that the present appeal under section 11(6) is not maintainable which, on one read of the MoU, is not obvious. Enforcing the clauses of the MoU with the reference of past orders, this decision explains that the seat of arbitration cannot merely be looked at from one clause and has to be read with the other clauses of the MoU and also through the conduct of the parties.

Ministry of New and Renewable Energy

The Government of India, *vide a notification* dated March 20,2020, from Procurement Policy Division, Department of Expenditure, Ministry of Finance, issued clarification on the issue of considering the outbreak of coronavirus in China or any other country as a case of natural calamity which could invoke the Force Majeure Clause (FMC) in concerned contractual agreements after following the due procedure.

(a) All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) were directed to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure.

(b) The Renewable Energy implementing agencies shall grant suitable extension of time for projects, on account of coronavirus, based on evidences / documents produced by developers in support of their respective claims of such disruption of the supply chains.

(c) All project developers who were desirous of time extensions claiming aforesaid disruption, shall make, a formal application to SECI / NTPC / other implementing agencies, by furnishing all documentary evidence(s) in support of their claim.

(d) SECI / NTPC / Implementing agencies shall examine the claim objectively and grant appropriate Extension of Time (EoT) based on facts. While considering such requests, SECI / NTPC / any other implementing agency may fully satisfy itself that the claimants were actually affected due to disruption of the supply chains due to spread of coronavirus in China or any other country in the period for which extension of time has been claimed.

(e) The implementing agencies shall also ensure that no double relief is granted due to overlapping periods of time extension granted for reasons eligible for such relief.

(f) The State Renewable Energy Departments (including agencies under Power/ Energy Departments of States, dealing in renewable energy) were also requested to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure and issue their own instructions on the subject.

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Warm Regards,

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