

LAWZINE



KAY LEGAL & ASSOCIATES LLP

THIS MONTH

IMPACT OF COVID-19 ON THE
INSOLVENCY LAWS IN INDIA.

(01 TO 06)

DEVELOPMENTS IN REAL
ESTATE SECTOR.

(07 TO 10)

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IMPACT OF COVID-19 ON THE INSOLVENCY LAWS IN INDIA

In the wake of an unprecedented situation arising out of the spread of COVID-19, or otherwise known as the Corona virus, which has been declared as a pandemic, the functioning of the entire world has slowed down in every sense with a deliberate view to curb the rapid spread of COVID-19. On account of this pandemic, India announced a lockdown on 25th March, 2020 for 21 days which was later on extended in order to contain its effects. It is difficult to ascertain the consequences and impact of the said lockdown on the economy of our country, however, it can be assumed without any difficulty that all the small and big industries will be affected by the pandemic and revival of the industries and stability of the economy will take a considerable amount of time.

Realizing the effects of the lockdown on the financial and economic aspects of the country, the Union Finance Minister, Smt. Nirmala Sitharaman, through a press conference held on 24th March, 2020 announced relaxation in statutory and regulatory compliances of corporate and taxation laws.

In pursuance to this announcement, the Government of India and various regulators such as the Ministry of Corporate Affairs (MCA) and the Insolvency and Bankruptcy Board of India (IBBI) are striving to minimize the implications by granting relaxation and exemptions from filings and other requirements under the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016 and other such related sectors.

This article focuses on certain Insolvency laws which have been relaxed during the period of lockdown and if any extension to the lockdown, in cases where the Corporate Insolvency Resolution Process (CIRP) has been or will be initiated against debt ridden corporate companies.

INCREASE IN THE MINIMUM THRESHOLD.

The Union Finance Minister vide Notification dated 24th March, 2020 increased the threshold limit of default from Rs. 1,00,000/- (Rupees One Lakh) to Rs. 1,00,00,000/- (Rupees One Crore)¹. As per Section 4 of the Insolvency and Bankruptcy Code, 2016, the Central Government may vide notification increase the minimum limit of default of higher value, however, the same shall not be more than Rs. 1,00,00,000/- (Rupees One Crore).

The notification came into immediate effect from 24th March, 2020. The said notification is applicable to all the applications filed under Section 7, 8 and 9 of the Insolvency and Bankruptcy Code, 2016.

NEED FOR THE NOTIFICATION

The main purpose of increasing the threshold was to limit filing of the applications which would be filed under the Code before the Adjudicating Authority once the lockdown came into effect. It is a matter of fact that during this period, all the companies including Micro, Small & Medium Enterprises (MSMEs) will undergo certain financial distress which, in all probability, will result into a lot of companies being debt ridden. This in turn may invite filing of a lot of applications before the Adjudicating Authority by financial and operational creditors of such debt ridden companies. The Adjudicating Authority has until 24th March, 2020 entertained applications where the amount of default has been as less as Rs.1,00,000/- (Rupees One Lakh).



INSOLVENCY



Insolvency process, expected to boost transparency and efficiency in the business sector

The present notification will help the small companies which are under extreme financial distress and will prevent triggering of insolvency proceedings against such companies by their financial and/or operational creditors.

As the said notification is silent regarding the status of the Demand Notices which have already been issued to the Corporate Debtor by the Financial or Operational Creditor, as the case may be, prior to 24th March, 2020, it shall be presumed that if in furtherance to the Demand

Notice, the Financial or Operational Creditor intends to file an Insolvency Application before the Adjudicating Authority, the revised threshold ought to be met with. The notification is, however, also silent as to the outer time period for the applicability of the increased threshold and it is currently impossible to ascertain whether this move of the Government is temporary till the economy stabilizes or the same shall be permanent.

APPLICABILITY: WHETHER PROSPECTIVE OR RETROSPECTIVE

The notification makes no mention whether the increased threshold limit is prospective or retrospective in nature. However, it would be safe to presume that the said notification is deemed to apply prospectively, since, there is no mention of the same being applicable retrospectively. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Therefore, it can be safely assumed that all the applications filed before 24th March, 2020 shall remain unaffected. This is only with reference to filing of new applications before the Adjudicating Authority post the period of lockdown. Two other steps have been taken to mitigate the impact on the already initiated insolvency resolution process².

AMENDMENT TO THE CIRP REGULATIONS

A need was felt to provide relaxation and a breather to the Resolution Professionals who play an important role in completion of the Corporate Insolvency Resolution Process (CIRP). Invitation and verification of claims, constitution of Committee of Creditors (CoC), appointment of Resolution Professional in place of an Interim Resolution Professional, Invitation of Expression of Interest (EOI) etc. would have been difficult to be performed during the period of lockdown. To overcome this predictable difficulty and to provide time to the Resolution Professional to carry out the various activities, on 29th March, 2020, the Insolvency and Bankruptcy Board of India (IBBI) published

a notification amending the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, by inserting a new regulation³. By the way of amendment, Regulation 40C has been inserted in the said Regulations which states as under:

“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.”

The said amendment came into force from 29th March, 2020. Section 12 of the Insolvency and Bankruptcy Code, 2016 along with the CIRP Regulations provide for a time-line for completion of the Insolvency process of a Corporate Debtor. The said amendment excludes the days of lockdown from the time- line provided for completion of the activities.

The amendment is a boon for the Resolution Professionals appointed to take over the management of the Corporate Debtor as the notification ensures that owing to the COVID-19 outbreak, the time of the lockdown would be excluded from the calculation of time-line viz. 180/90/270/330 days as prescribed under Section 12 of the Insolvency and Bankruptcy Code, 2016. In such a case, the Resolution Professional is not required to approach the Adjudicating Authority for extension of time to carry out the CIRP of a Corporate Debtor.

The said notification makes no mention of amending the IBBI regulations with respect to liquidation.

EXTENSION OF PERIOD OF LIMITATION

The Supreme Court has suo moto through Order dated 23rd March, 2020 taken cognizance of the situation arising out of the challenge faced by the country on account of COVID-19 outbreak which resulted in difficulties faced by the litigants across the country in filing their petitions/applications/suits/appeals /all other proceedings before Courts, Tribunals across the country⁴. By plain reading of the order, it is amply clear that the period of limitation shall stand extended from 15.03.2020 until further orders for filing before the Courts/Tribunals across the country.



EXCLUSION OF TIME BY NCLAT

In pursuance to the notification amending the IBBI regulations and the suo moto order passed by the Supreme Court, the National Company Law Appellant Tribunal (NCLAT) passed a suo moto Order dated 30th March, 2020 owing to the hardships faced by the Resolution Professionals in carrying out the CIRP of a Corporate Debtor. The Appellant Tribunal in exercise of its inherent powers under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 also interpreted in *Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd.*, has ordered that:

- I. The period of lockdown ordered by Central Government and State Governments shall be excluded from the period for completing the CIRP of a Corporate Debtor prescribed under Section 12 of the Code; and
- II. Any interim order/ stay order passed by NCLAT under the Code will continue till the next date of hearing.

The Order provides for complete exclusion from the time lines which are specified under Section 12 of the Code. It is further stated that an exclusion provided by the NCLAT shall cover the time period in cases where the State Government has ordered lockdown in the state where the registered office of the Corporate Debtor is situated.

MORATORIUM ON REPAYMENT OF LOANS

In a move to enable the borrowers to tide over the economic fallout from COVID-19, the Reserve Bank of India issued a notification dated 27th March, 2020 thereby directing all the Commercial Banks, Co-operative Banks, All-India Financial Institutions and NBFCs to allow a moratorium of three months on payment of installments in respect of all term loans outstanding as on 1st March, 2020. Therefore, repayment schedule and all subsequent due dates, as also the tenor for such loans, may be shifted across the board by three months.



However, interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period. The same has been challenged by way of a writ petition before the Supreme Court on 11th March, 2020 thereby seeking direction on setting aside the said notification by the RBI.

The Union Finance Minister in the press conference held on 24th March, 2020 had indicated that if the current situation prevails till 30th April 2020, the suspension of filing any applications under Sections 7, 9 and 10 for a period of 6 months shall be considered so as to stop the companies at large from being forced into insolvency proceedings in such force majeure clauses of default⁸. It is expected that the Government vide an Ordinance shall amend the provisions of the Insolvency and Bankruptcy Code, 2016 by introducing Section 10A to the Code which shall provide for suspension of Sections 7, 9 and 10 for six months or until further orders, with a rider that the amendment clause cannot be extended to more than a year

CONCLUSION

In conclusion, it can be said that appropriate measures are being taken by the authorities in the wake of the situation to avoid any panic and to avoid a total collapse of the economy. It can be safely said that any further notifications with regards to the insolvency process would be on the same grounds and to achieve the same objective.

1. Notification No. S.O 1205(E) dated 24th March, 2020

2. S.L. Srinivasa Jute Twine Mills v. Union of India & Anr. [(2006) 2 SCC 740]

3. <https://ibbi.gov.in/uploads/whatsnew/be2e7697e91a349bc55033b58d249cef.pdf>

4. Suo Moto Writ Petition (Civil) No. 03 of 2020

5. Suo Moto Company Appeal (AT) (Insolvency) No. 01 of 2020.

6. Company Appeal (AT) (Insolvency) No. 185 of 2018.

7. RBI/2019-20/186 dated 27th March, 2020

8. <https://www.bloomberquint.com/economy-finance/live-finance-minister-speech-fm-nirmala-sitharaman-to-response-lok-sabha-on-finance-bill-shorty-measures-cash-fiscal-announcement-businesses-tax-break-coronavirus-outbreak>



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D *Developments in Real Estate Sector*

The nationwide lockdown has impacted all sectors of the economy. The outbreak has significantly affected the real estate sector in India. All construction of real estate projects have come to a halt affecting the purchase decisions of buyers, causing unemployment fears and decline in interest of the buyers etc. The Government has taken some imperative measures and are expected to continue taking such measures, in order to protect the interest of the aggrieved parties in real estate sector.

A. Addition of COVID-19 as a force majeure condition under Section 6 of the Real Estate Regulatory Authority;

In view of the nationwide lockdown, the Force Majeure clause could be invoked in most construction agreements/ contracts where the construction activities have come to a standstill. Section 6 of the Act defines force majeure to include *“any other calamity cause by nature affecting the regular development of the real estate project”*. It is pertinent to note that the clause force majeure shall not frustrate the entire contract or absolve the promoter of delivery of units but merely give a time extension to perform his obligations under the agreement. The promoter of a real estate project shall get an extension of time to handover the possession of the constructed property and can apply for an extension of time with the concerned State Real Estate Regulatory Authority under force majeure conditions. Similarly, the allottee shall get the time extension in payment of money based on percentage of completion of the project.



B. Material Adverse Change (MAC) clause

The 'Material Adverse Change' or 'Material Adverse Effect' (referred as “MAC”) shall impact merger agreements or financing agreements to determine whether any party has a right to terminate the agreements or not perform certain obligations based on developments relating to the COVID-19 pandemic. Real estate borrowers and lenders need to assess the potential



application of this provision (MAC Clause) on existing credit facilities and / overview of term sheets.

C. Development under the Maharashtra Real Estate Regulatory Authority

The Maharashtra Real Estate Regulatory Authority vide its order dated 02nd April, 2020 has revised Project Registration validity and extended timeline for statutory compliances, in view of COVID -19 pandemic. For all registered projects where completion date, revised completion date or extended completion date expires on or after 15th March, 2020, the period of validity for registration of such projects has been extended by three months and project registration certificates with revised timelines for such projects would be issued subsequently. Further, the time limits of all statutory compliances in accordance with RERA due in March, April and May have been extended to 30th June 2020.

D. Impact on property prices in India due to coronavirus outbreak

Due to the prevailing situation, project delays can be expected due to delay in supply of construction materials, shortage of labour could push delivery time of ongoing projects. The project launch numbers would drop significantly on account of the present situation, as home buyers are likely to postpone their property purchase decisions. On the other hand, interest rates will fall, which might also indirectly benefit home-buyers. The RBI has lowered the repo rate to 4.4% and offered a 3 month moratorium on loan EMIs, which might help the developers. But again, the fall on price would depend on how long the COVID-19 impact lingers.



E. Impact of COVID-19 on existing commercial leases

The current crisis due to the pandemic has impacted the commercial leases, a substantial change in circumstances could occur, causing a particularly gross disparity of rights and obligations of the parties (for instance; obligations of the lessee of a closed hotel towards the lessor). In such a case, the lessee as a disadvantaged party could seek negotiations on the new terms of an agreement. A debtor (i.e. the lessee unable to pay rent) has to show a subsequent impossibility to perform his duty towards the lessor. In the present scenario, the lessor will need to determine the short term rent relief to lessee. The lessee must look beyond the four corners of their leases to assert defenses of impossibility and frustration of purpose. The lessee may also make claims against the Government for inverse condemnation arising from the Government orders to close all non-essential businesses and failure to provide just compensation.

F. Real Estate Investment Trusts (RESITs)

The forced lockdown has already impacted the global economy. This will eventually impact the valuation of the proposed Real Estate Investment Trusts REITs. The Securities and Exchange Boards of India (SEBI) vide notification dated 23rd March, 2020 has approved temporary relaxation for all filing and compliance obligations under Real Estate Investment Trusts (RESITs) for period ending on 31st March, 2020 by 1 month. The SEBI has also provide relaxation of filing the quarterly shareholding pattern by three weeks and eased the time period for filing the quarterly corporate governance report by a month.

G. Measures taken by the Government to provide relief to real estate sector

- I. The Government has increased the threshold for initiating the proceedings under the Insolvency and Bankruptcy Code (IBC) 2016, from Rs 1 lakh to Rs 1 crore. This will help to avoid frequent insolvency proceedings against the developers.
- II. Under the Building and Other Construction Workers' welfare cess act, 1996, the 'cess' funds are collected by the labour welfare boards. The Government of India has issued an advisory to all State Government to transfer funds in the account of construction workers who sustain their livelihood on daily wages. Further certain directions are expected by the State Governments on the utilisation of this fund to support and assist the construction workers.
- III. In a landmark judgment, the Supreme Court has categorised over 2.8 crore registered construction workers as consumers enabling them to move to consumer forums if any Government denied them statutory benefits promised under welfare schemes implemented with the funds collected as 'cess' from builders. This will help the aggrieved party and ensure that no statutory benefits are denied to this section.

Conclusion:

Depending upon the quantum of the current crisis, extension of the lockdown and the aftermath of COVID-19, the actual impact on the real estate sector can be analyzed. The Indian real estate sector ought to be prepared for the worst of the outcomes. Hopefully, the Government, through their policies and initiatives shall continue to help avoid a total collapse of the real estate industry during this crisis.



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