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ARTICLE

India: A Note On Personal Guarantors To Corporate Debtors Under Insolvency And Bankruptcy Code, 2016.

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The Central Government recently notified that Part III of the Insolvency and Bankruptcy Code, 2016 ("Code"), shall be applicable to the personal guarantors of a corporate debtor. The Code divides individuals falling under the Code into 3 categories, namely, personal guarantors to the corporate debtor, partnership/ proprietor firms and other individuals. Central Government in its notification dated 15th November, 2019, has notified the provisions related to personal guarantors to the corporate debtor in the Code. Central Government also notified the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019; the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

The said provisions, rules and regulations came into effect from 1st December, 2019. These Rules provide for the process and forms for making application(s) for initiating insolvency resolution and bankruptcy proceedings against personal guarantors to corporate debtors, withdrawal of such applications, forms for public notice for inviting claims from the creditors, etc.

The gist of the process specified under the IBC Code/ Rules is as follows:

- Application for initiating the Insolvency Resolution Process in respect of personal guarantors is to be made either under section 94 (1) of the Code by the Debtor himself along with Form A attached to the application or the Creditor(s) can initiate the CIRP by filing an application under section 95 (2) along with Form C attached. The Application by creditors can be made after 14 days of receipt of demand notice (Form B) by the Guarantor, if the Guarantor fails to make such payments.
- If the application is made by a resolution professional ("RP"), the Adjudicating Authority has to direct the Insolvency and Bankruptcy Board of India ("IBBI") to confirm within 7 days that no disciplinary proceedings are pending against the RP. Accordingly, the application is moved forward.
- The application copy has to be provided to the RP within 3 days of his appointment. One copy has to be submitted to the IBBI by the applicant.
- The Insolvency Process for Guarantors, in terms of Section 96 provides for an "interim moratorium" in relation to any debts of the Guarantor as soon as the application for insolvency under Section 94 or Section 95 is filed before the Adjudicating Authority, in addition to a moratorium under Section 101 which comes into effect only upon admission. This is a distinction from the CIRP regulations which imposes a single moratorium period in relation to the assets of a Corporate Debtor only once the National Company Law Tribunal ("NCLT") passes an order imposing such moratorium on the admission of an application filed before it.
- In cases of personal guarantors, regardless of whether the application against a guarantor is admitted by the Adjudicating Authority or not, an interim moratorium shall immediately apply preventing the enforcement of any debts of the guarantor and staying any ongoing legal proceedings in relation thereto.
- Unlike issue of public notice by Interim Resolution Professional under CIRP, the Adjudicating Authority itself issues the notice, under Section 102 of the Code, within seven days of passing the order under Section 100.
- Tantamount to a Resolution Plan, the Code requires that the Guarantor in consultation with the RP, shall prepare a Repayment Plan ("Plan") which shall, *inter alia*, provide for a restructuring mechanism for the debts owed by the Guarantor, justification for preparation of such Plan and reasons on the basis of which the creditors may agree upon the Plan.
- The Repayment Plan has to be submitted by the RP, as approved by the creditors, within 120 days from the resolution process commencement date.
- Upon the finalization of the Repayment Plan, the RP shall, within 21 days from the last date of submission of claims under Section 102, submit the Plan to the NCLT along with a report requesting whether or not a meeting of the creditors is required. In the event that a meeting is required, the

meeting of the creditors shall take place within a period of 28 days from the date of the recommendation by the RP.

- The RP is responsible for supervising the execution of the Plan, and upon successful implementation, notice of the same must be sent to the Adjudicating Authority. In the event the guarantor fails to implement the plan, the RP shall issue a notice to the guarantor asking the guarantor to remedy the same, in the event such remedy is not accomplished, and the RP may approach the Adjudicating Authority for directions.
- The RP shall apply to the NCLT for a discharge order in relation to the debts mentioned in Repayment Plan, on the basis of the Repayment Plan.
- Further, in the event of failure of the successful implementation of the plan the creditors so affected have the right to initiate bankruptcy proceedings against the guarantor in a similar manner as liquidation proceedings are initiated against a corporate debtor in the event that a resolution plan fails. Apart from a Creditor, the Debtor is also entitled to apply to the NCLT for initiating Bankruptcy process.
- The application can be withdrawn upon receipt of the permission of withdrawal from the Adjudicating Authority. The Adjudicating Authority may grant the permission for withdrawal before the application is admitted, on a request made by the applicant. Withdrawal may be allowed after the admission of the application if 90% of the creditors agree to such withdrawal.

The Insolvency and Bankruptcy of personal guarantors in the Code can be seen as a welcoming change as it will affect the strength of the creditors' efforts in resolution and the creditors can achieve an effective resolution for debt that is owed by a corporate debtor as well as its personal guarantors thereby avoiding legal proceedings in multiple tribunals. It also helps the personal guarantors to settle with the Creditor(s) through legal process and get discharged from the Creditors with respect to their liabilities under Guarantee(s).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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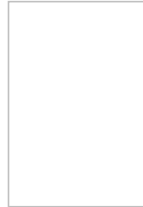
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