



THE INSTITUTE OF
Company Secretaries of India

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

Statutory body under an Act of Parliament

(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT PROFESSIONAL PROGRAMME (OLD SYLLABUS)

for

June, 2021 Examination

**CORPORATE RESTRUCTURING,
VALUATION AND INSOLVENCY**

MODULE 1

PAPER 3

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LESSON 2

MERGERS AND AMALGAMATIONS – LEGAL AND PROCEDURAL ASPECTS

1. Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with sections 230 to 233 and sections 235 to 240 of the Companies Act, 2013 the Central Government amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 by issuing the Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020.

"Corporate Action"

According to the Second Amendment Rules, 2020 a new definition "Corporate Action" has been inserted in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Under Rule 2(1)(e) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 the term "corporate action" means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and rights issue to the acquirer.

Purchase of Minority Shareholding Held in Demat Form

According to the Second Amendment Rules, 2020 a new Rule 26 A dealing with purchase of minority shareholding held in demat form has been inserted in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Rule 26 A. Purchase of minority shareholding held in demat form reads as under:

(1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

(2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.

(3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.

(4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that:-

(a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act;

(b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action a copy of the notice served to such shareholders and published in the newspapers to be attached;

(c) the minority shareholders shall be paid by the company immediately after completion of corporate action;

(d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.

(5) For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.

(6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

(7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899 (2 of 1899).

(8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.

Explanation. – The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.

(9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 (22 of 1996), the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

Explanation. – For the purposes of this rule, if “cut-off date” falls on a holiday, the next working day shall be deemed to be the “cut-off date”.

Impact: Rule 26A enables companies to purchase minority shareholding held in demat form and provides the procedure for purchase of minority shareholding held in demat form.

For

Details:<http://ebook.mca.gov.in/notificationdetail.aspx?acturl=6CoJDC4uKVUR7C9F14rZdatyDbeJTqg3pCAkroyIk32h6T4gDUoBdVdvl9F3vKGNvJ3LLkMt/iw>

2. Companies (Amendment) Act, 2020

According to the Companies (Amendment) Act, 2020, Section 68(11) reads as under:

(11) If a company makes any default in complying with the provisions of this section or any regulation made by the Securities and Exchange Board, for the purposes of clause (f) of sub-section (2), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

Impact: Amendment omitted the punishment of imprisonment in relation to an officer of the company who is in default for the offence specified under Section 68.

For Details: http://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

3. Companies (Amendment) Act, 2020

Merger and Amalgamation of Companies

According to the Companies (Amendment) Act, 2020, Section 232(8) read as under:

"(8) If a company fails to comply with sub-section (5), the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees."

Impact: Amendment provides for monetary penalty on failure to comply with the section 238(5).

For Details: http://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

4. Provisions of Section 230(11) and 230(12) notified on 3rd February, 2020

Central Government vide its Notification dated 03 February, 2020 appoints 03 February, 2020 the date on which the provisions of sub-sections (11) and (12) of section 230 of the Companies Act, 2013 shall come into force.

Provisions of Section 230(11) and 230(12) read as under:

(11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

Impact: Any compromise or arrangement may include takeover offer made in prescribed manner and an aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

5. National Company Law Tribunal (Amendment) Rules, 2020

Central Government vide its Notification dated 03 February, 2020 amended the National Company Law Tribunal Rules, 2016. According to the amendment a new Rule 80A has been inserted in the National Company Law Tribunal Rules, 2016.

Rule 80A reads as under:

Rule 80A: "Application under section 230.

An application under sub-section (12) of section 230 may be made in Form NCLT-1 and shall be accompanied with such documents as are mentioned in Annexure B.”.

Further, Application in cases of takeover offer of companies which are not listed: Rs. 5,000”

Application in cases of takeover offer of companies which are not listed shall be accompanied with following documents:

1. Affidavit verifying the petition
2. Memorandum of appearance with copy of the Board’s Resolution or the executed vakalatnama, as the case may be.
3. Documents in support of the grievance against the takeover.
4. Any other relevant document.

6. Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020

The Central Government vide its Notification dated 3rd February 2020 amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and inserted sub-rule (5) and sub-rule (6) in Rule 3 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

According to the Amendment, Rule 3(5) reads as under:

Rule 3(5) A member of the company shall make an application for arrangement, for the purpose of takeover offer in terms of sub-section (11) of section 230, when such member along with any other member holds not less than three-fourths of the shares in the company, and such application has been filed for acquiring any part of the remaining shares of the company.

Explanation I.—“shares” means the equity shares of the company carrying voting rights, and includes any securities, such as depository receipts, which entitles the holder thereof to exercise voting rights.

Explanation II.—Nothing in this sub-rule shall apply to any transfer or transmission of shares through a contract, arrangement or succession, as the case may be, or any transfer made in pursuance of any statutory or regulatory requirement.

According to the Amendment, Rule 3(6) reads as under:

Rule 3 (6): An application of arrangement for takeover offer shall contain:-

(a) the report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member after taking into account the following factors:—

(i) the highest price paid by any person or group of persons for acquisition of shares during last twelve months;

(ii) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.

(b) details of a bank account, to be opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.”

Schedule of Fees, for Application for compromise arrangement and amalgamation is Rs. 5,000/-.

Impact: Amendment Rules provide for eligibility of member of the company for an application of takeover offer and provide the contents of application for takeover offer.

LESSON 9 TAKEOVERS

1. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2020

Securities and Exchange Board of India vide its notification dated 16th June, 2020 amended Regulation 3 (2) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

According to the amendment, Regulation 3 (2) reads as under:

Regulation 3 (2) : No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company.

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to sub-regulation (2) of regulation 3.

Explanation.—For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition .

Impact: The amendment provides that the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company.

2. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2020

Securities and Exchange Board of India vide its notification dated 22nd June, 2020 amended the Regulation 10 (2B) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

According to the amendment, Regulation 10 (2B) reads as under:

Regulation 10(2B) provides that any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub-regulation (1) of regulation 3 and regulation 4.

Explanation-The above exemption from open offer shall also apply to the target company with infrequently traded shares which is compliant with the provisions of sub-regulations (2), (3), (4), (5), (6), (7) and (8) of regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. The pricing of such infrequently traded shares shall be in terms of regulation 165 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Impact: Amendment provide that any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer.

3. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2020

Securities and Exchange Board of India vide its notification dated 1st July, 2020 amended Regulation 17(1), 17(3)(c), 18 and 22 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 201.

According to the third amendment, Regulation 17(1), 17(3) (c), 18(11A) and 22(2A) read as under:

Regulation 17(1) reads as under:

(1) Not later than two working days prior to the date of the detailed public statement of the open offer for acquiring shares, the acquirer shall create an escrow account towards security for performance of his obligations under these regulations, and deposit in escrow account such aggregate amount as per the following scale:

| Sl No. | Consideration payable under the Open Offer | Escrow Amount |
|---------------|---|---|
| a. | On the first five hundred crore rupees | an amount equal to twenty five per cent of the consideration |
| b. | On the balance consideration | An additional amount of equal to ten percent of the balance consideration |

Provided that where an open offer is made conditional upon minimum level of acceptance, hundred percent of the consideration payable in respect of minimum level of acceptance or fifty per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.

Provided further that in case of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations, an amount equivalent to hundred per cent of the consideration payable in the open offer shall be deposited in the escrow account.

Regulation 17(3)(c) reads as under:

The escrow account referred to in sub-regulation (1) may be in the form of,—
(c) Deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin:

Provided that securities sought to be provided towards escrow account under clause (c) shall be required to conform to the requirements set out in sub-regulation (2) of regulation 9.

Provided further that the deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations.

Explanation:

The cash component of the escrow account as referred to in clause (a) above may be maintained in an interest bearing account, subject to the merchant banker ensuring that the funds are available at the time of making payment to the shareholders.

Regulation 18(11A) read as under:

Without prejudice to sub-regulation 11, in case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent per annum.

Provided that in case the delay was not attributable to any act of omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of acquirer, the Board may grant waiver from the payment of interest.

Provided further that the payment of interest would be without prejudice to the Board taking any action under regulation 32 of these regulation or under the Act.

Regulation 22(2A) read as under:

Notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, subject to,-

(i) such shares being kept in an escrow account,

(ii) the acquirer not exercising any voting rights over such shares kept in the escrow account:

Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

Impact: Amendment provides that where an open offer is made conditional upon minimum level of acceptance, hundred percent of the consideration payable in respect of minimum level

of acceptance or fifty per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account. Further, the deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of Regulation 13(2)(e) of SAST Regulation. In case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent per annum.

For Detail: <https://www.sebi.gov.in/legal/regulations/jul-2020/securities-and-exchange-board-of-india-substantial-acquisition-of-shares-and-takeovers-third-amendment-regulations-2020-46990.html>

LESSON 17

CORPORATE INSOLVENCY RESOLUTION PROCESS

1. Central Government Extended Suspension of Insolvency Proceedings by another 3 Months

In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016, the Central Government vide its Notification S.O. 4638(E) dated December 22, 2020, further extended the period by three months from the 25th December, 2020, for the purposes of the said section.

Impact: Suspension of Insolvency Proceedings extended up to March 25, 2021.

For Details: <https://www.ibbi.gov.in/uploads/legalframework/df55d4f612f270d6c637ee4b3c8131c8.pdf>

2. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 amended the Insolvency and Bankruptcy Code 2016.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 inserted a new section 10A and new sub-section (3) in Section 66.

Section 10A reads as under:

Section 10A. Suspension of initiation of corporate insolvency resolution process: Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

Section 66(3) reads as under:

Section 66(3): Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

Impact: In the light of the extraordinary economic situation caused by COVID-19 pandemic, a need was felt to temporarily suspend initiation of corporate insolvency resolution process under the Code, initially for a period of six months or such further period, not exceeding one year from 25th March, 2020, to provide relief to companies affected by COVID-19 to recover from the financial stress without facing immediate threat of being pushed to insolvency proceedings. The benefit of the suspension will be available to all those defaults of the corporate debtor that occur from 25th March, 2020 and till the end of the period of suspension.

For

Details:

<https://www.ibbi.gov.in/uploads/legalframework/c1d0cde66b213275d9cf357b59bab77b.pdf>

3. Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020

According to the Fifth Amendment Regulations, Regulation 2A reads as under:

“2A. Record or evidence of default by financial creditor.

For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-

(a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891;

(b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.”.

According to the Fifth Amendment Regulations, Regulation 13(2) (ca) reads as under:

“(ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;”.

According to the Fifth Amendment Regulations, Regulation 39(5A) reads as under:

“(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:

Provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;”.

Impact: The Financial Creditor along with the application, is required to furnish “record of the default recorded with the information utility or such other record or evidence of default as may be specified. Amended the Regulations specified two ‘other record or evidence of default’, namely, (a) certified copy of entries in the relevant account in the bankers’ book, and (b) order of a court or tribunal that has adjudicated upon the non-payment of a debt. The resolution professional shall publish the public announcement in the newspapers and websites.

For Details: <https://www.ibbi.gov.in/uploads/legalframework/202c20a1bf2d6bd49de67265b1436e3e.pdf>

4. Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020

According to the Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020, Regulation 4A (2) (aa), Regulation 16A (9) & Regulation 39(3) (3A)(3B) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 read as under:

Regulation 4A (2) (aa):

having their addresses, as registered with the Board, in the State or Union Territory, as the case may be, which has the highest number of creditors in the class as per their addresses in the records of the corporate debtor: Provided that where such State or Union Territory does not have adequate number of insolvency professionals, the insolvency professionals having addresses in a nearby State or Union Territory, as the case may be, shall be considered;”

Regulation 16A (9):

The authorised representative shall circulate the agenda to creditors in a class, and may seek their preliminary views on any item in the agenda to enable him to effectively participate in the meeting of the committee: Provided that creditors shall have a time window of at least twelve hours to submit their preliminary views, and the said window opens at least twenty-four hours after the authorised representative seeks preliminary views: Provided further that such preliminary views shall not be considered as voting instructions by the creditors.

Regulation 39(3), 3A &3B:

(3) The committee shall-

- (a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;
- (b) record its deliberations on the feasibility and viability of each resolution plan; and
- (c) vote on all such resolution plans simultaneously.

(3A) Where only one resolution plan is put to vote, it shall be considered approved if it receives requisite votes.

(3B) Where two or more resolution plans are put to vote simultaneously, the resolution plan, which receives the highest votes, but not less than requisite votes, shall be considered as approved:

Provided that where two or more resolution plans receive equal votes, but not less than requisite votes, the committee shall approve any one of them, as per the tie-breaker formula announced before voting: Provided further that where none of the resolution plans receives requisite votes, the committee shall again vote on the resolution plan that received the highest votes, subject to the timelines under the Code.

Illustration. - The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under

| Voting outcome | % of votes in favour of | | Status of approval |
|----------------|-------------------------|--------|---|
| | Plan A | Plan B | |
| 1 | 55 | 60 | No Plan is approved, as neither of the Plans received requisite votes. The committee shall vote again on Plan B, which received the higher votes, subject to the timelines under the Code |
| 2 | 70 | 75 | Plan B is approved, as it received higher votes, which is not less than requisite votes |
| 3 | 75 | 75 | The committee shall approve either Plan A or Plan B, as per the tie-breaker formula announced before voting |

Impact: The Code provides for appointment of an authorised representative (AR) by the Adjudicating Authority (AA) to represent FCs in a class. For this purpose, the Regulations require the IRP to offer a choice of three IPs in the public announcement, and the creditors in a class to choose one of them to act as their AR. The amendment provides that the three IPs offered by the IRP must be from the State or Union Territory, which has the highest number of creditors in the class as per records of the CD. This will facilitate ease of coordination and communication between the AR and the creditors in the class he represents.

The Regulations envisage that the AR shall seek voting instructions from creditors in a class at two stages, namely, (i) before the meeting; and (ii) after circulation of minutes of meeting. The amendment provides that the AR shall seek voting instructions only after circulation of minutes of meeting and vote accordingly. He shall, however, circulate the agenda, and he may seek preliminary views of creditors in the class before the meeting, to enable him to effectively participate in the meeting.

The Regulations provide that the CoC shall evaluate all compliant resolution plans as per evaluation matrix to identify the best of them and may approve it. The amendment provides that after evaluation of all compliant resolution plans as per evaluation matrix, the CoC shall vote on all compliant resolution plans simultaneously. The resolution plan, which receives the highest votes, but not less than 66% of voting share, shall be considered as approved.

5. Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020

Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020, Rule 4, Rule 6 & Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read as under:

4. Application by financial creditor.—

(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3) The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

6. Application by operational creditor.—

(1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

7. Application by corporate applicant.—

(1) A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) The applicant under sub-rule (1) shall serve a copy of the application to the Board by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

Impact: *Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020 inter-alia, require serving of copies of applications by the applicants under sections 7, 9 and 10 to the IBBI as well. This also requires an IP consenting to act as IRP to disclose the assignments he has in hand.*

For

Details:

<https://ibbi.gov.in/uploads/legalframework/27e336abe5b5328297a2ba5b35b39fac.pdf>

6. Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020

According to the Fourth Amendment Regulations, Regulation 30A reads as under:

30A. Transfer of debt due to creditors.

(1) A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.

(2) Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.

(3) The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31.

According to the Fourth Amendment Regulations, Regulation 37A reads as under:

37A. Assignment of not readily realisable assets.

(1) A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

Explanation.—For the purposes of this sub-regulation, —not readily realisable asset|| means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code.

According to the Fourth Amendment Regulations, Regulation 38 reads as under:

38. Distribution of unsold assets.

(1) The liquidator may, with the permission of the Adjudicating Authority, distribute amongst the stakeholders, an asset that could not be sold, assigned or transferred due to its peculiar nature or other special circumstances.

(2) The application seeking permission of the Adjudicating Authority under sub-regulation (1) shall-

(a) identify the asset;

(b) provide a value of the asset;

(c) detail the efforts made to sell the asset, if any; and (d) provide reasons for such distribution

Impact: According to the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020 a creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer. Further, a liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

For

<https://www.ibbi.gov.in/uploads/legalframework/fe690303fb44f8a748f0a10852dbda6.pdf>

Details:

7. Insolvency and Bankruptcy Board of India (Liquidation Process) (Third Amendment) Regulations, 2020

In regulation 4, in sub-regulation (2), in clause (b), after the Table, the following Clarification shall be inserted, namely:-

“Clarification: For the purposes of clause (b), it is hereby clarified that where a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.”.

In the principal regulations, in regulation 37, in sub-regulation (6), the word “of” shall be omitted.

In the principal regulations, in regulation 47, in the Table, -

(a) in serial number 4, in column 2, for “Section 38 (1) and (5), Reg. 17, 18 and 21A”, the following shall be substituted, namely:

- “Section 38 (1), Reg. 17, 18, 19, 20 and 21A”;

(b) in serial number 18, in column 4, for the word “disclosure”, the word “disclaimer” shall be substituted.

Impact: The IBBI (Liquidation Process) Regulations, 2016 require the CoC to fix the fee payable to the liquidator. Where the fee has not been fixed by the CoC, the Regulations provide for a fee as a percentage of the amount realised and of the amount distributed by the liquidator. The IBBI amended the Liquidation Process Regulations to clarify that where a liquidator realises any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him. Likewise, where a liquidator distributes any amount, which is not realised by him, he shall be entitled to a fee corresponding to the amount distributed by him.

For

Details:

<https://www.ibbi.gov.in/uploads/legalframework/99821042db3990a40cd7082f06019911.pdf>

8. Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2020

According to the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2020, Regulation 5 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 reads as under:

“5. Appointment of liquidator.

(1) Subject to regulation 6, the corporate person shall appoint an insolvency professional as liquidator, and, wherever required, may replace him by appointing another insolvency professional as liquidator, by a resolution passed under clause (c) of sub-section (3) of section 59 or clause (c) of sub-regulation (1) of regulation 3, as the case may be: Provided that such resolution shall contain the terms and conditions of appointment of the liquidator, including the remuneration payable to him.

(2) The insolvency professional shall, within three days of his appointment as liquidator, intimate the Board about such appointment.”

Impact: The Code enables a corporate person to initiate voluntary liquidation process if it has no debt or it will be able to pay its debts fully from the proceeds of the assets. The corporate person appoints an IP as liquidator to conduct the voluntary liquidation process by a resolution of members or partners, or contributories, as the case may be. However, there can be situations which may require appointment of another IP as the liquidator. IBBI amended the IBBI (Voluntary Liquidation Process) Regulations, 2016, to enable the corporate person to replace the liquidator by appointing another IP as liquidator by a resolution of members or partners, or contributories, as the case may be.

For Details: <https://www.ibbi.gov.in/uploads/legalframework/41dae71b62c3fa756602c8fec7848b58.pdf>
