



Insolvency and Bankruptcy Code, 2016

Drafting and Negotiating of RESOLUTION PLAN

Objective of the Code

- An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

Introduction and Overview

- A Resolution Plan means a plan proposed by resolution applicant for insolvency resolution of the Corporate Debtor as a going concern in accordance with Part II.
- The Resolution Professional invites Expression of Interest from the potential Resolution Applicants.
- For the purpose of formulation of a Resolution Plan, the Resolution Professional prepares an Information Memorandum to be submitted to the potential Resolution Applicants.
- The Resolution Professional also prepares a Request for Resolution Plan / Process Memorandum which provides the manner in which the entire CIRP will work.



Introduction and Overview

- The Resolution Professional collates the documents relating to the Corporate Debtor for enabling the proposed Resolution Applicant to do the due diligence.
- And upon receipt of Resolution Plans, Resolution Professional shall place it before the Committee of Creditors (CoC) for its approval.
- The approved Resolution Plan is then sent to the Adjudicating Authority for its final approval.

Resolution Plan

Approval: The responsibility of approving a resolution plan rests with the CoC, which will approve it with not less than **66** percent voting in favor of it.

Effect of Approval: If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub section (4) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. [Sec 31(1)]

Regulation 37- Resolution Plan

A resolution plan shall provide for the measures, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-

(a) **transfer** of all or part of the **assets** of the corporate debtor to one or more persons;

(b) **sale** of all or part of the **assets** whether subject to any security interest or not;

(c) the substantial acquisition of shares of the corporate debtor, or the **merger or consolidation** of the **corporate debtor** with one or more persons;

(ca) cancellation or delisting of any shares of the corporate debtor, if applicable

- (d) satisfaction or **modification** of any **security interest**;
- (e) **curing or waiving** of any breach of the **terms** of any debt due from the corporate debtor;
- (f) **reduction** in the amount payable to the **creditors**;
- (g) **extension** of a **maturity date** or a change in interest rate or other terms of a debt due from the corporate debtor;
- (h) **amendment** of the **constitutional documents** of the corporate debtor;
- (i) **issuance of securities** of the **corporate debtor**, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- (j) change in **portfolio of goods or services** produced or rendered by the corporate debtor;
- (k) **change in technology** used by the corporate debtor; and
- (l) obtaining **necessary approvals** from the Central and State Governments and other authorities

Regulation 38-Mandatory contents of the Resolution Plan

1. The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.
2. A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.
3. A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past

Regulation 38-Mandatory contents of the Resolution Plan

2) A resolution plan shall provide:

- a. the term of the plan and its implementation schedule;
- b. the management and control of the business of the corporate debtor during its term; and
- c. adequate means for supervising its implementation.

3) A resolution plan shall demonstrate that –

- a. it addresses the cause of default;
- b. it is feasible and viable;
- c. it has provisions for its effective implementation;
- d. it has provisions for approvals required and the timeline for the same; and
- e. the resolution applicant has the capability to implement the resolution plan.

Table of Content of a Resolution Plan

A typical table of content of a resolution plan is as follows:

1. Definitions and Interpretations for the terms used in the Resolution Plan.
2. Brief about Corporate Debtor
3. **Overview** of Resolution Applicant.
4. **Creditworthiness** and **Financial Capability** of the Resolution Applicant
5. **Prior Experience** in managing/turning around of Companies.
6. Credentials as required by **Regulation 38** of CIRP Regulations
7. **Financial Plan**
 - Settlement of all creditors
 - Restructuring of Corporate Debtor
 - Classification of Creditors
8. **Extinguishment** of claims
 - **Prior to CIRP Commencement Date OR NCLT Approval Date or date of Upfront Payment ?**
9. **Reliefs**, concessions and dispensation
10. Clean up Actions

Table of Content of a Resolution Plan

- 11) Key **terms for the implementation** of the Plan
- 12) Term of the Resolution Plan and its **Implementation Schedule**
- 13) Mechanism regarding the **management and control** of the affairs of the Company during the Term
- 14) **Manner of supervision** and implementation of plan.
- 15) **Declaration** that the Plan is **not in contravention** of provisions of the **Applicable Law**
- 16) Statement as to how the Resolution Applicant has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the Corporate Debtor.
- 17) **Sources** and identification of **Funds** to make payments.

Table of Content of a Resolution Plan

- 18) **Financial assumptions**, projections and business plan for the Company.
- 19) Rationale for Investment in Corporate Debtor/ **Synergies**
- 20) Indemnity
- 21) Miscellaneous Items

Typical Implementation Schedule

	Activity	Indicative Timeline	Responsibility
Phase I- Approval Process of Resolution Plan			
1	Approval of Plan by CoC and issuance of letter of intent	X	CoC / Resolution Professional
2	Submission of performance deposit and acceptance of letter of intent	X+ 3 Days	Resolution Applicant
3	Application to NCLT for approval of Resolution Plan	Y	Resolution Professional
4	Approval by NCLT of Resolution Plan and receipt of order	E	Resolution Professional
5	Intimation to the Governmental Authorities, if required in terms of the Applicable Law	E	Corporate Debtor
6	Intimation to all stakeholders of the Corporate Debtor		Resolution Applicant
Phase II- Implementation of Plan			
1	Execution of material agreements giving effect to the Plan	On and from E	Monitoring Committee
2	Appointment of the Monitoring Agent under the sole guidance and instruction of the Monitoring Committee until the Closing Date	E	Monitoring Committee
3	Infusion of funds in the Corporate Debtor	Closing Date	Resolution Applicant
4	Replacement of Suspended Board with new Board	Closing Date	Resolution Applicant
Phase III- Settlement of Creditors			
1	Payment of IRP Costs in priority to any other payment under the Plan	Closing Date	Monitoring Committee
2	Payment to the operational creditors in priority to Financial Creditors	Closing Date	
3	Payment to all the Financial Creditors in accordance with the Plan	Closing Date	

Evaluation Matrix

Regulation 2 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018 defines the following terms as follows:

“Evaluation Matrix” means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.”

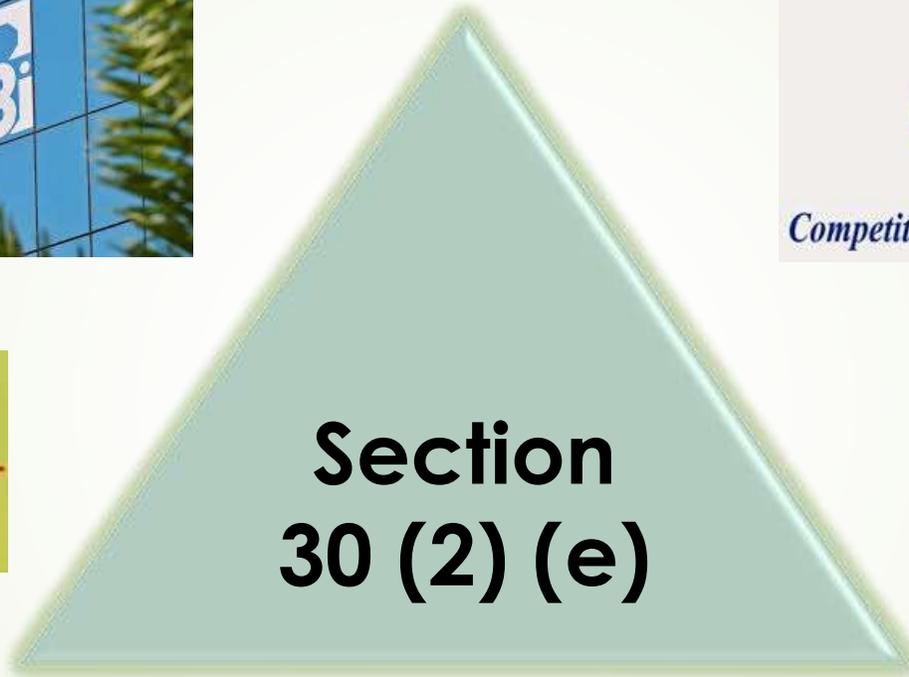
Illustrative Evaluation Matrix

Parameter	Score Matrix		Weightage	Max Score
Upfront Cash Payment	>= 35% of the Resolution Debt Amount	10	400%	40
	>= 20% <25% of the Resolution Debt Amount	5		
Cash on Deferred Payment Basis	>= 35% of the Resolution Debt Amount	10	200%	20
	>= 20% <25% of the Resolution Debt Amount	5		
Equity in the Company	>=10% <15% of equity stake in the Company	10	50%	5
	>= 1% < 5% of equity stake in the Company	2		
Fresh Equity Infusion for improving operations	>= 15% of the Resolution Debt Amount	10	100%	10
	>= 1% <5% of the Resolution Debt Amount	2		
Reasonableness of Financial Projections			50%	5
Ability to Turnaround the Company			100%	10
Standing of the Bidder			100%	10

Question

- When you act as RP, while inviting resolution plans, you also provide an evaluation matrix determining which bidder will score highest marks. The evaluation matrix is based on both quantitative and qualitative criteria: So the question is:
 - Is there any science in developing the Evaluation Matrix; How far it can be standardised; Do the criteria so developed has legal sanctity while declaring a successful bidder? Also when there is a deferred payment proposal, how one proposes to build discounting factors? What would be the basis of applying the weightage formula.
 - Does it lead to arbitrage situation vis-a-vis the prevalent lending interest rates

Compliances under section 30(4)



Section 30 (2) (e) -The resolution professional shall examine the resolution plan received to confirm that such plan does not contravene any of the provisions of the law for the time being in force

Supreme Court in Essar Steel matter

Role of the Resolution Professional

Role of the Prospective Resolution Applicant

Role of CoC in CIRP

Rights of creditors against guarantors

Jurisdiction of the AA and NCLAT

Secured and Unsecured Creditors

The constitution of sub-committee by the CoC

Claims



Role of Resolution Professional

- Not adjudicatory but administrative
- It is the responsibility of the resolution professional (RP) to
 - manage the affairs of the corporate debtor (CD) as a going concern during corporate insolvency resolution process (CIRP),
 - appoint and convene meetings of the CoC, so that they may decide upon resolution plans, and
 - collect, collate and finally admit claims of all creditors, which must be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated by the Committee of Creditors (CoC).

Role of Prospective Resolution Applicant

- The Plan submitted by the prospective resolution applicant must provide for measures as may be necessary for the insolvency resolution of the CD for maximization of the value of its assets, which may include transfer or sale of assets or part thereof, whether subject to security interests or not.
- The Plan may provide for either satisfaction or modification of any security interest of a secured creditor and may also provide for reduction in the amount payable to different classes of creditors.
- The prospective resolution applicant has a right to receive complete information as to the CD, debts owed by it, and its activities as a going concern, prior to the commencement of CIRP.

Role of Committee of Creditors (CoC)

- It is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the CD by accepting a particular resolution plan.
- The insolvency resolution is ultimately in the hands of the majority vote of the CoC. It may approve a resolution plan by a vote of not less than 66% of the voting share of the FCs, after considering its feasibility and viability, and various other requirements as may be prescribed by the Regulations.
- What is left to the majority decision of the CoC is the “feasibility and viability” of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors.

Extinguishment of creditors' rights against guarantors

- Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts running the business of the CD on a fresh slate as it were.
- It cannot be accepted that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the CD.

Jurisdiction of NCLT/NCLAT

- The limited judicial review available to AA & NCLAT, has to be within the four corners of section 30(2) and section 32 read with section 61(3) of the Code, respectively. Such review can in no circumstance trespass upon a business decision of the majority of the CoC.
- The ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the CoC, but, the decision of such Committee must reflect the fact that it has taken into account maximizing the value of the assets of the CD and the fact that it has adequately balanced the interests of all stakeholders including OCs.
- The reasons given by the CoC while approving a resolution plan may thus be looked at by the AA only from this point of view, and once it is satisfied that the CoC has paid attention to these key features, it must then pass the resolution plan, other things being equal.

Role of Committee of Creditors (CoC)

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Secured and Unsecured Creditors

- Equality principle cannot be stretched to treating unequal's equally, as that will destroy the very objective of the Code - to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational.
- The AA is to decide on whether a resolution plan passes muster under the Code and there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of.

Constitution of sub-committee by the CoC

- The powers of the CoC though are administrative in nature, shall not be delegated to any other person. The CoC alone must take the decisions mentioned in section 28.
- The power to approve a resolution plan under section 30(4) cannot be delegated to any other body as it is the CoC alone that has been vested with this important business decision which it must take by itself.



Extinguishment of Claims

- A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by the successful resolution applicant.
- All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the CD.

Interplay of SEBI Regulations and IBC

❑ ICDR Regulations

- Provisions relating to Preferential Issue are not applicable except lock-in provision

❑ Delisting Regulations

- Delisting regulations are not applicable for delisting the securities pursuant to resolution plan subject to:
 - Plan specifically providing the procedure to complete the delisting of securities; and
 - Exit opportunity is given to public shareholders.
- Exit price should not be less than liquidation value and exit price offered to existing promoters and other shareholders.
- Disclosure of exit price and justification within 1 day of resolution plan being approved.
- Cooling period of 5/10 years is not applicable in respect of securities delisted pursuant to resolution plan.

Interplay of SEBI Regulations and IBC

❑ LODR Regulations

- Provisions relating to Audit committee, nomination committee, stakeholders relationship committee, risk management committee are not applicable during CIRP.
- Provisions relating to composition of board of directors, number of Meetings, Compliance Report Compensation Payable to Directors are to applicable
- No shareholders approval required for:
 - Disposing more than 50% shares of material subsidiary;
 - Sell/dispose/lease assets to more than 20% of its material subsidiary.
- Disclosure of class of shareholders and conditions for reclassification of shareholders are not applicable.
- Obligation of Companies And Stock Exchange w.r.t draft scheme of arrangement are not applicable.
- Specific events have been specified which needs to be disclosed during CIRP process.

Interplay of SEBI Regulations and IBC

❑ Takeover Code

- Exemption from Open Offer under Reg 3.
- Resolution Applicant holding more than 25% can acquire more than 75% shares (i.e. exceeding minimum public shareholding requirement).

❑ Minimum Public Shareholding Requirement

- 18 months to bring public shareholding upto 10%.
- 3 years to bring public shareholding upto 25%.

Negotiation of Resolution Plan

- Whether the Resolution Plan can provide for extinguishment of unascertained, uncrystallised, future, unknown, contingent liabilities ?
- Whether the Resolution Plan can provide for waiver of any taxes (such as stamp duty, filing fees, etc) payable to any governmental authority arising out of implementation of the Resolution Plan?

Negotiation of Resolution Plan

- Whether the Resolution Plan can provide for extinguishment of pending or threatened litigations, proceedings, inquiries, etc. ?
- Whether the Resolution Plan can provide that no new inquiries, litigations, investigations, suits, claims, etc can be initiated against the Corporate Debtor ?
- Whether waiver from compliance with the provisions of the Companies Act, 2013 and other applicable provisions of law can be sought in respect of removal of statutory auditors?

Negotiation of Resolution Plan

- Whether the Resolution Applicant under the Resolution Plan can seek immunity from non-compliance with applicable law?
- Whether the Resolution Plan can provide that directors, managerial personnel appointed by the Resolution Applicant shall not be liable for any past non-compliances by the erstwhile management of the Corporate Debtor?
- Whether the Resolution Plan can provide that the Resolution Applicant will not be liable for subsidiary companies, associate companies of the Corporate Debtor? How to absolve the Corporate Debtor / Resolution Applicant with the liabilities / losses of subsidiary companies?

Negotiation of Resolution Plan

- Whether the Resolution Plan can provide the following clause:

“If this Resolution Plan cannot be implemented for any reason not attributable to the Resolution Applicant, then the Resolution Applicant shall have no liability on this account. If the Resolution Applicant has issued any guarantees, then such guarantees shall not be invoked on this account and shall be returned forthwith to the Resolution Applicant.”

- Whether the Resolution Plan can provide severability clause ?

Negotiation of Resolution Plan

- Whether NCLT/NCLAT has the jurisdiction to amend the Resolution Plan which has been approved by the CoC?
- Profits during CIRP – Should it be distributed amongst CoC members OR retained with the Corporate Debtor
 - Essar Steel
 - Orchid Pharma Limited – Expression of Interest
- Whether the Resolution Plan Value be less than the Liquidation Value?
- Whether the claimants who have not filed their claims in CIRP, loose their right to seek the recovery after approval of the Resolution Plan?

Negotiation of Resolution Plan

- How far the Resolution Plan can be considered as fair to all stakeholders when there is a difference in the ratio of unsecured financial creditors and trade creditors?
- Can the Resolution Plan be proposed as conditional Plan? If yes, to what extent can it be a conditional Resolution Plan
- What rights the erstwhile directors has in CoC considering the fact that they do not have voting rights?
- How far the creditors can have a say on the funds recovered pursuant to proceedings conducted by SFIO?

Negotiation of Resolution Plan

- Can the Resolution Plan provide differential allocation of the amount payable to trade creditors on the basis of importance of such creditors in relation to the business?
- Can the Resolution Plan provide differential allocation of amount to be paid to current employees and ex-employees or keeping threshold outstanding?
- What rights the erstwhile directors has in CoC considering the fact that they do not have voting rights?
- How far the creditors can have a say on the funds recovered pursuant to proceedings conducted by SFIO?

Tax Issues vis-à-vis Resolution Plan

- Whether waiver and consequent write-off of principal amount of loan(s) and creditors would be construed as income taxable in the hands of Corporate Debtor?
- What would be the tax treatment of waiver and write off of loans for computing MAT under section 115JB of the Act?
- Whether accumulated losses of Corporate Debtor would be hit by provisions of section 79 of the Act, in case(s) where shareholding changes beyond 51%?

Tax Issues vis-à-vis Resolution Plan

- Treatment of brought forward losses and unabsorbed depreciation under MAT in the case of Corporate Debtor?
- Whether reduction of capital under resolution plan would be regarded as deemed dividend?
- Whether infusion of equity/ preference share capital by Resolution Applicant would attract provisions of section 56 of the Act?