

Insolvency and Bankruptcy Law in India

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Week 05

Lecture 25

Welcome, everyone.

As part of the course on Insolvency and Bankruptcy Law in India, we will discuss the concept of Invitation for Expression of Interest and Shortlisting of Prospective Resolution Applicants today.

In the previous classes, we discussed that once an application by a financial creditor, operational creditor, or corporate debtor is admitted by the NCLT, the adjudicating authority, a resolution professional, also known as the IRP, will be appointed. The COC will constitute the committee of creditors. In previous classes, we have discussed voting rights, the powers of the COC, who can be a member of the COC, who cannot be a member of the COC, and who is considered a related party. So, all these things we discussed in the previous classes.

Today, we are going to discuss the concept of an invitation for expression of interest. So, once the resolution process begins, this is considered one of the important steps, okay. That is an invitation for you to express your interest. Whoever is interested, we will invite them. So, section 25, subsection 2, clause H of the IBC deals with the invitation for expression of interest, which provides that the resolution professional invites prospective resolution applicants who fulfill such criteria as may be laid down by him with the approval of the committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the board to submit a resolution plan or plans. Section 25, subsection 2, clause H provides that it is the responsibility and duty of the resolution professional to invite prospective resolution applicants. So here, whenever he is inviting applications from the prospective resolution applicants, the resolution professional, with the approval of the committee of the creditors, is going to prescribe eligibility criteria, so at least you are expected to have a turnover of so and so, and the minimum quotation amount must be so and so crores. So, he is going to prescribe certain criteria in this manner.

This criterion is quite complex in nature because it cannot be generalized. Depending on the company's nature and size, the criteria will change. That's why the resolution

professional, after considering the corporate debtor, that is, the company's size... Additionally, other factors related to the approval of the COC include the criteria being revised. Therefore, anyone who satisfies the specified criteria in the announcement is required to submit a resolution plan, as outlined in Section 25, Subsection 2, Clause H. Now, from this, you can understand that it is an obligation for RP to invite prospective resolution applicants. Here, the resolution professional has an obligation to invite prospective resolution applications so that they can be assessed, and the COC can approve them. Subsequently, the resolution plan can be approved, and the CRP process can be completed.

Then the important regulation is Regulation 36A. Today, we will primarily discuss Regulation 36A of the CRP regulations. So, what is the importance of Regulation 36A? So, Regulation 36A of the Insolvency and Bankruptcy Board of India, IBBI, pertains to the Insolvency Resolution Process for Corporate Persons. Generally, it is famously known as the CRP regulations. Regulations set out the procedure for inviting and processing expressions of interest. So, how do we invite them, and then how do we process the expressions of interest from prospective resolution applicants? The Regulation 36 addresses two aspects. One crucial step is inviting and processing the expression of interest, which is why it is a vital part of the corporate insolvency resolution process. In the CRP process, this is a crucial step, as it helps identify potential bidders interested in taking over or reviving the corporate debtor. Why? This step helps the corporate committee of creditors identify who is interested in taking over the company or filing an application for a resolution plan.

To determine who is interested in taking over the company or reviving the corporate debtor. That's why this process is very, very crucial in the CRP process. Then, what is the purpose of Regulation 36A? So, this regulation ensures a transparent and structured process. If you are only in this lesson, we will discuss the entire process of Regulation 36A. So, from this, you will understand that a transparent and structured process is prescribed in Regulation 36A. That is how to invite, how to collect expressions of interest, how to process applications, how to scrutinize them, how to shortlist candidates, how to present them to the COC, and what the COC will do subsequently. The entire process is discussed in this regulation. That's why this regulation ensures a transparent and structured process for inviting resolution applicants, while adhering to strict timelines. So, in the previous classes, we discussed the timelines prescribed under the IBC code. Therefore, we must adhere to the timelines. Apart from this, we also have to follow the procedure. So, it helps attract serious and eligible applicants who can propose a viable resolution plan for the distressed company. So, this is the purpose of Regulation 36A.

Now, let us look at Regulation 36A. So, Regulation 36A provides the manner in which the duty of the RP shall be performed. So, how RP should perform its duties is mentioned

in Regulation 36A of the CRP regulations. In the case of Ebix Singapore Private Limited versus the COC of Educomp Solutions Limited, the Supreme Court observed that it has identified the important role of the RP. Okay, why? Because he is the person who will replace the board of directors. Therefore, Regulation 36A outlines the duties of the RP and specifies how he must exercise these duties. In this judgment, the role of the RP has been identified, and it is noted that the RP has a duty to solicit resolution plans. When he is inviting and when he is receiving, he must solicit resolution plans through the invitation. And the RP is empowered to invite prospective resolution applicants who fulfill the criteria laid down by the resolution professional. The resolution professional will adjust the criteria, but please note that this criterion must be approved by the COC; the resolution professional cannot approve it themselves. The resolution professional is responsible for fixing it. It has to be approved by the COC, and then he will invite.

Then you will receive the applications and verify whether they meet the fixed criteria or not. That's why he plays a crucial role in the CRP process. In another case, Amritvani Exim Private Limited versus Ajanta Offset and Packaging Limited, the NCLT Delhi bench held that it had explained the stages of the CRP process. I mean Regulation 36A. First, you will proceed with the expression of interest, okay? Then, subsequent to that, you are going to receive the expression of interest. First, please announce your interest to whoever is interested; kindly share your expression of interest in a public announcement. Then, subsequent to that, you are going to receive the expression of interest.

Then, after receiving it, the RP resolution professional will conduct due diligence to determine whether the RP is in accordance with the rules and whether it satisfies the eligibility criteria. So, he is going to verify the applications. Once that is done, he will issue the provisional list. Provisionally, these are all the people who are eligible to file resolution applicant applications. Then, he will issue a provisional list, followed by an information memorandum. He is going to discuss the issue of the information memorandum and the evaluation matrix. Therefore, the request for the resolution plan and these actions will occur in parallel. Please remember the evaluation matrix and the information memorandum; they are very important for resolution applicants. Why? Based on the information memorandum and the evaluation matrix, they will provide the resolution plan.

Then, he will subsequently request the resolution plan. Then issue the final list of prospective resolution applicants after considering the objections. In the subsequent lessons, we will discuss who is not eligible to file a resolution application. Therefore, even the resolution professional, with the consent of the COC, will establish specific criteria. So, they will verify whether everyone has met the criteria or not. Once that is done, if any objections are received, they will issue the final list of prospective resolution applicants.

Now, we know who all the people are who will compete with each other to file a resolution application. Then, after that, the submission of the resolution plan. Once the resolution plan is submitted, they will examine it. The resolution professional, along with his other professionals, generally has the power to appoint various officers as per the law. With the help of other officers, they will verify and examine the resolution plan. Then, they will present it before the COC. Then, they will put it up for a vote. Once it is done, subsequent events will occur. Okay, so these are all the various stages. How will it happen? Okay, it was explained in the case of Amritvani Exim Private Limited versus Ajanta Offset and Packaging Limited. The Delhi Bench of the NCLT has laid down the stages. There are total of eight stages.

Now, let us look at the key provisions of Regulation 36A. The first one is the invitation for the expression of interest. So, the resolution professional must invite expressions of interest from the potential resolution applicants. The invitation must be published in the newspapers. Please remember that whenever they are talking about publication, the thumb rule is that you must publish in one English newspaper and one in a vernacular language in a place where the registered office of the company is situated, with wide circulation. So, having wide circulation is a question mark again. The resolution professional must invite expressions of interest from the potential resolution applicants. The invitation must be published in newspapers and on the IBBI website. It must be issued within 75 days of the insolvency commencement date. The invitation should clearly specify the eligibility criteria. When you are inviting, you should clearly state the eligibility criteria and what you expect. It must then be published in the newspaper and on the IBBI website as well. Then the contents of the invitation.

Let us discuss the contents. The invitation must include the necessary information. Details of the corporate debtor, that is, name, business activities, date of incorporation, industry, etc. So, why? Because when you are inviting, you should disclose information about your company; only then will resolution applicants or prospective resolution applicants come forward, as is the case. Therefore, it is essential to disclose the corporate debtor, including its name, business activity, date of incorporation, industry, industry structure, and all relevant details. The eligibility criteria for the applicants can be based on financial, technical, or legal aspects. What are all the eligibility criteria? We are ensuring that only serious applicants can participate. Why are we establishing the eligibility criteria? To ensure that not everyone is participating. Only those who are genuinely serious and meet the eligibility criteria should be allowed to participate. Otherwise, what happens? You will end up receiving so many applications that may not be useful.

Then, the last date for submission of the expression of interest is. It should be noted that at least 15 days should elapse between the date of the invitation and the event. When you invite people to express interest, there must be a minimum gap of 15 days. Then,

penalties and disqualification, along with any restrictions applicable to applicants, including ineligibility under section 29A. So, if Section 29A is in place, are there any penalties imposed or restrictions? So, these things must be included in the invitation. Under other conditions, the EOA must be unconditional. The applicant must provide the necessary undertakings and documents. So, whenever he submits, the necessary undertakings are in place. Therefore, we will also examine the form level. At the form level, we will examine the form. So, these things must be given. Then, the submission of the expression of interest. Once the EOA is given and the invitation is issued, the expression of interest will be submitted. The interested applicants must submit their expressions of interest before the deadline. So, in the invitation, we will specify the deadline. Within that period, you are required to submit your expression of interest. Then this expression of interest must include that whoever is making an application is eligible; otherwise, they must meet the eligibility criteria set out in the announcement, because when you are inviting, you are prescribing the eligibility criteria. Therefore, the eligibility criteria as prescribed by the COC exclude those who are not eligible under Section 29. These criteria must be satisfied, and you should provide a declaration that the applicant meets the eligibility criteria set by the RP. The RP will set the eligibility criteria in consultation with the COC, and you must confirm that you are complying with Section 29. These criteria disqualify certain applicants, such as promoters of defaulting companies and discharged insolvents. Therefore, certain categories of people are not eligible to make an application. Therefore, please confirm that I am not disqualified and that I am eligible. Additionally, any other information that may be required by the resolution professional must be provided. Then, once that is done, you will prepare a provisional list.

So, RP prepares a provisional list of eligible applicants within 10 days. Once the expression of interest and submission deadline are completed, he is supposed to prepare the provisional list within 10 days. Any applicant who is excluded from this list can raise an objection within 5 days. If someone is excluded, a provisional list will also be made available to the public. If anyone has any objections, they can raise them within 5 days. So, after considering the objection, the final list of eligible applicants is published within 10 days. So, then, subsequent to that, how to publish? So, in one of the case laws, there is Dr. Periyasamy Palani Gounder versus Mr. Radhakrishnan Dharmarajan R.P. Appu Hotels Limited. In this case law, the NCLAT held that the publication must be made in Form No. G.

We will also examine form number G. Please note that the publication of Form Number G is mandatory. So, if you fail to publish in Form Number G, it amounts to a material irregularity. In this case law, it was held that Form G is mandatory; you cannot escape from completing Form G. Then, you are supposed to complete the publication in Form G; we will review Form G. You should not be disqualified under Section 29A. Let us now

examine form number G, which is an invitation for the expression of interest in the name of the corporate debtor, operating industry type, and locations. The relevant information includes the name of the corporate debtor, the bank address, the website URL, the location of the majority of the fixed assets, and the installed capacity of the main products.

Suppose there is a thermal power project, then you are supposed to state the installed capacity. The cement industry has an installed capacity. Then, the quantity and value of the main products and services sold in the last financial year, as well as the number of employees and workers, are considered. Further details, including the last available financial statements, are available with schedules for the past two years. The list of creditors is accurate, so it must be updated and uploaded.

Then, the updated URL must be provided here. Then, the eligibility for a resolution applicant may be financial eligibility or technical eligibility. You have to stay here. Then the last date for receipt of expressions of interest, the date of issue of the provisional list, and the last date for submission of objections to the provisional list, if any. The dates of issue for the final list of prospective resolution applicants and the information memorandum will be provided once the final list is completed. You will then be given the opportunity to request the evaluation matrix for the resolution plan. Based on the information memorandum evaluation matrix, the proposed resolution applicants will submit the resolution plan. Then, the last date for submitting the resolution plan and the process email ID to submit the expression of interest is confirmed. These are all the basic data to be provided in Form G.

Now, let us discuss the detailed limitations. Regulation 36A(4). The duties of the RP are as follows: Section 25(2)(h) provides that he is required to invite prospective resolution applicants who fulfill the criteria as may be laid down by him with the approval of the committee of creditors. As we have already discussed, Regulation 25, Section 25(2)(h) stipulates that anyone who fulfills the criteria must be invited to apply. Then, having regard to the complexity and scale of the business' or corporate debtor's operations, and such other conditions as may be specified by the board, a resolution plan should be submitted. Therefore, Regulation 36A stipulates that the resolution professional is obligated to invite prospective resolution applicants who fulfill the criteria and also those who are not disqualified under Section 29A. Then, in one of the case laws, namely Mr. C. Raja John versus Mr. R. Raghavendran, RP of Springfield Shelters Pvt. Ltd., the NCLAT held that the RP can lay down certain criteria for inviting prospective resolution applicants who fulfill such criteria. The RP will revise the criteria, and please note that this criterion must be approved by the COC. Therefore, only those who satisfy or fulfill the criteria will be eligible to receive the applications.

Then, in another case, Law Binani Industries Limited versus Bank of Baroda, the NCLAT held that the CoC, RP, and resolution applicants are bound by the process documents prepared under Section 25(2)(h) because, under Section 25(2)(h), you are going to give an invitation where you are going to state the eligibility criteria and other details, such as what should be satisfied, etc. Therefore, based on the invitation, if someone expresses interest and submits a resolution plan, which is approved by the CoC, the CoC resolution applicant is bound by the process documents prepared under Section 25(2)(h). Then, does the CoC have the power to modify an invitation for expression of interest? Yes, okay. So, under regulation 36A, 4A of the CRP regulations, which provides that any modification in the invitation for expression of interest may be made in the manner in which any initial invitation for expression of interest was made, provided such modification shall not be made more than once.

Can you make the changes, please? Yes. You can modify how you prepare the original document, which is the original invitation, in the same manner; you can also prepare a modified version. However, this modification cannot be done more than once, so you only have the option to change or modify the invitation for the expression of interest once. Then, in the case of Amit Gupta versus Yogesh Gupta RP and in another case, Rakhi Agencies Limited versus Hemant Sharma RP for White Metals Limited, the NCLAT held that the time limitation and the timeline for submission of EOA cannot be extended. You have only specified the time limitation in the invitation. So, this cannot be extended. So, once someone submits the resolution application, if you receive it after the stipulated time limitation, it must be rejected. So, you must adhere to the limitation period. Therefore, if any submission is made after the time limit prescribed in the invitation, please note that you are required to reject the application. Okay, then, the manner in which expressions of interest should be submitted.

Okay. So far, we have discussed how to extend the invitation, then, once the invitation is done, how do we submit the expression of interest? So, Regulation 36A(7) provides for this. So, 36A(7) provides that an undertaking by the prospective resolution applicant is that it meets the criteria specified by the committee of the creditors. So, when he is giving an expression of interest, he should provide a declaration or an undertaking that he satisfies the eligibility criteria and is not disqualified under section 29A. The relevant records demonstrate that the eligibility criteria have been met. So, suppose you are adjusting the eligibility criteria to include financial criteria, such as a certain level of turnover. In this case, you must submit evidence to demonstrate that you have the required turnover. Perhaps you could submit the latest audited financial statements, as they would be the relevant evidence. So, relevant records of evidence must be submitted along with the expression of interest. An undertaking by the prospective reservation applicant that it does not suffer from ineligibility. Please remember that whenever you submit an EOI (Expression of Interest), one thing you must state is that you are eligible.

Another thing you have to state is that you are not disqualified under section 29A. So, these two things must be satisfied, and when you are stating that you are eligible, you are supposed to give evidence for that. Then, relevant information and the cost must be included to enable the reservation professional to evaluate these things, and an undertaking by the prospective resolution applicant that it shall inform the resolution professional forthwith if it becomes ineligible. Please remember that when you express interest, you are eligible; otherwise, you are not disqualified. Suppose in the near future he becomes disqualified; then you should give an undertaking that if he becomes ineligible at any time during the CRP process, he should inform the resolution professional.

Then he should give an undertaking that, as a prospective resolution applicant, every piece of information or record provided in the expression of interest is true to the best of his knowledge. Providing true and correct information, as well as disclosing any false information or records at any time, will render the application ineligible. Therefore, if it is proven that any information given is false, the applicant will become ineligible. Thus, he undertakes that he is prepared to accept ineligibility. Then he should provide an undertaking that he will maintain confidentiality, because when filing an application, you will receive a lot of confidential information from the company.

Therefore, you should give an undertaking that you are not going to use such confidential information with any person. You are not going to share this information, and you are not supposed to gain any undue advantage. Therefore, it may cause an undue gain or undue loss to itself or any other person. So why? Because you are not supposed to disclose information, these are all confidential. Generally, we prefer to have an NDA agreement, also known as a non-disclosure agreement, in place so that no resolution applicant or prospective resolution applicant will disclose information they received as part of the resolution process.

Then, the resolution professional has obligations to conduct due diligence. So, once he receives the expression of interest, he is supposed to do the due diligence. What is he supposed to do? Regulation 36A(8) provides that the resolution professional shall conduct due diligence based on the material information or material on the record in order to satisfy himself that the prospective resolution applicant complies with the provisions of section 2(h) and 25(2)(h), that is, whether he satisfies the eligibility criteria. So, how to verify? Based on the application submitted by him, verify the financial statements provided to determine whether he meets the financial requirements, turnover requirement, capital requirement, and eligibility criteria related to technical qualifications. Is he having the technical eligibility? Please verify.

Then, please verify whether he is disqualified under Section 29A. Other requirements may be specified in the invitation. Therefore, he must verify this data. Okay for due diligence anyway; he is supposed to ask the prospective resolution applicant to submit any further information as may be required whenever we require it. Then, in one case, there is Arcelor Mittal India Pvt Ltd vs. Satish Kumar Gupta. In this case, the Supreme Court held that the RP shall undertake to present all resolutions planned for the meeting of the COC. Therefore, please note that once the expression of interest applications are received, the RP shall conduct due diligence. Once the due diligence is completed, he should present all the resolution plans before the COC. In another case law, Sharavan Kumar Vishnoi vs. Upma Jaiswal, the NCLAT held that the opinion of the RP is only prima facie and preliminary in nature.

Why? Because, based on the due diligence, he must be forming some professional opinion. This opinion is only a prima facie opinion, so it must be presented to the COC. The commercial wisdom of the COC is final, so the decision is to be made by the COC only. ROC cannot make any decisions; ROC is there only to verify, conduct due diligence, and submit the resolution plans. All resolution plans should be presented to the committee of creditors.

The committee of creditors is responsible for making the decision. According to Regulation 36A(10), the resolution professional shall issue a provisional list of eligible prospective resolution applicants within 10 days of the last date for submission of expressions of interest. Once you receive the expressions of interest, you are supposed to prepare the provisional list. Then, subsequent to that, Regulation 36A-11 provides that any objection to the inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in Sub-regulation 10 may be made, accompanied by supporting documents, within 5 days. Within 10 days, he will issue the provisional list, and then, within 5 days, if any objections are raised, you can address them on the provisional list. Then, 36A-12 provides that, upon considering the objections received under sub-regulation 11, the resolution provider shall issue a final list of prospective resolution applicants. Once the expression of interest is completed, the provisional list is compiled, objections are received, and then you will prepare the final list. The final list will be provided within 10 days of the last date for receipt of objections to the committee. The list is now ready; you will then invite them to present their resolution plans. Let us recap what we have discussed today.

In today's session, we discussed the invitation for expression of interest and how to extend it. We then discussed Regulation 36A of the CRP regulations in detail, including its purpose and the reasons behind its introduction. Then, we discussed the key provisions of Regulation 36A today. We then discussed the contents of the invitation, so whenever you are giving an invitation for expression of interest, we have covered what the contents should be. Then we have discussed the provisions relating to the submission of an

expression of interest. We then discussed the provisions relating to the provisional and final lists of resolution applicants.

Then, we have discussed how the resolution applicant and resolution professional are expected to prepare the provisional and final lists of resolution applicants. We then discussed the power of COC to modify an invitation for the expression of interest. So, we have discussed the question of whether COC has the power to modify the invitation. That means once the invitation for expression of interest is given, we have discussed whether COC has the power to modify the terms and conditions or the contents of the expression of interest.

We discussed that the COC has the power to modify the invitation for expression of interest. Subsequently, we discussed the RP's obligations to conduct due diligence. Whenever he is presenting the resolution, the professional is expressing interest, which is an invitation for others to do the same. When he receives expressions of interest from prospective resolution applicants, he is expected to conduct due diligence.

In today's lesson, we have discussed the concept of invitation for the expression of interest and shortlisting of prospective resolution applicants.

Thank you.