

Insolvency and Bankruptcy Law in India

Dr. A. Sridhar

NALSAR University of Law, Hyderabad

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Lecture 28

Welcome, everyone.

Today, as part of the course on Insolvency and Bankruptcy Law in India, we will discuss the concepts of Information Memorandum, Request for Resolution Plan, and Evaluation Matrix. Before that, let us review what we have previously discussed.

In the previous classes, we have discussed the powers of the committee of creditors and other relevant topics; now we are focusing on the information memorandum. Under the Insolvency and Bankruptcy Code, the information memorandum is a critical document prepared by the resolution professional to provide comprehensive details about the corporate debtor's financial and operational status. So what is the significance of the information memorandum? The information memorandum is a document that describes the corporate debtor in simple language and contains details about its financial status and operations, enabling the resolution applicant to make an informed decision based on the information provided. The contents and preparation of the information memorandum are governed by Section 29 of the IBC and Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Simply, it is also called the CIRP Regulations. The provisions relating to the Information Memorandum are found under Section 29, read in conjunction with Rule 36 of the IBBI CIRP Regulations. Therefore, the Information Memorandum is considered one of the essential documents in the CIRP process.

Now, let us discuss Section 29 of the IBC. Section 29 of the IBC provides that the resolution professional shall prepare an information memorandum in a form and manner that contains relevant information specified by the board for the formulation of the resolution plan. So, Section 29 casts a responsibility on the resolution professional. If you observe Section 29, the resolution professional shall prepare an information memorandum. We now have the formats available, and we will subsequently discuss the contents of the information memorandum. Having such content, he is supposed to prepare the resolution plan. For the purpose of the resolution plan, he is required to prepare the information memorandum, as the resolution applicant will base the resolution plan solely on the information memorandum. Then, in subsection 2, the resolution professional shall

provide the resolution applicant with access to all relevant information in both physical and electronic form, provided that the resolution applicant undertakes to comply with the provisions of the law in force at the time relating to confidentiality and insider trading. To protect any intellectual property of the corporate debtor that it may have access to and not to share relevant information with third parties unless clauses a and b of this subsection are complied with. So, what they are saying is that, based on the information memorandum, generally, the resolution professional, when asked by the resolution applicant or a prospective resolution applicant for any information, responds that, unless the resolution applicant has detailed information, they generally cannot prepare a resolution plan. Therefore, when the resolution professional shares information about the company, it can be done in either a physical or electronic format, depending on the circumstances.

Then, please remember that whenever any information is shared by the resolution professional with the resolution or prospective resolution applicant, they are required to maintain confidentiality and refrain from engaging in insider trading. So what is this insider trading based on? Suppose the corporate debtor happens to be a listed company; then, based on the information received from the resolution professional, the resolution applicant or the prospective resolution applicant is not supposed to trade in the stock markets, okay? So, he is supposed to maintain confidentiality; that is, he is supposed to enter into an NDA agreement, refrain from engaging in insider trading, and protect the intellectual property of the corporate debtor. Why? Because, as part of the information memorandum, he is going to share a lot of information that is crucial for intellectual property. Therefore, the resolution applicant is supposed to protect the intellectual property of the corporate debtor. The explanation for the purpose of this section is relevant information. Relevant information means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information relating to disputes by or against the corporate debtor, and any other matter pertaining to the corporate debtor as may be specified.

As shown in the previous slide, in subsection 1, the resolution professional shall prepare an information memorandum in a form and manner that contains relevant information. They have used the term “relevant information.” Then, what is considered relevant information means anything related to the company’s financial position. When I say that the financial position of the company can be represented by a balance sheet, a cash flow statement, or any other relevant document. Under the Companies Act, we have books of accounts and financial statements. Relevant information can include books of accounts and financial documents, such as financial statements. Okay, so books of accounts include your ledgers and vouchers; everything is included within the meaning of books of accounts. Whereas financial statements include your balance sheet, profit and loss

account, and cash flow statements. All such information is considered to be relevant information for the purpose of this section. Relevant information includes financial information and disputes involving the corporate debtor. So the possibility is there. Against the corporate debtor, someone may have filed a case. So, if someone files a case and wins, there is a possibility that the corporate debtor may end up paying substantial penalties. Otherwise, the corporate debtor filed a case against a third party. If they are going to win, legal consequences will always be present. Therefore, these legal consequences will impact the resolution plan. That's why you are supposed to provide information related to the financial position and disputes, or any other matter, depending on the circumstances, that is important for framing the resolution plan. Then, if you observe the entire section, you will understand that section 29 of the IBC mandates the RP to prepare the information memorandum in such form containing relevant information as may be specified by the IBBI, because the IBBI, by framing the regulations, has already specified the format in which you are supposed to prepare the information memorandum. Therefore, if you read Section 29, you will understand that the resolution professional is required to prepare the information memorandum in the form and manner specified by the IBBI.

Now, let's examine the levels of regulation. Regulation 36 of the IBBI outlines the details and contents of the information memorandum. The details specified in the information memorandum include the information we are required to provide. Assets and liabilities, along with their values, are required in the information memorandum. You are expected to provide details of both assets and liabilities. What is the asset value? What is the liability value? What is their value? Along with the depreciation of assets, you are also expected to provide details about the depreciation. Then, you are expected to give the financial statements of the preceding two years. I have already explained the meaning of financial statements: financial statements comprise the balance sheet, profit and loss account, notes that support the balance sheet and profit and loss account, and cash flow statements. So this is included within the meaning of financial statements. For the last two financial years, you are supposed to provide the financial statements. The list of creditors and their corresponding amounts.

Then details of guarantees and contingent liabilities should be provided, so if the company has any contingent liabilities and if the company has given any guarantee in favor of any other person, because there is a possibility that if you give a guarantee in favor of another person, then in the near future a liability may arise, which is a contingent liability that may or may not occur. That's why you are supposed to give the details of guarantees and contingent liabilities. You are then expected to provide the operational details, including business models and key contracts. In some cases, a few companies have contracts that are extremely large, contributing more than 50 or 60% of their revenue. So that's why, if such contracts are there, you are supposed to give the

information about those key contracts, because these key contracts are contributing to a substantial part of your revenue. Okay, so that's why you are supposed to provide these operational details as well. Let us then discuss the key contents of the information memorandum that should be included.

The first part of the information memorandum is the corporate debtor details. So what are the corporate debtor details? Corporate debtor details include your company name, CIN number, corporate identification number, registered office, and basic data, such as the company's address, phone number, and email ID. Then you are expected to give the financial information. When providing the details of the financial statements, you are expected to include your net profit, profit before tax, profit after tax, total cash flow, total revenue, tax expenditure, total expenses, and total income. Therefore, everything you are required to provide is financial information.

Then, provide operational and business information, including details about your operational activities and business information. What is the core area where you are working? Okay, who are your core customers? Sometimes it is possible. The company may have only a few customers, so in such cases, you are expected to provide details about these customers as well. Then, the debt structure and creditor details, so you are expected to give the details about the debt structure. So, in the debt structure, you may have various categories of debts. In debt capital, you may have debentures, loans, bank loans, or deposits; various categories are available. You are expected to provide details about the debt structure. You are then expected to provide details about the litigation and contingent liabilities. If any cases are filed by the creditor, corporate debtor, or if any case is filed against the corporate debtor, you are also expected to provide details about this litigation.

Then, key employees and management information are expected, so you are required to provide information about the key employees. Okay, when I use the term "key employees," you may consider KMP, or key managerial personnel. Generally, key managerial personnel include your board of directors, your managing director, your whole-time director, your manager, and your C-level executives, such as the CEO, CFO, COO, depending on the company, as well as your Company Secretary. So, all these people will be included in the KMP. You are expected to obtain the approval of key employees, who serve as the foundation for the company, so that the Resolution Applicant can assess their input, depending on the employees.

Then, you are supposed to provide details about the resolution process. How is the process going? What are the timelines? In the previous classes, we discussed the various timelines within which you are expected to submit and complete your work. The resolution process, timelines, and bid requirements are also included. You are expected to provide the bid requirements. Then there is other material information. So here, the

material information is subjective in nature. Depending on the circumstances, you must interpret; therefore, based on the company's relevant information, you are required to provide details about it. Let me take one example: suppose we consider a thermal power plant. In the case of a thermal power plant, your material information can include who is supplying the raw material, that is, who is supplying the coal, and with whom you have an agreement for the distribution. Why? Because when power is generated, it is not transmitted. The transmission will always be done by the transmission company, which is Transcos. The government has Transcos, so there will be separate Transcos in each state and region. With whom are you entering into an agreement? With whom do you have an agreement to supply the coal, and with whom do you have an agreement to get the water supply? Unless you have the water supply, generally, that's why in the majority of cases, thermal power plants are established near the sea or near rivers. Why? Because you are expected to have the water supply. So, where are you getting the water supply from? These are the basic details that need to be provided. That's why you are expected to provide all this material information.

Then, there is confidentiality and access. This is very important. Please remember that whenever a resolution applicant is applying for information or needs any information, as discussed in Section 29, the Resolution Applicant must sign a confidentiality undertaking. Generally, it will be in the form of an NDA. So, because the Resolution Applicant is accessing the data that belongs to the corporate debtor. Therefore, the Resolution Applicant is expected to sign the document stating that they will not disclose the information they have received as part of this to any other third party. So, the resolution applicant must sign a confidentiality undertaking before accessing the information memorandum, ensuring that sensitive information is protected. That is the basic objective of the NDA agreement.

Let us then discuss a few practical aspects of preparing the information memorandum. Here are a few practical tips to consider when preparing an information memorandum. So, first is data collection and verification. Whenever you are preparing the information memorandum as a resolution professional, you are expected to collect and verify the data. From various sources, he can collect the data; for instance, he may obtain it from the ROC, which is the Ministry of Corporate Affairs, or conduct a public inspection. When conducting the public inspection, if any forms have been filed with the Registrar of Companies and uploaded to the MCA website, all documents can be verified. All documents can be downloaded through public inspection, which is one mode. Another mode is to download the data or obtain it from the information utility. So this is also one of the modes. In that way, you can obtain the data from the board of directors. In this way, you can obtain data from various sources. Therefore, data collection is one of the primary tasks that you are expected to undertake. Then, subsequently, the data that you are getting is supposed to be verified. Verification is also very, very important. Then,

classification and treatment of claims. As we have already discussed, creditors can be categorized into two types. Financial creditors and operational creditors; even among financial creditors, various categories can exist, resulting in multiple classes.

So, whenever you are receiving the claims from the previous classes, we have discussed how to make a public announcement, okay? After the public announcement, how to claim the amount by the operational creditor and the financial creditor, and the various categories of claims we have discussed in the previous classes. So, based on the information, the resolution professional is supposed to segregate the information. You are responsible for classifying and treating claims. then confidentiality and information access. Whenever you provide information to a resolution applicant, please ensure that you are expected to enter into an NDA agreement. Because the information that he has received must not be disclosed to a third party. because if he discloses to a third party, it may adversely impact the company's interests. So that's why you are supposed to ensure that confidentiality and information access are maintained. Then, consider treatment of operational aspects: whenever you are preparing an information memorandum, please also consider the operational aspects. How are you going to handle the operational aspects? So, if you want to continue the business, some essentials may be supplied to you. Then, how will you deal with those essentials? These factors must be discussed and considered whenever you prepare the information memorandum. Then asset valuation and disclosure.

In the next class, we will discuss asset valuation in detail. So, how do we do the asset valuation? What is the methodology to be followed regarding whether you need to appoint the valuer or not? These topics will be discussed in the subsequent lessons. In the next lesson, we will discuss. Before preparing the information memorandum, you are expected to conduct the asset valuation and disclosure. Generally, whenever the company is preparing the annual report, you are going to disclose your assets and liabilities in the form of notes to the balance sheet and profit notes to the balance sheet. The profit and loss account typically only includes income and expenditure, whereas the balance sheet encompasses all assets. This valuation can be identified from the notes attached to the balance sheet. Then, subsequent to that, even under Section 134 of the Companies Act, when you observe Section 134 of the Companies Act, the board of directors is expected to provide a report called the Director's Report. In the director's report, they will also provide disclosures; please observe the disclosures made by the board of directors. So, this is another important aspect.

Then, litigation and contingent liabilities. Whenever you are preparing the information memorandum, let's call it an IM. In the information memorandum, you are supposed to give details about the litigation, whether the company has filed any case against any other person, or whether any other person has filed a case against the company. These things

must be considered, and they should be disclosed in the IM. Then, to ensure compliance with the IBBI regulations, please note that, prima facie, it is the responsibility of the Resolution Professional to ensure that they are complying with the IBC. So, IBBI, when you are preparing the information memorandum, detailed rules and regulations are there. What is to be disclosed, what is not to be disclosed, and how many days are you supposed to take? For all these things, the IBBI has rules and regulations, so ensure that you are also complying with these regulations. The presentation and structure for resolution applicants. How are they supposed to present? How to structure the resolution plan. So you may be expecting something. Please provide details about your expectations as well. Then, digital data rooms are available for resolution applicants. So please provide the digital data rooms for the resolution applicants. Then, handling of post-IM disclosures and updates. So, post once if you give the data in the information memorandum. So post disclosure. How will you handle the post-IM disclosures? Therefore, something is already communicated to prospective resolution applicants about how you plan to handle this. How will you provide updates on this? So these things must be considered before preparation. Why? Once you issue the information memorandum, you cannot take any further action. Before issuing or preparing the information memorandum, you are expected to observe and plan in advance regarding all these matters.

Then, let us discuss a few other important aspects in the information memorandum. Assets and liabilities, including contingent liabilities, are generally necessary for ascertaining their values as of the insolvency commencement date. When providing information or preparing an information memorandum, you are expected to include details regarding assets and liabilities. Therefore, when providing details of assets and liabilities, you are also expected to include details of contingent liabilities. So, a contingent liability means that there is currently no liability, but we are uncertain whether it may arise in the near future. It may not arise. Therefore, liability may or may not arise. So, in the case of Kushal, the NCLAT, in a limited case, held that the word 'description' is used because, as you can observe from the heading, that is why I have kept the heading as such. If you observe the second line of the heading, with such a description. So, what is the meaning of such a description? The word description includes the details, such as the cost of acquisition. When you provide details about the assets and liabilities, what is the acquisition cost? Perhaps appreciation is present, or depreciation is present. Generally, in the case of flats, appreciation may be present, but in the case of other assets, depreciation is typically observed. So that's why you are expected to provide details regarding the cost of acquisition and other useful information, such as the identification number and the depreciation of the charge. So, you are supposed to provide the identification number as well as the depreciation. How much depreciation is there? Everything you have to do so that the prospective resolution applicant can understand the real and exact picture of the assets.

Then, in another case law, Punit Kaur versus KV Developers Private Limited, the NCLAT held that the term “liability” includes the liability to pay money or money’s worth. So, what is the meaning of “liability” here? Liability refers to the obligation to pay money or its equivalent. Sometimes, you may be liable to pay something; sometimes, you may be liable to transfer something. You may not pay money, but instead, you are paying something else. That is called money’s worth, and it includes liability for breach of trust or any liability under contract, tort, or bailment. There is a possibility in a contract that if you breach any provision, you are required to take a specific action. So even in the case of a bailment contract, and even in the case of torts. So ‘tort’ means a civil wrong. In the cases of tort, bailment, and contract, as well as breach of trust, there is a possibility that the corporate debtor may be liable to pay damages. So, he is liable to do something. So that is the meaning of liability when they use the terms assets and liabilities. Okay, so I think you are clear with the meaning of such a description, the word such a description that is used in the section, and the liabilities that are used in the section. Now they have used another word. The latest annual financial statements and audited financial statements are the corporate debtor. So, they have used our latest financial statements.

Then, in one of the cases, the State of Karnataka versus Alok Kailash Saxena. So, in this case, the NCLT Bengaluru bench held that the resolution plan is not an asset takeover. So, though in the previous slide, we discussed that in the information memorandum, you are expected to give the details about assets and liabilities, But only with assets and liabilities. We cannot proceed unless you provide the detailed financial statements. That is why I have used the term “financial statements” as seen in the section regarding the jet, where they also use the term “financial statements. So, why, if you are only considering asset value, would it not make sense, and can you not make an informed decision? That’s why giving asset value is not sufficient, because the resolution plan is not just an asset takeover; they are not only taking over the assets, but also the business. That’s why, in other words, the viability of the business is more important than its asset value. That’s why providing financial statements is mandatory to make an informed decision. So why do we need to give the financial statements? If I provide the financial statements, you can understand the assets, liabilities, cash flow statements, how cash is coming in and going out, and other liabilities, as well as how depreciation is accounted for. How are you? Even if you observe the financial statements, the auditor must have made some comments. So whether you are maintaining proper inventory management or not, whether your company’s inventory management is effective or not, he must have met some qualifications. Okay, so then all these things you can understand based on the financial statements, because the financial statements also include your auditor’s report. Therefore, in the auditor’s report, if CARO is applicable, the company’s auditor must include some comments. These comments are essential for understanding and making a proper, informed decision about whether to acquire the company or not. That is why you are supposed to provide the financial statements.

Then, you are supposed to provide the creditors with a list of their names, etc., so in the case of *Brothers Lorry Transport Service versus Emptee Distilleries Limited*, the Supreme Court held that. So, while preparing the list of creditors, it is very, very essential. Why? Because creditors are the individuals who actually file a case or who might have initiated the case. So, when you are settling the amounts, especially when discussing the waterfall mechanism under Section 53. First, creditors will receive the money. Before that, however, the resolution cost must be paid. Therefore, we will pay the resolution cost first. Subsequently, you will pay the amount to the creditor. Therefore, the resolution professional must take utmost care to include all claims in the information memorandum, as we have already discussed in previous classes, since both the financial creditor and operational creditor can submit their claims. So, the resolution professional shall compile and collate. We have already used these words. He must compile and collate all the claims in the information memorandum without fail, and he should avoid any pending claims on his end in consideration of the claims. If any claim comes to the office, he is not supposed to keep it pending. So, he should consider everything and try to include, depending on the nature, that he cannot claim to maintain all the claims in one place; therefore, segregation must be done.

Then, suppose the provident fund, gratuity fund, or other funds are maintained by the corporate debtor; will they be included in the assets? No, because the provident fund, gratuity fund, and other funds, although maintained by the corporate debtor, belong to the employees. That's why whenever you are presenting your assets and liabilities, as discussed in the previous slide, the information memorandum should provide details of both. So, when you provide the details of the assets. It is possible that the corporate debtor is maintaining the funds at times. Those funds are available, but they do not belong to the corporate debtor. That's why the provident fund, gratuity fund, and other funds maintained by the corporate debtor are not to be included in the assets of the company. They are not part of the corporate debtor's assets.

Then, whenever you request a resolution plan, these are the common steps to follow. First, set a time limit for seeking any clarifications from the resolution professional. You are giving the information memorandum, and you are seeking the resolution plan. So if a resolution applicant or prospective resolution applicant wants to seek any clarification, you should set the time limitation within which you are supposed to give it, and you are also supposed to give the evaluation matrix. In the next lesson, we will discuss the evaluation matrix. You are expected to provide the evaluation matrix or any other related information to the CRP. Then, set the time limit for issuing such clarifications. So when you are asking, or when the resolution applicant is asking, within what time, or I mean, what is the time limitation within which the resolution professional has to give the clarification?

Then, the confidentiality agreement is in effect, so you are expected to enter into it. Then, the manner in which the resolution plan should be submitted, how to submit the resolution plan, and the time within which the resolution plan must be submitted; and in the previous classes, we have discussed that if any resolution plan is submitted after the expiry of the period, then that need not be taken into account. That's why I am asking about the time limitation for submitting the resolution plan; everything must be included in the information memorandum. The documents that should be submitted along with a resolution plan must also be included. If you have any additional documents, they should be submitted with the resolution plan. The format of declaration affidavits is acceptable, as we have already discussed in previous classes under Section 29A. Certain categories of people are disqualified from being resolution applicants. You are supposed to give a declaration that you are not disqualified. Specific formats must be provided. Then, there is a requirement to submit any performance guarantee upon the approval of the resolution plan. Once the resolution plan is approved, the resolution applicant should ensure that he is implementing the resolution plan. In that process, he may also have to provide the performance guarantee. Then, the condition based on which the CoC will negotiate is important because once the resolution plan is submitted, the CoC will start negotiating with the resolution applicants. There must be some conditions; they must have had certain checklists, maybe, that are there based on which they are going to negotiate with the resolution applicants you are supposed to specify. Okay, so you are supposed to provide the evaluation matrix and criteria for evaluating the score of the resolution plan. Alternatively, other conditions, such as the write-off of the COC to scrap the process and reject the resolution plan, are also possibilities; they can scrap the entire process and opt for liquidation.

Then you are supposed to give the evaluation matrix. So what is this evaluation matrix? There is a definition of the evaluation matrix, which includes the parameters to be applied and the manner of applying these parameters, as approved by the committee for consideration of the resolution plan. So, whenever the resolution plan is submitted, there must be some evaluation metrics. Without evaluation metrics, you cannot assess. That's why they are going to adjust certain parameters. Therefore, these parameters are considered evaluation metrics. In the case of IMR, Metallurgical Resources AG versus Ferro Alloys Corporation Limited, the NCLAT held that the approval or rejection of the resolution plan would depend on commercial wisdom. Please remember that they will assess based on the evaluation matrix. Based on the evaluation matrix, if COC has made a decision, it cannot be questioned. Why? Because the commercial wisdom of the COC is paramount, as we have already discussed and continue to discuss from the beginning. The commercial wisdom of the COC is paramount. So that's why we cannot question anything based on that. Then, in another case, PNC Infratech Limited versus Deepak Maini, the NCLAT held that the bidder who came in second is selected. There is no

contravention because it is up to the COC. So, maybe the first bidder is selected, and the second bidder may be selected. It is up to the discretion of the COC.

Now, let us recap. So, what have we discussed till now? So far, we have discussed what an information memorandum is. Then, we have already discussed the contents of the information memorandum. Then request a resolution plan. When requesting a resolution plan, what are the common points to consider? The common steps involved in requesting a resolution plan are what we have discussed. Then we discussed the evaluation matrix.

Thank you.