



DISPUTE MANAGEMENT  
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CORPORATE  
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ENVIRONMENT

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TMT

IPR

REGULATION &  
PUBLIC POLICY

REAL  
ESTATE



**HAMMURABI  
& SOLOMON**  
Advocates & Corporate Law Advisors

**ADVICE NOTE**

**ON**

**RIGHTS OF OPERATIONAL CREDITORS**

**IN**

**CORPORATE INSOLVENCY RESOLUTION PROCESS**

**LEGAL**

**STRATEGY**

**PUBLIC POLICY**

**REGULATION**

1. The following advice on the process and rules pertaining to the Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 is extended with the view to presenting and elaborating upon the safeguards and legal recourses available to Operational Creditors:

- a. That of relevance are certain key clarifications and confirmation as laid down by the Hon'ble Supreme Court of India in *ArcelorMittal India Private Limited vs. Satish Kumar Gupta and Ors.* AIR2018SC5646 and the strategic relevance of the same is :
- i. Rule: No litigation against a Resolution Plan can be entertained prior to approval of the same by the CoC and the NCLT.

Relevance: In view thereof, it is advised that the Operational Creditors maintain a close watch on the listing and subsequent hearing of the matter to understand the developments pertaining to the Resolution Plan.

- ii. Process: Once approved by the Committee of Creditors, the Resolution Plan is to be submitted to the NCLT under Section 31 of the Code. It is at this stage that a judicial mind is applied by the NCLT to the Resolution Plan so submitted, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.

Relevance:

- A. The provision under Section 30 of the Code protects the interests of the Operational Creditors by providing that a Resolution Plan shall provide for the payment of the debts of Operational Creditors in such manner as may be specified by the Insolvency and Bankruptcy Board of India ('IBBI') which shall not be less than the amount to be paid to the Operational Creditors in the event of a liquidation of the corporate debtor.
- B. To this effect the said provision casts a duty upon the Resolution Professional to present to the committee of creditors for its approval only such resolution plans which confirm the requirement in 'A'.
- b. That in furtherance of the above, the Section 30 of the Code further provides that the CoC will approve a Resolution Plan through 66% voting share of financial creditors only after considering its feasibility and viability and such other requirement as may be specified by the IBBI. To this effect, it is essential to note that the IBBI has laid down that the amount due to the Operational Creditors under a Resolution Plan shall be given priority in payment over Financial Creditors. Thereby requiring that payment of all amounts which are due to the Operational Creditors be made prior to the Financial Creditors and not just the liquidation value.
- c. Moreover, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 mandates that a Resolution Plan shall specify the sources of funds that will be used to pay the liquidation value due to

Operational Creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a Resolution Plan by the NCLT.

- d. That the said IBBI Regulations also provide that 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.

2. Right to Appeal:

- a. That, if however, the Resolution Plan as approved by the CoC and presented to the NCLT and as approved by the NCLT is not in conformity with the aforementioned principles and processes, the Operational Creditors will have recourse to challenge the same before the Hon'ble National Company Law Appellate Tribunal under Section 61 of the Code.
- b. That if not satisfied with the outcome of the aforementioned appeal before the NCLAT, the Operational Creditors will have the recourse to appeal before the Hon'ble Supreme Court of India under Section 62 of the Code.

3. That the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.* 2019SCOnline73 has noted that:

*“The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors’ rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended.”*

and conclusively held:

*“The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors’ rights, together with priority in payment over financial creditors.”*

4. In view of the above, it is advised that Operational Creditors scrutinize the Resolution Plan as being in line with the aforementioned principles to safeguard its rights and interests.
5. That in furtherance of the above, it is submitted for consideration of the Operational Creditors, that although further advice can be rendered only upon perusing and understanding the related specifics of the matter, it is essential for the Operational Creditors to contend – as and when required before the appropriate forums – the principle of ‘ensuring equitable treatment of similarly situated creditors’ as espoused in the UNCITRAL Legislative Guidelines on Insolvency Law, as have been relied upon and recognised by the Hon'ble Supreme Court of India, which essentially translates into that classes of similarly placed creditors in the disbursement waterfall under the Code ought to be treated equally.

## CONCLUSION

6. In light of the above legal advice rendered it is conclusively presented as under: -
  - I. That the Operational Creditors obtain, peruse, and scrutinize the Resolution Plan and ascertain whether the same is in conformity with the legal principles.
  - II. That the Operational Creditors, if not satisfied with the Resolution Plan, can challenge the same on certain grounds before the NCLAT.
  - III. That the Operational Creditors seek equitable treatment with similarly situated creditors as recognised by the Hon'ble Supreme Court of India.