

NEWSLETTER

GOVERNMENT SHOULD STALL INSOLVENCY PROCESS FOR REALTORS FOR 6 MONTHS, SAYS MR. MISHRA

The nation-wide lockdown amidst COVID-19 has affected operations of companies in almost all sectors, thereby disrupting their cash flows and their ability to repay bank loans. In an interview to MVIRDC World Trade Center Mumbai, Mr. Sudhir Mishra, Founder & Managing Partner of Trust Legal Advocates & Consultants provides an overview of the impact of this pandemic on different sectors.

Mr. Mishra feels that although all sectors are affected by this crisis, the impact has been severe on hospitality, banking and real estate sectors. In order to provide relief to real estate companies, Mr. Mishra suggests that applications for insolvency proceedings against fresh default by real estate companies should not be entertained under NCLT for the next six months.

Excerpts of the Interview:

- 1. The nation-wide lockdown has prevented many firms from fulfilling their contractual obligations. Can you share the challenges faced by some of your clients in this circumstance?**

Apart from the devastating impact that COVID-19 continues to unleash on human beings and countries worldwide, its outreach has also reached commerce and business. COVID-19 has resulted in lockdown or restricted movements in countries. Consequently, businesses have been impacted and so have operations and consequently contracts and obligations under contracts are being revisited to assess these impacts. Most of our clients belong to the health care sector including medical services and media & broadcasting sector and as a result, the impact on them is less drastic. However, for some of our clients who are in real estate sector and transportation sector, the impact of the same is earth shattering.

- 2. The government has made key amendments in the Insolvency and Bankruptcy Code (IBC) to prevent firms facing temporary liquidity stress from being pushed to insolvency proceedings. Do you feel the government can take more steps to provide relief to distressed firms?**

The finance minister has recently said that if the disruption caused by COVID-19 extends then it would suspend the use of the corporate insolvency resolution process for sometime. The threshold for defaulting companies under the Insolvency and Bankruptcy Code (IBC) has been raised, with immediate effect, to Rs. 1 crore from Rs. 1 lakh earlier. Earlier, creditors had the right to file a case under IBC if a company defaulted on payment of Rs. 1 lakh or above, now this limit has been raised to Rs. 1 crore.

The government made another amendment under IBC introducing a minimum threshold of 100 or 10% of the homebuyers, whichever is lower, to take a defaulting developer to the National

Company Law Tribunal (NCLT). There are more exemptions on its way so far as IBC code is concerned. The move preventing insolvency proceedings against MSMEs will help thousands of small firms that are spread across the length and breadth of the country. While on the one hand it would reduce the number of frivolous cases in IBC/NCLT, on the other hand it raises the bar to exclude the majority of MSMEs who could use IBC as a threat to seek payment of their dues.

3. Do you feel the COVID-19 will force many small and large companies to file for bankruptcies? Which are the sectors that may be the worst affected by the crisis and how?

In my opinion, it is a great decision to temporarily increase the threshold from Rs. 1 lakh to Rs. 1 crore for real estate specifically. However, to ensure the industries, especially MSMEs, are protected, the levels may have to be decided on the merit of each sector. For the real estate sector, it is very important that the NCLT processes should be stalled for the next six months for any new defaults due to COVID-19, given that we might see a spate of issues arising through NCLT itself. So far as the effect of COVID-19 is concerned, we all know that the automobile, hospitality sector, banking sector and real estate sectors are at front of the collapse of our financial stability. The other sectors that will also see severe impact include IT, NBFCs, textiles, capital goods, cement, construction, hospitals, oil marketing companies, gas, exploration & production and metals.

4. Many of our exporters raised concern that they may face penalties from their overseas clients for not being able to fulfill the contractual obligations amidst the lockdown. What are your suggestions for firms who have not explicitly mentioned force majeure clause in their agreements?

If an event or circumstance comes within the ambit of a force majeure event and fulfils the conditions for applicability of the clause then the consequence can be with subject to the specific cases, i.e., whether parties would get some relaxation from performing their respective obligations to be undertaken by them under the contract during the period that such force majeure events continue. Several manufacturing sectors, particularly those relying heavily on China for raw materials, such as pharmaceutical firms for their active pharmaceutical ingredients, conventional and renewable energy equipment manufacturers and suppliers, electronics and chemical companies, are witnessing unprecedented delay or uncertainty in the supply chain. Such companies might invoke the force majeure clause. If a contract does not include a force majeure clause, the parties would have to ascertain in light factors such as the nature of the contract, the nature of event and so forth, as to whether Section 56 of the Contract Act (which deals with agreements between the parties to do an impossible act), can be applied to such contract so as to discharge the parties from their contractual obligations. Again each case with its specific facts will decide why a contract is getting frustrated.

5. How is your firm supporting organizations that are facing similar challenges in this situation?

As a media and broadcasting law firm which also has a huge health care and climate change practice, we are shaping up the crisis management plan of most of our clients. In most of the cases we are spending considerable time with HR department of the companies and reassessing the contracts of all kinds. We are also advising on performance of contract with regard to other vendors and service providers.

Role of HR and legal teams has become critical in view of huge legal interpretation of COVID-19 related aspects, notifications and economic meltdown. In my opinion legal professionals are going

the extra mile to communicate with clients and ensure that they remain as available as possible during this emergency situation. As far as our own firm is concerned, our team is in continuous touch advising all our client by setting up a virtual office through video conferences and screen-sharing options. These methods help maintain a continuous link reassuring the clients.

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