ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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VOL IX | NO. : 9 | PG. 1-60 | September-October 2023

INSOLVENCY AND BANKRUPTCY JOURNAL

Strengthening Insolvency through technology

ICSI Institute of Insolvency Professionals (ICSI IIP)

Reach us @ Below

Registered Office:

Third Floor, ICSI House
22, Institutional Area, Lodhi Road
New Delhi 110 003

Corporate Office:

ICSI House, C 36, Third Floor, Sector 62, Noida 201 309
Tel: +91 (120) 408 2142
Email: info@icsiiip.in
Website: https://icsiiip.in/

Working Hours:

Monday to Friday
09:00 AM - 05:30 PM

For any query, feel free to connect at below provided Number/ Email Id

Department	Email Id	Direct Number
Enrolment & Registration as an Individual Insolvency Professional (IP)	enrollment@icsiiip.in	+91 74289 22988
Enrollment & Registration as IPE	enrollment.ipe@icsi.edu	+91 120 408 2142
Monitoring & Inspection/ Authorization for Assignment/ Compliance (IBC)	reporting@icsiiip.in	+91 120 408 2153 +91 96250 53525
Program	programs.icsiiip@icsi.edu	+91 120 408 2142
CPE	programs.icsiiip@icsi.edu	+91 120 408 2142
Research Initiative	research.icsiiip@icsi.edu	+91 120 408 2142
Education & Publication	research.icsiiip@icsi.edu	+91 120 408 2142
Grievance/ Complaint	grievance@icsiiip.in	+91 120 408 2142
Administration & IT	chakshu.gambhir@icsi.edu	+91 74289 22988

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From Chairman's Desk

"The safest principle through life, instead of reforming others, is to set about perfecting yourself."

– Benjamin Haydon

MESSAGES

Dear Professional Member(s),

The Insolvency and Bankruptcy Code (IBC) has undoubtedly been a game-changer since its implementation. It has brought about a significant shift in the Indian economy, streamlining the insolvency process and establishing a robust framework for resolving distressed assets. This landmark legislation has not only provided a structured and time-bound mechanism for debt resolution but has also instilled confidence in both domestic and foreign investors.

IBC has contributed to the growth of India's economy by fostering a culture of entrepreneurship and encouraging responsible business practices. It has enabled businesses to address their financial difficulties quickly and efficiently, allowing them to either restructure or exit the market in a timely manner. This has not only saved jobs but has also freed up resources to be deployed in more productive sectors, ultimately driving economic growth. Furthermore, the IBC has played a crucial role in attracting foreign investment to India. The transparent and predictable insolvency process established by the Code has increased investor confidence, as they can now navigate the Indian business landscape with greater certainty. The IBC has positioned India as an attractive investment destination and has contributed to its improved ranking in various global indices. The IBC has played a crucial role in facilitating the restructuring of distressed companies, resulting in the recovery of a significant amount of stressed assets. This has not only strengthened the financial stability of the banking sector but has also created a conducive environment for growth and investment.

While we celebrate the success of the IBC, we must also recognize that there is still a lot of work to be done. Improvements can be made to further strengthen the effectiveness and efficiency of the insolvency resolution process. As members of the Insolvency Professional Agency, it is our responsibility to continue advocating for reforms that will enhance the framework and address the challenges that may arise. Looking ahead, it is important for us to embrace the advancements in technology, particularly in the field of Artificial Intelligence (AI), to further enhance the effectiveness of the IBC. Artificial Intelligence has emerged as a game-changer in numerous industries, and the field of insolvency and bankruptcy is no exception. Leveraging AI can streamline the insolvency process, improve decision-making, and provide valuable insights for recovery and resolution. By harnessing the power of AI, we can expedite the resolution process, reduce litigation, and enhance the credibility and transparency of the system. To achieve this, it is imperative that we bridge the gap between the legal and technological domains. Collaboration between legal experts, technologists, and policymakers will be key in exploring the potential of AI in the context of the IBC. It is also important to note that while AI has immense potential, it cannot replace human judgment and expertise in totality. Insolvency proceedings are complex and often involve sensitive matters that require human intervention. AI should be seen as a tool to support and enhance the work of insolvency professionals, rather than replace them.

Further, continuous training and upskilling of professionals in the insolvency space will be crucial to adapt to the evolving landscape of AI. We must equip ourselves with the necessary knowledge and skills to leverage AI tools effectively and responsibly. Let us work together to harness technology for the betterment of the insolvency ecosystem and drive economic growth. Stay updated with the latest advancements in AI and explore how it can be integrated into your practice. By doing so, we can ensure that our profession remains at the forefront of innovation and continues to deliver the best outcomes for our clients. The resilience and adaptability demonstrated by our profession are commendable, and I have no doubt that together, we can overcome any obstacles that come our way.

(P.K. Malhotra)

Chairman, ICSI IIP

INSTITUTE OF INSOLVENCY PROFESSIONALS
(Subsidiary of ICSI and Insolvency Professional Agency of IBBI)

ICSI IIP'S PUBLICATIONS

HELLO,

we are your expert in providing the right solutions

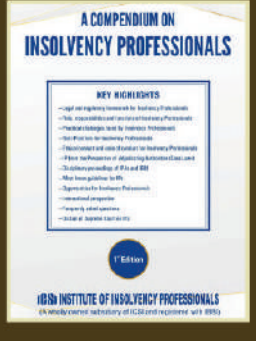
WE OFFER

BOOKS ARE UNIQUELY PORTABLE MAGIC

A Compendium on Insolvency Professionals

ICSI IIP has brought-out a comprehensive publication on Insolvency Professionals titled 'Compendium on Insolvency Profession', which the IBBI Chairperson Mr. Ravi Mital has himself released on 27th Oct 2022 at IBBI office.

The publication is a comprehensive document covering varied aspects like legal and regulatory framework for IPs, disciplinary proceedings against IPs (and their outcomes), ethical and code of conduct for IPs, opportunities for IPs and case laws related to IPs.



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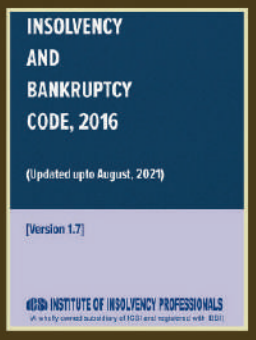
LET'S GROW WITH US



Insolvency and Bankruptcy Code, 2016 (Version 1.7)

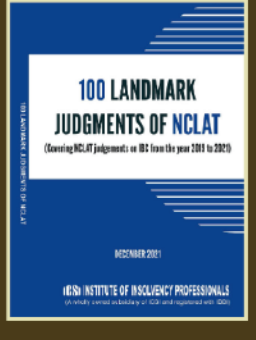
This Publication (updated upto November, 2022) covers the provisions of Insolvency and Bankruptcy (Amendment) Act, 2021 which provides the specialised forum to oversee Insolvency and Liquidation proceedings.

INR 500/- Postage Extra

Insolvency and Bankruptcy (Rules and Regulations) (Version 1.7)

This Publication (updated upto November, 2022) covers all the Rules, Regulations and Notifications along with all the Circulars and Guidelines issued by Insolvency and Bankruptcy Board of India (IBBI).

INR 600/- Postage Extra



100 Landmark Judgements of NCLAT (covering NCLAT judgements on IBC from the year 2019 to 2021)

This publication is about making the legal provisions in the Insolvency & Bankruptcy Code, 2016 and the interpretations thereof easily discernible for the readers. This is approached through the analysis of 100 crucial landmark judgments delivered by Hon'ble National Company Law Appellate Tribunal (NCLAT). The landmark judgments, as delivered by Hon'ble NCLAT, have been identified and their ratios culled out in this book.

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Headquarter
ICSI House, C 36, Third Floor,
Noida, Sector 62, Uttar Pradesh 201309
Landline: +91 120 408 2142
Email: icsiiip.publications@icsi.edu
Website: https://icsiiip.in/

MD's Message

Be the change that you wish to see in the world.

– Mahatma Gandhi

Dear Professional Member(s),

As we navigate through an uncertain business climate, it is crucial for us to reflect upon the significant strides made in the corporate insolvency resolution landscape. The Insolvency and Bankruptcy Code (IBC) has ushered in a new era of accountability and transparency, fostering a conducive environment for economic growth and investment. As the helm of this transformative journey, the Insolvency Professional Agency (IPA), entrusted with the onerous responsibility of regulating Insolvency Professionals (IPs) and facilitating a smooth and efficient insolvency resolution process. I take great pride in the remarkable progress we have achieved together, through the collective efforts of all stakeholders and the effective implementation of cutting-edge technologies.

Technology plays a crucial role in several stages of the insolvency process. Technological advancements lead to faster and cost-effective resolution of insolvency cases and facilitate electronic filing, real-time information dissemination, and seamless communication between stakeholders. The IBBI has taken several measures to promote technological advancements in the insolvency and bankruptcy process such as development of the Integrated Insolvency Resolution Management System (IIRMS), which allows for electronic filing and monitoring of cases. The IBBI also encourages stakeholders to use technology for communication, such as e-voting and virtual meetings. Guidelines have been issued for the use of technology, and the IBBI is committed to regularly upgrading and adapting technological solutions. Information Utilities are also utilize various software and processes to streamline operations and improve data accuracy and efficiency such as data integration software to gather data from multiple sources and consolidate it into a single database, data validation software to identify and rectify errors, inconsistencies, and duplications in the data, ensuring that only high-quality data is maintained in the system and advanced analytics software to derive insights and patterns from the collected data. In addition, Information Utilities use reporting and visualization tools to present data in a clear and comprehensible manner. These tools help in creating interactive reports and dashboards that allow users to explore and understand data easily. To ensure the security and privacy of data, Information Utilities also implement data encryption and protection software. Furthermore, Information Utilities utilize data storage and management software to efficiently store and organize the collected data. It also ensures data redundancy and backups to prevent data loss and maintain data integrity. The Government and IBBI also discussed on the need for technological intervention to connect multiple platforms used by various actors in the system.

To facilitate the adoption of technology, the IPA will also focus on educating and training insolvency professionals on the use of technology in the resolution process. We believe that equipping professionals with the necessary skills to leverage technology will be crucial in realizing the benefits it can offer.

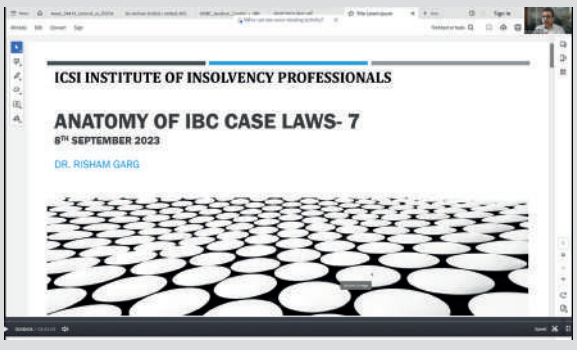
It is through our collective efforts that we have achieved significant milestones in the insolvency sector. Let us continue to adapt to the evolving landscape, embracing technology and adhering to the latest regulatory changes for the betterment of our industry.

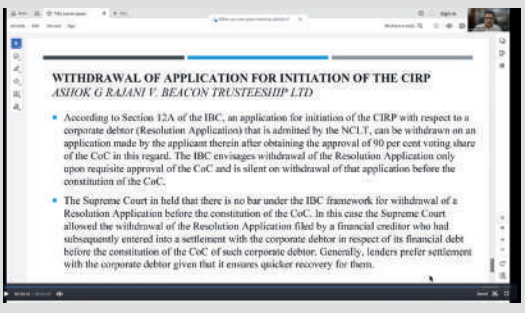
Dr. Prasant Sarangi
Managing Director (Designate), ICSI IIP

Events @ICSI IIP

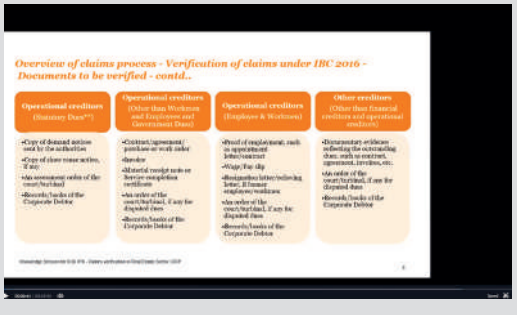
(Workshops, Webinars, Round-table Discussions, Interactive Meets etc.)

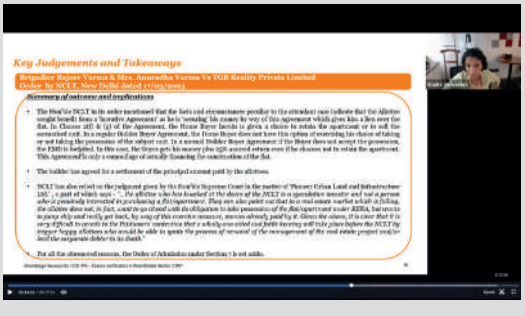
1. Webinar on Anatomy of IBC Case Laws 7 by Dr. Risham Garg on Friday, 8th September, 2023



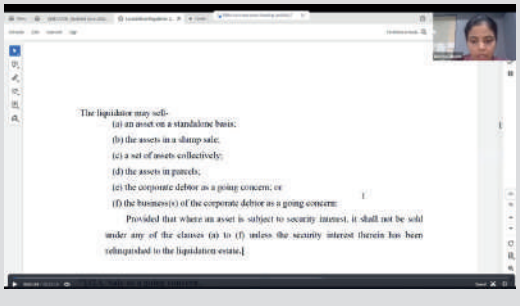


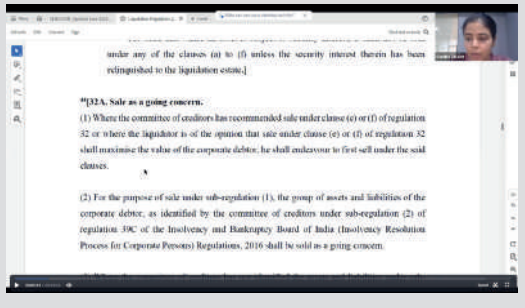
2. Webinar on Knowledge Session on Challenges related to Real Estate Claims by IP Shalini Shrivastav and Mr. Abhirup Ganguli on Saturday, 9th September, 2023



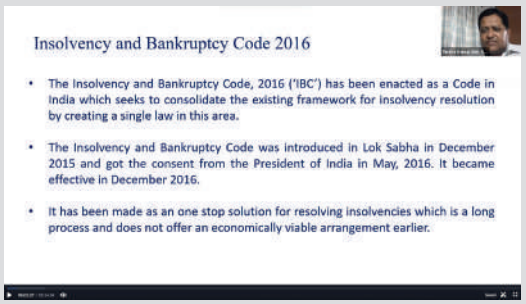


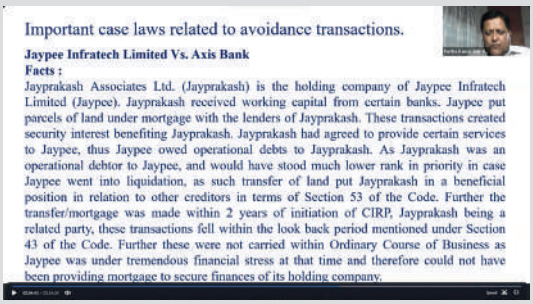
3. Webinar Series on Reviewing Regulations notified under Insolvency and Bankruptcy Code, 2016 by CS Barsha Dikshit on Wednesday, 13th September, 2023





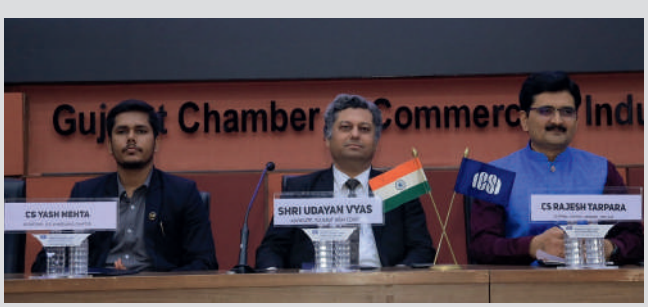
4. Webinar on Knowledge Session on Avoidance Transactions under IBC by CS and IP Partha Kamal Sen on Friday, 15th September, 2023





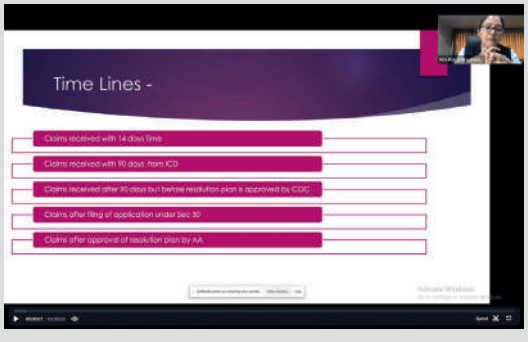
5. Webinar on Artificial Intelligence in Turnaround and Insolvency - Transforming Businesses by Advocate and IP Rocky Ravinder Gupta on Saturday, 16th September, 2023

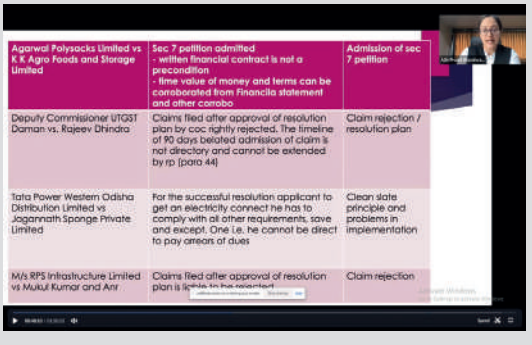
6. Seminar On NCLT: Practices And Procedures organised by ICSI Ahmedabad Chapter In Association With ICSI Institute Of Insolvency Professionals on Saturday, 16th September, 2023



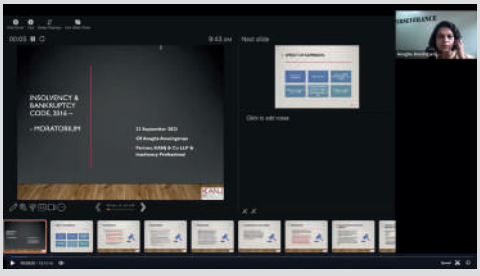
7. Seminar On NCLT: Practices And Procedures organised by ICSI Bengaluru Chapter In Association With ICSI Institute Of Insolvency Professionals on Saturday, 16th September, 2023

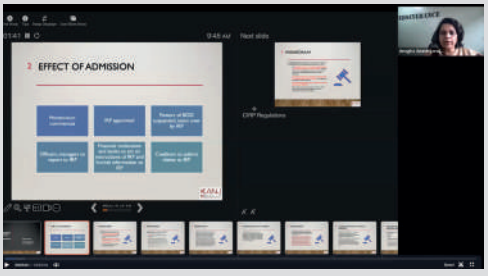
8. Webinar on Anatomy of IBC Case Laws 8 by Advocate Prachi Wazalwar on Friday, 22nd September, 2023

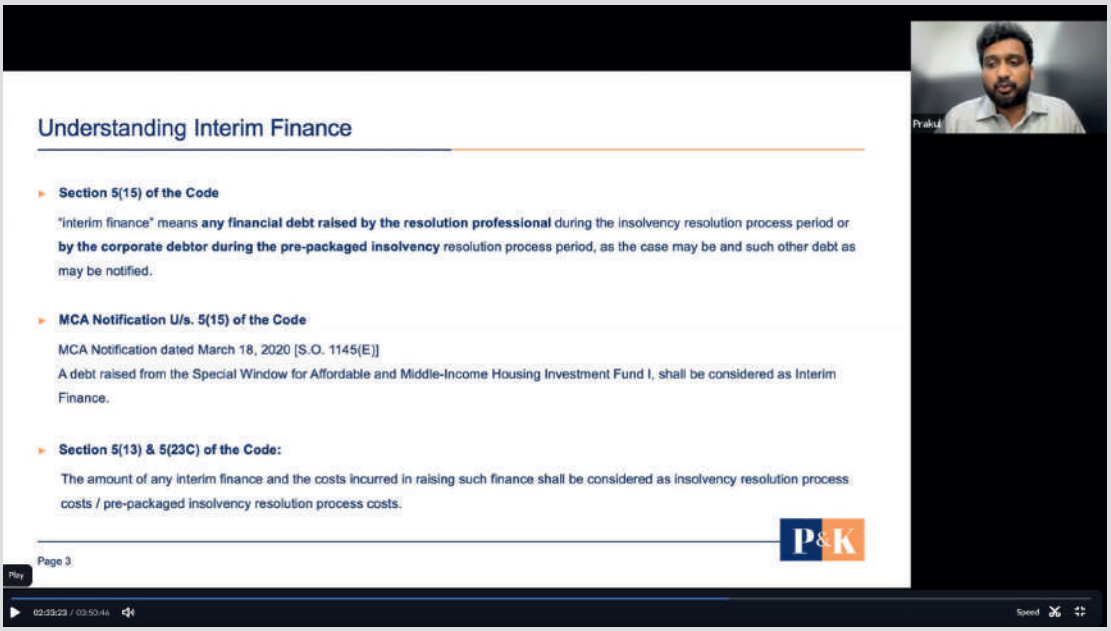




9. Workshop on Learner's Session on Moratorium and Interim Finance under IBC by CS and IP Anagha Anasingaraju and CS and IP Prakul Thadi on Saturday, 23rd September, 2023





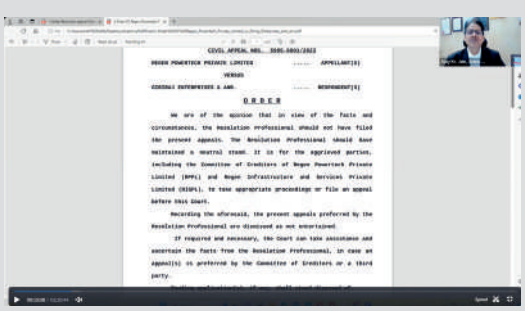


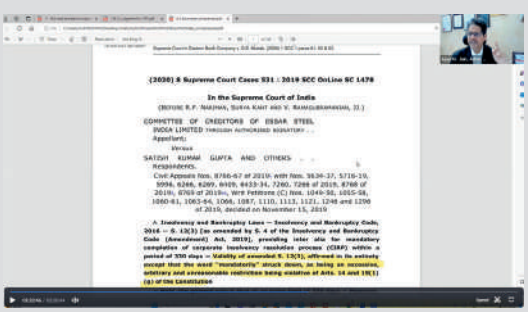
10. Seminar On NCLT: Practices And Procedures organised by EIRC of ICSI In Association With ICSI Institute Of Insolvency Professionals on Saturday, 23rd September, 2023

11. Seminar On NCLT: Practices And Procedures organised by ICSI Hyderabad Chapter In Association With ICSI Institute Of Insolvency Professionals on Saturday, 23rd September, 2023

12. Seminar On NCLT: Practices And Procedures organised by ICSI Bhubaneswar Chapter In Association With ICSI Institute Of Insolvency Professionals on Monday, 25th September, 2023

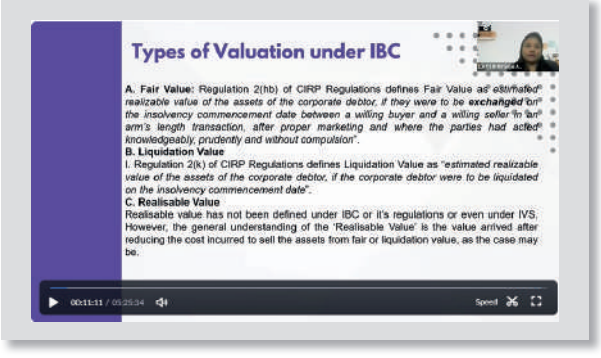
13. Webinar on Anatomy of IBC Case Laws 9 by CS and IP Ajay Kumar Jain on Friday, 6th October, 2023

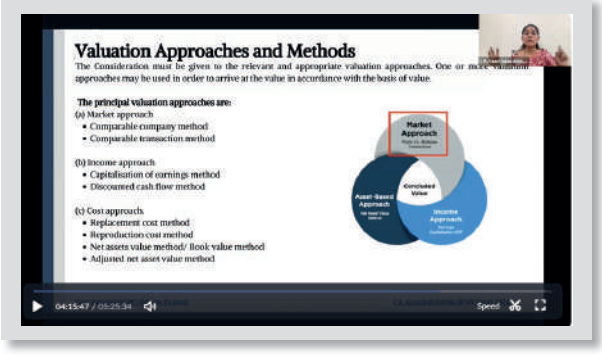




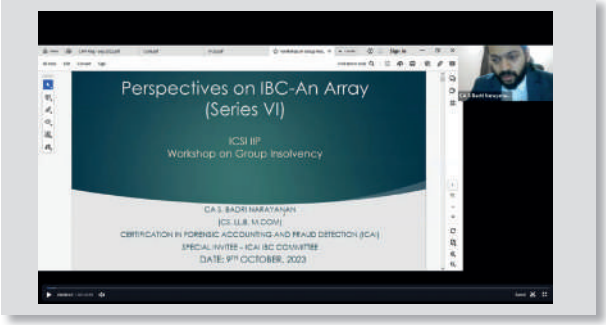
14. NCLT Conclave on Pre Pack for MSMEs & Insolvency against Guarantors organised by ICSI Chandigarh Chapter In Association With ICSI Institute Of Insolvency Professionals on Friday, 6th October, 2023

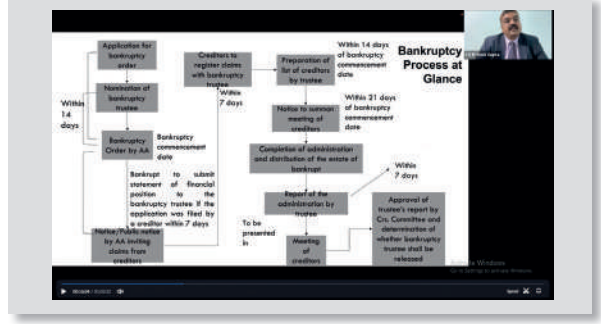
15. Workshop on Learning Aspects of Valuation under IBC by CS and IP Sejal Agrawal and CA and IP Ananthalakshmi S. on Saturday, 7th October, 2023

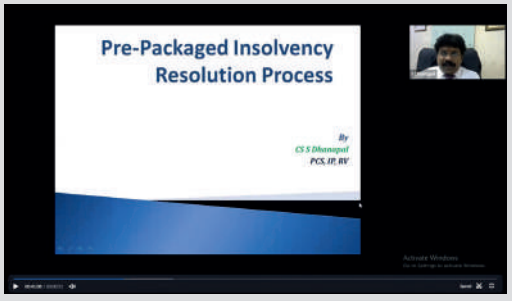




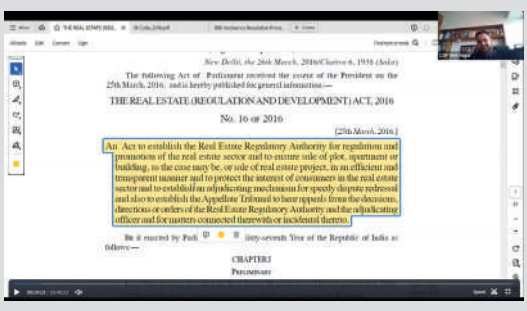
16. Workshop Series "PERSPECTIVES ON IBC Series VI-AN ARRAY" from 9th October, 2023 to 13th October, 2023. The topics covered in the series such as group insolvency, role of ADR under IBC, individual insolvency, pre-packaged insolvency resolution process and cross border insolvency

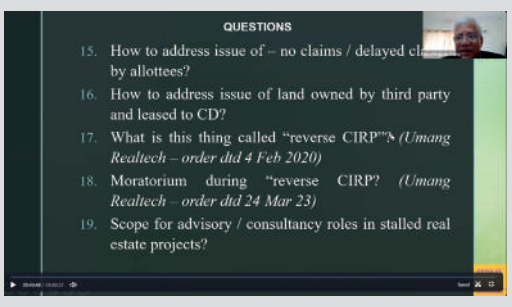






17. Workshop on Real Estate Ecosystem and Treatment of Homebuyers by CS and IP Vinit Nagar and IP Ravi Prakash Ganti on Saturday, 28th October, 2023





18. NCLT Conclave organised by ICSI CCGRT-Navi Mumbai and ICSI WIRC in association with ICSI Institute of Insolvency Professionals on Saturday, 21.10.2023

TURNAROUND AND RESTRUCTURING SERIES

Rocky Ravinder Gupta

President of Turnaround Management Association India.

He is a Lawyer and Managing Partner of UnitedJuris, INSOL Fellow, an Insolvency Professional and an Accredited Mediator.

STAGES OF BUSINESS TURAROUND

Conquering Crisis, Embracing Opportunity

Business turnaround refers to the process of revitalizing a struggling or distressed company and steering it towards profitability and long-term sustainability. It involves identifying and addressing the underlying issues that have contributed to the business's decline, implementing strategic changes, and restoring its competitive position in the market. Business turnaround typically occurs in several stages, each with its unique objectives and strategies. These stages provide a structured framework for managing the turnaround process effectively.

1. DENIAL

a. In the initial stages the entrepreneur who has seen success is quite blinded by the fact of his experience as a business owner as he has run his company successfully over a few years, earning and generating amazing profits for his shareholders. The mindset of the promoter/entrepreneur is full of positivity and there is no speck of a thought that he may fail in his enterprise. His ego and success cloud his judgement and attention to recognize the internal and external conditions which are changing the business environment. These changes

may adversely affect his business and require him to take steps to mitigate these changes, which he fails to do, due to lack of fully understanding the impact of such changes on his business. The business is showing Early warning signals, but they are not yet so clear to be identified by the owners.

b. Often, there are tectonic technical changes that are happening during this time. For instance, Sony could not see that its Walk Man would soon be obsolete. Moser bear could not see the end of CD era. Failure to anticipate such changes has taken big brands to the extent of extinction. The case of Blackberry phones, which at one point in time were considered the epitome of corporate phones and were a prized possession. Blackberry did not see the shift in the mobile phone market towards touch phones, where Apple was gaining ground. They did not change their products fast enough to meet the market requirement, and it is a fact that Blackberry stopped producing mobile phones some years back.

c. In this stage, companies are not scanning their external environment carefully enough. Even if they are scanning the environment and recognize the changes, they do not actually understand its significance and hence failure to act takes them towards the next stage. The reality is that businesses continually operate within the context of an external environment. The ability to understand and adapt to the changing environment could mean the difference between continued success and bankruptcy.

d. In the second phase of denial, the changes in the external environment become more visible to the organization. However, there is still inertia in the organization. This is because firstly, these organizations are quite large. Hence, changing policies is not that easy. It becomes even more difficult when the policy that needs to be changed is the reason behind the success that the company is facing. The company in question still does not recognize the urgency of the situation.

e. They are typically slow to act since they do not believe that the challenges pose a serious threat to them. In this stage, the changes in the external environment become unavoidable, and the organization is propelled towards action. The external environment typically starts affecting the internal environment in the form of excessive costs, decreased profits, or decreased market share. Most of these are the result of the technological backwardness that the company has acquired by being outdated. However, the managers still do not recognize the fact that the business can only be salvaged by fundamentally restructuring the business. Hence, the managers instead try to make minor changes such as cutting costs. Often their actions are not as effective. In fact, they end up making the problem worse since they are treating the wrong cause.

f. The third stage of denial is an actual crisis stage. This is because the company is unable to salvage itself, and the economic problems keep getting worse by the day. This is where it starts becoming apparent that the company will not survive for very long. By the end of this stage, the company ends up either bankrupt or ends up being taken over by another corporation.

g. At this point, the company is trying to make desperate attempts to reverse the damage done. Cutbacks and layoffs follow on a large scale. Since the company is in distress, a lot of people willingly leave it to find greener pastures elsewhere. The measures that are taken often end up being too little and too late. This is the reason that the odds are stacked against the company at this stage. Default at this stage has become the norm. It is important to note that it is possible to salvage and save the company from each of these stages. This means that the company need not progress onto the next stage but can instead move to the earlier stage. However, the process becomes increasingly difficult with the passage of time as the company progresses through these stages.

2. RECOGNITION

When a promoter becomes aware of critical issues plaguing their business, it is crucial for them to recognize the limitations of self-treatment and seek professional help to address the underlying stresses. Ignoring these issues or attempting to handle them alone can exacerbate the problems and lead to detrimental consequences. The awareness of the business owner that he needs professional help as early in time as possible, increases the chances of success in any turnaround situation. It is important to note that the stages of a business crisis may vary depending on the nature of the crisis and the specific circumstances faced by the organization. This stage involves recognizing and preparing for potential crises before they occur. It includes activities such as risk assessment, establishing crisis management plans and protocols, and training employees in crisis response procedures. The goal is to be proactive and develop strategies to prevent or minimize the impact of crises.

a. This stage in a business stress situation is a critical period that can determine the outcome of a potential crisis. It is characterized by a range of factors that indicate an impending crisis and require proactive measures to prevent or mitigate its impact. This stage is crucial for identifying early warning signs, conducting risk assessments, and implementing strategies to address vulnerabilities.

b. The pre-crisis stage is marked by several indicators that point towards an emerging crisis. These indicators can be external or internal in nature. External indicators include changes in the economic environment, shifts in consumer behaviour, regulatory changes, or emerging competition. Internal indicators encompass operational inefficiencies, declining financial performance, employee unrest, or leadership issues. It is essential for organizations to closely monitor these indicators and develop mechanisms to detect potential crises in their early stages.

c. One of the fundamental components of the pre-crisis stage is risk assessment. Organizations need to conduct a comprehensive evaluation of potential risks and vulnerabilities that could lead to a crisis. This involves identifying and analysing various risk factors such as market risks, operational risks, financial risks, reputational risks, and legal risks. By understanding these risks, businesses can develop strategies to minimize their impact or avoid them altogether. Risk assessment should be an ongoing process, as new risks may emerge, or existing risks may evolve over time.

d. In addition to risk assessment, effective communication plays a crucial role in the pre-crisis stage. Organizations must establish open and transparent channels of communication both internally and externally. Internally, employees should be encouraged to report potential issues or concerns that could escalate into a crisis. Regular communication between management and employees can help identify early warning signs and allow for timely intervention. Externally, organizations should maintain strong relationships with stakeholders such as customers, suppliers, investors, and regulatory bodies. Transparent communication with these stakeholders can foster trust and provide valuable insights into the business environment.

e. Another important aspect of the pre-crisis stage is the development of contingency plans and crisis management strategies. Organizations should proactively create plans that outline specific actions to be taken in the event of a crisis. These plans should include clear roles and responsibilities, communication protocols, escalation procedures, and resource allocation strategies. By having well-defined contingency plans, businesses can respond quickly and effectively to crises, minimizing their impact and facilitating a smoother recovery process.

f. Furthermore, training and preparedness initiatives are vital during the pre-crisis stage. Employees at all levels should receive appropriate training on crisis management

protocols and procedures. This ensures that they are well-equipped to handle crisis situations and make informed decisions under pressure. Conducting drills and simulations can also help evaluate the effectiveness of contingency plans and identify areas for improvement.

g. Finally, the pre-crisis stage requires a proactive and adaptive mindset within the organization. Businesses should be open to change and continuously evaluate their strategies and processes. This includes regularly reassessing risks, revisiting contingency plans, and updating communication channels. By fostering a culture of continuous improvement, organizations can enhance their resilience and responsiveness to potential crises.

The pre-crisis stage in a business stress situation is a critical period that demands proactive measures. It involves monitoring early warning signs, conducting risk assessments, establishing effective communication channels, developing contingency plans, providing training, and fostering a culture of adaptability. By investing time and resources in the pre-crisis stage, organizations can significantly reduce the impact of crises and position themselves for a more successful recovery.

3. DIAGNOSIS OR CRISIS IDENTIFICATION STAGE

In this stage, the crisis is present, and its cause/s need to be identified and acknowledged by the organization. It is crucial to have systems in place that allow for the early detection and assessment of potential crises. This stage involves gathering information, analysing the situation, and determining whether it meets the criteria of a crisis.

a. In a business stress situation, a crisis trigger refers to the event or circumstance that sets off a crisis. It is the catalyst that disrupts normal operations, threatens the stability of the organization, and requires immediate attention and action. Understanding crisis triggers is crucial for businesses as it allows them to anticipate potential crises, develop preventive measures, and respond effectively when a crisis occurs.

b. Crisis triggers can arise from various sources, both internal and external to the organization. Internal triggers often originate from within the business itself, such as operational failures, financial difficulties, leadership issues, or employee misconduct. For example, a major product recall due to safety concerns can serve as an internal crisis trigger, as it can lead to reputational damage, financial losses, and legal implications. Similarly, external triggers can be external events or circumstances that impact the organization, such as natural disasters, economic downturns, regulatory changes, or technological disruptions. An external trigger could be a sudden change in market conditions that significantly reduces demand for a company's products or services, leading to a financial crisis.

c. Identifying potential crisis triggers requires a proactive approach. Businesses should conduct thorough risk assessments and scenario planning exercises to anticipate possible triggers. This involves analysing the internal and external environment, assessing vulnerabilities, and considering various "what-if" scenarios. By understanding the potential triggers, organizations can develop strategies and preventive measures to mitigate their impact or avoid them altogether.

d. Preventive measures include implementing robust risk management systems, establishing effective control mechanisms, and ensuring compliance with regulations and industry standards. For example, businesses can invest in quality control processes, diversify their customer base, maintain adequate financial reserves, and cultivate strong relationships with suppliers and other stakeholders. By taking these measures, organizations can reduce the likelihood of a crisis being triggered and minimize its potential consequences.

e. However, despite preventive efforts, crisis can still occur due to unexpected triggers. When an unexpected crisis trigger is activated, it is crucial for businesses to respond swiftly and effectively. The first step is to activate the

crisis management team and establish clear lines of communication and decision-making. This team should consist of key individuals from various departments who have the authority and expertise to address the crisis.

f. Upon identifying the crisis trigger, it is important to gather accurate and up-to-date information about the situation. This includes assessing the scope and severity of the crisis, understanding its potential impact on the organization and its stakeholders, and identifying any immediate threats or risks. By having a clear understanding of the crisis trigger and its implications, businesses can develop an appropriate crisis response strategy.

4. CONTAINMENT AND DAMAGE CONTROL STAGE

Once a crisis is identified, the focus shifts to containing the situation and minimizing the damage. This involves implementing crisis response plans, and communicating with relevant stakeholders. The organization must take immediate action to address the crisis and prevent it from escalating further.

a. The crisis response strategy should focus on containing the crisis, mitigating its impact, and restoring normal operations as quickly as possible. This may involve taking immediate actions such as activating backup systems, initiating emergency procedures, conducting product recalls, communicating with stakeholders, and mobilizing additional resources. The crisis management team should also be responsible for coordinating efforts across different departments and ensuring that the organization speaks with one voice during the crisis.

b. Communication is a critical component of crisis management. Effective communication helps to manage stakeholders' expectations, maintain transparency, and build trust. Businesses should establish a designated spokesperson or crisis communication team to handle external communications. This ensures that accurate and consistent information is disseminated to the media, customers, employees, and other stakeholders. Internal communication is equally important to keep employees informed, address their concerns, and rally their support during a crisis.

c. Once the immediate crisis is under control, organizations should conduct a post-crisis analysis to evaluate the effectiveness of their response and identify lessons learned. This analysis should include assessing the crisis trigger and its impact, evaluating the strengths and weaknesses of the crisis management process, and identifying areas for improvement.

5. RECOVERY STAGE:

This stage involves dealing with the immediate effects of the crisis and working towards resolving the underlying issues. It may require implementing strategies to restore operations, mitigate financial losses, rebuild reputation, and address any legal or regulatory consequences. The organization must develop and execute a comprehensive plan to fully recover from the crisis.

a. In a business stress situation, crisis response refers to the actions and strategies implemented by an organization to address and overcome a crisis. It involves a series of coordinated efforts aimed at managing the crisis, minimizing its impact, and restoring normal operations as quickly as possible. Effective crisis response is crucial for businesses as it can help preserve reputation, rebuild stakeholder trust, and ensure long-term viability.

b. The crisis management team should develop a crisis response strategy. This strategy should outline the goals, objectives, and key actions required to manage the crisis effectively. It should address various aspects, such as operational continuity, stakeholder communication, legal and regulatory compliance, and financial management. The strategy should be flexible enough to adapt to changing circumstances and incorporate feedback from stakeholders.

c. Communicate Effectively: Communication is a critical component of crisis response.

Clear, timely, and transparent communication helps manage stakeholders' expectations, maintain trust, and mitigate reputational damage. The crisis management team should establish a designated spokesperson or a crisis communication team to handle external communications. Internal communication is equally important to keep employees informed, address their concerns, and maintain morale during the crisis.

d. Take Immediate Actions: Depending on the nature of the crisis, immediate actions may be required to contain the situation and minimize its impact. These actions can include activating backup systems, initiating emergency procedures, conducting product recalls, implementing safety measures, or mobilizing additional resources. The crisis management team should prioritize these actions based on their potential to mitigate risks and restore normal operations.

e. Coordinate Efforts: Crisis response requires effective coordination across different departments and functions within the organization. The crisis management team should ensure that all relevant stakeholders are involved and that efforts are coordinated seamlessly. Regular meetings, clear communication channels, and defined roles and responsibilities are essential to streamline coordination efforts.

f. Adapt and Learn: As the crisis unfolds, it is important to continuously assess the effectiveness of the crisis response strategy and make necessary adjustments. This may involve revisiting the initial assessment, reassessing priorities, and modifying actions based on new information. Organizations should be agile and willing to adapt their strategies to address emerging challenges during the crisis.

6. LEARNING AND ADAPTATION STAGE:

After the crisis has been resolved, it is essential to reflect on the experience and learn from it. This stage involves evaluating the crisis management process, identifying lessons learned, and implementing improvements for future crisis readiness. Organizations should use the crisis as an opportunity to strengthen their resilience and enhance their ability to handle similar situations in the future.

a. Post-crisis learning in a business stress situation refers to the process of analyzing and extracting valuable insights from a crisis experience. It involves reflecting on the events, evaluating the effectiveness of crisis response efforts, identifying lessons learned, and implementing improvements to enhance the organization's resilience and preparedness for future challenges. Post-crisis learning is crucial for businesses as it allows them to turn adversity into an opportunity for growth and development.

b. Reflect on the Crisis: The first step in post-crisis learning is to reflect on the crisis itself. This involves reviewing the events, understanding the causes and triggers, and examining the timeline of the crisis. By gaining a comprehensive understanding of what transpired, organizations can better analyze the impact and identify areas for improvement.

c. Evaluate Crisis Response Efforts: After reflecting on the crisis, it is important to evaluate the effectiveness of the crisis response efforts. This includes assessing the performance of the crisis management team, the efficiency of communication channels, the timeliness of decision-making, and the alignment with the established crisis response strategy. A thorough evaluation helps identify strengths and weaknesses in the response process.

d. Identify Lessons Learned: The next step is to identify the key lessons learned from the crisis. This involves analyzing the root causes, vulnerabilities, and gaps that contributed to the crisis. It also involves understanding the successful strategies and actions that helped mitigate the impact. By identifying these lessons, organizations can gain valuable insights for future crisis prevention and response.

e. Foster a Learning Culture: Creating a learning culture within the organization is crucial for effective post-crisis learning. This involves promoting open communication, encouraging employees to share their observations and insights, and embracing a mindset of continuous improvement. Organizations should foster an environment where learning from mistakes is seen as an opportunity for growth rather than a source of blame.

f. Share Knowledge and Insights: It is important to share the knowledge and insights gained from the post-crisis learning process across the organization. This can be done through formal channels such as reports, presentations, or training sessions. Sharing knowledge helps disseminate best practices, lessons learned, and effective strategies throughout the organization, ensuring that the entire workforce benefits from the post-crisis learning experience.

g. Update Crisis Management Plans: Post-crisis learning should inform the revision and updating of crisis management plans. Based on the insights gained, organizations should revisit their crisis response strategies, refine communication protocols, and incorporate new preventive measures. Crisis management plans should be dynamic documents that evolve as the organization learns from past experiences and adapts to new challenges.

h. Strengthen Risk Management: Post-crisis learning should also strengthen the organization's overall risk management practices. By analyzing the root causes and vulnerabilities exposed by the crisis, organizations can identify areas where risk management can be enhanced. This may involve implementing additional risk assessment processes, developing contingency plans for specific risks, or strengthening controls and monitoring mechanisms.

i. Invest in Training and Development: Learning from a crisis experience should be accompanied by investments in training and development programs. This includes providing employees with the necessary knowledge, skills, and resources to effectively respond to and manage crises. Training programs can cover crisis management protocols, effective communication during a crisis, decision-making under pressure, and other relevant areas.

j. Engage External Expertise: Organizations can also benefit from engaging external expertise to facilitate post-crisis learning. External consultants or industry experts can provide an objective perspective, offer insights based on their experiences, and help identify blind spots or areas for improvement. Their expertise can enhance the organization's ability to learn from the crisis and implement effective changes.

k. Continuously Monitor and Adapt: Post-crisis learning is an ongoing process that should be integrated into the organization's culture. It is essential to continuously monitor the effectiveness of the implemented changes and adapt as needed. This involves tracking key performance indicators, conducting regular reviews of crisis management plans, and incorporating new insights into the organization's practices and processes.

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About the Author: *Rocky Ravinder Gupta is the President of Turnaround Management Association India. He is a Lawyer and Managing Partner of* ***UnitedJuris,*** *INSOL Fellow, an Insolvency Professional and an Accredited Mediator. Turnaround Management Association India (TMA India) is the Indian chapter of the Turnaround Management Association (TMA) Global. TMA India is a community of professionals in the corporate restructuring and reorganization field to promote the interdisciplinary field of turnaround management, bringing together professionals and experts from law, accounting, business, and investing community.*

ICSI IIP – AT A GLANCE

1. DURING THE MONTH OF SEPTEMBER AND OCTOBER 2023:

S. No.	Particulars	Details
1.	Members enrolled	3
2.	Members registered	0
3.	Inspections conducted	3
4.	IPs monitored	9
5.	AFA applications received	123
6.	AFA applications approved	109
7.	Complaints/Grievances received	
8.	Complaints/Grievances disposed off	
9.	SCN issued	-
10.	Disciplinary action taken	-

2. DURING THE MONTH OF SEPTEMBER 2023 AND OCTOBER, 2023, FOLLOWING PROGRAMS WERE ORGANISED BY ICSI IIP:

WORKSHOPS

S. No	Date of Workshop	Topic
1.	23.09.2023	Workshop | Learner's Session on Moratorium and Interim Finance under IBC | September 23, 2023 | 09:30 AM to 04:30 PM
2.	07.10.2023	Workshop | Learning Aspects of Valuation under IBC | October 07, 2023 | 10am - 5pm
3.	09.10.2023 to 13.10.2023	Workshop | Perspectives on IBC - An Array (Series VI) | 9th Oct. 2023 - 13th Oct. 2023 | 2pm - 5pm
4.	28.10.2023	Workshop | Real Estate Ecosystem and Treatment of Homebuyers | October 28, 2023 | 09.30 AM - 04.30 PM

WEBINARS

S. No	Date of Webinar	Topic
1.	08.09.2023	Webinar | Anatomy of IBC Case Laws - 7 | September 08, 2023 | 2:00 PM to 5:00 PM
2.	09.09.2023	Webinar | Knowledge Session on Challenges Related to Real Estate Claims | September 09, 2023 | 10:00 AM to 1:00 PM
3.	13.09.2023	Webinar Series: Reviewing Regulations notified under Insolvency and Bankruptcy Code, 2016 | September 13, 2023 | 02.00 PM
4.	15.09.2023	Webinar | Knowledge Session on Avoidance Transactions under IBC | September 15, 2023 | 2 PM to 5 PM
5.	16.09.2023	Webinar | Artificial Intelligence in Turnaround & Insolvency | September 16, 2023 | 12 PM - 2 PM

S. No	Date of Webinar	Topic
6.	22.09.2023	Webinar | Anatomy of IBC Case Laws - 8 | September 22, 2023 | 02:00 PM to 05:00 PM
7.	06.10.2023	Webinar | Anatomy of IBC Case Laws - 9 | October 06, 2023 | 2 PM - 5 PM
8.	20.10.2023	Webinar | Anatomy of IBC Case Laws - 10 | October 20, 2023 | 2 PM - 5 PM

ROUNDTABLE

S. No	Date of Roundtable	Topic
1.	21.08.2023	Round-table (Virtual) Discussion | IBBI Dis. Ppr on "Streamlining the Voluntary Liquidation Process" | October 21, 2023 | 12:00 PM - 02:00 PM

NCLT CONCLAVE

S. No	Date of NCLT Conclave	Topic
1.	16.09.2023	ICSI Ahmedabad Chapter In Association With ICSI Institute Of Insolvency Professionals Organizes Seminar On "NCLT: Practices And Procedures" On 16.09.2023
2.	16.09.2023	ICSI Bengaluru Chapter In Association With ICSI Institute Of Insolvency Professionals Organizes Seminar On "NCLT: Practices And Procedures" On 16.09.2023
3.	23.09.2023	EIRC of ICSI In Association With ICSI Institute Of Insolvency Professionals Organizes Seminar On "NCLT: Practices And Procedures" On 23.09.2023
4.	23.09.2023	ICSI CCGRT-Hyderabad and ICSI Hyderabad Chapter In Association With ICSI Institute Of Insolvency Professionals Organizes NCLT Conclave on "Practices and Procedures" On 23.09.2023
5.	25.09.2023	Bhubaneswar Chapter of EIRC of the ICSI In Association With ICSI Institute Of Insolvency Professionals Organizes Seminar On "NCLT: Practices And Procedures" On 25.09.2023
6.	06.10.2023	Chandigarh Chapter of NIRC of the ICSI In Association With ICSI Institute Of Insolvency Professionals Organizes NCLT Conclave on "Pre Pack for MSMEs & Insolvency against Guarantors" On 06.10.2023
7.	21.10.2023	ICSI CCGRT-Navi Mumbai and ICSI WIRC In Association With ICSI Institute Of Insolvency Professionals Organizes NCLT Conclave on "Practices and Procedures" On 21.10.2023

TRAINING PROGRAMME

S. No	Date of Roundtable	Topic
1.	13.10.2023	Training Program on "Challenges under IBC 2016: Practical Implications" (Hybrid Mode) on 13th October 2023

Learner's Corner

Insolvency of a Country

UNDERSTANDING THE TERM:

The insolvency of a country occurs when the government is unable to fulfill its financial obligations, such as paying off its debt, providing essential services, or maintaining its economy. This situation often arises as a result of accumulated government debt, economic decline, or mismanagement of funds. Insolvency can have severe consequences for a country and its citizens. It can lead to a decrease in investor confidence, a decline in economic growth, high unemployment rates, and social unrest. The government may face difficulties in providing essential public services, such as healthcare, education, and infrastructure development. When a country becomes insolvent, it is unable to access further credit from the international financial community, leading to a deterioration of its economic situation. This may result in a reduction in government spending, austerity measures, increasing taxes, or defaulting on loans.

To address insolvency, countries may seek assistance from international financial institutions, negotiate debt restructuring or relief programs with creditors, or implement economic reforms to stabilize the economy. However, these measures often come with conditions and sacrifices, impacting the lives of ordinary citizens. Overall, the insolvency of a country is a complex issue with far-reaching economic, social, and political implications. Addressing this situation requires a combination of structural reforms, responsible fiscal management, and international cooperation to restore financial stability and promote sustainable economic growth.

WHAT HAPPENS WHEN A COUNTRY BECOMES BANKRUPT?

Bankruptcy is a legal process that occurs when a country is insolvent and cannot pay off its debts. It allows the country to reorganize its finances, renegotiate its debts, or liquidate its assets to repay its creditors. After a country becomes insolvent, several potential outcomes may occur:

Bailout or Financial Assistance: The country may seek financial assistance from international organizations, such as the International Monetary Fund (IMF) or other countries. The International Monetary Fund (IMF) not only provides financial assistance, but also suggests ways and means to revive the economy. In exchange for financial aid, the country may be required to

implement structural reforms and austerity measures to improve its financial situation.

Debt Restructuring: The country may negotiate with its creditors to restructure its debts. This could involve extending the repayment schedule, reducing interest rates, or forgiving a portion of the debt. Debt restructuring aims to make the debt burden more manageable for the country.

Austerity Measures: As part of the conditions for financial assistance, the country may be required to implement austerity measures. These measures often involve cutting government spending, reducing public sector wages, increasing taxes, and implementing structural reforms to improve the country's financial health.

Seizure of overseas assets: In case of an individual or organization that becomes bankrupt, their assets can be auctioned by the creditors. However, creditors cannot exercise the same privilege in case a country becomes bankrupt. While creditors cannot touch the internal assets of a country, it may be possible to confiscate assets of the country located at international locations. But this could involve lengthy court battles, so such measures are taken only as a last resort.

Long-term Recovery: Bankruptcy provides an opportunity for the country to restructure and rebuild its economy on a more sustainable footing. However, the process of recovery can be long and challenging, requiring ongoing reforms, investment, and commitment from both domestic and international stakeholders.

It is important to note that the specific outcomes and processes following bankruptcy depend on various factors, including the severity of the crisis, the country's economic structure, and the support available from external sources. The outcome of a country's bankruptcy is highly dependent on its unique circumstances, the legal and economic framework involved, and the actions undertaken by relevant stakeholders.

Nearly half of the countries of the European continent, 40% of the countries of Africa, and 30% of the countries of Asia declared bankruptcy during the previous two centuries. Some of them are listed below:

Greece Financial Crisis

Greece faced a sovereign debt crisis in late 2009, widely known in the country as the Crisis, triggered by the turmoil of the world-wide Great Recession, structural weaknesses in the Greek economy, and lack of monetary policy flexibility as a member of the Eurozone. The crisis resulted in reforms and austerity measures that led to poverty, loss of income and property, and a humanitarian crisis. Greece went through the longest recession of any advanced mixed economy, causing significant political and social upheaval, and leading to a brain drain as many well-educated Greeks left the country. To address the crisis, Greece implemented a series of austerity measures, spending cuts, and reforms from 2010 to 2016. These measures were met with protests and social unrest. Despite the efforts to stabilize the economy, Greece required multiple bailout loans from international organizations such as the International Monetary Fund and the European Central Bank. The country also negotiated a debt relief agreement with private banks, reducing its debt burden. The crisis had severe social and economic consequences for Greece. The country experienced the longest recession of any advanced economy, leading to widespread poverty, loss of income and property, and a brain drain as educated individuals left the country. Greece's debt levels increased, and the debt-to-GDP ratio rose significantly. The crisis also led to political upheaval and increased social exclusion. On 21 June 2018, Greece's creditors agreed on a 10-year extension of maturities on 96.6 billion euros of loans (i.e. almost a third of Greece's total debt), as well as a 10-year grace period in interest and amortization payments on the same loans. Greece successfully exited (as declared) the bailouts on 20 August 2018.

Sri Lanka Financial Crisis

The Sri Lankan economic crisis began in 2019 and is the country's worst economic crisis since its independence. It has resulted in high inflation, depletion of foreign exchange reserves, shortages of medical supplies, and price increases for basic commodities. Multiple factors, including tax cuts, money creation, policy shifts, the Easter bombings in 2019, and the impact of the COVID-19 pandemic, contributed to the crisis. The Sri Lankan government

defaulted on its international debt in April 2022, making it the first sovereign default in the country's history. The United Nations has attributed the crisis to officials' impunity for human rights abuses and economic crimes. The government's failure to address economic warnings and engage in proper economic policies has aggravated the crisis.

The Prime Minister Ranil Wickremesinghe in June 2022, revealed that the government has no usable dollar reserves and even finding a million dollars was a challenge, the revenue is not enough to cover expenses as a revenue forecast of Rs. 3.3 trillion is against a total government expenditure of around Rs. 4 trillion resulting in a deficit of around Rs. 2.4 trillion, inflation would continue to rise, daily power outages could increase up to 15 hours a day, medicine shortage has become severe, especially for heart disease and surgical equipment. Payments for medicine and equipment supplies have not been paid for four months and the government owes them around Rs. 34 billion. As a result, the State Pharmaceuticals Corporation is being blacklisted by pharmaceutical suppliers. Wickremesinghe described the period as "the most difficult ones of our lives" and claimed that it would be more difficult than the worst periods Sri Lankans had faced in the past. The Wickremesinghe administration undertook many reforms in order to meet the IMF conditions for the bailout. By November 2022 the economic condition had significantly improved.

CONCLUSION

The insolvency of a country can lead to a wide range of economic and financial difficulties, which in turn can affect the financial stability and viability of businesses. A country in financial distress tends to experience high inflation rates, currency devaluation, and capital flight. In addition to a deteriorating business environment, a country's insolvency can also lead to higher interest rates and reduced access to credit. When a country is unable to meet its debt obligations, it may default on its loans or be forced to implement strict austerity measures to regain fiscal stability. Furthermore, the insolvency of a country can have a negative impact on consumer confidence and overall demand for goods and services. As the country's economy contracts and unemployment rates rise, consumers have less disposable income to spend. Lastly, the insolvency of a country can lead to increased political and regulatory uncertainty. Governments in financial distress may resort to policy changes, including stricter regulations, higher taxes, or nationalization of industries, to stabilize the economy.

It is important to note that not all countries that experience financial difficulties go bankrupt, and the consequences can vary widely depending on the specific circumstances and the actions taken by both the country and the international community. Effective crisis management, transparency, and responsible fiscal policies can mitigate some of the negative impacts of a financial crisis and help a country on the path to recovery.

LEGAL MAXIMS

Non obstante verdicto.

Meaning: Notwithstanding the verdict.

Example: *"As a parenthetical note, we point out that judgment n.o.v. literally means judgment* ***non obstante verdicto,*** *or a judgment not withstanding the verdict rendered by the jury. Black's Law Dictionary, 5th ed. 1979. Plaintiffs, as verdict winners, had no reason to pursue such a remedy."*- McLAUGHLIN vs. FELLOWS GEAR SHAPER CO. (24.03.1986 - 3rd Circuit)

Pendente lite.

Meaning: During litigation.

Example: "***pendente lite*** *neither party to the litigation can alienate the property in dispute so as to affect his opponent.» During a litigation nothing new should be introduced - pendente lite nihil innovetur."* - Hiranya Bhusan Mukherjee and Ors. vs. Gouri Dutt Maharaj and Ors. (27.08.1942 - CALHC)

Prior tempore potior iure / lex posterior.

Meaning: Earlier in time, stronger in law

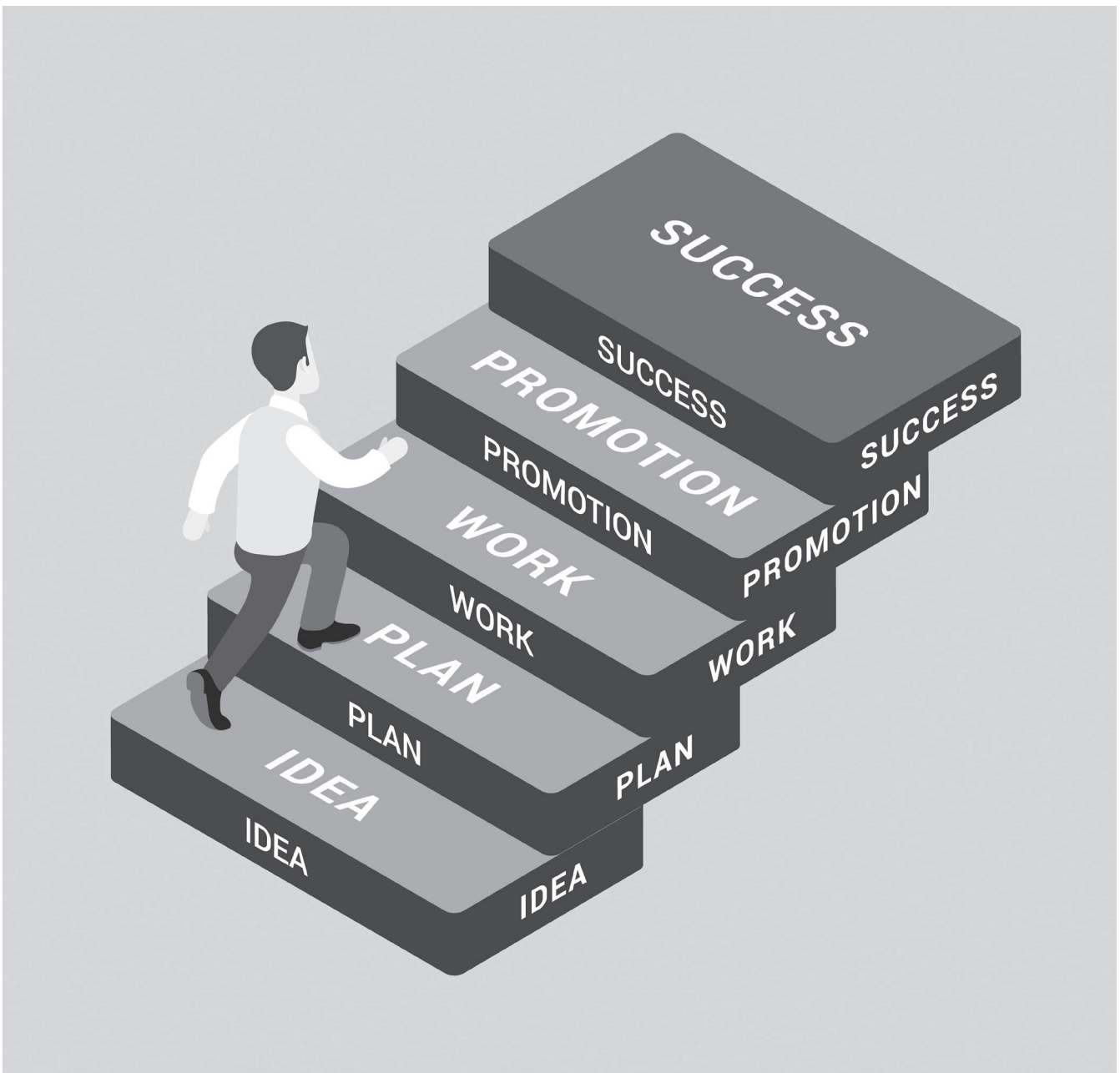
Example: *"The entitlement to keep the right of pre-emption in existence beyond 30 days had accordingly, in my view, not vested at the time when the Sale of Shares Agreement was concluded on 22 April 2010 and accordingly, on the application of the rule* ***qui prior est tempore potior est iure the rights acquired by the [purchaser] are of greater force than those subsequently acquired by the [franchisor] in respect***

of the extended period."- Pick 'n Pay Retailers (Pty) Ltd and Others v. Eayrs NO and Others (26.09.2011 - SASC)

A verbis legis non recedendum est.

Meaning: A provision of the law shall not depart; or From the words of the law, there must be no departure.

Example: *"The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word. The legal maxim* ***"A Verbis Legis Non Est Recedendum" means, "From the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said....."*** - Rohitash Kumar and Ors. vs. Om Prakash Sharma and Ors. (06.11.2012 - SC)



IP Rajendra D Aphale
Er CMA

Amendments to Corporate Insolvency Resolution Process (CIRP) Regulations September 2023

Significant amendments to the CIRP regulations were announced on 18th September 2023, called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023. Purpose of this article is to review these changes and help IPs and other professionals to prepare themselves better for the understanding and practicing amended CIR process.

1. CIRP Application under S 7 or 9

Various details have to be furnished while applying for CIRP of a Corporate Debtor (CD) by Financial Creditor or Operational Creditor respectively. The scope of this information is further expanded to include - evidence of default, chronology of the debt and default including the date when the debt became due, date of default, dates of part payments, if any, date of last acknowledgment of debt and the limitation applicable. A new section 2C has been inserted for this purpose. There has been some litigation where the CD claims the default is out of limitation. This provision will help in addressing at least some of these litigations.

In a recent case, NCLAT held that a time barred application has to be rejected even if no defense of limitation is raised. (Sheetal Impex vs Shree Swastic Sales)

2. **Interim Resolution Professional (IRP) / Resolution Professional (RP) taking charge of CD and co-operation of personnel of CD** – Regulation (Reg) 3A has been inserted. After CIRP of a CD has been ordered by NCLT, the IRP is expected to take charge of the CD's business operations, assets and liabilities. No procedure was prescribed in the Code for this purpose, and it was left to the individual IRP or RP to proceed. The new regulations prescribe a procedure for this purpose. Also a related issue of co-operation of the employees, promoters and other people associated with the management of the CD is also addressed in the process. In many cases the personnel of the CD have been found to be uncooperative or even resisting to the RP. Now the new provisions might help accelerate the CIRP process.

   The IRP / RP shall take custody of – a. records of assets, finances, and operations; and other items required as per Reg 36 (relating Information Memorandum) and Section 18(a) (relating to duties of IRP); b. assets recorded in the balance sheet or any other record of the CD, including any assets over which the CD has control (S 18(f)).

   The personnel of the CD shall hand over a list of assets and records, to the IRP/RP and identify persons in whose possessions these assets might be held. In case any assets or records have not been handed over, the IRP / RP shall prepare a list of such assets and records. Each such list should be signed by the parties present (IRP / RP and the employees of the CD as the case may be); and 2 individuals who have witnessed the act of taking control of such assets and records.

   The IRP / RP may requisition information on the assets, finances or operations which was required to be kept by the CD, and not handed over to the IRP / RP. This refers to the information under S.18 (a) and Reg 36 (referred above).

   Any application made under 19(2) i.e. Application made to the Adjudicating Authority (AA) for necessary directions in case any personnel of the CD who is required to assist or cooperate but is not assisting or cooperating should now include presence of assets or records of such assets or records, and absence of such asset or record taken in custody.

3. **Submission of Claim** – Earlier the provisions of the Code in this regard stated that the claimants should submit their claims (with proof) within 14 days of appointment of IRP (S15(1)(c), Reg 6(2)(c) and 12(1), this date is specified in the Public announcement; or within 90 days of commencement of CIRP (Reg 12(2)).

   Now the Creditors can submit their claims (with proof) up to the date of issue of request for Resolution Plans (RPlans) or 90 days from commencement of CIRP, whichever is later. The creditor will have to give reasons for the delay if the submission is after the expiry of 90 days.

   This may create issues at the stage of Resolution Plan, which are addressed in the next section.

4. **Claim Admission –** under CIRP the IRP / RP is to verify, admit, and collate (collate means collect and combine) claims within 7 days of receipt of claims as per Reg 13(1). If he does not, he has to give reasons for the same).

   Now that the creditors have more time for submitting claims, if the claims are received after the 12(1) period (14 days from appointment of IRP, the date as in Public Announcement) but up to 7 days before the date of Committee of Creditors (CoC) meeting for voting on RPlans, or on liquidation, the IRP / RP shall collate such claims. If the claims are received within the 7 days period above (i.e. within 7 days before the CcC meeting for the above purpose, these claims shall be classified as acceptable and non-acceptable. This classification should be communicated to the respective creditors within 7 days of categorization with reasons. These claims should be presented to the CoC in the next meeting with recommendation for inclusion and its treatment in RPlan. These claims also

should be submitted to the AA for condoning the delay and adjudication as applicable.

The Regulations have given a clearer procedure for admission of claims that have been submitted after the dates stipulated before the amendments.

5. **Authorized Representative (AR) –** Authorized Representatives are appointed for a class of creditors. There was no provision for their replacement, there was no provision for meeting of class of creditors and the role of AR was limited to voting in the CoC meetings. The present amendments provide remedies for these issues.

   A. Replacement of AR – the financial creditors in the class, representing not less than 10% voting share may seek replacement of AR and should include name of an Insolvency Professional (IP) of their choice). The wording implies that the creditors can pool together and need not have 10% of vote share individually. Also voting share implies voting share in CoC, and not among the class of creditors.

   Such creditors should make a request to the IRP / RP to that effect. The IRP / RP should send this request to the creditors in that class and announce a voting window of 24 hours. Similar to the existing provisions, the RP shall offer a choice of at least 3 IPs, including one proposed above, along with the existing AR.

   The IP who receives highest percentage of voting share of financial creditors in that class shall be the next AR. Only the creditors belonging to that class are entitled to vote and their share will be as per their admitted claims.

   B. The fees receivable by the AR have been revised.

   C. Meetings of creditors in class – earlier, there was no provision for meetings of creditors in a class. Now, an AR can call for meetings as required, and get paid for it (for 2 meetings no consent of CoC will be required). These payments will be part of CIRP cost. The usual rules for meeting and minutes will apply in this case also.

   D. Expanded role of AR – Prior to the amendments, the role of AR was confined to voting as per the instructions of the creditors he is representing. Now the role is expanded to support the CIRP process, and to help creditors understand the process better. The creditors in class can propose additional responsibilities. The new responsibilities are welcome step, to help creditors understand the process well so that they can make more informed decisions. Particularly the provision regarding modifications in RPlan, is welcome as AR's knowledge in this area can be put to good use. The AR shall also represent the class of creditors in front of AA, NCLAT and other Regulatory Authorities. Specifically –

   (a) assist the creditors in a class he represents in understanding the discussions and considerations of the committee meetings and facilitate informed decision-making;

   (b) Review the contents of minutes prepared by the resolution professional and provide his comments to the resolution professional, if any;

   (c) help the creditors in a class he represents during the consultations made by the resolution professional to prepare a strategy for marketing of the assets of the corporate debtor in terms of sub-regulation (1) of regulation 36C;

   (d) work in collaboration with the creditors in a class he represents to enhance the marketability of the assets of the corporate debtor in terms of sub-regulation (3) of regulation 36C;

   (e) Assist the creditors in a class he represents in evaluating the resolution plans submitted by resolution applicants;

   (f) Ensure that the creditors in a class he represents have access to any information or documents required to form an opinion on issues discussed in the committee meetings;

(g) Update regularly the creditors in a class he represents on the progress of the corporate insolvency resolution process;

(h) Make suggestions for modifications of the resolution plan as may be required by the creditors in class he represents;

(i) Record proceedings and prepare the minutes of the meeting with the creditors in a class he represents; and

(j) Act as a representative for the creditors in a class he represents in representations before the Adjudicating Authority, National Company Law Appellate Tribunal, and other regulatory authorities.

6. **Transfer or assignment of debt by any creditor –** it is a common business practice to transfer or assign debt due to a creditor to some other entity. This amendment provides that in such a case, both the parties, the transferor and the transferee should notify the IRP / RP within 7 days of such transfer and the terms thereof. Before this amendment, no time period was prescribed. Reg 28(2) has been amended.

7. **Audit of CD –** new Regulation 30B provides that any member of the CoC may propose an audit of the CD along with the objectives, scope, costs, time frame and names of proposed auditors. The CoC may approve this proposal and then the audit may be conducted. This new provision is a welcome change arming the RP and CoC to obtain a professional assessment of the CD.

   The audit will be conducted by an IP, who has the requisite qualification for such audit. No other qualifications are prescribed/defined in this regulation.

   The auditor will submit his report to the CoC along with any comments of the RP. The expenses of this audit shall be part of the CIRP cost.

8. **Communication to Resolution Applicants –** A very important amendment is made in Reg 36B (Request for Resolution Plans).

   The RP is to issue a final list of Resolution Applicants (RAs) after scrutinizing the Expression of Interest (EOI, under Reg 36A), within 5 days of issuing of this list, the RP is to issue the information memorandum, evaluation matrix, and request for RPlan in the list. Before this amendment, the RP was to issue these details to all prospective RAs in the provisional list as well as to all those prospective RAs who contested the decision of RP against including them in the provisional list.

   The amendment essentially talks about the final list of RAs. The reference to provisional prospective RAs is in the proviso. Also the reference to those prospective RAs who contested the decision of the RP has been excluded in the amendments. The information will be shared within the same time frame as earlier but only to the final list of RAs. The amended Regulations has a proviso that states that where such documents are available, they may be provided to all prospective RAs in the provisional list.

9. **Filling of form - CIRP 7 –** Form CIRP 7 needs to filled in if some activities have not been completed in time. The amendments mandate that this form is to be filled in 2 cases – a. if information memorandum (IM) is not issued within 92 days from the date of public announcement; and b. if the Request for Resolution Plan is not issued within 10 days from the date of issue of IM to the CoC.

10. **Miscellaneous –** these amendments essentially amend the time-tables based on the amendments above. Amendments to Form G intend to provide more information to prospective RAs. Form H has been amended to include minutes of CoC that approved the RPlan.

    In short, the amendments issued in September 2023 provide more details of procedures, processes where there were ambiguities earlier; recognize that ARs can play a bigger role in CIRP, and provide for such role. We hope this will help CIRP processes with lesser disputes, issues and ambiguities to speed up the processes.

Dr. Rajinder Aurora,
Senior Lead,
Research and Content Development,
Shriram Learning Systems

Dr. Roopali Srivastava,
Professor,
Project Management & SCM,
IBS Mumbai

Reliance-Jio Financial Services (JFSL) Demerger

INTRODUCTION:

The proposed demerger of Jio Financial Services from Reliance Industries Limited has generated significant excitement in the financial markets. Investors are eager to capitalize on this opportunity, given the potential value unlocking and the company's eligibility for large-cap inclusion in the index over a period of time. It has the potential to unlock value for investors and attract institutional investors.

RESULT OF THE DEMERGER OF JFSL FROM RIL?

The spun-off business shall be removed from the index after the end of day on the third day of its actual listing. The listing of Jio will happen after the entire process of demerger is over. While the listing date is not known yet, the markets expect Jio to begin trading normally in July or August as per the media reports appearing. The price of the new shares will get Split by Book Value. Book Value refers to the value of a firm's assets as appearing in its Balance Sheet. Due to demerger, a certain portion of book assets, book debt etc. gets transferred to the resulting companies leading to a fall in the share pace of the parent company and adding value to the share price of the new entity.

THE PROPOSAL GIVEN FOR DEMERGER:

Under the Reliance-JFSL demerger, shareholders of Reliance will get one share of the demerged entity for every share owned by them in the oil-to-telecom conglomerate. When reliance announced that it will demerge JFSL from Reliance Industries the main question going on in every mind is what will happen to the shares after demerger and will it impact the shareholders adversely? The question is arising as previous demerger cases were not very successful in creating wealth for the shareholders. Under the Reliance-JFSL demerger, it was proposed that the shareholders of Reliance Industries will get one share of the demerged entity (JFSL) for every share owned by them in the oil-to-telecom conglomerate. The shareholders were delighted to get this news.

Mukesh Ambani led Reliance Industries Ltd (RIL) demerged its financial unit, Jio Financial Services (JSFL) on 20 July, 2023. The share price of RIL ex-JFSL has been discovered at Rs 2,580 per share while Jio Financial Services is valued at Rs 261.85 per share after the pre-opening session on the NSE and BSE. The ratio for demerger has been fixed at 1:1.

Reliance announced the demerger of its financial services arm Reliance Strategic Investments Limited (RSIL) as part of its group restructuring. The demerged entity will be renamed as Jio Financial Services Limited (JFSL). The demerger of the financial services unit involved a spin-off of Reliance Industries 6.1 per cent treasury shares. So no new shares had to be issued.

The price of the shares was discovered after listing in the market and it was Rs 261.85 per share of Jio Financial Services which has come much higher than most brokerages' estimates. This high price is a clear reflection of the market's assessment of Jio Financials' future market potential as the financial service sector is a sunrise sector. The wide reach of JFSL through RIL's other business segments like Reliance Retail provides it with a potential to grow the company at a fast pace for many years to come. The market it is being perceived is discounting the future potential.

UNDERSTANDING THE TERM DEMERGER AND WHY IS IT INITIATED?

A de-merger is when a company splits off one or more divisions to operate independently or be sold off. A de-merger may take place for several reasons, including focusing on a company's core operations and spinning off less relevant business units, to raise capital, or to discourage a hostile takeover.

HOW THE STAKEHOLDERS REACTED?

LIC said that the cost of the acquisition done through the demerger of the non-banking financial entity will be 4.68 per cent of the pre-demerged cost of Reliance Industries as stated in the notice issued by the company for information given to SEBI, in July 19, 2023. Because of the proposed demerger LIC announced on that it has acquired 6.660 per cent shareholding in Jio Financial Services, the demerged financial entity of Reliance Industries that made its stock debut in the market. Usually, when a company demerges its business, it announces a distribution of shares from the new company for its existing investors. This of course leads to a fall in the price of the company's own stock proportionately. Although the new entity carved out of the demerger gets listed and is able to fetch a price of its own price. JFSL listed at a premium and the price of the shares fell for the next four days, but then it started rising giving return to the shareholders. While the share of JFSL did move northwards, the price of the parent company too improved. This is what adds value to the plan. And the shareholders gain from the deal.

IS DEMERGER GOOD FOR INVESTORS?

Demerger transactions create more transparency for investors, as visibility over operations and cash flow of the subsidiary is increased. This is looked upon as the biggest benefit for the investors.

HOW WILL THE DEMERGER IMPACT SHAREHOLDERS?

Under the Reliance-JFSL demerger, shareholders of Reliance will get one share of the demerged entity for every share owned by them in the oil-to-telecom conglomerate. Reliance had fixed 20 July

as the record date to identify eligible shareholders for the allotment of shares of the demerged entity. So, if an investor owns 100 RIL shares on 20 July, he/she will be eligible to receive 100 Jio Financial Services shares. The shareholding pattern at JFSL will be the same as at Reliance Industries.

HOW WAS THE SHARE PRICE CALCULATED AFTER DEMERGER?

During the special pre-opening session, traders had the opportunity to watch the market sentiment and assess the fair value of Reliance Industries stock post-demerger. The difference between Reliance's pre-demerger closing price and the discovery price during the pre-open auction was used to calculate the initial share price of Jio Financial Services.

Reliance's stock price has been found at Rs 2,580 when the pre-opening session ended at 9.45 am. This was at 9.2 per cent discount from Wednesday's closing price of Rs 2,841.85 per share on the National Stock Exchange (NSE). Shares of Jio Financial Services are now valued at Rs 261.85 after the pre-open auction session.

Jio Financial Services is expected to be listed on stock exchanges in 2–3 months. Apart from benchmark Nifty 50, Jio Financial would also be included in other indices including Nifty 100, Nifty 200, and Nifty 500 among others. It will be the 51st stock on the Nifty 50 as part of the arrangement. The demerged entity shall be removed from the index after the end of day on the third day of actual listing.

HOW WILL THE CAPITAL GAINS TAX ON JFSL SHARES BE CALCULATED?

According to a statement by Reliance, the post-demerger cost of acquisition of RIL shares is 95.32 per cent and that of JFSL shares is 4.68 per cent. For example, if you had purchased the Reliance share on 19 July at Rs 2,840 then value of your Reliance holding would be 2,707 and Rs 133 for JSFL holding. So, Rs 133 in effect is the acquisition cost of Jio Financial Services. Capital gains will be calculated on the difference between the prices at which the shares are sold excluding Rs 133 (assuming you bought the shares at Rs 2,840).However, the tax liability will only occur at the time of the sale of shares by the investor. Currently, investors cannot sell JFS shares as it will remain at a constant price in all the indices where Reliance is present.

JIO FINANCIAL SERVICES AFTER DEMERGER:

The portfolio expert believe that the demerger decision is basically taken to keep financial service business distinct from other businesses and may attract a different set of investors, strategic partners, lenders and other stakeholders, was the opinion of experts.

RELIANCE-JFSL DEMERGER:

After demerger of Jio Financial Services Ltd (JFSL) from its core Reliance Industries Ltd (RIL), Jio Financial Services share price is expected to list on NSE at ₹273 per share (₹2,853 - ₹2,580). This is ₹140 higher from the softly accepted JFSL share price of ₹133 by Reliance Industries Ltd while declaring the cost of acquisition details for RIL and JFSL. However, valuations of the Jio Financial Services shares are coming at ₹261.45 per share levels after demerger. After strong than expected looking debut of Jio Financial Services shares, stock market experts are highly bullish on this new Reliance entity on Dalal Street. They believe that JFSL would be a pure financial company that will be in lending, investing and other financial business. Appointment of two banking pioneers KV Kamath and Hitesh Sethi is a glaring example of the plans it aims to pursue.

ADVANTAGES AND BENEFITS OF DEMERGER:

Every demerger generates benefits for the entity as well as the investors.

A) Benefits of demerger for companies:

1. Tax benefits:

Legislation provides capital gains tax relief for shareholders and the company concerned. Spin offs can be non-taxable events. Split offs are also a tax-efficient way for the parent company to redeem shares.

2. **Improved strategic focus**

   The most obvious benefit of a demerger is that separation brings about improved strategic focus. Removal of the parent company from the decision-making concerning the subsidiary allows for more agility in operations and for decisions to be made with closer proximity to the customer. For the parent company, a carve out is often (but not always) an opportunity to sell a non-core and potentially under-performing business unit.

3. **Improved profitability**

   Large conglomerates are complicated and often inefficient beasts. Remove that complexity by creating separate companies and you can achieve an enormous amount of cost savings within more straightforward, focused businesses. This naturally leads to improved profitability.

4. **Cash injection**

   In the case of a carved out demerger, the parent company can raise funds by selling a portion of the subsidiary's shares via IPO, while retaining control. This capital injection can be used to invest in services central to the parent company's business strategy. It also prevents the subsidiary from being purchased by a competitor.

BENEFITS OF DEMERGER FOR SHAREHOLDERS

1. **Enhanced shareholder value:**

   It's possible to create significant shareholder value through a demerger. In fact, the general consensus among analysts is that demergers can be highly beneficial to the shareholders of both parent and new entity if everything was effectively planned and executed well.

   For example, EY research between 2002 and 2017 into 124 global spin off transactions revealed that shareholder value was created as a result of certain factors, including speed of transaction completion and naming a candidate from the parent company as either CEO or CFO or both.

   (*Success was defined as the entity is successful in delivering a total shareholder return one year after the spin that was higher than the parent company's within the same period before the transaction)

2. **Long-term value creation:**

   Even in instances where shareholder value is not created within the first year post-transaction, long-term growth is almost always an outcome. This is because shareholders of demerged companies can enjoy the benefits of more strategically focused businesses with independent management accountability. This invariably results in increased share prices relative to if the demerger hadn't happened.

3. **Increased transparency:**

   Demerger transactions actually create more transparency for investors, as visibility over operations and cash flow of the subsidiary increases substantially. This is a strong benefit that ultimately allows investors to make timely and better investment decisions.

DISADVANTAGES OF DEMERGER OR DIVESTMENT

1. **Shareholder dissent**

   There is always the possibility of shareholder stir up if they are against the demerger decision. In some cases, there is even a risk of shareholder lawsuits if the premium offered by Parent company during a split off is deemed unfair.

2. **Immediate drop in stock value:**

   In a spin off the price of shares in the parent company declines by the market value of the business spun off by it. However, it's worth shareholders noting that disinvesting purely because of an announced demerger could mean missing out on some significant value in the future.

3. **Significant Planning Required:**

   A demerger is an enormous activity and there is always a certain amount of execution risk involved in it. Splitting a business requires

considerable planning, almost always more than the organization can imagine. So to maximize the value, meticulous preparation is the key accompanied with execution too.

Accurate costing and valuation are difficult to achieve. Every aspect of the creation of the new entity needs to be considered in the costing process that includes all departments from IT department to licenses and permissions. These figures can't be overlooked because when it comes to IPO or a future trade sale, this is the first thing people will want to know when valuing the business.

COST TO ACQUISITION:

The cost of acquisition of the shares in the resulting company shall be the amount which bears to the cost of acquisition of shares held by the assesses in the demerged company the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company

Is demerger good or bad for the stock?

Increase in market capitalization:

In many cases, demergers are used to create stock market value. Investors have more visibility over the operations and cash flow of a firm that has been spun off. This enables them to make better investing decisions. Investors are thus willing to pay a premium for this better information.

JFSL THE ROAD AHEAD:

Reliance Industries Ltd (RIL) has set Jio Financial Services demerger record date on 20th July 2023, just one day ahead of the RIL Q1 results of 2023 for the FY 23-24. After this demerger, there will certainly be a phenomenal value unlocking for the RIL while all its financial businesses will move to Jio Financial Services Ltd that owns 6.1 per cent stake in RIL. So it is presumed that after the demerger, Jio Financial Services valuations would stand at around ₹10,000 crore. This is the value this demerger would add to the group. The value of JFSL at the time of Demerger was Rs.5,300 crores but in a few days it is valued at Rs.10,000

CONCLUSION:

The discussion above looks at the overall situation in the market. The actual results of the demerger will get visible over time. The general perception of investment managers is that the new entity has the potential to create value as it has the potential to attain success since it enjoys technology and digital advantage in a market that is driven by these two elements. Instead of reaching conclusion on these perceptions one should wait for some time and observe the movement in the shares of the new entity which is being projected as a multi bagger of the future.

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"Emerging Thoughts and Judicial Developments in India's Insolvency and Bankruptcy Law: A Roadmap for Practitioners and Regulators"

Prakash Jha

INTRODUCTION

India's Insolvency and Bankruptcy Code, 2016 (IBC), enacted with the objective of expediting the resolution process for stressed assets, has witnessed significant judicial and regulatory developments since its inception. These changes are pivotal in shaping the insolvency landscape in the country and providing valuable insights for practitioners, regulators, adjudicating authorities, and senior advocates. This article delves into some of the noteworthy trends and legal developments that have emerged in the realm of insolvency and bankruptcy law in India.

LANDMARK JUDGMENTS AND INTERPRETATIONS:

Over the years, various courts have issued landmark judgments that have clarified and refined the provisions of the IBC. One such ruling

is the Essar Steel case (2019), which resolved critical issues surrounding the distribution of funds among creditors. The Supreme Court, in this case, reinforced the principle of equitable distribution and prioritized operational creditors.

Additionally, the court's interpretation of Section 29A, which bars certain persons from submitting resolution plans, has had far-reaching consequences in preventing defaulting promoters from regaining control of their companies. The judgment in the Binani Cement case (2018) further solidified this stance.

CROSS-BORDER INSOLVENCY FRAMEWORK

The introduction of the Cross-Border Insolvency Framework through the Insolvency and Bankruptcy Board of India (Cross-Border Insolvency) Regulations, 2019 has paved the way for better coordination and cooperation with foreign jurisdictions. This development is significant as it allows for the recognition of foreign insolvency proceedings, facilitating the resolution of complex cross-border cases.

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PIRP)

The IBC was recently amended to introduce the concept of the Pre-Packaged Insolvency Resolution Process, offering a more streamlined and efficient approach for resolution. This mechanism, detailed in the IBC (Amendment) Act, 2021, has the potential to expedite the insolvency resolution process further.

DEALING WITH GROUP INSOLVENCIES

Addressing group insolvencies, where multiple companies within a corporate group face financial distress, has been a challenge. The Insolvency and Bankruptcy Board of India (IBBI) has been actively working on regulations to provide a comprehensive framework for handling such cases, recognizing the need for a holistic approach to group insolvency.

NEED FOR A DATA-DRIVEN APPROACH

To enhance the effectiveness of the IBC, stakeholders must embrace a data-driven approach. The establishment of a comprehensive insolvency database could provide valuable insights into industry-specific trends, the success rate of resolution processes, and areas requiring regulatory intervention.

STRENGTHENING REGULATORY OVERSIGHT

The IBBI plays a critical role in shaping the insolvency landscape. Continual efforts to refine regulations and guidelines, along with increased collaboration with industry experts and practitioners, are essential to ensure that the IBC remains robust and responsive to evolving challenges.

CONCLUSION

The Insolvency and Bankruptcy Code in India has come a long way since its inception, with several landmark judicial pronouncements and regulatory developments shaping the landscape. As insolvency practitioners, regulators, adjudicating authorities, appellate authorities, senior advocates, and other stakeholders, it is imperative to stay updated on these emerging thoughts and developments.

To further enhance the efficacy of the IBC, stakeholders should explore innovative solutions, such as the establishment of an insolvency data repository and comprehensive regulations for group insolvencies. By fostering collaboration and embracing technological advancements, India's insolvency ecosystem can continue to evolve, ultimately serving its intended purpose of expeditious and equitable resolution of distressed assets.

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IBC: A visionary's vision

Kumar Kartikay
(Advocate, Supreme Court of India)

Ever since IBC got enacted in the year 2016, the life of the Code has never seen a dull moment. The vision with which it was founded and the underlying commitment of the stakeholders to make it achieve its objectives has made the journey of the legislation full of exciting and rewarding moments, and most importantly, the progression has come from all quarters (the Legislature, the Executive, the Regulator (and regulated persons), and most importantly the Judiciary which has championed the legislation). The Courts while interpreting provisions of a law follow some well-settled principles/norms. Amongst the first principles of interpretation of statutes lies the literal interpretation rule which states that when language of the law is simple and words thereof are capable of giving only one meaning, words have to be given their simple meaning itself. However, in case, the language of the law is capable of providing more than one meaning, the Courts are required to look at the text as well as the context of the legislation (and its provision). For these purposes, the Courts refer to the well-settled aids of interpretation. In the context of IBC, in case there is an ambiguity in the meaning of a provision, the Courts and tribunals have very often referred to the Bankruptcy Law Reforms Committee (BLRC) Report as well as the Insolvency Law Committee (ILC) Reports which are counted as an important source to comprehend the context and the background. These reports have also been referred to and quoted in judicial decisions/judgments. Thus, the BLRC report (and the ILC reports) do provide us with the context in which the IBC (and its amendments) got enacted, and for anyone looking into question as to

why this law came into being, what were the laws on the subject prior to IBC and the flaws in those laws that were sought to done away with through IBC, the BLRC report does provide the necessary clarity.

To understand the relevance of IBC statute as a reformative piece of legislation, let's travel a little back into the history of the legislation.

In India, one of the major challenges that an entrepreneur used to face while setting-up an enterprise concerned *availability* and *cost of capital*. Compared to most developed economies, the cost of capital in India was much higher. This proved to be a major deterrent for those having entrepreneurship skills in setting-up a business (or even expanding it). Taking loans from Banks and Financial Institutions as a source of funding was difficult as the Banks would invariably look at the value of the collateral offered as security for loan repayment. Therefore, there was a definite need to increase supply of money in the economy, and balance the demand-supply mismatch thereof. Now, one way to do this (though not a recommended one) is to print more notes from the treasury and make them available in the market. This would have been a short-term measure with very heavy cost for the future as it would have led to a major challenge to the fiscal discipline of the nation. For finding a long-term solution to the problem, a need was felt to find out as to where is it that the money is stuck-up in the system, and what could be the ways for releasing the money for its better circulation in the market. The Banks are in the business of money lending, and money lending is majorly done to the businesses which would then deploy it in their businesses and run its operations. The underlying covenant of all lending arrangements/contracts is that the money lent is to be repaid by the borrower along with an agreed rate of interest. Infact, the interest sum is the incentive for the banks to lend the money which belongs to its depositors. The interest realised is also used for the purposes of payment to the depositors. Now, if the money gets stuck in the system and repayment is not forthcoming to the Banks, the Reserve Bank of India requires Banks to classify such accounts as a non-performing account (NPA). Before the advent of IBC, the NPAs figures were mounting high which stood as a huge challenge before the Banks since they were unable to recover their money. The law dealing with the problem was scattered and was contained in different legislations. For instance, the Sick Industries (Special Provisions) Act, 1985 was a legislation which was founded with an objective to safeguard the interest of a sick industrial company and provided a legal protection to such sick industry from all recovery actions which its creditors may initiate against it during pendency of its reference before the Board for Industrial and Financial Reconstruction *i.e.*, BIFR (reference to s. 22, SICA). On the other hand, legislations like the RDB&FI Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) were there to provide a remedy to the lenders against the debtors. SARFAESI, in particular is a legislation which provide a remedy to a secured lender to realise its dues by enforcement of its security interest without intervention of the Court/tribunal. SARFAESI, though provided a potent took in the hands of secured creditors, does not allow the firm to survive as a going concern. This legislation which was regarded as a solution to the problem of rising number of NPAs in the country, succeeded only initially in containing the problem as the processes followed in DRTs took the shape and form of those followed in normal civil courts. Moreover, since the legislation did not allow firms to survive as a going concern, there was hardly any revival of businesses by virtue of this legislation. When a firm has taken a secured loan and it fails on its obligations, SARFAESI framework emphasise on secured creditors taking control over the assets charged with them, and the borrowing entity would then suffer an unnatural death of sorts.

Once the IBC law got enacted by the Parliament, the Government swung into action and created the ecosystem necessary for working of the Code. As a first step, it created the IBBI and subsequently, it went on to implement the Code in a systematic and practical manner.

The IBC (Code) has seen a rapid progress and has been accompanied by an ecosystem as well as a commitment by the Government to keep in touch with the current reality. Infact, it may not be an exaggeration to say that no other economic law has engaged such amount of attention of the Government and the Courts as the IBC. The Code attempts to reform

the credit market, which, prior to introduction of IBC, was in a very bad shape. In the absence of a robust credit market, economic growth of a nation (through the industries) takes a hit. *Risk taking* is essential to entrepreneurship, and to build entrepreneurship at a time when Governments all over the world have turned extremely conservative and wherein Privatisation and Liberalisation in the market are ruling our lives, it is necessary for people to take initiatives and create opportunities and jobs and contribute to the well-being of the economy and financial markets. To encourage risk-taking capabilities of the firms, law needs to draw the necessary distinction between a case of simple *default* from a case of *wilful default* (or a case of malfeasance) because if the two are taken as synonyms, this can only have a chilling effect on risk-taking capability of entrepreneurs and will be counter-productive. A limited liability corporation, as well understand, is a well-strung of entrepreneurship. It is an important concept evolved from judicial decisions which have drawn a clear distinction between the Company and its members. Infact, if we look at the history of evolution of such limited liability corporations, they came about to encourage risk-taking zeal of entrepreneurs. If the liability of the members is made unlimited, there would hardly be any person who will be willing to undertake big projects and thus exploration would come to a standstill. The concept of a separate legal identity of a company from that of its members gives the shareholders an assurance that in the event of business suffering losses, their liability will not exceed beyond their shareholding in the Company.

Now, equally, there is another idea which is popular in our corporate ownership, which is, that control of the company is not a divine right (or a privilege). The key relationship between Debt and Equity is that when a company defaults on repayment of its debt, the control of the company gets shifted to the creditors.

The Bankruptcy law reforms in India (through the introduction of IBC) has achieved four major objectives, that is, *firstly*, it creates effective barriers against the managers who transfer money out of the company when the company nears default (this is achieved through the IBC provisions concerning PUFE/avoidance transactions); *secondly*, through a swift shift of power from shareholders to creditors upon occurrence of *default*; *thirdly*, recognizing the concept of *limited liability* vis-a-vis companies as a part of our working market economy. In a market economy, most businesses depend upon credit as a source of funding its operations, however, in India, because of absence of *debt financing* or *bond market*, bank loans are still a major source of project financing. This is also because, corporate bond holders have had a very bad recovery rates in the past. Looking at the other side, amongst the lending banks, there is a misplaced emphasis on secured credit. There is always a necessity for somebody to produce security to facilitate a loan. At present, there are many landers who are willing to give loans to companies against collaterals. The trend of looking at the cash flows of a company and giving loans on that basis has created an emphasis on debt financing through secured credit.

IBC recognises that the decision as to solvency or otherwise of a firm are those of the markets. The hallmark of IBC is that is describes timelines for different stages of proceedings and that the decision of revival through insolvency resolution or liquidation of assets of the Corporate Debtor is that of the Financial Creditors which has its biggest stake in the company.

IBC was framed with 2 noble causes. These are to have a robust debt market by having flow of money in the market, and second is to foster entrepreneurship.

Now, the design of IBC is such that the Debtor is able to negotiate repayment and Creditor is able to enforce payment. For this, the creditor needs to be prohibited from resorting to measures for coercive enforcement, and the debtor as well as creditor know that the decision is to be taken swiftly. For initiating the proceedings, IBC has adopted the *Default test* which signifies the need for early recognition of stress for timely resolution of insolvency. Thus, we moved from the networth erosion test (under SICA, 1985) to default test (under IBC).

Amongst the most remarkable features of IBC is the *Codification of the law* on the subject. IBC is now a single law which takes care of the subject of insolvency of all business entities. For individuals, at present, the legal provisions are to be found in Presidency Town Insolvency Act, 1908 and Provincial Insolvency Act, 1919 wherein jurisdiction is conferred

on the District Courts. These two legislations, though already repealed under the IBC, still exist on the statute book as the date of commencement of IBC provisions dealing with individual insolvency (except PG to CD) have not been notified yet.

As regards the liquidation process prior to IBC, there were many hurdles and bottlenecks. From the viewpoint of creditors, a good realisation can be assured if the firm is sold as a going concern, and in liquidation, the realisation is less when there are delays. *Delay causes value destruction*, and hence a need to identify and combat the sources of delay. The sources of delay would include: (a) lack of information about the assets and liability of the debtor; (b) asymmetry of information between the debtors and creditors. A dispute *inter se* the parties has the potential to take years in the Civil Courts; (c) delays caused on account of adjudicatory mechanisms, especially due to existence of multiple forums for adjudication and cross litigations by parties. IBC deals with these issue by conferring jurisdiction on NCLTs vis-à-vis Corporate Entities (and PG to CD) and on DRTs vis-à-vis Individuals (except PG to CD) and Partnership Firms.

Conclusion: IBC was launched with a great fervour and great hope with entire world looking at it optimistically that it would resolve the long-standing problem of sticky and slow movement of resolution matters in the country. We had experience with DRTs and SARFAESI legislation earlier and so the expectations are that IBC would definitely make us leapfrog such challenges by bringing about a huge difference. The law has made tremendous difference particularly when it comes to the culture of meeting contractual obligations in the country. The message that it has thrown amongst the businesses and industrialists in the country is, if you do not meet your contractual obligations, then you can no longer continue in the seat of management of such enterprises and somebody who is capable of running the entity efficiently shall be put in charge of the management. The strong point of the law with which it sought to distinguish itself is that it lays down timelines for every activity making every process a time-bound process (admission of CIRP is time-bound, there are strict timelines for resolution professionals, there are timelines for liquidation as well). The Government has been extremely responsive, amendments have been done as and when needed, and now after 6 years of its history of implementation, if we had some strong observations about certain things, the govt is fast in introducing changes. That indicates the sensitivity and responsiveness of the regulator. And therefore, we have a very responsive regulator. That is one noticeable feature. However, there are many challenges as well in the way of the legislation. For instance, while the law provides the AA with 14 days time period to admit or reject a CIRP application, the time taken in reality can be more than an year. Many matters which are filed do not come for a substantive hearing even for a year, thereby making the mandate of admitting or rejecting an application within 14 days a pious and humble objective.

While the spirits of all are high and we are poised to make this reformative legislation succeed in realising its objectives, there is a long laundry list of actions that we all need to take.

SEBI Vs. IBC

R. SUGUMARAN.
BBA, FCS, FCMA, MBA (Finance),
Insolvency Professional

ABSTRACT OF THE ARTICLE:

The Government of India, has enacted the Insolvency and Bankruptcy code in the year 2016, to facilitate restructuring and to provide resolutions under the process of insolvency and bankruptcy of Companies registered under the Companies Act, partnership and individuals which/who are in financial distress. For the Listed Companies whose governance is monitored by SEBI through LODR Regulations, any scheme of arrangement for restructuring was required to be preapproved by Stock Exchanges, before filing it before any Tribunal or Court. After the enactment of IBC, 2016, once the scheme under the Resolution Plan is approved by NCLT, the Corporate Debtor need not undergo the process specified by SEBI Regulations. Now, SEBI Regulations are amended to eliminate duplication of compliance in order to complete the Resolution Process within the specified timelines, under the IBC, 2016.

SEBI Regulations on Listed Companies undergoing CIRP under IBC, 2016

Preamble:

The enactment of Insolvency and Bankruptcy Code, 2016, facilitated early resolution for the stressed companies, by way of restructuring, reorganization and delisting by way of adoption of Resolution Plan. The code also empowers to find resolution for the partnership firms and individuals which/who are under financial stress. To meet the point of resolution with ease within the stipulated time and to avoid duplication of process, SEBI has amended LODR Regulations which regulate the governance of Listed Companies. The amendments in SEBI(LODR) Regulations with respect to the Listed Companies under Corporate Insolvency Resolution Process (CIRP) are discussed hereunder:

SCOPE OF IBC:

The code enables early resolution with a time bound process for the Companies, Partnership Firms and Individuals with the ultimate goal of reaching of maximisation of wealth, professional management and meeting the requirements of all stakeholders in a balanced manner. In case, such a resolution could not be reached, the Code provides for Liquidation in case of Companies and Bankruptcy for Partnership Firms and Individuals to pay off the creditors and the other stakeholders. Finally, when all the assets are sold off and all the stakeholders are settled, the code provides for dissolution of the Companies and Partnership Firms and Bankruptcy for individuals.

WHAT IS CIRP:

Corporate Insolvency Resolution Process is the process initiated by the Adjudicating Authority i.e National Company Law Tribunal (NCLT), by admitting the petition u/s 7 or 9 or 10 of the IBC, 2016. Financial Creditors of the Companies, when there is default in the loan commitments, initiates Insolvency Petition u/s 7 of the IBC, 2016, against the companies under the said code. Similarly, insolvency process is initiated by Operational Creditors u/s 9 and by the Companies themselves for voluntary liquidation u/s 10 of the said code.

Under this process, the management of the Company is vested with the Insolvency Professional who is appointed by NCLT at the time of admission. The authority of Board of Directors will stand suspended on the admission of the Company under CIRP. There will be moratorium during the CIRP period against any other legal proceedings.

ROLE OF RESOLUTION PROFESSIONAL:

On the admission of CIRP by NCLT, an Insolvency Professional/Insolvency Professional entity is appointed as Interim Resolution Professional (IRP). He/ She or an Insolvency Professional Entity will take over the management of the Corporate Debtor from the Board of Directors. The employees of the Corporate Debtor will report to the IRP and the suspended directors are required to cooperate with the IRP in managing the affairs of the Corporate Debtor. The IRP will invite claims from all the creditors and collate the same. He will convene the First Committee Of Creditors (COC), after constituting it based on the claims received from the creditors. He/ she/ Insolvency Professional Entity will seek Resolution Plans from the Prospective Resolution Applicants. On the approval of the Resolution Plan by the Committee of Creditors (COC), the same will be filed with NCLT for its approval.

ROLE OF COMMITTEE OF CREDITORS:

The COC constituted by IRP, will take on record the claims collated by IRP. It will appoint Resolution Professional (RP) in the place of IRP and will supervise the work of RP in finalising the appropriate Resolution Plan, after inviting such Resolution Plans from the Prospective Resolution Applicants by the RP and getting approval of such Resolution Plan by NCLT. COC plays the role of Board of Directors. COC will approve the CIRP expenditures and each member of the COC will contribute towards the CIRP expenditures, proportionately based on their claims.

IBC Vs SEBI(LODR):

While IBC, 2016 provides for resolutions for the stressed companies, by way of reorganisation, restructuring and delisting, the SEBI(LODR) Regulations provides for disclosures and compliances for better governance of Corporates which are listed.

On admission of the Listed Companies under CIRP by NCLT, IRP appointed by NCLT is required to comply with the provisions of the applicable laws, when managing the Corporate Debtor. Accordingly, he/ she / insolvency professional entity, will follow the SEBI(LODR) Regulations in the case of listed companies undergoing CIRP in its governance. When. NCLT approves the resolution plan under the IBC, 2016, involving restructuring, reorganization and delisting in the case of listed companies, such plan needs to be disclosed to SEBI. Now, amendments were made in SEBI(LODR) Regulations for prompt disclosures of the events happening under IBC, 2016, while excluding such events from the normal process specified in SEBI Regulations.

Supreme Court in the case of Innoventive Industries Limited vs ICICI Bank Limited, held that IBC, 2016 super cedes any other Law and once moratorium is declared u/s 14 of the IBC, 2016, SEBI has no power against the Corporate Debtor.

In Shobha Limited vs Pancard clubs Limited, NCLT, Mumbai declared that Investor Protection is dealt by SEBI, whereas IBC, 2016 deals with the interest of the creditors. Hence investors cannot proceed against the Corporate Debtor when it is under CIRP.

CLARIFICATION FROM MCA ON IBC Vs COMPANIES ACT:

Ministry of Corporate Affairs has clarified that when NCLT approves a resolution involving restructuring, reorganisation and delisting, the requirement under the Company law, to get the approval by the shareholders of the Corporate Debtor is not required. In normal course, when there is restructuring of companies through the process of merger, demerger, amalgamation, delisting, acquisition etc, the approval of the shareholders of the Company is required under the Companies Act. Vide its Circular dated 25.10.2027, MCA clarified that the process of shareholders' approval under the Companies Act, 2013 is no more required for the Resolution Plan which is approved by NCLT.

AMENDMENT IN SEBI(LODR):

With the changing environment on the enactment of IBC,2016, the responsibility of governance of the listed companies is changed. The management is vested with IRP/RP/ Insolvency Resolution Entity, on the admission of the Companies under CIRP. Further, any reorganization of the Company under the Resolution Plan as approved by NCLT is required to be completed within the stipulated time. In normal course of time, it will involve various approvals by regulatory authority. Hence, SEBI issued a discussion paper on 28 March 2018 to amend the SEBI Regulations to meet with the changing environment.

SEBI, based on the discussion paper to facilitate support to IBC, 2016 and to eliminate duplication of governance process, amended the following regulations on 31 May 2018:

1. **SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;**
2. **SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015;**
3. **SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.**

The Resolution Plan as approved by NCLT, may result in change in the shareholding pattern, very frequently exceeding the 75% ceiling on the shareholding of promoters, change in the nature of promoters' shareholding and delisting of shares, the implications of which are discussed below:

1. ACQUISITION BEYOND 75%:

When NCLT approves a Resolution Plan involving restructuring, reorganization and/or delisting of a Listed Company, it may result in holding of shares beyond the threshold of 75%. Under SEBI(LODR) Regulations, a promotor of the said company cannot hold more than the threshold limit of 75%. But when it is approved by NCLT, it does not require any approval from SEBI, however requires disclosure. This is as per the amendment made in the Take Over Regulations on 31.05.2028 which complemented the earlier amendment in August 2017. SEBI by its amendment, has exempted such acquisition of shares beyond 75% as per the Resolution Plan as approved by NCLT under section 31 of IBC, 2016. SEBI has mandated that the Corporate Debtor to maintain public shareholding at least at 5% level, in order to get admission into Stock Exchange after the completion of CIRP.

2. CLARITY ON PROMOTERS' SHAREHOLDING:

If reclassification of the existing promoter is made as per the Resolution Plan as approved by NCLT, Regulation 31A of the SEBI(LODR) Regulations would not apply, subject to the conditions that the control of the Corporate Debtor will not be with the present promoter and the rationale of such reclassification is disclosed to SEBI within one day of the approval of such Resolution Plan. The latest amendment in SEBI(LODR) Regulations, 2015, enables the classification of erstwhile promoters' shareholding as part of public shareholding, however, during the normal course, such reclassification does not entitle the promoters from diluting their holdings.

3. CLARITY ON DELISTING:

SEBI Delisting Regulations, requires the following Process:

a. making a public announcement;

b. making an offer to public shareholders;

c. opening an escrow account for depositing the consideration payable; and

d. determining the offer price through a book building process.

However, for the Listed Companies under CIRP, where NCLT has agreed with a delisting process under a Resolution Plan under Section 31 of IBC, 2016, vide Amendment dated 31.05.2018, SEBI has made the Delisting Regulations not applicable with a condition that there should be a mechanism of delisting and a specific provision for exit option for the existing public shareholders in the Resolution Plan.

The exit option for the public shareholders, if any in Resolution Plan under the IBC, 2016, should provide for price which should be not less than the liquidation value as per Regulation 35 after the payment of creditors u/s 53 of the IBC,2016.

Whenever the promoters get an exit opportunity in a Resolution Plan at a price and similar option should also be made available to the public shareholders as well under the said Resolution Plan.

Regulation 30(2A) provides that application for listing of the delisted equity shares of the Corporate Debtor, which has undergone CIRP under the IBC, 2016, whereas, under SEBI Delisting Regulations stipulate 5 years cooling period for shares delisted under Chapter III or IV and 10 years cooling period for the shares delisted under Chapter V for listing again of the delisted equity shares made under SEBI Regulations.

SUMMARY OF OTHER CHANGES TO THE LODR REGULATIONS:

SEBI has amended a number of other provisions in LODR Regulations to facilitate successful Resolution under the IBC, 2016. They are:

a) The LODR Regulations on the composition and roles of Board of Directors and Committees are not applicable to the Corporate Debtor who undergoes CIRP. Under the IBC, 2016, these roles are performed by the IRP/RP under the supervision of the Committee of Creditors.

b) The matters relating to (i) material related party transaction, (ii) material subsidiary and (iii) transfer/lease of more than 20% in material subsidiary will be disclosed to SEBI by the IRP/RP under the IBC, 2016 and shareholders' approval for such events under the Companies Act, is not required for the Listed Companies undergoing CIRP.

c) The Scheme of Arrangement of the Corporate Debtor under CIRP under the Resolution Plan as approved by NCLT requires disclosure by RP to SEBI and does not require any pre- approval from the Stock Exchange.

d) Section 29A controls the involvement of the promoters in a Resolution Plan and any Resolution Plan approved by NCLT, reclassifying the promoter shareholders as public shareholders requires only disclosure to SEBI by RP and the provisions of SEBI(LODR) Regulations and the Companies Act do not apply on such reclassification by NCLT under IBC, 2016.

DISCLOSURES UNDER AMENDED LODR:

Based on the amendment to SEBI(LODR) Regulations, the following additional requirements of disclosures are to be made by the Listed Company to SEBI:

1. **Filing of Application u/s 10 of the IBC, 2016, by the Listed Company for CIRP;**
2. **Filing of Application u/s 7 and 9 by the Creditors for CIRP;**
3. **Defaulted amounts as per the applications u/s 7,9 and 10 to NCLT;**
4. **Receipt of Demand Notice u/s 8(1) of IBC, 2016, demanding the defaulted amount from the Operational Creditor.**

On admission of CIRP of the Listed Company by NCLT, the following disclosures are required under the amended provisions of Regulation 30 of SEBI(LODR) Regulations:

1. ***Public Announcement as ordered by NCLT on admission under CIRP;***
2. **Invitation of claims by the IRP;**
3. **CoC's confirmation of the appointment of IRP;**
4. **Notice of the COC's Meetings;**
5. **Notice of Information Memorandum as prepared by RP;**

6. **Number of Bids received by RP;**
7. **Notice of Filing of Resolution Plan with NCLT;**
8. **Event of the approval of the Resolution Plan by NCLT;**
9. **Other Material information like delisting etc without disclosing any commercial secret.**

Amendment in ICDR Regulations w.r.t IBC:

Any Resolution Plan approved by NCLT involving any preferential issue of equity shares or convertible preference shares/debentures is not required to comply with the conditions set in Chapter VII of the ICDR Regulations except lock in provisions, pursuant to the amendment dated 14.08.2017 in ICDR Regulations.

WHAT FURTHER IS EXPECTED FROM SEBI:

SEBI Discussion Paper provided temporary trading suspension of the shares of the Listed Company under CIRP to avoid insider trading and market manipulation. The shareholders of the Listed Company may tend to sell their holdings in the market, having come to know about the CIRP. This will unnecessarily erode the market capitalisation of the Corporate Debtor, which may result in lower valuation of its assets. But, this discussion is incomplete and the amendment is yet to be made as this requires further study.

Similarly, restoring the 25% public shareholding within an extended time frame requires consideration of SEBI. Keeping the public shareholding below the threshold limit of 25%, for a long period will not help in the maximisation of wealth to all the stakeholders. As per the Securities contract (Regulation) Rules, when the threshold limit falls below 10% due to CIRP, the time prescribed to bring back a minimum of 10% is 18 months and to 25% within 3 years from the date of such fall. High concentration of shareholders within the promoters may help in the manipulation of the market price of the shares.

REFERENCES:

1. **Insolvency and Bankruptcy Code, 2016;**
2. **SEBI Regulations;**
3. **SEBI Circular no. CFD/DIL3/CIR/2017/21**
4. **IBBI Regulations and Notifications;**
5. **Discussion Paper of SEBI on CIRP of Listed Companies-March 2018;**
6. **MCA Notifications on IBC,2016.**

Global Arena

MALAYSIA: INSOLVENCY LAWS & REFORM

The law relating to corporate insolvency in Malaysia is governed by the Companies Act, 2016 while the laws relating to personal insolvency in Malaysia are contained in the Insolvency Act 1967 along with Rules and amendments thereon. Malaysia has a federal system of laws governing insolvency, with a separate legislative scheme for companies (winding-up) and individuals (bankruptcy). The Malaysian insolvency system is similar to and based on the English model.

THE COMPANIES ACT, 2016

Earlier, the corporate insolvency framework in Malaysia governed by the Companies Act 1965. Prior to amendment, a company in financial distress can only restructure by a scheme of arrangement under section 176 or 178 of the Companies Act 1965. Section 176 also allows the existing management to continue in management without adequate protection for creditors against dissipation of assets and inappropriate application of cash resources.

The passing of the Malaysian Companies Bill 2015, culminated in the Companies Act 2016, replaced the Companies Act 1965 marks the most comprehensive legislative change in Malaysian corporate laws in 50 years.

OVERVIEW

Liquidation or winding-up of a company, is a process whereby the company's business is closed, assets of a Company are collected realised by the liquidator in order to pay its debts to the creditors and the balance distributed to its members and eventually the company ceases to exist. In Malaysia, a company may be wound up voluntarily or compulsorily by an order of court.

The Companies Act 2016 makes significant changes to Malaysia's corporate insolvency regime. Recognizing the inadequacy of existing provisions to facilitate the rehabilitation of companies, reforms in the Companies Act 2016 include the introduction of two key features:

1. **judicial management and corporate voluntary arrangement as new corporate rescue mechanisms and**

2. **additional controls on court sanctioned schemes of arrangement to make this process more effective as a means of effecting a corporate debt restructuring.**

Judicial Management

Judicial management allows a company, its directors or a creditor, to apply to the Court to place the management of the company in the hands of a qualified insolvency practitioner known as a "**Judicial Manager**." The Judicial Manager will manage the affairs, business and property of the company for the period of 6 months with the possibility of extension for further 6 months. From the time the application is made and for the duration of any judicial management order made, a moratorium will be in force to prevent any winding up order or any other legal proceedings against the company without leave of court, including enforcement proceedings by secured creditors.

The judicial manager then prepare and present a restructuring plan for approval of creditors by 75% in value, whose claims have been accepted by the judicial manager and thereafter oversee its implementation.

The application for a judicial management order will be allowed if the company is or will be unable to pay its debts and there is a reasonable probability of rehabilitating the company, preserving all or part of its business as a going concern, or otherwise serving the interests of creditors better than in a winding up.

Certain institutions regulated by the Central Bank of Malaysia and the Capital Markets and Services Act 2007, such as financial institutions, insurance companies and asset management companies, will be unable to access the judicial management regime.

Corporate Voluntary Arrangement

The corporate voluntary arrangement is conceptually similar to the existing scheme of arrangement mechanism where the existing management of a financially distressed company remains in control during the restructuring. The fundamental difference is that the implementation of the debt restructuring proposal will be supervised by an insolvency practitioner with minimal court supervision.

The corporate voluntary arrangement will not apply to public companies, any company with charged property and certain institutions regulated by the Central Bank of Malaysia and Capital Markets and Services Act 2007.

The process of corporate voluntary arrangement commences when a proposal for the voluntary arrangement lodged with the Court by directors of the company or the liquidator or a judicial manager, whereupon the moratorium begins. The proposal shall be approved by the creditors with required majority of 75% of the total value of creditors present and voting and a simple majority of the members present and voting in the meeting of creditors and members. The moratorium ends on the day the meeting of creditors is called and can only continue to remain in place for a period of up to 60 days with the consent of 75% majority in value of creditors present at the meeting of creditors. The voluntary arrangement may also end prematurely if it has not been or cannot be fully implemented.

Improvements to the scheme of arrangement

The only formal corporate rescue mechanism available in Malaysia at the time of the Companies Act, 1965 is the scheme of arrangement. The provisions in section 176 of the Act are generally available to adjust the rights of members and creditors, reorganize the share capital of the company or perform a reconstruction or merger in the case of a group of companies. A debt restructuring scheme generally involves a compromise proposed between a company and its creditors or any class of them.

Procedurally, the Company applies to the Court for approval of the Scheme if it is approved by the Creditors representing 75% in value. The Scheme once approved by the Court, becomes binding on all creditors, including dissenting creditors.

Although section 176 of the Companies Act 1965 was amended in 1998 by the introduction of a new subsection which imposed stricter requirements, there were still major shortcomings. The scheme of arrangement procedure in the Companies Act 2016 imposes two key improvements to prevent the abuse of the moratorium provisions:

1) **limiting the maximum duration for a restraining order to 3 months with extensions of up to a further 6 months only and**

2) **allowing the Court to appoint an approved liquidator to assess the viability of the scheme of arrangement proposed and prepare a report for submission to the meeting of creditors and members. This is on the basis that an independent liquidator will be able to adopt a more objective assessment of the commercial viability of a proposed scheme, and accordingly provide necessary assistance to the Court.**

THE INSOLVENCY ACT 1967

Insolvency Act 1967 ("Act"), is an Act relating to the insolvency and bankruptcy of an individual and a firm and for connected matters. It was enacted and subsequently amended to provide for the protection of creditors and debtors, and to facilitate the orderly distribution of assets in cases of insolvency or bankruptcy. The Act contains provisions for Voluntary Arrangements and Bankruptcy of an individual. It provides orderly resolution of Bankruptcy cases and also sets out Rules and Regulations in order to protect the interests of both creditors and debtors, and to ensure that assets are distributed fairly and efficiently. The Insolvency Act 1967, was last amended on 1 September 2021 vide the Insolvency (Amendment) Act 2020.

OVERVIEW

Bankruptcy under Insolvency Act, 1967 ('the Act') refers to a process where a debtor will be declared a bankrupt pursuant to a court order. All the unsecured property belonging to the bankrupt will be vested on the Director General of Insolvency (DGI) except properties listed under section 48(1)(a) of the Insolvency Act 1967. The DGI has the responsibility to realize all such assets. The proceeds of the sale will be distributed among creditors who have filed their proof of debts and the debts have been admitted by the DGI. The debtor can only be declared bankrupt by an Order of Court. There are two methods in which the court order may be granted:

- **Petition filed by a creditor for bankruptcy action against the debtor if the debt owing amounts to RM100,000; or**
- **Petition filed by a debtor voluntarily, seeking order of Court to be declared a bankrupt.**

The Bankrupt may discharge from his bankruptcy through any of the four following methods:

a) **Annulment Order under section 105 of Insolvency Act 1967. On an application filed by the bankrupt once all debt owed debt has been paid in full;**

b) **Discharge by Court Order under section 33(3) of Insolvency Act 1967. On an application filed by the bankrupt anytime to the court at any time after a bankruptcy order has been made;**

c) **Discharge by DGI under section 33A of Bankruptcy Act 1967.**

A bankrupt may apply for discharge by DGI only if 5 years has lapsed from the date of bankruptcy order was made and upon satisfying the criteria imposed by the DGI for the exercise of his discretion. However, the DGI may discharge four (4) categories of bankrupts without any objection from the creditors under section 33A to be read together with sub section 33B(2A) of Act 360. The four (4) categories are-

1) **a bankrupt who was adjudged bankrupt by reason of him being a social guarantor;**

2) **a bankrupt who was registered as a person with disability under the Persons with Disabilities Act 2008;**

3) **a deceased bankrupt; and**

4) **a bankrupt suffering from a serious illness certified by Government Medical Officer.**

(d) Automatic Discharge under section 33C of Bankruptcy Act 1967.

A bankrupt may apply for an automatic discharge on the expiration of three years from the date of submission of the Statement of Affairs subject to the conditions as stipulated in the Act which are as follows:

1) **Bankruptcy Notice (BN) issued only on and after 6 October 2017;**

2) **has already filed and submitted the statement of affairs under section 16 of the Act;**

3) **has filled out an application form and undertaking to comply with the target contribution and to file an account of moneys and property every six (6) months;**

4) **the duration for monitoring of the Target Contribution (TC) of three years starts from the date the statement of affairs is filed; and**

5) **the bankrupt has achieved the TC as determined by the DGI taking into account some of the matters set forth in the Act.**

Revamping of Malaysian Insolvency Laws: Insolvency (Amendment) Bill 2023

In overcoming the experiencing problem, the government had taken up proactive steps to keep in tandem with the latest development in the corporate sector. **The Insolvency (Amendment) Bill 2023** ("Amendment") was passed in the 'Dewan Rakyat' (House of Representatives) on May 24, 2023. The critical suggested amendments to the Act are as follows:

Sub-Section 33B (2A) of the Act was amended to include 2 new categories where bankrupt individuals may be able to qualify for a discharge from bankruptcy and the creditor(s) may not object:

- **Individuals incapable of managing their affairs due to any mental disorder, as certified by a psychiatrist from any government hospital;**
- **Individuals aged 70 and above incapable of managing their affairs based on the opinion of the Director General of Insolvency.**

Section 33C of the Act was amended to enable bankrupt individuals to be discharged automatically in a shorter period of time, of three years from the date of the submission of the Statement of Affairs, provided that the bankrupt individual has complied with his obligations under the Act and paid the sum of money determined by the DGI. The DGI may also suspend the automatic discharge of a bankrupt for a period of not more than two years if the bankrupt individual does not fulfill his obligations under the Act and ask the bankrupt individual to provide further information on his income, expected income as well as properties.

Section 130 of the Act was amended to incorporate the ability to send notices and other documents via electronic communication, provided the person has given consent for use of electronic communication.

Section 15 of the Act and **Schedule A** was amended to provide that a meeting of creditors may be held as soon as may be after the making of a Bankruptcy Order. This suggests that a meeting of creditors is no longer mandatory and will only be held upon request and where necessary. The amendment further clarifies that the DGI for the purpose of meetings of creditor is required to summon:

- **the bankrupt and all creditors mentioned in the bankrupt's statement of affairs and creditors who have filed the proof of debts (in case of debtor's petition);**
- **the petitioner, the bankrupt and all creditors mentioned in the bankrupt's statement of affairs and creditors who have filed the proof of debts (in case of creditor's petition).**

Additionally the DGI also allowed to use remote communication technology to hold the meeting of the creditors.

REFERENCES:

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Judgments

JUDGMENTS

Case Title: Tata Power Western Odisha Distribution Ltd. & Anr. vs. Jagannath Sponge Pvt. Ltd. & Director
Case no.: Civil Appeal No. 5556/2023
Decision Date: September 11, 2023
Court/Tribunal: Supreme Court of India

FACTS:

- Corporate insolvency resolution process (CIRP) was initiated against the Corporate Debtor Jagannath Sponge Pvt. Ltd., a sponge iron manufacturing company and a resolution professional (RP) was appointed to manage its affairs and invite resolution plans from prospective resolution applicants.
- The Committee of Creditors (CoC) approved the resolution plan submitted by Shyam Metalics and Energy Ltd. (SMEL).
- The National Company Law Tribunal (NCLT), Cuttack Bench, approved the resolution plan submitted by SMEL and directed the appellant to provide a fresh electricity connection to SMEL without insisting on payment of arrears of the Corporate Debtor.
- The appellant challenged the order of NCLT before NCLAT, contending that it had a statutory right to recover its dues from SMEL under Section 56 of the Electricity Act, 2003 and that the IBC did not override the Electricity Act.
- The NCLAT dismissed the appeal and upheld the order passed by the NCLT. Aggrieved with the same the appellant challenged the order of NCLAT before the Supreme Court.

DECISION:

- The Supreme Court held that SMEL was not liable to pay any such arrears as per Section 31 of the IBC, which provides that once a resolution plan is approved by NCLT, it is binding on all stakeholders, and that it grants a discharge to the corporate debtor from all its past liabilities and dues.
- The Supreme Court observed that this is based on the clean slate principle, which aims to give a fresh start to the corporate debtor and its business under new management and ownership.
- Supreme Court further observed that IBC is a later and special law that deals with a specific subject matter of insolvency and bankruptcy and

therefore, it prevails over the Electricity Act, which is a general law that deals with a different subject matter of electricity supply and distribution.

- The Supreme Court further observed that the dues of appellant being an operational creditor, are subject to distribution as per Section 53 of the IBC, which gives priority to secured creditors over unsecured creditors and to government dues over residual debts. The Court dismissed the appeal.

CASE REFERRED:

Paschimanchal Vidyut Vitran Nigam Ltd. vs. Raman Ispat Private Limited and Others; Southern Power Distribution Company of Andhra Pradesh Limited vs. Gavi Siddeswara Steels (India) Pvt. Ltd. and Another; Embassy Property Developments Private Limited vs. State of Karnataka and Others.

Case Title: Eva Agro Feeds Private Limited v. Punjab National Bank & Anr.

Case no.: Civil Appeal No.7906 of 2021

Decision Date: September 06, 2023

Court/Tribunal: Supreme Court of India

FACTS:

- The Adjudicating Authority ordered for liquidation of the Corporate Debtor Amrit Feeds Limited faced and appointed second respondent as the liquidator.
- The Liquidator fixed an auction for sale of assets of the Corporate Debtor. However, the auction did not materialise and hence, the Liquidator scheduled another auction.
- The appellant received an e-Auction Certificate from the Liquidator, certifying that the Appellant had won the auction. The liquidator next day intimates the appellant that the e-Auction had been cancelled under Clause 3(k) of the Disclaimer Clause in the E-Auction Process Information Document and that a fresh e-Auction would be conducted for the Subjected Property.
- Aggrieved with the same, the Appellant filed an Application before the NCLT, which was allowed by the Adjudicating Authority.
- Punjab National Bank (PNB)/respondent financial creditor challenged the adjudicating authority's decision that directed the liquidator to proceed with the highest bidder, Eva Agro Feeds Pvt. Ltd. (Eva), in the auction.
- The National Company Law Appellate Tribunal (NCLAT) overturned the adjudicating authority's order and instructed the liquidator to initiate a new auction process.
- The NCLAT pointed out the liquidator's authority to accept or reject any bid or to cancel the auction without providing a reason. The NCLAT stated that the sale is considered successful only after complete payment has been made.
- Eva approached the Supreme Court against the NCLAT's ruling.

DECISION:

- The Supreme Court observed that para 1(11) of Schedule I to the IBBI (Liquidation Process) Regulations, 2016 (Regulations) permitted the liquidator to conduct multiple rounds of auction to maximize the realization in the sale of assets and to promote the best interests of the creditors. However, a liquidator was dutybound to intimate the reasons to the highest bidder for rejecting the highest bid in the auction process and was also required to mention it in the next progress report.
- Furnishing of reasons presupposes application of mind to the relevant factors and consideration by the concerned authority before passing an order. Absence of reasons may be a good reason to draw inference that the decision making process was arbitrary.
- The Supreme Court emphasized that, in the event of a conflict between the auction process document and the IBC or the Regulations, the provisions of the IBC or the Regulations would always take precedence.
- The Supreme Court observed that ordinarily the highest bid may be accepted by the Liquidator unless there are statutory infirmities in the bidding or the bidding is collusive in nature or there is an element of fraud in the bidding process.

- Furthermore, even in the subsequent e-Auction, the Liquidator had announced the same reserve price as the earlier one, in which the Appellant had emerged as the highest bidder.
- Consequently, the Supreme Court observed that the NCLAT was not justified in setting aside the order of the adjudicating authority and the appeal was allowed.

CASE REFERRED:

S. N. Mukherjee versus Union of India; State of Orissa versus Dhaniram Luhar; East Coast Railway versus Mahadev Appa Rao; Kranti Associates (P) Ltd. Versus Masood Ahmed Khan; Valji Khimji and Company Versus Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Others; K. Kumara Gupta Versus Sri Markendaya and Sri Omkareswara Swamy Temple and Ors.; Swiss Ribbons Private Limited and Another Versus Union of India and Others; Phoenix ARC Private Limited versus Spade Financial Services Limited; Arcelor Mittal (India) (P) Ltd. V. Satish Kumar Gupta; Arun Kumar Jagatramka Versus Jindal Steel and Power Limited and Another.

Case Title: SAJ Housing Pvt. Ltd Vs. Ms. Priyanka Chouhan, Liquidator & Ors.

Case no.: Company Appeal (AT)(Insolvency) No. 1093 of 2022

Decision Date: September 01, 2023

Court/Tribunal: NCLAT, New Delhi

FACTS:

- The Corporate Debtor - M/s Drishti India Limited had entered into a Development Agreement with SAJ Housing Private Limited (SHPL) for development of a piece of land for a housing society.
- SHPL as the Developer paid a total consideration amount of Rs.16.15 cr to the Corporate Debtor in lieu of purchase/acquisition of irrevocable development rights. The SHPL had 56% ownership rights while the Corporate Debtor had 44% rights in the built-up area of the project.
- The Respondent No.2 - Financial Creditor had paid an amount of Rs.1.90 cr purportedly as loan to the Corporate Debtor. Due to default in repayment of the amount by the Corporate Debtor, the respondent No. 2 filed an application under Section 7 of the IBC.
- The Adjudicating Authority admitted the said application and appointed the Resolution Professional. The Resolution Professional filed an application before the Adjudicating Authority to direct SHPL to hand over possession, control and custody of the land of the Corporate Debtor under development.
- Meanwhile, the Resolution Professional convened the 3rd meeting of the Committee of Creditors (CoC) wherein the CoC with 100% vote share approved the filing of an application for liquidation of the Corporate Debtor.
- SHPL filed its claim before the Resolution Professional. The claim was not accepted by the Resolution Professional on the ground of being time-barred. SHPL filed an application before Adjudicating Authority against rejection of their claim by the Resolution Professional.
- The Adjudicating Authority ordered liquidation of the Corporate Debtor and disposed of the application filed by SHPL by giving them an opportunity to make their claim before the liquidator.
- Aggrieved with the same, appeal was filed on the grounds that the CoC failed to abide by the timelines of the CIRP and had rushed into liquidation within 38 days of commencement of CIRP.

DECISION:

- The NCLAT held that once the CoC with 100% vote share had found that the company is not a running company and cannot be revived as there is no employee or any business activity, the decision of the CoC becomes a business decision of the majority of the CoC.
- The decision as to whether the Corporate Debtor is to be revived or not is essentially a business decision and hence should be left to the CoC so long as it musters more than 66% vote share.

- Undisputedly, in the statutory framework of the IBC, there is only limited review available which can be exercised by the Adjudicating Authority without trespassing upon the business decision of the majority of the CoC.
- There can be no fetters on the commercial wisdom of the CoC. The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the Hon'ble Supreme Court.
- It is not for the Adjudicating Authority to consider or evaluate on merits the rationale underlying the commercial decision of the CoC.
- The NCLAT dismissed the appeal and directs the liquidator to continue with the liquidation process and inter-alia allow SHPL to submit their claim before the liquidator in terms of the IBC and regulations framed thereunder.

CASE REFERRED:

Committee of Creditors of Essar India Ltd. Vs. Satishkumar Gupta & ors 2020(8) SCC 531; Amit Bharana Vs. Gianchand in CA (AT) (Ins) 274/2020.

Case Title: Mr. Vijay Kumar Garg Vs. Power Grid Corporation of India Limited & Ors.

Case no.: Company Appeal (AT) (CH) (INS.) No. 260 of 2023

Decision Date: September 01, 2023

Court/Tribunal: NCLAT, Chennai

FACTS:

- The Corporate Debtor executed a Transmission Agreement with the respondent and in terms of Clause 1 of the said Agreement, the Corporate Debtor, had furnished `Bank Guarantees', for a Sum of Rs.66 Crores, to and in favour of the respondent.
- The Respondent because of the `Adverse Progress of the Generation Project of the Corporate Debtor', issued letters to the Corporate Debtor invoking Bank Guarantee.
- The appellant comes out with a plea against the respondent and takes a stand that the act of recovery of monies will directly impact the financial health of the Corporate Debtor and is prohibited under Section 14 of the IBC.
- The Adjudicating Authority is of the view that applicant could not provide a valid ground or sufficient cause to interfere with the invocation letters issued by respondent seeking to invoke the Bank Guarantees and consequently dismissed the application.
- Aggrieved with the impugned order passed by the Adjudicating Authority, the appellant preferred an appeal before the NCLAT.

DECISION:

- The NCLAT held that `Performance of Bank Guarantee', is `excluded' from the definition Section of 3 (31) of the IBC, 2016. The NCLAT holds in a cocksure manner that the `Performance Bank Guarantee', does not fall under `Moratorium', in terms of Section 14 of the IBC, 2016.
- It was observed by the NCLAT that there was an Adverse Progress as regards the Construction of Generating Station by the Corporate Debtor. The Transmission Agreement points out that the Bank Guarantee shall be encashed in case of Adverse Progress of Work.
- The NCLAT observed that it was well settled legal principle that the Bank Guarantee is neither an Asset nor a Liability of a Company. Considering the facts and circumstances of the case the NCLAT, held that the Invocation of Performance Bank Guarantees is pursuant to the Transmission Agreement are just `valid' and `legally tenable'.
- NCLAT dismissed the appeal and held that the conclusion arrived at by the Adjudicating Authority in the impugned order in dismissing the Interlocutory Application is free from any legal infirmities.

Case Title: Pankaj Tibrewal vs. West Bengal Industrial Development Corporation

Case no.: IA (IB) No.1267/KB/2022 IN C.P (IB) No.1712/KB/2019

Decision Date: September 01, 2023

Court/Tribunal: NCLT, Kolkata Bench-II

FACTS:

- An application for initiation of the CIRP of the Corporate Debtor (M/s. DuttaAgro Mills Private Limited) was filed by IDBI Bank (Financial Creditor), under Section 7 of the Code, which was admitted by the Adjudicating Authority.
- The ex-management of the Corporate Debtor informed the Resolution Professional that physical possession of the Corporate Debtor has been taken over by West Bengal Industrial Development Corporation (WBIDC), the respondent.
- The Corporate Debtor in the year 2006 had availed a term loan of Rs.17,20,00,000 from the Respondent. As per the terms of the loan agreement, a charge was created by the Respondent upon the movable and immovable assets of the Corporate Debtor.
- The respondent being a Financial Corporation comes under the purview of Section 3 of the State Financial Corporation Act, 1951 (SFC) and had powers/rights to take over the management or possession or both of the Corporate Debtors by virtue of Section 29 of the SPC Act, 1951.
- Further, the applicant as a Resolution Professional has right and power to take over the possession of the Corporate Debtor and by virtue of Section 19 and Section 25 of the Code to take custody and control of all the assets of the Corporate Debtor.
- The applicant filed an application before the Adjudicating Authority to direct the Respondent to handover the possession of the properties/ assets of the Corporate Debtor to the Applicant on the grounds that IBC overrides the SFC Act.

DECISION:

- The Adjudicating Authority observed that the Corporate Debtor is a defaulter but the WBIDC the Creditor Corporation is not the owner of the property hypothecated/mortgaged to it by the Corporate Debtor.
- The Adjudicating Authority held that IBC, 2016 is indubitably and indisputably a Special Statute as also a later statute vis-a-vis the SFC Act of 1951, both having non obstante clause. However, the reach of non obstante clause of SFC Act is limited by Section 46 B of the Act, whereas non obstante clause of IBC shows that it prevails in all situations. Hence the provisions of IBC, 2016 should prevail over SFC Act, 1951.
- The Adjudicating Authority allowed the application by the Resolution Professional and directed the Resolution Professional to act in accordance with the provisions of the Code.

CASE REFERRED:

Bihar State Financial Corporation; A. Navinchandra Steels Private Limited; Allahabad Bank Vs. Canara Bank, (2000) 4 SCC 406; Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills, (2008) 15 SCC; Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1;

Policy and Regulatory Updates

Insolvency and related news around the world

❖ NCLT GRANTS REQUEST TO SAFEGUARD RESOLUTION PROFESSIONAL IN NITIN DESAI INSOLVENCY CASE

The National Company Law Tribunal (NCLT) on Friday allowed the resolution professional's plea seeking protection from any action for his inability to immediately take steps under the insolvency code in deceased art director Nitin Desai's ND's Art World's insolvency case. The counsel for the resolution professional of ND's Art World said that owing to the matter's sensitivity, the resolution professional will only be able to take necessary steps in discharge of his duties after "normalcy is restored".

Read More at: https://www.livemint.com/news/india/nclt-grants-request-to-safeguard-resolution-professional-in-nitin-desai-insolvency-case-11693577890215.html

❖ FUTURE RETAIL LENDERS REJECT SPACE MANTRA'S BID; NCLT EXTENDS INSOLVENCY PERIOD FOR 15 DAYS

In August, Kishore Biyani and his brother Rakesh Biyani were asked by the Bank of India to respond to findings made in the forensic audit report by BDO, a forensic auditor appointed by the leading financial creditor of FRL. The lenders of Future Retail Ltd have rejected the bid submitted by Space Mantra for the debt-ridden firm, which is currently going through Corporate Insolvency Resolution Process (CIRP).

Read More at: https://www.zeebiz.com/companies/news-future-retail-lenders-reject-space-mantras-bid-nclt-extends-insolvency-period-for-15-days-257168

❖ INDIA CHANGES INSOLVENCY RULES TO EXCLUDE FREEZING OF LEASED AIRCRAFT

India has amended its insolvency law to exclude leased aircraft from assets that can be frozen, according to a government notification released, resolving a discrepancy between global and local rules after criticism from leasing firms. The rule change comes at a time when foreign lessors of budget airline Go First are entangled in a legal dispute to recover their aircraft after the airline went bankrupt in May.

Read More at: https://www.moneycontrol.com/news/business/india-changes-insolvency-rules-to-exclude-freezing-of-leased-aircraft-11478971.html

❖ MCA TWEAKS RULES; NEW PROMOTERS OF BANKRUPT FIRMS CAN EASILY SHIFT REGISTERED OFFICES

The Indian government has amended rules to allow insolvent firms to easily shift their registered offices to another state or union territory if there are no pending investigations or appeals against the resolution plan. The move is expected to provide relief to new promoters who want to achieve better operational synergy with their other businesses.

Read More at: https://economictimes.indiatimes.com/news/economy/policy/mca-tweaks-rules-new-promoters-of-bankrupt-firms-can-easily-shift-registered-offices/articleshow/104674793.cms

❖ ADANI POWER CLOSE TO TAKING OVER COASTAL ENERGEN FOR ₹3,440 CRORE

After two days of intense bidding, Adani Power emerged as the winner late Saturday evening, said two people with knowledge of the matter. Jindal Power, the other bidder in the fray, quit the race, they added. The interest in Coastal Energen, undergoing corporate insolvency, is mainly because it is among a few operational power plants for sale.

Read More at: https://economictimes.indiatimes.com/industry/energy/power/adani-power-close-to-taking-over-coastal-energen-for-3440-crore/articleshow/104633578.cms

❖ A NEW CHARTER FOR THE NARCL, IDRCL TWINS

In her budget speech of 2021, the finance minister proposed to set up an asset reconstruction company ("NARCL") and an asset management company ("IDRCL"), i.e., "The Twins", "to consolidate and take over the existing stressed debt and then manage and dispose of the assets to alternate investment funds and other potential investors for eventual value realization".

Read More at: https://economictimes.indiatimes.com/industry/banking/finance/banking/a-new-charter-for-the-narcl-idrcl-twins/articleshow/104580386.cms

GAMES CORNER

GUESS THE CASE

1. The Court gave the reasoning that the literal interpretation of Section 7(5)(a) would indicate that the word *"may"* is used to indicate the discretion of the Court which is unlike the case in Section 9(5)(a) where the word "shall" is used.
2. The Supreme Court opined that if a resolution plan excludes the statutory dues payable, such a resolution plan is liable to be rejected by the NCLT. In this case, the debt owed to a secured creditor was ranked equal to the security interest in favour of the government in lieu of the statutory dues under the GVAT Act.
3. The customs authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium.
4. The Supreme Court further clarified that for the purpose of calculating of limitation period of three years, each time the limitation would get extended when there is the existence of an acknowledgment of debt in any of the firms specified above.
5. Definition of 'dispute' is inclusive and not exhaustive under the Code and applies to all kinds of disputes in relation to 'debt' and 'default'.

Answer key:

1. Vidarbha Industries Power Limited v. Axis Bank Limited (Civil Appeal No. 4633 of 2021)
2. State Tax Officer v. Rainbow Papers Limited (Civil Appeal No. 1661 and 2568 of 2020)
3. Sundresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs (Civil Appeal No. 7667 of 2021)
4. Asset Reconstruction Company Limited v. Tulip Star Hotels Private Limited and Ors. (Civil Appeal No. 84-85 OF 2020)
5. Kirusa Software Pvt. Ltd. V. Mobilox Innovations Pvt. Ltd.

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