ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
(A wholly owned subsidiary of ICSI and registered with IBBI)
VOL XII | NO. : 12 | PG. 1-68 | March 2024

INSOLVENCY AND BANKRUPTCY JOURNAL

New Beginnings: Policies and Processes

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	info@icsiiip.in	+91 74289 22988
Finance & Accounts	info@icsiiip.in	+91 120 408 2159

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From Chairman's Desk

Starting a business is like jumping out of an airplane without a parachute. In mid-air, the entrepreneur begins building a parachute and hopes it opens before hitting the ground

– Robert Kiyosaki, Author: Rich Dad Poor Dad

Unlocking value for businesses through the Insolvency and Bankruptcy Code (IBC) has emerged as a transformative mechanism in India's corporate landscape. Enacted in 2016, the IBC introduced a robust framework for the resolution of insolvency and bankruptcy proceedings, aiming to streamline the process, maximize asset value, and promote economic efficiency.

The IBC revolutionized India's insolvency and bankruptcy landscape by providing a comprehensive legal framework for the resolution of distressed assets and corporate insolvency. It established clear procedures, timelines, and mechanisms for the resolution of insolvent companies, with the overarching goal of maximizing value for all stakeholders involved.

The IBC provides a lifeline for distressed businesses by facilitating their revival through resolution plans that focus on restructuring debt, infusing capital, and enhancing operational efficiency. By enabling distressed companies to overcome financial challenges, the IBC preserves value and preserves jobs.

Through the transparent bidding process mandated by the IBC, distressed assets are sold to the highest bidder, ensuring maximum realization of value for creditors. This competitive process attracts strategic investors and financial buyers, driving up asset prices and maximizing recoveries.

In cases of corporate deadlock or insolvency, the IBC provides a mechanism for breaking impasses and resolving disputes through the intervention of insolvency professionals and judicial oversight. By facilitating consensus-building and negotiation, the IBC unlocks value trapped in stalemate situations.

The IBC's emphasis on transparency, accountability, and creditor rights enhances investor confidence in India's corporate ecosystem. The efficient resolution of insolvency cases instils trust in the legal and regulatory framework, attracting domestic and foreign investment and fostering economic growth. By swiftly resolving insolvent companies and reallocating capital to more productive uses, the IBC optimizes capital allocation in the economy, channeling resources to sectors with higher growth potential and promoting overall economic efficiency.

The Insolvency and Bankruptcy Code (IBC) represents a paradigm shift in India's approach to corporate insolvency and restructuring. By providing a robust legal framework, the IBC enables businesses to unlock value, preserve jobs, and promote economic growth. As businesses continue to navigate the challenges posed by insolvency and financial distress, the IBC remains a critical tool for revitalizing distressed companies, maximizing asset value, and fostering a more resilient corporate ecosystem in India.

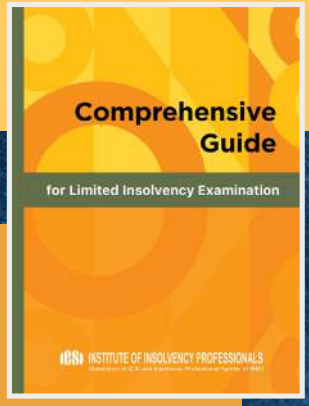
(P.K. Malhotra)

Chairman, ICSI IIP

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

Book Release

"we pride ourselves with building knowledge by having enhancement to education skill vision, and helping it reach its fullest potential."



Comprehensive Guide for Limited Insolvency Examination 1st Edition

This book serves as a guide for how to ace the exam that makes a professional an Insolvency Professional and open up a sea of opportunities for themselves. This is based on the latest syllabus as made applicable by IBBI.

INR 990/-
Postage Extra

IBC Digest: A Compendium of Research Outcomes

This publication is a collection of Research Articles submitted by our members for this editorial. This publication will bring to its readers both retrospective and prospective viewpoints relating to Insolvency and Bankruptcy realm. With over 10 Research Articles, this collection is a first of its kind publication for ICSI IIP.

INR 390/-
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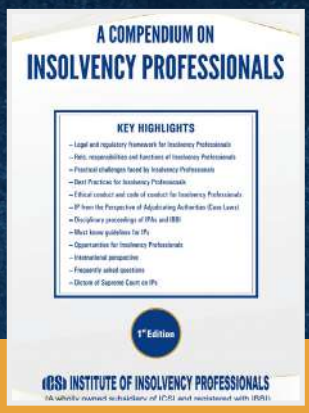

A Compendium on Insolvency Professionals

ICSI IIP has brought-out a comprehensive publication on Insolvency Professionals titled 'Compendium on Insolvency Profession', 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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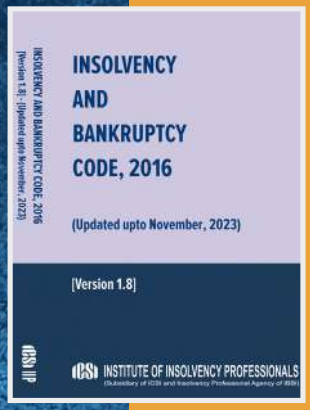
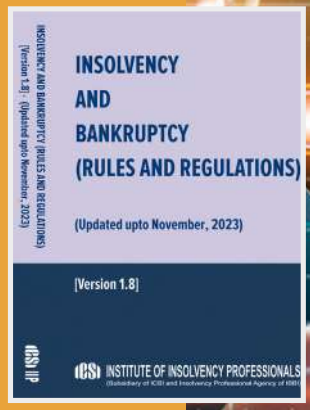
Postage Extra



Insolvency and Bankruptcy Code; Insolvency and Bankruptcy (Rules and Regulations) 8th Edition

The Bare Act and its Regulations in a pocket book format, updated till November 2023.



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MD's Message

The implementation of the Insolvency and Bankruptcy Code (IBC) in India has had a significant positive impact on the growing economy, particularly concerning the recovery of bad assets. The IBC has introduced a robust legal framework for the resolution of insolvency and bankruptcy proceedings, which has helped address longstanding challenges in the Indian banking sector and promote economic growth.

Under the IBC framework, the resolution process focuses on maximizing the value of distressed assets for creditors, which encourages strategic investors to participate in the resolution process. The transparent bidding process mandated by the IBC ensures fair competition and optimal realization of asset value, thereby minimizing losses for creditors and enhancing overall recovery rates.

The introduction of the IBC has enhanced credit discipline among borrowers and lenders by establishing clear consequences for defaulting on loan obligations. The fear of insolvency proceedings and loss of control over assets has incentivized borrowers to repay loans promptly and adhere to contractual obligations, leading to improved credit culture and reduced incidence of loan defaults.

The IBC provides a lifeline for distressed businesses by offering them a chance to revive and restructure under new ownership or management. By facilitating the resolution of stressed businesses in a timely manner, the IBC helps preserve jobs, protect the interests of employees, and prevent the erosion of value in viable businesses facing financial distress.

The implementation of the IBC has bolstered investor confidence in India's legal and regulatory framework by providing a transparent and predictable mechanism for resolving insolvency cases. The robustness of the IBC framework, coupled with the successful resolution of several high-profile cases, has attracted domestic and foreign investment, fostered entrepreneurship, and stimulated economic growth.

The IBC has helped address systemic issues in the Indian banking sector, such as the prevalence of NPAs and the lack of an effective mechanism for resolving insolvency cases. By enabling banks to recover bad loans more efficiently and improving asset quality, the IBC has contributed to the stability and resilience of the banking system, which is vital for sustaining economic growth.

Overall, the implementation of the IBC has promoted economic efficiency by reallocating capital from unproductive or distressed assets to more productive uses. By facilitating the resolution of insolvency cases in a timely manner and maximizing recovery rates for creditors, the IBC helps optimize resource allocation, stimulate investment, and drive economic development.

IBC has emerged as a game-changer for the Indian economy, particularly concerning the recovery of bad assets and the resolution of insolvency cases. By introducing a transparent and efficient resolution mechanism, the IBC has enhanced investor confidence, strengthened credit discipline, and promoted economic growth, positioning India as a more attractive destination for investment and business development.

Dr. Prasant Sarangi

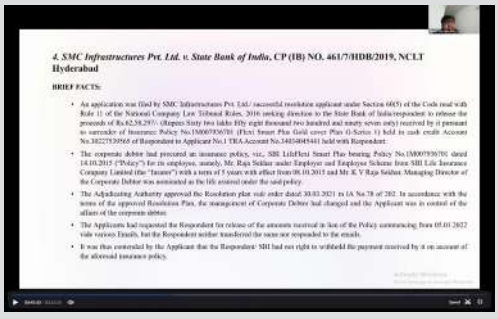
Managing Director, ICSI IIP

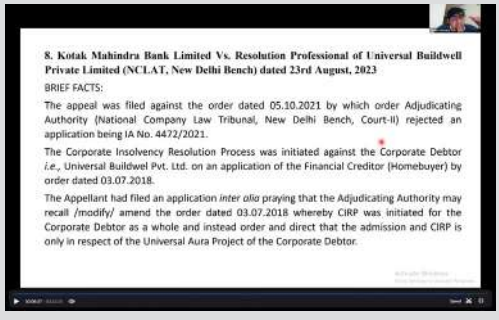
Events @ICSI IIP

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

1. IBC Conclave organised by ASSOCHAM Tamil Nadu State Development in association with ICSI Institute Of Insolvency Professionals on Saturday, 3rd February, 2024 at the Southern India Chamber of Commerce and Industry, Chennai

2. Webinar on Anatomy of IBC Case Laws-14 by Advocate and IP Apoorv Sarvaria on Monday, 5th February, 2024



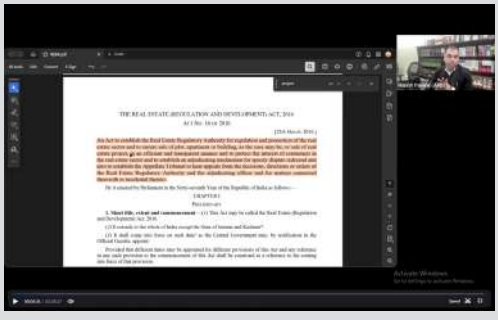


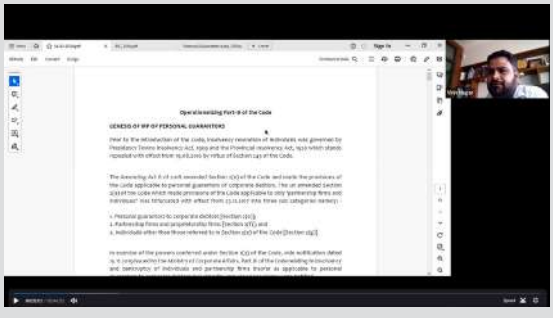
3. Workshop on Interplay of IBC with Other Laws by CS S. Badri Narayanan, CS and IP Dipti Atul Mehta and CS and IP Ashish Singh on Wednesday and Thursday, 7th February, 2024 and 8th February, 2024

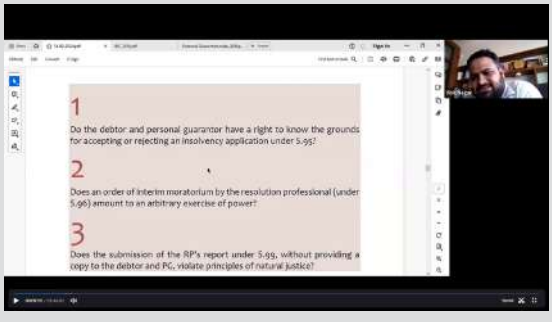
4. Seminar cum Celebration of 47th Foundation Day of Chandigarh Chapter organised by ICSI Chandigarh Chapter In Association With ICSI Institute Of Insolvency Professionals on Saturday, 10th February, 2024

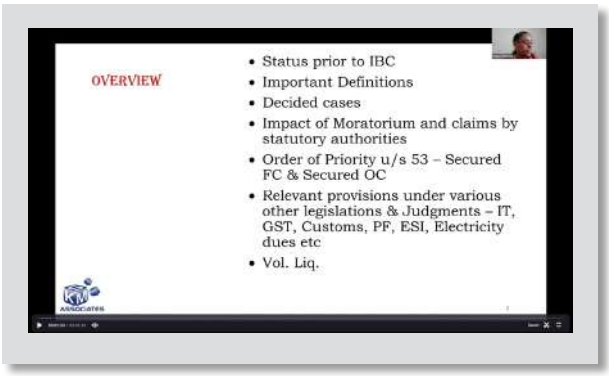
5. Workshop Series "Perspectives on IBC Series VIII-An Array" from 13th February, 2024 onwards.

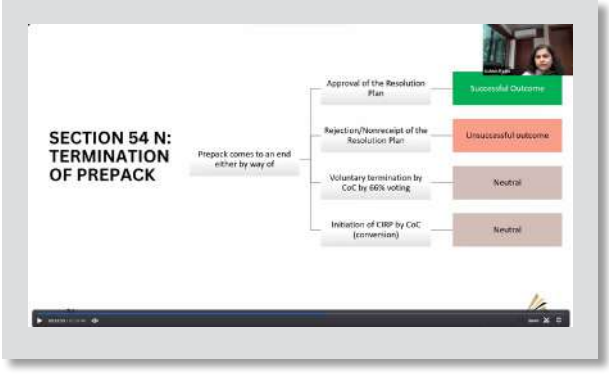
The topics covered in the series such as understanding corporate restructuring under IBC with relevant case laws, project wise (real estate) insolvency under IBC with relevant case laws, operationalization of part III of IBC with relevant case laws, treatment of government dues under IBC with relevant case laws and learning session on prepack for IPs with relevant case laws

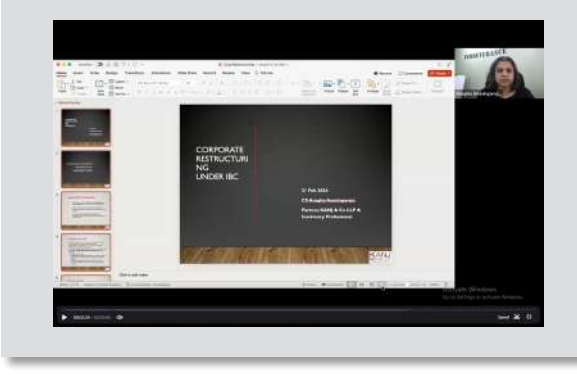




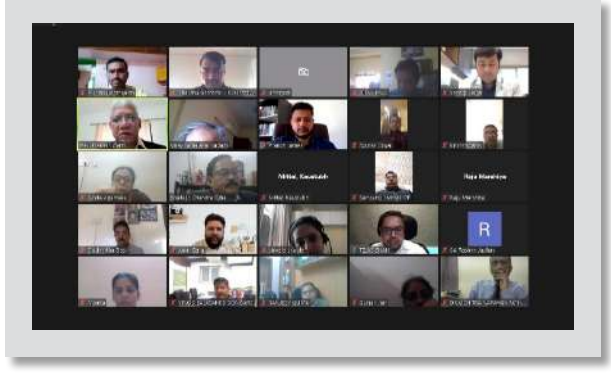




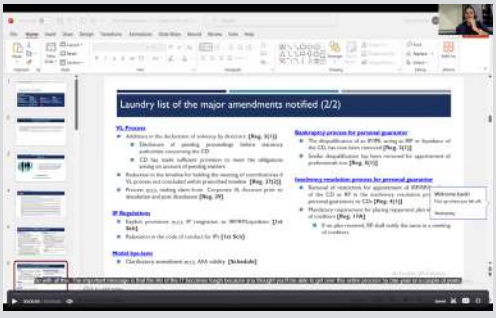


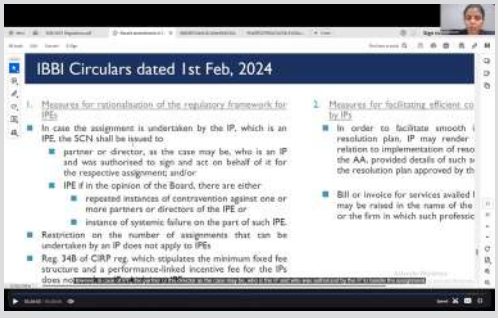


6. 63rd Batch Pre-Registration Education Course (Online Course) organised by ICSI IIP jointly with IIIPI and IPA ICAI from Monday, 19th February, 2024 to Sunday, 25th February, 2024

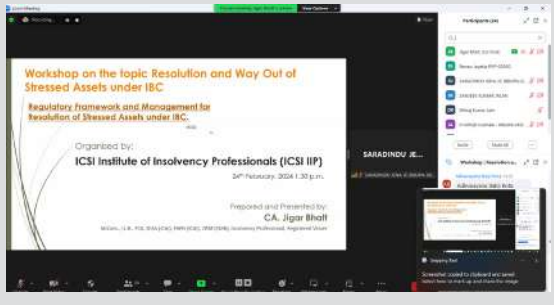


7. Webinar on Decoding Recent Changes in IBC Regulations by CS and IP Vinod Kothari on Thursday, 22nd February, 2024

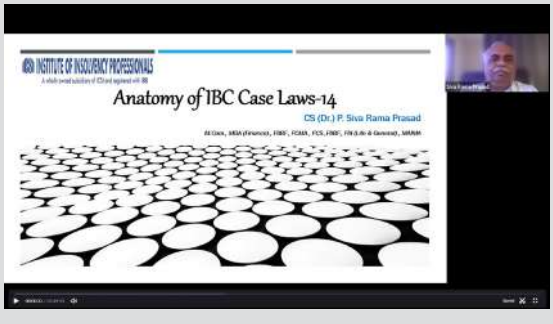


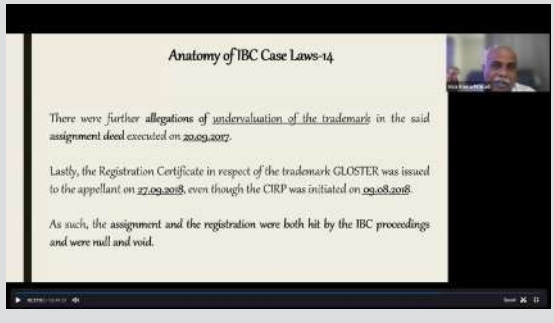


8. Workshop on Resolution and Way Out of Stressed Assets Under IBC by CS S. Dhanapal Narayanan and CA and IP Jigar Bhatt on Saturday, 24th February, 2024

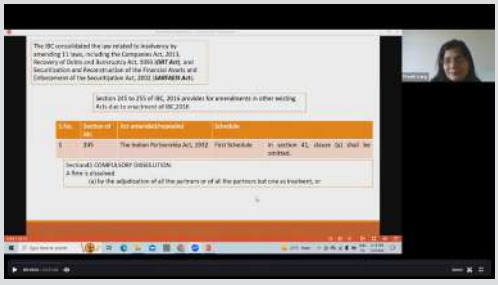


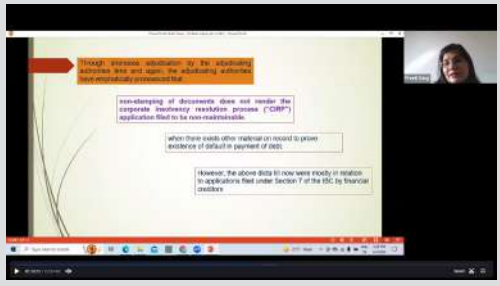
9. Webinar on Anatomy of IBC Case Laws-14 by CS, CMA and IP Siva Rama Prasad Puvvala on Thursday, 29th February, 2024

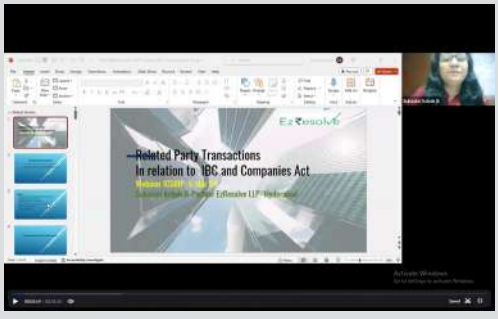


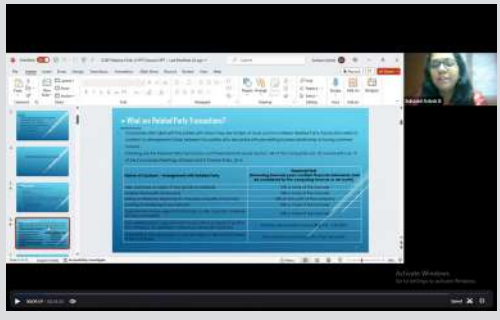


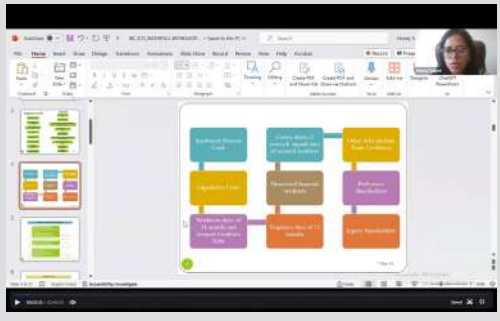
10. Workshop Series "Perspectives on IBC Series VIII-An Array" from 4th March, 2024 to 8th March, 2024. The topics covered in the series such as interplay of IBC with allied laws, drafting, pleadings and arguments before NCLT and NCLAT, related party transaction in relation to IBC and companies act, waterfall mechanism under IBC and CIRP and reverse CIRP under IBC

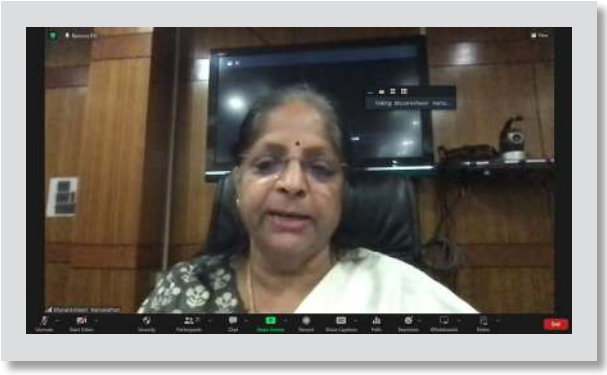




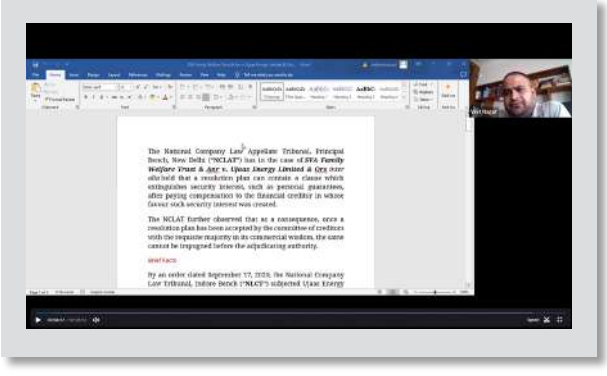


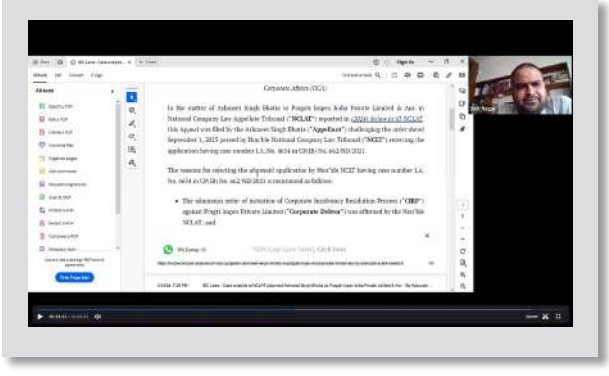




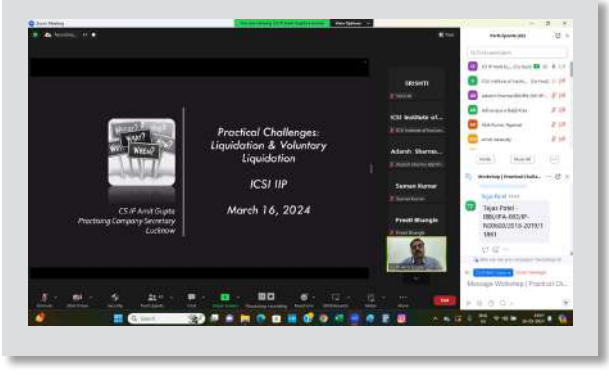


11. Webinar on Anatomy of IBC Case Laws-15 by CS and IP Vinit Nagar on Friday, 15th March, 2024



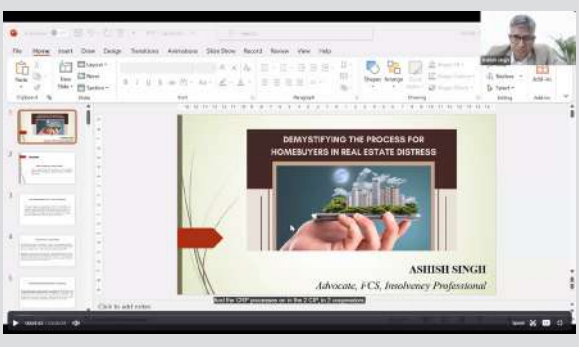


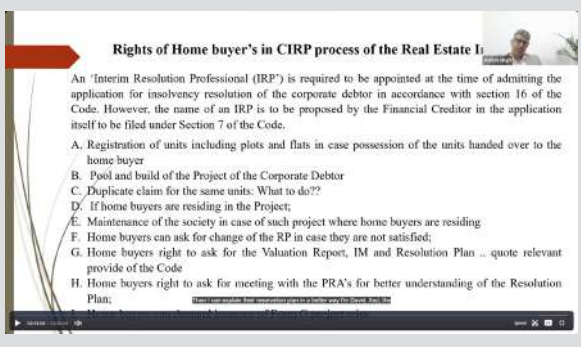
12. Workshop on Practical Challenges: Liquidation and Voluntary Liquidation Processes by CS Barsha Dikshit and CS and IP Amit Gupta on Saturday, 16th March, 2024



13. Annual Residential Refresher Course organised by RIPA in association with ICSI Institute of Insolvency Professionals from Friday to Sunday, 15th March, 2024 to 17th March, 2024

14. Webinar on Demystifying the Process for Homebuyers in Real Estate Distress by CS and IP Ashish Singh on Tuesday, 19th March, 2024





Learner's Corner

FAQS ON FAST TRACK CIRP

Q1. Who can go for Fast track corporation insolvency resolution process (Fast Track CIRP)?

Chapter IV Part II of the Code provides a fast track process for insolvency resolution, which is applicable in respect of the following category of corporate debtors laid down in section 55(2) of the Code:

a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or

b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or

c) such other category of corporate persons as may be notified by the Central Government.

Q2. What are the categories of corporate debtor, notified by the Central Government for the purpose of Fast Track CIRP?

The Central Government has notified the following categories of corporate debtors:

a) a small company as defined under 2(85) of Companies Act, 2013 (18 of 2013); or

b) a startup (other than the partnership firm) as defined in the notification of the Government of India in the Ministry of Commerce and Industry number G.S.R. 501(E), dated the 23rd May, 2017 published in the Gazette of India, Extraordinary, Part II, section 3, sub-section (i), dated the 23rd May, 2017; or

c) an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding ₹1 crore.

Q3. What is the manner for initiating Fast Track CIRP?

As per Section 57, an application for fast track corporate insolvency resolution process may be filed

by a creditor or corporate debtor as the case may be, along with-

a) The proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board; and

b) Such other information as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process

Q4. What are the timelines for completion of Fast Track CIRP?

As per Section 56, the fast track process is required to be conducted within a period of 90 days from the insolvency commencement date, with a provision of one-time extension of up to 45 days.

Q5. Whether there is any regulation governing Fast Track CIRP?

The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

Legal Maxims

Allegiants Contrarie Non-Est Audiendus

He is not be heard who alleges things contradictory to each other. The principal *Estoppel* used in the Indian jurisprudence is based on this maxim.

Example: In the case of ***B.L.Sreedhar & Ors. Vs K.M. Munireddy (Dead) & Ors. (AIR 2003 SC 578: 2003 (2) SCC 355),*** Supreme Court was of the view that if a man either by words or by his conduct intimates that he consents to an act, he cannot question the legality of the act to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. This *Estoppel* was held to be based on the maxim, *allegiants contraire no est audiendus* (a party is not be heard to allege the contrary)

Assignatus utitur jure auctoris

An assignee is clothed with the rights of his principal

Example: In the case of **K. Subbanna Rai Vs Deranna Rai & Ors. (MANU/KE/2503/2010),** a leading rule concerning alienations and forfeitures is *"assignatus utitur jure auctoris"* – an assignee is clothed with the rights of his principal.

Delegatus non potest delegare

In the absence of power, a delegate cannot sub-delegate its power to another person.

Example: In the case of ***In Re: The Delhi Laws Act, 1912 (AIR 1951 SC 332: 1951 (2) SCR 747)***, a 7 Judge Constitution bench of Supreme Court held that no legislative body can delegate to another department of the government, or to any other authority, the power, either generally or especially, to enact laws which embody the principle underlying the maxim, delegatus non-protest delegate. The Court further clarified that all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duty with which it has been entrusted.

Ignorantia Facti Excusat Ignorantia Juris Non-Excusat

Ignorance of facts may be excused but not ignorance of the law – the legal principle being that a person who is unaware of a law may not escape liability for violating that law merely because he was unaware of its content.

Example: In the case of ***Inder Singh Vs Union of India (LA Appeal Nos. 66/2013, 278/2013 & 91/2014)***, the court used the maxim to not entertain the plea of a party that he was not aware of the right to file an appeal i.e. ignorance of the law is not an excuse.

ICSI IIP – AT A GLANCE

1. DURING THE MONTH OF FEBRUARY, 2024

S. No.	Particulars	Details
1.	Members enrolled	2
2.	IPs monitored	5
3.	AFA applications received	38
4.	AFA applications approved	37
5.	Complaints/Grievances received	2
6.	Complaints/Grievances disposed off	8
7.	SCN issued	0
8.	Disciplinary action taken	3

2. DURING THE MONTH OF FEBRUARY, 2024, FOLLOWING PROGRAMS WERE ORGANISED BY ICSI IIP

WORKSHOPS

S. No	Date of Webinar	Topic
1.	07.02.2024	Workshop | Interplay of IBC with Other Laws | February 7th to 8th, 2024
2.	13.02.2024	Workshop | Perspectives on IBC - An Array (Series VIII) | 13th Feb. 2024 (Onwards) | 2pm - 5pm
3.	24.02.2024	Workshop | Resolution and Way Out of Stressed Assets Under IBC | 24th Feb. 2024 | 9.30am - 4.30pm

WEBINARS

S. No	Date of Webinar	Topic
1.	05.02.2024	Webinar | Anatomy of IBC Case Laws - 13 | February 05, 2024 | 3pm - 6pm
2.	22.02.2024	Webinar | Decoding Recent changes in IBC Regulations | 22 February 2024 | 05:30pm
3.	29.02.2024	Webinar | Anatomy of IBC Case Laws - 14 | February 29, 2024 | 2pm - 5pm

SEMINARS

S. No	Date of Seminar	Topic
1.	10.02.2024	Seminar cum Celebration of 47th Foundation Day of Chandigarh Chapter jointly with IIPs on 10/02/2024 at Hotel Mountview, Chandigarh at 4.00 PM onwards

IBC CONCLAVE

S. No	Date of IBC Conclave	Topic
1.	03.02.2024	ASSOCHAM Tamil Nadu State Development Council | IBC Conclave | Saturday, 03rd February 2024 | The Southern India Chamber of Commerce and Industry, Chennai

PREC

S. No	Date of PREC	Topic
1.	19.02.2024	63rd Batch Pre-Registration Education Course (Online Course) (February 19, 2024 - February 25, 2024)

Learning the Law

By: Adv. Ankita Agarwal
Executive (Legal & Research)
ICSI Institute of Insolvency Professionals

PRE-PACKAGED INSOLVENCY: BASICS AND CONCEPTS

The concept of Pre-Packaged insolvency or bankruptcy (commonly referred to as 'Pre-Packs') was first germinated in the United States of America (USA). The prevalent insolvency legislation in the US is Title 11 of the United States Code, commonly referred to as Chapter 11 proceedings. A pre-packaged insolvency or bankruptcy is a corporate rescue procedure wherein the debtor prepares a financial reorganisation plan in consonance with its creditors that is implemented once a company enters Chapter 11 (insolvency) proceedings. It is the preparation of a plan and its negotiation prior to filing for insolvency by the corporate debtor itself. The reasoning behind this process was to deleverage the company capital structure without causing any disruption to the operations of the corporate debtor.

The thought of introducing something concise and quick like a pre-packaged insolvency was to shorten and streamline the process along with saving funds of the company that would otherwise have been spent on legal and other professional fees. The practice of pre-packaged bankruptcy is now prevalent in the United Kingdom, Netherlands as well as Singapore and Canada.

Pre-pack is a hybrid restructuring mechanism which mostly involves informal arrangements between the debtor and creditor without the influence of a third party, however the final sanction rests on judicial intervention. The role of the judicial intervention is not just limited to final approval of the arrangement/plan, it also includes protection from unequal treatment met out to any creditor, if at all.

The Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process (hereinafter referred to as the 'Sub-Committee Report') explained that the pre-pack, therefore, is a voluntary consentient process between debtors and creditors to resolve stress. The state of stress, whether reflected in default or not, should not matter for initiation of prepack.

The Statement of Insolvency Practice -16 (SIP 16) provides detailed guidance for insolvency practitioners involved in a pre-pack administration process in the United Kingdom. It defines the term 'pre-packaged sale' as an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the

transaction or transactions immediately on or shortly after appointment.

It is established that pre-packaged insolvency is a semi formal method of reorganisation. The need for pre-packaged insolvency is felt when there is a gap in the existing insolvency framework wherein a group or a specific group of organisations or individuals are deficient in finding a solution to them being insolvent or bankrupt due to lapses in the procedure of the existing framework.

The expedited reorganization proceedings discussed in the Guide to address those situations follow the procedure of reorganization, but on an expedited basis, combining voluntary restructuring negotiations, where a plan is negotiated and agreed by most affected creditors, with reorganization proceedings commenced under the insolvency law to obtain court confirmation of the plan to bind dissenting creditors. Such proceedings are designed to minimize the cost and delay associated with formal reorganization proceedings, while at the same time providing a means by which a restructuring plan negotiated voluntarily by a debtor with some, or all its creditors nevertheless can be approved in the absence of unanimous support of those creditors. They also allow the approval of the restructuring plan obtained in the voluntary negotiations to be used to achieve a reorganization that will bind creditors, at the same time providing the protections of the insolvency law to affected creditors.

These difficulties, as well as some of the costs, delays and procedural and legal requirements often associated with full-fledged reorganization proceeding, may be avoided where pre-packaged restructuring is used. These proceedings can provide a cost-efficient means of resolving a debtor's financial difficulties.

Advantages

Pre-Packs come with a lot of advantages owing to two of its principal features, i.e., informal reorganisation and shorter timelines. Some of its major benefits are:

Quick Resolutions	**Cost Effective**	**Value Mazimisation**
Debtor as going Concern	**Reduce Judicial Intervention**	**Job Preservation**

As indicated above, the efficiency that a pre-pack solution would offer tends to be drawn from the fact that the pre-pack is a low cost, speedy, and synergised approach to an otherwise debt-ridden organisation whose alternate solution would be loss of jobs and business, hefty costs of legal and other professionals as well as loss of time and control that would be incurred owing to being pushed into insolvency and reorganisation. The speed offered in this device of reorganisation is something that would prove to be useful to companies that are smaller in size and has more direct involvement of the owner and its promoters.

Pre-packs are a machine to cause minimum disruption in the functioning of the corporate debtor's functioning and tends to offer a larger opportunity to the promoters/owners of the company to retain their control over the corporate debtor and preserve the business partner relationships.

This method of partial formal restructuring also offers the creditors a chance to be actively involved in the process and manage and mitigate their debts along with a debtor, who might suffer a loss under a formal reorganisation plan.

The pre-packaged also offers several apprehensions and concerns regarding transparency and the role of the insolvency professional/administrator of the plan as well as the Adjudicating Authority. The lack of control of any outside, neutral party is the basis for apprehension among the stakeholders. Another point of concern is that the administrator/insolvency professional may be unable to tend to the interest of all the creditors, including minority as well as unsecured. All these apprehensions emanate from the point of lack of transparency in the system as well as the lack of transfer of control within the organisation. The lack of transfer of control is said to make it more susceptible to fall victim to one of the avoidance transactions. The cynics of the system strongly believe that the one responsible for pushing the company into insolvency cannot be the same one to bring it out of insolvency and towards a better structural reorganisation.

However, the advantages outweigh the criticisms of the system as each apprehension, especially the ones dealing with managerial control can be easily managed with viable solutions.

Acknowledging the system of pre-pack better, it is important to understand certain specific procedures and concepts that govern the device.

NEED FOR PRE-PACKAGED INSOLVENCY

The use of solutions such as pre-packaged restructuring need not stem from the fact that the formal insolvency system might be poor, inefficient or unreliable, but rather from the advantages such solutions can offer as an aide to purely formal insolvency proceedings, which deliver fairness and certainty.

There are several factors that point toward the need for a semi formal or an informal restructuring mechanism in the country. For brevity, they are listed as under:

1. Delay in courts: There is tremendous pressure on the Adjudicating Authorities due to overburdening of the courts, lack of sufficient infrastructure etc. The time taken in even admitting of new applications are abysmal.
2. Slow Sale of Distressed Assets: Originating from the delays made in courts and otherwise, the publishing of interest for stressed assets is slower, the more time it takes less is the interest expressed in such assets due to loss of value. there are issues with marketability of such assets also.
3. Non-cooperation: At various stages of the insolvency process, it is often observed that the process is met with resistance either from the debtor, its promotors, its management or the creditors themselves. This eventually pushes the debtor into liquidation.
4. Limitations to certain sectors: The applicability of the Insolvency laws of the country cannot yield the same results with every industry. Some provisions that may work best for manufacturing industry might not be the same for the hospitality industry. Thus to make the insolvency law a "one size fits all" framework, different frameworks might need to be introduced under the same.

INITIATION

The initiation of the pre-packaged insolvency proceedings should be done in a simplified manner. However, since this is a pre-emptive form of insolvency, it would also require steps to be taken prior to filing of the application for initiation with the Adjudicating Authority. The idea for such initiation rests with the debtor. Once the debtor and its management have decided to initiate the proceedings, the approval or consent of the creditors would be required. Since it is a semi formal system of restructuring, there would need to be some preinitiation steps to be taken by the debtor and the creditor.

The consent required may be through a system of special resolution or a resolution by simple majority taken amongst the creditors. The system and procedure for commencement may be simple and cost effective. The initiation should also establish safeguards to protect debtors, creditors, and other parties in interest, including employees, from abuse of the application procedure.

It should ideally also provide for the initiation to be done at a pre insolvency stage wherein since onus is on the debtor to initiate, there should not be a need to supply a proof of debt along with the application made for insolvency. The initiation of such insolvency proceedings must also not be delayed due to lapses in the judicial system and must be fast tracked owing to its nature being simplified and consensual. The timeline for admission of such applications must be shorter than the ones prescribed for formal restructuring procedures.

The initiation must also be allowed to be done by the creditors of the corporate debtor.

In a situation such as a pre-packaged insolvency process where a pre-initiation stage is just as important, if not more, it is also necessary to determine whether the checklist for pre-initiation has been ticked. The most necessary aspect of such a procedure is the mixture of both formal and informal mechanisms to ensure that the commencement is based on a consensus. After checking with the preinitiation requirements, necessary internal approvals need to be taken from the debtor and then head to commencement of the proceedings. After completion of the pre-initiation requirements, an application will be filed with the Adjudicating Authority.

The Adjudicating Authority will decide the fate of the parties by either admitting the application or

rejecting the application within a specific time frame. The Adjudicating Authority will ensure that all the pre-initiation requirements and specifications have been fulfilled.

DEBTOR-IN-POSSESSION VS. CREDITOR-IN-CONTROL

With the arrival of Insolvency and Bankruptcy Code, 2016, the legal model framework for insolvency in the country moved towards a creditor focused, creditor friendly, creditor first model, also known as *"Creditor-In-Control"*. This essentially means that during the insolvency proceeding of a debtor, the debtor is striped off any rights to their business as well as decision making, and the reigns are handed over to the creditors. The creditors are usually given the power to decide on important aspects during the insolvency through a system of either majority voting or unanimous decision making while the debtor is denied any control or management of their corporation.

Conversely, a *"Debtor-In-Possession (DIP)"* concept, permits the debtor company to arrive at the terms of restructuring while remaining in possession of its assets. The concept is prevalent in countries like the United States wherein the courts have the power to permit the debtor company to retain management of the company. The debtor company, however, remains subject to the oversight of the creditors and their committee and the Adjudicating Authority. Under this model granted to the corporate debtor, the debtor is in charge of its day-to-day activities and the existing management of the debtor is not replaced by the control of a insolvency professional or an administrator. The UNCITRAL Legislative Guide on Insolvency Law defines this model as *"a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;"* In support of the "Debtor in possession" model, the Report of the Sub Committee of the Insolvency Law Committee (hereinafter referred to as the Sub Committee Report) stated that,

> *"The co-operation of the existing management is critical to the process. It needs to continue to be in possession of the CD and carry on the business as usual to minimise disruption to business. A third party or insolvency practitioner taking over business is a disruption and a dent to reputation which pre-pack endeavours to avoid. In pre-pack sale in the UK, though the CD moves to supervision of an administrator, the sale is often executed within hours of the appointment of the administrator. The management has control over the company before commencement of administration and substantial control over the process."*

There is the advantage that there are far more possibilities of a reorganisation to happen while keeping the debtor organisation as a going concern. This is since if the debtor is in control of his own fruit of labour, he is more likely to want the best possible solution in line with the creditors to keep the organisation afloat. However, once the debtor has sole control in the process. However, the flip side of this coin is such that given a free hand, the debtor may act irresponsibly or even fraudulently, by, for example, dissipating the assets leading to undermining the organisation as well as the creditors. This possibility leads to low to none chances of reorganisation or restructuring.

The design of pre-pack aims to marry both the concepts and strike a balance between the rights and duties entrusted to the parties. An informal mechanism with the limited involvement of the Adjudicating Authority would warrant equal participation and agreement of the parties. However, the design of the DIP model is directly inverse to the existing model of CIC in India.

On the point of adopting a system in India with regard prepack regime, the Sub Committee Report that,

MANAGEMENT OF CD

3.35. A debtor-in-possession model is the preferred option for resolution of stress through prepacks. This avoids inevitable shocks to the operations associated with CIRP where the CD shifts from the current management to the IRP and then to the RP and then finally to the successful RA. This incentivises the CD to initiate pre-pack, as its management continues to run the business and has high possibility of retaining it through a resolution plan. This is necessary particularly when the business needs resolution and the market may

not have many third parties interested in business of the CD. The sub-committee recommends debtor-in-possession model for prepacks. This makes the process simpler and its closure quicker, while helping the CD operate at its optimum level during the resolution.

3.36. The sub-committee is, however, cognisant of the balance of power envisaged under the Code. The debtor-in-possession must not dilute the hold of creditors over the CD. The management of the CD shall have a certain set of duties, in addition to its fiduciary duties under the Companies Act, 2013 towards the creditors of the CD, similar to those that an IRP/RP has in a CIRP with regard to managing the operations of the CD. The CD shall also continue to be liable for all compliances, which are otherwise the responsibilities of the RP during a CIRP. The transactions envisaged under section 28 are not routine operation related matters. Ideally, such transactions should not be undertaken during the pre-pack. However, complete prohibition may compromise the interests of CD or creditors in certain circumstances. ***Hence, decisions in matters enumerated under section 28 of the Code shall be taken by the CD with the approval of the CoC.***

3.37. The CoC may have liberty to close the process with 66% of those who are present and voting, if the CD engages in any activity which has potential to cause depletion of assets or value to the detriment of creditors. The CoC may even decide with 75% of voting power to liquidate the CD at any time during the pre-pack process, where the conduct of the CD is not above Board, the CD does not have a viable business, or for any other reason. This will ensure that the CD behaves well and makes a sincere effort to resolve stress. The creditors will also behave responsibly as the liquidation may not always be in their interest and they may find it difficult to have approval by 75% of voting share unless the rationale for liquidation is strong. ***The sub-committee, therefore, recommends a hybrid approach of debtor-in-possession with creditor-in-control for pre-pack with clear demarcation of responsibilities of the CD, RP, and creditors."***

As is clear from the discussion above, the solution may be that if the debtor is in possession and stays in control during the process, a very delicate dance of checks and balances needs to be put in place so that appropriate protections including varying levels of control of the debtor and provision for displacement of the debtor in specified circumstances, is present in the legislation itself. The powers given to the debtor also need to be divided between the Insolvency professional appointed by the Court as well as the debtor themselves. A hybrid solution may include limited displacement, where the debtor may continue to operate the business on a day-to-day basis, subject to the supervision of an insolvency representative, in which event the division of responsibilities between the debtor and the insolvency representative should be specified in the law. There also should be varying degrees of supervision by the court and the creditors, in an instance where the control is with the debtor and the powers of the insolvency professional are limited.

Where the committee of creditors is given the power to make a decision, even in a hybrid debtor in possession model, there the decision-making ability should be completely independent and should represent the interests and concerns of all the creditors.

PHOENIXING VIS-À-VIS SECTION 29A

One of the greatest speculations against the concept of the pre-pack regimes is that it is a ploy to escape debt. In some cases a pre-pack is a *"sham... to ditch debt"*, which could result in 'phoenixing' of companies *"whereby companies are successively allowed to run down to the point of winding up, only to rise phoenix-like from the ashes as a new company formed and managed by an almost identical group of persons and utilising a company name similar to that under which the former company was trading."*

Section 29A of IBC, pertaining to ineligibility of resolution applicants has been made applicable to such pre-packs. However, it is ambiguous to understand the practical implication of the Swiss Challenge vis-à-vis section 29A of IBC. The facts that the ineligibility net of the promoters is too wide under section 29A and negligible promoters would be ideally eligible to submit the resolution plan make it difficult to determine the feasibility of any eligible

promoter submitting a base resolution plan or challenging the bid.

The reasoning behind the introduction of Section 29A may help us understand a little about the apprehension in the minds of creditors and investors alike. The Insolvency Law Committee Report of 2018 reasoned that Section 29A was added to the Code by the Amendment Act of 2018. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code. The scope of persons to be tested for the disqualification criteria can be determined by reading the first line of section 29A with clause (j). They read as follows: *"A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person" suffers from any of the infirmities stated in clauses (a) to (i) or "has a connected person not eligible under clauses (a) to (i)."*

The Committee felt that section 29A was introduced to disqualify only those who had contributed in the downfall of the corporate debtor or were unsuitable to run the company because of their antecedents whether directly or indirectly.

However, in recognition of the importance of Micro, Small and Medium Enterprises (MSMEs) to the Indian economy and the unique challenges faced by them, it was decided to allow the Central Government to exempt MSMEs from application of certain provisions of the Code. Illustratively, since usually only promoters of an MSME are likely to be interested in acquiring it, applicability of section 29A has been restricted only to disqualify wilful defaulters from bidding for MSMEs.

The worry about phoenix-ing, though, is not viable. There are already checks in place in the form of Swiss Challenge, Voting by COC, Protection to Operational Creditors as under IBC. In other jurisdictions, such as the UK, USA, Netherlands and Singapore, there are no such restrictions. In the UK, there is a provision of an expert panel that analyses the plans submitted by *'connected persons.'*

The Hon'ble Apex Court in the matter of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***[1] while deciding on the applicability of Section 29A held that a person ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 to submit a resolution plan, shall be considered ineligible from making a compromise or arrangement under Section 230 of the Companies Act, 2013. The Hon'ble Supreme Court also held that courts should adopt a purposive interpretation of Section 29A of the IBC, which acts as a vital link in ensuring that the objects of the IBC are not defeated by allowing the management (who have run the company aground) to return to the corporate debtor as resolution applicants.

SWISS CHALLENGE METHOD

A Swiss Challenge is a method of bidding, wherein an interested party initiates a proposal or a bid. The details of the project are then open for all and proposals are invited from all interested parties interested in executing it. On the receipt of all these bids, the best bid is matched. In doing so, opportunity is provided to the original bidder to match the competing bid, else the best amongst the competing bids is accepted. In its application to CIRP, the lenders or more specifically, the Committee of Creditors, decides on the use of Swiss Challenge Method for maximising the value of assets.

The pre-pack mechanism allows for a Swiss challenge for any resolution plans which proved less than full recovery of dues for operational creditors. Under the Swiss challenge mechanism, any third party would be permitted to submit a resolution plan for the distressed company and the original applicant would have to either match the improved resolution plan or they can lose their company. The lenders will have to call for fresh bids if the resolution plan of the promoters involves any haircuts for the operational creditors. The promoters will be given an opportunity to match the bids, else they may lose the business to a new player.

The mechanism for Swiss Challenge Method as envisaged under the pre-pack regime proposed in India is that there should be a pre-condition, there should be a base plan, which may be proposed by the promoters and where they are not eligible under Section 29A,

from such other person as arranged by the CoC. The base resolution plan once approved, is submitted to the resolution professional. A binary approach is followed. *First,* the resolution plans that propose to pay operational creditors in full and *second,* the ones where only a portion of operational creditors' claim is proposed to be recovered.

The pre-pack should start with a base resolution plan. The Base Resolution Plan prepared by corporate debtor having inside knowledge of business is a good starting point. In fact, if there is no impairment of operational creditors, CoC can accept the Base Resolution Plan itself, with some improvements. It is specifically clarified that the corporate debtor may submit the base resolution plan either individually or jointly with any other person.

The **Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process** capitulated that

3.74. The base resolution plan submitted by promoters shall form the basis for swiss challenge, where the details of the plan are disclosed. The sub-committee noted that swiss challenge is a time-tested mechanism and has proven to be highly effective in value maximisation and ensuring transparency of the process. However, the rights and interests of promoters and RAs participating in the swiss challenge should be balanced carefully. If the promoter knows that someone may come up with a better offer, it will endeavour to offer the best value at the first instance. However, to prevent unexpected takeovers by third-party RAs, if a plan is submitted that offers a higher consideration than the plan offered by the promoters of the CD, the promoters should have an option to match such a plan. This would minimise the fear of loss of control by the existing management of CD and incentivise it to initiate the process at an early stage. However, if the promoters have an absolute right to match the offer of a challenger, then no RA will be interested to participate in the process, as they know that the promoter would ultimately match their offers. Conversely, it will incentivise the promoter to submit an undervalued resolution plan at the outset, knowing fully well that it can later match the value in case a higher value is offered. Further, there must not be more than one round of swiss challenge, as it will disturb the timeline and even discourage prospective RAs to participate in the process. However, after swiss challenger is identified, the CoC may allow multiple chances to the promoter and the swiss challenger to improve their plans in quick succession. Therefore, design of the swiss challenge needs to balance the incentives and disincentive of the promoters and the swiss challenger to drive value maximisation.

A model swiss challenge process has been described in the Report as follows:

A base resolution plan should be ready before commencement of pre-pack. It could come from promoters if they are eligible under section 29A of the Code and wish to submit a plan, or from another person arranged by the creditors. Where creditors are arranging a resolution plan, they may run a private and confidential process to invite resolution plans from select investors and select the best of them to serve as the base plan.

On commencement of pre-pack, the base resolution plan shall be submitted to the RP. If such plan pays out the dues of OCs fully and the CoC feels that it gives the best value, it may decide to accept the plan. If it does not pay the dues of OCs fully, it shall necessarily conduct a swiss challenge. It shall release the commercials of the base plan and its weighted average score (WAS) as worked out by the CoC and invite resolution plans to challenge the base plan and select the best of them. Such invitation will be made only once.

The CoC now has two plans, the base plan (Plan A) from the promoter / investor and the plan (Plan B) of the swiss challenger. If WAS of Plan B is better than the Plan A by more than X%, Plan B will be accepted. If WAS of Plan B is better than Plan A by less than X%, the promoter /investor would have an option to improve the WAS of Plan A by at least Y% above that of Plan B. Thereafter, the swiss challenger will have an option to improve WAS of Plan B by at least Y% above that of Plan A. Then the promoter/investor would have option to similarly improve its plan further. This process will go on till one of then decides to quit. The opportunity for improvement will be closed in 24-48 hours. The person, who does not quit, becomes the successful resolution applicant. The processes will be backed up by usual legal arrangements to enforce the outcome.

INSIGHTS

CA Pawan Kumar Singal
B.Com (H), FCA, ACS,
Insolvency Professional
Registered Valuer, CERT. IND (AS), FA & FD & PMLA

Recovery from avoidable transactions at crossroads

One of the objectives of the CIRP is to maximize the value of the assets of the company, in financial distress. In line with the objective of maximizing asset value for creditors, the IBC includes provisions to ensure that all undesirable or fraudulent transactions that accrued prior to the CIRP date and have diminished the company's value are cancelled or avoided. One of the major responsibilities cast upon an insolvency professional during CIRP includes forming opinion and determining the amounts involved and filing application to Adjudicating Authority in respect of preferential, undervalued, extortionate and fraudulent transactions, named as PUFE or Avoidance transactions. Such exercise is intended to extract or disgorge the value from the erstwhile management or other wrongful beneficiaries in the direction of achieving value maximization for corporate debtor's business/assets.

Overall, since inception of IBC, applications for avoidance transactions filed with the Adjudicating Authority till March 31, 2022, involves dues of Rs 2.21 lacs crores. Of these applications, 73 applications involving dues of Rs.15,000 crore only have been disposed and balance (714) applications were ongoing as on March 31, 2022. Against this, recovery stands at Rs.4,549 crore across 12 applications. However, the recovery is mainly attributed to only one application (viz. Jaypee Infratech Limited) by way of recouping land

parcels, valued at Rs.4,500 crores. Various reasons which inter-alia include delays at NCLT to decide upon the fate due to frequent adjournments and counter litigation, quality of forensic / transaction audit report, non-availability of assets etc, can be attributed to slow pace of disposal of applications and low recovery rate from applications. Recent judgement by Hon'ble Supreme Court in the case of ***Glukrich Capital Pvt. Ltd. v. The State of West Bengal & Ors, ("Glukrich")*** shall further jeopardise, already beleaguered quantum of recovery from avoidable transactions.

In IBC 2016, avoidable transactions have been classified in four categories:

1. Preferential transactions (Section 43)
2. Undervalued transactions (Section 45)
3. Extortionate credit transactions (Section 50)
4. Fraudulent trading or wrongful trading (Section 66)

Efficacy of section 43, 45 and 50 is very limited due to limited scope and limitation of time of two years, in case of related party transactions and one year in other cases. However, scope of section 66 of the IBC, is very wide wherein any type of transaction can be determined as fraudulent transaction provided such transaction can be demonstrated to have been carried out with the "intent to defraud" its creditor or for "any fraudulent purpose". Further, there is no time limitation on look back period unlike other sections. Section 66 has been divided into two parts. Section 66(1) prescribes liability of any person who is knowingly party to the carrying of any business with a dishonest intention to defraud creditors. However, section 66(2) prescribes liability only on directors and partners of a company if the directors know or ought to have known that there was no reasonable prospect of avoiding the commencement of corporate insolvency resolution process and if the directors or partners have failed to exercise due diligence in minimizing the potential loss to be incurred by the creditors.

Due to wide scope and no limitation on time period, recovery under section 66 can be substantial provided IPs / forensic auditor identify and determine avoidable fraudulent transactions objectively and diligently. However, affirmation of Apex Court in the *Glukrich Capital Pvt. Ltd. v. The State of West Bengal & Ors,* that the remedy against third party is not available under Section 66 of IBC, and in such circumstances, it is for the Resolution Professional or the successful resolution applicant to take such civil remedies against third party for recovery of dues payable to corporate debtor, and the civil remedies which may be available in law are independent of the said Section, has narrowed the scope of section 66(1).

In its judgement Apex Court held that

> *"…observe that the Tripura High Court has rightly relied upon the observations made by this Court in a binding precedent, in Usha Ananthasubramanian Vs. Union of India, which pertains to a matter under Section 339(1) of the Companies Act, 2013 which is pari materia with Section 66 of IBC."*
>
> *We are of the considered opinion that in such circumstances, it is for the Resolution Professional or the successful resolution applicant, as the case may be, to take such civil remedies against third party, for recovery of dues payable to corporate debtor, which may be available in law. The remedy against third party, however, is not available under Section 66 of IBC, and the civil remedies which may be available in law, are independent of the said Section."*

In the aforesaid judgement, Apex court referred judgement of Tripura High Court, delivered in the matter of Smt. Sudipa Nath Vs. Union of India & Ors. wherein court observed that:

> *"13….. That Section 66 (1) also directed towards making such persons personally liable for such fraudulent trading to recouping losses incurred thereby and to provide that the NCLT can pass order holding such persons liable to make such contributions to the assets of the corporate debtor as it may deem fit. No power has been conferred on NCLT to pass such orders against other organizations/legal entities (other than corporate debtors) with whom such business was carried out against any person responsible in such other organizations/legal entities for carrying on business with corporate debtor. For the said purpose, the ratio of the judgment of the Hon'ble Supreme Court in Usha Ananthasubramanian (supra) in the context*

of section 339 (1) one of the companies Act, 2013 as extracted above would clearly apply even in the context 66(1) of IBC. Accordingly, an application under Section 66(1) by the resolution professional would not bar any civil action in accordance with law, either at the instance of resolution professional or liquidator or by the corporate debtor in its new avatar on a successful CIRP for recovery of any dues payable to the corporate debtor by such organization / legal entities. Such legal action is independent of Section 66(1)."

Both Tripura High Court as well as Apex Court in Glukrich case followed Apex court judgement in the matter of Usha Ananthasubramanian. In the case of Usha Ananthasubramanian , who was former MD & CEO of Punjab National Bank , issue before Supreme Court was whether the order of the (NCLAT which directed the freezing of assets of former MD of PNB, Usha Ananthasubramanian was without jurisdiction. The Apex Court set aside the order of the NCLAT and observed that it is clear that powers under these sections (invoked against the appellant) cannot possibly be utilized so that a person who may be the head of some other organization be roped in, and his or her assets be attached. The Apex court further observed that Section 337 of Companies Act refers to the penalty for frauds by an officer of the company in which mismanagement has taken place. Likewise, Section 339 of Companies Act refers to any business of the company which has been carried on with intent to defraud creditors of that company. The Apex Court observed that:

"Obviously, the persons referred to in Section 339(1) as persons who are other than the parties to 'the carrying on of the business in the manner aforesaid' which again refers to the business of the company which is being mismanaged and not to the business of another company or other persons,"

In none of the above referred cases, Court directly defined "third party". In general parlance, word "third party" refers to a person, which is not involved in a transaction. Third person is a person who neither have any obligation nor any right in the transaction. Usha Ananthasubramanian being MD & CEO of Punjab National Bank only, neither had any personal obligation nor right or benefited from transactions entered into by Punjab National Bank with its client and therefore rightly, held that being third party, her personal assets cannot be freezed. Hon'ble Tripura High Court in Smt. Sudipa Nath Vs. Union of India & Ors, also intended to have the same meaning , as it used the words "against other organizations/legal entities (other than corporate debtors) with whom such business was carried out ***against any person responsible in such other organizations/legal entities for carrying on business with corporate debtor.***

However, in Glukrich case, facts were entirely different. In this case, Glukrich Capital was unsecured financial creditor of Leading Hotels Ltd. (Corporate Debtor), which was undergoing insolvency proceedings. Glukrich Capital filed SLP before the Supreme Court challenging extension of the transit anticipatory bail to the suspended directors of the Corporate Debtor. The application was dismissed on the ground that the Glukrick has no locus as it was neither a party not informant in the instant matter. Glukrich again approached before the Supreme Court vide an Interim Application for clarification and in that context Apex Court observed the above. Certainly, Apex court was correct in its observation that Glukrich had no locus in the matter. However, subsequent observation that *"The remedy against third party, however, is not available under Section 66 of IBC, and the civil remedies which may be available in law, are independent of the said Section." has created entire confusion, as Apex Court has not defined categorically meaning of third party.*

After the above judgement, various benches of NCLT started following Glukrich judgement without appreciating facts of the said judgement and started rejecting all applications filed u/s 66(1) of code in which relief is being sought against persons / entities others than directors, even if such persons/ entities were direct parties and real beneficiary of such transactions, and still holding immovable assets acquired through such transactions. Above judgement has made situation very peculiar in a real estate company, where directors usually transfer assets fraudulently through complex transaction which interalia include:

- Parking flats in their own disguised company(s) by taking small amount as sale consideration

- Undervalued sale of flats to its own chosen persons / entities
- Giving possession by receiving small consideration
- Bulk sale of flats under marketing arrangement, at substantially undervalued price
- Double sale of flats
- Allotment of flats against antecedent operational debts

Had there been no time limitation, certainly, some of above types of transactions could have been categorised as preferential or undervalued transactions. However, despite meeting all the essential ingredients of section 66(1) of the Code, above types of fraudulent transactions would escape from the clutches, due to narrow interpretation of the section, even if Resolution Professional / COC submit application u/s 66(1) and seek relief against persons responsible for carrying on business i.e directors, as assets remain in possession of other persons / entities and not with directors. It is futile to expect directors to return assets, as they are not in possession of such assets or otherwise compensate corporate debtor for its losses on such account. Only worthwhile remedy is to cancel such transactions so that assets is made available to corporate debtor to recoup its losses. In real estate industry, fraudulent trading is rampant, and therefore, impact of judicial interpretation in Glukrich case would be felt maximum in this industry. Above narrow interpretation would rather embolden promoters / directors to transfer assets through fraudulent trading before initiation of CIRP.

There is fine difference in the language used in Section 66(1) and Section 66(2). Section 66(1) of the Code prima facie has a wider import in as much as it brings in its fold "any person(s) who was knowingly party to the carrying on of the business in such manner". If assets acquired through such fraudulent transactions and which still continues to be in the possession of such persons /entities, are not recovered by cancellation of such transaction just because such persons were not directors or were not in the management and control of the corporate debtor, would not only mean enrichment of such persons at the cost of other creditors but would also be against the objectives of IBC.

CONCLUSION

There is urgent necessity for the judiciary and other statutory/regulatory authorities to take holistic view of the section 66(1) of the Code, considering the objective of IBC and to prevent siphoning of assets through complex fraudulent transactions by unscrupulous promoters.

Sunil Choraria
Resolution Professional & Practising Company Secretary

VOLUNTARY LIQUIDATION AND ITS ISSUES

INTRODUCTION

Voluntary liquidation is a process wherein a solvent company, i.e., a company with sufficient assets to cover its debts, chooses to wind up its operations and distribute its assets among its stakeholders in a systematic manner. The primary objective of voluntary liquidation is to ensure that the assets of the company are distributed fairly among its creditors and shareholders, while also promoting a swift and efficient exit from the business.

Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the Code. The IBBI (Voluntary Liquidation Process) Regulations, 2017 govern the process of Voluntary Liquidation in India.

ISSUES

All Insolvency Professionals are well aware of the Process starting from Declaration of Solvency by Directors and culminating with order of Hon'ble Bench, NCLT wrt. Dissolution. The Insolvency Professional has tried to discuss herein, some of the issues faced by the Professional whilst concluding the assignments in the Voluntary Liquidation process -

Income Tax Issues

The issues faced herein are multiple. Examples of issues are - Till what time are the returns required to be filed? How to pay exact taxes when return is yet to be filed? How to sign the return and the procedure related thereto?

These issues get multiplied more so when the process of dissolution take time and get carried over to the next financial/assessment year. This creates a more confusing issue wrt. payment of state and central taxes, professional fees to Consultant's for filing tax return and even many a times complying with Income tax assessment hearings & orders which may create demands on the company.

With the Bank accounts closed within 90/360 days, the change in financial years and any demand thereafter, create problems to the Professional & Company in complying with regulatory aspects.

Though it is imperative that accounts have to be audited and tax return be filed till the dissolution is complete, the aspects related to filing, payment of taxes and expenses thereon, is complex and needs a detailed manual so that any further complexity is reduced.

Sometimes, the requirement or non-requirement of Income Tax Department's No Objection certificate (NOC) is also becoming matter of debate, more so when it is put forward at some point or other, during the course of hearings, even though the IBBI circular is clear in this respect.

Multiple Hearings and payment for Hearings

As part of the process, after payment to the creditors and shareholders, the NIL Bank account is closed and application for dissolution filed with Hon'ble NCLT bench. Hence comes the aspect of payment of expenses related to Hearings and complexities in case, if any. During the course of extended hearings, the Bench may require additional affidavits and corresponding additional hearings. All these expenses may not be feasible to be guessed beforehand. This puts a strain on Liquidation Costs and calculation of fees for all concerned, since the Liquidation Bank Account gets closed and payments already made for various.

In some cases, the process having spilled over to more than one year and more than 5-6 hearings, after closure of account, it becomes a matter of great misunderstanding between the Liquidator and the Company. The calculation of fees and expenses are usually done on presumption basis, and hence difficult to justify before or afterwards.

Assets of Peculiar Nature and their Liquidation issues

Sometimes assets will be there in the books, which represents futuristic character like Sundry Debtors, Work in Progress etc. These assets may or may not have intrinsic value in the eyes of the Valuer or the Liquidator. Their value and sale become very important from shareholders point of view.

In one of the cases, the WIP was represented by expenses paid for Licence, application etc which didn't materialize till date. The Liquidator must ensure and adhere to all norms while selling/ liquidating or adjusting these types of assets in the books maintained by him.

Further sometimes the buyer of assets likes to pay in instalments. Since The liquidator has to distribute proceeds from realization **within 30 days** from the receipt of the amount to the stakeholders, the concept

of instalment receipt may be avoided. The words here should be "full" amount of the Liquidation Proceeds.

The Professional should use the concept of best practises and try to maximise the value of the assets under discussion.

Expenses/Issues during later period

Some expenses like Preservation of records, Closing of Demat accounts and claim of any government organisation for non-compliance (if any), after re-payment to shareholders put strain on the methodology for calculating zero balance in Bank account and its closure. Any suit further complicates matters.

In one matter, the directors /Company decided to voluntary liquidate a company whose main objects was coal mining and related activity. Though no case/suit was pending, however, given the complexity, it needed a judicious review by the Insolvency Professional for going ahead with such voluntary liquidation. The matter before the IP and the Company was whether declaration made is in order. Enquiry into the affairs/defraud any person – meaning had ramifications herein the case.

It has also been seen that the various government agencies are setting up special cell for such cases. However, the gap between procedure and working on task takes time many-a-times, causing issues which invites additional time and expenses towards Liquidation Costs.

In short, one feels that Reduction in timelines is not need of the hour but the concept of ease with compliance should be aimed for.

Conclusion

The voluntary liquidation mechanism under the IBC 2016 offers a pragmatic approach for solvent companies to wrap up their affairs while ensuring fair treatment for all stakeholders involved. By providing a structured framework, the IBC promotes efficiency, transparency, and accountability throughout the liquidation process.

As India's insolvency landscape continues to evolve, voluntary liquidation remains a valuable tool for companies seeking an exit from regular compliances due to Nil businesses, with proper sharing to stakeholders, in a suitable manner.

CS Antima Balala

Assistant Manager - Legal & Secretarial at Onicra credit rating of India Private limited, Noida, U.P

IBC: MAJOR SETBACKS AHEAD

INTRODUCTION:

A noteworthy development in the field of insolvency and bankruptcy resolution in India is the Insolvency and Bankruptcy Code, 2016 (IBC). The IBC completely changed the laws about bankruptcy and insolvency when it was approved by Parliament and signed into law on May 28, 2016. The IBC aimed to rectify the inadequacies of the previous bankruptcy regimes while also enacting a cultural shift. To do this, it established new procedures for resolving insolvencies, instituted judicial discipline, and wrote a complete code for insolvency and bankruptcy. However, the IBC has encountered difficulties despite its lofty goals. This article explores the difficulties and possibilities brought forth by the IBC's implementation, illuminating its main clauses, historical background, and possible implications for business and creditors.

In 2024 IBC will witness:

- Finalization of significant Corporate Insolvency Resolution Processes (CIRPs), such as Future Retail, Go First and Reliance Capital, is anticipated by NCLT and the NCLAT in 2024.
- As of September 2023, 7,058 cases had been filed since the IBC went into effect. Inactive CIRP cases number more than 2,000.

- In the meantime, half of all admissions for insolvency procedures came from businesses in the manufacturing and real estate industries.

The Intricate Pre-IBC Context

India lacked a thorough legal framework that addressed the complexities of financially troubled enterprises before the creation of the IBC. The landscape was confused by a variety of regulations, each of which applied to different situations, businesses, or groupings of creditors. The Companies Act, of 1956 handled liquidation and winding-up proceedings, whereas the Sick Industrial Companies Act, of 1985 (SICA) was exclusively dedicated to saving industrial companies. Laws about debt recovery, such as the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), simultaneously gave financial institutions ways to enforce security and recover debt. There were delays, misunderstandings, and conflicts between the different laws and forums as a result of the fractured legal system. Additionally, not all of these laws—SICA included—achieved prompt restructuring that takes debtors' and creditors' interests into account. In the World Bank's Ease of Doing Business Index, India consistently scored poorly, which was indicative of these difficulties in resolving insolvencies.

The IBC's inception and implications

The Bankruptcy Law Reform Committee was formed by the Ministry of Finance in 2014 to address these problems, and Mr. T.K. Viswanathan serves as its chair. Restructuring bankruptcy was made possible by the Committee's recommendations and the 2015 Insolvency and Bankruptcy Bill draft. Eventually, the IBC was established as a consolidated statute after several revisions and adjustments to expedite the resolution and liquidation of insolvencies. A committee of creditors (COC), special adjudicating authorities (AA), and the Insolvency and Bankruptcy Board of India (IBBI), a new regulatory agency, were all established as part of the IBC to address these shortcomings. Resolution and liquidation of corporate insolvency was assigned to the National Companies Law Tribunal (NCLT). However, the backlog of cases has caused delays in the resolution of disputes, especially in big cities like Delhi and Mumbai. The tribunal's capacity to manage the mounting workload is a source of worry notwithstanding attempts to increase bench strength and establish regional benches due to open positions and impending retirements among the judge and technical members.

Under the IBC, a payment default over INR 1,000 for individuals or partnership organizations and INR 1,00,000 for corporate debtors activates an early trigger mechanism for insolvency resolution. As a result of default, which triggers a 180-day moratorium and the appointment of an insolvency specialist to manage the debtor's operations, financial creditors may apply. Resolution and liquidation goals are balanced by the IRP. A prospect for the company's rebirth exists if the resolution plan is accepted by 75% of the financial creditors. Next comes the debtor's liquidation if this plan is rejected or deemed impractical.

Secured creditors may choose to assert their security interests upon liquidation, but doing so gives up their right to the first division of assets. Notably, the IBC highlights modifications from previous legislation by establishing a defined priority order for allocating assets among different groups of creditors.

Setbacks:

Protracted and Time-Intensive Procedures

The duration of the process is one of the main obstacles to debt resolution and insolvency in India. Although the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) have historically experienced delays, the IBC was created to speed up resolution. Protracted legal disputes and appeals can cause the process to take years, which is bad for debtors as well as creditors. It is imperative to reduce the backlog in these tribunals and streamline the legal process.

Insufficient Resources and Knowledge

Having a strong ecosystem of insolvency practitioners, certified valuers, and information utilities is essential to the success of insolvency and debt settlement. Building and preserving such an ecosystem has presented hurdles for India. It takes

a long time and is frequently subjective to value an asset, and there is a dearth of bankruptcy specialists with the necessary training and experience. Encouraging a greater number of competent experts and guaranteeing their availability to current data and innovations is essential.

Inadequate Pre-Packaged Insolvency Framework

Pre-packaged insolvency settlements have become more well-known throughout the world as a quicker and more effective means of resolving financial difficulties. There are still delays and uncertainty since India lacks a comprehensive framework for pre-packaged insolvency. To remedy this problem and expedite debt settlements, precise rules and procedures for pre-packaged insolvency should be established.

Intricate Group Organizations and Cross-Border Insolvencies

In today's economic environment, organizations frequently function within intricate group structures, which makes it difficult to determine the actual assets and beneficiaries. Because different countries may have contradictory laws and regulations, cross-border insolvencies introduce still another level of complexity. Addressing these issues requires strengthening collaboration with foreign agencies and harmonizing insolvency laws and procedures with international standards.

The Structure of Creditors

Prioritizing financial creditors over operational creditors, the IBC established a hierarchy of creditors. Although a clear payment schedule was supposed to be provided, this has instead caused disagreements and legal action between various credit classes. Achieving a fair distribution of assets while maintaining a balance between the interests of all parties involved can be difficult. It could be required to amend the IBC to solve these issues.

Discipline Problems and Uncooperative Behavior

The conduct of different parties is another difficulty for India's bankruptcy and debt resolution processes. While creditors might not always behave honourably, some debtors turn to delaying strategies. The resolution process may be impeded by the parties' lack of collaboration. To overcome these obstacles, all stakeholders must be encouraged to be open, accountable, and cooperative.

Inefficient Procedure for Liquidation

The liquidation process is frequently considered a last choice, even though the IBC primarily focuses on resolution. Nonetheless, there are inefficiencies and delays in the Indian liquidation procedure, which lowers the rates of recovery for creditors. Improving the value realized from distressed assets and streamlining the liquidation procedure is essential to raising the insolvency framework's overall efficacy.

How Can the IBC Get Over Obstacles?

- To improve the functioning of the IBC, CRISIL Rating recommended a CDE method, where C stands for capacity augmentation, D for digitalization, and E for expanding pre-pack resolutions to large corporates.
- Enhancing the infrastructure and human resources of important organizations, such as the NCLT, which is in charge of IBC implementation, is known as capacity augmentation.
- Creating a digital platform to link all the parties engaged in the IBC process is known as "digitalization." This will improve transparency, help to remove data asymmetry and speed up decision-making.
- Value deterioration over time can be avoided by extending the pre-packaged insolvency resolution process (PPIRP) to major corporations.

In summary

With the introduction of the IBC, India's bankruptcy and insolvency processes have become much more streamlined. Its provisions give insolvency experts a defined framework and an early trigger for settlement. But the evolution of regulations, in particular the creation of a skilled group of insolvency specialists, will determine how effective it is. It has created a framework for handling insolvency cases that is more organized and efficient. To fully exploit the revolutionary potential of the IBC, however, obstacles about delays, court interpretation, and structural concerns in the adjudicating authority need to be addressed.

CS Dr. Rajas Bodas
Rajas Bodas & Associates, Company Secretaries, Pune

Do we interpret Section 99 correctly?

Abstract: Though not in every tribunal, resolution professionals used to face the music of late submission of recommendation reports in spite of their strenuous efforts in collecting the data, understanding the intricacies, examining the facts, adjoining the flow of transactions and coming to conclusion within the reasonable time period. It is observed however that a (wrong) practice, custom and convention is being followed in many tribunals while interpreting this provision of submission of report within 10 days, which in legal parlance is never contemplated by the law makers! This article also suggests the changes which may be brought in the Section 99 of the Code which could fall the curtain once for all on the extant confusion created.

INTRODUCTION

Insolvency & Bankruptcy Code (IBC) is an evolving legislation and has brought a sea change transformation through transparency, efficiency and time bound dispute resolution mechanism in Indian financial distress. Slowly and steadily it has amplified its scope from mere corporate insolvency to individual insolvency, particularly when the personal guarantees are invoked. Hence provisions of individual insolvency are still at nascent stage and require some reshaping in tune with the practical aspects.

The trigger point of initiation of individual insolvency is when the debtor files application u/s 94 or a creditor files application u/s 95 of the IBC. Consequential effect of this application is the appointment of resolution professional u/s 97 or replacement of resolution u/s 98 of the IBC. Further the resolution professional needs to submit a recommendation report to the Adjudicating Authority, which stands as a foundation for the admission or rejection of the application so moved u/s 94 of IBC by the debtor or u/s 95 of IBC by the creditor.

Literal meaning of confusing wording

Section 99(1) of the IBC reads as follows -

The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

One may observe two basic limbs to the above provision, viz:-

a. The application made by debtor or creditor is to be examined within 10 days AND

b. Submission of recommendation report to the Adjudicating Authority for approval or rejection of application so filed.

Important words and their literal meanings

"To examine" as per the Cambridge Dictionary means to look at or consider carefully and in detail in order to discover something

"To examine" as per the Merriam Webster Dictionary encompass activities like inspecting, testing, inquiring, investigating and interrogating closely

"To examine" as per the Oxford Dictionary means to consider or study a subject very carefully

Hence the first part of the sentence contemplates carefully studying and analyzing the application filed by the debtor u/s 94 or creditor u/s 95 of the IBC.

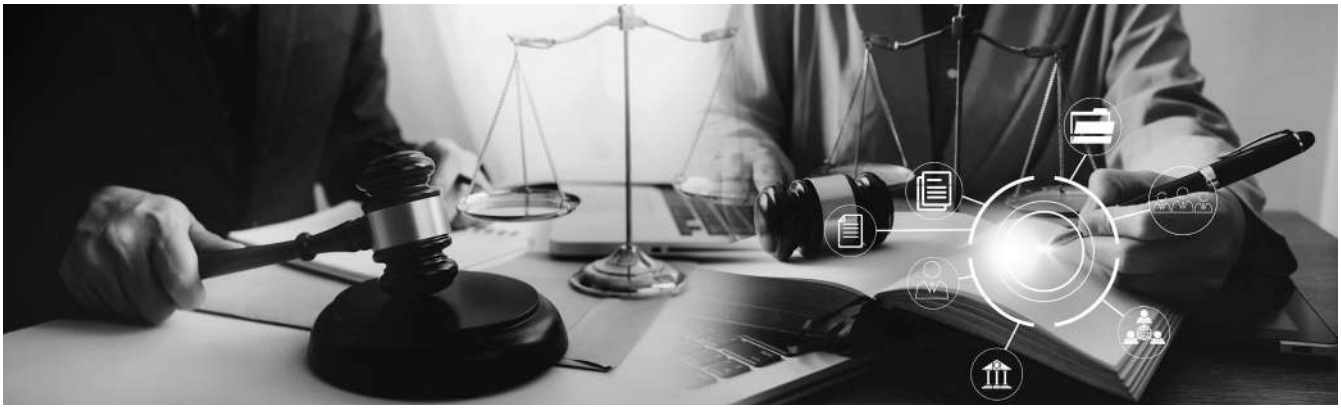
Further Section 99(4) and (5) of the IBC make the understanding more complicated. Let's go through these subsections -

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

Hence it is provided in the Code that apart from the respective applicant (debtor u/s 94 or creditor u/s 95 of the IBC) resolution professional may seek further information or explanation from any person who may or may not be associated with the instant case of debtor or creditor, while coming to the conclusion or confirming her recommendation. Invocation of these provisions allows a timeline for response of 7 days of communication. In a practical sense, submission of a recommendation report within 10 days in such a case becomes an illusion.

According to Collins dictionary "report" is an official document which is made after investigating a situation or event. According to the Britannica



dictionary "report" means a written description, information or statement about a particular subject, situation or event. Hence we may conclude that reporting encompasses a range of activities like communication, data collection, data analysis, verification, interpretation, correlation of events, situation and documents, arranging and designing the data, writing, presentation of available information gathered, conclusion and recommendation. In the context of preparing the report under IBC, resolution professionals have to undergo the preliminary due diligence of the personal guarantor and public search/ inspection of the corporate debtor. Considering the activities involved in the assignment, it becomes a herculean task; even if we believe that the code expects the submission of a recommendation report within 10 days.

It is however felt that following the timeline of report submission within 10 days may be feasible only where the application by debtor u/s 94 of the IBC is made through a resolution professional, as she may have sufficient stuff of information, data and details well in advance while coming to conclusion. Even in cases where the application is made by the creditor u/s 95 of the IBC, expected co-operation from the debtor usually stands missing, which leads to missing out the time lines.

Common parlance

Applying the principles of common parlance test many illustrations could be given for better understanding the positioning of "examining" and "reporting". From a student's perspective, there happens to be a reasonable time gap between giving the examination and getting the report card of evaluation of performance. A patient's pathology report is always prepared after examining and passing him through various tests. First information report or FIR is prepared by the police after visiting the event, observing the consequences, examining the witnesses and coming to the conclusion. In a nutshell, there is an obvious and reasonable time lag between "examining" and "reporting". How the understanding of legal provisions may be in deviation with our everyday life?

It could be concluded that examination of application and submission of report are the two tasks a resolution professional needs to undergo. Out of these two basic activities the first activity of examining the facts, documents and information is expected to be completed within 10 days. However the activity of report submission could not be bound by any prescribed time, as every case may have its subjectivity, intricacy and complexity. We may however infer in such cases to submit the recommendation report within a reasonable period of time.

***Change could bring the clarity**

Understanding the practical difficulties faced while interpreting the literal meaning of the extant provision of Section 99(1) of the IBC; certain changes are suggested. The revision of sub-section may be read as follows -

99. (1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application, **within 30 days of his appointment.*

**Provided the period of submission of report shall commence from the date of intimation of appointment to the resolution professional from the registry of the Adjudicating Authority;*

**Provided further that the Adjudicating Authority may extend the period of submission of report by such further period of time not exceeding fifteen days considering the intricacies of the transactions, facts and circumstances of the case on an application made by the resolution professional.*

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 may introduce a form containing following particulars, viz.

a. **Date of order appointing the resolution professional;**
b. **Date of notice from the registry of the Adjudicating Authority;**
c. **Steps taken during examination of application (It may include application and associated documents checked, e-mails sent, e-mails reverted, postal communications made, responses received, objections raised etc.);**

d. Progress till the date of submission of report (It may include additional documents checked, verified, further communications made to debtors, creditors and third parties, and whether they were received within the stipulated time, objections raised, scrutiny of those documents, verification etc.).

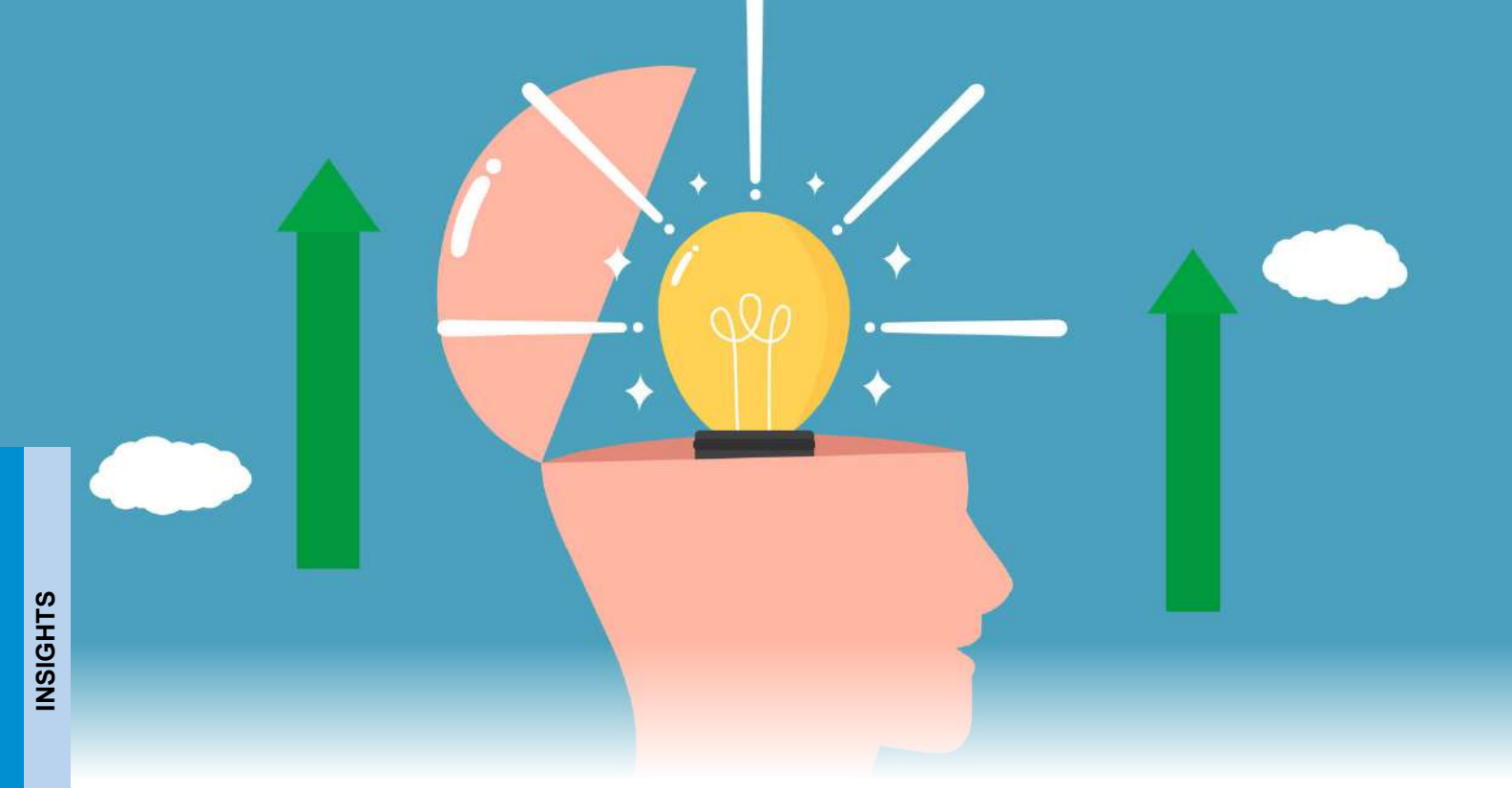
Proactively entailing above form in the insolvency process would lead the Adjudicating Authority to understand the progress during the examination of application filed by the debtor or creditor till the submission of recommendation report.

Chapter IIA may be introduced in the IBBI (IRPPGC) Regulations, 2019 to incorporate examination of application and submission of recommendation report by the resolution professional. Such a chapter is not only necessary but could also give practical directions on contemplated compliances and their timelines.

Conclusion:

The apex court through the landmark judgment of Innoventive Industries had demonstrated that the faster and time-bound financial distress resolution is the crux of IBC. However it shall not be at the cost of injustice to the resolution professional, who happens to be the most instrumental pillar in the IBC system.

In the light of above discussion, it could be concluded that Section 99(1) of the IBC is incorrectly interpreted currently within the insolvency world and this requires an immediate attention by the regulator - Insolvency & Bankruptcy Board of India (IBBI) and Ministry of Corporate Affairs. The confusion caused due to wrong punctuation and loose wording of the section could be corrected by amendment in the extant Code, which needs to be approved in both the houses of parliament and the president's endorsement. Tribunals may then be guided by clarificatory circular so that the resolution professionals may not get ground unnecessarily in the courts of law.



CS TALLAVAJHALA VENKATA NARASIMHAM

Associate Company Secretary

THE BOARD UNDER CIRP

CALLING, HOLDING AND CONDUCTING OF ANNUAL GENERAL MEETINGS LEADING TO ADJOURNED MEETINGS WHEN BOARD OF DIRECTORS AND MANAGING DIRECTOR ARE RUNNING THE CORPORATE DEBTOR AND WHEN THE BOARD AND MANAGING DIRECTOR ARE UNDER SUSPENSION AND RESOLUTION PROFESSIONAL IS RUNNING THE CORPORATE DEBTOR UNDER INSOLVENCY AND BANKRUPTYCY CODE 2016.

This article deals, as the title signifies, with the provisions of the Companies Act 2013 and the practical problems with regard to the calling, holding and conducting of annual general meetings leading to adjourned annual general meetings with practical problems when board of directors and managing director are running the corporate debtor before introduction of Corporate Insolvency and Resolution Process procedure and when the board and managing director are under suspension and the Resolution Professional under the supervision of Committee of Creditors is running the corporate debtor as going concern under Insolvency and Bankruptcy Code 2016 after introduction of Corporate Insolvency and Resolution Process procedure. The practical problem is that no shareholder attends the Annual General Meeting when being held and conducted by the Resolution Professional under Corporate Insolvency Resolution Process procedure as per the provisions of Insolvency and Bankruptcy Code 2016.

The provisions of section 96 of the Companies Act 2013 stipulate the agenda items for any Company as the Ordinary Business to be taken up as the following:

1. Consideration of Financial Statements of the previous Financial Year and the Reports of Board Directors or Auditors; Annual Report in case of Resolution Professional;
2. Appointment and fixation of remuneration of Statutory Auditors
3. Appointment/reappointment of directors in place of those retiring
4. Declaration of Dividend, if any

The ordinary item at serial number 3 does not arise under Corporate Insolvency Resolution Process procedure as per Insolvency and Bankruptcy Code 2016, because the Board of Directors stand suspended before introduction of Corporate Insolvency and Resolution Process procedure. The ordinary item at serial number 4 also does not arise under Corporate Insolvency Resolution Process procedure as per Insolvency and Bankruptcy Code 2016 and is to be ignored in the case of loss making company and in default with the creditors in respect of scheduled loan repayment instalments.

In fact, the first item, the financial statements of the Corporate Debtor, are to be considered and noted in the Annual General Meeting by the shareholders and the second item the appointment of Statutory Auditors by the Committee of Creditors for the previous financial year be ex post facto noted and vesting of mandatory appointment authority, with the Committee of Creditors, of Statutory Auditors for the current financial year of the Annual General Meeting was to be noted by the shareholders.

Requirement of Deemed Approval

Therefore, this Article emphasizes the requirement of deemed approval of the central government regulatory department, the Ministry of Corporate Affairs, as per the provisions of sections 97 and 103 of the Companies Act 2013 that delve on the matter of quorum with regard to the first two agenda items of the ordinary business of the Annual General Meeting, which particularly are to be complied with as per the e-filing Forms prescribed for a) financial statements; b) annual return under MGT-7 and c) appointment of statutory auditors under e-Form ADT-1 even under Corporate Insolvency and Resolution Process procedure as per Insolvency and Bankruptcy Code 2016.

This Article purposefully avoids the agenda items under Special Business and Resolutions requiring to be passed as Special Resolutions which need the required presence of the shareholders, without fail, since the main central idea of this Article is in the public interest of the Resolution Professionals and other accountable employee stakeholders who may be vulnerable to be held as Officers in default.

As such, the provisions of sections 97, 103, 114, 116, 118 and 121 of the Companies Act 2013 that particularly deal with the situation are to be considered. Further, in

the adjourned Annual General Meeting of any listed/ public/private limited company, where the original Annual General Meeting could not be held and the National Company Law Tribunal under section 97 of the Companies Act 2013 on submission of application issues order for calling the annual general meeting with a direction that one member of the company present in person or by proxy shall be deemed to constitute the quorum for the annual general meeting, even one shareholder, if attends, shall be deemed to be an annual general meeting of the company under this Act. Hence, the Promoter-Managing Director or directors shall take appropriate steps accordingly with the advice of the employee Company Secretary or the retained Practicing Company Secretary and also on consultations with the Company's Legal Adviser if felt necessary to fulfil this stipulation, by roping in the minimum of two members, who usually are the promoters and their relatives / friends.

Practical problems of the Promoter-Chairman

However, some of the doubts on certain practical problems being faced by the Promoter-Chairman can be detailed as follow:

1. The members attending the annual general meeting to sign on the attendance sheet as part of the quorum of the meeting to be a valid annual general meeting, even though called by the Resolution Professional, due to suspension of the Board of Directors by the National Company Law Tribunal.

2. As per the provisions of the Companies Act, 2013, the annual general meeting should be conducted to e-file the annual financial statements and annual return of the previous financial year with the Ministry of Corporate Affairs as the going concern and the company owners are the present shareholders/members of the Company, even though the operations were conducted by the Resolution Professional appointed by the National Company Law Tribunal under Corporation Insolvency Resolution Process procedure of Insolvency and Bankruptcy Code, 2016.

3. As per the provisions of the Companies Act, 2013, or the Insolvency and Bankruptcy Code 2016, the Resolution Professional had to act independently and was not bound to make any courtesy call even on any Board Director or the Managing Director or any Whole Time Director. However, as a good practice or conduct, the Resolution Professional could make a courtesy call. Nevertheless, the Resolution Professional was granted with immunity for his acts of omission and commission done in good faith. He is accountable to the Committee of Creditors only. Committee of Creditors can take disciplinary action on the Resolution Professional with the approval of the National Company Law Tribunal only or any appellate authority. But, the compliance responsibility lay with the Company Shareholders and this Annual General Meeting should be deemed to have been conducted on the scheduled date declared by the Ministry of Corporate Affairs, due to Covid19 conditions or not, even if it was invalid meeting, without 21 days' notice or without the signed copies of the financial statements or even if it was not held and conducted, and hence, the required Returns to be e-filed with the Ministry of Corporate Affairs should contain that the annual general meeting was held and conducted as per the prescribed date by the Ministry of Corporate Affairs, to avoid non compliance, as the compliance of submission of e-Returns is mandatory even for the Corporate Debtor. In the case of non compliance, the employee Company Secretary or the Chief Finance Officer or the Chief Executive Officer or the Chief Operating Officer of the Corporate Debtor may become the officers in default and may be penalized and not the Resolution Professional, because any delay in appointment of auditors and consequent non completion of financial statements may be due to the prolonged scheduled meetings of Committee of Creditors.

4. As per the provisions of section 118 of the Companies Act 2013, the minutes signed by the Chairman of the annual general meeting and maintained accordingly shall be evidence of the proceedings recorded therein and until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed to have been duly passed. In fact, the draft resolutions placed in respect of two ordinary agenda resolutions discussed above are deemed to have been duly passed.

5. The sections 103, 116 & 118 of the Companies Act 2013 are particularly applicable for regular companies having the Board of Directors and not for the Corporate Debtors under Corporate Insolvency Resolution Process procedure.

Practical problems of the Resolution professional

Now there is the case of practical problems being faced by the Resolution Professional, if the shareholders are around 10 to 15 and even if 2 or 3 minority shareholders due to exigency of circumstances are not in a position to make the presence even through virtual meeting at the time of original date of calling the Annual General Meeting or at the automatically adjourned annual general meeting to the same day next week, for want of quorum in the original meeting.

As a matter of law, the provisions of section 97 of the Companies Act 2013 are already applicable to the Corporate Debtor under Corporate Insolvency Resolution Process procedure as per Insolvency and Bankruptcy Code 2016, by inference, since the Process procedure has been initiated by the National Company Law Tribunal of the Region where the Registered Office of the Corporate Debtor is situated and the Corporate Debtor is a going concern till the Resolution Plan submitted is approved by the National Company Law Tribunal. As such, the Corporate Debtor is already under the umbrella of National Company Law Tribunal of the Region as per Insolvency and Bankruptcy Code 2016. However, the provisions of section 97 of the Companies Act 2013 require the presence of at least one shareholder for regular Companies which are not in the purview of the law of Insolvency and Bankruptcy Code 2016 and the regular Board and the corporate authorities of the Company take appropriate measures for the eventuality. The practical problem for the Resolution Professional is that he cannot make any shareholder to be present either in the original annual general meeting or in the adjourned annual general meeting, in spite of making the formal requests and section 97 of the Companies Act 2013 is already in operation easing his duty under Corporate Insolvency Resolution Process procedure, by inference but not by any specific order or clarification.

Readers please be alert at this juncture. There is another practical problem awaiting the unassuming Resolution Professional. Let us presume at least one shareholder attended the original annual general meeting out of the required minimum of five members for a public limited company – Corporate Debtor and original annual general meeting stands automatically adjourned to the same day next week, for want of quorum in the original annual general meeting. Another scenario is that if in the original Annual General Meeting of the public limited company-Corporate Debtor four shareholders attended and the Annual General Meeting automatically stands adjourned to the same day next week. Unfortunately, in the adjourned Annual General Meeting the earlier four shareholders are not able to attend and no other shareholder attends, the legal position is not clear whether the attendance of the four shareholders in the original Annual General Meeting can be counted. This order / clarification requires to be issued positively because it is the same number of Annual General Meeting but differentiated as original and adjourned and the date of adjourned Annual General Meeting is to be taken as the date of deemed passing of the Resolutions (section 116 of the Companies Act 2013). The absence of such order/clarification from the Ministry of Corporate Affairs is the main embarrassment to the Resolution Professional of the Corporate Debtor.

Let us also presume, in the adjourned annual general meeting, no other shareholder, including the lone shareholder or four shareholders attended in the original annual general meeting, as the case may be, can attend due to their own exigencies of the circumstances, thus leaving the Annual General Meeting of the current year as unattended by any shareholder and consequently not held or conducted and there are no minutes with draft resolutions deemed to have been passed and will it become illegal in the case of Corporate Debtor headed by Resolution Professional under Corporate Insolvency Resolution Process procedure as per Insolvency and Bankruptcy Code 2016 in the absence of such order/ clarification from the Ministry of Corporate Affairs!

Well, it is the time to invoke the provisions of sections 97, 103 and 116 of the Companies Act 2013. It is already known that when the provisions of section 97 are invoked in respect of Corporate Debtor that comes into the purview of the National Company Law Tribunal, the provisions of section 103 of the Companies Act 2013 become redundant. The original annual general meeting called by the Resolution Professional, recommended by the Committee of Creditors and appointed by the National Company Law Tribunal, is to

be deemed to have been called as per the provisions of section 97 of the Companies Act 2013 by inference.

The learned Legal Advisers and the Practicing Company Secretaries may differ with this view. But the Corporate Debtor, the Resolution Professional and the employee Company Secretary the Chief Finance Officer or the Chief Executive Officer or the Chief Operating Officer of the Corporate Debtor have the bounden duty of complying with the provisions of e-filing of the Returns prescribed in the form of various e-Forms mandatorily.

Perhaps keeping in view the above mandatory stipulation as to e-filing of Returns under the Companies Act 2013, the provisions of sections 116 and 118 ease the predicament of stakeholders to some extent granting relief in the form of the resolutions deemed to have been passed in the adjourned annual general meeting. Further it can be also presumed that the absentee shareholders indirectly agreed to the mandatorily to be passed two essential ordinary resolutions referred to vide section 96 of the Companies Act 2013.

Case for Counting of Attendance in Original AGM and Adjourned AGM

But the Companies Act 2013 has not categorically contained the basic requirement of the continuation and carrying forward of the attendance of one shareholder in original annual general meeting to the adjourned annual general meeting, if he cannot make himself present in the adjourned annual general meeting. The shareholder's attendance in original annual general meeting going astray is worrisome to the Resolution Professional and the employee Company Secretary regarding the legal complications that may arise. However, this is very palatable to the litigants who are ready to sabotage the going concern status of the Corporate Debtor. This type of persistent legal harassment may in future require the Apex Court's intervention to save these types of Corporate Debtors to enable them to complete the Resolution Process procedure. Plugging this legal missing provision through the clarification Order by the Ministry of Corporate Affairs issuing that the Annual General Meeting is deemed to have been held and conducted upholds the proverb "a stitch in time saves nine" in respect of already battling Corporate Debtor, whether listed public company or unlisted public company or deemed listed public company.

Thus, as per above presentation submitted, the Central Government Regulating Department, the Ministry of Corporate Affairs, may consider and issue the Orders stating that the different shareholder(s) attended the original annual general meeting and the adjourned annual general meeting, including the situation that only single shareholder or no shareholder attended in both the meetings, do matter in respect of quorum and the adjourned annual general meeting minutes signed by the Resolution Professional or by the Promoter-Chairman are final and stand in good stead and that the Annual General Meeting is deemed to have been held and conducted. This submission to the Ministry of Corporate Affairs is reiterated for the benefit of smooth completion of the Corporate Insolvency Resolution Process procedure of the Corporate Debtor only, under the special law of Insolvency and Bankruptcy Code 2016.

E-Filing part of the e-Returns

It is not out of place to mention that this article is not complete if the e-filing part of the e-Returns to be filed as per the provisions of section 92 – Annual Return-e-Form-MGT-7; section 137 – Financial statements – e-Form-AoC-4 XBRL and section 139 –Appointment of Auditors (Statutory Auditors to differentiate with Internal Auditors)-e-Form-ADT-1 is not covered. This is possible only when the Annual General Meeting is deemed to have been held and conducted, since the e-Forms contain the date of Annual General Meeting held which has to be filled compulsorily.

But the Ministry of Corporate Affairs prescribed the e-Form GNL-2 to be e-filed attaching filled e-Form-MGT-7 for Corporate Debtors under Corporate Insolvency Resolution Process procedure of the Insolvency and Bankruptcy Code 2016 from the year 2020. However, from January 2023, the Ministry of Corporate Affairs introduced two portals of V2 and V3 and placed e-filing of GNL-2 compulsorily under V3 portal for the purpose of other matters and not for the purpose of e-filing of Annual Return, that is, E-Form-MGT-7 and this GNL-2 under V3 does not contain the box for e-filings under Insolvency and Bankruptcy Code 2016 under serial number 3. In fact, this V3 portal specifically created for the Company Directors and other digitally authorized signatories of Companies who jump the provisions of the

Companies Act 2013 and other allied Acts after e-filing the important e-Returns including e-Form-GNL-2 for other acts under serial number 3 of the said e-Form and not for the Resolution Professionals appointed by the National Company Law Tribunal.

Hence, the Ministry of Corporate Affairs shall restore e-Form-GNL-2 under V2 portal with the box of filings under Insolvency and Bankruptcy Code 2016 under serial number 3 for facilitating the e-filing of Annual Return-e-Form-MGT-7 and also disabling all other boxes at serial number 3 of the said e-Form, if considered not required. The filling of this box disables automatically also the box to be filled with the date of board resolution under Verification part of the said e-Form.

Further, in respect of e-filing of financial statements of the Corporate Debtor, the filling of details of e-Form-AoC-4-XBRL with regard to the details of the Managing Director and other Directors, especially when they are under suspension and the business of the Corporate Debtor run by the Resolution Professional during the previous financial year as the going concern are all legal omissions and commissions for which the employee Company Secretary or employee Chief Financial Officer may be held accountable and penalized, if the Courts of Justice in future may hold such filling of details as erroneous or misrepresentation of facts. Further, it is to be invariably filled that the Balance Sheet and the Annual Report as signed by the Managing Director or Directors, whereas the same stand signed by the Resolution Professional. And the Directors' Report is in fact called as Annual Report and is signed by the Resolution Professional for the Corporate Debtor.

Similarly, it may be suggested that the appointment of Internal Auditors requires another e-Form –ADT-IA or the Ministry of Corporate Affairs may issue the Orders that e-Form-GNL-2 under V2 Portal with the box of filings under Insolvency and Bankruptcy Code 2016 under serial number 3 is the prescribed e-Form for facilitating the e-filing of the appointment of Internal Auditors.

As such, the Ministry of Corporate Affairs may consider the above issues raised positively in the public interest and also in the interest of stakeholders and in the interest of unassuming Resolution Professionals appointed by the National Company Law Tribunal and last but not least the employee Company Secretaries and the Chief Financial Officers and the Chief Executive Officers and the Chief Operating Officers of the Corporate Debtors under Corporate Insolvency Resolution Process procedure as per the provisions of the Insolvency and Bankruptcy Code 2016.

CS TALLAVAJHALA VENKATA NARASIMHAM

Associate Company Secretary

TREATMENT OF SECTION 128 OF COMPANIES ACT, 2013 DURING CIRP

The following are the facts happened in the case of a Corporate Debtor before it was considered for Corporate Insolvency and Resolution Process procedure by NCLT under IBC 2016.

1. **The Corporate Debtor Board considered and approved the Board Resolution to shift its Registered Office from its Branch Office to one room tenement on rent within 30 kms of within the greater municipal limits of the Hyderabad city in Telangana state with effect from 15th February 2019 in its Board Meeting on 30-01-2019.**
2. **The Corporate Debtor Board did not mention as to the keeping of books of account in the resolution but continued to keep the books of accounts at the Branch office which was till then the Registered Office, but kept the copies of audited balance sheets and relevant e-Forms filed with the Registrar of Companies, Telangana state in the new Registered Office of single room tenement in Hyderabad city, where there is no accounting function nor functionary. The statutory audits were conducted in the Branch office only where the entire accounting activity has been carried out under the**

Corporate Insolvency and Resolution Process procedure by NCLT under IBC 2016.

3. **However, the e-Form 22 was filed with the Registrar of Companies, Telangana state on 3rd April 2019 only with the additional fees of Rs.2400/-.**
4. **In the meanwhile, effective from 09-04-2019, the Corporate Debtor was brought under Corporate Insolvency and Resolution Process procedure by NCLT under IBC 2016.**

The relevant Section 128(1) of the Companies Act 2013 in this regard reads :

128. Books of account, etc., to be kept by company.—(1) Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and explain the transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting:

Provided that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the Board of Directors may decide and where such a decision is taken, the company shall, within seven days thereof, file with the Registrar a notice in writing giving the full address of that other place:

Provided further that the company may keep such books of account or other relevant papers in electronic mode in such manner as may be prescribed.

(2) Where a company has a branch office in India or outside India, it shall be deemed to have complied with the provisions of sub-section (1), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarized returns periodically are sent by the branch office to the company at its registered office or the other place referred to in sub-section (1).

The Ministry of Corporate Affairs, the regulating department of the Country, through the Rules Prescribed the e-Form AoC-5 for intimating the Registrar of Companies as to the place of keeping the books of accounts at any such other place in India, other than the Registered Office. In the e-Form 22, the details along with photo of the single room tenement on rent were submitted to the Registrar of Companies, Telangana state in April 2019.

Now, this author thinks any such other place in India should be other than the branch office (works place) or the Regd. Office, as per sub section 2, since the branch office has to periodically send the details to any such other place in India. The Rules in this regard did not include the Branch office to consider the Branch office as any such other place in India and the branch office, practically and pragmatically besides legally, is part and parcel of the Registered Office, wherever the Registered Office and the Branch Offices situate in entire India. Further, the Rules do not contain any provision as to the intimation to the Registrar of that state, in which any other place in India falls, either Rajasthan or Arunachal Pradesh or Kashmir or Kerala, even if it is other than the Branch office. For a branch office in Tamil Nadu and the Registered Office in Uttaranchal state, the Registrar of Companies is Uttaranchal state. But in this case, it is the branch office in the same state and in the vicinity of the state capital and not any other place and hence there is no requirement of intimation separately.

If any e-Return has to be filed mandatorily by the Corporate Debtor under the Corporate Insolvency and Resolution Process procedure by NCLT under IBC 2016, the relevant e-Form is GNL-2 only under V2 portal of the Ministry of Corporate Affairs by filling box of 'filing under IBC'.

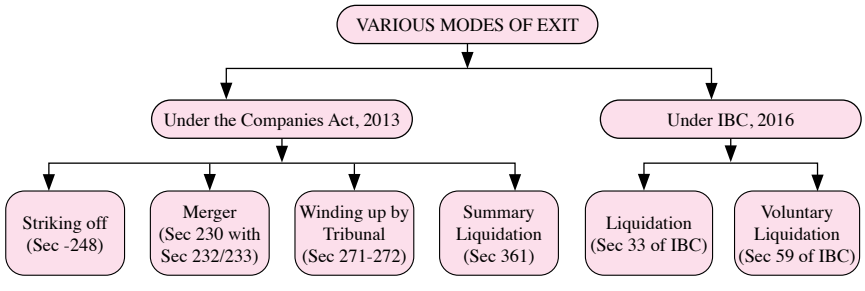
CS Chandra Sekhar, ACS, ACMA,
Practicing Company Secretary,
Insolvency Professional & Regd Valuer

VOLUNTARY LIQUIDATION

With recent amendment to IBBI regulations for voluntary liquidation dated 31.1.2024, the process for voluntary liquidation has become more transparent, efficient and faster. These amendments have also brought some additional safeguards to protect interest of stakeholders. Now, it is mandatory to hold contributories meeting, if the voluntary liquidation is not completed within the specified period of 90 or 270 days as the case may be

Background

Companies are incorporated as per the provisions of Companies Act, 2013. A Company after incorporation will become an artificial person. The termination of its existence will conclude with dissolution as per the provisions of Insolvency and Bankruptcy Code, 2016 (IBC). Various ways of termination of its existence (dissolution) are as follows:



I. Striking off - FTE (Fast Track Exit) U/S 248 of Companies Act, 2013

Company's name can be struck off pursuant to section 248(1) by the Registrar of Companies or the Company can apply voluntarily for strike-off under section 248(2) of the Companies Act, 2013 when it has not carried out its business operations for a period two years or more.

II. Merger or Amalgamation under section 230-232/233

Transferor Company gets dissolved when it merges with transferee company pursuant to section 230-232 or section 233 of the Companies Act, 2013.

III. Winding-up by Tribunal - Section 271-272

Section 271 of the Companies Act provides for winding up of a company when members passes special resolution; on application by Registrar for non-filing of financials for 5 consecutive years; Tribunal on just and equitable grounds. The winding under this section requires order of Tribunal.

IV. Summary Liqudiation under Section 361

Pursuant to Section 361 of the Companies Act, 2013, Regional Director may order for winding up of a Company under summary procedure

i. When a Company has assets of book value not exceeding one crore rupees; and

ii. belongs to such class or classes of companies as may be prescribed.

V. Liquidation of a Company under Section 33 of IBC, 2016

When a Company fails to get a Resolution Plan under CIRP (Corporate Insolvency Resolution Process) or does not comply with the terms of approved Resolution Plan or for certain other reasons, Tribunal may order for dissolution of the Company.

VI. Voluntary Liquidation pursuant to section 59(7) of IBC, 2016 – Solvent Company

Voluntary liquidation is a process of winding up voluntarily without the court/NCLT intervention. Members of the Company and creditors, if any, will appoint a liquidator to liquidate all assets and pay to all its creditors. Surplus amount, if any, after meeting all costs and expenses shall be distributed to the members as per the mechanism provided in Section 53 of IBC, 2016. Voluntary liquidation process has to be completed as per Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. Only a solvent Company is eligible for voluntary liquidation.

Voluntary liquidation of LLP's and other Body corporates are also covered under these regulations and hence the same procedure is applicable with suitable changes.

However, voluntary liquidation of financial service providers is regulated separately and procedure specified in IBBI (Voluntary Liquidation Process) Regulations, 2017 are not applicable to such companies.

Voluntary liquidation pursuant to Section 59(7) of IBC, 2016

Introduction: As per Section 59(7) of IBC, a Company which intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation process subject to fulfilment of certain conditions.

A. Reasons for voluntary liquidation are as follows:

a. *Special purpose Vehicle (SPV): A company can be liquidated voluntarily when the object for which the Company has been incorporated is fulfilled. For example, creation of a special purpose vehicle (SPV) in real estate projects, or toll projects etc., formed with sole purpose.*

b. *No potential opportunities (Unfeasible operations or poor operating conditions): If any Company does not have potential business opportunities or it is not feasible to run its operations economically due to technical obsolescence or due to un-favorable environment conditions or due to change in legal framework, it may decide to wind-up its operations voluntarily.*

c. *As tax planning measure: Companies may also plan for voluntary liquidation to avail certain tax benefits. Further, companies can plan for voluntary liquidation to offset*

its capital losses. Ex. If a holding company has capital gain on sale of its shares in one transaction, then it may plan for liquidation of loss making subsidiary(ies) or associate companies to book capital losses which can be set off against capital gains thereby holding company can save capital gain tax.

B. Conditions for Voluntary Liquidation:

a) Company must be solvent.

b) Company must have resolved to wind up voluntarily through a special resolution passed by its shareholders and creditors, if any.

C. Process of Voluntary Liquidation:

1) Solvency Declaration: The Board of directors must file a Declaration of Solvency (DoS) in the form of an affidavit stating that:

a. They have made a full inquiry into affairs of the Company and they have formed an opinion that either the Company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the liquidation;

b. The company is not being liquidated to defraud any person; and

c. The company has made sufficient provision to meet the obligations arising on account of pending matters. #

The declaration must be accompanied with:

i. audited financial statements and record of business operations of the company for latest previous two years or for the period since its incorporation, whichever is later;

ii. a report on valuation of assets of the company, if any. (Valuation report is not required, if the Company has only cash and cash equivalents)

Within four weeks of such declaration under sub-clause (a), shareholders must pass special resolution approving winding up of the Company and appoint an Insolvency Professional (IP) to act as liquidator to complete the process.

***If a Company has* any debt, creditors representing two-thirds in value of the debt must confirm the resolution passed for voluntary winding-up within seven days of such resolution.**

2) Intimation to ROC and IBBI: The Company shall intimate to ROC and IBBI about the commencement of voluntary liquidation within seven days of approval of resolution by shareholders or creditors as the case may be. The declaration of solvency shall be filed with the Registrar of Companies in Form GNL-2.

Effect of liquidation: The company shall from the liquidation commencement date cease to carry on its business. However, the company shall continue to exist until it is dissolved.

3) Liquidator to take over the Management control: Liquidator shall take over the Management control of the company and proceed with liquidation process. He is responsible for management of affairs of the Company from the liquidation commencement date and to ensure timely legal compliances.

4) Public Announcement: Within five days of his appointment, the liquidator must cause public announcement in Form A requesting claims from the stakeholders. Claims must be filed within 30 days and publication is to be made in English and regional language newspaper having wide circulation in the area where the company's registered office is located and if the Company has website, the copy of publication also to be uploaded on its website.

5) Submission and verification of claims: Creditors either financial or operational including employees are required to submit their claims in the prescribed form attaching proof of claim. The liquidator shall verify the claims within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part.

If the liquidator rejects the claim, then the creditor may file an appeal before Adjudicating Authority within 14 days.

6) Preliminary Report: The liquidator shall submit a preliminary report to the Company within 45 days from liquidation commencement date and preliminary report to include capital structure, estimate of its assets and liabilities and other relevant information.

7) **Separate Bank Account:** The liquidator must open a separate bank account in the company's name, with the words '**in voluntary liquidation'** to receive all money owed. All transactions above Rs 5000 must be made by way of cheque or through internet banking channel.

8) **NOC from Tax Authorities:** The liquidator shall inform to assessing officer about the commencement of liquidation. If the claims are not received or no NOC is received from the tax authorities, it is presumed that they do not have any outstanding claims.

9) **Assets Realization:** The liquidator shall liquidate all assets and realize the money on timely basis in order to maximize the stakeholders' value. The money realized is required to be deposited in a separate bank account opened for this purpose.

10) **Distribution:** Before distribution of money to stakeholders, the liquidation cost must be paid in full and balance amount shall be distributed to stakeholders as per mechanism provided under Section 53 of IBC. The distribution must be made within 30 days from the date of receipt. If a particular asset cannot be realized due to its nature or other conditions, the liquidator may distribute such assets to its stakeholders with due approval.

11) **Preservation of records:** The liquidator shall maintain records and registers as per the formats prescribed in Schedule II of the Voluntary Liquidation Regulations. In case the books of accounts are not complete as on the liquidation commencement date, then the liquidator shall have them completed and brought-up-to date. The records shall be preserved:

    a) **electronic copy of all records for a minimum period of 8 years; and**

    b) **physical copy of records for a minimum period of 3 years;**

12) **Completion of liquidation:** The liquidator shall endeavour to complete the liquidation process and submit the Final Report

    a. **Within 90 days – if the Company does not have creditors.**

    b. **Within 270 days – if the Company has creditors.**

    If the liquidation process does not complete within stipulated period mentioned above, (i.e. 90 days or 270 days as the case may be), the liquidator shall hold a meeting of the contributories within fifteen days from the end of stipulated period and submit status report. Thereafter, the liquidator shall conduct contributors meeting at the end of every succeeding two hundred and seventy days or ninety days, as the case may be, till submission of application for dissolution. The status report shall contain:

    Settlement of the list of stakeholders; details of any assets that remain unsold; distribution to the stakeholders; distribution of unsold assets to the stakeholders; developments in any material litigation, by or against the company; filing of and developments in applications for the avoidance of transactions.

13) **Corporate Voluntary Liquidation Account:** Unclaimed dividends and undistributed proceeds, if any, shall be deposited into 'Corporate Voluntary Liquidation Account' and shall intimate ROC and IBBI attaching a statement in Form-G with names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds.

14) **Final Report:** After the liquidation process is concluded, the liquidator shall prepare and file Final Report containing the following information:

    a. Audited statement of accounts;

    b. A declaration stating that all assets have been sold, all debts have been paid off, and no legal action is underway;

    c. A statement of an asset sale that shows the assets realized value, cost, manner and mode of sale, any shortfall, and to whom it is sold.

    Liquidator shall file the final report with the registrar and the IBBI, and also submit copy to NCLT attaching compliance certificate in form **H**.

15) **Petition to NCLT for dissolution order:** The liquidator shall make an petition to NCLT seeking

dissolution order. After receiving the order from the hon'ble NCLT, the liquidator shall file form INC 28 with ROC. With approval of form INC 28, the company gets dissolved and master data with ROC will show Company status as **"Dissolved under section 59(8)."**

D. Income tax implications for voluntary liquidation: The following are compliances under Income Tax, 1961:

(i) Section 2 (22) (c) – Dividend

(ii) Section 46 - Capital Gains

(iii) Section 178 - Company in Liquidation

Section 2 (22) (c) - Dividend: Any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to accumulated profits of the company is treated as deemed dividend and accordingly TDS @ 10% is required to be deducted (As per section 194 of Income Tax Act,1961).

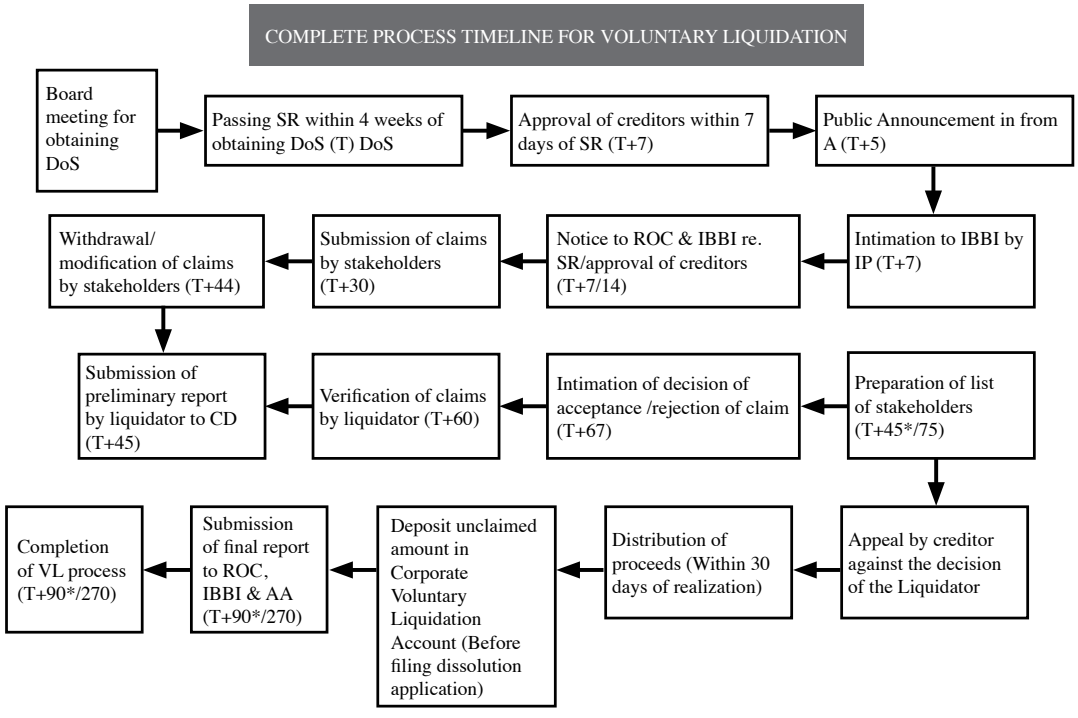
Section 46 - Capital Gain: Distribution of assets of the company to its shareholders on its liquidation shall not be regarded as a transfer by the company. Any money or other assets received by a shareholder from company during liquidation shall be chargeable to income-tax under the head "Capital gains", as reduced by deemed dividend u/s 2(22) (c).

Section 178 - Company in Liquidation: The liquidator of a Company shall give intimation to income tax officer within 30 days from the date of his appointment. If the liquidator fails to give such intimation, he shall be personally liable for payment of income tax dues and other compliances.

7. However, obtaining NOC is not mandatory as per circular issued by IBBI Circular No. IBBI/LIQ/45/2021 Dated 15-11-2021.

Liquidator occupies the position of principal officer as per section 2(35) of Income Tax Act, 1961 for ensuring required compliances.

Stamp duty impact: If a company distributes immovable property to its shareholders, then liquidator is required to execute sale deed and the transaction attracts stamp duty as per respective state stamp act.



It is important to note that while voluntary liquidation may seem straightforward but legal complexities and procedural nuances can arise. Companies considering this option should seek legal counsel to ensure compliance with all regulatory requirements and to navigate potential challenges.

Note: **#** Effective from 31.1.2024

References: IBC and regulations and IBBI newsletters.

Global Arena

EU Insolvency Regulations

The Insolvency Regulation is an EU Regulation concerning the rules of jurisdiction for opening insolvency proceedings in the European Union. The EC Regulation on Insolvency Proceedings 2000 was passed on 29 May 2000 and came into effect on 31 May 2002. It replaced the substance of the 1995 Convention. The Regulation applies between all member states of the European Union, except Denmark which has an opt-out from the EU's Area of freedom, security and justice, and focuses upon creating a framework for the commencement of proceedings and for the automatic recognition and co-operation between the different member states. The Convention on insolvency proceedings, adopted within the European Community on 23 November 1995 and never entered into force as it was never ratified by the United Kingdom. Subsequently, the criterion was adopted by the UNCITRAL model law on cross border insolvency of 1997, adopted with the Resolution No 52/58 of the United Nations General Assembly of 15 December 1997, in the harmonized legal framework proposed to the UN Member States on cross-border insolvency. The Regulation (EC) No 1346/2000 on insolvency proceedings, which reproduced many of the rules the Convention of 23 November 1995 made use of, which never entered into force. Regulation (EC) No 1346/2000 is today replaced by Regulation (EU) 2015/848, applicable from 26 June 2017 to insolvency proceedings.

An amendment to the regulation was approved in 2015, which again applied to all EU member states except Denmark.

REGULATION (EU) 2015/848

On 12 December 2012, the Commission adopted a report on the application of Council Regulation (EC) No 1346/2000. The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Since that Regulation has been amended several times and further amendments are to be made, it should be recast in the interest of clarity.

The EU Regulation 2015/848 (the recast Regulation) comes into force, in part, on 26 June 2017. The recast Regulation, which deals with cross-border

jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU, replaces EC Regulation (1346/2000) (the original Regulation) making changes to existing provisions and introducing areas of new policy.

This Regulation applies to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

b) the assets and affairs of a debtor are subject to control or supervision by a court; or

c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The recast Regulation makes a number of subtle but important changes to jurisdiction, including a definition of centre of main interests (COMI). Article 3 of the recast Regulation introduces 'look back periods' where the general presumption that a debtor's COMI is located in the place of the registered office does not apply if the registered office has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings. Similar provisions also apply to individuals. The presumption, in the case of an individual carrying on business, that COMI is located in the principal place of business, will not apply if this has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings. In the case of individuals not carrying on business, the presumption that COMI is located in the place of habitual residence will not apply if this has been moved to another Member State within the 6 month period prior to the request for the opening of proceedings.

Centre of Main Interest or COMI

The COMI is defined under Art. 3 of Regulation (EU) 2015/848 as the "place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". Therefore, the COMI shall be traced via objective elements that localize the debtor economic life. The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. If the COMI of an entity is outside of the European Union then the insolvency proceedings are not subject to the Regulation. In relation to companies there is a presumption that the registered office will be the COMI of the company, but this presumption can be (and often is) rebutted.

Regulation (EU) 2015/848 of the European Parliament and of the Council deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings as well as with the interconnection of insolvency registers. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons. However, that Regulation does not tackle the disparities between national laws regulating those procedures. Furthermore, an instrument limited only to cross-border insolvencies would not remove all obstacles to free movement, nor would it be feasible for investors to determine in advance the cross-border or domestic nature of the potential financial difficulties of the debtor in the future. There is therefore a need to go beyond matters of judicial cooperation and to establish substantive minimum standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs.

DIRECTIVE 2019/1023

The 2019 Restructuring Directive aims to provide for a harmonised minimum restructuring standard across the EU enabling "honest entrepreneurs" to better manage financial difficulties with a view to giving viable businesses a "second chance". Further, reducing the substantive differences in pre-insolvency regimes among Member States is expected to bring greater transparency, legal certainty and predictability.

The directive has been published on June 26, 2019, entered into force on July 16, 2019 and should have been implemented in national regulation on July 17, 2021. Directive 2019/1023 addresses two aspects of the bankruptcy code: the 'pre-insolvency procedure' and the debt discharge following the closure of insolvency proceedings. It provides the tools for restructuring the debts 'before insolvency' but does not provide a framework for the liquidation of assets of insolvent debtors. It rather aims to help companies in distress avoid insolvency by giving them access to preventive schemes that allow them to restructure their debts and possibly return to viable business. The directive does not address insolvency proceedings as such; instead, it provides a legal framework for the 'discharge' of debts as the outcome of insolvency proceedings. The legal basis for Directive 2019/1023 is Article 114 TFEU on the approximation of laws.

HARMONISING INSOLVENCY LAWS IN THE EU

On 7 December 2022, the Commission tabled a proposal for a directive aimed at enhancing and harmonising insolvency law in the EU. The proposal seeks to make it easier to recover assets from the liquidated insolvency estate; render insolvency proceedings more efficient; and ensure a predictable and fair distribution of recovered value among creditors. The directive would complement two recently adopted pieces of legislation, namely, the directive on pre-insolvency proceedings and debt discharge following insolvency proceedings, and the regulation on the determination of jurisdiction and applicable law for cross-border insolvency. The proposed directive lays down common rules for all aspects related to insolvency proceedings, including the annulment of transactions entered into by the debtor prior to the opening of insolvency proceeding (avoidance actions); the tracing of assets belonging to the insolvency estate; the duty of directors to submit a request for the opening of insolvency proceedings; simplified winding-up proceedings for microenterprises; and creditors' committees. It also provides that Member States should draw up an information factsheet on their domestic laws on insolvency proceedings. The directive does not apply to proceedings related to financial institutions, including insurance and re-insurance companies, credit institutions, investment firms or collective investment undertakings, central counterparties, and other financial institutions.

The proposal is based on Article 114of the Treaty on the Functioning of the European Union (TFEU), which grants the European Union (EU) the competence to lay down appropriate provisions for the approximation of Member States' laws, with a view to the establishment and functioning of the internal market (Article 26, TFEU).

At the end of 2022, the European Commission published an impact assessment (IA) accompanying the proposal. According to the IA, Member States' insolvency laws vary extensively, and such significant differences constitute a serious obstacle to the capital markets union. Insolvency rules need to be consistent with the wider legal system in the Member States, covering areas such as company law, labour law and property law. The proposal

aims to enhance and harmonise three aspects of insolvency law: -

a) the recovery of assets from the liquidated insolvency estate;

b) the efficiency of proceedings; and

c) the predictable and fair distribution of recovered value among creditors.

It provides for:

a) a minimum set of harmonised conditions for exercising avoidance actions;

b) strengthening asset traceability through improved access by insolvency practitioners to beneficial ownership registers and asset registers, including in a cross-border setting;

c) provisions to introduce so called 'pre-pack' liquidation procedures;

d) provisions on a duty of directors to timely file for insolvency to avoid potential asset value losses for creditors;

e) simplified liquidation procedure for insolvent microenterprises;

f) requirements for improving the representation of creditors' interests in the proceedings through creditors' committees;

g) enhanced transparency on the key features of national insolvency regimes.

The Proposal will now go through the legislative process. The European Parliament and the Council are likely to suggest changes to the text of the Proposal. Once the European Parliament and the Council have adopted the final text of the proposed directive, it may enter into force. Thereafter, EU member states shall implement the directive.

Judgments

JUDGMENTS

Case Title: Mr. Shiv Charan & Ors. Vs. Adjudicating Authority & Anr.
Case no.: Writ Petition (L) No. 9943 & 29111 of 2023
Decision Date: March 01, 2024
Court/Tribunal: High Court of Bombay

FACTS:

- The Corporate Debtor had been subjected to a Corporate Insolvency Resolution Process ("CIRP") since at the instance of a financial creditor. A resolution plan propounded by the Resolution Applicants approved by the Adjudicating Authority by an order dated 17th February, 2023.
- The properties of the Corporate Debtor were attached provisionally under section 5 of the PMLA, 2002 and subsequently continued by a confirmatory order passed by the Adjudicating Authority under section 8 of the PMLA, 2002. The attachment continued even after approval of resolution plan.
- The AA disposed of an interim application filed by the RP, seeking a direction to the ED to release the attached properties on the premise that the attachment must come to an end once a moratorium under section 14 of the IBC, 2016 and ruled that once the moratorium commenced, the attachment must abate.
- ED filed a Writ Petition challenging the authority and legal capacity of the Adjudicating Authority to pass orders invoking Section 32A of the IBC, 2016. The ED has sought quashing of an order whereby the Adjudicating Authority directed the ED to release the attached properties.
- The core issue that falls for consideration is whether the Adjudicating Authority had the jurisdiction to direct the ED to release the Attached Properties, invoking Section 32A of the IBC, 2016, since Section 32A provides that all attachments over properties of a corporate debtor would cease once a resolution plan in respect of the said corporate debtor is approved.

DECISION:

- The Hon'ble High Court affirmed the ruling made by the NCLT. Hon'ble High Court noted

that protections to the Corporate Debtor under Section 32A apply upon approval of a qualifying Resolution Plan, ensuring a clean break with a change in ownership.

- The NCLT was well within its jurisdiction in declaring that the corporate debtor would stand discharged from the offences alleged to have been committed prior to the CIRP and that the Attached Properties as identified in the Approval Order became free of attachment from the time of approval of the resolution plan eligible for benefit of Section 32A.
- The Court also noted that the jurisdiction of Section 32A of the IBC, 2016 would be attracted from the point at which a qualifying resolution plan is approved under Section 31 of the IBC, 2016. The protections afforded by Section 32A would become available only when the resolution plan is so approved.
- The Court noted that as a consequence of Section 32A of the IBC, the ED must now necessarily release the attachment, without being logged down by the question of how to interpret the continuation of attachment after the commencement of CIRP and before the approval order and the implications for the same under Section 14 of the IBC, 2016.
- The NCLT in its capacity as the Adjudicating Authority under the IBC, 2016 has only interpreted the provisions of Section 32A and applied them to the facts at hand, to declare that the attachment of the Attached Properties by the ED must come to an end.
- The Court therefore, hold that the interpretation by the NCLT in both, the Approval Order, and the April 2023 Order, did not at all render nugatory, the provisions of the PMLA, 2002 or its legislative objectives.
- The NCLT has merely given effect to the provisions of Section 32A of the IBC, 2016 in its terms and that is an accurate decision. The Court ruled that the attachment by the ED over the attached properties of the CD came to an end. The Writ Petitions are disposed of accordingly.

CASE REFERRED:

Manish Kumar Vs Union of India – (2021) 5 SCC; Kiran Shah, Resolution Professional of KSL and Industries Ltd. Vs. Enforcement Directorate – (Company Appeal (AT) (Insolvency) No. 817/2021; Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors – (2019 SCC OnLine SC 1542) Deputy Director, Office of the Joint Director, Directorate of Enforcement Vs. Asset Reconstruction Company India Ltd. & Ors. – (2020 SCC OnLine Mad 28090); Phoenix Tech Tower Ltd. Vs. AP Gems and Jewellery Park Pt. Ltd. – (2020 SCC OnLine NCLT 12503); Manohar Lal Vij Vs. The Directorate of Enforcement – ([IB]- 1205/[ND]/2019); Deputy Director of Enforcement, Delhi vs. Asix Bank & Ors – (2019 SCC OnLine Del 7854); P. Mohanraj Vs. Shah Brothers Ispat Pvt Ltd. – (2021 SCC OnLine SC 152) (P Mohanraj); Rai Foundation through its Trustee Vs. The Director, Directorate of Enforcement (WP (Crl.) No. 100/2015).

Case Title: Godavari Projects (JV) vs. Union of India
Case no.: ARB.P. 1342/2022
Decision Date: March 04, 2024
Court/Tribunal: High Court of Delhi

FACTS:

- The disputes between the parties have arisen in context of a tender process initiated by the respondent for "construction of dwelling units including allied services for officers & ORS at Mumbai (Army)".
- The bid submitted by the petitioner was accepted by the respondent on 15.06.2016, and accordingly a Work Order dated 27.06.2016 was issued.
- The petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the A&C Act) has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
- The respondent has submitted that the work was cancelled/terminated by the respondent vide letter dated 21.01.2022 since the petitioner was in violation of its contractual obligations.
- It is further submitted that the present petition is not maintainable due to insolvency proceedings being undertaken against one of the member constituents of the petitioner JV.

DECISION:

- The Hon'ble High Court observed that in terms of the settled legal position, the scope of inquiry in a petition under Section 11 of the A&C is limited to examination of the existence of an arbitration agreement.
- The Court also noted that even assuming the petitioner JV is under insolvency, it will not prevent the (corporate debtor) from filing an application under Section 11 of the A&C Act against another party, since the said proceedings are for the benefit of the corporate debtor.
- Accordingly, Mr. Justice (Retd.) Krishna Murari, Former Judge Supreme Court of India, (Mob No.-9415308516) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.
- The respondent shall be entitled to raise preliminary objections as regards jurisdiction/ arbitrability, which shall be decided by the learned arbitrator, in accordance with law.
- All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
- Accordingly, the petition stands disposed of.

CASE REFERRED:

Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund; Gammon India Limited v. Commissioner of Customs, Mumbai; New Horizons Limited v. Union of India; Power Grid Corporation of India Ltd vs. Jyoti Structures Ltd; New Delhi Municipal Council v. Minosha (India) Ltd; MFAR Constructions Pvt. Ltd. v. Married Accommodation Project; Ivrcl Limited v. Union of India; Mohindra Bros v. Union of India; Perkins Eastman Architects DPC v. HSCC (India) Ltd and Sai Enterprises vs Union of India.

Case Title: Vishal Sethi Vs. M/s Collage Group Infrastructure Pvt. Ltd.
Case no.: Company Appeal (AT) (Insolvency) No. 903 of 2023
Decision Date: March 20, 2024
Court/Tribunal: NCLAT, New Delhi

FACTS:

- The Appellant/Operational Creditor was appointed as General Manager in the Corporate Debtor Company - M/s Collage Group Infrastructure Private Limited. In due course of time, the Corporate Debtor failed to release timely payments of salary and eventually salary payments came to a halt from 2015 onwards.

- The Appellant submitted his resignation and requested the CD to pay the balance of his arrear salary. The Corporate Debtor provided a full and final settlement statement admitting an outstanding amount of Rs. 9,28,972/- as debt due and payable.
- The Corporate Debtor also made limited part payments of the outstanding dues, but when some cheques issued by the Corporate Debtor were dishonored and further payments were not forthcoming, the Appellant sent a Section 8 notice and thereafter filed a Section 9 application.
- It was pointed out that subsequently a settlement was arrived at between the Appellant and Corporate Debtor which was brought on record before the Adjudicating Authority and Section 9 application was withdrawn with the liberty to revive the same in the event of failure of settlement between the parties.
- Owing to breach caused in the terms of settlement by the Corporate Debtor, the matter was reopened before the Adjudicating Authority, by the Appellant. However the application was rejected by the AA holding that the Appellant was working with a separate company and not with the Corporate Debtor.
- Assailing the impugned order, it has been contended that Clause 2 of the letter of appointment clearly shows that the Appellant was under the employment of the Corporate Debtor and not of any separate entity namely, MNT Infrastructure Private Limited (MNT).
- The settlement agreement was signed by one of the representatives of MNT, it was clarified that the latter was governed and operated by the same staff/management of the Corporate Debtor and that there existed 100% shareholding between the two entities.

DECISION:

- The Hon'ble Court observed that the Indian Companies Act, 1956 has statutorily recognised subsidiary companies as a separate legal entity. A subsidiary is a separate legal entity for tax and liability purposes.
- Further, to hold the parent company liable, there is need of specific and detailed information, but no such credible information has been provided by the Appellant. There are no sustainable grounds placed on record for holding the Corporate Debtor company liable for the acts of its subsidiary.
- The Hon'ble Court affirm the findings recorded by the Adjudicating Authority in the impugned order and held that when any Operational Creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out from the present factual matrix.
- The provisions of IBC cannot be manipulated and the process of law allowed to be misused such as to turn IBC into a debt recovery proceeding as it would frustrate the basic intent and objective of this special code to bring the Corporate Debtor back on its feet.
- The Court therefore, satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 application. Hence, dismissed the appeal.

CASE REFERRED:

Vodafone International Holdings BV vs Union of India and Anr. (2012) 6 SCC 613; Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) in C.A. No.9405 of 2017

Case Title: Ashdan Properties Pvt. Ltd. Vs Mamta Binani & Ors.
Case no.: Company Appeal (AT) (Insolvency) No.464 & 459 of 2024
Decision Date: March 18, 2024
Court/Tribunal: NCLAT, New Delhi

FACTS:

- Two appeals have been filed by the same Appellant challenging the orders dated 12.02.2024 and 21.02.2024 passed by the Adjudicating Authority.
- The Adjudicating Authority directed the Resolution Professional to place the Plan for the Corporate Debtor filed/to be filed by B-Right Realestate Ltd and

Intervenor MGN Agro Properties Private Limited, for the consideration of the Committee of Creditors.

- The Appellant underwent 33 rounds of bidding and was declared H1 and it was thereafter IA was filed by Patanjali Ayurveda Ltd. and other two applicants namely B-Right Realestate Ltd. and MGN Agro Properties Private Limited, on whose application direction has been issued to place their Resolution Plan before CoC for consideration.
- It is submitted that neither Patanjali nor the other two applicants who subsequently filed applications were included in the list of Prospective Resolution Applicants (PRAs), hence, there was no occasion to issue direction to the CoC to consider their application or Resolution Plan.
- It is submitted that as per Regulation 39(1)(b) of the CIRP Regulation, the Applicant whose name is not included in the list of PRAs cannot be considered.

DECISION:

- The Court observed that the Regulation thus clearly provides that the committee shall not consider a resolution plan received from an application whose name does not appear in the list of PRAs. Admittedly, neither Patanjali nor other two applications have submitted any EOI nor their name was reflected in the List of PRAs.
- Further, Regulation 36A provides for Invitation for Expression of Interest which empowers the CoC to modify the invitation for Expression of Interest. It is always open for the CoC to take a decision to not proceed on the Applications, EOI received and take a decision for issuance of fresh Form G and permit other applicants to participate.
- When no fresh Form G has been issued, it is not open for any new applicant to submit application before the Adjudicating Authority for being permitted to participate in the CIRP and submit Resolution Plan.
- The Court is of the view that impugned order dated 12.02.2024 and 21.02.2024 cannot be sustained, Committee of Creditors having taken resolution not to consider any additional new entrants. Hence, allowed the appeals and set aside the impugned orders.

Case Title: Mr. Tushar Harshadrai Mehta Vs. Samarth Softech Solutions Private Limited
Case no.: CP (IB)/311/MB/2023
Decision Date: March 22, 2024
Court/Tribunal: NCLT, Mumbai Bench, Court-II

FACTS:

- A Company petition is filed by Mr. Tushar Harshadrai Mehta (Operational Creditor), former Director of the Corporate Debtor, praying for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s. Samarth Softech Solutions Private Limited (Corporate Debtor) under Section 9 of the IBC.
- The Company Petition was filed on 03.04.2023 claiming an outstanding amount of INR 1,06,03,252/-, out of which the principal amount is INR 77,76,159/- and interest thereon computed by the Applicant @ 18% p.a. is INR 28,27,093/- only.
- The principal claim of the Applicant is comprised of remuneration and commission payable by the Corporate Debtor to the Applicant for the services rendered by the Applicant as a technical director of the Corporate Debtor.
- Despite several reminders and follow-ups for the release of payment, the Operational Creditor did not receive his rightful dues and being aggrieved by such non-payment, the Operational Creditor had sent a Demand Notice under Section 8 of the IBC. Hence, filed an application under Section 9.
- The Corporate Debtor submits that the interest claimed by the Applicant/Operational Creditor in the instant Petition @ 18% p.a. is not supported by any agreement/clause whatsoever. Interest at the above-rate has been claimed and computed only for the purpose of inflating the claim so as to reach the minimum threshold of rupees one crore for filing an application u/s 9 of the Code.
- If the interest component is excluded for the reasons stated hereinabove, then the present petition is not maintainable u/s 4 of the Code.

DECISION:

- The Hon'ble NCLT find that the amount claimed to be in default is INR 1,06,03,252/-. The principal value of claim is Rs. 77,76,158/- and interest thereon computed by the Applicant at the rate of 18% p.a. comes to Rs. 28,27,094/-.
- The Court noted that it is well settled position in law that where the contract provides for payment of interest, both principal and interest can be considered to determine whether the threshold set out u/s 4 of the Code is met.
- The Court however observed that where there is no such contractual clause stipulating payment of interest or where the liability in respect of the interest is disputed, then in such cases, the interest portion cannot be considered for determining whether the threshold set out u/s 4 of the Code is met.
- In this case, there is no agreement between the parties hereto with respect to interest. Further, nothing has been placed on record to show that the Corporate Debtor is liable to pay interest to the Applicant/Operational Creditor on account of delay in payment of remuneration.
- Further, the Corporate Debtor too has denied and disputed its liability to pay interest for want of any agreement between the parties in respect thereto. Hence, the interest amount of INR 28,27,093/- cannot be taken into account while ascertaining the quantum of default to see if the minimum threshold prescribed u/s 4 of the Code is met or not.
- Even otherwise, the Petition filed u/s 9 of the Code does not meet the minimum threshold of Rs. 1 crore which is required u/s 4 of the Code to trigger CIRP against the Corporate Debtor.
- Hence, the interest of Rs. 28,27,093/- claimed by the Applicant from the Corporate Debtor cannot be treated as an 'operational debt' as defined u/s 5(21) of the Code and thus, it cannot be taken into account while reckoning the quantum of default to see if minimum threshold prescribed u/s 4 of the Code is met.
- The Court dismissed the petition with above mentioned observations.

CASE REFERRED:

Krishna Enterprises v/s. Gammon India Ltd. - Company Appeal (AT)(Insolvency) No.144 of 2018.

INSOLVENCY NEWS FROM AROUND THE GLOBE

❖ WILMINGTON TRUST APPROACHES NCLAT, FILES INSOLVENCY APPEAL AGAINST SPICEJET

Aircraft lessor Wilmington Trust SP Services has moved NCLAT, filing an appeal against an earlier order of NCLT, which had dismissed its insolvency plea against low-cost carrier SpiceJet. Wilmington Trust's petition has been listed for hearing on Thursday before a bench headed by the Chairperson Justice Ashok Bhushan of the National Company Law Appellate Tribunal (NCLAT).

Read More at:

https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/wilmington-trust-approaches-nclat-files-insolvency-appeal-against-spicejet/articleshow/108655526.cms?from=mdr

❖ NCLT ADMITS INSOLVENCY PLEA AGAINST YARN MAKER SHRIVALLABH PITTIE INDUSTRIES

The National Company Law Tribunal (NCLT) admitted Indian Overseas Bank's petition seeking initiation of corporate insolvency resolution process against textiles manufacturer Shrivallabh Pittie South West Industries. Indian Overseas Bank, one of the financial creditors, had dragged the debt-laden firm to NCLT over non-payment of dues after it failed to make a payment of ₹73.92 crore to the bank.

Read More at:

https://www.livemint.com/companies/news/nclt-admits-insolvency-plea-against-textile-company-shrivallabh-pittie-11697025653092.html

❖ NCLT ADMITS INSOLVENCY RESOLUTION PLEA AGAINST ERSTWHILE PROMOTER OF DHFL DHEERAJ WADHAWAN

DHFL had availed various term loan facilities of more than Rs 4,000 crore and working capital facilities of Rs 450 crores. Wadhawan had provided unconditional and irrevocable guarantees toward the credit facilities granted by the public sector lender to DHFL. On November 20, 2019, the central bank superseded the board of DHFL and appointed R Subramaniakumar as the company administrator.

Read more at:

https://economictimes.indiatimes.com/industry/banking/finance/nclt-admits-insolvency-resolution-plea-against-erstwhile-promoter-of-dhfl-dheeraj-

wadhawan/articleshow/108798956.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ CCI CLEARS ADANI POWER'S PURCHASE OF LANCO AMARKANTAK

Adani Power proposes to acquire a 100% stake and control of bankrupt Lanco Amarkantak following a corporate insolvency resolution process (CIRP), the CCI said. Last month, Adani Power reportedly won the bid for the debt-laden firm for Rs 4,101 crore. "The proposed transaction does not result in an appreciable adverse effect on competition in any plausible relevant market in India. Accordingly, the definition of the relevant market may be left open," the CCI said.

Read More at:

https://economictimes.indiatimes.com/industry/energy/power/cci-clears-adani-powers-purchase-of-lanco-amarkantak/articleshow/108798033.cms

❖ IL&FS SEEKS NCLAT NOD TO SELL INSOLVENT COMPANIES WITH HAIRCUT, WITHOUT SHAREHOLDERS' APPROVAL

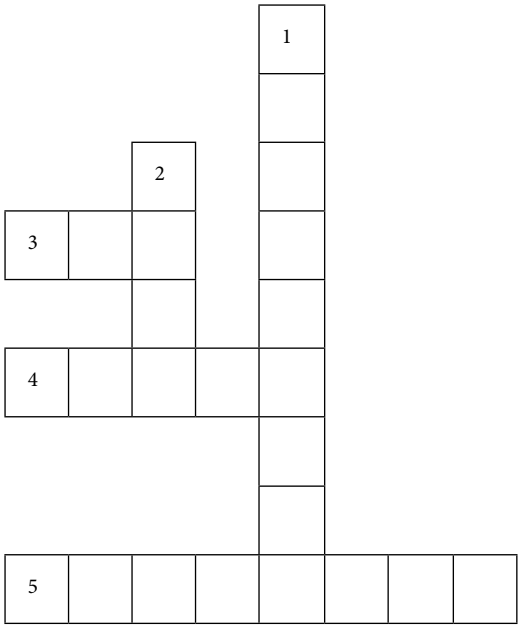
IL&FS group has approached the NCLAT to seek permission to sell its stake with a "haircut" and without shareholders' approval in its companies, which are insolvent with unsustainable debts and placed under the Category II list of resolution framework. The government sought time to file a reply from the NCLAT in the last hearing earlier this week over IL&FS' interim application to sell a stake in group entities falling under Category II, whose highest bid amount was lesser than their debts.

Read more at:

https://economictimes.indiatimes.com/news/company/corporate-trends/ilfs-seeks-nclat-nod-to-sell-insolvent-companies-with-haircut-without-shareholders-approval/articleshow/108748002.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

GAMES CORNER

The Corporate Debt Restructuring (CDR) Quiz



ACROSS

3. CDR guidelines are issued by _____

4. CDR has a _____ tier system

5. The CDR Forum general body of all banks participating in CDR system.

DOWN

1. The individual cases of CDR shall be decided by the CDR _____ Group.

2. The cases not eligible for restructuring under the CDR system.

Answer key:

1. Empowered
2. BIFR
3. RBI
4. Three
5. Standing

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