The Institute of Chartered Accountants of India

Eastern India Regional Council

&

ACAE Chartered Accountants Study Circle of EIRC

Background Material

Conclave on Insolvency & Bankruptcy Code, 2016

29th February 2020, Kolkata

Knowledge Partners

IIIPI

INSOL India

IWIRC connecting women worldwide

Kolkata Bar Association

Support Partners

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THE INSTITUTE THE CHARTERED ACCOUNTANTS OF INDIA

EASTERN INDIA REGIONAL COUNCIL

Jointly with

ACAE CHARTERED ACCOUNTANTS' STUDY CIRCLE - EIRC

Extending a Warm

WELCOME

to The Dignitaries, Guests, Speakers and Delegates

at

Conclave on Insolvency & Bankruptcy Code, 2016

Saturday, 29th February, 2020

Venue : The Hotel Hindusthan International, Kolkata.

ICAI Motto

य एष सुप्तेषु जागर्ति कामं कामं पुरूषो निर्मिमाणः।
तदेव शुक्रं तद् ब्रह्म तदेवामृतमुच्यते।
तस्मिंल्लोकाः श्रिताः सर्वे तदु नात्येति कश्चन। एतद् वै तत् ।।

Ya esa suptesu jagarti kamam kamam Puruso nirmimanah |
Tadeva sukram tad brahma tadevamrtamucyate |
Tasminlokah sritah sarve tadu natyeti Kascan | etad vai tat ||

(That person who is awake in those that sleep, shaping desire after desire, that, indeed, is the pure. That is Brahman, that, indeed, is called the immortal. In it all the worlds rest and no one ever goes beyond it. This, verily, is that, kamam kamam : desire after desire, really objects of desire. Even dream objects like objects of walking consciousness are due to the Supreme Person. Even dream consciousness is a proof of the existence of the self.
No one ever goes beyond it : cf. Eckhart : 'On reaching God all progress ends.')

Source : Kathopanishad

ABOUT
THE INSTITUTE THE CHARTERED ACCOUNTANTS OF INDIA
AND
ITS EASTERN INDIA REGIONAL COUNCIL

ICAI is a statutory body established by an Act of Parliament, for regulating the profession of Chartered Accountancy in our country. The institute, functions under the aegis of the MCA, Government of India. The ICAI is the 2nd largest professional body of CAs in the world. Since 1949, the profession has grown by leaps and bounds with around 3,00,000 members and 8,00,000 students as of now. The EIRC of ICAI was constituted in the year 1952 with its jurisdiction on 10 States and 1 Union Territory. Today it has 13 branch-es, 23 study circles, 7 CPE chapters and 8 study groups. It caters to over 25,000 members and about 90,000 students as on date.

Conclave on Insolvency & Bankruptcy Code, 2016

Organised by : EASTERN INDIA REGIONAL COUNCIL
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

Jointly with : ACAE CHARTERED ACCOUNTANTS' STUDY CIRCLE – EIRC

Date : 29th February 2020 • Time 10.00 AM to 5.15 PM
Venue : Hotel Hindusthan International

Supported by : IIIPICAI, IPA Knowledge Partners: INSOL India, NCLT Kolkata Bar Association, IWIRC

Time	Topics	Dignitary / Speaker
REGISTRATION & NETWORKING 9.30 am to 10.00 am		
INAUGURAL SESSION 10.00am to 10.30 (30 Mins.)		*Guest of Honours :* Hon'ble Mr. Justice V P Singh Hon'ble Member National Company Law Appellate Tribunal (NCLAT), New Delhi Dr. Navrang Saini Whole Time Director, IBBI
TECHNICAL SESSION - I 10.30 am to 11.30 am (60 Mins.)	Reporting & Compliance	Dr. Navrang Saini Whole Time Director, IBBI
PANEL DISCUSSION 11.30 am to 12.30 pm (60 Mins.)	Personal Guarantors to Corporate Debtors	*Moderator :* CA Subodh Kumar Agrawal Past President, ICAICA Arun Kumar Jagatramka Group Chairman, Gujarat NRE Mr. Arjun Asthana Advocate, Sharma & Sharma Legal
TECHNICAL SESSION - II 12.30 pm to 1.30 pm (60 Mins.)	Asset Tracing, Claim Review, Monitoring of ongoing operation	CA Anil Goel
LUNCH • 1.30 pm to 2.15 pm (45 Mins.)		
TECHNICAL SESSION - III 2.15 pm to 3.15 pm (60 Mins.)	Decoding Recent Judgements of Supreme Court	Mr. Sumant Batra Advocate
Technical Session - IV 3.15 pm to 4.15 pm (60 Mins.)	Information Utility – An important pillar under IBC Process	Mr. Siva S Ramann MD & CEO, NeSL Information Utility, Mumbai
Technical Session - V 4.15 pm to 5.15 pm (60 Mins.)	Burning Issues in IBC	CA Anil Goel

Contents

DISCLAIMER

ICAI does not accept any responsibility for the views expressed in the material or advertisements published in this Souvenir. Although every effort has been made to avoid any error or ommission in the Souvenir, ICAI and it's Souvenir Sub-Committee shall not be responsible for any kind of loss or damage caused to any one on account of any error or omission which might have occured.

INDEX OF ARTICLES

राष्ट्रीय कम्पनी विधि अपील अधिकरण

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Vijai Pratap Singh
Technical Member

I am glad to learn that Eastern India Regional Council of ICAI jointly with ACAE Chartered Accountants Study Circle of ICAI is organising a Mega IBC Conclave on 29th February 2020 at Hotel Hindusthan International, Kolkata.

The Indian Chartered Accountants are acknowledged for their professional capabilities not only within the country but also in other parts of the world. The present day Chartered Accountants are comprehended as complete business solution providers and handle comprehensive functions such as controller of finance, managing business decisions, supervising legal compliance and assist the Board on various vital matters to arrive at an appropriate strategic decisions. No doubt, Chartered Accountancy is a vibrant profession and it needs to continuously evolve to align itself with the emerging needs of the stakeholders and accomplish competently in the ever changing complex business environment.

I am sure that this Conclave would be fruitful, enlightening and educative experience for all the participants. I wish the Conclave a grand success.

V.P. Singh
Member (Technical)

3rd Floor, Mahanagar Doorsanchar Sadan, 9 CGO Complex, Lodhi Road, New Delhi – 110003 Tel: 24306817
E-mail: vpsinghjudge@gmail.com

Message

I am happy to learn that the Eastern India Regional Council of the Institute of Chartered Accountants of India (EIRC of ICAI) along with ACAE CA Study Circle are organizing a full day conclave on IBC on Saturday, 29th February, 2020and a souvenir is being published to commemorate this occasion. Insolvency Professionals (IP) plays a vital role in success of the corporate insolvency resolution process. It is incumbent upon the IPs to build and safeguard the reputation of the profession which should enjoy the trust of the society and inspire confidence of all the stakeholders.

Discussions and deliberations made through conclaves considerably enhances professional competence of professionals. I am sure that EIRC of ICAI along with its IPA will continue to contribute in professional development of its IP members through organising more such programmes. I convey my best wishes for the success of the Conclave.

Dr. NAVRANG SAINI
Whole Time Member,
IBBI
26 February, 2020

Message

The growing economy of India has placed great demands on specialization and professionalism. Chartered Accountancy is at the forefront in adapting to the changing economic scenario. The role of a Chartered Accountant in the past has been restricted to Accounting, Auditing and Taxation. Today, a Chartered Accountant is required to have knowledge in various fields including Strategic Management, Laws and Economics. It is important for the professionals to imbibe a sense of responsibility and integrity. Further, there are many changes that are taking place all around us. A greater challenge is to keep abreast of the changes taking place in relevant areas and acquire contemporary knowledge and skills. The need of the hour is to further strengthen our profession and consolidate position.

Chartered Accountants provide value added services to various clients with their multi dimensional skills. It is, therefore, quintessentially important for the members to upgrade their knowledge. They need to develop their professional knowledge and skills relevant to their current and future work and professional responsibilities.

It gives me immense pleasure to welcome the participants to this Mega IBC Conclave on 29th February 2020 which is being organised by the Eastern India Regional Council of ICAI jointly with ACAE Chartered Accountants Study Circle of ICAI at Hotel Hindusthan International.

The Insolvency and Bankruptcy Code is one of the major economic reform Code initiated by the Government in the year 2015. The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). This conclave have been specifically designed to assist our members to enable them to have clarity on the provisions of the Insolvency and Bankruptcy Code and its Regulation.

I am very confident that all the participants of this programme will be benefited by sharing the experience with the speakers.

I wish the Conclavea grand success.

CA NITESH KUMAR MORE
Chairman, EIRC

Message

Dear Friends,

ACAE Chartered Accountants Study Circle (ACAE) is organising this Mega Conclave on IBC jointly with EIRC-ICAI, in its endeavour to update the professional with regularly changing provisions and regulations under IBC.

In three (3) years since enactment of Insolvency and Bankruptcy Code2016, the entire ecosystem of Adjudicating Authority (AA), Insolvency and Bankruptcy Board of India (IBBI),Insolvency Professional (IP), Insolvency Professional Entity (IPE), Information Utility (IU), Registered Valuers (RV), Registered Valuer Organisation(RVO)is in place and has been working very proactively. The success of the code is clearly visible on ground and the Board &Legislature has acted very swiftly by making suitable amendments in the Code and Regulations thereby removing the bottlenecks whenever required.

Towards first phase of implementation ofIndividual Insolvency, the Government has taken a major steps by notifying the provisions relating to Insolvency ofPersonal Guarantor to the Corporate Debtor.It's the added professional opportunity not only for the Insolvency Professionals but would also be beneficial for entire ecosystem of the Corporate Insolvency Resolution Process.

Topics in this conclave has been chosen keeping in view the need of time and we are sure the delegates would immensely be benefited from the deliberation by eminent speakers who have come from all across the Country.I am thankful to entire team of ACAE and EIRC towards making this conclave a grand success.

Best Regards,

CA JITENDRA LOHIA
President - ACAE

Message

Dear Professional Colleagues,

"Gaining knowledge is the first step to wisdom.
Sharing it is the first step to humanity."

Insolvency and Bankruptcy Code provides for a time-bound process forprofessionals to play a vital role in liquidating the entity assets and other settlement processes during bankruptcy. We, professionals are the ones who shall stand to decode the code for valuation, analysis and due diligence relating to assets, finances and operations.

We bring to you Full day Conclave on IBC with immense pleasure. We have tried to integrate the various convolutions of the code through this material. We sincerely hope it would meet the expectations of the readers and you would enjoy learning as much as we have enjoyed consolidating it.

Eastern India Regional Council, ICAI along with ACAE Chartered Accountants Study Circle – EIRC is bringing forward panel discussion on personal guarantors to corporate debtors along with technical sessions on reporting, compliance, asset tracing, claim review, information utility, Supreme Court judgements and burning issues related to IBC.We would take this opportunity to express our gratitude to the speakers for sharing their unique knowledge for the benefit of all.

We convey our sincere thanks to the Chairman, Eastern India Regional Council, ICAI, and President Association of Corporate Advisers & Executivesfor giving us this responsibility. Sincere thanks to all the content writers. In case of any suggestions, feel free to contact on the E-mail ID given below.

Thanking you,

CA SUMIT BINAN
Chairman
(Souvenir Committee)

CA NIRAJ HARODIA
Vice Chairman
(Souvenir Committee)

ACAE CHARTERED ACCOUNTANTS' STUDY CIRCLE – EIRC

ACAE Chartered Accountants' Study Circle – EIRC, which was formed by the Chartered Accountants members of Association of Corporate Advisers & Executives (ACAE) in the year 2002, is known in Eastern part of the Country for organizing events with experts and nationally acclaimed personalities on unconventional topics for the benefit of its members besides organizing Lecture Meetings, Conferences, Seminars, Workshops, Interactive Sessions, Conclaves, Debates, Panel Discussions etc. on contemporary burning issues in GST, Direct Taxes, Corporate Laws , Auditing & Accounting etc. It also provides a platform to many young talents for making their deliberations on various issues of economic interest, thus grooming future intellectuals and professionals in the society.The Study Circle has received many accolades over the year from ICAI – EIRC.

The ACAE Study Circle has always been the front runner in spearheading knowledge to professionals and its very hard working and dedicated tem of CA Members continuously strive for excellence and help each other in deliberating the complex issues and their efforts has enabled the Study Circle to excel in different spheres.

For ACAE Study Circle, success is a journey and not a destination. Thus, we continuously strive for excellence to undertake challenges of the future.

CA Tarun Kr Gupta

Convenor

ACAE AT A GLANCE

ACAE Family Day Out at Rashbari Garden House in Belur on 05.01.2020

Ganga Aarti in the evening

GST Conclave at BCCI, Kolkata on 11.01.2020

Release of ACAE House Journal -Special Issue on GST Conclave by Chief Guest, Hon'ble Shri P K Choudhary, Member (Judicial), CESTAT, Kolkata Bench, accompanied by CA Tarun Kr Gupta, Convenor - ACAE CA Study Circle, CA Niraj Harodia, Chairman - House Journal Sub-Committee, CA Jitendra Lohia, President-ACAE, CA Sushil Kr Goyal, Chairman-Indirect Tax Committee, ICAI, New Delhi and CA P D Rungta, Chairman - GST Conclave Sub-Committee.

Panel Discussion on Recent Changes in GST Regime - GST 2.0 - The Next Leap. Panelists : Ms. Nandini Ghosh, Sr. Joint Commissioner West Bengal SGST, Mr. Pramod Gupta, Chairman, CGTA Logistics Hub, CA Sushil Kr Goyal, Chairman, Indirect Tax Committee, ICAI, New Delhi, Moderator- CA Tarun Kr Gupta, Practicing Chartered Accountant, Kolkata, CA Prabin Dokania, CFO, GSTN, New Delhi, Mr. Mahesh Keyal, VP, FIEO and Mr. Sanjib Kothari, Co-Chairman, GST, MCC.

Special Session & Interaction with Shri Anurag Singh Thakur, Hon'ble Minister of State for Finance & Corporate Affairs, Govt. of India organised by ACAE, MCCI, BCC, CCC & DTPA at The Oberoi Grand, Kolkata on 16.01.2020

President-ACAE, CA Jitendra Lohia felicitating Hon'ble Minister Shri Anurag Singh Thakur. Seminar on Union Budget - 2020 at Rotary Sadan, Kolkata on 03.02.2020

Guest Speaker, CA Bhupendra Shah, Mumbai giving his deliberations on Direct Tax.

On the dais, Speaker CA Arun Kr Agarwal, Speaker CA S S Gupta, CA Jitendra Lohia, President-ACAE, Speaker CA Jatin Harjai, Jaipur and CA Tarun Kr Gupta, Convenor.

PROFILE

SHRI VIJAI PRATAP SINGH

Shri Vijai Pratap Singh has done Science Graduation in the year 1973 and Law Graduation in the year 1976 from Allahabad University. He got selected in Uttar Pradesh Judicial Service in 1977 Batch at the age of 23 years and joined as Munsif Magistrate on 05.11.1979 and remained posted in different Districts in the rank of Munsif Magistrate and Chief Judicial Magistrate/Civil Judge Senior Division. Thereafter, he got promoted and selected in Higher Judicial Service w.e.f. 23.06.1999 and held the post of Additional District and Sessions Judge in Aligarh, Kanpur Nagar, and Pilibhit during the period 23.06.99 to 07.01.2006. He joined as Judicial Member, Trade Tax Tribunal, Meerut on 07.01.2006 and worked there till 06.06.2009. He also worked as Additional District and Sessions Judge/Officiating District Judge in Mathura from 10.06.2009 to 03.02.2012. In addition to his judicial work in 2012, he was elected as President of Uttar Pradesh Judicial Services Association and worked as President till 28.02.2015. In 2013, he was also elected as Secretary General of All India Judges Association, a representative registered body of all the members of subordinate Judiciary in India. He remained Principal District and Sessions Judge in Mau, Sultanpur, Firozabad and Agra districts in Uttar Pradesh till 28.02.2015 and after superannuation; he joined as Chairman, Permanent Lok Adalat, Meerut and thereafter, joined as Chairman, Permanent Lok Adalat at Ghaziabad. Subsequently, after resigning from Permanent Lok Adalat, Ghaziabad on 02.06.2016, he joined as Member (Judicial), National Company Law Tribunal on and from the same day, i.e. 02.06.2016.

During his tenure in NCLT, he has served as Member (Judicial) in Kolkata Bench, Allahabad Bench and Mumbai Bench and after that he got elevated to be post of Member (Technical), NCLAT w.e.f. 23.10.2019.

PROFILE

DR. NAVRANG SAINI
Whole Time Director, IBBI

Dr. Navrang Saini took charge as Whole Time Member, Insolvency and Bankruptcy Board of India in New Delhi on 31st March, 2017.

He has post-graduation degrees in Management and Law along with PHD in Corporate Law and professional qualification as a Company Secretary.

Dr. Navrang Saini has served the Ministry of Corporate Affairs in various capacities. His last assignment was as Director General (in the rank of Additional Secretary) at the Ministry. He also served as a Commissioned Officer in Territorial Army from July 1985 to March 2011 and superannuated as Lt. Colonel.

During his tenure as Registrar of Companies, Delhi and Haryana, Dr. Navrang Saini implemented the first mission mode e-governance project of the country 'MCA21' as a major pilot project.

He is a keen mountaineer, trekker and sky-diver.

Dr. Navrang Saini is presently looking after Administrative Law Wing + Others comprising Adjudication, Court Proceedings, Finance & Accounts, Information Technology, Limited Insolvency Examination, Valuation Examinations, Graduate Insolvency Programme, National Insolvency Programme, Board Secretariat, Strategy, International Affairs, Parliament, Disciplinary Committee.

Dr. Navrang Saini was a member of the Appellate Authority established by the Central Government in accordance with the powers conferred under section 22A of the Chartered Accountants Act, 1949, the Cost and Works Accountants Act, 1959 and the Company Secretaries Act, 1980 from 3rd November, 2015 to 2nd November, 2018.

PROFILE

CA SUBODH KUMAR AGRAWAL

SUBODH KUMAR AGRAWAL,a practising chartered accountant from Kolkata,is a member of Institute of Chartered Accountants of India as well as Institute of Chartered Accountants of Australia. He is also registered with IBBI as Insolvency Professional.

He has got more than 30 years of experience in various audits, sebi matter, corporate law matters, public finance and financial services.

He has been very active and has served as Chairman of Eastern Regional Council of ICAI in 2006 and also has been President of ICAI for the year 2013. He has served on the various national committees of RBI/ SEBI/ MCA/ CAG/ NACAS, Quality Review Board constituted under the Chartered Accountants Act. and also served on the Board of Insurance Regulatory Development Authority.

On International front he has been (i) President of South Asian Federation of Accountants an apex body of SAARC, (ii) Board Member of Confederation of Asian and Pacific Accountants and also (iii) Member of Small and Medium Practitioners Committee of International Federation of Accountants, New York. He has been associated with chamber of commerce, social organisations etc.

On the academic front he got 10th all India rank in CA Final Exam held by The Institute of Chartered Accountants of India.

Has delivered lectures in various seminars, symposia's and conferences organized by EIRC, ICAI various study circles and other organisations on the topic of financial matters and related to CA professionals including public finance.He is a regular speaker on bank audit, advances, restructuring, and now on Insolvency and Bankruptcy Code.

PROFILE

ARUN KUMAR JAGATRAMKA

Mr. Arun Kumar Jagatramka is a Chartered Accountant with an all India 1st rank and gold medal; and the Chairman of Gujarat NRE Group.

He has taken keen interest in building a close India–Australia relationship and is a strong advocate for strengthening the strategic partnership between the two countries. Under his able guidance, Gujarat NRE was the first Indian company to hold and manage two prime coking-coal mines in Australia. He was conferred "Person of the Year 2009" title by *Illawarra Mercury*, a leading Australian publication.

Mr Jagatramka has earlier served as the Honorary NSW 'Sydney Ambassador' to India, appointed by the Government of New South Wales, Australia. He has also been a member of the India Australia CEO forum and Indian Japan Business Leaders Forum nominated by the Prime Minister of India. He is the present Chairman of Entrepreneurship Helpline Foundation.

He is also an active member of prominent industry associations like CII and ASSOCHAM. He is the immediate past Chairman of ASSOCHAM National Council on Ease of Doing Businessand is a sought-after speaker in various national and international platforms on a wide range of subjects like economy and industry, steel, coking coal and met coke as well as on ethics, integrity and Ease of Doing Business.

PROFILE

ARJUN ASTHANA
(*Associate Partner*)
SHARMA & SHARMA
Advocates & Legal Consultants (Delhi Office)

Arjun is the Associate Partner of Sharma & Sharma, Advocates & Legal Consultants and leads the Commercial Litigation team of the Delhi office of the firm. A law graduate from Faculty of Law, University of Delhi and having sound tutelage in Engineering; he has been a Member of Editorial Board in International Organisation of Scientific Research and Development (IOSRD) since 2016.

Arjun has been involved in the practice of Insolvency and Bankruptcy Code, 2016 since its inception and has represented in the Corporate Insolvency Resolution Process of various Corporate Debtors whose name appeared in the first list of Reserve Bank of India. Arjun appears before numerous benches of National Company Law Tribunals across India and appears regularly before the Hon'ble National Company Law Appellate Tribunal representing Financial Creditors, Resolution Professionals, Corporate Debtors, Promoters, Operational Creditors, and State Government Corporations amongst others. Arjun has been instrumental in successful implementation of Resolution Plans and towards effective implementation of Corporate Insolvency Resolution Processes and in the process has rendered numerous legal opinions on complex issues of laws such as distribution matrix, preferential and extortionate transactions, liquidation estate, consequences of imposition of moratorium etc.

His core area of practice includes Engineering Procurement and Construction Contracts, Law of Guarantee & Indemnity, mergers and acquisitions, Commercial Arbitration, Mines and Minerals Laws, Constitutional Law, Competition Law, Environmental and Energy Laws. Arjun has also represented and assisted Senior Counsels in matters relating to invocation of performance bank guarantee, indemnity and personal guarantees, oppression and mismanagement, cancellation of Mining Leases, barging and dredging, fly ash utilizations, disputes arising out of Environmental Clearances, , disputes arising out of breach of warranties etc.

Having sound technical background, Arjun is also involved in advising clients and rendering opinions on cyber law, surveillance law, civil aviation and defence procurement laws.

PROFILE

CA ANIL GOEL
B.Com, FCA, DISA(ICAI)
Founder & Chairman
New Delhi

Total Number of years of experience :

35 years' experience as auditor, debt syndication consultant, stressed asset consultant, compliances consultant as Founder of M/s AKG & Co., a mid-level CA Firm.

15 Years' experience as Resolution Agent and Enforcement Agent under SARFAESI Act as Founder of AAA Capital Services Pvt Ltd., India's Largest Resolution Agents and Enforcement Agents under SARFAESI Act.

3 Years' experience as Insolvency Professional as Founder and Chairman of AAA Insolvency Professionals LLP, an IPE under IBC. Having handled 17 assignments as RP & 10 Liquidator, 3 Assignments as Process Consultant and supervised another 85 assignments assigned to partners of AAAIP

Has handled complicated cases under IBC, where assets are attached by ED, PMLA, EOW, SEBI, CBI, IT

Department, Local bodies etc.

Handled cases ranging up to Rs. 29500 Cr. Debt

Has prepared many resolution plans for resolution applicants

Core Competence & Industry specific experience:-

- Accounts & Auditing;
- Tax and Company Law Compliances;
- Bank Loan syndication;
- Restructuring and rehabilitation of sick units, onetime settlement of Bank loans;
- Recovery of Bank loans through the process of SARFAESI action;
- Venture Capital funding and due diligence for debt and equity funding
- Projected financial statements, Technical and Financial Viability Study
- Preparation of rehabilitation scheme for BIFR cases; CDR Cases
- Insolvency and Bankruptcy Law

Experience of various industry sectors as auditor, consultant, resolution agent and resolution professional.

PROFILE

SUMANT BATRA

An insolvency lawyer of international repute, social commentator and thought leader, Sumant Batra is Past President of INSOL International. As senior international insolvency and creditors' rights consultant to the World Bank Group, International Monetary Fund, OECD and other developmental institutions, he has worked extensively on policy matters in Africa, Eastern Europe, Middle East and South Asia.

Rated as India's No. 1 insolvency lawyer by Legal 500 for many consecutive years, Insolvency Lawyer of the Year 2017 and 2018 by Corporate LiveWire Global Awards, and India-Insolvency Game Changer of the Year Award – 2017, Sumant is an independent insolvency consultant and currently leads the insolvency practice of Kesar Dass B. & Associates, a leading Indian law firm co-founded by him in 1993.

The only Indian lawyer with over 20 years of experience in insolvency at global and Indian level, Sumant is the author of *Corporate Insolvency – Law & Practice*.

He is Chief Mentor of INSOL India; President of SIPI – a think tank on insolvency; and Member of Advisory Committee, the Insolvency and Bankruptcy Board of India.

Designated as Professor at Practice (Adjunct) by the Indian Institute of Corporate Affairs, Government of India, he is vising faculty of National Law University, Delhi, National Judicial Academy, Bhopal, National Colloquium of National Company Law Tribunal and Insolvency Professionals licensed by the Insolvency and Bankruptcy Board of India.

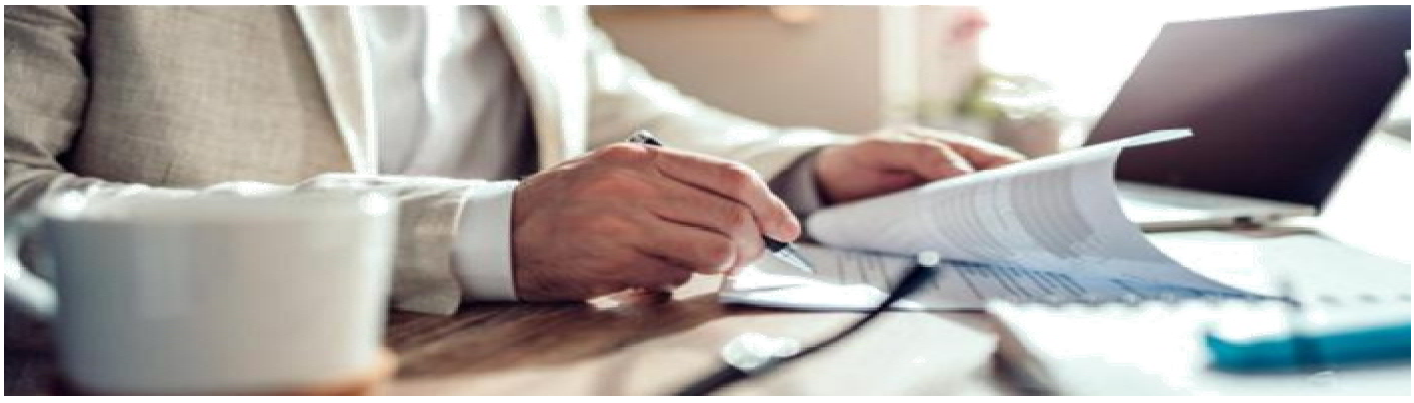
A cultural champion, Sumant is the founder and architect of a number of innovative creative projects to promote Indian heritage, culture, art and literature. An avid collector of memorabilia, he is probably the largest collector of Indian cinema memorabilia and has founded *Chitrashala*, a private museum of Indian vintage popular culture art.

He is the author of the bestselling coffee table book - The Indians.

PROFILE

SHRI S. RAMANN

Shri. S. Ramann, is from the civil service and is deputed to NeSL by the C&AG of India as the MD & CEO of National E-Governance Services Limited (NeSL). Prior to joining NeSL, Ramann was the Principal Accountant General of State of Jharkhand. He is also empaneled as Joint Secretary to the Government of India. From 2007 to 2013 he was at SEBI, where he served as CGM and then as Executive Director while on deputation from Government of India. He has also served as Secretary to the CAG of India and First Secretary at Indian High Commission London. His qualification are, BA (Hons) Economics from St Stephens College and MBA from FMS, Delhi University. His professional qualification are L.L.B. from university of Mumbai, Msc Regulations from the London School of Economics, certified Internal Auditor from IIA, Florida and Post Graduate Diploma in Securities Law.



THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ORDINANCE, 2019

Promulgated by President of India on 28/12/2019

Key Amendments

CA ANIL GOEL
Founder and Chairman
AAA Insolvency Professionals LLP

1. CIRP Commencement date

   Proviso to section 5(12) has been omitted mean: CIRP commencement date would always be the date of admission of an application and the appointment of IRP would be done on the same day.

2. Interim Finance

   Definition of Interim Finance was restricted to financial debt raised during CIRP under section 5(15). The amendment proposes that the Govt will notify other kinds of debt also that can be raised during CIRP and can qualify as Interim Finance and will have priority of payment in case of Resolution or Liquidation.

3. Threshold for filing the insolvency petition by Homebuyers(allottees), debenture or bond holders, public depositors :

   a) Homebuyers /Allottees:

      Joint application by minimum 100 allottees or 10% of the allottees of the same real estate project (not all the projects of Corporate Debtor), whichever is less. The application should be joint application and not through the RWAs or Home-buyers' Association or Welfare Society.

   b) Debenture /Bond Holders or Public Depositors:

      Joint application by minimum 100 such creditors or 10% of such creditors, whichever is less. Each class of creditors e.g. Debenture holders, bond holders or public depositors would be considered as a separate class.

   c) Existing Pending applications:

      30 days have been given to all the pending applications filed where the minimum threshold is not met for compliance, otherwise the application would be considered as withdrawn. The applicants would have to work for gathering the support of required number of such creditors.

   The individual creditors or small group of these classes of creditors would not be able to pressurise the Corporate Debtor for settlement is a good protection to real estate industry and other Corporate Debtors who have raised debt as debentures or bonds.

   On the other hand, the collective action of these classes of creditors would get immediate response either from Corporate Debtor or from the Tribunal.

4. Filing of Applications for initiating CIRP against the debtors of Corporate Debtor by IRP / RP/ Liquidator / Resolution Applicant /Monitoring Agency / Corporate Debtor

   Section 11 is amended to provide that IRP/ RP/ Liquidator / Resolution Applicant/ Monitoring Agency / Corporate Debtor can file application against any other Corporate Debtor for initiating

CIRP of that other Corporate Debtor in case of default of debt owed to Corporate Debtor.

This amendment is made to address some judgements giving varied views. It would be easier to recover debts of Corporate Debtor during CIRP or Liquidation or even after the Resolution Plan is approved.

5. Moratorium is extended to protect the license, permit, registration, quota, concession, clearances or a similar grant or right during CIRP Period
   a) A non-obstante clause has been inserted in section 14 of the Code wherein it is provided that following would not be suspended or terminated on the grounds of commencement of CIRP: -
      1. A licence, permit, registration, quota, concession, clearances or a similar grant or right given by
      2. The central, state or local authority, sectoral regula-tor or any other authority subject to the condition
      3. That there is no default in dues arising for the use or continuation of the said licence, permits, etc during the moratorium period.
   b) The supply of goods or services would also not be ter-minated, suspended or interrupted during moratorium if IRP/RP considered that the supply is critical to protect and preserve the value of the Corporate Debtor and to manage the Corporate Debtor as a going concern.

      Unless the payment for the current supply is not being made by the Corporate Debtor to the supplier.

      These provisions would bring revival of many companies, otherwise there are doubts in the minds of Resolution Applicant about the revival of licences, permits, etc. or about the availability of critical raw material.
6. RP to continue managing the Corporate Debtor and to do all such acts as required from RP till the Resolution Plan is approved or liquidation order is passed.

   It is clarificatory amendment that Resolution Professional will continue to function till Resolution Plan is approved or Liquidation order is passed.
7. Liability of Corporate Debtor for offences prior to CIRP (PMLA, FEMA, SEBI, etc.) and Attachment of Assets for the offences
   1. New Section 32A is inserted
   2. This is non-obstante section/clause and provide as under:
      - The liability of Corporate Debtor for any offence committee prior to CIRP shall cease;
      - Corporate Debtor shall not be prosecuted for such offence from the date Resolution Plan is approved
      - Even if the prosecution is instituted during CIRP, this section would be applicable;
      - Any person of officer who is in default for the of-fence, would continue to be liable for the offence and punishment, notwithstanding that the liability of the Corporate Debtor is ceased;
      - No action shall be taken against the property of the Corporate Debtor in relation to an offence comitted prior to CIRP if that property is part of a Reslution Plan approved by AA, which results in to change in the management
      - No action shall be taken against the property of the Corporate Debtor in relation to an offence comitted prior to CIRP if that property is sold during liquda-tion process under IBC
      - An action against the property of the corporate debtor in relation to an offence shall include the at-tachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
      - The Corporate Debtor and any other person in-cluding Resolution Professional or Liquidator shall provide all the assistance and co-operation to the in-vestigating agency regarding the offence committed before the commencement of CIRP

      Conditions for this section:
      - Resolution Plan or sale during liquidation process results in change in the

management or control of Corporate Debtor

- The new management or the buyer during liquida-tion process is not a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- The new management or the buyer during liquida-tion process is not a person with regard to whom the relevant investigating authority has reason to believe that he had abetted or conspired for the commission of the offence

List of Some Acts, where offences are committed (inclusive)

- Prevention of Money Laundering Act, 2002 (PMLA Act); Information Technology Act, 2000 (IT Act); The Securities and Exchange Board of India Act, 1992 (SEBI Act); The Securities Contracts (Regulations) Act, 1956; The Companies Act, 2003; The Prevention of Corruption Act, 1988; The Benami Transactions (Prohibition) Act; The Indian Penal Code; The Protection of Depositors Act, 1999;
- Tax Crimes under Income-tax Act, 1961; The Customs Act, 1962; The Central Excise Act, 1944; Goods and Services Tax Act,
- Environmental Crimes under The Environment (Protection) Act, 1986; The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and Control of Pollution) Act, 1981; The Representation of People Act, 1951
- Foreign Transactions crimes under the Foreign Trade (Development and Regulation) Act, 1992; Foreign Exchange Management Act, Foreign Contribution (Regulation) Act, 1976;
- Banking Regulation Act, 1949 for bank frauds
- Offenses under the investigation of State Governments: Prize Chits and Money Circulation Schemes (Banning) Act, 1978; The Protection of Interest of depositors, 1999

Agencies to Enforce Criminal Law (inclusive):

- The Directorate of Enforcement (ED) for PMLA & FEMA; Central Bureau of Investigation (CBI); Criminal Investi-gation Department (CID);
- Serious Fraud Investigation Office (SFIO), Ministry of Corporate Affairs;
- The Central Economic Intelligence Bureau (CEIB) for various economic offences and COFEPOSA
- The Central Bureau of Narcotics (CBN) for drug related offences
- The Directorate General of Anti-Evasion (DGA) for central excise related crimes
- The Directorate General of Revenue Intelligence (for customs, excise and service tax related offences)
- The SEBI for protection of interest of investors and securities related offenses
- The Directorate General of Income-tax (Investigation)
- The Competition Commission of India for anti-competitive trade practices)

PERSONAL GUARANTEE UNDER IBC WITH REFERENCE TO INDIAN CONTRACT ACT 1872 AND ITS IMPACT OVER OTHER ACTS - AN ANALYSIS

CS MAMTA BINANI

Introduction

On November 15, the corporate affairs ministry has notified the rules and regulations for the initiation of insolvency proceedings against personal guarantors to corporate debtors, which will be applicable from December 1.

Source:-

https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/Nov/213963-32-73_2019-11-16%2000:23:12.pdf

https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/Nov/213963-1-31_2019-11-16%2000:23:02.pdf

https://www.ibbi.gov.in/uploads/legalframwork/8573c02ee31bba941201afff84b95ae4.pdf

https://www.ibbi.gov.in/uploads/legalframwork/40c64dd41380b7d710b874a8d1152fe6.pdf

Under these rules, if insolvency proceedings against a corporate debtor under the Insolvency and Bankruptcy Code are already in process, the same bench of the bankruptcy court would also deal with the proceedings against the personal guarantor.

Under the Insolvency and Bankruptcy Code (IBC), individuals are classified into three classes –

1. personal guarantors to corporate debtors,
2. partnership firms and proprietorship firms, and
3. Other individuals.

Regarding these new rules, the ministry said that , these "provide for the process and forms of making applications for initiating insolvency resolution and bankruptcy proceedings against personal guarantors to corporate debtors, withdrawal of such applications, forms for public notice for inviting claims from the creditors, etc".

Adjudicating Authority When the case is filed against the Personal Guarantor under section 60 of the IBC Code then the Adjudicating Authority is National Company Law Tribunal. In any other case the Adjudicating authority is Debt Recovery Tribunal

Personal Guarantor under IBC Code

"Personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor.(Section 5(22)).

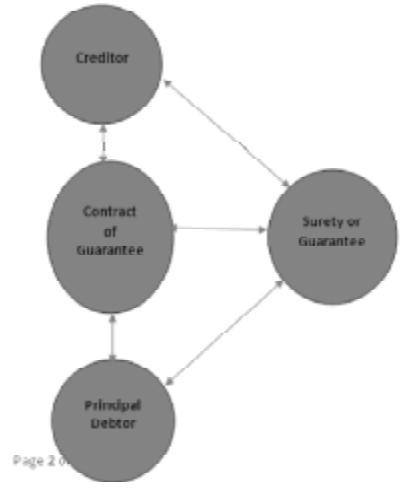
The terms "surety" and "Contract of Guarantee" is not defined under the IBC but it is defined under the Indian Contract Act.

The Indian Contract act deals with Contract of Guarantee and Surety. Therefore, before proceeding with IBC Case against the surety under the Contract of Guarantee it is important to understand about the terms "surety" and "Contract of Guarantee" and the related provisions under the Indian contract act 1872.

Contract of Guarantee

Contract of Gurantee is defined under section 126 of the Indian Contract Act 1872

Contract of Guarantee means a contract to perform the promises made or discharge the liabilities of the third person in case of his failure to discharge such liabilities



Three Parties

There are three parties in the Contract of Guarantee

The person who gives the guarantee is called "surety". The person of whose default the guarantee is given is called the "Principal debtor". The person to whom the guarantee is given is called the creditor.

For example

Mr. Aadvances a loan of 50000 to Mr. B and Mr. C promise that in case Mr. B fails to repay the loan, then he will repay the same. In this case of a contract of guarantee,

Mr. A is a Creditor, Mr. B is a principal debtor and Mr. C is a Surety.

Section 127 –Consideration for Guarantee

Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

In many cases the Companies agrees to sell the goods to their customers after obtaining the Guarantee or Surety from other person or company for the payment of price for the goods sold to their customer. This can be understood from the following examples:-

Illustration

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise."

Is it possible to file IBC Case against the surety for the operational debt?

Yes, if the *Individual* had given any guarantee for payment of price for the goods sold to the corporate debtor by the Operational Creditor and if the Corporate Debtor fails to make the payment to the Operational Creditor then the Operational Creditor can file an IBC Case against the Surety to the Contract of Guarantee for his Operational debt.

Provided the Claim Amount is more than Rupees One Lakh.

Because the section (Section 5(22)) of the IBC Code states that,

"Personal guarantor" means an *individual who is the surety* in a contract of guarantee to a corporate debtor.

Liability of the Surety

Section 128 deals with the liability of the Surety

According to section 128 of Indian Contract Act, 1872, the liability of a surety is co-extensive with that of principal debtor's unless the contract provides.

For example:

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it

Types of Guarantee under Indian Contract act

A contract of guarantee may be for an existing liability or for future liability. A contract of guarantee can be a specific guarantee (for any specific transaction only) or continuing guarantee.

A) Specific Guarantee

A specific guarantee is for a single debt or any specified transaction. It comes to an end when such debt has been paid.

A specific guarantee is given in respect of a single debt or transaction. For example, A asks B to give a loan of Rs. 500 to C promising to pay the amount on the failure of C to repay the amount

'Continuing guarantee'.— Section 129

A guarantee which extends to a series of transactions, is called a 'continuing guarantee'

For Example:-

A guarantees payment to B, a Cements-dealer,to the amount of Rs.1,00,000/- for any Cement he may from time to time supply to C. B supplies C with Cement of above the value of Rs.1,00,000 and C pays B for it. Afterwards, B supplies C with Cement of the value of Rs. 2,00,000/-. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Rs. 1,00,000/- only.

Revocation of Guarantee-

Revocation of Continuing Guarantee-Section 130

The Guarantee can be revoked by the surety in the following manner:-

1. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

For Example:

A, in consideration of B's discounting, at, A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A

revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

Decided Case

Debt Recovery Appellate Tribunal in the matter of Kailash Chandra Gaur vs Central Bank Of India And Ors.

on 21 July, 2005decided the matter with respect to the order dated 21.11.2003, passed by the DRT Bangalore, in OA No. 382/1998 that, the Continuing Guarantee can revoked by giving the notice to the Creditor.

https://indiankanoon.org/doc/1819380/

2. On the death of surety. –Section 131

   The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

3. Discharge of surety by variance in terms of contract-Section 133

   Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

For Example:

A gives to C a continuing guarantee to the extent of 5,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then, existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

Decided Case

In the Matter of

The Indian Bank, Madras vs S. Krishnaswamy and Others on 15 February, 1989 The Honourable Madras High Court held that,

Originally these suits were instituted in the City Civil Court, Madras, and were transferred to this Court. C.S. No. 31 of 1974

This is a case where the bank entered into a fresh arrangement with the principal debtor by which all outstanding accounts were adjusted and converted into a term loan for Rs. 35,00,000. To this arrangement, the guarantors were not parties and they did not have the knowledge about the same. Therefore, the sureties were discharged from their liabilities. It is also observed in the said case that unless the sureties had expressly bound themselves for variation, they are liable to be discharged.

https://indiankanoon.org/doc/1584632/

Discharge of surety by release or discharge of principal debtor-Section -134

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Example-1:-

A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

Example: 2

A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—Section 135

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract

Decided Case

The Punjab and Haryana High court in the matter of
Shri Kundanmal Dabriwala
....Appellant
Versus
Haryana Financial Corporation and another
....Respondents
Civil Writ Petition No.2713 of 2009

held that,

i) The scheme of arrangement sanctioned by the Company Court in exercise of the jurisdiction under

Section 391 of the Companies Act, 1956, is binding on all creditors including the Civil Writ Petition No.2713 of 2009 (O&M) [23] non consenting creditors. Such scheme extinguishes the remaining claim of the creditor.

ii) On such extinction of the claim of the creditor, the surety stands discharged inter-alia for the reason that he cannot step in the shoes of the creditor and sue the debtor for the recovery of the amount paid by the surety in terms of Sections 139 and 140 of the Indian Contract Act.

https://indiankanoon.org/doc/199376373/

Section 136– Where a contract to give time to the principal debtor is made by the creditor with a third person and not with the principal debtor, then the surety is not discharged.

For example- A agrees with B to supply 500 tons of steel in consideration of Rs 15 Lakhs. C stands surety to A . A agrees with D (B's father) to extends the delivery date. C is not discharged as D is the third party and not the principal debtor.]

Section 137– Mere Forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not discharge the surety.

Creditor's forbearance to sue does not discharge surety.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

For example:

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for six months after the debt has become payable. A is not discharged from his suretyship.

Section 139– Discharge of surety by creditor's act or omission impairing surety's eventual remedy.:

The creditor either does something which is inconsistent with the rights of the surety or omits to do his duty towards the surety.

And because of this the eventual remedy of the surety that he had against the principal debtor is impaired(weakened) , the surety is discharged.

In the case of Jose Inacio Lourence vs Syndicate Bank and Another [1989 65 Comp Cas 698 Bom],

the Hon'ble Bombay High Court held that "failure in not registering the charge is also an act which is inconsistent with the rights of surety within the meaning of Section 139, ICA and the eventual remedy which the surety may have against the principal debtor is impaired resulting in discharge of the surety

The object of this section is to ensure that no arrangement different from that contained in the surety's contract is forced upon him. Duty of care is owned by the creditor.

https://indiankanoon.org/doc/448781/

Rights of surety on payment or performance. Section 140

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

The meaning of this section is that the surety steps into the shoes of the creditor after he has paid the guaranteed debt or performed whatever he was liable for. This right of the surety to step into the shoes of the creditor is known as the surety's right of subrogation.

Automatic subrogation: Once the surety has paid the guarantee amount to the creditor. The surety is invested with this right automatically without any pre-conditions attached to it.

Section 141– A surety is entitled to every security which the creditor has against the principal debtor at the time when the suretyship is entered into. Or if the creditor loses or parts with such security the surety is discharged to the extent of the value of the security.

This section is applied even when the surety's consent is not there. The words "if the creditor loses security" refer to deliberate action by the creditor and not a mistaken situation beyond the control of the creditor.

Extent of discharge: if the value of the security is less than the liability undertaken by the surety, then the surety must be held to be discharged to the extend of the value of the security and that he will still be required to discharged the liability which exceeds the value of security. However, if the value of the security given is in far excess of the liability, the surety must be held to be discharged wholly.

Section 142– Guarantee obtained by misrepresentation.

Any guarantee obtained by misrepresentation made by the creditor is invalid.

Section 143– Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Madras High Court in the matter of The Secretary Of State for India
vs
Nilamekam Pillai on 27 April, 1883

https://indiankanoon.org/doc/1332766/

It was held that, the Guarantee is obtained by Concealment and Misrepresentation is invalid.

"To avoid a guarantee under this Section, it must be proved not only that there was silence as to material circumstance, but the guarantee was by means of such silence.

Section 144–Guarantee on contract that creditor shall not act on it until co-surety joins.

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Section 145– In every contract of guarantee there is an implied contract of indemnity in between the surety and principal debtor.

Principal debtor has to indemnify the surety later with the rightfully sum. The surety can sue the principal debtor for the guarantee amount as soon as his liability becomes absolute. The surety may recover all damages, all costs and all sums in accordance with section 125 of ICA.

Co-sureties

Section 138– When one co-surety is released does not discharge other co-surety.

A release by the creditor of one of them does not discharge the others neither does it free the surety so released from his responsibility to the other sureties.

Section 146-Co-sureties liable to contribute equally

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Section 147– Co-sureties are bond in different sums are liable to pay equally as fars the limits of their respective obligations permit.

For e.g.. – A, B and C are sureties for D enter into 3 several bonds. A in the penalty of Rs.10,000, B in that of Rs. 20,000 and C in Rs 40,000. D makes a default to the extent of Rs. 40,000. So, the liability of A will be 10,000 , B's liability will be 15,000 and C's liability will be 15,000 as well.

Status of the Personal Guarantor under other acts after filing or admission of Insolvency Case against him.

1. Companies act 2013

   Once the IBC Case is filed against the Director for giving the Personal for the loan taken by the Company then that, director will become disqualified under section 164(1)(C) of the Companies Act 2013.

   The section 164(1) of the Companies Act 2016 is reproduced below

   "164. (1) A person shall not be eligible for appointment as a director of a company, if —

   (a) he is of unsound mind and stands so declared by a competent court;

   (b) he is an undischarged insolvent;

   (c) he has applied to be adjudicated as an insolvent and his application is pending;

   (d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence.".

From the above section , it is clear that, if IBC Case is filed against the Director for giving the Personal Guarantee for the loan taken by the Company then that, director will become disqualified under section 164(1)(C) even if the Application is pending.

Section 167 of the Companies Act 2013

Section 167 of the Companies Act 2013 deals with the vacation of office of the Director. The Office of the Director stands vacated once the Directors meets any Disqualification as specified under section 164.

"167. (1) The office of a director shall become vacant in case—

(a) he incurs any of the disqualifications specified in section 164;"…

Therefore, the office of the Director is also stands vacated once the IBC Case is filed against him.

2. Insolvency and Bankruptcy code 2016

Section 141 of the IBC puts some restrictions on the Bankrupt once the Insolvency Application is admitted against him.

"141. Restrictions on bankrupt. –

(1) A bankrupt, from the bankruptcy commencement date, shall, –

(a) *not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;*

(b) without the previous sanction of the bankruptcy trustee, be prohibited from creating any charge on his estate or taking any further debt;

(c) *be required to inform his business partners that he is undergoing a bankruptcy process*;

(d) prior to entering into any financial or commercial transaction of such value as may be prescribed, either individually or jointly, inform all the parties involved in such transaction that he is undergoing a bankruptcy process;

(e) without the previous sanction of the Adjudicating Authority, be incompetent to maintain any legal action or proceedings in relation to the bankruptcy debts; and

(f) not be permitted to travel overseas without the permission of the Adjudicating Authority……."

3. Banking laws Regulation Act 1949

Termination of the relationship between a Banker and a customer -

The relationship between banker and customer may be terminated in any of the following ways -

1. By mutual agreement
2. Death of customer
3. Lunacy of customer
4. Notice to terminate
5. *Bankruptcy*
6. Order of court
7. Transfer of balance amount.

Once the Individual is declared Bankrupt then the Banker and Customer relationship is stands terminated under this act.

4. Partnership act 1932

According to section 42 of the Partnership act the partnership firm will be dissolved.

Section-42 DISSOLUTION ON THE HAPPENING OF CERTAIN CONTINGENCIES.

Subject to contract between the partners a firm is dissolved

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

(c) by the death of a partner; and

(d) *by the adjudication of a partner as an insolvency.*

Section-34 -INSOLVENCY OF A PARTNER.

If the Individual is a partner in any partnership firm and then he will be ceased to be a partner of such firm once he has declared insolvent.

"(1) Where a partner in a firm is adjudicated an insolvent, he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made……"

5. Limited Liability Partnership Act 2008

According to Section 5 of the Limited Liability Partnership Act, 2008.

This section provides that an individual or a body corporate may become a partner in an LLP. The section also indicates the disqualifications which will prohibit an individual to become a partner of any LLP.

Partners.

"Any individual or body corporate may be a partner in a limited liability partnership: Provided that an individual shall not be capable of becoming a partner of a limited liability partnership, if-

(a) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;

(b) he is an undischarged insolvent; or

(c) he has applied to be adjudicated as an insolvent and his application is pending……."

Therefore, the individual is disqualified under section 5 of the LLP act and he is ceased to be a partner of the firm once the insolvency application is filed against him and the Application is pending.

6. Indian Trust Act 1882

According to section 73 of the Indian Trust Act 1882 the new trustee shall be appointed if the existing trustee is declared insolvent.

Section 73 of the act is reproduced below

Appointment of new trustees on death, etc.

Whenever any person appointed a trustee disclaims, or Any trustee, either original or substituted, Dies, or is for a continuous period of six months absent from India, or leaves India for the purpose of residing abroad, or *is declared an insolvent, or* desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee……."

7. Income Tax 1961

According to section 238 of the income tax act any claim for refund is to be made to the Income tax Authorities by the Insolvent then it is should be made only by the liquidator or his legal representative or the trustee or guardian or receiver, as the case may be, shall be entitled to claim or receive such refund for the benefit of such person or his estate.

The person who becomes insolvent cannot claim the refund from the Income tax authorities

Section 238 of the Income tax is reproduced below

"***Person entitled to claim refund in certain special cases.***

"(1) Where the income of one person is included under any provision of this Act in the total income of any other person, the latter alone shall be entitled to a refund under this Chapter in respect of such income.

(1A) Where the value of fringe benefits provided or deemed to have been provided by one employer is included under any provisions of Chapter XII-H in the value of fringe benefits provided or deemed to have been provided by any other employer, the latter alone shall be entitled to a refund under this Chapter in respect of such fringe benefits.

(2) Where through death, incapacity, insolvency, liquidation or other cause, a person is unable to claim or receive any refund due to him, his legal representative or the trustee or guardian or receiver, as the case may be, shall be entitled to claim or receive such refund for the benefit of such person or his estate……"

Conclusion

As per the latest rules, proceedings against the corporate debtor as well as personal guarantors may be initiated simultaneously. The Code now provides easier and faster recourse for creditors against personal guarantor vis-à-vis the earlier regime which required the creditors to initiate recovery proceedings under the guarantee agreement and therefore, engage in prolonged litigation. Even though bringing personal guarantors under the IBC will be a big benefit for banks where it can take all promoters (who have given guarantees) into consideration. Now the person who is giving the guarantee to corporates should be very careful before executing any documents for the same and they should read the terms and conditions of the Contract carefully or they should engage the legal expert in case of any difficulty in understanding any clauses in the agreement,because the consequences are very serious if the Company defaults in making their payment.

ANALYSIS OF
General CIrcular No. O4I2O2O dated 17-02-2020
issued by MCA for Filing for Form before ROC by IRP/RP/Liquidator

MCA has made modifications in the procedures and have also amended the software to facilitate filing of various documents before ROC. The contents of the circular is being presented hereunder in user friendly format:-

A. Immediately on appointment as IRP/RP/Liquidator
   - File Form INC-28 whenever appointed as IRP/RP/Liquidator
   - Select option 'others' at Sr. no 5(a)(i)
   - Affix DSC of IP
   - Choose designation as 'others' while affixing DSC
   - Approval of Form by ROC or re-submission or rejection need to be managed.
   - Once Form is accepted, no other person would be authorised to file any document to ROC other than IP
   - After approval of INC-28, IRP/RP/Liquidator will choose his designation as 'Chief Executive Officer' or CEO
   - Master data will show that the company is under CIRP/Liquidation
   - IRP/RP/Liquidator name shall be displayed in CEO Column

B. After Registration all filings would be done by IRP/RP/Liquidator

C. E-Forms SH-8(buyback of shares), SH-9(declaration of Solvency) and iXBRL (inline version of XBRL) can also be filed by IP instead of the requirement of two directors

D. MGT-7(filing of annual return) can be filed by IP and thereafter the Company Secretary in Practice can certify the return.

E. INC-28 will again will be required to be filed in the following circumstances:
   - Approval of Resolution Plan
   - Initiation of Liquidation Process
   - Withdrawal of CIRP
   - Set-aside of the order of CIRP or liquidation
   - Stay of CIRP or liquidation by any court

The status of the Corporate Debtor would be changed to normal.

F. In case New Board is required to be appointed:
   - IP will make an application to ROC for insertion of details of first authorised signatory by quoting SRN of Form 28
   - Details of first authorised signatory of such board will be inserted by ROC
   - IP would be free from all responsibilities after insertion of First authorised signatory

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Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019

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The Government and the regulator have been nimble in responding to the challenges faced by various stakeholders in the course of insolvency resolution. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 is another reflection of the government's attempts to thwart potential impediments in the effective functioning of the Insolvency and Bankruptcy Code, 2016 ('IBC').

The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019,which was introduced in the Parliament on 12 Dec' 19, could not be taken up for consideration in the Parliament. Hencethe amendments proposed in the aforesaid bill were effected through the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ('Ordinance'), effective 28 Dec'19.

I have discussed below certain key changes to IBC,effected through the Ordinance.

Section 7

A proviso has been inserted insection 7 which sets out that –

a. for financial debt in the form of securities or deposits or where the debt is owed to a class of creditors exceeding the notified threshold, or
b. for financial creditors who are in the form of allottees under a real estate project the application shallbe filed jointly by "not less than one hundred" of such creditors in the same class/allottees in the same real estate project or "not less thanten percent of total number" of such creditors/allottees, whichever is less.It follows that the aforesaid limits will also have to be complied where trustees or agents file the aforesaid application on behalf of the deposit or security holders.

A further proviso has been inserted requiring pending applications filed by the aforesaid creditors to be modified to comply with the above requirements within 30 days of the Ordinance.

The above changes are perceived to be in response to the large number of applications being filed by the homebuyers (1821 during Jun 18 to Sep 19) and developer lobbies' demanding a deterrent in the form of a minimum threshold numberrequirement for homebuyers to come together to apply tothe NCLT rather than a single homebuyer with a claim as low as INR 100,000 being eligibleto do so.

However, the aforesaid amendment and its retrospective application have been challenged by homebuyers and investors (of Karvy group), citing inter alia the challenges in compliance with the threshold requirements, in the absence of publicly available data, and the discrimination caused by the pre-conditions v. the other financial creditors under IBC.

As the Supreme Court seeks replies from the government on the matter, vide its order dated 13 Jan '20, it has ordered status quo in respect of the pending applications.

Section 11

An explanation has been inserted to section 11, clarifying that"nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor."

Section 11 provides inter alia thata corporate debtor undergoing a corporate insolvency resolution process or in respect of whom a liquidation order has been made shall not be entitled to make an application to initiate corporate insolvency resolution process ('CIRP'). This provision was interpreted by certain benches of the NCLT as well as the NCLATto deny a corporate debt or undergoing CIRP from initiating the insolvency resolution process,under the IBC, against another corporate debtor.

In Abhay N. Manudhane v. Gupta Coal India Private Limited, vide order dated 1 Oct '19, the NCLAT upheld the judgement of the NCLT, (Mumbai bench), refusing to

grant permission to the 'corporate debtor under liquidation' to file an application for initiating the CIRP under Section 9 of the IBC against other companies, citing the provisions of section 11 of the IBC.

In Mandhana Industries Limited v. Instyle Exports Private Limited, the NCLT, (New Delhi bench) vide order dated 30 Aug '18,opined that per the 'literal interpretation' of section 11 of IBC, the corporate debtor, undergoing CIRP was not permitted to file an application under section 9 of IBC against another corporate debtor. The aforesaid order further stated that 'clarification' was required as to whether the corporate debtor undergoing CIRP could file an application under section 9 of IBC in the capacity of "Operational Creditor" against another corporate debtor.

However, in Siddhi Vinayak Logistics v. Arkay Logistics, the NCLT Mumbai, citing the observations of the Supreme Court in 'Forech India Ltd. Vs. Edelweiss Assets Reconstructions Co. Ltd.' and relying on the "notes to clauses" had made it clear that Section 11 has a very limited scope and the intent of the legislature was to stop re-filing of Insolvency proceedings against the same corporate debtor again and again.

The explanation provided by the Ordinance would set to rest any divergence of opinion in allowing initiation of the CIRP against other companies and facilitate the Resolution Professional in recovery of debts of the corporate debtor undergoing insolvency resolution or liquidation.

Section 14

Section 14 has been modified to include an explanation to sub-section 1 and to insert a new sub-section 2A.

The explanation provides inter alia that a license or a similar grant or right given by the government or any statutory authority shall not be suspended or terminated on the grounds of insolvency, if there is no default in payment of its dues during the moratorium period.

Sub-section 2A provides that-where the resolution professional considers the supply of certain goods or services critical to preserve the value of the corporate debtor and manage its operations as a going concern, then the supply of such goods or services shall not be terminated or suspended if the duesfor the moratorium period have been paid, except in specified circumstances (not yet specified).

In the matter of Embassy Property Development Pvt. Ltd. v. State of Karnataka, the Corporate Debtor held a mining lease granted by the Government of Karnataka and a notice for premature termination of the lease for violation of the terms and conditions of the lease deed was issued. The resolution professional moved an application in NCLT, Chennai against the refusal of the government of Karnataka to grant deemed extension of the lease. NCLT, Chennai allowed the application, setting asidethe order of the government, citing violation of themoratorium, declared in terms of Section 14(1) of IBC. However, on appeal, the Supreme Court, in Dec 19, ruled that the moratorium provided for in Section 14 could not impact theright of the government to refuse the extension of lease as 'the purpose of moratorium is only topreserve the status quo and not to create a new right'.

To set to rest any apprehensions or legal mis interpretations on account of this judgement, the Ordinance through this modification to section 14, clarifies that an existing right or license will not be suspended or terminated on account of insolvency, so long as the dues for the moratorium period for use of the right or license are paid for.

Section 23

The proviso to Section 23 (1) of the IBC has been amended to provide that the resolution professional ('RP') shall continue to managethe operations of the corporate debtor after the expiry of the CIRP period until an order approving the resolution planor appointing the liquidator is passed.

The earlier proviso to Section 23(1) did not provide for continuation of the RP until an order appointing a liquidator is passed.

Section 32A

A new section 32A has been inserted which provides inter alia that

- the corporate debtor shall not be prosecuted for an offence committed prior to the commencement of the CIRP ('such offence')and its liability for the offence shall cease from the date the resolution plan has been approved by the Adjudicating Authority, if the resolution plan results in change in the management or control of the corporate debtor to an unrelated party or to a person who has not abetted in the commission of such offence.

- no action shall be taken against the property of the corporate debtor for such offence, ifthe property is covered under the resolution plan approved by the Adjudicating Authority

However, the aforesaid section states that a "designated partner" as per the Limited Liability Partnership Act, 2008 or an "officer who is in default" per the Companies Act, 2013, or a person associated with the corporate debtor and directly or indirectly involved in the commission of such offence as per the investigating authority, shall continue to be liable to be prosecuted and punished for such offence.

It follows that the shield under this section will not be available to a promoter or a related party participating in the resolution process in the case of an MSME (as permitted by the provisions of section 240A of the IBC) or otherwise, as permitted under section 29A of IBC (where the concerned corporate debtor is a non-performing asset for less than a year).

Thespecific immunity to the corporate debtor from action against its property (attachment or confiscation) and clear ringfencing of the unrelated successful bidder,in respectof such offences, brings clarity to the litigation risks associated with a corporate debtor. Accordingly, the insertion of this section should spur more investment in stressed assets.

In order dated 12 Feb '19, NCLT, Mumbai in the case of SREI Infrastructure Finance Limited v. Sterling SEZ and Infrastructure Limited had held that the attachment order passed by the PMLA court in respect of a corporate debtor, undergoing CIRP, is not binding given the moratorium imposed by Section 14 of IBC and the overriding effect of IBC as per Section 238. However, there have been subsequent instances of cases under IBC being subjected to property attachment by the Enforcement Directorate ('ED') as inKudos Chemie Ltd and SPS Steel Rolling Mills Ltd

The immediate trigger though for introduction of this section was the refusal of the ED to lift the freeze on the properties of Bhushan Power and Steel Limited ('BPSL') despite direction to that effect by the National Company Law Appellate Tribunal('NCLAT'). This action of the ED put on hold the resolution of one of the largest cases under IBC with a debt size of ~ INR 47,000 crores.

However, the matter is not yet resolved with the ED and the Ministry of Corporate Affairs submitting contrary views to the NCLAT in respect of application of the Ordinance to the pending cases and the ED further claiming that the resolution applicant would qualify as a related entity (despite having been cleared under section 29A of the IBC) and hence liable to be prosecuted and punished for such offence. The verdict of the NCLAT is awaited in the matter. Given the specific facts of this case, whichever way the verdict goes, it should not dilute the salutary impact of this section in smoothening the path of resolution of the IBC cases.

To sum up, while the jury is still out on the amendment to section 7 of the IBC, overall, the Ordinance has served to remove the ambiguities, be it in respect of initiation of corporate insolvency resolution processes by the corporate debtor or protection available to the resolution applicant under the IBC process. It is thus expected tofurther strengthen the IBC framework.

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2019: BACKGROUND, IMPLICATIONS AND CONCERNS

SHREYA PRAKASH (Advocate, New Delhi)

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 ("Amendment Act" or "Act") brought in the third set of amendments to the Insolvency and Bankruptcy Code, 2016 ("Code"). The amendments were clearly aimed at resolving issues arising from the implementation of the Code, and reiterating legislative intent behind the provisions of the Code on key issues such as distributions under a resolution plan, in the wake of contrary judicial interpretation. In this essay, I examine the rationale and implications for the amendments made to the Code through the Act, and outline a few issues that remain to be resolved.

The Amendment Act proposed the following amendments to the Code:

- Restructuring under a Resolution Plan

  Section 2 of the Act providesan Explanation to the definition of a resolution plan andstatesthat a resolution plan may include provisions for restructuring the corporate debtor including by way of merger, amalgamation and demerger.

  While the resolution plan in *Synergies Doorays,*[1] had allowed for restructuring, the need for this amendment appears to have arisen in the context of subsequent orders of the Appellate Authority that have stressed that a resolution plan must propose the resolution of the corporate debtor as a going concern.[2]These orders had caused confusion on what options may be resorted to, to resolve the corporate debtor as a going concern.

  This amendment recognizes that though the resolution plan must propose that the corporate debtor is preserved as a going concern, the resolution plan can propose that the corporate debtor may not be continued exactly as it was before. In other words, the resolution of the corporate debtor can involve the restructuring of the corporate debtor as well. Since restructuring is defined broadly, this may include,*inter alia*,operational restructuring as well as structural restructuring (which could involve hiving off of parts of the corporate debtor). Thus, this amendment takes crucial steps towards underlining the flexibility a resolution applicant has in choosing the manner in which they will manage the corporate debtor as long as they can show that its business will continue.

  While this clarificatoryamendment appears to be a step in the right direction, it is arguable that it does not go far enough. For *one*, despite this amendment, there is still some lack of clarity as to the flexibility that a resolution applicant has, to turnaround the business of the corporate debtor and sell it. For instance, in *BhartiDefence*the Adjudicating Authority stressed that "*acquiring property of the corporate debtor and running the company with the sole intention of value addition and after that selling, the company and its assets, can't be treated as Insolvency Resolution Plan of the corporate debtor.*"[3] Thus, even though the corporate form was being preserved, and the business was to continue, the resolution plan was rejected. While a purposive reading of the amendment would indicate that in such cases the resolution applicant should be accorded flexibility to rescue the company the way it seeks fit, this is not squarely dealt with by the amendment. *Secondly,* this amendment lost an opportunity to allow a business sale of the corporate debtor. It is critical to note that in business sales, the business of the corporate debtor continues as a going concern, but the corporate form is not preserved. In fact, business sales are often conducted in insolvency proceedings in other jurisdictions.[4]While the Appellate Authority has interpreted Section 5(26) to require that the corporate form of the debtor would also need to be preserved as a part of a resolution plan, in fact, the intent of the Code was also to allow such business sales as part of the resolution plan, as is evidenced by the Notes on Clauses to Clause 31 which state that "*a resolution plan may provide for any proposal for its insolvency resolution (including sale of the business as a going concern, takeover of the corporate debtor by another entity, reorganising*

or retiring debt etc. — all in compliance with law)". However, the amendment does not go far enough to explicitly clarify that such sales should be possible as part of the resolution plan.

- Timelines

  The Amendment Act aims at dealing with delays both prior to, and during the insolvency resolution process.

  Specifically, section 3 of the Amendment Act amends section 7 of the Code to provide that Adjudicating Authorities must give reasons for delay, where they are not able to admit applications filed by financial creditors within fourteen days. While the Code requires that applications filed by financial creditors should be admitted within fourteen days, thisperiod has been held to be directory, and not mandatory.[5] In fact, in practice, Adjudicating Authorities are taking more than six months to admit applications under the Code. This amendment, therefore, aims to nudge the Adjudicating Authority to admit applications filed by financial creditors, that are typically backed by sufficient documentation, and are not disputed within the time-period provided in the Code,*i.e.*, fourteen days.

  In addition, section 4 of the Amendment Act provides that the maximum time for completing the insolvency resolution process, including time taken for litigation, should not exceed 330 days. Section 12 of the Code previously provided that the insolvency resolution process should not exceed 270 days. However, the Supreme Court in *Arcelor Mittal,* held that the time period of 270 days would exclude time taken in litigation as "*otherwise a good resolution plan may have to be shelved resulting in corporate death, and the consequent displacement of employees and workers*."[6] However, time is of the essence in insolvency resolution processes. As the time taken for insolvency resolution increases, the value of the debtors' assets erodes rapidly. Further, as time taken in litigation increases, the direct costs of litigation also increase. This further impedes the objective of value maximization. Given this, this amendment was introduced to ensure that the insolvency resolution process mandatorily completes in 330 days. However, this amendment to section 12 was read down by the Supreme Court in *Essar Steel.*[7]The court held that while the insolvency resolution process must ordinarily be completed within 330 days, including time taken in litigation, it may be extended beyond this period onlyif it can be shown that the time taken in legal proceedings cannot be ascribed to the fault of the litigants, *and* if only a short period is left for completion of the insolvency resolution process, and it would be in the interest of all stakeholders that the corporate debtor not be sent into liquidation. Thus, while this amendment has been read down, in effect, it may still make it harder for a person to request for an extension beyond 330 days by restricting the circumstances in which this extension may be granted, and by requiring a higher standard to be proved by those asking for the extension.

- Voting in the Committees of Creditors ("CoCs")

  Section 5 of the Amendment Act introduced an amendment aimed at facilitating voting in CoCs, consisting of 'classes of financial creditors' represented by authorized representatives. The amendmentprovides that the authorized representative would now cast the vote for such financial creditors, not based on the decision of each individual creditor, but on the basis of the decision taken by the class. The decision of the class would be the one that receives the highest percentage of votes calculated on a present and votingbasis in a meeting of such creditors.

  It had been observed that in cases where a large number of financial creditors were 'creditors in classes', such as homebuyers or depositors, a requisite majority did not cast their vote leading to deadlocks in decision-making. Given this, the Adjudicating Authority had creatively interpreted the law to provide that in cases where the CoC is constituted only of homebuyers, the requirement to have 66% of the CoC voting in favour of a decision would be read as directory instead of mandatory.[8] On the other hand, the Appellate Authority interpreted the provisions of the Code such that the requirement to have 66% of the CoC in favour of a decision would be calculated on a present and voting basis.[9] Given that both these accommodations were not consistent with the expressly stated provisions of the Code, a new scheme has been proposed by the Amendment Act.

  This legislative scheme is welcome since it reduces deadlocks in cases with classes of creditors, without changing the scheme of the Code for other financial

creditors. However, the manner in which the classes are to be formed becomes more important where the authorized representative votes on behalf of them as a class. In such cases, it becomes important that only those people who have a commonality of interest,[10] are considered a class, or else their grouping together may be considered arbitrary. Practically, therefore, it may be the case that, going forward, multiple classes of such creditors may have to be made for class voting to be conducted fairly. For instance, in the insolvency of a real estate developer, multiple classes of homebuyers may have to be made, based on whether they form part of the same project or not, what percentage of payment has been made by the homebuyer, etc. This practice needs to develop further under the Code, and may be a source of litigation in the future.

- Treatment of creditors in a Resolution plan

  Section 6 of the Amendment Act makes amendments relating to the treatment of creditors in a resolution plan. *First*, the Act enhances the amount that an operational creditor and dissenting financial creditor would be required to receive in a resolution plan. Earlier, the Code provided that operational creditors would, at a minimum, receive the value they would have in liquidation. The Amendment requires that they would be given the value they would have received had the value proposed in the resolution plan been distributed in accordance with section 53. Dissenting financial creditors had no such minimum protection, but now the Act requires that they also receive the amount that would have been due to them in liquidation. *Secondly*, the Amendment Act requires that the provision of such enhanced value be considered 'fair and equitable' to such creditors, thereby precluding review of such distributions by the Adjudicating Authority on grounds of equity. *Thirdly*, the amendment clarifies that the decision on distribution would have to be made by the CoC,and that the CoC may take into account the nature and value of security interest of secured creditors while approving the distributions made in the resolution plan.

  These amendments were aimed at removing the legal basis for the ruling of the Appellate Authority in *Essar Steel.* The Appellate Authorityhad held that operational creditors and financial creditors must be given "*roughly the same treatment*".[11]Further,the Authority had held that the Code does not make a distinction between secured and unsecured financial creditors and thus a resolution plan cannot make classifications between different financial creditors,[12] and that the CoC should not be able to vote on the distribution in the plan due to "*conflict of interest*".[13]

  In fact, they were challenged before the Supreme Court, and were upheld. While upholding these amendments,the Court held that the Adjudicating Authority or Appellate Authority does not have 'equity' jurisdiction to interfere in the business decisions of the CoC as long as the requirements given in the Code are met. Further, the Court clarified that theCoC may approve a resolution plan that involves "*differential payment to differentclasses of creditors, together with negotiatingwith a prospective resolution applicant for betteror different terms which may also involvedifferences in distribution of amounts betweendifferent classes of creditors*."[14]However, the Court held that the Code is aimed at resolving the corporate debtor as a going concern, which would not be possible without the cooperation of operational creditors that are critical to the running of the business. Thus, the interests of the operational creditors should have been taken care of in the resolution plan. In this regard, the Adjudicating Authority "*may send a resolution plan back to the Committee of Creditors to re-submit such plan*"[15] if it is felt that the plan does not adequately consider their interests.The Supreme Court also specifically clarified that secured and unsecured creditors were, in effect,differently situated since the former, has interest in the property of the debtor, and the CIRP proceedings must respect these pre-insolvency rights of secured creditors.

  These amendments, and the Supreme Court's intervention,arewelcome since they clarify the status of different creditors, particularly of secured and unsecured creditors, and settle the role of the Adjudicating Authority. However, it remains to be seen how the Adjudicating Authority chooses to exercise the flexibility vested with it to return resolution plans, in practice. If the Adjudicating Authority returns resolution plans with clear instructions as to how the interests of operational creditors must be dealt with, the status of distributions would continue to be litigated heavily,

and would undermine the purpose of these amendments, which was to treat all creditors "*fairly, without unduly burdening the Adjudicating Authority*."[16]

- Treatment of Statutory Creditors

  Section 7 of the Amendment Act clarifies that all statutory creditors will be bound by the resolution plan.

  The definition of operational creditors includes *"the Central Government, any State Government or any local authority"*[17]to whom dues are owed under a statute,*i.e.*, statutory creditors. Despite this, there was litigation over whether specific authorities such as Income Tax authorities would be consideredoperational creditors, and it was held that these would be operational creditors,[18] who are bound by the terms of a resolution plan, as provided in section 31 of the Code.

  However, despite such pronouncements of the Appellate Authority, in practice, statutory authorities were unwilling to accept that they would be bound by such a resolution plan, and were contending that they were not in fact operational creditors. In this background, this amendment clarifies that statutory creditors will be bound by the contents of the resolution plan. However, various practical issues regarding the submission of claims by statutory creditors, and the valuation of their claims, that may often be contingent, remain to be addressed by the law.

- Direct recourse to liquidation

  Section 8 of the Amendment Act clarifies that the CoC can take a decision to liquidate the corporate debtor at any time after its constitution. Under the Code, there is no direct recourse to liquidation. Instead, liquidation can only be an outcome of a resolution process. Ifno resolution plan is received by the end of the insolvency process period, if the resolution plan is rejected or the resolution plan is contravened by the corporate debtor (*i.e.* if the resolution fails), liquidation may be initiated. However, in certain cases, the corporate debtor's assets are likely to be less valuable than the cost of carrying out the resolution process. In such cases, the most value maximizing solution for the CoCis likely to be to recommend liquidation before carrying out the resolution process.

  However, in some cases, the Adjudicating Authority had required that the CoC carry out a marketing exercise before they recommend liquidation of the corporate debtor.[19] This forces the corporate debtor to be run as a going concern, even when it would be less costly for all stakeholders for the corporate debtor to be liquidated piece meal. Given this, this amendment reiterates the legislative intent to give the CoC discretion to liquidate the corporate debtor, where it would be value maximizing to do so, and is to be appreciated.

  Thus, the Amendment Act takes steps to reduce uncertainty on issues that go to the heart of the scheme of the Code. The success of this Act will lie in how these amendments are interpreted and applied in cases going forward, which remains to be seen.

(Footnotes)

[1]Synergies DoorayAutomative Ltd. &Ors. v. Edelweiss Asset Reconstruction Company, CA 123/2017 in CP (IB) No. 01/HDB/2017 (NCLT, Hyderabad)- decision dated: 02.08.2017, Para 13

[2]*See:* Binani Industries Ltd. v. Bank of Baroda &Anr., CA (AT) (Insolvency) No. 82 of 2018 &Ors. (NCLAT)- decision dated: 14.11.2018, Para 17

[3]MrDhinal Shah &Anr. v. BharatiDefence and Infrastructure Ltd., MA 170/2018 in CP 292/I&B/NCLT/MAH/2017 (NCLT, Mumbai)- decision dated: 14.01.2019, Para 53

[4] *See:* Olivarez Caminal*et al, Debt Restructuring* (OUP, 2011) Para 3.14; van Zweiten, *Goode on Principles of Corporate Insolvency* (Thomson Reuters, 2018) Para 11-24

[5] JK Jute Mills Company Ltd. v. M/S Surendra Trading Company, CA(AT) (Insolvency) No. 09 of 2017 (NCLAT)- decision dated: 01.05.2017, Para 41 confirmed by M/S Surendra Trading Company v. M/S JuggilalKamlapat Jute Mills Co. Ltd. &Ors., (2017) 16 SCC 143, Para 14

[6]Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta &Ors., (2019) 2 SCC 1

[7] Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta &Ors., 2019 (16) SCALE 319

[8]Nikhil Mehta & Sons v. M/s AMR Infrastructure Ltd., CA No. 811 (PB)/2018 in (IB)-02(PB)/2017 (NCLT, Principal Bench)-decision dt. 28.09.2018, Para 38

[9] IDBI Bank Ltd. v. Anuj Jain, I.A. No. 1857 of 2019 in CA(AT)(Insolvency) No. 536 of 2019 (NCLAT)- decision dated: 10.06.2019.

[10]*See :* In Re: Maneckchowk and Ahmedabad Manufacturing Co. Ltd. [1970] 40 CompCas 819 (Guj), Para 41, citing Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573

[11]Standard Chartered Bank &Ors. v. Satish Kumar Gupta &Ors., CA (AT) (Insolvency) No. 242 of 2019 &Ors, (NCLAT) - decision dated: 04.07.2019, Para 148

[12]*Ibid* at Para 164

[13]*Ibid* at Para 140

[14] Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta &Ors., 2019 (16) SCALE 319, Para 56

[15]*Ibid* at Para 46

[16]Statement of Objects and Reasons, The Insolvency and Bankruptcy Code (Amendment) Bill, 2019.

[17] Section 5(20) read with Section 5(21)

[18]*See:* Pr. Director General of Income Tax v. M/S Synergies Dooray Automotive Ltd. &Ors., CA (AT) (Insolvency) No. 205 of 2017 (NCLAT)- decision dated: 20.03.2019

[19]*In Re* Vedika Nut Craft Private Limited, IB-40(PB)/2017 (NCLT, Principal Bench)- decision dated:12.01.2018

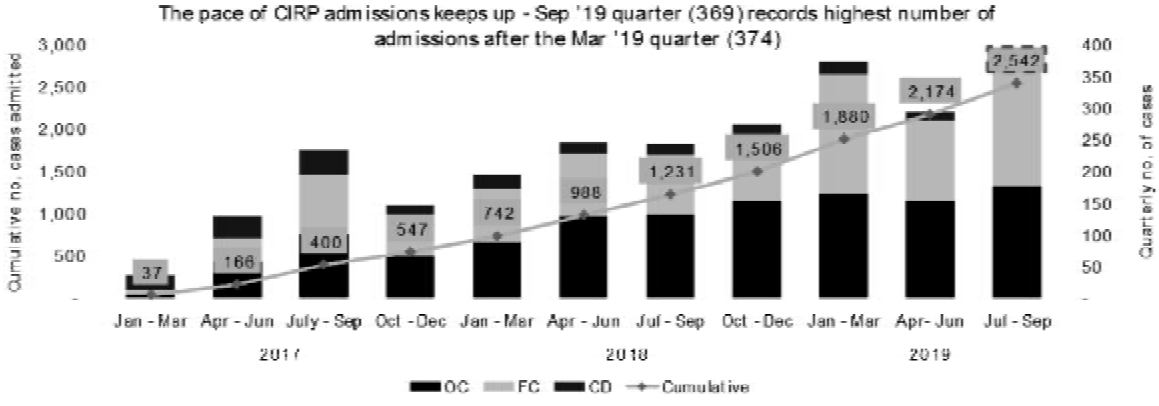
Section A - IBC statistics

PULKIT GUPTA
Director - EY

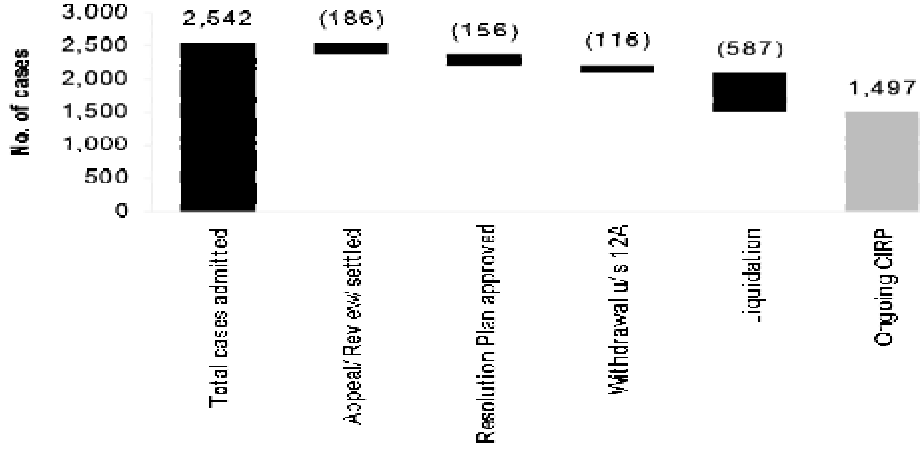
ANKIT SHARMA
Associat - EY

Since the Code was introduced in 2016, over 2,500 cases have been admitted (as on 30th September 2019). On an average (of the last 4 quarters)over 300 cases are being admitted every quarter. Operational creditors (OCs) have filed over 48% of total admitted cases and financial creditors (FCs) have filed over 43% of total admitted cases. In each of the last 15 quarters (except Jan-Mar 2019 quarter), number of admitted cases by OCs has outstripped the number of admitted cases by FCs. Operational creditors are thus increasingly using the Code irrespective of a lower priority structure in liquidation.

However, filings by FCs are on an increasing trend on a year-on-year basis. Average quarterly admitted cases by FCs has increased from 137 in 2017 and 240 in 2018 to 346 in 2019. It should be noted that in 2018, 959 cases were admitted in 2018 (by FCs). In 9m 2019, the number of cases admitted by FCs already stands at 1,037 of the 2,542 admitted cases, 1,497 cases (almost 60% of total admitted cases) were ongoing as on 30th September 2019. If we consider the six-month timeline for the 2,542 cases, as on 30th September 2019, over 1,800 cases should have closed (resolved or commenced liquidation) and hence only ~600 cases should have been ongoing. If we consider a nine-month timeline, over 1,500 cases should have closed and hence only ~1,000 cases should have been ongoing.



Of the ongoing cases, over 35% have crossed the 270-day timeline. Cases beyond 270 days as a % of total ongoing cases at the end of the quarter have increased from 31% (as on 31stDecember 2018) to 36% (as on 30th September 2019) signifying an increasing rate of cases getting tied up at various levels in the judiciary. Moreover, more than half (57%) of the ongoing cases have crossed the 6-month timeline (as on 30th September 2019).

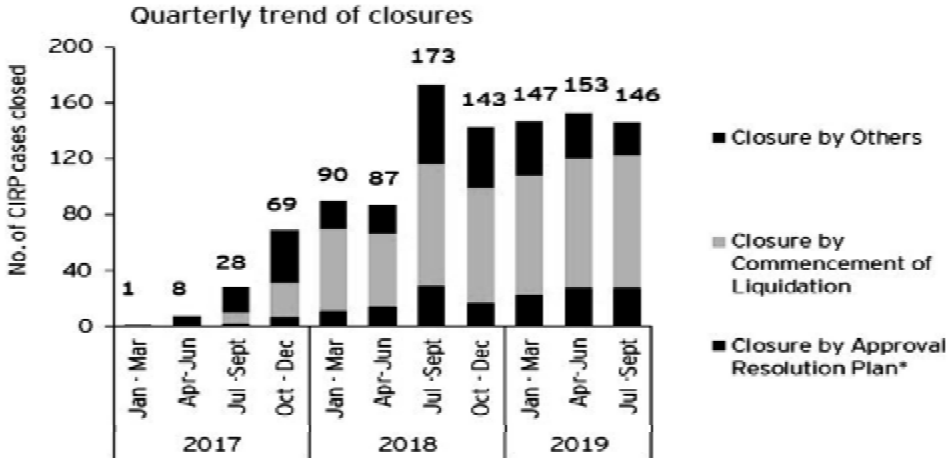


Of the 1,497 ongoing cases, 39% are from manufacturing sector, 17% are from real-estate and related sectors

and 12% are from the construction sector. These sectors, while accounting for ~70% of ongoing cases, also accounted for ~70% of new admissions in the preceding twelve months (1st October 2018-30th September 2019).

Cases under construction and power sectors have been the most sclerotic in terms of closures in the last 9 months. As on 31st December 2018, ~100 construction and 26 power cases were ongoing. In 9m 2019, ~40 construction and 10 power cases have closed (i.e. either resolved or commenced liquidation). Meanwhile, 100+ real estate cases have closed in 9m 2019. As on 31st December 2018, 148 real-estate CIRP cases were ongoing.

Over the last 4 quarters (till 30th September 2019), 589 cases have closed (through resolution, commencement of liquidation, withdrawal under 12A or appeal/review/settled). The quarterly average of closures is only 147. Meanwhile, 1,312 cases have been admitted over the same period.



Moreover, liquidations account for ~2/3rd of total closures in each of last 4 quarters. Of the 587 liquidation cases as on 30th September 2019, only 37 have closed (final report submitted or closed by dissolution). Over 200 liquidation cases are ongoing for more than 1 year. The amount of claims admitted towards the aforementioned 37 cases is INR 9,752 Crores and the recovery is only 1%. Of the 550 ongoing liquidation cases, data is available for only 354 cases. The amount of claims involved in these 354 cases is INR 3.47 lac crores. Lanco Infratech and ABG Shipyard, part of the top 12 cases, are currently under liquidation.

Over 156 cases were resolved as on 30th September 2019. Over INR 3.3 Lakh crore of financial debt was resolved with average aggregate recovery of 42%. Actual cash received by the creditors, however, may be lower due to structured payments / implementation of resolution plans. 7 of top 12 cases are under various stages of closing the resolution process.

Section B – IBC Progress till date

SHAILENDRA AJMERA
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On the eve of implementation of the Insolvency and Bankruptcy Code (the Code or IBC), in 2016, it would have been hard to anticipate where the Code and insolvency eco-system would be in next three years. Prior to the Code, the set of actions available to a banker were time-consuming and getting lost among the various laws that were applicable to resolve a distressed situation. The RBI also accorded several mechanisms for resolving distress through various frameworks, however, there were only a few cases which benefitted, as envisaged, by these schemes. Unsurprisingly, the Code, since its implementation, has seen large number of corporate debtors enter the Corporate Insolvency Resolution Process (CIRP) as per the provisions of the Code. Notwithstanding the numbers, the market has oscillated from exhorting its success to decrying the several problems that have emerged during the implementation of the Code.

THE ASSESSMENT THUS FAR

While the journey has been full of ups and downs, the Code has largely lived up to the expectations of the stakeholders. So much so that India's ranking in the World Bank's Ease of Doing Business (EoDB) report has risen from 100th place in 2018 to 77th place in 2019 to 63rd place in 2020. A major driver for this has been the improvement in the 'Resolving Insolvency' parameter in EoDB rankings (from 108th place in 2019 to 52nd place in 2020). Until 30 September 2019, more than 2,500 cases were filed, with almost ~1,000 being concluded via resolution (a restructuring plan being approved), settlement or passing in to liquidation and remaining ~1,500 cases are currently undergoing the process. Approximately US$50 billion of financial debt was resolved in 156 cases, with an average recovery of 42% for the financial creditors. The recovery percentage, while may be considered healthy, but is limited to few cases, as, so far only a sixth (156 cases) of the ~1,000 closures have resulted in a resolution. Moreover, the average time taken for the resolutions is 374 days i.e. well over the 270/330-day timeline.

CONTINUOUS EVOLUTION

The large volume of cases meant that all the stakeholders – government, regulators, banks, investors and professionals – have kept busy. Given the dynamic nature of insolvencies and the magnitude of monies involved, the government and regulator have been pro-active and brought about several changes in the law and corresponding regulations, such as giving powers to the Reserve Bank of India (RBI) to refer nonbanking finance companies into bankruptcy, blocking promoters who had defaulted from bidding and allowing exit from the Code post admission (provided the committee of creditors (CoC) vote for the exit). The government and the regulator have also taken regular market feedback, while introducing updates or amendments to the Insolvency and Liquidation process. Most recently, as a stop gap arrangement, rules were notified by the Ministry of Corporate Affairs (MCA) providing a framework for insolvency resolution of systemically important Financial Service Providers (FSPs), excluding banks. These rules are under the powers given to Government in Section 227 of IBC and are only applicable for NBFCs (including Housing Finance Companies) with asset size of INR 500 crore or more as per last audited balance sheet. The rule, and the notification thereunder, is another important juncture for the Code. Such timely and substantial interventions at frequent intervals are unprecedented in the Indian context, which is again testament to the promise and potential that the Code holds. The continuous evolution of the Code and emerging jurisprudence has acted as a catalyst for the law to keep progressing forward. Like government and regulator, judiciary has also played its part. It can take several years for a new law of this magnitude to settle down, and provide complete clarity, certainty and predictability for the stakeholders. The Supreme court, along with NCLAT

and NCLT, has settled several contentious and principle-based issues and delivered landmark judgments. The Supreme Court has been in the forefront in setting the jurisprudence and supporting the implementation of the Code including upholding the constitutional validity of the Code in Swiss Ribbons verdict. In addition, courts have also opined on role of CoC, Insolvency professional, claims moratorium etc. Some judgements, including Jet Airways and Videocon, have taken the Code to entirely new frontiers – areas like cross border and group insolvency, which are not currently covered in the legislative framework.

STEADY PROGRESS, BUT MORE GROUND TO COVER

It should be noted that the Code's implementation coincided with the worst NPA cycle of the independent India's last 70 years without the corresponding increase in judicial or institutional capacity. Combined with lack of required out-of-court restructuring options, the Code has been converted into a primary restructuring and reorganization mechanism for the corporate distress which may lead to sub-optimal outcomes. There is a need to build capacity across the spectrum to better the yield and enable the code to effectively realise its goals. While the Code and the incumbent stakeholders will continue to evolve, there is a need to protect the insolvency framework from pernicious trends to ensure the strength, integrity and effectiveness of the bankruptcy system. In the immediate future, a stringent focus on timelines and post approval implementation support would enable the insolvency ecosystem in India to enter the next phase.

SECTION C – WAY FORWARD ON THE RESOLUTION OF STRESSED ASSETS

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Indian economy has been facing economic slowdown for past couple of years with major sectors such as infrastructure, power, steel, shipping, automobiles and real estate facing the brunt of slowdown, and as a result have become the largest contributors to non-performing assets in the banking sector.

GDP growth of Indian Economy has touched a six year low in the first financial quarter of April-June 2020. It touched 5.8% in January-March, although in nominal terms India's GDP grew by 7.99% which is also lowest since December 2002. The official data released by the National Statistics Office (NSO) confirm that. Weaker consumer demand and slowing private investments are the two key factors behind the Indian Economy Slow Down.

The slowdown is a result of multiple economic factors which may be clubbed into 4 key buckets including micro and macroeconomic elements:

POLICY SHOCKS : Demonization and implementation of GST caused major disruptions in routine economic operations, especially in an economy where cash has traditionally dominated small value transactions. Overnight change in currency denomination lead to chaos in unorganized sectors and as a result daily wage earner lost out the most. GST implementation also had multiple challenges, biggest being managing compliance requirement by small and medium enterprises.

While theese initiatives were launched towards controlling counterfeit currency, black money and increasing the tax base in the country, the outcome has not been inline with the expectations and as a result our tax to GDP dropped from 11.2% in FY2016-17 to 10.9% in FY2018-19. Shrinking revenue continues to be a major hurdle in achieving a US$ 5 trillion economy target.

OIL MARKET VOLATILITY : India is one of the largest oil importers in the world, which has a direct bearing on cost of all essential items in the country thereby driving inflation. Oil prices have been fluctuating due to overall geopolitical uncertainties. Consequently, efforts to control inflation in an oil dependent economy are not giving results as expected.

IMPENDING RECESSION : World over, both developed and emerging economies are experiencing economic slowdown. This has dented our export output. Since

India is a net commodity exporter, lower exports have a direct bearing on our GDP.

CREDIT CRUNCH : Thebanking sector troubles began in 2014 when RBI initiated clean-up by identifying the non-performing accounts. Stricter regulatory monitoring compounded with aforementioned economic challenges resulted in shrinking credit availability that is essential to fuel demand in a slowing economy like India. Dampening liquidity of NBFCs who were the major providers of retail loans in recent years has also dented retail consumption/ demand.

IMPACT ON THE BANKING SECTOR

Indian Banking Sector contributes ~ 7.7% to our overall GDP and works as the backbone of our economy. The banking sector has been facing difficult times for past three to four years on account of identified Non-performing Accounts (NPAs). The drive to identify NPAs began in 2014, however, banking sector has not been able to recover from the impact as slowing economy resulted in surfacing of additional NPAs.

Scheduled Commercial Banks (SCBs) were the worst hit and NPAs have since become a major roadblock in fuelling economic growth. Lapse in timely monitoring and downgrading of credit rating for large accounts left small room for timely corrective action and recovery, and as a result 12 banks were put under Prompt Corrective Action (PCA) which required them to regain the regulatory capital adequacy thresholds before they could lend again. Currently 6 banks continue to remain under PCA, which includes one private bank. The estimated Gross NPA for SCBs is expected to be 9.9% by September 2020 (*Source: Financial Stability Report December 2019*).

100 large borrowers of SCBs form 16.3 % of GNPAs and 16.3% of gross advances, which essentially reflects the need to resolve large accounts keeping in view minimal value erosion for all stakeholders. Power sector and Real estate continue to be the largest contributors to NPAs in the country followed by steel, shipping and textile.

Indian Government recapitalised the public sector banks by infusing ~INR 2.8 Lac Crore since 2014, however, the amount has been insufficient as a substantial chunk has been utilised to clean bad loans besides meeting Basel-III norms. Significant time and effort are being dedicated to resolving bad loans and as a result credit growth for SCBs shrunk to 8.7% YoY in September 2019.

The credit situation in the country worsened with large NBFCs reeling under financial stress which were once looked as a shadow banking avenue to ensure credit availability. These NBFCs borrowed short term to lend out for long term projects creating an asset liability mismatch situation. This was being managed by their ability to roll over debt and pay when due thereby avoiding a default.

NBFCs have had a heavy reliance on funding lines from debt mutual funds, however, redemption default resulted in market crash, and investors have thus shied away from investing in debt funds. Considering the ongoing downturn in NBFC market, the fund managers are under pressure to not lend to NBFCs citing default risk.

Automobile and real estate are key sectors that heavily depend on NBFCs for credit. Since the crash of 2 large NBFCs in the country coupled with ongoing banking distress, there has been a 20% decline in auto sales. Funding line for real estate developers and retail buyers have also dried up resulting in piling of unsold inventory both in residential and commercial spaces.

Revival initiatives by the Government

The government along with other regulators have been on the forefront towards resolving the bad loan issue and to ensure timely recovery for stakeholders thereby preserving the intrinsic value of each business.

Insolvency and Bankruptcy Code, 2016

Government of India (GoI) introduced the long due Insolvency and Bankruptcy Code in 2016 (IBC) with an objective to ensure timely resolution of all stressed assets. IBC has since become the go to resolution avenue for all creditors, however, recoveries have been subdued. Similar to any new law, IBC was India's first attempt towards acknowledging and resolving stress assets and hence the road is full of litigations which is paving way for precedents which would eventually result in timely resolution.

A total of 2,542 cases have been admitted to insolvency till September 2019 out of which 1,497 are ongoing and balance 1,045 closed. Out of the 1,497 ongoing cases, 535 caseshave exceeded the 270 days resolution timelines owing to the fact that the entire process is evolving and hence remains litigative. Till September 2019 realisation for Financial Creditors against the admitted claims has been ~42%.

RBI June 7 Circular

RBI issued a circular for Prudential Framework for Resolution of Stressed Assets on 7 June 2019. The objective of this circular was timebound resolution prior to borrower being admitted in NCLT under IBC. To ensure that there remains just 1 guideline towards stressed asset resolution, RBI withdrew all existing extant guidelines/ circulars towards asset resolution.

June 7 Circular provided for timely resolution of stressed assets with emphasis on execution of ICA to ensure implementation of resolution plan with 75% majority approval. The Circular also envisaged independent credit rating of RP4 grade of above for successful implementation. Account upgradation was dependent on satisfactory performance and repayment of 10% of all outstanding principal debt.

Way forward

As a step towards timely resolution with an objective to preserve value for all stakeholders the GoI along with regulators need to work towards the following:

Insulating new investors by ring fencing liabilities

Investors currently are looking at Indian stress market with great interest in order to infuse capital in sectors which did not attract enough traction previously. Even though there has been significant interest from both domestic and global investors/ funds, not many deals have seen completion due to ambiguity over past cialms/ liabilities and taxation impact upon such investment involving reduction in debt.

Various regulatory authorities (i.e. ICAI, SEBI, MCA) may come out with guidance on how to deal with various compliances (including relaxation on the applicability of various accounting standards, listing requirements, publication of quarterly results etc.) during the CIRP period or for cases undergoing financial restructuring.

Insulating lenders from investigations/ litigations for taking commercial decision on stressed assets

Lenders are being extra cautious while evaluating any restructuring plan/ deals prior to according their approvals. Accounts with merit might be missed out due lack of flexibility in the system. Compliance with all aspects of RBI guidelines and circulars leave little room for decision making by the lenders which might pose as a hindrance in taking commercial decisions.

Mechanism on price discovery/ valuation might assist them in taking informed decisions.

Ease divestment decision making for lenders by benchmarking price of assets

As per various reports, it may appear that banks are facing challenges in the form of low recovery for all assets undergoing restructuring due to inadequate mechanism for price discovery and difference between investors and lenders expectation on asset valuation. Presently, the financial creditors/ lenders are looking for upfront cash as part of the resolution plan for stressed assets. Roll over of sustainable debt along with equity upside as part of the resolution plan is given a lower weightage. This will result in:

- Decline in share of successful resolutions as a % of total number of stressed asset cases and
- Lower number of bidders for stressed assets.

Time taken to arrive at final decision on divestment is longer than anticipated in most cases owning to price discovery on H1 basis. Additional time spent on transactions might shrink the interest of a potential buyer/ investor.

Regulator may consider empanelment of Investors/ Funds basis MoU in order fast track the divestment process.

Pre-packaged insolvency proceedings

Internationally, pre-packaged insolvency proceedings ('pre-packs') have been around for some time now, but in the last decade or so, the number of pre-packs has increased dramatically across the United Kingdom and the European Union.

The advantages of a pre-pack process:

- The speed at which pre-packs can be accomplished;
- The business continues without interruption and may lead to minimal disruption owing to erosion of customer confidence, damage to relationship with key employees, suppliers, and other stakeholders in the business;
- A pre-pack sale avoids the cost of trading the company in administration, which leads to value maximisation; and
- The pre-pack sale is a valuable tool where a business has a strong brand or intellectual property, the value

of which may decrease dramatically by even a hint of a formal insolvency.

We need to think on lines of introducing pre-pack resolution for stressed assets in Indian economy. We may implement the same as a pilot for a few sectors to evaluate overall reliance on the process.

Infrastructure funds/ lenders/ Pension funds maybe encouraged to invest long term projects/ assets to avoid cash flow mismatch of commercial banks

In India, commercial banks and specialised infrastructure financing institutions are the major source of financing for the infrastructure segment including power sector. While traditionally PFC, REC, IDBI, ICICI, IIFCL, IDFC, IL&FS etc. were mandated to provide financing to the sector (of which ICICI, IDBI and IDFC have become banks), scheduled commercial banks also took exposure in infrastructure projects including thermal power assets in order to cater to the demand of the sector coupled with lack of viable alternatives.

Traditionally banks were not meant for long term funding, which is usually required along with moratorium in the initial period to stabilize in case of large infra projects with long gestation period. While internationally, institutions such as World Bank, Asian Development Bank, Pension Funds, International Finance Corporations, etc. have funded long term projects/ infrastructure projects, there is lack of availability of viable alternatives in India.

Government may consider to create special funds for investing in infrastructure projects by way of long term infrastructure bonds/ funds. These bonds/ funds will assist in replacing existing commercial banks thereby assuring alignment in cash flows with debt servicing obligation.

Roadmap from Indian Banking to International Bond Market

Alternative source of funding can also be explored including but not limited to international bond market to fund infrastructure projects in the country, thereby replacing exposure of existing commercial banks.

While the corporate bond market in India is slowly gathering pace owing to competitive interest rate, infrastructure industry has not used long term bonds as a preferred means of finance. Further, historically only A rated companies used to avail benefit of the bond market, however, the trend has been changing in the recent past.

The Securities and Exchange Board of India (SEBI) has recently announced certain reforms to make the capital market more efficient, transparent and lower cost for the investors. One of the key reforms would require large firms (having borrowings in excess of INR 100 Cr) to borrow 25% of their incremental borrowings from the bond market effective 1 April 2019.

In addition to the above, better tax treatment for debt mutual fund investors has led to steady inflows in the domestic mutual fund industry (domestic mutual funds are now one of the biggest lenders in bond market). Further, the government and RBI have been continuously introducing reform measures to ensure higher participation in the corporate bond market. The same is likely to structurally help the long overdue development of the Indian fixed income market.

Resolution of Financial Service Providers

Until recently, India lacked a comprehensive framework for dealing with and resolving distress n Financial Service Providers (FSPs). The needs was felt even more so when in recent past large NBFCs such as Infrastructure Leasing and Financial Services (IL&FS) Group and DHFL defaulted on their debt obligations.

The Government has now notified rules for providing a framework for Insolvency resolution of systematically important FSPs excluding banks. These rules are under the power given to the Government in Section 227 of IBC and are only applicable to NBFCs with asset size of INR 500 Cr or more.

There is implicit recognition in the aforementioned rules that financial firms are different from traditional industry corporates. Financial rms, in addition to managing their own resources, handle large amounts of public money. Banks, insurance companies, NBFCs etc. channel a large part of the savings of households and rms. Some of the nancial rms are also systemically important, as their failure may disrupt the nancial system and hurt the real economy.

Unlike traditional corporate insolvency, financial firms insolvency tends to attract a regulator driven process instead of a completely independent market driven approach.

AMENDMENTS TO SARFAESI ACT, 2002

Made on 26th December 2019 w.e.f. 24th January 2020

CA ANIL AGARWAL
Partner
AAA Insolvency Professionals LLP

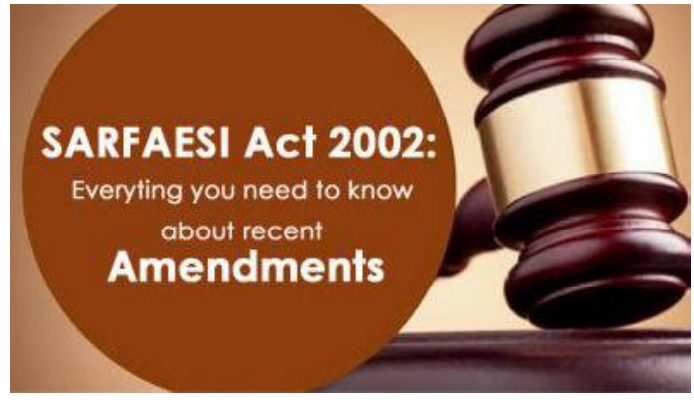
The enforcement of security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 came in force on 12th August 2016 for the purpose of making amendments in Sarfaesi Act, 2020, however, different sections were notified on different dates.

Following sections of the above Act were notified by Ministry of Finance, Department of Financial Services, vide Notification No SO. 4619 (E) dated 26th December 2019 and are effective from 24th January 2020

- Section 17 is for amendment in section 23 of Sarfaesi Act, 2002
- Section 18 is for insertion of Chapter IVA to Sarfaesi Act, 2002. Chapter IVA is about the registration process, right of enforcement of securities and priority of secured creditors
- Section 19 is about omission of section 27 of Sarfaesi Act, 2002 regarding penalty for non-filing etc u/s 23 after its notification

FILING OF TRANSACTIONS OF SECURITISATION, RECONSTRUCTION AND CREATION OF SECURITY INTEREST -SEC 23(1)

1. The particulars of every following type of transactions shall be filed with Central Registry of Securitisation and Asset Reconstruction and Security Interest of India (CERSAI) w.e.f. 24th January 2020 :-
   a) Transactions of securitisation,
   b) Transactions of asset reconstruction; or
   c) Transactions of creation of security interest
2. All such transactions subsisting on or before the of CERSAI must be registered up to th January 2020
3. "securitisation" means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstrution company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise - Sec. 2(1)(z)
4. "asset reconstruction" means acquisition by any asset reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance - Sec. 2(1)(b)
5. "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes :-
   (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the prop-erty, given on hire or financial lease or conditional sale or under any other contract which secures the obliga-tion to pay any un-paid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
   (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation in curred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset - Sec. 2(1)(zf)



CHAPTER IVA of SARFAESI ACT, 2002 – Notified w.e.f. 24th January 2020 FILING OR REGISTRATION BY SECURED CREDITORS AND OTHER CREDITORS

The Central Government has notified the provisions of Chapter IVA of Sarfaesi Act, 2020 w.e.f. 24th January 2020 consisting of sections 26B to 26E and the implication of such notification would be as under : -

1. The filing of transactions can be done now by all creditors for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower. This facility was earlier open only to banks, FIs, Specified NBFCs, ARCs, debenture trustees or any other trustee holding securities on half of banks or FIs – Sec 26B
2. The filing of transactions would not extend any right to the creditor for enforcement of security interest under Sarfaesi Act, 2002 unless the creditor is a bank, FIs, Specified NBFCs, ARCs, Debenture Trustee, etc as per the definition of Secured creditor u/s 2(1)(zd)
3. Every authority or officer of Central Government or State Government or Local Authority, entrusted with the function of recovery tax, revenue or government dues shall also file the transaction of attachment of any property with CERSAI to recover the tax or government dues.
4. If any person obtains orders for attachment of property from any court or authority against any of his claim, such person may file particulars of such attachment orders with CERSAI to fortify his claim on the property.

EFFECT OF THE REGISTRATION OF TRANSACTIONS, ETC. – Sec 26C

1. The effect of such filing or registration by a secured creditor or other creditor or government authority or a person having an attachment order would constitute a public notice.
2. Where a security interest or attachment order is filed/ registered with CERSAI, then the claim of such creditor shall have priority over any subsequent security interest created upon such property. Any sale or transfer or lease of that property would be subject to the security interest registered or filed by the creditor with CERSAI

RIGHT OF ENFORCEMENT OF SECURITIES – Sec 26D

1. From the date of appointment as notified i.e. 24th January 2020, no secured creditor shall be entitled to exercise the rights of enforcement of securities under Sarfaesi Act, 2002 unless the security interest is registered with CERSAI.

PRIORITY TO SECURED CREDITORS – Sec 26E

1. After the registration of security interest with CERSAI, the debts of the secured creditor i.e. banks, FIs, NBFCs, ARCs, etc. shall be paid in priority over all other debts and all revenue, taxes, cessess and other rates payable to Central Government or State Government or Local Authority.
2. If IBC proceedings are pending in respect of any secured assets, the priority of the secured creditors would be as per IBC

CONCLUSION:

The notification dated 26th December 2019, effective from 24th January 2020 is very significant in terms of effect of registration with CERSAI, rights of enforcement of security interest and priority to secured creditors against government and tax dues.

This notification also provides a platform where the security interest can be registered by any creditor or government authority who have any security interest or attachment order against any credit given or against any tax dues. This will provide a public notice to all before any subsequent charge is created on the property fraudulently by the borrower or the creditor.

The registration of security interest with CERSAI would also assure the payment to secured creditors and tax dues or any other government dues would not have any priority over the dues of creditor who have registered his security interest with CERSAI.

CROSS BORDER INSOLVENCY IN INDIA

MANISHA DHIR

CROSS BORDER INSOLVENCY- THE CONCEPT

Advent of Jet Airways1 matter in Insolvency and Bankruptcy Code, 2016 ('IBC') is a knock on the doors of the Cross Border Insolvency regime. As this case has provided India a unique opportunity for showcasing its capabilities in order to handle Cross Border Insolvency disputes.

The Hon'ble National Company Law Tribunal ('NCLT') in the disputed order of Jet Airways recognized that the resolution of the Jet Airways which had operations and stakeholders across the globe shall have implications as regards various parties spread across jurisdiction. However, due to the untested provisions of the Cross Border Insolvency in IBC and non adoption of a United Nation Commission on International Trade model law on Cross Border insolvency ('Model Law') the NCLT pointed out a typical struggle between universalism and territorialism. Universalism, wherein cross border insolvency is proceeded in a single forum and under single law regardless of the actual location of the parties, is a utopian position. At the same time, Territoriality, wherein blind faith is on the sovereign interest which lead to unpredictable outcomes which can hamper foreign trade and investments.2 In this background, Model Law has emerged as a version of modified universalism.

Cross Border Insolvency comes into picture where the insolvent debtor has assets located in more than one country or in a situation where some of the creditors of such debtor are not located in a country where the insolvency proceedings have been initiated.

Cross Border Insolvency usually revolves around three circumstances: Firstly, the debtor's assets are located in diverse jurisdictions and the creditors want to cover those assets for the purpose of insolvency proceedings. Secondly, in safeguarding the creditors' rights who have interest in the assets of the debtor located in the different jurisdiction. Thirdly, in cases when the insolvency proceedings have been initiated in more than one jurisdiction on the same Corporate Debtor.

Since 1990's due to globalization and privatization the cases for the Cross Border Insolvency have increased. However, the majorly Countries are yet to agree upon an amicable and a singular international law which is crucial for disposing of such cases without inviting any conflict of interest of the interested entities.

INDIAN SCENARIO

Earlier in India, as regards to Cross Border Insolvency under the Companies Act, 19563 and the Companies Act 20134 a court could order winding up of a foreign company limited to the extent of its assets in India. However, there were no specific statutory provisions in case an Indian company having is assets abroad was sought to be wound up. Therefore, it was done through a mutual recognition of foreign decrees as provided under the Code of Civil Procedure, 1908. In the absence of such recognition it was a tricky situation for the liquidator in gathering information with regards to foreign assets and disposing them under the liquidation.

In 2000 the aforementioned difficulty was acknowledged by the Justice V. Balakrishna Eradi Committee5 which called for urgency in adoption of the Model Law, partly or in whole for an effective cross border regime. Subsequently, N.L Mitra Committee report6 reiterated the need for adoption of the Model Law. Further, the Banking Law reforms committee report7, which is the basis of the IBC, side line the question on Cross Border Insolvency by stating that the Committee would take this subject in its next stage of deliberations.

Presently, Section 234 and 235 of the IBC provides the legal framework under the IBC with respect to Cross Border Insolvency. However, the provided legal framework has not been notified yet and therefore is not into effect and any orders passed in India with respect to Cross Border Insolvency will not have any effect in a foreign country. Moreover, Section 234 and 235 of the IBC envisage entering into bilateral agreements and issuance of letters of request to foreign courts by Adjudicating Authorities under the IBC therefore; finalizing such bilateral treaties require time-

consuming negotiations and every treaty made would be distinct which will create ambiguity for foreign investors.

IBC is silent on the position of a foreign creditors' right to approach NCLT to initiate corporate insolvency proceedings. However, in the matter of *Macquarie Bank Limited* v. *Shilpi Cable Technologies Ltd.,8* the Hon'ble Supreme Court gave a clarity that rights of the foreign creditors are similar to the rights of the domestic creditors with respect to initiating and participating in Corporate Insolvency Resolution Process under IBC.

Though under current insolvency law there is implication of bilateral arrangement between nations however, the IBC lacks any mechanism for providing proper procedure of Cross Border Insolvency. Under the present legal framework there is no assistance for the situation where India does not have a bilateral agreement with an particular country and the debtor's assets are located in that country.9

MODEL LAW AND INDIA'S RECOMMENDATIONS FOR ITS ADOPTION

Model Law was recognized as a framework which was globally accepted. The Model Law got its consensus by UNCITRAL in 1997 and since then it has become as the most widely accepted framework which deals with the Cross Border Insolvency issues and therefore, around 44 countries and in total 46 jurisdictions have adopted the legislation based on the Model Law.10 Broadly there are four main principles on which Model Law is based on are as follows:

1. RECOGNITION: Under the Model Law recognition is given to both the proceedings i.e. remedies provided under the foreign proceedings as well as the remedies provided under the Domestic proceedings. Relief can be provided if the foreign proceeding is either a main or non-main proceedings. Main proceedings are the one wherein the domestic courts determine main interest of the Debtor lies in the foreign country. On the other hand non main proceedings are the one wherein the interest of the Debtor lies in the domestic country. In the Model law recognition as main proceedings where the interest of the debtor lies in the foreign country will result in automatic relief by imposing the moratorium on the assets of the debtor and allowing the foreign representative dreater powers in handling the estate of the Debtor.11 On the other hand for the relief under the non- main proceedings the relief lies at the discretion of the domestic courts.

2. COORDINATION: the Model Law provides coordination between the foreign and domestic insolvency proceedings by encouraging cooperation between the courts. This legal framework provides a structure for commencement of foreign insolvency when the domestic insolvency has already begun and vice versa.

3. ACCESS: The Model Law provides a transparency and allows the foreign insolvency professionals and foreign creditors to participate in the domestic insolvency proceedings against the debtor.12 Presently, on perusal of Section 234 of IBC it is clear that there is direct access with regards to the foreign creditors has been provided under the IBC. However, with respect to the foreign insolvency professionals no such provisions have been envisaged under the IBC.

4. COOPERATION: The Model Law endows basic legal framework for cooperation between the domestic and foreign courts/ insolvency professionals. Under the Model Law there is direct cooperation between the foreign insolvency professional and the domestic insolvency professional.

In India Insolvency Law Committee in its report recommended adoption of Model Law13, as it provides for a wide-ranging framework to deal with Cross Border Insolvency issues. However, few carve out were suggested by the Insolvency Law Committee in order to ensure that there is no contradiction between the current domestic insolvency framework and Model Law framework.

For the application part, the Committee recommended that presently the Model Law should be extended only to the Corporate Debtor. The rationale behind this recommendation was that the Part III of the IBC has still not notified and extending the Cross Border Insolvency provisions of the Model Law to individuals and partnership firms will be premature. Further, Countries which enact the Model Law are allowed to exempt certain entities from the application of the Model Law therefore; the Committee recommended to exclude the banks and insurance company from the scope of Model Law. The rationale provided behind this exclusion was

that the insolvency of those entities requires partihcularly prompt and circumspect action and may be subject to a special insolvency regime. Furthermore, the Committee recommended that for initial purposes the Model Law may be adopted on a reciprocity basis and eventually it may be diluted based on the experience in implementation of Model Law and development of adequate infrastructure in the insolvency system.

The Committee recommended that only the creditors will be allowed in foreign countries to commence and participate in domestic insolvency proceedings. Further, the Committee was of the view that Section 234 and 235 of IBC should be amended so that it is applied only to individuals and partnership firms since the content relevant to the Corporate Debtor has already been captured under the Proposed Model Law.

With respect to dual regime, the Committee noted that at present the Companies Act, 2013 already contain provisions related to insolvency of foreign companies. The Committee was of the view that once the Proposed Draft is enacted, it will result in dual regime dealing with insolvency of foreign companies. Therefore, the Committee recommended the ministry of corporate affairs to study such provisions of the Companies Act and assess whether to retain them.

With regards to reciprocity, in the Model Law reciprocity indicates that a domestic court will recognize and enforce a foreign court's judgment only in the case if the foreign country has adopted an akin legislation to the domestic country.14 Thus on Reciprocity, the committee recommended that the Model Law may be adopted initially on a reciprocity basis which may be diluted upon reconsideration.

Foreign proceedings and its relief are duly recognized under the Model Law. Relief will be provided irrespective of the fact that the proceeding is a main proceedings or non- main proceeding. Therefore, if the domestic court determines that the debtor has its centre of main interest in a foreign country; such foreign proceedings will be recognized as the main proceedings. This recognition will allow foreign representative greater powers in handling the debtor's estate. Further, for non main proceedings, it is on the discretion of the domestic courts to provide the relief. The Committee recommended that a list of indicative factors comprising centre of main interest may be inserted through rule-making powers. Such factor may include location of the debtor's books and records and location of financing.

The Model Law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and domestic and foreign insolvency professionals. It is known that the infrastructure of the Adjudicating Authority under IBC is still evolving, the cooperation between Adjudicating Authorities and foreign courts is proposed to be subject to guidelines to be notified by the Central Government.

In cases where in a foreign insolvency proceedings has already been commenced then under the Model Law a legal framework for initiation of domestic insolvency proceedings has been provided or vice versa. It also provides cooperation between the courts of two or more simultaneous insolvency proceedings. The Committee recommended adopting provisions in relation to these in the proposed draft chapter.

With respect to public policy, the proposed draft chapter provides that in case any action is contrary to the public policy then the Adjudicating Authority may refuse it under IBC. Further, the Committee recommended that in such a situation a notice must be issued to the Central Government by the Adjudicating Authority and in case the notice is not issued the Central Government can sue moto take action.

CONCLUSION

In the era of globalization and privatization the Indian companies have global footprints and apart from this many overseas companies have presence in India. Therefore, the proposed draft by the Insolvency Law Committee will enable us to deal with the Indian companies having its assets overseas and vice versa. The inclusion of the Cross Border Insolvency under the IBC will be a major step in bringing the Indian legislation at par with the legislation of the developed countries.

Enactment of the proposed draft chapter will make India an attractive destination for investment of foreign creditors. There are three foremost economic benefits which can be achieved by adopting the Model Law15: firstly, there can be reduction in time for exchanging necessary information between countries, Secondly, there will be increase in credit Recovery efficiency, Thirdly, the assistance and cooperation helps in

preserving the company's asset from dispersing which will eventually result in successful reorganization.

Therefore, the chapter of Cross Border Insolvency under IBC is much awaited and a welcoming step as direct coordination and cooperation between the insolvency resolution professionals and the courts located in domestic as well as foreign jurisdiction will be enhanced which would enable the legal framework to have effective assistance in situations of concurrent proceedings.

(Footnotes)

[1] Jet Airways (India) Ltd. v. State Bank of India & Ors., Company Appeal (AT) (Insolvency) No. 707 of 2019.

[2] Anderson, Kent. (2000). The cross-border insolvency paradigm: A defense of the modified universal approach considering the Japanese experience. University of Pennsylvania Journal of International Economic Law. 21.

[3] Section 584 of Companies Act, 1956.

[4] Section 391 of The Companies Act, 2013.

[5] The Eradi committee report on Law Relating To Insolvency And Winding-up Of Companies 2000 available at <http://reports.mca.gov.in/> , last viewed on 17 January, 2020.

[6] Committee chaired by Dr. N. L. Mitra submitted 'Report of The Advisory Group on Bankruptcy Laws – May 2001.

[7] The report of the Bankruptcy Law Reforms Committee, Ministry of Finance, Government of India (November 2015)

[8] Macquarie Bank Limited v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674.

[9] Ministry of Corporate Affairs, Public Notice on Cross Border insolvency, available at <http://www.mca.gov.in/Ministry/pdfPublicNoiceCrossBorder_20062018.pdf>, last accessed on 14 January 2020.

[10] Status, The UNCITRAL Model law on Cross-Border Insolvency (1997), available at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>, last accessed on 14 January 2020.

[11] Chapter III of the Model Law.

[12] Chapter II of the Model Law.

[13] The report of Insolvency Law Committee on Cross Border Insolvency, Ministry of Corporate Affairs, Government of India (October, 2018).

[14] Keith D.Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 Int. Insolv. Rev. 149, available at <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.151>, last accesses on 15th January 2020.

[15] Fernando Locatelli, International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross- Border Insolvency an Answer for Brazil- An Economic Analysis of its Benefits on International Trade, 14 Law & Bus. Rev. Am. 313 (2008).

Valuation Reports : Acceptance and Rejection Decision Making

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Introduction and Objectives

Valuation is the art and science of estimating the price at which an asset or a liability would exchange hand between a willing buyer and a willing seller. This estimation of price could change based on the circumstances and situations in which the exchange happens and the same is further defined as Fair Market Value, Synergistic Value, Equitable Value, etc., based on the standards used or based on the legally defined terms as per the laws of the country or region.

From an Indian perspective, valuation reports could be as defined as per the Wealth Tax Act, 1957 or The Companies Act, 2013, but barring the Capital Gains Tax Valuations, the widely accepted standards is of International Valuation Standards Committee, called as International Valuation Standards. The Companies Act, with the Insolvency and Bankruptcy Code encourages the registered valuation organizations formed to follow a certain standard and a number of such RVO's have adopted the International Valuation Standards as required to be used, for its members.

Indian Valuation Standards or creation of such a standard is being examined by the Indian Valuation Standards Committee which has members from Academia, Government and the Valuer community and on promulgation of the same, we may have our own standards which could be widely used.

However, for the purpose of this article, I would be looking at providing a holistic picture based on international valuation standards, as it is most widely used in asset valuations including real estate, plant and machinery. The SFA valuation has other standards being practiced by the community in India which I would quote wherever necessary.

The objective of this article is to provide the readers with an understanding of critical reading of a valuation report and make decisions of acceptance and rejection based on valuation report available.

International Valuation Standards

International Valuation Standards have been developed with an aim to

- identify or develop globally accepted principles and definitions,
- identify and promulgate considerations for the undertaking of valuation assignments and the reporting of valuations,
- identify specific matters that require consideration and methods commonly used for valuing different types of *assets* or liabilities.

The international valuation standards, also called as IVS has a framework that consists of general principles for valuers following the IVS regarding objectivity, judgement, competence and acceptable departures from the IVS. The IVS consists of IVS General Standards as well as IVS Asset Standards. This classification into general standards and asset standards help in providing the guidelines that are required for classifying any valuation report as a IVS Standardized report.

IVS General standards sets forth the requirements of conducting any valuation and consists of the standards for establishment of terms of engagement, Bases of Value, Valuation approaches and Methods, Reporting primarily. The General standards are common to all kinds of valuation including Real Estate, Development Properties, Plant and Machinery Properties and Businesses.

IVS Asset Standards sets forth requirements for valuation of specific kind of assets and is required to be followed for those specific kind of assets in conjunction with IVS General Standards.

Valuation Reports

Valuation report is an outcome of a multitude of things done as part of the process of estimating the price in a defined situation and hence, the process, needs to be covered in depth in the valuation report. Considering that the estimation of value involves scientific process

but a judgement which is an art, the valuation report should reflect the same.

Minimum Contents

The International Valuation Standards do mention the minimum contents of a valuation report and this minimum content is expected to be present in any valuation report. Any valuation report that does not provide this may not be called as a IVS compliant valuation report. As a user, this is one of the strong indicators about the quality of the valuation report and has to be checked. The minimum contents of the valuation report as per IVS are-

(a) the scope of the work performed,

(b) the approach or approaches adopted,

(c) the method or methods applied,

(d) the key inputs used,

(e) the assumptions made,

(f) the conclusion(s) of value and principal reasons for any conclusions reached, and

(g) the date of the report (which *may* differ from the valuation date).

However, from an Indian context in addition to the above mentioned contents, it is recommended that the purpose of valuation, premise and bases of value, Documentation provided and referred to, Departures and Disclosures is also mentioned as this will help in a better review or understanding. Since, the value of the property is dependent on the purpose of valuation to a large extent, this purpose needs to be mentioned in the valuation report, so that the valuation judgement is not applied for a different purpose, which may become erroneous. In the same way, the premise and bases of value, Departures and Disclosures will help in wholesome understanding of the valuation and hence is recommended to be mentioned in detail.

Valuer Competence

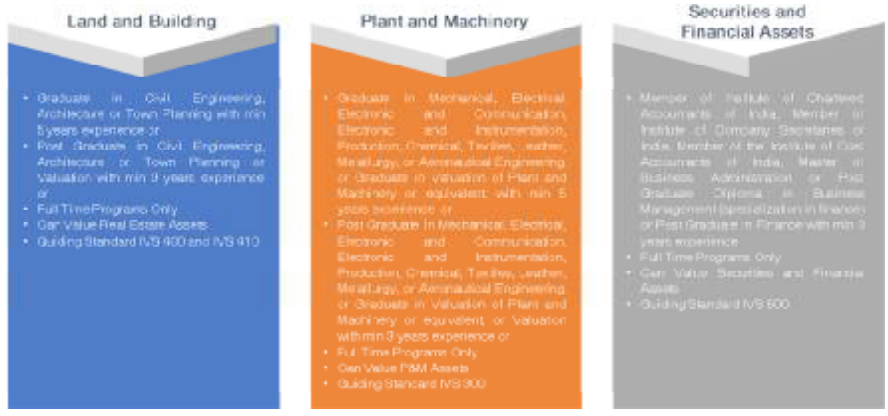
International valuation standards do not define the qualification and experience requirements of a valuer but mentions the following-

a. Valuations *must* be prepared by an individual or firm having the appropriate technical skills, experience and knowledge of the subject of the valuation,the market(s) in which it trades and the *purpose of the valuation*.

b. If a *valuer* does not possess all of the necessary technical skills, experience and knowledge to perform all aspects of a valuation, it is acceptable for the *valuer* to seek assistance from specialists in certain aspects of the overall assignment, providing this is disclosed in the scope of work

c. The *valuer must* have the technical skills, experience and knowledge to understand, interpret and utilise the work of any specialists.

The above requirements are broad due to the applicability of the standards across the globe where each country has different requirements for declaring a valuer to be competent. For example, in India, IBC has clearly defined the education and experience requirements for different fields of valuation to become a Registered Valuer as mentioned below.



Having defined competence, there are still a few grey areas which are to be understood to check if the valuer to be appointed for any assignment is competent.

In case of valuation of contaminated properties, to satisfy the requirements of IVS, the valuer should be competent to understand the environmental data concepts.

In the same way, Intangible asset valuation is a grey area to some extent. Though IBC is clear in its policy that the intangible asset valuations has to be undertaken by the SFA Registered Valuers, according to IVS, intangible assets created by the physical assets should be valued by physical asset valuers. For example, a hotel, whose brand value is created due to the better property and its amenities, the intangible value of the property has to be valued by a Land and Building Valuer as it meets the competence requirements of the IVS.

Reading the Valuation Report

Valuation report is an output coming out of the valuation process that has been undertaken on a physical or a financial asset and the judgement made by a person of competence on the estimation of price at which a transaction is expected to happen in a defined situation. Considering the above, the valuation report, should reflect the process and the judgement. Hence, while reading the valuation report, few pointers are as below-

1. The report should be on the letterhead of the valuer, which reflects his competence in the form of qualifications and experience. In case the competence is due to a license or due to being part of a firm that has the expertise, details of the credentials could be obtained prior to signing of the engagement letter. However, even in that case, it is recommended to mention the competence of the person(s) handling the valuation in the valuation report.
2. The purpose of the valuation report as defined in the engagement letter should be available in the valuation report with a detail on the contours of the purpose thereby defining the scope of work. This is an important part of the valuation report as a number of other parameters of valuation are dependent on this scope of work and hence has to be understood well while reading the report for decision making.
3. The valuer should have then provided the approach adopted. The approach section should contain details of why a certain approach has been adopted for a particular asset and in case the other approaches have been considered, a commentary providing details of how other approaches have been considered and rejected with reasons for the same also needs to be provided. Any discussions with the client for considering a certain approach has to be recorded in the report.
4. The bases of value and premise of value would flow from the above points and has to be mentioned in the report. Errors in these could lead to an erroneous valuation as this defines the measurement. For example, for a leased machinery valuation for the owner of the asset, the bases of value could be the market rent of the asset for an income approach valuation and in case the valuer has mentioned bases of value as market value and is using income approach to valuation, the results are erroneous and will qualify for rejection of the valuation report.
5. The methods applied and methods considered alternatively also needs to be mentioned by the valuer and has to be read by the user in detail. The methods used would provide a lot of information on the quality of data accessed, the skill with which the data has been analysed and the reasons why certain methods have been adopted for arriving at the valuation judgement. The user should be able to understand if the methods adopted truly reflect the situation as defined in the scope of work. In case the methods adopted are not reflecting the situation, the valuation report may qualify for rejection.
6. The valuation report will have details of the inputs used. This could be published databases, market surveys, etc. The quality of these inputs could reflect the quality of the valuation judgement. Hence, any information that is used from sources which is generally not considered of a good quality, could have impact on the value arrived at. A skilful valuer would cover the quality issues as qualifying statement and would have described the reasons for considering the said input and the treatments administered on the said data for making it less erroneous. These statements would help the user check if the input and the treatments are reasonable for acceptance.
7. A separate section providing the details of documents provided and documents referred to would provide if reliable sources has been checked for various details. For example, the documents related to ownership of the company should have been checked for valuation of the company and the same needs to be mentioned along with the source of this documentation. Client provided documentation and documentation from public sources such as government will have the highest weightage and this needs to be seen by the user.
8. Assumptions made also have to be clearly mentioned in the valuation report and it also needs to mention the reasons for making these assumptions. The assumptions made could be to ensure that the situation as defined in scope of work is considered or it could be due to market practices, or other reasons. The report would have details of the assumptions made and reasons for the assumptions. The reasoning would reflect the considerations made and its impact on value. Wherever possible, the assumptions made should

be a calculated assumption rather than an assumption for ease of arriving at a value.

9. A "*departure*" is a circumstance where specific legislative, regulatory or other authoritative requirements *must* be followed that differ from some of the requirements within IVS. Departures are mandatory in that a *valuer must* comply with legislative, regulatory and other authoritative requirements appropriate to the *purpose* and *jurisdiction* of the *valuation* to be in compliance with IVS. A *valuer may* still state that the valuation was performed in accordance with IVS when there are departures in these circumstances. The departures that have been seen have to be clearly mentioned along with the reasons as the user would be able to understand the limitations of the valuation report due to these requirements.
10. Disclosures also mentioned in the report would help the user understand any details of asset or liability that has an impact on value but not captured in the documents. For example, while valuing an under-construction real estate project for the developer, the valuer observes that the developer who is not the user of the valuation report is a minority shareholder and the other shareholders are not developers. This information may have an impact on the valuation provided as the risk of non-completion of the project could exist. This observation should be mentioned in disclosure section of the report along with how the same could have an impact on the value arrived at in the valuation report. The user should be able to decide if the situation defined in the scope of work is reasonable considering the disclosure and decide if the valuation report is qualified for acceptance.
11. Conclusions made should be based on the above and the same should clearly state the value arrived at and the commentary on conclusions should provide the valuers comments on the conclusion(s) made. The reasoning for a given value and the variance that the valuer expects should also be clear for the user to make a judgement for acceptance of the value.
12. The date of valuation report is significant and has to be seen if the same is different from the date of site visit or date of information used for inputs or assumptions. The difference in this, if there are any material variations that could have an impact on value, the valuation report could be qualified for rejection.

Summary

To summarise the commentary above, to decide on acceptability or reject-ability of the valuation report, the user need to do the following-

a. Check for the standards adopted. In case the same is not available in the valuation report, the quality of the report is questionable as it is difficult to review the process followed by the valuer and qualifies the report for rejection.
b. Check for the competency of the valuer based on the law of the land or based on qualifications and experience that is required for the specific assignment.
c. Define scope of work clearly for the valuer to understand the situation and the conditions of valuation. In case of unclear definition of scope of work, the valuation judgement may not be suitable for the particular situation and hence may qualify for rejection. To a large extent, it is valuer's duty to make the scope of work clear and hence a healthy discussion of the same is suggested before signing of an engagement letter.
d. The valuation report should have the minimum contents of report as defined by IVS or any other standard and it should additionally contain details that ensure that the valuation report reflects the scope and purpose defined. In case of non availability of minimum contents, it is difficult to ascertain and make judgements on the value arrived at and hence may qualify for rejection. It is better if the valuer is able to provide reasoning or facts for every input or assumption made and the user should be able to understand these for making the decision on acceptance of the valuation report.
e. Departures, Disclosures needs to be provided by valuer and should be studied by the user for understanding the limitations and any material impact these may have on the value. In case, the same is not provided, it does not alter the decision making.

SECTION 29A OF IBC-KEY ISSUES AND CHALLENGES

URVASHI SAHI

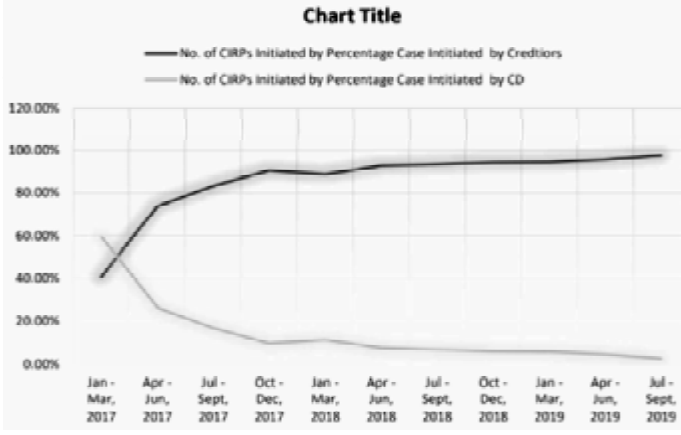
One of the underlying objectives of Insolvency Laws is to ensure higher standards of business and commercial morality.Insolvency laws provide easy exit and fresh start to the genuine entrepreneurs; however, it also makes sure that it does not become an instrument of abuse in the hands of unethical and fraudulent promoters. An effective insolvency law must ensure that promoters are unable to abuse the corporate identity by intentionally pushing the company into a state of insolvency and buying back the entity at a discounted price, thereby hampering interest of all other stakeholders. However, in doing so,striking a correct balance among conflicting interests becomes very important. This is because such measures are detrimental for the economy both in the case of overreach or underreach. The former would prevent business rescues and development of a beneficial rescue culture, while the latter would harm stakeholder's interests.

The BLRC though had envisaged such a possibility of abuse of IBC, it had not elaborated on the moral hazards inherent in such practice. Neither did the IBC specifically address it. Only after the Essar episode, the President of India promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2017 to restrict certain categories of persons from being eligible as the resolution applicant. Consequently, with concerns being raised about the Ordinance diluting the concept of limited liability, the parliament passed Insolvency and Bankruptcy Code (Amendment) Bill, 2017, thereby, narrowing down certain provisions of the ordinance and introducing section 29A to IBC barring certain categories of persons from bidding as resolution applicants. The eligibility criteria as provided under the aforesaid provision was very wide and subjective. Consequently, the provision was amended in 2018.Since then there have been several attempts by the judiciary to clarify and narrow down the ambit of section 29A, most prominent being Swiss Ribbons case and Arcelor Mittals case, however there are still some concerns which are discussed hereinafter.

Firstly,Section 29A has clearly failed to differentiate between genuine promoters and fraudulent unethical promoters with the guilty mind. It accords suspicion on promoters as a class which is a very faulty proposition and is primarily based on past experience of the erstwhile regime (SICA to be specific). Section 29A does not differentiate between intentional and unintentional wrongs.29A(g) debars promoters and other persons in management and control where preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction have taken place and an order has been passed regarding the same.However,it is noteworthy that in establishing a preferential transaction (section 42) or undervalued transaction (section 45), the IBC does not require any *mala fide* intent on the part of the corporate debtor or its promoters. An innocuous commercial arrangement without any *mala fide* intent to defraud creditors could still qualify as a preferential or undervalued transaction under the IBC. Furthermore, knowledge of the promoter or person in control with regard to all aforementioned avoidance transactions is immaterial which means even if the promoter had no knowledge of the same, he will still be ineligible.

Also,29A© bars a person to submit a resolution plan if he has an NPA account under his management and control and a period of one year has passed from such a classification. Though the intent of this clause is laudable, the timeline of one year is questionable especially in certain sectors.Many industry segments run in business cycles and in these business cycles if you have a downturn, it may take more than a year- generally, it takes about two to three years- for this business cycle to turn around. In such a scenario, debarring the promoters or persons in control from bidding for their erstwhile corporations would be against the objective of section 29-A. In addition to this, it fails to take into account the possibility of bidders hiving off the stake in the entity holding an NPA account, instead of paying off the dues, asattempted by Arcelor Mittal who sold its stake in Uttam Galva. Lastly, it is not necessary that trading on an NPA account for more than a year is always a case of fraud as sometimes the companies might have continued under genuine hope of revival from distress. That being said, companies which are currently undergoing CIRP have already been holding NPA's for more than a year. This provision has excluded whole class of promoters and other persons in management and control of such a company.

This has disincentivized the promoters from availing the easy exit opportunity as provided by the Insolvency and Bankruptcy



Secondly the ambit and reach of this provision is very wide especially in context to related party,connected persons and persons acting jointly in concert

Section 29A is a restrictive provision. It imposes four layers of ineligibility.First layer ineligibility, where the person itself is ineligible; Second layer ineligibility, i.e. where a "connected person" is ineligible; Third layer ineligibility, i.e. being a "related party" of connected persons; and Fourth layer ineligibility, where a person acting jointly/in concert with a person suffering from first layer/second layer/third layer ineligibility, becomes ineligible.

Interestingly, the term 'person acting jointly or in concert' has not been defined in the Code and using the definition provided in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, stretches the scope of section 29A to unintended widths.In practice, it is unclear whether the term 'connected person' in clause (j) applies to only the resolution applicant or even 'persons acting jointly or in concert with such person'. If the latter interpretation is taken, this provision would be applicable to multiple layers of persons who are related to the resolution applicant even remotely. Further, ARCs, banks and alternative investment funds which are specifically excluded from the definition of 'connected person' provided in section 29A may be caught by the term 'person acting jointly or in concert with such person'.

Also, the definition of 'related party' in relation to an individual is extensive bringing a large number of people in the ineligibility criteria. Though, the scope of related party with regard to nexus with the business activity has been clarified in the case of Swiss Ribbons, COC and RP's are still uncertain about the same and raise objections against all any person who happens to be a relative of an ineligible person. This clause has led to more confusion and there is an immediate need of more clarity on the same, preferably by way of an express provision limiting the scope of related parties.

This results in a very wide gamut of prospective resolution applicants to fall within the criteria of ineligibility, ultimately effecting the competition and hampering recovery rates and resolution of distressed corporation.

Lastly, it has made the process more complex causing further delay in resolution

Delayed timelines have been the biggest challenge and roadblock for IBC and section 29-A is one of the paramount contributors to the same. Pursuant to its introduction, considerable litigation has been filed in relation to the eligibility of resolution applicants, leading to delays in the resolution process of insolvent entities, thereby undermining the intent of the Code.

Suggestion

we must realize that IBC is not a magic wand to correct all commercial wrongs. The problem which 29A seeks to address is more of a governance issue. Promoters are able to abuse the corporate identity mainly because of differential voting rights. DVR allows them to take decisions which serve their own interest rather than the interest of corporation and other stakeholders at large.

Besides, the core objective of IBC as also envisaged in its preamble, is value maximization of corporate debtor. Commercial morality on the other hand is only an underlying aim to ensure longterm value in corporation. Hence due care must be taken that overemphasis on underlying object must not defeat the purpose of the code.

Therefore, there is a dire need to narrow down the scope of section 29A to ensure its economic feasibility. There must not be a blanket ban on connected and related parties. However certain safeguards must be imposed to avoid benami transaction in the garb of relations/connections.

Also,just because of few unscrupulous promoters, whole class must not always be seen under the lens of suspicion.

INSOLVENCY OF GROUP COMPANIES

SUMANT BATRA

I. GROUP COMPANIES OR ENTITIES

1. Group companies are the most important and commonly encountered business structure throughout the world. It is a common practice for commercial ventures to operate through groups of entities and for each entity in the group to have a separate legal personality.[1]Suchcommercial activity may take place through a diverse form of legal persons, such as companies, trusts, partnerships, societies and other form of legal entities. Each such entity may be governed by different laws. Separate entities, so called special purpose entities or vehicles are set up in order to dissociate specific assets from general liabilities, the purpose being to raise funding under more favourable conditions. This is not surprising or unusual. Generally, legal systems tend to adhere to the concept of the corporate form permitting separate personality and limited liability to be the default rules for companies even in respect to the relationship between companies and their 'sisters' or 'parents' in a group context. Accordingly, each entity must have its own constitution, its own board of directors or similar body, its own registered office, and its own financial statements. Although in some cases these reasons could be criticised, they are usually perfectly reasonable and fair, sometimes even imposed by sound business management.

II. ONE ECONOMIC ENTITY

2. Although the enterprise group is comprised of separate entities there may be close relationship among them and the group as a whole may be integrated and operate a single business. In many instances companies in a group are run as a single entity. The group treasury function may be located in one company with all cash within the group being swept into the bank accounts of one company; the human resources function may be typically centralised; brands developed for the group, not for individual companies; there may be only one Chief Executive Officer (by whatever name called), one Chief Financial Officer (by whatever name called); all or most employees may be employed by one or just a few entities within the group.

3. When these businesses are solvent and operational, public perception is typically that they function as a unified group in the eyes of customers, suppliers, creditors, etc.; lenders offer seek guarantee or credit support from ultimate parent; and formal divisions are ignored by third parties, who are under the impression that they are dealing with the group as a whole.

4. The use of the group structure presents opportunities for manipulating the corporate form, evading regulations and responsibilities. For example, annual reports, balance sheets and profit and loss statements can be manipulated, by concealing losses using intra-group transactions designed to create profits.[2] Assets may have been transferred around the enterprise with no proper book keeping; intra-group claims are unascertainable, and so forth. The result is significant confusion as to which entity owes what to which creditor, or which entity is the true owner of which assets. As companies grow around a group structure, the Salomon[3] principle may be abused.

III. OCCURRENCE OF INSOLVENCY OF A GROUP COMPANY

5. As long as a group of companies remains solvent, the fact the business is formally divided into several corporations is not an issue. Often this is even ignored by third parties, who are under the impression that they are dealing with the group as a whole. However, if one or more of the companies in the group become insolvent, treatment of such company or companies as separate legal personality or personalities raises a number of issues that are generally complex and may be difficult to address. The question often arises as to whether and to what

extent each of the related companies should really be treated as a separate entity.

6. In certain situations, such as where the business activity of a company has been directed or controlled by a related company, the treatment of the group companies as separate legal personalities may operate unfairly and prevent access to the funds of one company for the payment of the debts or liabilities of a related debtor company. This is notwithstanding the close relationship between the companies and the fact that the related company may have taken part in the management of the debtor or acted like a director of the debtor and caused it to incur debts and liabilities. Furthermore, where the debtor company belongs to a group of companies, it may be difficult to untangle the specific circumstances of any particular case to determine which group company particular creditors dealt with or to establish the financial dealings between group companies.[4]

7. The historical approach to these situations has been that, regardless of the fact that a legal entity is or not part of a group of companies, if insolvency occurs it is traditionally considered a stand-alone body, solely liable for its own debts with only its own assets. This approach ignored that during its life-time the company was part of a larger economic entity and has always been treated as such. The size and complexity of many enterprise groups is not always readily apparent, as the public image of many is simply that of a unitary organization operating under a single corporate identity. Indeed, that may reflect not only the public view but also the internal concept within the organisation - the legal structure of a group as a number of separate legal entities is seldom indicative of how the business of the group is managed. This is hardly surprising. The interrelationships between group members that determine the manner in which the group operates while solvent isgenerally severed on the commencement of insolvency and restructuring proceedings. This is the case in a domestic context and even more so in the cross-border context.

IV. CONSEQUENCES OF SEPARATE INSOLVENCY PROCEEDINGS

8. The issues that arise in insolvency of group companieswill often result in tension between legal form and the economic reality of groups while dealing with financial distress of any one or more of the group companies. This "atomistic" approach leads to the separate insolvency or liquidation of the estates of each of the group entities, some of which may be insolvent, while others remain solvent. This approach often triggers a fierce battle over the formerly unified estates. The creditors resort to extraordinary means such as "piercing the corporate veil" by which the creditors of one company try to gain access to the assets of another. The inherent limitations and deficiencies of this atomistic approach are well- known; considerable time, effort and therefor costs are in particular spent on inter-company claims. Consequently, a substantial part of the over all assets is spent on intra-group battles instead of benefiting the group's goodfaith external creditors. The process frequently lasts years which is detrimental to the interest of the creditors.[5]

9. Viewed from the prism of historical and conservative approach, it can be argued that as the Adjudicating Authority in relation to insolvency resolution and liquidation for corporate persons under the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter, "Code") is the National Company Law Tribunal (hereinafter, "NCLT")having territorial jurisdiction over the place where the registered office of a corporate person is located, separate proceedings will be commenced against each company in the group before the appropriate NCLT.[66]*"60. Adjudicating Authority for corporate persons.*

   (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of a corporate person is located.

10. Commencement of separateproceedings for each entity meansseparate committee of creditors for common creditors, EOIs to be issued by the resolution professional, valuations to be carried out, invitation for resolution plans and require separate approvals by the committee of creditors; and by the NCLT. Further, as the Code does not apply to trusts

and societies, a large number of entities will remain out of reach of the Code.[7] This prevents access to all the relevant entities that may form a single economic entity of a group and deal with the resolution process in a comprehensive manner. Unless insolvency proceedings relating to all members of this economic interest group can be coordinated, it is unlikely that the group can be reorganized, with the result that it will be broken up into its constituent parts with resulting financial and employment losses. Absence of a coherent approach is likely to result in inefficiency; loss of value; lack of coherence; multiplication of cost; conflicting decision making; and uncertainty of outcome.

11. The tensions heighten when some entities in the group are legally non-amenable to the insolvency law leading to a number of issues. These issues escalate the tension for the RP and CoC, who feel helpless in the face of artificial boundaries and façade of separate legal entities and commercial rights of various legal persons created within the Group even though these entities are one economic entity for all intend and purposes, thus, impacting the efficiency and effectiveness of the CIRP of different entities in the group.

V. GLOBAL APPROACHES TO INSOLVENCY OF GROUP COMPANIES

12. Recognising this, the modern insolvency laws, practices and jurisprudence approach such situations differently, and have sought to iron the creases created by the insolvency of economic groups. Four broad approaches have been applied:

- Procedural Consolidation;
- Partial Substantive Consolidation;
- Consensual Consolidation; or
- In appropriate cases, by Substantive Consolidation.

PROCEDURAL CONSOLIDATION

13. Procedural Consolidation is where the same courtor forumis given,or assumes the jurisdiction to order and monitor the insolvency of all (orseveral) group companies, orthe same insolvency practitioner isappointed as office holder formorethanone of the affiliated companies. In short, procedural consolidation means that insolvencies are administratively dealt together, but without substantively pooling their assets and liabilities. Both, the law and the courts may assist the process by Procedural Consolidation, by coordinating hearings, or appointing the same insolvency representative across the group. The common principle of laws of this type is that, for a consolidation order to be granted, the court must be satisfied that creditors would suffer a greater prejudice in the absence of consolidation than what the insolvent companies and any objecting creditors would from its imposition.

PARTIAL SUBSTANTIVE CONSOLIDATION

14. PartialSubstantiveConsolidationis extension of consolidation to only thoseassetsorcreditors inrespectofwhich such consolidation appears fair and equitable. This form of consolidation may be limited to the intermingled part of the group's assets.

CONSENSUALCONSOLIDATION

15. Practice has shown that parties some times desire to have recourse to consolidation of related bank rupt cieson a consensual basis, both procedurally and / or substantively. It is important to allow this. As Consensual Consolidation is not an option in the case in hand, this option is not discussed further.

SUBSTANTIVE CONSOLIDATION

16. Substantive Consolidation is the treatment of the assets and liabilities of two or more enterprise group members as if they were a single insolvency estate. Where the debtor belongs to an economic interest group where it is not possible to untangle the indebtedness to determine which particular company is indebted to individual creditors or to establish the financial dealings between group companies, it may be appropriate for the court to order the consolidation of the insolvency proceedings. The law and/or the courts, may intervene to facilitate Substantive Consolidation in cases where Procedural Consolidation or Partial Substantive Consolidation may not be adequate to achieve effective outcome for restructuring or to prevent the interest of creditors and other stakeholders from being safeguarded, substantive restructuring may be imperative.

17. Like in India, there are no provisions for Substantive Consolidation under the United States Bankruptcy Code and in the insolvency laws in many other developed jurisdictions. However, the Courts in these jurisdictions have invoked their inherent powers to ensure order Substantive Consolidation to serve the objectives of the Code. The US Courts have invoked their inherent powers[8] to develop clear guidelines in this regard.

18. Some prominent decisions are listed below:

In Re Vecco Const. Industries, Inc., 4 B.R. 40 (Bankr. E.D. Va. 1980): The Second Circuit In re Continental Vending Machine Corp., 517 F,2nd 997, 1001 (2nd Cir. 1975)

"The trial and appellate courts, in addressing the issue of consolidation, have delineated various criteria which when used as a yardstick, have assisted the courts in determining whether it was proper to allow proceedings to be consolidated…"

These elements may be stated as follows:

First, the degree of difficulty in segregating and ascertaining individual assets and liability. Second the presence or absence of consolidated financial statements. Third, the profitability of consolidation at a single physical location. Fourth, the commingling of assets and business function. Fifth, the unity of interests and ownership between the various corporate entities. Sixth, the existence of parent and inter-corporate guarantees on loans. Seventh, the transfer of assets without formal observation of corporate formalities.

The extent to which assets of the corporate entities are found to be hopelessly commingled must necessarily be decided on a case-by-case basis.

The court in the matter of *WM. Gluckin Company, Ltd.., 457 f. Supp. 379 (S.D.N.Y. 1978)* did not consider it necessary to disregard the corporate identity. The court stated:

"while many of the considerations leading to a decision to consolidate may also lead to a conclusion that corporate identities should be disregarded, such a consolidation is that the interrelationships of the group are hopelessly obscured and the time and expenses necessary even to attempt to unscramble them so substantial as to threaten the realization of any net assets for all the creditors, does not require any 'piercing of the corporateveil'. (citations omitted.) Id. At 384." (emphasis supplied)

In re *Auto-train corporation, Inc., a Florida Corporation,a/k/a Railway Services Corporation Murray Drabkin, Trustee of Auto-train Corporation, A/k/aRailway service Corporation, Appellant, v. Mildand-Ross Corporation, 810 F.2d 270 (D.C.Cir.1987)*, the DC Circuit Court of Appeals discussed the principal as follows:

"Although the Bankruptcy Code nowhere specifically authorizes consolidation of separate estates, courts may order consolidation by virtue of their general equitable powers. E.g., In re Continental Vending Machine Corp., 517 F.2d 997, 1000 (2d Cir. 1975), cert. Denied, 424 U.S. 913, 96 S. Ct.1111, 47 L. Ed. 2d 317 (1976). When they do so, it is typically to avoid the expense or difficulty of sorting out the debtor's records to determine the separate assets and liabilities of each affiliated entity. See Chemical Bank New York trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966). However, because every entity is likely to have a different debt-to-asset ratio, consolidation almost invariably redistributes wealth among the creditors of the various entities. This problem is compounded by the face that liabilities of consolidation entities inter se are extinguished by the consolidation. See flora Mir Candy Corp. v. R.s. Dickson & Co., 432 F.2d 1060, 1063 (2d Cir. 1970)"

Further, the Court laid down as follows:

"*The proponent must show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or to realize some benefit. Id; see also Flora Mir Candy Corp. v. R.S. Dickson & Co., 432 F.2d at 1063; Chemical Bank New York Trust Co. v. Kheel, 369 F. 2d at 847. At this point, a creditor may object on the grounds that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation. See Chemical bank New York Trust Co. v Kheel, 369 F. 2d at 848 (friendly. J., concurring). If a creditor makes such a showing, the court may order consolidation only if it determines that the demonstrated benefits of consolidation "heavily*" outweigh the harm. In re Continental Vending Machines Corp. 517 f 2d at 1001.

It appears to us that a bankruptcy court must undertake on additional and slightly different balancing process before using its equitable nunc pro tunc powers to give a consolidation order retroactive effect." (emphasis supplied)

In Re *Augie/restive Banking Company, Ltd., Augie's Banking Company, Ltd., Debtors.Union Savings Bank, Appellant, v. Augie/restive Baking Company, Ltd., Augie's baking Company, ltd., Manufacturers Hanover trust Company, Ltd., Applellees, 860 F.2d 515 (2d Cir.1988*),

Decided by the Second Circuit, though did not allow for substantive consolidation, developed the following two elements for the analysis of substantive consolidation: "(i) whether creditors dealt with the entities as a single economic unit and did not reply on their separate identity in extending credit; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors." …."*Commingling, therefore, can justify substantive consolidation only where "the time and expense necessary even to attempt to unscramble them (is) so substantial as to threaten the realization of any net assets for all the creditors*." Kheel, 369 F2d at 847; Commercial Envelope, 3 B.C.D at 648, or where no accurate identification and allocation of assets is possible. In such circumstances, all creditors are better off with substantive consolidation. (emphasis supplied)

In re Food fair, Inc., debtor., 10 B.R. 123 (1981):

Finally, a key factor for this Court, although not mentioned by the Vecco court, is that substantive consolidation of these Debtors will yield an equitable treatment of creditors without any undue prejudice to any particular group. As was stated by the court in Stone v. Eacho (In re Tip Top Tailors, Inc.) 127 F.2d 284, 288 (4th Cir. 1942). "*only by ignoring the separate corporate entity of the subsidiary (ies) and consolidation the proceeding with those of the parent corporation can all the creditors receive that equality of treatment which it is the purpose of the bankruptcy act to afford.*" "*By consolidation all of these proceedings all of the assets of the Debtors can be pooled to provide a common fund for the payment of all claims which will be treated as having been filed in a consolidated proceeding*." (Emphasis supplied).

VI. PRINCIPLES FOR SUBSTANTIVE CONSOLIDATION

19. It is clear from the analysis of the above decisions, the US bankruptcy courts have ordered substantive consolidated of proceedings along with the assets and liabilities of different debtor companies by exercising their equity jurisdiction, on the basis of the following criteria:

    (i) Presence or absence of consolidated financial statements;

    (ii) The profitability of consolidation in a single entity;

    (iii) Inter-mingling of business functions and assets leading to inter-dependency among the group companies;

    (iv) The unity of interests and ownerships;

    (v) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

    (vi) Inter-corporate guarantees and liabilities;

    (vii) Transfer of interest across the group entities.

VII. THE VIEW OF BLRC

20. The Bankruptcy Law Reforms Committee, based on whose recommendation the Code was enacted, was inspired from the UNCITRAL Legislative Guide[9] While discussing the insolvency of group companies, the UNCITRAL Legislative Guide records as follows:

    "88. Where the insolvency law grants the courts a wide discretion to determine the liability of one or more group companies for the debts of other group companies, subject to certain guidelines, those guidelines may include the following considerations: a) the extent to which management, the business and the finances of the companies are intermingled; b) the conduct of the related company towards the creditors of the insolvent company; c) the expectation of creditors that they were dealing with one economic entity rather than two or more group companies; and d)the extent to which the insolvency is attributable to the actions of the related group company. Based on these considerations, a court may decide on the degree to which a corporate group has operated as a single enterprise and, in some jurisdictions, may order that the assets and liabilities of the companies be consolidated or pooled, in particular where that

order would assist in a reorganization of the corporate group, or that a related company contribute financially to the insolvent estate, provided that contribution would not affect the solvency of the contributing company. Contribution payments would generally be made to the insolvency representative administering the insolvent estate for the benefit of the estate as a whole.

90. The common principal of all regimes with laws of this type is that, for a consolidation order to be granted, the court must be satisfied that creditors would suffer greater prejudice in the absence of consolidation than the insolvent companies and objecting creditors would from its imposition. (emphasis supplied)

VIII. WHETHER NCLT HAS THE JURISDICTION TO ORDER SUBSTANTIVE CONSOLIDATION?

No bar in the Code against substantive consolidation

21. The most notable aspect is that although there is no express provision in the Code for consolidation of proceedings, there is also no bar in the Code prohibiting consolidation. Similarly, there is no express provision in the Code vesting NCLT with jurisdiction to order consolidation, but there is also no bar in the Code on NCLT from prohibiting consolidation.

The Code recognises the concept of consolidation and one economic entity

22. In fact, the Code recognises the concepts of consolidation and single economic, entity and even provides for some formof combining of proceedings in certain cases. Sub-sections (2) and (3) of section 60 carves out an exception to sub-section (1) of section 60 of the Code which provides for the territorial jurisdiction of the NCLT. Sub-section (2) provides that an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, during the pendency of CIRP of principal borrower, shall be filed in NCLT where proceedings against the borrower are pending, irrespective of the territorial jurisdiction of such NCLT over the said guarantors. Further, where an insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor is pending in any court or NCLT, it shall stand transferred to the NCLT Bench dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

23. Therefore, the Code itself recognises that in cases where there is common debt or common commercial agreements, insolvency process of such entities would lie before the same NCLT.

Recognition of concept of Group Companies or Group Entities by the Code

24. The Code recognises and defines the 'related party' in relation to a corporate debtor. Section 5(24) of the Code states as follows:

5 (24) "related party", in relation to a corporate debtor, means-

(a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;

(b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;

(c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;

(d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid- up share capital;

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of-

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor;

25. Section 3(37) of the Code states "words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872 (9 of 1872), the Indian Partnership Act, 1932 (9 of 1932), the Securities Contract (Regulation) Act, 1956 (42 of 1956), the Securities Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), the Limited Liability Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the meanings respectively assigned to them in those Acts".

26. Deferring to the Companies Act, 2013, the term "related party of a company" is defined therein under sub-section 76 of Section 2, which states as follows:

"S2 (76) related party, with reference to a company, means—

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager is a member or director;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

(B)a subsidiary of a holding company to which it is also a subsidiary;

(ix) such other person as may be prescribed;"

27. An "Associate company" is defined in section 2(6) of the Companies Act, 2013 as follows:

"2(6) In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation—For the purposes of this clause, "significant influence means control of at least twenty per cent. of total share capital, or of business decisions under an agreement",

28. "Holding company" is defined in section 2(46) of the Companies Act, 2013 to mean, "in relation to one or more other companies, means a company of which such companies are subsidiary companies.

29. Section 2(87) of the Companies Act, 2013 defines "*subsidiary company"* or "*subsidiary*" as:

"2 (87) In relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation. —For the purposes of this clause,

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression ¯company includes any body corporate;

(d) ¯layer in relation to a holding company means its subsidiary or subsidiaries;

30. Section 2(11) of the Companies Act, 2013 defines body corporate as follows:

2 (11) "body corporate" or "corporation" includes a company incorporated outside India, but does not include—

(i) a co-operative society registered under any law relating to co-operative societies; and

(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

31. A key reason for defining the term 'related party', in relation to corporate debtor and the company is that the Code renders certain types of transactions between related parties subject to avoidance. A corporate debtor may attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. Insolvency law contains avoidance provisions to claw back such transactions or compensate the party affected adversely by it by penalising those responsible. Although there are variations in the details of these provisions they are based on some common objectives, and have some significant similarities.[10] Avoidance provisions serve two major purposes. One, they prohibit debtors from disposing of their property either with the intent to place it improperly beyond the reach of their creditors or for less than reasonable consideration when they are insolvent by providing a legal mechanism to avoid such transfers. The second, they promote efficient and fair economic relations between debtors and creditors by helping to ensure that debtors will not attempt to evade their obligations to creditors through improper transactions. Avoidance laws include preferential transactions, to promote and attempt to uphold the equality of the distribution of an insolvent debtor's assets among its creditors. This ensures that all creditors – not just the most friendly, necessary, lucky and/or aggressive creditors – receive payment on their claims. Avoidance of preferential transfers prevents the existence of *de facto* or secret liens on a debtor's assets.

32. The World Bank Principles recommend that certain transactions prior to the application for or the date of commencement of the insolvency proceeding should be avoidable (cancelable), including fraudulent and preferential transfers made when the enterprise was insolvent or that rendered the enterprise insolvent.[11]The UNCITRAL Legislative Guide mentions three types of avoidable transactions that are found in most legal systems:

transactions intended to defeat, hinder or delay creditors from collecting their claims; transactions at an undervalue; and transactions with certain creditors that have the effect of preferring them over all other creditors. Each of these avoidable transactions has some specific characteristics, depending on the circumstances of the transaction. They may have characteristics of more than one power to avoid, and thus the insolvency representative may be able to choose on which basis to challenge it.[12]In the Code, they are articulated in Chapter III of Part IIof the Code.

33. With respect to all avoidable transactions there are usually stricter criteria when "related persons" (sometimes also referred to as connected persons or insiders) are involved. The relationship between the company and the other party to the transaction may be a relevant indicator of fraud. In the context of preferences and transactions below value, the suspect period will typically be longer where related persons where party to the transaction or presumptions (or shifted burden of proof) regarding intent or the financial situation of the company may be applied. Contracts with connected persons may not be negotiated in the market place and so one may not assume that the company received a fair deal.[13]

34. The avoidance, fraudulent and wrongful trading provisions in the Code have a direct nexus with the consolidation in cases where related party transactions are involved.

35. Section 424 of the Companies Act, 2013 (as amended by section 255 and the 11th Schedule of the Code), while discussing the procedure before the NCLT and National Company Law Appellate Tribunal (hereinafter, "NCLAT") states as follows:

424. (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Actor of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016 the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: —

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the

purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

36. While dealing with the provision *in pari materia* with section 424 of the Companies Act, 2013 with section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Supreme Court in *Allahabad Bank, Calcutta vs Radha Krishna Maity and Ors*.[14], held as follows:

We may also point out We may also point out that Section 22(2) too does not limit the general powers referred to in Section 22(1). All that Section 22(2) states is that in respect of the type of applications falling under (a) to (h), the Tribunal has only powers as are vested in a Civil Court.

THE SUPREME COURT HELD THAT:

The scope and the extent of the powers of the Tribunal are mainly referred to in Sub-clause (1) of Section 22 of the Act which says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but shall be guided by principles of natural justice. As stated in Grapco by this Court, the Tribunal can exercise powers contained in the Code of Civil Procedure and can even go beyond the Code as long as it passes orders in conformity with principles of natural justice.

37. The powers available to the NCLT for exercising the jurisdiction under the Code are extensive by virtue of section 424 of the Code. The Delhi High Court in *SAS Hospitality Private Limited vs Surya Construction Pvt. Ltd*.[15] Held that "NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of affairs of a company...". It was held that, "*Under* Section 424 *of the Companies Act, 2013, the Tribunal also has the same powers and functions as are vested with a Civil Court. In addition to the above, the Tribunal also has the power to punish for contempt which was hitherto not available with the CLB. In various ways, the NCLT is not merely exercising the jurisdiction of a Company Court under the new Act, but is also vested with inherent powers and powers to punish for contempt."* (emphasis supplied)

NCLT HAS INHERENT POWERS TO ORDER CONSOLIDATION

38. The NCLT also has inherent powers under Rule 11 of the National Company Law Tribunal Rules, 2016 (hereinafter, "NCLT Rules 2016") as affirmed by the Supreme Court in *Swiss Ribbons Pvt. & Anr. vs Union of India & Ors.*[16]:

.....We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case. (emphasis supplied)

39. RULE 11 OF NCLT RULES 2016 STATES AS FOLLOWS:

11. Inherent Powers - Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.

40. In *UOI v. Paras Laminates*[17]the Supreme Court held that a tribunal has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers.

"There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes, (eleventh edition) "where an Act confers a jurisdiction, it

impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution." (emphasis supplied)

41. In *Grindlay's Bank Ltd. Vs Central Government Industrial Tribunal & Others* [18], the Supreme Court held that:

"A Tribunal should be construed to be endowed with such ancillary and incidental powers as are necessary to discharge its function effectively to do justice between the parties, unless there is any indication in the statute to the contrary." (emphasis supplied)

42. In Rajendra Kumar Malhotra & Ors. V. Harbans Lal Malhotra & Sons Ltd. & Ors (1999) 2 CALLT 13 (HC), the Calcutta High Court, while dealing with the inherent power of the Company Law Board under Regulation 44 of the Company Law Board Regulation, 1991 held that

"*The provisions of Section 151 of the Code of Civil procedure has been reproduced mutatis mutandis in Regulation 44 of the CLB Regulations. There are two separate bases for exercise of these inherent powers namely the ends of justice and he prevention of abuse of process*." (Emphasis supplied)

Inherent powers under Section 151 has been used for consolidation in *Chitivalasa Jute mills v. Jaypee Rewa Cement 2004 (3) SCC*, the Supreme Court in para no 12 held that

"The two suits ought not to be tried separately. Once the suit at Rewa has reached the Court at Visakhapatnam, the two suits shall be consolidated for the purpose of trial and decision. The Trial Court may frame consolidated issues. The Code of Civil procedure does not specifically speak of consolidation of suits but the same can be done under the inherent powers of the Court flowing from Section 151 of the CPC. Unless specifically prohibited, the Civil court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multicity of proceedings, delay and expenses.

Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. the parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials."

43. As stated above, there is no provision in the Code that prohibits the NCLT from ordering consolidation.

44. In the absence of the statutory provisions on a matter, it is the duty of the court to effectively provide, through court practice, such interpretation to the provisions of the statute which advances the objectives of the Code. Maxwell on Interpretation of Statutes (12th Edn., page 228), under the caption 'modification of the language to meet the intention' in the chapter dealing with 'Exceptional Construction' states the position succinctly:

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. (emphasis supplied)

45. In District Mining Officer v. Tata Iron & Steel Co., the Hon'ble Supreme Court stated:

"The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by us a of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully in the Varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches

Use of inherent and ancillary powers to preserve value and safeguard interest of creditors will be fully justified

46. It is pertinent to mention that one of the fundamental objectives of the Code is to provide maximization of value of assets of corporate debtor

for the benefit of the creditors, the distressed company and other stakeholders. The statement of object of the Code reads as below:

" An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto." (emphasis supplied)

47. It is noteworthy to mention herein that the Hon'ble Supreme Court and Hon'ble National Company Law Appellate Tribunal (hereinafter, NCLAT") in the matter of *Binani Cement Limited*, while approving the resolution plan of *Ultratech Cement Limited*, has laid down certain principles, making the concept of maximization of value of the assets if the corporate debtor sufficiently clear. The judgment also states that the resolution professional and the committee of creditors are duty bound to ensure maximization if value within the framework of the Code. The judgment further brings a clearer picture of the objectives behind the Code. The same was also upheld by the Hon'ble Supreme Court of India.

Can NCLT pass orders in respect ofnon-incorporated entities like -the Trusts and Societies

48. As the query in hand involves the Trusts and Societies, it would be relevant to discuss whether their legal status would serve as an impediment in the way of the NCLT exercising its inherent powers to consolidate the proceedings.

49. Section 3 of Indian Trust Act, 1882 defines the Trust is an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

50. The Supreme Court in *Ashoka Marketing Ltd v Punjab National Bank*[19], held that, "The expression 'body corporate' is used in legal parlance to mean a public or private corporation." Further, the Supreme Court, in *Board of Trustees, Ayurvedic and Unani Tibia College v. State of Delhi*[20], while posing the question as to what is a corporation, the court answered it with the statements contained in HALSBURY 4th Edn., Vol.9, para 1201 as:- "A Corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in case of a corporation sole) which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office, in question."In *S. P. Mittal v. Union of India*[21], the Supreme Court again summed up the essential elements in the legal concept of a corporation, which are: "(1) a continuous identity, i.e., the original member or members or his or their successors are one; (2) the persons to be incorporated, (3) the name by which the persons are incorporated, (4) a place, and (5) words sufficient in law to show incorporation. A corporation aggregate can express its will by deed under a common seal."

51. The Courts in India in various decisions held that the instrument of registration does not by itself lend legal entity to a trust. In *Duli Chand v Mahabir Prasad etc. Trust*,[22] the court observed that a trust is "not like a corporation which has a legal existence of its own and therefore, can appoint an agent. A trust in not in this sense a legal entity. It is possible for some of the trustees to authorize the others to file a suit but this could only be done by the execution of a power of attorney." It was also held in *H. N. Bhiwandiwala v Zoroastrian Co-op. Bank*[23] that, a suit against a trust is not maintainable as it is not a legal entity. Observed, "all the trustees must be made a party."

52. As stated already, although the Trusts are not a body corporate, theyare a "person" within the meaning of sub-section (23) of section 3 of the Code and they may be related to corporate debtor as per sub-section (24) (m) of section 5 of the Code.A trust is a curious instance of duplicate ownership which allows for the separation of the powers of management and the rights of enjoyment. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of

the other. The former is called the trustee, and his ownership is trust-ownership; the latter is called the beneficiary, and his is beneficial ownership. The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than substance, nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of someone else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him for the benefit of the real owner. As between trustee and beneficiary, the law recognizes the truth of the matter; as between two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large. As stated, Trusts are an accumulation of assets and liabilities, which constitute the trust estate.

53. Companies and trusts have in common the fact that they are artificial constructs. A Company consists of people who do things but the law deems their actions to be done by a legal construct – a company. In a similar way, trusts consist of people who say and do things but the Courts impose a set of rights and obligations upon them which overlay their own personal rights and obligations.When a company becomes insolvent it is tempting to look behind the veil of incorporation and determine that the person who mismanaged it should be made liable for its losses. Similarly, with trusts, when trustees appear to hide behind the form of trusteeship it can be tempting to disregard the legal form and hold the individuals accountable on the basis that the trusts do not in fact exist. In such circumstances, Lord Neuberger's warning is appropriate[24]:

" ... the use of words such as "sham" or "puppet" may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and while they may enable the Court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law."

54. Companies and trusts have been of enormous benefit to the countries which have adopted them into their laws. But when things appear to go wrong with them, great care needs to be taken to ensure that the Courts do not undermine the two concepts and lessen their usefulness to society. Therefore, a trustee is in a position of trust; he or she must act in a fiduciary capacity in accordance with the trust deed. Consequently, a trustee may be negligent if he or she fails timeously and diligently to act in the interests of the trust, to protect those interests against unlawful or unwarranted intrusion.

55. In *Dr. A. Lakshmanaswami Mudaliar & Ors. V/s. Life Insurance Corporation of India & Anr.*[25], the Supreme Court held as under:

15. The trust has numerous objects one of which is undoubtedly to promote art, science, industrial, technical or business knowledge including knowledge in banking, insurance, commerce and industry. There is no obligation upon the trustees to utilise the fund or any part thereof for promoting education in insurance and even if the trustees utilised the fund for that purpose, it was problematic whether any such persons trained in insurance business and practice were likely to take up employment with the Company. Thus the ultimate benefit which may result to the Company from the availability of personnel trained in insurance, if the trust utilises the fund for promoting education, insurance, practice and business, is too indirect, to be regarded as incidental or naturally conducive to the objects of the Company. We are, therefore, of the view that the resolution donating the funds of the Company was not within the objects mentioned in the Memorandum of Association and on that account it was ultra vires.

16. Where a Company does an act which is ultra vires, no legal relationship or effect ensues therefrom. Such an act is absolutely void and cannot be ratified even if all the shareholders agree. Re. Birkbeck Permanent Benefit Building Society, (1912) 2 Ch 183. <u>The payment made pursuant to the resolution was therefore</u>

unauthorised and the trustees acquired no right to the amount paid by the Directors to the trust.

17. *The only question which remains to be considered is whether the appellants were personally liable to refund the amount paid to them. Appellants 2 and 4 were at the material time Directors of the Company and they took part in the meeting held under the Chairmanship of the fourth appellant in which the resolution, which we have held ultra vires, was passed. As office bearers of the Company responsible for passing the resolution ultra vires, the Company, they will be personally liable to make good the amount belonging to the Company which was unlawfully disbursed in pursuance of the resolution. Again by S. 15 of the Life Insurance Corporation Act, 1956 the Life Insurance Corporation is entitled to demand that any amount paid over to any person without consideration, and not reasonably necessary for the purposes of the controlled business of the insurer be ordered to be refunded, and by sub-sec. (2) authority is conferred upon the Tribunal to make such order against any of the parties to the application as it thinks just having regard to the extent to which those parties were respectively responsible for transaction or benefited from it and all the circumstances of the case. The trustees as representing the trust have benefited from the payment. The amount was, it is common ground, not disposed of before the Corporation demanded it from the appellants, and if with notice of the infirmity in the resolution, the trustees proceeded to deal with the fund to which the trust was not legitimately entitled, in our judgment, it would be open to the Tribunal to direct the trustees personally to repay the amount received by them and to which they were not lawfully entitled."*

56. In *V.Z Dianne Windsor Morrell and V.Z Demo and others*[26] it was held that the Courts are entitled to *"lift"* or *"pierce"* the *"corporate veil",* which is done only in exceptional cases.

    In this case, Demo had failed to pay his maintenance order as he had no assets in his personal name because he had placed all his assets in four trusts. The Applicant sought an order directing that the veils of the trust be pierced and, amongst other orders, to declare the assets as those of Demo. The court ordered that the assets, which fell under the four trusts, be deemed personal and/or Demo's personal assets.The common law remedy of piercing the corporate veil is applied when the interests of creditors are weighed against the duties of company directors to run the business in the best interests of its shareholders. The main aim of piercing the veil is to remove the limited liability afforded to directors and/or shareholders presented by the company structure. This mostly happens when directors and/ or shareholders are involved in fraudulent activity.In conclusion, the core element of a trust is that there should be separation of ownership from enjoyment of the trust assets. If assets are transferred into a trust but dealt with as before, there can be no separation of ownership. As a result, courts are entitled to disregard the "veneer" of a trust. In the same breath, courts have no discretion to disregard the existence of a separate corporate entity whenever it considers it just or convenient to do so. It may be permitted in instances where the corporate entity is the alter ego of a controlling person.

57. In United States, starting way back in 2006, with the case of *Badenhorst v Badenhorst*[27], the Supreme Court of Appeal provided some relief when it came to the issue of shielding assets using a trust's separate legal personality. In this case, in relation to a marital dispute, it was decided that the value of assets in the trust could be taken into account when it came to considering a redistribution order, which applies to marriages entered into before 1 November 1984, being the date that the Matrimonial Property Act came into force. The reason for the provision relating to redistribution orders was to curb the unfair results of marriages out of community of property before the accrual system came into effect. In the Badenhorst case, the Court held as it did because the terms of the trust deed and the evidence as to how the trust was being conducted during the marriage were indicative of the fact that the trust founder spouse maintained actual control of the trust, but wished to make use of the trust as if it weren't simply just a pool for his money.The reasoning behind this decision was that the founding spouse had not respected the difference between trust assets and his own assets,

resulting in a blur in the distinction between which assets belonged to him and which assets were controlled by the trust.Thus, the values of the assets of the trust were taken into account in determining the extent of the redistribution order in the case in question. This amounted to a "piercing" of the trust's veil, which is usually respected. This "piercing" closely resembles what is referred to in commercial law as "piercing the corporate veil." Piercing the corporate veil occurs in order to get past the separate legal identity of a business so as to hold a natural person personally liable for certain consequences due to an abuse of the separate legal identity of said business.

58. In the REM case, the Supreme Court of Appeal had to answer the question whether the assets of certain trusts legitimately formed part of the assets of the trusts and not part of the appellant's estate and, therefore, not falling under the accrual system. The Court, therefore, had to determine whether the trusts in question were simply "alter egos" of the appellant. While the Court did not find the trusts to be merely "alter egos" of the appellant, there are very important consequences that come about because of the decision. The Court acknowledged an "equitable remedy" in the form of piercing the veil of an "alter ego" trust which is approached flexibly in order to redress an abuse of the trust form in certain circumstances. The Court stated that this remedy will generally find application where the trust has been used for dishonest purposes or in an unconscionable manner in order to evade liabilities or avoid obligations that the founder would otherwise have.The most important aspect of this decision was the opinion of the Court that the main consideration in cases of trusts and the patrimonial consequences of divorce is whether the trust-creating spouse had attempted to prejudice a monetary claim of the other spouse by administering the trust in a manner that is an abuse of the trust form. The Court held that this would occur, in the accrual system, where the trust-creating spouse had set up the trust, transferred assets to it and dealt with them as if they were trust assets in a fraudulent or dishonest attempt to hide them and prejudice his/her spouse's accrual claim. In such situations, so the Court held, the assets of the trust in question would be used to quantify the accrual claim of the aggrieved spouse and to satisfy any payment owed under the accrual regime to the other spouse.The assets of an alter ego trust can be taken into account in order to calculate the accrual claim of a prejudiced spouse, providing more protection to less financially-stable divorcees who are prejudiced by the concealment of assets by unscrupulous ex-spouses.

59. In the case of *Rees & Others v Harris & Others*[28], Harris, a representative of various companies, alleged that the Aljebami Trust, of which Rees was a trustee, was merely the alter ego of Rees. Harris also sought to hold Rees personally liable for losses incurred by the Trust, in respect of investments it had made in an unlawful and fraudulent Ponzi scheme. Harris directed substantial amounts of monies to entities controlled by Rees, for further investment by Rees. After the fraudulent investments were uncovered, Rees had relocated to Switzerland. In order to bring Rees before the South African courts, Harris sought to pierce the veneer of the Trust in order to attach the assets of the trust, as if the assets were those of Rees. The Court held that piercing of the veil is an exceptional act. The separate legal personality of a corporate entity is to be recognised and upheld, except in the most unusual circumstances. The circumstances where a court will disregard the distinction between a corporate entity and those who control it depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. There must at the very least be some misuse or abuse of the distinction between the entity and those who control it, giving them an unfair advantage. There will be no piercing unless the members of the entity dominate the finances, policies and business practices, to the extent that the corporate entity had no separate mind, will or existence of its own in the relevant transaction.Harris alleged that Rees was always the front man in relation to the investments. Rees would advise Harris as to the financial viability of the investments and Harris relied completely on the knowledge, know-how and candidness of Rees. Rees for all intents and purposes controlled all the assets of the trust. Harris alleged that Rees used the alter ego of the trust to siphon investors' funds

through various of Rees' bank accounts to perpetuate various frauds through a Ponzi scheme and was now hiding behind the veil of the trust. The Court had to decide whether this justified the stripping of the separate legal personality of the trust.Despite the fact that it was clear that the functional separation between control and enjoyment of the trust by Rees was lacking, the court found that there was nothing to suggest, on a balance of probabilities, that the assets of the trust were in fact the assets of Rees in his personal capacity. Harris failed to discharge the burden of proof to establish that Rees, exclusively of his wife who was his co-trustee, controlled the trust to such an extent that the assets of the trust were effectively Rees' own.

60. In the present case, there is no real difference or distinction between the owners, trustees or beneficiaries. The structure has been created for ease of business structuring although such structure has been abused to prejudice the interest of the secured creditors. The Trusts have been used in an improper fashion by its trustees to perpetrate deceit. The Courts in India look past the corporate veil (its status as a separate legal entity) of a company to hold natural persons behind the entity personally liable for the debts of the company where the company has been misused to perpetrate deceit or fraud. A similar principle can be applied to strip the façade of the separate legal personality from the Trusts to get to the trustee and the management, which is serving as an alter ego. The veneer of the Trust can be pierced by the NCLT in the same way as the corporate veil of a company. The persons behind the Trusts' veneer can be held personally liable for the debts of the Trusts.Accordingly, the assets of the Trust could, because of reasons discussed already, be considered to be those of the trustee, provided the NCLTis convinced and makes a finding to this effect, which would more often than not be easier said than done.

NCLT HAS A DUTY TO REMOVE SHADES OF GREY

61. In the absence of specific provision, NCLT can order substantive consolidation and other suitable steps in this case, as more specifically discussed in the later part of the Memo, by exercising its inherent powers to meet the ends of justice, in the interest of the secured creditors and other stakeholders, and to serve the larger objectives of the Code.

62. It is the duty of NCLT to act in a manner that advances the objectives of the Code and not defeat them, by being innovative and creative. NCLT should be progressive and fill the legislative gaps by judicial decision making and interpretation of law. In the Epilogue to its decision in *Swiss Ribbons Pvt. & Anr. vs Union of India & Ors. (Supra),* the Supreme Court observed that, '*To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation"*:[29]

85. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so- called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. (emphasis supplied)

SUBSTANTIAL CONSOLIDATION SHOULD NOT PREJUDICE ANY PERSON

63. It will only be fair for the NCLT, whileconsidering passing an order of substantive consolidation, take into consideration if order of substantive consolidation will commercially or legally prejudice any person. Safeguards can be provided by the NCLT while ordering consolidation.

64. Being a member of the Working Group on Group Insolvency, the author has not commented on the report of the Working Group.

(Footnotes)

[1]UNCITRAL Legislative Guide, page 276

[2]T Hadden "Regulating Corporate Groups: An International Perspective" in J McCahery S Picciotto and C Scott (eds) Corporate Control and Accountability (Oxford University Press Oxford 1993), 343, 360, 362.

[3]The principle of separate corporate personality has been firmly established in the common law since the decision in the case of Salomon v Salomon & Co Ltd.,, whereby a corporation has a separate legal personality, rights and obligations totally distinct from those of its shareholders. Legislation and courts nevertheless sometimes "pierce the corporate veil" so as to hold the shareholders personally liable for the liabilities of the corporation. Courts may also "lift the corporate veil", in the conflict of laws in order to determine who actually controls the corporation, and thus to ascertain the corporation's true contacts, and closest and most real connection.

[4]UNCITRAL Legislative Guide, page 276

[5]Insolvency in a Group of Companies, Substantive and Procedural Consolidation: when andhow? Henry Peter (2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal. (3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor. (4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of subsection (2). (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of - (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code. (6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded." (d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; 1 [***] (e) personal guarantors to corporate debtors; (f) partnership firms and proprietorship firms; and (g) individuals, other than persons referred to in clause (e).] in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be."(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan; (iii) sets the date by which a party in interest other than a debtor may file a plan; (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan; (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

[8]Section 105(a) of the US Bankruptcy Code provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, suasponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. (b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title. (c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28from its operation. (d) The court, on its own motion or on the request of a party in interest - (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, includingan order that - (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or (B) in a case under chapter 11 of this title- (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

[9]Refer Para 3.3.1 of the BLRC Report, November, 2015

[10]Transaction Avoidance in Bankruptcy of Corporate Groups, IritMevorach

[11]World Bank Principles for Effective Insolvency and Credit Debtor Regimes, Principle C11

[12] UNCITRAL Legislative Guide, page 141

[13]Transaction Avoidance in Bankruptcy of Corporate Groups, IritMevorach

[14](1999) 6 SCC 755

[15]CS (COMM) 1496/2016

[16]Writ Petition (Civil) No. 99 of 2018 decided on 28 January 2019.

[17]1990 (49) ELT 322 (SC)

[18]AIR 1981 SC 606

[19](1990) 4 SCC 406

[20]AIR 1962 SC 458

[21]AIR 1983 SC 1

[22]AIR 1984 Del 145

[23]AIR 2001 Bom 267

[24][Insert the details of decision.]

[25]AIR 1963 SC 1185

[26]2014 SGHC

[27]2006 (2) SA 255 (SCA)

[28][Insert details]

[29]Writ Petition (Civil) No. 99 of 2018 decided on 28 January 2019.

SOME IMPORTANT JUDICIAL RULINGS IN IBC

CA. R.R.MODI

Issue Involved/Topic : Supremacy of financial and Operational Creditor. *Case No – 1*
Title : CoC of Essar Steel India Limited Vs. Satish Kr Gupta &Ors. (Essar Steel CIRP case)
Citation : (2019) 111 Taxmann.com 234 (SC)
Forum : Supreme Court Date of Order : 15.11.19

Background	Ruling	Current Status
• Essar Steel was declared insolvent with a total debt of Rs. 54547 crs. • NCLT approved the bid of Arcelor Steel of Rs. 42000 crs. • Several appeals were made, two among them were most important, first the bid made by Arcelor Steel was alleged invalid by Mr.Ruia and second by the several operational creditors alleging the resolution plan was unjust. • NCLAT approved the resolution Plan of Arcelor Steel. NCLAT made an order of considering both the financial and operational creditors at par.	• The apex court set aside the judgement of NCLAT dated 4th July 2019 and contended that the appellate authority did not had the authority of making modification in the resolution plan if it is approved by the CoC. • The financial and the operational creditors should be treated on equitable basis and not equally. • The role of Resolution professional is supportive and not adjudicative. The time frame to be taken for completion of the CIRP process of Essar Steel which had already crossed 330 days may be pardoned as the rule may not apply in all the cases	After NCLAT pronouncement of order on 4th July 2019, the law was amended wef 5th August 2019 as below: • Section 30 (4) amended to include "manner of distribution which may take into account priority as per waterfall including priority and Value of Security Interest of a secured creditor". • Section 30(2)(b) of IBC 2016 was newly substituted. Payment to operational creditors should be higher of (a) liquidation value or (b) distributable amount in the resolution plan as per waterfall. • The amendment shall apply to all pending Resolution plan / Resolution Plan against which appeal is pending/ all Resolution Plans where appeal filing period is not yet over/ Resolution Plans against which legal proceedings are initiated in any court.

Comments : Apex court also settled many other issues as below : It upheld the constitutional validity of IBC (Amendment) Act 2019. The amendment cannot be struck down on the ground that amendment aims at only curing the defects in the above NCLAT order. There should be free play for legislators to fill up the voids/gaps, as IBC is an economic legislation

- *NCLT has a limited judicial role review u/s 30(2) of IBC 2016. NCLAT has also limited role to play as per S 32 r/w S 61(3) of the Code. Such review by them cannot trespass upon the business decision of requisite majority of COC whose commercial wisdom will prevail.*
- *The amendment in Reg 38 does not conclude that FCs and OCs or secured and unsecured FCs must be paid the same amount in percentage terms. The resolution plan may involve differential payment to different classes of creditors. It can be mentioned in the resolution plan that claims of the guarantors on account of subrogation shall be extinguished. Similarly Claim of erstwhile directors for giving guarantee can also be stated in the plan to be extinguished. Earlier, SC judgement in SBI VS V Ramkrishnan was followed.*
- *Prospective Resolution applicant cannot be burdened with undecided claims after his resolution plan is accepted. · Distribution of profits during CIRP will not be utilised for payments to creditors.*
- *Vital decisions u/s 28 cannot be delegated by COC. However sub-committees can be formed with the condition of ultimate approval of COC.*

Issue Involved/Topic : Can dissenting financial creditor be discriminated? *Case No – 2*
Title : Rahul Jain Vs. Rave Scans Pvt Ltd
Citation (2020) 113 taxmann.com 342 (SC)
Forum : Supreme Court Date of Order : 08.11.19

Background	Ruling
• The Process of CIRP initiated against M/s Rave Scans on dated 25.01.17 U/s 10 • Resolution Plan approved by the NCLT • M/s Hero Fincorp challenged the order on the ground that the plan was discriminatory as it did not treat secured financial creditors equally. • NCLAT referring to the amendment made in Reg. 38 on 05.10.18, reversed the order of NCLT • An appeal was filed in the Supreme Court	The Apex Court, not disputing with the fact that M/s Hero Fincorp was not paid equally even after falling within the group of secured creditor, reversed the order of NCLAT and restored the order of NCLT on the ground that the provisions of the amended regulation 38 dated 05.10.18, shall not apply in the present case, because the CIRP was initiated prior to the amendment, where the Resolution Plan was approved by a majority of 75% voting by the CoC

Issue Involved/Topic : Whether Resolution Plan approved by CoCbe rejected? *Case No – 3*
Title : SBI vsUshdev International Ltd
Citation : (2019) 111 taxmann.com 178 (NCLT – Mum.)
Forum : NCLT Date of order : 07.11.19

Ruling

The A.A directed the plan to be approved, which was rejected by the CoC with 77.61 %, contending that the CoC didn't implement it's "Commercial Wisdom" while rejecting the resolution plan. NCLT observed that on the face of it (a) neither there was existence of prudence nor (b) existence of commercial wisdom.

Issue Involved/ Topic : Limitation Act & IBC *Case No – 4*
Title : TJSB Sahakari Bank Vs. Unimetal Castings Ltd
Citation : CP (IB) -3622/I&BP/MB/2018
Forum : NCLT Date of Order : 25.01.19

Background	Ruling
• TJSB made an application U/s 7 • CD contented that the application is time barred on the ground that the cause of action arose more than 3 years back i.e dated 30.06.2015 and the application was made on 23.08.2018, however the balance sheet of the CD for financial year ending 2017, showed a liability as loan in the name of the bank.	The A.A contended that "When liability is shown in the balance sheet, that is clear acknowledgement of debt by the corporate debtor. There are umpteen numbers of judgement to say that debt shown in the balance sheet is an acknowledgment of liability" and made an order accepting the application of the financial creditor.

Issue Involved/ Topic : Limitation Act & IBC/ Time barred debt *Case No – 5*
Title : Jignesh Shah Vs. Union of Indi
Citation : [2019] 109 taxmann.com 486 (SC)
Forum : Supreme Court Date of Order : 25.09.19

Background	Ruling
• *IL & FS Financial Services on* 01.10.2016 made a petition to Bombay High Court for winding up *LA- FIN Financial Services.* • *LA- FIN* had denied tohonour the obligation, of purchasing shares (Put Option) of MCX-SX from IL & FS under a letter of undertaking on exercise of put option by IL & FS on 16.08.2012. Thus, Financial Debt got due on 16.08.-2012. • IBC came in to force on 01.12.2016 • The pending suit got transferred and eventually admitted in NCLT, Mumbai Bench, on 28.08.2018 in IL & FS Financial Services Ltd Vs. La - Fin Financial Services Pvt Ltd.	The Hon'ble Supreme Court on the appeal made by Jignesh Shah, shareholder of the La- Fin Financial Services Pvt Ltd, reversed the order of the NCLAT, contending "We therefore allow Civil Appeal (Diary No. 16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set

• NCLAT dismissed the appeal of the petitioner *Jignesh Shah* for reversing the order of NCLT, on the ground that the debt was time barred. Further Both NCLT and NCLAT held the impugned "Put Option transaction" as Financial Debt. • NCLAT held that IBC was enforced on 01.12.2016 and the application for initiating CIRP was admitted on 28.08.2018 was within the limitation period.	aside."

Comments:

Bk Educational Services Pvt Ltd V. Parag Gupta & Associates [2018] 98 taxmann.com 213 (SC), was relied upon by the Hon'ble *Supreme Court.*

In the above case, NCLAT held that the provision of S.238A of IBC did not apply on the application made U/S. 7/9 during the period from 01.12.2016 till 06.06.2018. The apex court reversed the order, on the contention that in order to understand the object behind substitution of S.238 A, on 06.06.2018, the provisions of it should be given retrospective effect. It is worth noting here that Hon'ble Supreme Court did not deal with the issue, whether "Put Option" will be a Financial Debt or not. SC Set aside the NCLT & NCLAT judgements only on the ground of time barring effect. However, in the author's view there appears to be merit in NCLT & NCLAT view of holding "Put Option" as Financial Debt.

Issue Involved/ Topic : Guarantee/ CIRP Initiated against two corporate guarantor *Case No – 6*
Title : Dr. Vishnu Agarwal Vs. M/s Piramal Enterprises Ltd
Citation : [2019] 101 taxmann.com 464 (NCLAT)
Forum : NCLAT Date of Order : 08.01.19

Background	Ruling	Current Status
• M/s Piramal Enterprise gave loan to All India Society for Advance Education and Research, against the corporate guarantee of two companies. • M/s Piramal Enterprises initiated CIRP process against the two corporate guarantors simultaneously.	• NCLAT held that, while a CIRP has been initiated against a guarantor for a set of claim, an another CIRP cannot be initiated against another guarantor for the same set of claim, contending that two CIRPs cannot be entertained for the same set of claim at the same time.	The matter is pending with the supreme court

Comments :

The judgment of NCLAT stands divergent to the very concept of guarantee where the liability of both the principal debtor and the surety is co – extensive, and a legal action can be initiated against either any one of them or both and where the sequence of such legal action initiated is immaterial. It also stood inconsistent to the concept of Double Proof V. Double Dip.

Issue Involved/ Topic : Guarantors & Moratorium *Case No –7*
Title : Schweitzer Systemtek India Pvt Ltd Vs. Phoenix ARC Pvt Ltd.
Citation : [2018] 92 taxmann.com 146 (NCLT - Mum.)
Forum : NCLT Date of Order : 03.07.17

Ruling

The NCLT contended that," "The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor."

Note : *NCLAT dismissed an application against the said order and upheld the decision of the NCLT* .

Issue Involved/ Topic : Guarantors & Moratorium *Case No –8*
Title : NUI Pulp & Paper Industries Vs. Roxcel Trading Gambh
Citation : [2019] 108 taxmann.com 356 (NCL-AT)
Forum : NCLAT Date of Order : 17.07.19

Background	Ruling
• CD contended that the debt was disputed and needed more time to reply to the application made u/s 7 • Applicant apprehended that CD would dispose its property, hence abusing the process under IBC • NCLT passed an order under Rule 11 of the code, barring the directors to dispose off the property of CD • CD challenged the order	The Appellate Authority while upholding the order made by the NCLT contended that there was no restriction on NCLT from making such order under rule 11 of NCLT and hence it can provide such interim relief.

Issue Involved/ Topic : Applicability of moratorium on counter claim. *Case No – 9*
Title : SSMP Industries Ltd Vs. Perkan Food Processors Pvt Ltd
Citation : [2019] 110 taxmann.com 212 (Delhi)
Forum : High Court Date of Order : 18.07.19

Background	Ruling
• A counter claim was filed by the defendant in a money suit filed against a claim from the plaintiff. • Plaintiff went into insolvency. • It was to be decided whether the counter claim to be stayed in the view of section 14 of the code	High Court was in the view that the claim made by the defendant is still to be adjudicated, and unless a claim is determined it will not have any effect on the assets of the CD, hence both the claims made through suits in the court be carried on. However, once the claim is determined, the creditor cannot file a claim to recover such debt but the CD can proceed to recover the same.

Issue Involved/ Topic : Guarantors & Moratorium *Case No – 10*
Title : SBI Vs. V. Ramakrishnan&Anr
Citation : [2018] 96 taxmann.com 271 (SC)
Forum : Supreme Cour Date of Order : 14.08.18

Background	Ruling
• NCLT admitted an application from a personal guarantor, restraining an appellant from initiating CIRP against the personal guarantor. • NCLAT dismiss the application against the order of NCLT	The apex court reversed the order and clarified that, Moratorium shall only be applicable only to the CD and not to the personal guarantor

Case No –11
Issue Involved/ Topic : Whether corrected application can be admitted even if it is made beyond the time specified in the code?
Title : Surendra Trading Company Vs. JK Jute Mills Co Ltd &Ors.
Citation : [2017] 85 taxmann.com 372 (SC)
Forum : Supreme Court Date of Order : 19.11.17

Background	Ruling
• NCLAT rejected an appeal against order of NCLT, where NCLT had rejected to admit an application as its resubmission was made beyond the time specified in the code.	The apex court contended that the time limit specified under the code is directory and not mandatory, so an application can be accepted in the light of a proper condonation is made.

Case No – 12
Issue Involved/Topic : Application for extension of time limit for completion of CIRP process.
Title : Quantum Ltd Vs. Indus Finance Corporation
Citation : [2018] 93 taxmann.com 122 (NCL-AT)
Forum : NCLAT Date of Order : 20.02.18

Background	Ruling
NCLT had rejected the application in the ground that it was made after expiry of 180 days	The order was reversed. The appellate authority stated an application for extension of time limit for completion of CIRP process can be accepted even after expiry of 180 days,

	through a resolution passed by CoC by majority vote of 75% of voting share, as no provision in the code was present that required the application shall be made before expiration of 180 days

Issue Involved/ Topic : Approval of resolution plan *Case No : 13*
Title : RBL Ltd Vs. MBL Infrastructure
Citation:[2018] 97 taxmann.com 231 (NCLT - Kolkata)
Forum : NCLT Date of Order : 30.03.17

Background	Ruling
One of the Corporate Guarantor submitted Resolution Application. It was challenged by bank that newly inserted section 29A does not allow it.	NCLT held Since corporate guarantee is not invoked during CIRP, Co. guarantor had not committed any default. So resolution plan submitted is not barred U/s 29A.

Issue Involved/Topic : Approval of Resolution Plan *Case No -14*
Title : K. Sashidhhar Vs. Indian Overseas Bank Ltd
Citation :
Forum : Supreme Court Date of Order : 05.02.19

Background	Ruling
In the CIRP of Kamineni Steel & Power India Pvt Ltd, NCLT, Hyderabad, had approved the resolution plan on the ground that FCs who did not participate in the voting, will not be counted for the purpose of the majority vote (Expressed approval in favour of the resolution plan of 66.67 %, dissenting FCs of 26.97 % and FCs with 6.36 % didn't participate in the voting. By not taking into account FCs with 6.36 %, the percentage of approval came to 78.63 %, which was higher than the requisite percentage of 75 %)Later 3 financial creditors approached NCLAT U/s 61(3) of the code against the above order of NCLT / NCLAT reversed the order of NCLT on the ground that the plan was not approved by the requisite majority.	The Apex court : • Upheld the decision of NCLAT • Stated that the role of NCLT/NCLAT is restricted only to satisfying itself that Resolution plan so submitted is in conformity to provisions of S.30(2) of the code • Stated that the CoC has the complete discretion of approving a resolution plan, and the decision of the CoC is non – justiciable

Note : *The requisite percentage for approving any resolution plan has been brought down to 66% from 75% w.e.f 06.06.2018. In the above case SC also made an order in matter relating to CIRP of Innoventive Industries Ltd (IIL), where NCLAT affirmed the order of NCLT, Mumbai Bench rejecting the Resolution Plan. In the IIL case the resolution plan was approved by 55.73 %, 15.15 % voted against it. It was argued that those didn't vote shouldn't be counted and as such the requisite percentage should be treated at 78 % {55.73/(55.73+15.15)*100}. In IIL case it was pleaded before NCLAT that (1) NCLT and NCLAT should exercise judicious mind (2) Resolution professional opined through an affidavit that there is a possibility of reviving the company. It was equally argued by the other side i.e Dissenting FC in IIL, that this have taken commercial decision and it is not open to judicial scrutiny. SC approved the NCLAT decision in both the cases*.

Case No – 15
Issue Involved/Topic : Whether a promoter can be a Resolution applicant if CD is MSME
Title : Sarvana Global Holdings Ltd &Anr Vs. Bafna Pharmaceuticals Ltd &Anr.
Citation:[2019] 108 taxmann.com 358 (NCL-AT)
Forum : NCLAT Date of Order : 04.07.19

Background	Ruling
NCLT approval of a resolution plan, made by a promoter, duly approved by CoC, where CD was an MSME, was challenged by the appellant before NCLAT.	It was argued by the appellant that they were prejudiced by the deferment of their resolution plan and no chance was eventually given to them. It was also contended by the appellant that the admitted resolution plan of promoter of CD (MSME) do not satisfy S. 25/29 & 29 A of the code. It was held by the NCLAT that when promoter of an MSME CD

	submits a resolution plan, it is open to CoC to defer the process of issuance of IM if the offer of promoter is viable and feasible plan, maximising the asset value and balancing the interest of all the stake holders, it is not required for the promoter of MSME Cd to follow all the procedures and accepting proposals u/s 12A, IBC. NCLAT dismissed the application. Thus the gist of NCLAT judgement here is that if a CD is MSME it is not necessary for the promoters to compete with other resolution applicants to regain the control of CD.
Comments : *The Apex Court in Civil Appeal No – 5344/2019, by its order delivered on 15th July, 2019 dismissed the appeal filed against the above NCLAT order on the ground that no case has been made out and hence no interference with the NCLAT order is required.*	
Issue Involved/ Topic : Existence of a claim prior to the code. *Case No - 16* Title : Sirpur Paper Mills Ltd Vs. I.K Merchants Pvt Ltd. Citation:[2020] 113 taxmann.com 364 (Calcutta) Forum : High Court Date or Order : 10.01.20	
Background	Ruling
Certain relevant facts are required to be stated at the outset; (*i*) the Reference was made on 18th June, 2001 and the Arbitrator was appointed on 2nd March, 2006. (*ii*) the arbitral Award was delivered on 7th July, 2008 for a sum of Rs.3,21,927.70/- at 9% per annum in favour of the respondent/claimant(*iii*) the present application for setting aside of the Award was filed on 31st October, 2008 (*iv*) Operational Creditors initiated proceedings under the IPC against the petitioner (Corporate Debtor) in Sept. 2017. (*v*) By an order dated 19th July, 2018, the adjudicating authority declared that the moratorium order under Section 14 shall cease to have effect (*vi*) the application under Section 34 of the 1996 Act was taken up for hearing by this court on 11th December, 2019. (vii) Petitioner, (Award Debtor) pleaded for setting aside the hearing of application made under S. 34 of Arbitration	• High Court rejected the plea of the petitioner • It stated that, Corporate insolvency resolution proceedings cannot be used to defeat a claim or a dispute which existed prior to the insolvency proceedings, Both "K.Kishnan" and "Mobilox" make it clear an earlier dispute of notice of a suit or an arbitration must be given precedence to the insolvency proceedings"NOTE : "K.Kishnan" & "Mobilox" refers to the cases earlier decided by the supreme court.
Issue Involved/ Topic : Exclusion of days for calculation of timeframe for completion of CIRP process. *Case No – 17* Title : SBI Vs. Manibhadra Polycot &Ors Citation : [Civil Appeal Nos. 4392-4393/ 2019] Forum : Supreme Court Date of Order : 09.08.19	
Background	Ruling
NCLAT made an order dated 01.05.19 excluded a period of 21 days in sets of 7, 11 & 3 days	The apex court while setting aside the order of NCLAT, did not allow exclusion of two sets of days 7 & 11 days on the ground that those delay were not on account of any litigation.
Issue Involved/ Topic : Fee of RP, when CoC not required to be formed. *Case No – 18* Title : S3 Electricals and Electronics Pvt Ltd Vs. Brian Lau &Anr Citation : [Civil Appeal No. 103/2018 with Civil Appeal No. 835/2018] Forum : Supreme Court Date of Order : 05.08.19	
Background	Ruling
• Matter settled between the parties	The apex court observed that under such circumstances,

• NCLAT closed the proceeding and directed that NCLT shall fix the fee of the RP, which shall be borne by CD.	where stage for formation of CoC was not reached, Fee of the RP shall be fixed by the A.A and will be borne by the creditor making the application.

Issue Involved/Topic : Power of CoC to replace RP after 270 days and whether NCLT can decide the fee of a RP *Case No – 19*
Title : Sanjay Kr Ruia Vs. Catholic Syrian Bank Ltd &Anr
Citation:[CA (AT)(Insolvency) No 560/2018]
Forum : NCLAT Date of order - 11.09.19

Ruling

The applicant is erstwhile resolution professional in the CIRP of SN Plumbing Pvt Ltd. The CoC removed the said RP after the expiry of 270 days. NCLT converted this CIRP into Fast Track CIRP and extended the time beyond 270 days by another 90 days. RP filed an application against the NCLT decision before the NCLAT.

- NCLAT held that the CoC had no jurisdiction of replacing a RP after expiry of 270 days as CoC ceases to exist after expiry of the said period. Even if the decision is taken before completion of the said period and in the absence of any order of NCLT, the same cannot be put into force.
- The erstwhile RP, who submitted details of Rs. 1,45,92,064 and contended before NCLAT that the same is approved by CoC. The respondent being FC contented that the same amount was not approved by CoC. NCLAT directed that the resolution cost will be determined by the Adjudicating authority in this case.

Issue Involved/ Topic : Record of default. *Case No – 20*
Title : Sunrise 14 A/s Denmark Vs. Ravi Mahajan
Citation : [2018] 96 taxmann.com 488 (SC)
Forum : Supreme Court Date of Order : 03.08.18

Background	Ruling
The appellate tribunal had set aside an order of admission on the ground that the record of default U/s 7(3)(a) was missing and the application so made was made by an advocate and the applicant.	The apex court reversed the order contending that the provision of the statutes does not apply on the foreign companies while making an application, which are almost impossible for a foreign company to comply with. It also observed that an application made by an advocate is maintainable.

Judgement Relied:*Macquaire Bank Ltd Vs. Shilpi Cable Technologies Ltd* [2017] 88 taxmann.com 180 (SC) dated 15.12.17

Issue Involved/Topic : Applicability of S.14 on criminal proceeding. *Case No - 21*
Title : Tayal Cotton Pvt Ltd Vs. State of Maharashtra &Ors
Citation : [Criminal WP 1437/2017]
Forum : Bombay High Court Date of Order : 06.08.18

Ruling

The Hon'ble High court held that provision contained in S.14 of the code only prohibits a suit or a proceeding of a like nature and does not include any criminal proceedings.

Issue Involved/Topic : Copy of Resolution plan whether to be sent to suspended members of the board. *Case No – 22*
Title : Vijay Kr Jain Vs. Standard Chartered Bank
Citation:[2019] 102 taxmann.com 14 (SC)
Forum : Supreme Court Date of Order : 31.01.19

Ruling

The apex court observed that copy of resolution plan is to be provided to the members of suspended board of directors and OCs participating in COC, along with notice of meeting of CoC.

Issue Involved/Topic : Reverse Corporate Insolvency Process *Case No – 23*
Title : Flat Buyers Association Winter Hills – 77, Gurgaon Vs. UmangRealtech Pvt Ltd
Citation : CA (AT) (Insolvency) No. 926 of 2019
Forum : NCLAT Date of Order : 04.02.20

Background	Ruling
• CIRP of UmangRealtech Pvt Ltd was initiated at the application of two allottees, who later became member of the association. • The members of the association though wanted the corporate insolvency process for resolution but did not want approval of any plan made by the third party. • NCLT, made an order that the applicant to deposit a sum of Rs. 2 lakh to keep the CD a going concern through the IRP.	The NCLAT observed the following that, • If an application for initiating CIRP is made, the claim so filed shall be restricted only to the project to which the applicant is connected to and not to any other project of the CD. Accordingly the said project is the asset of the CD to be taken in account in the CIRP. • The financial institution, Bank being the secured financial creditors to be the first to have a claim over the assets of the CD, would not be interested in such assets of the CD, which contains only the units/ apartments in the project unlike the homebuyers who are the unsecured financial creditors. • The amount of Rs. 2 lakh as directed by the NCLT to be deposited by the applicant for keeping the CD as going concern would not suffice to meet the object, allowed a promoter of the CD to remain outside the process of insolvency to finance the project for the purpose of keeping the CD as a going concern.Based on the above observation the NCLAT, introduced reverse corporate insolvency process, as it was impossible in such case as above to maintain the normal process of CIRP.

Issue Involved/ Topic : Application U/s 66 for fraudulent and U/s 43 preferential transaction *Case No - 24*
Title : IDBI Bank Ltd Vs. JaypeeInfratech Ltd
Forum : Supreme Court Date of Order – 12.12.19

Background	Ruling
• JaypeeInfratech Ltd (JIL) was owner of 858 acres of land valued at about Rs. 5900 crore. Jayprakash Associate Ltd (JAL) is 71% holding company of JIL. JAL took a loan of Rs. 20,510 crore on the security of the above land of the subsidiary company. JIL being the subsidiary company later went in to CIRP. • Mortgage created amounted to PUF Transaction • Mortgage created for lenders of holding to "JAL" • NCLT ordered to reverse the transaction and ordered for release and discharge of SI created through such mortgage & property so mortgaged be vested in "JIL" henceforth. • The impugned transaction is a fraudulent transaction U/s 66 • Following factors were considered by NCLT to declare it fraudulent a. Timing of impugned transaction b. No lender/ shareholder approval c. No counter-guarantee & consideration from JAL d. It was against JLF decision e. AA also held it to be preferential on following grounds. f. RP formed an opinion g. Preference has been given to related party • NCLAT set aside NCLT Order – August 2019	• SC stays NCLAT order on 858 acre on Homebuyers challenge and directed "JAL" to return land to "JIL" • Homebuyers also challenged the considering of "JAL's" lender as FC in "JIL" because JIL gave guarantee to the JAL lenders. • It was held by the Supreme Court that "JAL" lenders cannot be FC in "JIL"

Issue Involved/ Topic : Appeal filed by the Income Tax Department *Case No – 25*
Title : ShamkenMultifab Ltd s. DCIT, CC-20, New Delhi
Citation : [2020] 113 taxmann.com 329 (Delhi – Trib)
Forum : ITAT, Delhi Bench A Date of Order – 22.10.19

Ruling
During Moratorium U/s 14 of IBC, 2016 appeal filed by the Revenue against the assesse in Income Tax Act, 1960 cannot be allowed to continue.
Issue Involved/ Topic : Constitutional Validity of IBC *Case No – 26* Title : Swiss Ribbons Pvt Ltd Vs. Union Of India &Ors Citation:Forum : Supreme Court Date of Order : 25.01.19
Ruling
• The resolution process is non-adversarial. • It is a beneficial legislation and not recovery legislation for creditors. • Classification between FC and OC is neither discriminatory nor arbitrary nor in violation of Article 14. • Withdrawal can be allowed even after EOI. • RP has no adjudicatory power. • Code is proving to be largely successful. Defaulter's paradise is lost.
Issue Involved/ Topic : Resolution Plan *Case No – 27* Title : Rajputana Properties Pvt Ltd Vs. Ultratech Cement Ltd &OrsCitation : CIVIL APPEAL No. 10998 OF 2018 Forum : Supreme Court Date of Order : 19.11.18
Ruling
• It was held by the apex Court that approval of the Adjudicating authority is not a mere requirement or formality, though the NCLT is not permitted to change or modify the terms of the plan, the ultimate authority to approve or reject a plan vests with the NCLT. It should consider the followings : (i) whether the Resolution Plan complies with Section 30(2)? (ii) whether the plan is fair and equitable(iii) whether there is any unjust discrimination not envisaged by law? (iv) whether the plan maximises the value of assets and balances the interests of all the stakeholders?
Issue Involved/ Topic : Repugnancy of Statutes and overriding effect of IBC. *Case No - 28* Title : M/s Innoventie Industries Ltd Vs. ICICI Bank &Anr Citation : [2017] 84 taxmann.com 320 (SC)Forum : Supreme Court Date Of Order : 31.08.17
Ruling
• A FC can file an application U/s 7 for the default of financial debt owed to any other FC of the CD. It need not be a debt to the applicant FC. • The non-obstante clause of the IBC will prevail over any other state statute • Once the Insolvency has been ordered, the Board of Directors ceases to have the power to represent the company.
Issue Involved/ Topic : *Case No – 29* Title : M/s ShamraoBaliram Vs. Vijay Kr V.Iyer (RP for Murali Industries Ltd) Citation:[CA (AT)(INSolency) No 925 of 2019] Forum : NCLAT Date of Order : 24.01.20
Ruling
• NCLAT held that the claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such resolution plan submitted by the resolution professional is approved, then those claims would stand extinguished.
Issue Involved/ Topic : Whether redeemable preference shareholders are FCs. *Case No – 30* Title : Tata Capital Financial Services Ltd Vs. Mcnally Bharat Engineering Co Ltd. Citation : CP (IB) No 843/KB/2019 Forum : NCLT, Kolkata Date Of Order : 10.02.20
Ruling
A holder of a Redeemable Preference shares cannot sue the company for redeeming its shares except out of the profit of the company or out of the proceeds of a fresh issue of share made for the purposes of such redemption. On a combined reading of S. 55 of the Companies Act, 2013 read with rule 9 of the Company (Share Capital) Rules, 2014 and S. 5(7) & (8) of the code, a preference share holder cannot be classified as a financial creditor falling under S. 5(7) of the code and the applicant's claim is not a financial debt under S 5(8) of the code.

Liquidation of Corporate Debtor - Overview

CA BINAY KUMAR SINGHANIA

Liquidation is an event that usually occurs when a company is declared insolvent. In most cases as the operations of the company are not revenue generating the *assets of the debtor is utilised* to *pay-off creditors and other stakeholders, based on the priority of their claims.*

Initiation of Liquidation Process (*Section-33*)

Liquidation process can be initiated as per section 33 under following situation:-

1) Where the Adjudicating Authority,
   a) does not receive a Resolution Plan on or before the expiry of the CIRP period,
   b) rejects the Resolution Plan under Section 31 for the non-compliance of the requirements specified therein,

   Mandatory contents of Liquidation order

   - The order passed by the Adjudicating Authority shall *lay down the manner* in which the Corporate Debtor is to be liquidated.
   - *Issue a Public Announcement* stating that the corporate Debtor is in Liquidation.
   - *Dispatch such an order* to the authority with which the corporate Debtor is registered.
2) Where the Committee of Creditors decides to liquidate the Corporate Debtor before passing of a resolution plan *(approved by at least sixty-six percent of the voting share)*,the Adjudicating Authority shall pass a liquidation order.
3) Where the Resolution Plan as *approved by the Adjudicating Authorityis contravened by the concerned corporate debtor*.
4) Once the Adjudicating Authority determines that the Corporate Debtor has contravened the provisions of the Resolution Plan as stated in the application under sub-section (3),it shall pass a liquidation order.

   Powers of the Board of Director vested in Liquidation

   - All powers of the Board of Director, KMPs and the partners of the corporate debtor shall cease to have effect and be *vested in the liquidator.*
   - The *personnel* of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator.

Effects of the Order Passed

a) Subjected to section 52, *no suit or other legal proceedings shallbe instituted* by or against the Corporate Debtor.

   Provided that a *suit or legal proceedingmay be instituted* by the LIQUIDATOR on *behalf of the Corporate Debtor* taking prior approval of the Adjudicating Authority.

b) However, *legal proceedings can be instituted* to such *transactions* as maybe *notified by the Central Government* in consultation with any financial sector regulator.

c) The *order* shall be *deemed to be a notice of discharge* to all the officers, employee and workmen of the Corporate Debtor *except when the business* of corporate debtor *is in continuation* by the liquidator during liquidation process.

Liquidation Cost

Liquidationcost under clause (16) of section 5 means-

(i) fee payable to the liquidator as liquidator's fee;

(ii) remuneration payable by the liquidator for appointment of other professionals;

(iii) costs incurred by the liquidator for verification and determination of a claim shall form part of liquidation cost

(iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;

(v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;

(vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower;

(vii) the amount repayable to contributories;

(viii) any other cost incurred by the liquidator which is essential for completing the liquidation process

However, cost incurred by the liquidator in relation to compromise or arrangement under section 230 of the Companies Act, 2013, if any, shall not form part of liquidation cost.

Contribution to Liquidation Cost (Reg-2A)

If the COC did not approve a plan under regulation 39B(3) of CIRPregulations, the liquidator shall call upon the financial creditors, being financial institutions, to contribute the excess of the liquidation costs over the liquid assets of the corporate debtor, as estimated, in proportion to the financial debts owed to them by the corporate debtor.

When a plan as per regulation 39B(3) has been made and approved by the COC or contributions made under regulation 2A(1) is received, the amounts received shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank, within seven days of the passing of the liquidation order.The amount contributed shall be repayable with interest at bank rate referred to in section 49 of the Reserve Bank of India Act, 1934 (2 of 1934) as part of liquidation cost.

Appointment of Liquidator

After the Adjudicating Authority passes the Liquidation order the *resolution professional* who had been appointed for the CIRP *shall act as the Liquidator* (provided a written consent in Form)for the Liquidation Process unless the same has been replaced by the Adjudicating Authority.

Replacement of Resolution Professional by the Adjudicating Authority

a) The resolution plan submitted by the resolution professional was rejected for failure to meet therequirements;

b) The Board recommends the replacement of the same;

c) The Resolution Professional fails to submit hiswritten consent.

Replacement of Liquidator

Where the *resolution plan was rejected as it contained deficiencies under section 30 (2)* or*there is a lack of written consent* of the resolution professional the Adjudicating Authority may direct the Board to propose another name to be appointed as liquidator.

The Board shall propose the name of the person to be appointed as liquidator along with written consent within 10 days of the direction issued.

On receipt of the proposal of the Board the Adjudicating Authority shall appoint such person as the liquidator.

Liquidator's fee

The liquidator shall charge such fee for the conduct of the liquidation which shall be paid to the liquidator from the proceeds of the liquidation estate under section 53 as per

1. the fees decided by the COC under Regulation 39D of the CIRP regulations, or;
2. In other cases, he shall be entitled to the CIRP fees for the period of compromise or arrangement under section 230 of the Companies Act, 2013, and
3. as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under

Amount of Realisation / Distribution (In rupees)	Percentage of fee on the amount realised / distributed		
	in the first six months	in the next six months	there-after
Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	5	3.75	1.88
On the next 9 crore	3.75	2.8	1.41
On the next 40 crore	2.5	1.88	0.94
On the next 50 crore	1.25	0.94	0.51
On further sums realized	0.25	0.19	0.1
Amount Distributed to Stakeholders			
On the first 1 crore	2.5	1.88	0.94
On the next 9 crore	1.88	1.4	0.71
On the next 40 crore	1.25	0.94	0.47
On the next 50 crore	0.63	0.48	0.25
On further sums distributed	0.13	0.1	0.05

Note: Where the fee is as per above, the liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed.

Powers and Duties of Liquidator.

The code states the duties and powers in Section 35. In addition Section 35 power and functions of the liquidator also include the following:-

- Make a public announcement

  The liquidator shall make a public announcement in Form B of Schedule II within five days from his appointment as per Regulation 12.

- List of stakeholders

  The Liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted accepted, the same has to be filed with the Adjudicating Authority within 45 days from the last date for receipt of claim and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3)

- Formation of Stakeholder Consultation Committee

  The Liquidator shall form a Stakeholder Consultation Committee within 60 days from the date of commencement of Liquidation Proceeding under section 33. The Composition of the committee should be in accordance to Regulation 31A of Liquidation Regulations.

- Reporting (Regulation 5)

  Liquidator has to submit the following Reports to the Adjudicating Authority, which are :-

  1. Preliminary Report- to be submitted within 75 days from the liquidation commencement date (Regulation 13.)
  2. Early Dissolution- If appear to the liquidator under Regulation 14 that realizable properties of the corporate debtor are insufficient to cover the cost of the liquidation process and the affairs of the corporate debtor do not require any further investigation, then it may apply for early dissolution
  3. Assets Memorandum as per regulation 34 on forming the liquidation estate under section 36, the liquidator shall prepare an asset memorandum in accordance with this Regulation within seventy-five days from the liquidation commencement date.
  4. Progress Reports- as per regulation 15 first progress report within 15 days the end of the quarter in which he is appointed; subsequent Progress Report(s) within fifteen days after the end of every quarter during which he acts as liquidator.
  5. Asset Sales Report as per regulation 36on sale of an asset, the liquidator shall prepare an asset sale report in respect of said asset, to be enclosed with the Progress Reports .
  6. minutes of consultation with stakeholders- Considering that no definite time period has been stated in the code or the regulation, the time period applicable for COC meeting minutes of 48 hours is adhered to.
  7. final report- as per regulation 45,when the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated. The liquidator shall submit an application along with the final report and the compliance certificate in form H to the Adjudicating Authority

Power of Liquidator to access information for admission and proof of claims from the following sources :-

- an information utility ;
- credit information system regulated under any law ;
- any agency of the Central , State or Local Government
- information systems for financial and non-financial liabilities;
- any database maintained by the Board;
- any other source as may be specified by the Board.
- Consolidation of Claims
  1) The Liquidator shall receive or collect the claims of the creditors within a *period of thirtydays* from the *date of commencement of the liquidation process.*
  2) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement
  3) A creditor may withdraw his claim within Fourteen days of its submission.
- Verification of Claims

  After submission of the claims by the creditors the liquidator shall verify the same and may require any creditor or corporate debtor to produce any other document as he thinks necessary;

  Admission or Rejection of Claims

  - The Liquidator after verification of claims shall either admit or reject the claim.
  - Provided that where the *liquidator rejects the claim* he shall record in writing the reasons for such rejection.

- The Liquidator shall communicate his *decision of admission or rejection ofclaim t*o the Creditor or the Corporate Debtor within 7 days of such admission or rejection.

The *Liquidator shall determine* the value of claims admitted in such manner as may be specified by the board.

Appeal against the decision of Liquidator

A creditor may appeal to the *Adjudicating Authority* against the decision of the liquidator of accepting or rejecting the claim within 14 days of the receipt of such decision.

- Update and Maintain Books of Accounts and other Registers

  As per regulation 6, the liquidator shall update and maintain the Books of Accounts and Registers mentioned in Regulation 6 (2). The same needs to be maintained for a period of Eight years.
- Appoint Professional (Regulation 7)

  A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost.
- Realisation Of Assets

  The liquidator under Regulation 32 may sell-
  (a) an asset on a standalone basis;
  (b) the assets in a slump sale;
  (c) a set of assets collectively
  (d) the assets in parcels;
  (e) the corporate debtor as a going concern; or
  (f) the business(s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.

Proving security interest.

As per Regulation 21 the existence of a security interest may be proved by a secured creditor on the basis of

i. the records available in an information utility, if any
ii. certificate of registration of charge issued by the Registrar of Companies
iii. proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

Presumption of security interest

As per Regulation 21A, secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate

Regulation 21A(2) states that where a secured creditor proceeds to realise its security interest, under section 52 it shall pay an amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date

In case a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

Liquidation Estate

For the purpose of liquidation the liquidator shall form an estate of the assetswhich will be called the Liquidation Estate.

Following Assets shall not form part of Liquidation Estate

- Assets owned by third party which are in possession of the corporate debtor;
- Assets in security collateral held by financial services providers;
- Personal assets of any shareholder or partner of corporate debtor;
- Assets of any Indian or foreign subsidiary of Corporate Debtor;
- Any other asset as may be specified by the Board;

NCLAT Ruling:-

SBI Vs. Moser Baer

PF/ Gratuity not included in Liquidation Estate under section 36 and hence does not form part of the workmen claims.

Proceeds Of Liquidation And Distribution of Proceeds

- All money to be paid in to bank account (Regulation 41)

The liquidator shall open a bank account in the name of the corporate debtor followed by the words 'in liquidation'*, in a scheduled bank*, for the receipt of all moneys due to the corporate debtor.

The liquidator shall deposit in the bank account all moneys, including cheques and demand drafts received by him as the liquidator of the corporate debtor, *and the realizations of each day shall be deposited into the bank account without any deduction not later than the next working day*.

The liquidator may maintain a cash of one lakh rupees or such higher amount as may be permitted by the Adjudicating Authority to meet liquidation costs

- Distribution of Assets

Section 53 of the Code states the order of priority in which the proceeds from the sale of the liquidation shall be distributed.

Subject to the provisions of section 53, regulation 42 states the liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.

The liquidator shall distribute the proceeds from realization within ninety days from the receipt of the amount to the stakeholders. *The insolvency resolution process costs, and the liquidation costs shall be deducted before such distribution is made*

- Completion of Liquidation

The liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencementdate, *notwithstanding pendency of any application for avoidance of transactions* under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof.

However, where the sale of corporate debtor is attempted as a going concern under regulation 32A(1), the liquidation process may take an additional period up to ninety days.

If the liquidator fails to liquidate the corporate debtor within one year, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation

Secured creditor in liquidation proceedings (Section 52)

A secured creditor in the liquidation proceedings may relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or it may realise its security interest as per the procedure laid in section 52 of the code.

As per Regulation 37 a secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset

Within twenty one days of receipt of the intimation by the Secured Creditor, the liquidator shall inform if any person is willing to buy the secured asset before the expiry of thirty days from the date of intimation at a price higher than the price intimated. In this case the secured creditor shall sell the asset to such person.

Where no such intimation is provided to the Secured Creditor then he may realize the secured asset in the manner it deems fit, but at least at the price intimated by him earlier to the Liquidator.

Excess/ Deficit realisation of Security Interest

Where the enforcement of the security interest yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall account to the liquidator for such surplus and tender to the liquidator any surplus funds received from the enforcement of such secured assets. However if the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in section 53.

Realization of Liquidation Cost (Under Section 52)

The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in section 52, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

Resistance in realization of Security Interest

If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor

to realise such security interest in accordance with law for the time being in force.

The Adjudicating Authority, on the receipt of an application from a secured creditor may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

Model Timeline for Liquidation Process (Regulation 47)				
Sl. No.	**Section / Regulation**	**Description of Task**	**Norm**	**Timeline (Days)**
1	Section 33 and34	Commencement of appointment ofliquidator liquidation and	LCD	0 = T
2	Section 33 (1) (b) (ii) / Reg. 12 (1, 2,3)	Public announcement in Form B	Within 5 days of appointment of liquidator.	T + 5
3	Reg. 35 (2)	Appointment of registered valuers	Within 7 days of LCD	T + 7
4	Section 38 (1)and (5), Reg.17,18 and 21A of LCD	Submission of claims; Intimation of decision on relinquishment of security interest	Within 30 days	T + 30
5	Section 38 (5)	Withdrawal/ modification of claim	Within 14 days of submission of claim	T + 44
6	Reg. 30	Verification of claims regulation12(2)(b) received	Within 30 days from the last date for receipt of claims	T + 60
7	Reg. 31A	Constitution of SCC	Within 60 days of LCD	T + 60
8	Section 40 (2)	Intimation about decision of acceptance/ rejection of claim	Within 7 days of admission or rejection of claim	T + 67
9	Reg. 31 (2)	Filing the list of stakeholders and announcement topublic	Within 45 days from the last date of receipt of claims	T + 75
10	Section 42	Appeal by a creditor against the decision of the liquidator	Within 14 days of receipt of such decision	T + 81
11	Reg. 13	Preliminary report to the AA	Within 75 days of LCD	T + 75
12	Reg. 34	Asset memorandum	Within 75 days of LCD	T + 75
13	Reg. 15 (1),(2),(3), (4) and(5),and 36	Submission of progress reports to AA;Asset Sale report to be enclosed with every Progress Report, if sales are made	First progress report Q-2 Q-3 Q-4 FY: 1 Audited accounts of liquidator's receipt & payments for the financial year	Q1 + 15 Q2 + 15 Q3 + 15 Q4 + 15 15thApril
14	Proviso to Reg. 15 (1)	Progress report in case of cessation of liquidator	Within 15 days of cessation as liquidator	Date of cessation+ 15
15	Reg. 37 (2, 3)	Information to secured creditors	Within 21 days of receipt of intimation from secured creditor	Date of intimation+ 21
16	Reg. 42 (2)	Distributionof theproceedstothe stakeholders	Within 3 months from the receipt of amount	Date of Realisation+90
17	Reg.10 (1)	Application to AA for Disclaimer of onerous property	Within 6 months from the LCD	T + 6months
18	Reg.10 (3)	Notice to persons interested in the onerous property or contract	At least 7 days before making an application to AA for disclosure.	
19	Reg. 44	Liquidation of corporate debtor.	Within one year	T + 365
20	Reg. 46	Deposit the amount of unclaimed dividends & undistributed proceeds	Before submission of application under sub-regulation (3) of regulation 45	
21	Sch-1 Sl. No 12	Time period to H1 bidder to provide balance sale consideration	Within 90 days of the date of invitation to provide the balanceamount.]	

[AA: Adjudicating Authority, LCD: Liquidation Commencement Date, SCC: Stakeholders' Consultation Committee]

LIQUIDATION PROCESS

CA ANKIT GOEL
Founder and Partner
AAA Insolvency Professionals LLP

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016

Effective from 6 th January, 2020

A. LAST TWO LOOPHOLES PLUGGED - PROMOTERS CANNOT TAKE THE COMPANY BACK :

1. It is provided that if a compromise or arrangement is proposed u/s 230 of the Companies Act, 2013, any person who not eligible either u/s 29A or otherwise under the Code shall not be a party to the scheme – Reg 2B
2. A secured creditor after invoking section 52 and deciding to sell his assets himself, shall not sell the assets to any person who is not eligible u/s 29A or otherwise – Reg 37(8)

The first amendment is based on the feedback that the suspended management was looking forward to take over the Corporate Debtor under 230 of the Com-panies Act, 2013 and to achieve this, they were making all efforts to suffocate the CIRP and push the Corporate Debtor to liquidation process.

The second amendment is based on reports that some secured creditors were making arrangements with the suspended management that the secured asset would be sold to them under Sarfaesi Act or otherwise, as the case may be, after invoking section 52 during liquidation process.

These two loopholes were big deterrent and hindrance for finding an acceptable resolution Plan during CIRP and the amendment will now ease the process as the suspended management will not have any such hope.

B. INVOKING SECTION 52 AND REALISING OR SELLING THE SECURED ASSET BY THE SECURED CREDITOR MADE MORE DIFFICULT :

Where any secured creditor decides to sell its asset u/s 52, it shall pay to liquidator following amount - (Reg 21A(2): -

- CIRP Cost as he would have paid if the assets were sold by liquidator with in 90 days of Liquidation Commencement Date
- Liquidation Cost as he would have paid if the assets are sold by liquidator within 90 days of Liquidation Commencement Date
- Any excess amount realised from the sale of assets over the claim amount of the secured creditor shall be paid to liquidator within 180 days
- In case the asset is not sold or realised and the amount payable to Liquidator as per para (c)

above is not certain within 180 days, then thesecured creditor shall pay to the liquidator within 180 days an amount which is the difference of the estimated value of the asset as per liquidator and the amount of claim.

- In case the secured creditor fails to comply the above provisions, then the secured asset will form part of Liquidation Estate and the asset will be sold by the Liquidator.

Earlier w.e.f. 25 th July, 2019 the amendment was made that the secured creditor will decide invoking section 52 along with the submission of claim i.e. with in 30 days from the liquidation commencement date.

Even otherwise, the proceeds from sale to assets would be distributed by the Liquidator to the secured creditor considering the amount of debt and the value of security interest of each creditor.

Therefore, the secured creditors would not now have any advantage to invoke section 52.

C. CORPORATE LIQUIDATION ACCOUNT OF IBBI :

- IBBI will open, operate and maintain a bank account called 'Corporate Liquidation Account' for managing unclaimed dividends or undistributedProceeds.
- Liquidator shall deposit any unclaimed dividend or undistributed proceeds into the Corporate Liquidation Account within 15 days if the due date
- In case Liquidator, fails to deposit then he will deposit along with interest @ 12% from the due date to the actual date of deposit
- The amount would be deposited by the Liquidator along with an application in Form 1 containing the detail of last known details of the stakeholders
- Any stakeholder later may claim any amount from IBBI by an application in Form J.
- IBBI will keep full account of this account and will get it audited also.
- After 15 years of no claim from any stakeholder, the balance in that account would go to Consolidated Fund of India

Earlier the unclaimed divided or undistributed proceeds was required to be deposited with RBI, whereas now the structure of Corporate Liquidation Account is created and the entire responsibility has been taken by IBBI.

IBC AND GST –CROSS CONNECTION!

CA TARUN KR. GUPTA

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC) is considered as one of the biggest success stories in the government's efforts to de-clog the economic system from ill-effects of stressed assets. Similarly the Goods & Services Tax (GST is also a game changer and has transformed the indirect taxation structure in the country. Both these legislations came almost at the same time and both the legislations are presently evolving.

As per IBC laws, tax authorities are treated on at par with operational creditors and eligible to receive payments with others. However, GST framework currently doesn't allow a firm to file current tax dues if it has past dues pending. Penal action has been initiated for non-compliance even in cases where the insolvency resolution process has been initiated or GST registration has been cancelled.This comes in the way of efforts to revive a company under the IBC process. Industry organisations have lobbied with the government on the issue, requesting it to accept current GST dues while giving a moratorium on past ones.

IBC OVERRIDES GST LAW

The Chennai Bench of National Company Law Tribunal (NCLT) recently inter-alia directed Revenue Authorities to allow Corporate Debtors to access the GST portal to file taxes after the commencement of insolvency proceedings. In T. R. Ravichandran, RP Vs The Asst. Commissioner (ST) (NCLT), (in the matter of Kiran Global Chem Ltd.; 2019-TIOLCORP-12-NCLT) the Court observed that, "As to provisions of GST Act, since Section 238 of the Insolvency and Bankruptcy Code having categorically mentioned that IBC will have over riding effect on all other laws which are in contravention to the provisions of the IBC, RP cannot raise an objection saying since no provision has been made in GST or in its software to accept such accounts, the business happening in the market after initiation of CIRP through debtor company will come to stand still and in such situation no company under CIRP can function as a going concern. In view thereof, we hereby direct all the Respondents including the 13th Respondent to allow the Corporate Debtor to have access to its GST Net Portal Account, permit the applicant to file GST Returns of the Corporate Debtor generated after commencement of CIRP without insisting upon payment of past dues of GST during the pre-admission period and accept net GST liability after availing eligible ITC from the date of commencement of CIRP and adjust such GST payment so remitted by the Corporate Debtor towards discharge of GST during the CIRP period."*(emphasis supplied)*

In respect of liquidation, as per the waterfall mechanism provided under Section 53 of IBC ('Distribution of assets'), among all creditors, government stands fifth in the queue. This means that only after settlement of workmen's dues, dues of other operational creditors, etc., claim of tax authorities will be considered. However, in respect of resolution, the endeavour is to transfer the entity as a going concern and, therefore, as NCLT has observed, GST authorities can claim tax dues like any other operational creditor. If the corporate debtor is barred from accessing his cash ledger or credit ledger and if payment for past period is insisted, the objective of resolution of stressed asset as a going concern gets totally defeated. The Resolution Professional is also desisted from managing the affairs of the Corporate Debtor as a going concern.

STATUTORY DUES ARE 'OPERATIONAL DEBT' UNDER IBC

The judiciary has upheld the view that statutory dues are included within the definition of 'operational debts'.In a recent judgment passed on March 20, 2019 in the case of *Pr. Director General of Income Tax (Admn). & TPS) vs M/s. Synergies Dooray Automotive Ltd. & Ors.* (clubbed with certain other company appeals), Hon'ble NCLAT held that statutory dues such as income tax, sales tax, value added tax and various other taxes fall within the definition of 'operational debt' under section 5(21) of the Code and the statutory authorities claiming the aforesaid dues will be treated as operational creditors under the Code.

The GST Authorities however face problems in getting information that Corporate Insolvency Resolution Process (CIRP) has initiated against a company and then quantifying the claim since there is default in filing of returns by the company. In this context, the Resolution Professional may send specific information to the Jurisdictional Officer informing of the initiation of CIRP and seeking claim w.r.t GST.

DUTIES OF AN RESOLUTION PROFESSIONAL W.R.T. COMPLIANCE OF LAW INCLUDING GST:

As per the Charter of Responsibilities of IRP / RP and CoC in a CIRP issued by IBBI in March 2019, an Insolvency Professional, when acting as an Interim Resolution Professional or Resolution Professional, is vested with an array of statutory and legal duties and powers. He exercises the powers of the board of directors of the corporate debtor undergoing resolution. He manages operations of the corporate debtor as a going concern, protects the value of its property and complies with applicable laws on its behalf. In fact, he conducts the entire CIRP. The stakeholders are required to co-operate with him in discharge of his functions. In its order dated 16th January, 2019 in the matter of Asset Reconstruction Company (India) Pvt. Ltd. Vs. Shivam Water Treaters Pvt. Ltd., the Hon'ble Adjudicating Authority held: ".. RP (Resolution Professional) is acting as an officer of the Court and any hindrance in the working of the CIRP will amount to contempt of court." In its order dated 18th February, 2019 in the same matter, the Hon'ble Adjudicating Authority held: "It is to be clarified that RP is discharging duties as Court Officer and any non-compliance of the Court Officer will be deemed as Contempt of Court." However the present situation is far from being in RP's favour. The Interim Resolution Professional (IRP)/ Resolution Professional and the Resolution Applicant (RA) face many issues while complying with the GST laws.

ACCESSING USER ID AND PASSWORD:

Companies under the IBC process face hostile erstwhile promoters who do not share the user id and password of the GST portal. This is the first problem faced by the Interim Resolution Professional (IRP)/ Resolution Professional and the Resolution Applicant (RA). The GST portal does not allow change of user id and password without the help of the digital signature of current signatories. In a case, the Hon'ble Kolkata Bench of National Company Law Tribunal (NCLT) had to appoint a Special Officer who had to physically go to the erstwhile promoters, take his digital signature and in his presence ensure that the user id and password is changed. This happened after almost one year of efforts by the Resolution Professional and the Resolution Applicant, when finally after series of applications and letters, they had to approach the Hon'ble NCLT. The reason why I am mentioning this point is that even for a simple thing like user id and password, the Resolution Professional and the Resolution Applicant had to knock the doors of the Hon'ble NCLT. The GST Act, must allow the Resolution Professional and the Resolution Applicant to take a new registration after the company has gone into insolvency resolution process so that all the past baggage stays with the old promoters and the Resolution Professional and the Resolution Applicant start afresh with GST compliance.

PAYMENT OF TAX AND FILING OF RETURNS:

The GST software doesn't allow companies to pay current or future taxes without clearing dues from earlier years. But under IBC, the tax department has to wait until all creditors get their dues before beginning recovery. This leads to a problem for payment of tax by the Resolution Professional and the Resolution Applicant, even for liabilities on reverse charge mechanism. In many cases, the erstwhile promoters have not cleared their past liabilities and have not filed the returns. Now the Resolution Professional and the Resolution Applicant are not able to pay simple liabilities like GST on advocate fees under reverse charge mechanism as past liabilities and past returns are pending. Thus the Resolution Professional and the Resolution Applicant even when they would like to comply with present laws or pay the current liabilities, are not able to do so. This problem can also be resolved if the GST Act, allows the Resolution Professional and the Resolution Applicant to take a new registration after the company has gone into insolvency resolution process so that all the past baggage stays with the old promoters and the Resolution Professional and the Resolution Applicant start afresh with GST compliance. The GST law should also allow companies in CIRP to transfer the balance in their Input Tax Credit ledger to the new registration through the filing of TRAN forms.

BLOCKING OF E-WAY BILL:

As per the Charter of Responsibilities of IRP / RP and CoC in a CIRP issued by IBBI in March 2019 (supra),the RP

manages operations of the corporate debtor as a going concern and protects the value of its property. This means that if the company's operations are going on, at whatever the rate of utilization of the plant, it is the duty of the Resolution Professional to ensure that he manages the affairs of the company as a going concern and protects the value of the property of the company. Now because of non-payment of past liabilities and non-submission of past returns, in cases where it exceeds 2 months, generation of the e-way bill is blocked. Thus, in transactions where e-way bills are mandatory, generation of e-way bill is not allowed by the portal and all deliveries/ business operationswillcome to a standstill.

CANCELLATION OF REGISTRATION

As per provisions of GST, in case returns for the past 6 periods are not filed, the GST registration is liable to be cancelled. The same can only be revoked if all the past returns are filed and past liability is paid. This has come as a big problem for the Resolution Professional and the Resolution Applicant. On the one hand when the GST dues are treated as operational debt and suffers the same haircut as all other operational creditors and on the other hand, the GST registration is liable to be cancelled if the past liability is not paid in full. In case past dues are not paid, the GST registration gets cancelled and the operations of the company come to a standstill.

SALE INVOICES ARE NOT SHOWING IN FORM GSTR 2A

The Resolution Professional and the Resolution Applicant are also facing the issue with B2B customers wherein because of non-filing of form GSTR 1 by the company, the invoices are not showing in the form GSTR 2A of the customer/buyer. This has resulted in the mis-match of input tax credit availed by the customer/ buyer in form GSTR 3B and the invoices as shown in form GSTR 2A. In fact many assessees have received notices from the GST Department about such mismatch and now they are facing problems after they have bought goods from companies which are undergoing insolvency resolution process.

CHANGES DONE IN IBC ORDINANCE, 2019

As per the recent IBC Ordinance (promulgated on Dec 28, 2019), as per the Explanation inserted to section 14(1) Moratorium, "it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period."

This is a welcome amendment in IBC laws as it can be interpreted that till the time "current dues" of GST is paid during the moratorium period by the Resolution Professional, GST authorities cannot cancel the GST registration or suspend the right to generate e way bill. Changes in the GST laws and GSTN is however still awaited.

CONCLUSION

The lawmakers are required urgently to address the issue of alignment of the IBC process with the GST process especially payment of tax and return filing. Despite the Code providing a clear moratorium for the Buyers from paying dues (including GST) for the past period, the above restriction is forcing the Buyer not to file current GST returns as well. The Buyers have been left with no option except to challenge this restriction in the Courts being contrary to the Code. This issue will not only result into blockage of working capital of the Buyers but also defeats the entire purpose of insolvency resolution concept in India. Ultimately, it would add to difficulties in doing business as opposed to promoting ease of doing business.This very issue (if not addressed soon) is capable of derailing the unbeatable development of the Code and reforms under GST.

The Government should immediately introduce an exception in the GST laws to enable the Buyers to file present and future GST returns irrespective of payment of past GST dues in case of companies under IBC. Similarly, the Government can allow companies under IBC to take a new registration so that all past baggage is left behind and decided as per the Resolution Plan and the Resolution Professional and the Resolution Applicant starts afresh with GST compliance. However, we can only wait and watch for some more action by the Government in resolving the cross-connection!

DISTRESSED ASSET VALUATION

CA VIKASH GOEL

The valuation of a business entity is a difficult task as it is, but when the business is in distress, the valuation of such a business becomes even more difficult. There are a lot of complexities involved particularly in the valuation of distressed business assets. It is often necessary for the parties involved in the undertaking of a business to have a fair idea of the value of the business, irrespective of it being distressed. That is why; distressed asset valuation is an important step while trying to ascertain the value of the business, the distribution of the assets among the undertakers and the further course of action with the company's business.

Uncertainties associated with the value of such a distressed business can arise due to structural factors. The factors are mentioned below:

Structural Factors:

1. The structural factor of causing valuation uncertainty comes from the fact that exposing the company's business to the market might result in undervaluation if the market is depressed because:
   a) Potential buyers are not looking to expand
   b) There are other similar businesses in the market
   c) It is difficult to assemble a large and well-resourced group of investors
   d) The reputation might be at stake.
2. Since the market price of the business does not reflect its true value, there is uncertainty surrounding the true value of the business. Consequently, it is considered futile to expose the business to the market.
3. Once the company becomes distressed, fewer analysts follow the company's stock than before, considering that there will be more regulations and fewer market interest to capitalize on that data of shares. Thus, the superior estimates of the company are no longer available, leading to further uncertainty.

Corporate Distress Prediction – Various Models

A. Altman Z Score Model Definition

The likelihood of a business failure can be predicted using quantitative or qualitative predictive models. One such model is Edward Altman's Z-Score Model, who was a professor at the Leonard N. Stern School of Business of New York University and the model is subsequently revised for private companies, which is used to predict business failure or bankruptcy. Altman's aim at predicting bankruptcy began around the time of the great depression, in response to a sharp rise in the incidence of default.

Altman Z Score Purpose

The purpose of the Z Score Model is to measure a company's financial health and to predict the probability that a company will collapse within 2 years. It is proven to be very accurate to forecast bankruptcy in a wide variety of contexts and markets. Studies show that the model has 72% – 80% reliability of predicting bankruptcy, subject to certain constraints.

Altman Z Score Analysis

In general analysis, the lower the Z-Score, the higher risk of bankruptcy a company has, and vice visa. Different models have different overall predictability scoring. Probabilities of bankruptcy in the above ranges are 95% for one year and 70% within two years.

1. Original Z-Score for public manufacturing companies:

Z-Score	Forecast
Above 3.0	Bankruptcy is not likely
1.8 to 3.0	Bankruptcy cannot be predicted-Gray area
Below 1.8	Bankruptcy is likely

2. Model A Z-Score for private manufacturing companies:

Z-Score	Forecast
Above 2.9	Bankruptcy is not likely
1.23 to 2.9	Bankruptcy cannot be predicted-Gray area
Below 1.23	Bankruptcy is likely

3. Model B Z-Score for private general companies:

Z-Score	Forecast
Above 2.60	Bankruptcy is not likely
1.10 to 2.60	Bankruptcy cannot be predicted-Gray area
Below 1.10	Bankruptcy is likely

Altman Z Score Formula

1. Original Z-Score formula for public manufacturing companies:

   Original Z-Score = 1.2X1 + 1.4X2 + 3.3X3 + 0.6X4 + 0.999X5

2. Model A Z-Score for private manufacturing companies:

   This model substitutes the book values of equity for the Market value in X4 compared to original model.

   Model A-Z = 0.717 (X1) + 0.847 (X2) + 3.107 (X3) + 0.420 (X4) + 0.998 (X5)

3. Model B Z-Score for private general companies:

   This model analyzed the characteristics and accuracy of a model without X5 – sales/total assets.

   Model B-Z-Score = 6.56 (X1) + 3.26 (X2) + 6.72 (X3) + 1.05 (X4)

   In the equations above,

$$X1 = \frac{Working\ Capital}{Total\ Assets}$$

X1 measures the net liquid asset of a company relative to the total assets.

$$X2 = \frac{Retained\ Earnings}{Total\ Assets}$$

X2 measures the financial leverage level of a company.

$$X3 = \frac{Earnings\ before\ Interest\ and\ Taxes}{Total\ Assets}$$

X3 measures productivity of a company's total assets.

$$X4 = \frac{Market\ Value\ of\ Equity}{Book\ Value\ of\ Total\ Liabilities}$$

X4 measures what portion of a company's assets can decline in value before the liabilities exceed the assets. For a private company, the Book value of equity may be taken as a proxy for market value, in the absence of more information.

$$X5 = \frac{Sales}{Total\ Assets}$$

X5 measures revenue generating ability of a company's assets.

Example:

Unified Chemicals Limited ("UCL") was established as a Small-Scale Manufacturer of Chlorinated Paraffin in 2003. UCL has two divisions – Chemical Division and Plastics Division. Chemical Division manufactures Chlorinated Paraffin, Hydrochloric Acid at Plant A and Plastics Division manufactures Polypropylene Compounds & Talc at Plant B.

The company has filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiation of Corporate Insolvency Resolution Process ("CIRP") of the Company as per the provisions of IBC before the Hon'ble National Company Law Tribunal ("NCLT") which was admitted by the NCLT.

The company manufactures and deals in the business of trading of chlorinated paraffin wax, hydrochloric acid, sodium hydrochloride, PP compound, and PE compound. The company does not have any subsidiaries or branches but has 2 Plants A and B.

Approximately 10 workers are working in the Plant A. To protect the livelihood of the workers and pay back the debtors the factory has to be run. Fixed Assets are being effectively utilized for the purpose of production. No fixed asset has been sold off. some new fixed assets have been added replacing the old and dead ones but overall fixed assets remain same. The capacity utilization of the Plant is 70 percent.

Around 26 workers are working in the plant B. Apart from them there are casual workers supplied by contractors on daily basis which would another 10 nos. Accordingly, around 40 workers are involved. It is understood that the production is around 45 percent of the capacity and the workers' wages has been delayed.

Based on the physical verification of inventory, some of the inventory was obsolete and had declined in their saleable value. Poor maintenance contributed to the decline in their values. For the inventory that was found to be in order, the fair market value of the inventory was considered after taking a haircut of 55 percent of the value reported in the books. Considering the short shelf life of the chemicals and other inventory, the liquidation value of the inventory was considered to be significantly lower than the fair value.

The valuer assessed the ageing of the debtors and also carried out a sample survey amongst the debtors and it was realized that only 17 percent may be recovered from the debtors. However, some of these debtors would take a long time to pay off. In case of earlier realisation, the amount fetched may go down to 7 percent of book values.

Most of the Short Term Loans and Advances were secured but were disputed with government authorities. Accordingly, only 34 percent million may be recovered from them. However, in case of early realisation, only 2 percent would be plausible. None of the Other Current Assets are recoverable.

Extract of Latest Financial Statements

Income Statement	31-Mar-19 (INR Lakhs)
Revenue from Operation	250.65
Other Income	5.05
Total Revenue	255.70
Cost of material Consumed	256.43
Change in inventories of finished goods	(1.52)
Employee Benefits Expenses	40.80
Finance Costs	15.01
Depreciation & Amortization Exp.	30.28
Other Expenses	23.69
Total Expenses	364.69
Profit before Prior Period Items	(108.99)
Prior Period Items	-
Profit before Tax	(108.99)
Tax Expenses	-
Deferred Tax	-
Profit After Tax	(108.99)
Balance Sheet	31-Mar-2019 (INR Lakhs)
EQUITY & LIABILITIES	
Shareholder's Fund	
Share Capital	351.69
Other Equity (Includes Share Premium and Accumulated Losses)	16.32
Shareholder's Fund	368.01
Non-Current Liabilities	
Long Term Borrowings	40.57
Current Liabilities	
Short Term Borrowings	516.24
Trade Payables	270.02
Other Current Liabilities	21.33
Current Liabilities	807.59
Total	1,216.16
ASSETS	
FIXED ASSETS	
Tangible Assets	616.66
Other Non-Current Assets - Deferred Tax Assets	199.65
Non Current Assets	816.31
Current Assets	
Inventories	27.74
Trade Receivables	196.18
Cash & Cash Equivalents	8.43
Short-term loans and advances	119.02
Other Current Assets — Current Investment	48.47
Total Current Assets	399.85
Total	1,216.16

Altman's Z-Score Analysis for UCL.

Z = 0.717 (X1) + 0.847 (X2) + 3.107 (X3) + 0.420 (X4) + 0.998 (X5)

Altman's Z Score	Num	Den	Ratio	Weight	Weighted Ratio
X1 = Working Capital / Total Assets	(408)	1,216	(0.34)	0.717	(0.240)
X2 = Retained Earnings / Total Assets	(240)	1,216	(0.20)	0.847	(0.167)
X3 = EBIT / Total Assets	(94)	1,216	(0.08)	3.107	(0.240)
X4 = Book Value of Equity / Book Value of Total Debt	368	557	0.66	0.420	0.278
X5 = Sales / Total Assets	251	1,216	0.21	0.998	0.206
Altman's Z Score					(0.164)

Since the score is below 1.23, it represents a high chance of insolvency and accordingly the company should be valued on a piecemeal basis as there may not be a suitable buyer to buy and operate the company.

The Valuation of the Financial Assets would be as follows:

Assets	Book Values	Realisable Value	Liquidation Value
Current Assets			
Inventories	27.74	12.48	1.39
Trade Receivables	196.18	33.35	13.73
Cash & Cash Equivalents	8.43	8.43	8.43
Short-term loans and advances	119.02	28.57	2.38
Other Current Assets — Current Investment	48.47	-	-
Total Current Assets	399.85	82.83	25.93

NCAER Model of Sickness Prediction

According to National Council of Applied Economic Research (NCAER) conducted a study for Punjab National Bank in 1979. It provided a precise definition of industrial sickness. Here sickness is considered similar to non-viability. An enterprise can be considered financially viable when the following three interdependent elements are positive which are as follows:

(i) Profitability: It is represented by cash profit.

(ii) Liquidity: It is measured in terms of net working capital.

(iii) Solvency: It is described by net worth.

When any one of these three elements becomes negative, it should be seen as an indicator of tendency towards sickness.

When any two of these three elements become negative, it speaks of 'incipient sickness'.

When all the three elements turn out as negative, the enterprise is considered a case of 'fully sick'.

In 1983 Supreme Court of India used this definition of sickness while justifying the merger of International Tractors India Ltd., a sick unit with the profit earning unit Mahindra and Mahindra as per section 72-A of Income Tax Act, 1977.

Sharma & Sharma, Advocates & Legal Consultants is a premier full service law firm with its head office at Kolkata. The Firm has been established in 2006 by Mr. Sidharttha Sharma, who has an enriching experience of 18 years in the areas of corporate restructuring, commercial litigation, contractual and industrial disputes. Over the years the Firm has established its offices in cities like New Delhi, Bombay, and Chandigarh and with the recent inaugural of our Bhubaneswar office, the Firm proudly boasts its vast network of associate lawyers, chartered accountants, company secretaries in most major cities of India, with substantial representations in company law matters including advisory services and litigation, maritime disputes, oppression and mismanagement, competition law, and other areas of commercial litigation and dispute resolution, apart from Insolvency and Bankruptcy Code, 2016 throughout the country.

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In this span of around three years from enactment of the Code, the Firm has represented vital stakeholders in the Corporate Insolvency Resolution Process and even in Liquidation Proceedings before most of the National Company Law Tribunals and the members of the firm regularly appear before the National Company Law Appellate Tribunal. The members of the Firm have also represented clients in Civil Appeals and Writ Petitions before the Hon'ble Supreme Court of India arising out of disputes pertaining to the Insolvency and Bankruptcy Code, 2016. Our strives to obtain the most desirable relief for our Clients has resulted into pronouncement of numerous deciding and landmark judgments, such as on the issues of categorization amongst financial creditors based on security interest held by them even before the amendment, inclusion of demerger of Corporate Debtor in the Resolution Plan and its effective approval and implementation, applicability of laws of limitation in insolvency proceedings amongst others and accordingly, the names of the members of the firm often appear in reported judgments in the field of Insolvency and Bankruptcy Laws. The Members of the Firm have also played instrumental role in obtaining numerous restraining orders from the National Company Law Appellate Tribunal as well as National Company Law Tribunals for stay on formation of Committee of Creditors by Interim Resolution Professional, stay on publication by the Interim Resolution Professional, stay on sale of asset belonging to the Liquidation Estate and has also extended valuable assistance in carrying out effective settlement between the parties.

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