

INSOLVENCY AND BANKRUPTCY LAW - CORE

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LESSON 1 - INTRODUCTION TO INSOLVENCY AND BANKRUPTCY CODE

REGULATORY FRAMEWORK

- Insolvency and Bankruptcy Code, 2016
- IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- BBI (Liquidation Process) Regulations, 2016
- IBBI (Voluntary Liquidation Process) Regulations, 2017
- BBI (Insolvency Professionals) Regulations, 2016

INTRODUCTION

The word “bankruptcy” is widely believed to have originated from an Italian phrase “bancarotta”-“banca” means bench and “rotta” means broken. It is believed that the word “bankruptcy” originated from the trade that was carried out on Ponte Vecchio, a medieval segmental arch bridge over the Arno River, in Florence, Italy. In medieval Italy, if a banker, who conducted his market place transactions on a bench, was unable to meet business obligations and was in debt, his bench was broken in a symbolic show of failure and his inability to continue. This act of “bancarotta” or “breaking the bench” is believed to have evolved into the modern concept of bankruptcy. The role of the law, in a formal bankruptcy process, is to lay down rules of procedure into which the conflict is channelled, and results in a solution. A sound legal framework provides procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.

The objective of the bankruptcy process is to create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

- Financial failure - a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or
- Business failure - which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments. Often, an enterprise may be a successful business model while still failing to repay its creditors.

A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency.

CONCEPT OF INSOLVENCY, BANKRUPTCY AND LIQUIDATION

The words “Insolvency” and “Bankruptcy” are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term “**insolvency**” notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term “insolvency” is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word “**bankruptcy**” is the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor’s assets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion. In case of insolvency, one cannot pay off the debts, whereas in the case of bankruptcy, a court order states as how an insolvent person or business has to pay off their debts-by way of selling their assets or erasing the debt that cannot be paid.

The term insolvency is used for individuals as well as organisations/corporates. If insolvency is not resolved, it leads to bankruptcy in case of individuals and liquidation in case of corporates.

Liquidation, on the other hand, in its general sense, means closure or winding up of a corporation or an incorporated entity through legal process on account of its inability to meet its obligations or to pay its debts. In order to clear the indebtedness, the assets are sold at the most reasonable rates by a competent liquidator appointed in this regard.

Section 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term “bankruptcy” as the state of being bankrupt.

According to Section 79(3) of the Code, “**bankrupt**” means

- (a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;
- (b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or
- (c) any person adjudged as an undischarged insolvent.

INSOLVENCY FRAMEWORK IN UK, USA AND INDIA

UNITED KINGDOM

In England, the Act of Parliament of 34 & 35 Henry VIII, c4 is regarded as the first legislation on the subject. Promulgated in 1542 under the reign of Henry VIII, it was a strict and creditor supportive legislation enacted mainly for the benefit of creditors. This Act of 1542, was in fact akin to a criminal statute directed against men who indulged in wasteful expenditures and then refused to pay off debts incurred during the course of extravagance. The 1542 Act looked upon the debtors as offenders. There was no provision for the discharge of debtors and even future earnings of the debtors were not exempt from execution for the debt.

The early bankruptcy laws of England were an instrument of debt-collection and aimed at seizing the debtor’s assets against the strong protections to private property offered by the Common law, since medieval times.

In the beginning of the eighteenth century, these strict and creditor supportive medieval laws began to lose its punitive nature. That is why a few authors maintain that the first real bankruptcy laws in England were 4 Anne, c. 17(1705), and 10 Anne, c.15(1711) as unlike earlier statutes which looked upon debtors as offenders, the highlighting feature of the Statutes of Anne was the discharge of the bankrupt who conformed to the provisions of the law. While the additional rights given to the bankrupt under the 1705 Act were significant yet the Act was passed for the sole benefit of the creditors. In contrast, the primary focus of modern insolvency laws is not elimination of insolvent entities but on their rehabilitation and continuation of their business.

THE CURRENT REGULATORY FRAMEWORK IN UK

The Insolvency Act, 1986 and the Insolvency Rules, 1986 regulate the insolvency framework in the United Kingdom. The Insolvency Act, 1986 was enacted on the recommendation of the Cork Review Committee Report on Insolvency Law and Practice (1982). Prior to the enactment of the Insolvency Act, 1986, the law relating to insolvency in the UK was fragmented and was contained in the Bankruptcy Act, 1914, the Deeds of Arrangement Act, 1914, the Companies Act, 1948 and parts of the County Courts Act, 1959. These Acts were supplemented by the principles of common law and equity.

The Act of 1986 consolidated all-

- enactments relating to company insolvency and winding up,
- enactments relating to the insolvency and bankruptcy of individuals, and
- all other enactments bearing on these two subject matters, including the functions and qualification of insolvency practitioners, the public administration of insolvency, the penalisation and redress of malpractice and wrong doing, and the avoidance of certain transactions at an under value.

The Insolvency Act, 1986 deals with the insolvency of individuals and companies and is divided into the following three groups.

- Group 1 deals with Company Insolvency;
- Group 2 deals with Insolvency of Individuals; and
- Group 3 deals with Miscellaneous Matters Bearing on both Company & Individual Insolvency.

The Insolvency Act, 1986 introduced the following three new procedures in order to explore the possibility of bringing a burdened company back to life as a viable entity. These measures in the UK Insolvency Act, 1986 represent an attempt to emulate the 'rescue culture', a characteristic of the corporate sector in the US.

1. 'Company Voluntary Arrangements' (CVAs)- It provides away where a company in financial difficulty can come to a binding agreement with its creditors. It is are negotiation by a company of the payments due to all of its creditors, or other form of financial restructuring, and is subject to creditors meeting and approval of 75% of the creditors present and voting.
2. 'Administration'- In this second option, an administrator is appointed by a court to suggest proposals to deal with the company's financial difficulties. This option offers companies a breathing space as the creditors are restrained from taking any action during this period. It is designed to hold a business together while plans are formed, either to put in place a financial restructuring plan to rescue the company, or to sell the business and assets, to produce better results for the creditors, than a liquidation.
3. 'Administrative Receivership'- This third option permits the appointment of a receiver by certain creditors (normally the holders of a floating charge).

UNITED STATES OF AMERICA

America being a colony of the United Kingdom, followed the English bankruptcy system and like the UK system, American bankruptcy laws involved imprisonment until debts were paid or creditors agreed for the release of the debtor. There was no uniform law in America as bankruptcy laws differed from State to State. Some of these American states became in famous as debtor's havens because of their unwillingness to enforce commercial obligations.

The lack of uniformity in bankruptcy and debt enforcement laws adversely affected business and commerce between the states. Article I, Section 8, Clause 4 of the United States Constitution as adopted in the year 1789, made provision for the grant to Congress the power to establish uniform bankruptcy law throughout the United States.

The Congress enacted temporary bankruptcy statutes in 1800, 1841 and 1867 to deal with economic recessions. The Acts of 1800 and 1841 vested jurisdiction in the federal district courts. The district court judges were given the power to appoint commissioners or assignees to take charge of and liquidate a debtor's property. However, these laws were temporary measures and were repealed as soon as economic conditions stabilized.

There was not a permanent bankruptcy law in the United States of America until 1898, when the National Bankruptcy Act was enacted. This Act of 1898 was later amended in 1938 to provide for the rehabilitation of a debtor as an alternative to liquidation of assets. The National Bankruptcy Act, 1898 governed bankruptcy in the United States for 80 years until 1978, when after a thorough review of the then existing law and practice, the Bankruptcy Reform Act, 1978 was enacted.

The Bankruptcy Reform Act, 1978 superseded the National Bankruptcy Act, 1898 and established bankruptcy courts in each district and made provisions for the appointment of separate bankruptcy judges.

THE CURRENT REGULATORY FRAMEWORK IN USA

"Bankruptcy Code", a federal law, governs bankruptcy in the United States of America. It is a uniform federal law that governs all bankruptcy cases in America. The Bankruptcy Code was enacted in 1978 by § 101 of the Bankruptcy Reform Act, 1978 and is codified as title 11 of the United States Code. The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules).

Six basic types of bankruptcy cases are provided for under the Bankruptcy Code.

Chapter 7 titled "Liquidation" - In Chapter 7 Bankruptcy, a court-appointed trustee or administrator takes possession of non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors. He shall be accountable for all the property received and has the right to investigate the financial affairs of the debtor. He shall also file accounts of the administration of the estate with the United States Trustee and the Court.

Chapter 9 titled "Adjustment of Debts of a Municipality". - Chapter 9 Bankruptcy proceedings provides for reorganization which is available to municipalities. In Chapter 9 Bankruptcy proceedings a municipality (which includes cities, towns, villages, counties, taxing districts, municipal utilities, and school districts) get protection from creditors and a municipality can pay back debt through a confirmed payment plan.

Chapter 11 titled "Reorganization" - Unlike Chapter 7 where the business ceases operations and a trustee sells all of its assets, under Chapter 11 the debtor remains in control of its business operations and repay creditors concurrently through a court-approved reorganization plan. Generally, it is a debtor in possession regime. Section 1106 of the Bankruptcy Code requires the trustee, where appointed, to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed.

Chapter 12 was added to the Bankruptcy Code in 1986. It allows a family farmer or fisherman to continue to operate the business while the plan is being carried out.

Chapter 13 enables individuals with regular income to develop a plan to repay all or part of their debts.

Chapter 15 was added to the Bankruptcy Code in 2005. It provides mechanism for dealing with insolvency cases involving debtors, claimants and other interested parties involving more than one country. Under Chapter 15 are representative of a corporate bankruptcy proceeding outside the country can get access to the United States courts.

HISTORICAL DEVELOPMENTS OF INSOLVENCY LAWS IN INDIA

The law of Insolvency in India owes its origin to English law. India being a colony of the United Kingdom, followed the English insolvency system. In India, the earliest provisions relating to insolvency can be traced to sections 23 and 24 of the Government of India Act, 1800. These sections conferred insolvency jurisdiction on Supreme Court at Fort Williams (Calcutta), Madras and Recorder's Court at Bombay as the need for an insolvency law was first felt in Presidency Towns of Calcutta, Bombay and Madras where the British majorly carried on their trade. These Courts were empowered to make rules and grant relief to insolvent debtors.

Later insolvency courts were established in the Presidency-Towns when Statute 9 (Geo. IV c. 73) was passed in 1828. This Act of 1828 marks the beginning of special insolvency legislation in India. The insolvency court had a distinct existence although the court was presided over by a Judge of the Supreme Court. The Act of 1828 was originally intended to remain in force for a period of four years but subsequent legislation extended its duration up to 1848. The Provisions of the Indian Insolvency Act was passed in 1848 and remained in force until the enactment of the Presidency Towns Insolvency Act, 1909. Later Provincial Insolvency Act was passed in 1920.

The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920 were two major enactments that dealt with personal insolvency but the two differ in respect of their territorial jurisdiction. While Presidency Towns Insolvency Act, 1909 applied in Presidency towns of Calcutta, Bombay and Madras, the Provincial Insolvency Act, 1920 applied to all provinces of India. These two Acts were applicable to individuals as well as partnership firms.

Insolvency law usually has a two-fold purpose-(i) to give relief to the debtor from the harassment of creditors whose claims he is unable to meet, and (ii) to provide a machinery by which creditors who are not secured in the payment of their debts are to be satisfied.

The Insolvency and Bankruptcy Code, 2016 has repealed both the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

Before the enactment of the Insolvency and Bankruptcy Code, 2016, the provisions relating to insolvency and bankruptcy were fragmented and there was no single law to deal with insolvency and bankruptcy in India. Before the enactment of the Insolvency and Bankruptcy Code, 2016 the following Acts dealt with insolvency and Bankruptcy in India:

- The Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Indian Partnership Act, 1932
- The Companies Act, 1956
- The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)
- The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002)
- The Companies Act, 2013.

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 of List III (Concurrent List) in the Seventh Schedule to the Constitution. Hence both the Centre and State Governments are authorised to make laws on the subject.

GOVERNMENT COMMITTEES ON BANKRUPTCY REFORMS

Various committees were constituted from time to time by the Government to review the existing bankruptcy and insolvency laws in India. These committees analysed the laws and suggested reforms to bring the law in tune with ever evolving circumstances. Following is a snapshot of various committees constituted along with the outcome.

S.No.	Year	Committee/ Commission	Recommendations/Outcome
1	1964	Third Law Commission	Third Law Commission was established in 1961 under the Chairmanship of Justice J L Kapur. It submitted 26th Law Commission Report in 1964 proposing amendments to the Provincial Insolvency Act, 1920.
2	1981	Tiwari Committee	Following the recommendations of the Tiwari Committee, the Government of India enacted the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) in order to provide for timely detection of sickness in industrial companies and for expeditious determination of preventive and remedial measures.
3	1991	Narasimham Committee I	The government enacted Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993.
4	1998	Narasimham Committee II	The committee's recommendations led to the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002.
5	1999	Justice Eradi Committee	Recommended setting up of a National Company Law

			Tribunal (NCLT) and proposed repeal of SICA.
6	2001	NL Mitra Committee	Proposed a comprehensive bankruptcy code.
7	2005	J J Irani Committee	The Committee proposed significant changes to make the restructuring and liquidation process speedier, efficient and effective and accordingly amendments were made to (RDDBFI) Act, 1993 and (SARFAESI), 2002.
8	2008	Raghuram Rajan Committee	Proposed improvements to credit infrastructure.
9	2013	Financial Sector Legislative Reforms Commission	Recommended changes in Indian Financial Sector.
10	2014	Bankruptcy Law Reforms committee (BLRC)	Reviewed the existing bankruptcy and insolvency framework in the country and proposed the enactment of Insolvency and Bankruptcy Code as a uniform and comprehensive legislation on the subject.

NEED FOR A NEW LAW

Before the enactment of the Insolvency and Bankruptcy Code, there was no single law in the country to deal with insolvency and bankruptcy. There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution. The legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system.

Prior to the enactment of the Insolvency and Bankruptcy Code, the provisions relating to insolvency and bankruptcy for companies were made in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provided for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts. Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920.

The liquidation of companies was handled under various laws and different authorities such as High Court, and Debt Recovery Tribunal had overlapping jurisdiction which was adversely affecting the debt recovery process.

As per World Bank data in 2015, insolvency resolution in India took 4.3 years on an average, which was way higher when compared to other countries such as United Kingdom (1 year) and United States of America (1.5 years). These delays were caused due to time taken to resolve cases in courts, and confusion due to a lack of clarity about the current bankruptcy framework.

The objective of the Insolvency and Bankruptcy Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. An effective legal framework for timely resolution of insolvency and bankruptcy will not only encourage entrepreneurship but will also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – INTRODUCTION

In India, the legal and institutional machinery for dealing with debt default has not been in line with global standards. The recovery action by creditors, either through the Contract Act or through special laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, has not had desired outcomes. Similarly, action through the Sick Industrial Companies (Special Provisions) Act, 1985 and the winding up provisions of the Companies Act, 1956 have neither been able to aid recovery for lenders nor aid restructuring of firms. Laws dealing with individual insolvency, the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, are almost a century old. This has hampered the confidence of the lender. When lenders are unconfident, debt access for borrowers is diminished. This reflects in the state of the credit markets in India. Secured credit by banks is the largest component of the credit market in India. The corporate bond market is yet to develop.

The Insolvency and Bankruptcy Code Bill was drafted by a specially constituted “Bankruptcy Law Reforms Committee” (BLRC) under the Ministry of Finance. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on 21 December 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations and the modified Code was passed by Lok Sabha on 5 May 2016. The Code was passed by Rajya Sabha on 11 May 2016 and it received the presidential assent on 28 May 2016.

The objective of the Code is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto.

The salient features of the law are as follows:

- i. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.
- ii. Two distinct processes for resolution of individuals, namely- “Fresh Start” and “Insolvency Resolution”.
- iii. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.
- iv. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.
- v. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.
- vi. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.
- vii. Enabling provisions to deal with cross border insolvency.

The Insolvency and Bankruptcy Code, 2016 extends to the whole of India.

Section 1 of the Code provides that the Central Government may appoint different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.

Section 2 of the Insolvency and Bankruptcy Code, 2016 provides that the provisions of the Code shall apply to –

- a) any company incorporated under the Companies Act, 2013 or under any previous company law,
- b) any other company governed by any special Act for the time being in force,

- c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,
- 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,
- 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.

The Insolvency and bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms). The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic jump in the ease of doing business rankings by consolidating the law and providing for resolution of insolvencies in a time-bound manner.

KEY OBJECTIVES OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism;
2. To ensure maximisation of value of assets;
3. To promote entrepreneurship;
4. To increase availability of credit;
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues;
6. To establish an Insolvency and Bankruptcy Board of India as a regulatory body; and
7. To provide procedure for connected and incidental matters.

HOW CODE IS ORGANISED?

The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts. Part II deals with insolvency resolution and liquidation for corporate persons whereas Part III lays down procedure for insolvency resolution and bankruptcy for individuals and partnership firms. Part IV of the Code makes provisions for regulation of Insolvency Professionals, Agencies and Information Utilities and Part V includes provisions for miscellaneous matters. The Code also has eleven Schedules which amends various statutes.

Part I Preliminary (Sections 1 to 3)

Part II Insolvency Resolution and Liquidation for Corporate Persons

- Chapter I Preliminary (Sections 4 to 5)
- Chapter II Corporate Insolvency Resolution Process (Sections 6 to 32)
- Chapter III Liquidation Process (Sections 33 to 54)
- Chapter III A Pre-Packaged Insolvency Resolution Process (Section 54A-54P)
- Chapter IV Fast Track Corporate Insolvency Resolution Process (Sections 55 to 58)
- Chapter V Voluntary Liquidation of Corporate Persons (Section 59)
- Chapter VI Adjudicating Authority for Corporate Persons (Sections 60 to 67)
- Chapter VII Offences and Penalties (Sections 68 to 77).

Part III Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms

- Chapter I Preliminary (Sections 78 to 79)
- Chapter II Fresh Start Process (Sections 80 to 93)
- Chapter III Insolvency Resolution Process (Sections 94 to 120)
- Chapter IV Bankruptcy Order for Individuals and Partnership Firms (Sections 121 to 148)
- Chapter V Administration and Distribution of the Estate of the Bankrupt (Sections 149 to 178)
- Chapter VI Adjudicating Authority for Individuals and Partnership Firms (Sections 179 to 187).

Part IV Regulation of Insolvency Professionals, Agencies and Information Utilities

- Chapter I The Insolvency and Bankruptcy Board of India (Sections 188 to 195)
- Chapter II Powers and Functions of the Board (Sections 196 to 198)
- Chapter III Insolvency Professional Agencies (Sections 199 to 205)
- Chapter IV Insolvency Professionals (Sections 206 to 208)
- Chapter V Information Utilities (Sections 209 to 216)
- Chapter VI Inspection and Investigation (Sections 217 to 220)
- Chapter VII Finance, Accounts and Audit (Sections 221 to 223).

Part V Miscellaneous (Sections 224 to 255)

- The First Schedule (see Section 245) amendment to the Indian Partnership Act, 1932
- The Second Schedule (see Section 246) amendment to the Central Excise Act, 1944
- The Third Schedule (see Section 247) amendment to the Income-Tax Act, 1961
- The Fourth Schedule (see Section 248) amendment to the Customs Act, 1962
- The Fifth Schedule (see Section 249) amendment to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Sixth Schedule (see Section 250) amendment to the Finance Act, 1994
- The Seventh Schedule (see Section 251) amendment to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Eighth Schedule (see Section 252) amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Ninth Schedule (see Section 253) amendment to the Payment and Settlement Systems Act, 2007
- The Tenth Schedule (see Section 254) amendment to the Limited Liability Partnership Act, 2008
- The Eleventh Schedule (see Section 255) amendments to the Companies Act, 2013
- The Twelfth Schedule (see Section 29A(d)) Act for the purposes of clause (d) of Section 29A.

SALIENT FEATURES OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

1. The Insolvency and bankruptcy Code, 2016 offers a uniform, comprehensive insolvency legislation covering all companies, partnerships and individuals. Financial service providers are not included in the ambit of the Insolvency and Bankruptcy Code, 2016.
2. To ensure a formal and time bound insolvency resolution process, the Code creates a new institutional framework consisting of the Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authorities (AAs), Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and Information Utilities (IUs).
3. The Code provides for Insolvency Professionals (IPs), a class of regulated but private professionals having minimum standards of professional and ethical conduct, to act as intermediary in the insolvency resolution process. Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue 'authorisation for assignment' to the IPs enrolled with them.

Following are the designated Insolvency Professional Agencies (IPAs) established under the Code:

- The Indian Institute of Insolvency Professionals of ICAI,
- ICSI Institute of Insolvency Professionals, and
- Insolvency Professional Agency of Institute of Cost Accountants of India.

To regulate the working of Insolvency Professional Agencies (IPAs), the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations in exercise of the powers conferred by the Insolvency and Bankruptcy Code, 2016:

1. The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016; and
2. The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

4. The Insolvency Professionals control the assets of the debtor during the insolvency resolution process. The insolvency professional verifies the claims of the creditors, constitutes a committee of creditors, runs the debtor's business as a going concern during the moratorium period and assists the creditors in finalising the revival plan. He also ensures that the debtor is in compliance with all laws applicable to it during the revival process. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee. The Insolvency and Bankruptcy Board of India has framed the IBBI (Insolvency Professional) Regulations, 2016 to regulate the working of Insolvency Professionals. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.
5. While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utilities, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors in centralised electronic databases is to facilitate swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.
6. The Code provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities as well as regulating the insolvency process. The members of the Board include representatives from the central government as well as the Reserve Bank of India. The Board is empowered to frame and implement regulations to regulate the profession as well as processes envisaged in the Code. The Bankruptcy Board of India has also been designated as the 'Authority' under the Companies (Registered Valuers and Valuation Rules), 2017 for regulation and development of the profession of valuers in the country.
7. The Code proposes two Tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the Adjudication Authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs). The insolvency proceeding will be initiated by NCLT or DRT, as the case may be, after verification of the claims of the initiator. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India. For individuals and other persons, the Adjudicating Authority is the DRT. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

To ensure that the insolvency resolution is commercially viable, the Code separates the commercial aspects from the judicial aspects and thus limits the role of adjudicating authorities to ensuring due process rather than adjudicating on the merits of the insolvency resolution.

8. To initiate an insolvency process for corporate debtors, the default should be at least INR 1, 00, 00,000. Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the prepackaged insolvency resolution process of corporate debtors under Chapter III-A. Central government vide Notification S.O. 1543(E) dated 9th April 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor under Chapter III-A of the Code.

9. In resolution process for corporate persons, the Code proposes two independent stages:
 - (i) Insolvency Resolution Process, during which the creditors assess the viability of debtor's business and the options for its rescue and revival
 - (ii) Liquidation, in case the insolvency resolution process fails or financial creditors decide to wind up and distribute the assets of the debtor.
10. The Code envisages two distinct processes in case of Insolvency Resolution Process (IRP) for Individuals/ Unlimited Partnerships
 - (i) Automatic Fresh Start
 - (ii) Insolvency Resolution.
11. The Code provides a Fresh Start Process for individuals under which they will be eligible for a debt waiver of up to INR 35,000. The individual will be eligible for the waiver subject to certain limits prescribed under the Code. Under the automatic fresh start process, eligible debtors can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.
12. A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate an Insolvency Resolution Process (IRP) against a corporate debtor. The defaulting corporate debtor, its shareholders or employees, may also initiate voluntary insolvency proceedings. The National Company Law Tribunal (NCLT) is the designated adjudicating authority in case of corporate debtors.

In case of individuals and unlimited partnerships, the insolvency resolution process consists of preparation of a repayment plan by the debtor. If approved by creditors, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

Section 11 of the Code disentitles the following persons to make an application to initiate corporate insolvency resolution process:

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or
 - (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre- packaged insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
 - (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

It may be noted that a corporate debtor falling under the above clauses can initiate corporate insolvency resolution process against another corporate debtor.

13. The Code provides for a time bound Insolvency Resolution Process for companies and individuals, which is required to be completed within 180 days (subject to a one-time extension by 90 days) and mandatorily be completed within 330 days from the insolvency commencement date. Corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process and the time taken in legal proceedings in relation to such resolution process of the corporate debtor. If the resolution plan does not get finalised or is rejected by NCLT or DRT on technical grounds, then assets of the debtor are sold to repay his outstanding dues.
14. The Code makes significant changes in the priority of claims for distribution of liquidation proceeds. In case of liquidation, the assets will be distributed in the following order: (i) fees of insolvency professional and costs related to the resolution process, (ii) workmen's dues for the preceding 24 months and secured creditors, (iii) employee wages, (iv) unsecured creditors, (v) government dues and remaining secured creditors (any remaining debt if they enforce their collateral), (vi) any remaining debt, and (vii) shareholders

Before the enactment of the Insolvency and Bankruptcy Code, the Government dues were immediately below the claims of secured creditors and workmen in order of priority. Now the Central and State Government's dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors.

15. The Code provides for the creation of Insolvency and Bankruptcy Fund. Section 224 of the Code provides that the following amounts shall be credited to the fund

- the grants made by the Central Government for the purposes of the Fund;
- the amount deposited by persons as contribution to the Fund;
- the amount received in the Fund from any other source; and
- the interest or other income received out of the investment made from the Fund.

Section 224(3) further provides that a person who has contributed any amount to the Fund may, in the event of proceedings initiated in respect of such person under the Code before an Adjudicating Authority, make an application to such Adjudicating Authority for withdrawal of funds not exceeding the amount contributed by it, for making payments to workmen, protecting the assets of such persons, meeting the incidental costs during the proceedings or such other purposes as may be prescribed.

16. The Code specifies stringent penalties for certain offences such as concealing property in case of corporate insolvency. The imprisonment in such cases may extend up to five years, or a fine of up to one crore rupees, or both.

17. In case of cross-border insolvency proceedings, the central government may enter into bilateral agreements and reciprocal arrangements with other countries to enforce provisions of the Code.

The Code repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

In addition, it amends the following 11 Acts:

- The Indian Partnership Act, 1932
- The Central Excise Act, 1944
- The Income-Tax Act, 1961
- The Customs Act, 1962
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Finance Act, 1994
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Payment and Settlement Systems Act, 2007
- The Limited Liability Partnership Act, 2008
- The Companies Act, 2013.

PILLARS OF INSOLVENCY AND BANKRUPTCY CODE, 2016

(A) INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

The Insolvency and Bankruptcy Code, 2016 provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India was established on 1st October 2016. It is a unique regulator which regulates a profession as well as processes under the Code. Its role includes over seeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities. The Board is responsible for implementation of the Code that consolidates and amends the laws relating to insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. The Board is empowered to frame and enforce rules for various processes under the Code, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy.

Section 188 (2) of the Code provides that the Board shall be a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. As per section 189 (4), the term of office of the Chairperson and members (other than ex officio members) shall be five years or till they attain the age of sixty-five years, whichever is earlier, and they shall be eligible for reappointment.

Removal of member from office

Section 190 empowers the Central Government to remove a member from office if he-

- (a) is an undischarged bankrupt as defined under Part III;
- (b) has become physically or mentally incapable of acting as a member;
- (c) has been convicted of an offence, which in the opinion of the Central Government involves moral turpitude;
- (d) has, so abused his position as to render his continuation in office detrimental to the public interest.

Section 190 mandates that no member shall be removed under clause (d) unless he has been given a reasonable opportunity of being heard in the matter.

Powers and Functions of the Board

Section 196(1) of the Insolvency and Bankruptcy Code provides that the Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:

- (a) Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.
 - (aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code.
- (b) Specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities.
- (c) Levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities.
- (d) Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities.
- (e) Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies.
- (f) Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder.
- (g) Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder.
- (h) Call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities.
- (i) Publish such information, data, research studies and other information as may be specified by regulations.
- (j) Specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data.
- (k) Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.
- (l) Constitute such committees as may be required including in particular the committees laid down in Section 197.
- (m) Promote transparency and best practices in its governance.
- (n) Maintain websites and such other universally accessible repositories of electronic information as may be necessary.
- (o) Enter into memorandum of understanding with any other statutory authorities.

- (p) Issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities.
- (q) Specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder.
- (r) Conduct periodic study, research and audit the functioning and performance of to the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board.
- (s) Specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations.
- (t) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor.
- (u) Perform such other functions as may be prescribed.

Section 196(2) of the Code further provides that the Board may make model bye-laws to be to adopted by insolvency professional agencies which may provide for:

- (a) The minimum standards of professional competence of the members of insolvency professional agencies.
- (b) The standards for professional and ethical conduct of the members of insolvency professional agencies.
- (c) Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.

Explanation. – For the purposes of this clause, the term “non-discriminatory” means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified.

- (d) The manner of granting membership.
- (e) Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.
- (f) The information required to be submitted by members including the form and the time for submitting such information.
- (g) The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.
- (h) The grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof.
- (i) A fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies.
- (j) The grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies.
- (k) The quantum of fee and the manner of collecting fee for inducing persons as its members.
- (l) The procedure for enrolment of persons as members of insolvency professional agency.
- (m) The manner of conducting examination for enrolment of insolvency professionals.
- (n) The manner of monitoring and reviewing the working of insolvency professional who are members.
- (o) The duties and other activities to be performed by members.
- (p) The manner of conducting disciplinary proceedings against its members and imposing penalties.
- (q) The manner of utilising the amount received as penalty imposed against any insolvency professional.

Section 196(3) states that the Board shall have 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:

1. The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board.
2. Summoning and enforcing the attendance of persons and examining them on oath.
3. Inspection of any books, registers and other documents of any person at any place.
4. Issuing of commissions for the examination of witnesses or documents.

(B) INSOLVENCY PROFESSIONALS (IPS)

The Code provides for Insolvency Professionals (IPs) to act as intermediary in the insolvency resolution process. Insolvency professionals are a class of regulated but private professionals having minimum standards of professional and ethical conduct. Section 3(19) of the Code defines an “insolvency professional” as a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

An insolvency professional plays a very important role under the Code. He acts as an “interim resolution professional” and/or as a “resolution professional” in the corporate insolvency resolution process (specified in Part II of the Code which deals with corporate persons) as well as Part III of the Code (which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms) for conducting the fresh start process or insolvency resolution process.

An insolvency professional also acts as a liquidator in accordance with the provisions of Part II as well as a “bankruptcy trustee” for the estate of the bankrupt under section 125 in Part III of the Code.

Enrolment and Registration of Insolvency Professionals

Section 206 lays down that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

Section 207(1) further lays down that every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations. Section 207(2) empowers the IBBI to specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field to act as insolvency professionals.

The Insolvency and Bankruptcy Board of India has framed the IBBI (Insolvency Professional) Regulations, 2016 to regulate the working of Insolvency Professionals. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

Functions and obligations of insolvency professionals

Section 208(1) of the Code provides that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely: –

- (a) a fresh start order process under Chapter II of Part III;
- (b) individual insolvency resolution process under Chapter III of Part III;
- (c) corporate insolvency resolution process under Chapter II of Part II;
- (d) individual bankruptcy process under Chapter IV of Part III; and
- (e) liquidation of a corporate debtor firm under Chapter III of Part II.

Section 208(2) mandates that every insolvency professional shall abide by the following code of conduct: –

- (a) to take reasonable care and diligence while performing his duties;
- (b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- (c) to allow the insolvency professional agency to inspect his records;
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- (e) to perform his functions in such manner and subject to such conditions as may be specified.

(C) INSOLVENCY PROFESSIONAL AGENCIES (IPA)

Section 3(20) of the Code defines “insolvency professional agency” as any person registered with the Board under section 201 as an insolvency professional agency.

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue ‘authorisation for assignment’ to the IPs enrolled with them. In exercise of powers conferred by the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations to regulate the working of Insolvency Professional Agencies (IPAs):

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and
- The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

Following are the Insolvency Professional Agencies (IPAs) registered under the Code:

- The Indian Institute of Insolvency Professionals of ICAI;
- ICSI Institute of Insolvency Professionals; and
- Insolvency Professional Agency of Institute of Cost Accountants of India.

Section 199 of the Code provides that save as otherwise provided in this Code, no person shall carry on its business as insolvency professional agencies under this Code and enrol insolvency professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Board.

According to Section 204 of the Code, insolvency professional agencies perform the following functions, namely:

- (a) grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;
- (b) lay down standards of professional conduct for its members;
- (c) monitor the performance of its members;
- (d) safeguard the rights, privileges and interests of insolvency professionals who are its members;
- (e) suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
- (f) redress the grievances of consumers against insolvency professionals who are its members; and
- (g) publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

(D) ADJUDICATING AUTHORITY (AA)

Section 5(1) of the Code provides that the “Adjudicating Authority” for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. Section 60(5) of the Code further provides that 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.

Section 63 of the Code excludes the jurisdiction of the civil courts. It provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under this Code.

Similarly, in case of individuals and partnership firms, section 79(1) of the Code provides that the “Adjudicating Authority” for insolvency resolution and bankruptcy for individuals and partnership firms is the Debt Recovery.

Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Section 179(1) of the Code provides that subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.

Section 179(2) of the Code further provides that the Debt Recovery Tribunal shall, have jurisdiction to entertain or dispose of –

- (a) any suit or proceeding by or against the individual debtor;
- (b) any claim made by or against the individual debtor;
- (c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

Section 180 of the Code excludes the jurisdiction of civil courts. The section provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal has jurisdiction under this Code.

Thus, the Insolvency and Bankruptcy Code proposes two tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the adjudication authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs).

Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India. For individuals and other persons, the adjudicating authority is the DRT. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

(E) INFORMATION UTILITY (IU)

Section 3(21) of the Code defines an “information utility” as a person who is registered with the Board as an information utility under section 210.

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitate swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India oversees the functioning of such information utilities. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

The Code provides that the data with the IU facilitates the CIRP. The RoD of the IU provides evidence of debt and default and assists the AA in deciding on an application for admission of insolvency proceedings against a CD. Sections 7(3) & 9(3) of the Code read with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, require submission of RoD from an IU as evidence of default, among various other options, along with application for initiation of CIRP. The RoD issued by an IU has evidentiary value in IBC processes. It contains complete details of the parties to the debt, debt information, security details, default information, details of communication with debtor and authentication status by the counter parties of the debt categorized in accordance with regulation 21 of the IBBI (Information Utilities) Regulations, 2017. The IU issues RoD in every defaulted loan (unique debt) reported to it on completing the process of authentication.

There is one IU, namely, the NeSL that provides authenticated financial information to the users. The IBBI interacts with the MD & CEO of the IU along with the MDs of IPAs every month to discuss the issues relating to receipt and authentication of financial information. As at the end of March 2025, NeSL has issued about 1,37,350 RoDs under Corporate Segment to support the IBC ecosystem.

Obligations of information utility (Section 214)

- a. create and store financial information in a universally accessible format;
- b. accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;
- c. accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;
- d. meet such minimum service quality standards as may be specified by regulations;
- e. get the information received from various persons authenticated by all concerned parties before storing such information;
- f. provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;
- g. publish such statistical information as may be specified by regulations;
- h. have inter-operability with other information utilities.

KEY DEFINITIONS AND CONCEPTS

Sections 3, 5 and 79 of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code. Section 3 of the Code defines general important terms used in the Code whereas section 5 of the Code defines important terms relating to Insolvency Resolution and Liquidation for Corporate Persons covered in Part II of the Code. Similarly section 79 of the Code defines important terms relating to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms which is discussed in Part III of the Code.

DEFINITIONS IN SECTION 3 OF THE CODE

Section 3(37) provides that words and expressions used but not defined in the Insolvency and Bankruptcy Code, 2016 but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those acts. Therefore, all such words and expressions not defined in the Code but defined in other acts shall have the meanings assigned to them in those other acts.

Section 3 states that unless the context otherwise requires,

“Board” means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188 [Section 3(1)].

“Bench” means a bench of the Adjudicating Authority [Section 3(2)].

“Bye-laws” mean the bye-laws made by the insolvency professional agency under section 205 [Section 3(3)].

“Charge” means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage [Section 3(4)].

“Claim” means –

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured [Section 3(6)].

Claim’ gives rise to ‘debt’ only when it is due and ‘default’ occurs only when debt becomes due and payable and is not paid by the debtor. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019).

‘Claim’ under section 3(6) of the Code means a right to payment, even if it is disputed. (Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

“Corporate Person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider [Section 3(7)].

National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb of the Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ultimately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of ‘corporate person’ in section 3(7) of the Code to include NHAI. (Hindustan Construction Company Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) No. 1074 of 2019 with other Civil Appeals] SC judgement dated 27.11.2019)

“Corporate Debtor” means a corporate person who owes a debt to any person [Section 3(8)].

If a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression “corporate debtor” in section 3(8) of the Code. (Laxmi Pat Surana Vs. Union Bank of India & Anr. [Civil Appeal No. 2734 of 2020] SC judgement dated 26.03.202)

“Core Services” means services rendered by an information utility for –

- (a) accepting electronic submission of financial information in such form and manner as may be specified;
- (b) safe and accurate recording of financial information;
- (c) authenticating and verifying the financial information submitted by a person; and
- (d) providing access to information stored with the information utility to persons as may be specified [Section 3(9)].

“Creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder [Section 3(10)].

In the matter of Digamber Bhondwe Vs. JM Financial Asset Reconstruction [CA(AT)(Ins) No. 1379 of 2019] it was held “We further reject the submission that because in Section 3(10) of I&B Code in definition of “Creditor” the “decree holder” is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with “Insolvency Resolution and Liquidation for Corporate Person”, & has its own set of definitions in Section 5. Section 3 (10) definition of “Creditor” includes “financial creditor”, “operational creditor” “decree-holder” etc. But Section 7 or Section 9 dealing with “Financial Creditor” and “operational creditor” do not include “decree-holder” to initiate CIRP in Part II.”

Sh. Sushil Ansal Vs. Ashok Tripathi and Ors, the National Company Law Appellate Tribunal, Delhi (NCLAT) held that no decree holder who is covered within the definitions of a creditor given under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) can come within the ambit of the class of a financial creditor. This implies that a decree holder is not permitted to incorporate any corporate insolvency resolution process (CIRP) against any corporate debtor with the sole objective of executing a decree under it.

“Debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt [Section 3(11)].

“Default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be [Section 3(12)].

‘Default’ is defined in section 3(12) of the Code in very wide terms as non-payment of a ‘debt’ once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. (Innovative Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

The context of section 3(12) of the Code is actual non-payment by the CD when a ‘debt’ has become due and payable. (B. K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates [Civil Appeal No. 23988 of 2017 and other appeals] SC judgement dated 11.10.2018)

“Financial Information”, in relation to a person, means one or more of the following categories of information, namely:

- (a) records of the debt of the person;
- (b) records of liabilities when the person is solvent;
- (c) records of assets of person over which security interest has been created;
- (d) records, if any, of instances of default by the person against any debt;

- (e) records of the balance sheet and cash-flow statements of the person; and (f) such other information as may be specified [Section 3(13)].

“Financial Institution” means –

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and
- (d) such other institution as the Central Government may by notification specify as a financial institution [Section 3(14)].

“Financial Product” means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed [Section 3(15)].

“Financial Service” includes any of the following services, namely: –

- (a) accepting of deposits;
- (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- (c) effecting contracts of insurance;
- (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
- (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of –
 - (i) buying, selling, or subscribing to, a financial product;
 - (ii) availing a financial service; or
 - (iii) exercising any right associated with a financial product or financial service.
- (f) establishing or operating an investment scheme;
- (g) maintaining or transferring records of ownership of a financial product;
- (h) underwriting the issuance or subscription of a financial product; or
- (i) selling, providing, or issuing stored value or payment instruments or providing payment services [Section 3(16)].

“Financial Service Provider” means a person engaged in the business of providing financial services in terms of authorization issued or registration granted by a financial sector regulator [Section 3(17)].

“Financial Sector Regulator” means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government [Section 3(18)].

“Insolvency Professional” means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207 [Section 3(19)].

“Insolvency Professional Agency” means any person registered with the Board under section 201 as an insolvency professional agency [Section 3(20)].

“Information Utility” means a person who is registered with the Board as an information utility under section 210 [Section 3(21)].

“Person” includes –

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a trust;
- (e) a partnership;
- (f) a limited liability partnership; and
- (g) any other entity established under a statute, and includes a person resident outside India [Section 3(23)].

A sole proprietary concern, not being a ‘person’ under section 3(23) of the Code and also when there is a pre-existing dispute, cannot file application under section 9. (R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd. [IB722/ND/2019] NCLT, New Delhi judgement dated 23.09.2019)

A 'trade union' is an entity established under a statute i.e. the Trade Unions Act, 1926 and is therefore, a 'person' under section 3(23) of the Code. (JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamalapat Jute Mills Company Ltd. & Ors. [Civil Appeal No. 20978 of 2017] SC judgement dated 30.04.2019)

A proprietorship concern does not fall within the purview of "person" as per section 3(23) for the purpose of filing an application under section 9 of the Code. Proprietorship concern cannot sue and be sued unless it is represented by a proprietor. (Shri Shakti Dyeing Works Vs. Berawala Textiles Pvt. Ltd. [CP (IB) No. 854/NCLT/AHM/2019] NCLT, Ahmedabad judgement dated 25.01.2021)

"Property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property [Section 3(27)].

"Secured Creditor" means a creditor in favour of whom security interest is created [Section 3(30)].

The State Tax Officer does not come within the meaning of 'secured creditor' as defined under section 3(30) read with section 3(31) of the Code. (Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. [CA (AT) (Ins.) No. 354 of 2019 and other appeals] NCLAT judgement dated 19.12.2019)

In the matter of Rainbow Papers Ltd., Hon'ble SC held that the State is a secured creditor as per the Gujarat Value Added Tax Act, 2003 and are to be rank equally with secured debts under section 53(1)(b). As per section 3(30) of the Code, secured creditor means a creditor in favour of whom security interest is created. Such security interest could be created by operation of law. The definition of secured creditor in the Code does not exclude any Governmental Authority. Therefore, the resolution plan ignores the statutory dues payable to any State Government or legal authority, the Adjudicating Authority is bound to reject the resolution plan.

In the matter of Rainbow Papers Ltd., Hon'ble SC held that the State is a secured creditor but thus judgement is overturned in the matter of "Paschimanchal vidyut vitran nigam Ltd. V. Raman Ispat", now state is not considered as secured creditor.

"Security Interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee; [Section 3(31)].

'Security Interest' does not include 'Performance Bank Guarantee' and it is not covered by section 14 of the Code. (Indian Overseas Bank Vs. Arvind Kumar [CA (AT) (Ins.) No. 558 of 2020] NCLAT judgement dated 28.09.2020)

"Transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor [Section 3(33)].

"Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien [Section 3(34)].

"Transfer of Property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property [Section 3(35)].

DEFINITIONS IN SECTION 5 OF THE CODE

Section 5 belongs to Part II of the Code which lays down procedure for insolvency resolution and liquidation to be followed in case of corporate persons. Section 5 states that unless the context otherwise requires:

"Adjudicating Authority", for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 [Section 5(1)].

"Constitutional Document", in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership [Section 5(4)].

“Corporate Applicant” means –

- (a) corporate debtor; or
- (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process or the pre-packaged insolvency resolution process as the case may be, under the constitutional document of the corporate debtor; or
- (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
- (d) a person who has the control and supervision over the financial affairs of the corporate debtor [Section 5(5)].

“Corporate Guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor [Section 5(5A)].

If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under section 60(2) before the same NCLT and not before the DRT. (State Bank of India Vs. D. S. Rajender Kumar [CA (AT) (Ins.) No. 87 to 91 of 2018] NCLAT judgement dated 18.04.2018)

Without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under section 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor. (Rai Bahadur Shree Ram and Company Pvt. Ltd. Vs. Rural Electrification Corporation Ltd. & Ors. [Civil Appeal No. 1484 of 2019] SC judgement dated 11.02.2019)

The principal debtor (CD) is discharged under the Code not on the instance of a creditor but due to operation of law, i.e., approval of resolution plan. Hence, the guarantor is not discharged of its liability merely because the creditor consented to a resolution plan of the principal debtor. (State Bank of India Vs. Sungrowth Shares & Stocks Ltd. [CP (IB) No. 796/KB/2018] NCLT, Kolkata judgement dated 04.09.2019)

The corporate guarantees given by the CD can be invoked only in the event of a default on the part of the borrower. (Export Import Bank of India Vs. CHL Ltd. [CA (AT) (Ins.) 51 of 2018] NCLAT judgement dated 16.01.2019)

It makes no difference as to whether the corporate person stood as guarantor to an individual or a corporate person, and as so long as the obligation in respect of a claim is due from a corporate person falling within the definition of ‘financial debt’, then it is obvious that the creditor can proceed under Section 7 of the Code against such corporate person. (The Karur Vysya Bank Ltd. Vs. Maharaja Theme Parks and Resorts Pvt. Ltd. [CP/1314/IB/2018] NCLT, Chennai judgement dated 08.04.2019)

The Code is at a nascent stage and it is better that the interpretation of the provisions is taken up by the SC to avoid any confusion and to authoritatively settle the law. It directed that no further petitions involving the challenge to the notification dated November 15, 2019, which brought into force certain provisions relating to the personal guarantors (PGs) to CDs, shall be entertained by any High Court (Insolvency and Bankruptcy Board of India Vs. Lalit Kumar Jain & Ors. [TP (Civil) No.(s) 1034/2020 with other TPs] SC judgement dated 29.10.2020)

Neither section 14 nor section 31 of the Code place any fetters on a bank/financial institution from initiation and continuation of proceedings against the guarantor for recovering of their dues. The liability of the principal borrower and guarantor remain coextensive and a bank/financial institution is entitled to initiate proceedings against the personal guarantor under the SARFAESI Act during the continuation of the CIRP against the principal borrower. (Kiran Gupta Vs. State Bank of India & Anr. [W.P.(C) 7230/2020 & CM.APPL. 24414/2020 (stay)] HC, New Delhi judgement dated 02.11.2020)

CIRP can be proceeded against the principal borrower as well as guarantor. (State Bank of India Vs. Athena Energy Ventures Pvt. Ltd. [CA (AT) (Ins.) No. 633 of 2020] NCLAT judgement dated 24.11.2020)

“Dispute” includes a suit or arbitration proceedings relating to –

- (a) the existence of the amount of debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty [Section 5(6)].

Any observations with regard to individual officer if made by a court of law or in any communication made by the operational creditor, the same cannot be treated to be an existence of dispute. (Yogendra Yasupal Vs. Jigsaw Solutions & Anr. [CA (AT) (Ins.) No. 222 of 2017] NCLAT judgement dated 16.10.2017)

The test of existence of a dispute is: (a) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (b) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (c) a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed. (Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. [Civil Appeal No.9405 of 2017] SC judgement dated 21.09.2017)

The dispute should not be a mere eyewash and attempt to derail the OC's entitlement to initiate the proceedings under sections 8 and 9 of the Code. (Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd. [IB No. (IB)- 167(ND)/2017] NCLT, New Delhi judgement dated 10.08.2017)

A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) and an inter-se dispute between two groups of shareholders of the CD does not constitute a 'dispute' in reference to OCs. The 'dispute' under section 5(6) of the Code must be between the CD and the OCs. (Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr. [CA (AT) (Ins.) No. 66 of 2017 and other appeals] NCLAT judgement dated 10.05.2018)

On the 'existence of a dispute', it was observed that section 5(6) is an inclusive provision and does not confine the AA from considering the existence of a dispute from a broader angle. Therefore, dispute in terms of section 8(2)(a) of the Code shall not be limited to instances specified in the definition under section 5(6). (Anuj Khanna Vs. Wishwa Naveen Traders & Anr. [CA (AT) (Ins.) No. 555 of 2020] NCLAT judgement dated 25.11.2020)

"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7)].

Essential criteria for being an FC: (i) A person to whom a financial debt is owed and includes a person whom such debt has been legally assigned or transferred to (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause

(a) to (i) of sub-section (8) of Section 5. (B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd. [CA (AT) (Ins.) No. 38 of 2017] NCLAT judgement dated 22.12.2017)

The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The Explanation was added in 2018 merely to clarify doubts that had arisen. The deeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code. (Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India & Ors. [WP (C) No. 43 of 2019 with other appeals] SC judgement dated 09.08.2019)

"Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation – For the purposes of this sub-clause,

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in

clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016.

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause [Section 5(8)].

The Joint Development Agreement entered, is a contract of reciprocal rights and obligations, both parties are admittedly Joint Development Partners, who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of contract, Section 7 Application is not maintainable as the amount cannot be construed as financial debt as defined under section 5(8) of the Code. (Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd. [CA (AT) (Ins.) No. 550 of 2020] NCLAT judgement dated 18.08.2020)

A financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)

The Supreme Court in the case of Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors. [Civil Appeal No. 2842 of 2020 with 3063 of 2020] SC judgement dated 01.02.2021 held that (a) The collusive commercial arrangements between FCs and the CD would not constitute a 'financial debt'; (b) The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the CD. The purpose of excluding a related party of a CD from the CoC is to obviate conflicts of interest; (c) Exclusion under the first proviso to section 21(2) is related not to the debt itself but to the relationship existing between a related party FC and the CD.; and (d) The FC, who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party FC divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, it would be in keeping with the object and purpose of the first proviso to section 21(2), to debar the former related party creditor.

Advance amount paid as Security Deposit bearing interest is Financial Debt. NCLT, New Delhi Bench vide its order dated 11th October 2021 in case of Magicon Impex Pvt. Ltd observed that, the amount which has been released pursuant to Agreement in the form of Security Deposit and the same is interest bearing, which means it is carrying consideration of time value of money having commercial effect of a borrowing. Therefore, in our view the "debt" claimed is a "Financial Debt" within the definition of Section 5(8)(f) of IBC, 2016.

"Financial Position" in relation to any person, means the financial information of a person as on a certain date [Section 5(9)].

"Information Memorandum" means a memorandum prepared by resolution professional under sub-section (1) of section 29 [Section 5(10)].

"Initiation Date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process or the pre-packaged insolvency resolution process as the case may be [Section 5(11)].

"Insolvency Commencement Date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case maybe [Section 5(12)].

"Insolvency Resolution Process Costs" means –

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board [Section 5(13)].

is incurred towards supply of essential services during the period of moratorium, it may be accounted towards the insolvency resolution process costs. (Dakshin Gujarat VIJ Company Ltd. Vs. ABG Shipyard Ltd. & Anr. [CA (AT) (Ins.) No. 334 of 2017] NCLAT judgement dated 08.02.2018)

“Insolvency Resolution Process Period” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day [Section 5(14)].

It is always open to the NCLT/NCLAT to exclude certain period for the purpose of counting the total period of 270 days. The grounds include the following: (i) If the CIRP is stayed by a court of law or the NCLT/NCLAT/ Supreme Court (ii) If no RP is functioning for one or other reason during the CIRP (iii) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP (iv) On hearing a case, if order is reserved by the NCLT/NCLAT/Supreme Court and finally pass order enabling the RP to complete the CIRP (v) If the CIRP is set aside by the NCLAT or order of the NCLAT is reversed by the Supreme Court and CIRP is restored (vi) Any other circumstances which justifies exclusion of certain period. (Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors. [CA (AT) (Ins.) No. 185 of 2018] NCLAT judgement dated 08.05.2018)

“Interim Finance” means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre-packaged insolvency resolution process Period, as the case may be, and such other debt as may be notified [Section 5(15)].

The Ministry of Corporate Affairs vide notification dated 18th March, 2020 notified that a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I, for the purposes of the said clause.

Explanation.– For the purposes of this notification, the expression “Special Window for Affordable and Middle- Income Housing Investment Fund I” shall mean the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India, established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector.

“Liquidation Cost” means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board [Section 5(16)].

“Liquidation Commencement Date” means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be [Section 5(17)].

“Liquidator” means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be [Section 5(18)].

“Officer” for the purposes of Chapter VI and Chapter VII of this Part, means an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013, or a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, as the case may be [Section 5(19)].

“Operational Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred [Section 5(20)].

It is clear that an OC who has assigned or legally transferred any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent of such assignment or legal transfer. (Cooperative Rabobank U.A. Singapore Branch Vs. Shailendra Ajmera [CA (AT) (Ins.) No. 261 of 2018] NCLAT judgement dated 29.04.2019)

The workmen of a Company come within the meaning of an OC in terms of section 5(20) r/w section 5(21) of the Code. (Suresh Narayan Singh Vs. Tayo Rolls Ltd. [CA (AT) (Ins.) No. 112 of 2018] NCLAT judgement dated 26.09.2018)

An OC means a person to whom an operational debt is owed, and an operational debt under section 5(21) means a claim in respect of provision of goods or services. (Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

A Trade Union or Association of workmen/employee does not come within the meaning of OC as no services is rendered by the Workmen's Association/Trade Union to the CD to claim any dues which can be termed to be debt as defined in sub-section (11) of section 3. (JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Co. Ltd. [CA (AT) (Ins.) No. 82 of 2017] NCLAT 12.09.2017)

“Operational Debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority [Section 5(21)].

Operational debt would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)

The property seized by Kolkata Municipal Corporation (KMC) towards recovery of municipal tax dues from CD, can be the subject matter of the CIRP under the Code as the claim of KMC had attained finality and fastened liability upon the CD, thus constituting an 'operational debt' under section 5(21) of the Code. (Kolkata Municipal Corporation and Anr. Vs. Union of India and Ors. [WPA No.977 of 2020] HC, Calcutta, judgement dated 29.01.2021)

Chipsan Aviation Pvt. Ltd. Vs. Punj Llyod Aviation Ltd. [Company Appeal (AT) (Insolvency) No. 261 of 2022] On an assurance from the CD, a sum of Rs. 60 lakh was advanced for aviation related services. The advance payment was reflected in the balance sheet of the CD. However, there was no contract between the parties for providing aviation services. The issue for consideration was whether such the advance paid will fall within the definition of 'operational debt' under the Code. The AA rejected the application holding that advance payment made by OC to the CD does not fall within operational debt. On appeal, the NCLAT observed that the expression 'in respect of' in section 5(21) of the Code has to be interpreted in a broad and purposive manner and held that the advance payment of Rs. 60 lakh was clearly an operational debt.

The Supreme Court in its order dated August 09, 2019 in the case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, held that “a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt”.

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

“Personnel” includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor [Section 5(23)].

“Preliminary Information Memorandum” means a memorandum submitted by the corporate debtor under clause (b) of sub-section (1) of section 54G [Section 5(23A)].

“Pre-Packaged Insolvency Commencement Date” means the date of admission of an application for initiating the pre-packaged insolvency resolution process by the Adjudicating Authority under clause (a) of sub-section of section 54C [Section 5(23B)].

“Pre-Packaged Insolvency Resolution Process Costs” means-

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of section 54F;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J;
- (d) any costs incurred at the expense of the Government to facilitate the prepackaged insolvency resolution process; and
- (e) any other costs as may be specified [Section 5(23C)].

“Pre-Packaged Insolvency Resolution Process Period” means the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order under sub-section (1) of section 54L, or sub-section (1) of section 54N, or sub-section (2) of section 54-O, as the case may be, is passed by the Adjudicating Authority [Section 5(23D)].

“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 [Section 5(24)].

“Related Party”, in relation to an individual, means –

- (a) a person who is a relative of the individual or a relative of the spouse of the individual;
- (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;
- (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;
- (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;
- (e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;
- (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;
- (h) a person on whose advice, directions or instructions, the individual is accustomed to act;
- (i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of

the share capital of the company or controls the appointment of the board of directors of the company.

Explanation. For the purposes of this clause, –

- (a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely:
 - (i) members of a Hindu Undivided Family, (ii) husband, (iii) wife, (iv) father, (v) mother, (vi) son, (vii) daughter, (viii) son’s daughter and son, (ix) daughter’s daughter and son, (x) grandson’s daughter and son, (xi) granddaughter’s daughter and son, (xii) brother, (xiii) sister, (xiv) brother’s son and daughter, (xv) sister’s son and daughter, (xvi) father’s father and mother, (xvii) mother’s father and mother, (xviii) father’s brother and sister, (xix) mother’s brother and sister; and
- (b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included. [Section 5(24A)].

In **Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India & Others** [(2019) 4 SCC 17], a constitutional challenge was raised against section 29A(j) (connected parties) read with the definition of related party under the IBC.

The Supreme Court examined the definition of “related party” and observed that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in section 5(24A) (definition of related party to an individual) show that such persons must be “connected” with the resolution applicant within the meaning of section 29A(j). This being the case, the categories of persons who are collectively mentioned as a “relative” need to have a connection with the business activity of the resolution applicant. If this cannot be shown such person cannot be disqualified under section 29A(j). All the categories in this subsection deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expressions “related party” and “relative” contained in the definition sections must be read noscitur a sociis (the meaning of an unclear word or phrase should be interpreted within the context it is being used) with the categories of persons mentioned in Explanation I. So read, they would include only persons who are connected with the business activity of the resolution applicant.

“Resolution Applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 or pursuant to the section 54K, as the case may be [Section 5(25)].

A resolution applicant whose resolution plan stands approved by CoC, cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process, and the same fraught with disastrous consequences for the CD which may be pushed into liquidation, as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a CD, more so, when it is a going concern. (**Kundan Care Products Ltd. Vs. Amit Gupta and Ors.** [CA (AT) (Ins.) No.653 of 2020] NCLAT judgement dated 30.09.2020)

A successful resolution applicant cannot be permitted to withdraw the approved resolution plan, coupled with the fact in the instant case being the sole RA in the CIRP, which is an MSME and having knowledge of the financial health of the CD as a promoter or as a connected person cannot be permitted to seek revision of the approved plan, on the ground which would not be a material irregularity within the ambit of section 61(3) of the Code. (**Seroco Lighting Industries Pvt. Ltd. Vs. Ravi Kapoor, RP for Arya Filaments Pvt. Ltd. & Ors.** [CA (AT) (Ins.) No.1054 of 2020] NCLAT judgement dated 10.12.2020)

“Resolution Plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It may be noted that a resolution plan may include provision the restructuring of the corporate debtor, insolvency by way of merger, amalgamation and demerger [Section 5(26)].

“Resolution Professional” for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process or the prepackaged insolvency resolution process, as the case may be and includes an interim resolution professional [Section 5(27)].

“Voting Share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor [Section 5(28)].

DEFINITIONS IN SECTION 79 OF THE CODE

Section 79 belongs to Part III of the Code which lays down procedure for insolvency resolution and bankruptcy for **individuals and partnership firms**. Section 79 states that unless the context otherwise requires:

“Adjudicating Authority” means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [Section 79(1)].

“Associate” of the debtor means –

- (a) a person who belongs to the immediate family of the debtor;
- (b) a person who is a relative of the debtor or a relative of the spouse of the debtor;
- (c) a person who is in partnership with the debtor;
- (d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;
- (e) a person who is employer of the debtor or employee of the debtor;
- (f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor; and
- (g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company.

Explanation – For the purposes of this sub-section, “relative”, with reference to any person, means anyone who is related to another, if –

- (i) they are members of a Hindu Undivided Family;
- (ii) one person is related to the other in such manner as may be prescribed [Section 79(2)].

“Bankrupt” means –

- (a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;
- (b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or
- (c) any person adjudged as an undischarged insolvent [Section 79(3)].

“Bankruptcy” means the state of being bankrupt [Section 79(4)].

“Bankruptcy Debt” in relation to a bankrupt, means –

- (a) any debt owed by him as on the bankruptcy commencement date;
- (b) any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and
- (c) any interest which is a part of the debt under section 171 [Section 79(5)].

“Bankruptcy Commencement Date” means the date on which a bankruptcy order is passed by the Adjudicating Authority under section 126 [Section 79(6)].

“Bankruptcy Order” means an order passed by an Adjudicating Authority under section 126 [Section 79(7)].

“Bankruptcy Process” means a process against a debtor under Chapters IV and V of this Part [Section 79(8)].

“Bankruptcy Trustee” means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125 [Section 79(9)].

“Committee of Creditors” means a committee constituted under section 134; [Section 79(11)].

“Debtor” includes a judgment-debtor [Section 79(12)].

“Discharge Order” means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be [Section 79(13)].

“Excluded Assets” for the purposes of this part includes –

- (a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation;
- (b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;
- (c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

- (d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and
- (e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed [Section 79(14)].

“Excluded Debt” means –

- (a) liability to pay fine imposed by a court or tribunal;
- (b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- (c) liability to pay maintenance to any person under any law for the time being in force;
- (d) liability in relation to a student loan; and
- (e) any other debt as may be prescribed [Section 79(15)].

“Firm” means a body of individuals carrying on business in partnership whether or not registered under section 59 of the Indian Partnership Act, 1932 [Section 79(16)].

“Immediate Family” of the debtor means his spouse, dependent children and dependent parents [Section 79(17)].

“Partnership Debt” means a debt for which all the partners in a firm are jointly liable [Section 79(18)].

“Qualifying Debt” means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include– (a) an excluded debt; (b) a debt to the extent it is secured; and (c) any debt which has been incurred three months prior to the date of the application for fresh start process [Section 79(19)].

“Repayment Plan” means a plan prepared by the debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs [Section 79(20)].

“Resolution Professional” means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process [Section 79(21)].

“Undischarged Bankrupt” means a bankrupt who has not received a discharge order under section 138 [Section 79(22)].

CASE LAWS

1. **The provisions of the IBC override anything contained in any other law in force or any instrument having effect by virtue of such law:** In the matter of Innoventive Industries Ltd. v. ICICI Bank, the Supreme Court for the first time explained the paradigm shift in law by virtue of the newly enacted Insolvency and Bankruptcy Code, 2016 which consolidates and amends all the laws relating to the insolvency and bankruptcy process in India.

Facts of the case

ICICI Bank had taken Innoventive Industries Ltd. to NCLT for the recovery of its due as the company had defaulted on loan repayment. The NCLT had given a verdict in favour of the ICICI Bank, which Innoventive Industries challenged in the National Company Law Appellate Tribunal (NCLAT), where it received yet another setback. The company later filed an appeal in the Supreme Court seeking relief under the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (MRUA), which states that if a company is facing bankruptcy, protection needs to be provided for the employees.

Judgement

The Supreme Court held that the Act is repugnant to the IBC. Under the MRUA, the State Government may take over the management of the undertaking and impose a moratorium in much the same manner as that contained in the IBC. By giving effect to the MRUA, the plan/scheme that may be

adopted under the IBC will directly be hindered. There would be a direct clash between moratoriums under the two statutes. The non-obstante clause of the IBC will prevail over the non-obstante clause in the MRUA. On account of the non-obstante clause in the IBC, any right of the CD under any other law cannot come in the way of the IBC.

Further, In the case of Pr. Commissioner of Income Tax Vs. Monnet Ispat And Energy Ltd. [SLP No. 6483- 2018 & other petitions], the Supreme Court held that the IBC would override anything inconsistent contained in any other enactment, including the Income Tax Act, 1961.

2. **Enactment of the IBC has marked a quantum change in corporate governance and the rule of law:** In the case of Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd [CA 9664 of 2019] judgement dated March 15, 2021, the Supreme Court observed that enactment of the IBC has marked a quantum change in corporate governance and

the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by an individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at re-organization and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems.

3. **The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor:** In the matter of Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019 Judgment dated 8th March, 2021, the Hon'ble Supreme Court of India observed that the primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor. The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the back door by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected in toto. The interpretation given to such statutory provisions that are textually similar to Section 60(5) (c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, inter alia, avoidance of multiplicity of fora and a timely resolution of the insolvency process.
4. **The foremost and primary objective of the IBC is the reorganization and insolvency resolution of the Corporate Debtor (CD) in a time bound manner:** Hon'ble Supreme Court of India in the matter of Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] Judgement dated 25th January, 2019 observed that as is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme - workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

LESSON 2 - CORPORATE INSOLVENCY RESOLUTION PROCESS

REGULATORY FRAMEWORK

- Section 6 to 32A of the Insolvency and Bankruptcy Code, 2016
- The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

INTRODUCTION

Part II of the Insolvency and Bankruptcy Code, 2016 deals with the insolvency resolution and liquidation for corporate persons. Section 4 of the Insolvency and Bankruptcy Code, 2016 provides that Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees. Proviso to Section 4 of the Insolvency and Bankruptcy Code, 2016 also provides that Central Government may prescribe minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the pre-packaged insolvency resolution process of corporate debtors that are Micro, Small and Medium Enterprises as provided under Chapter III-A of Part II.

(Pre-Packaged Insolvency Resolution Process is discussed in detail under Chapter 8)

Part II of the Insolvency and Bankruptcy Code, 2016 lays down the following two independent stages:

- (i) Corporate Insolvency Resolution Process [Sections 6 to 32A] and
- (ii) Liquidation [Sections 33 to 54] and Voluntary Liquidation [Section 59]

Chapter II of Part II deals with corporate insolvency resolution process. Chapter II of Part II (together with Chapter VII of Part II which contains provisions relating to offences and penalties) specifically deals with corporate insolvency resolution process. Chapter III together with Chapter V of Part II governs the liquidation process for corporate persons. Chapter III-A of Part II that deals with Pre-Packaged Insolvency Resolution Process for corporate debtors that are Micro, Small and Medium Enterprises was introduced in April 2021 by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

The expression “corporate insolvency resolution process” is not defined in the Insolvency and Bankruptcy Code, 2016. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 defines the expression “corporate insolvency resolution process”. According to Rule 3(1)(b), “corporate insolvency resolution process” means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code.

The Insolvency and Bankruptcy Code, 2016 also contains a provision for Fast Track Corporate Insolvency Resolution Process in Chapter IV of Part II of the Code and is applicable to small corporates as defined in Section 55(2) of the Insolvency and Bankruptcy Code, 2016.

In the case of **Swiss Ribbons Private Limited and Another Vs. Union of India and Others** [(2019) 4 SCC 17], the Supreme Court upheld the constitutionality of the IBC and observed that the foremost and primary objective of the IBC is the reorganization and insolvency resolution of the CD in a time-bound manner.

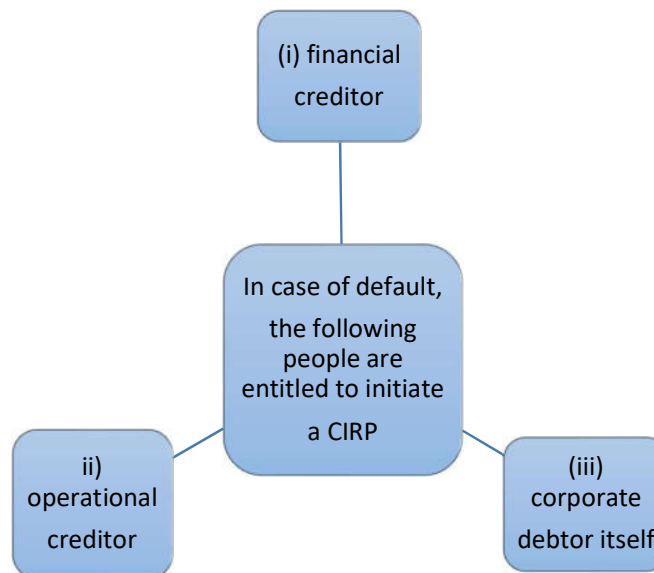
In **corporate insolvency resolution process**, the financial creditors assess the viability of debtor’s business and the options for its revival and rehabilitation. If the corporate insolvency resolution process fails or the financial creditors decide that the business of the debtor cannot be carried on in a profitable manner and it should be wound up, the debtor’s business undergoes the liquidation process.

In the liquidation process, the assets of the debtor are realized and distributed by the liquidator in accordance with provisions.

PERSONS WHO MAY INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under Chapter II of Part II of the Code.

Default is the mandatory trigger point to initiate CIRP: Going by the combined reading of section 4 along with section 6 of the Code, CIRP can be initiated against a corporate debtor only if corporate debtor commits a default of Rs. 1 (one) crore or more.

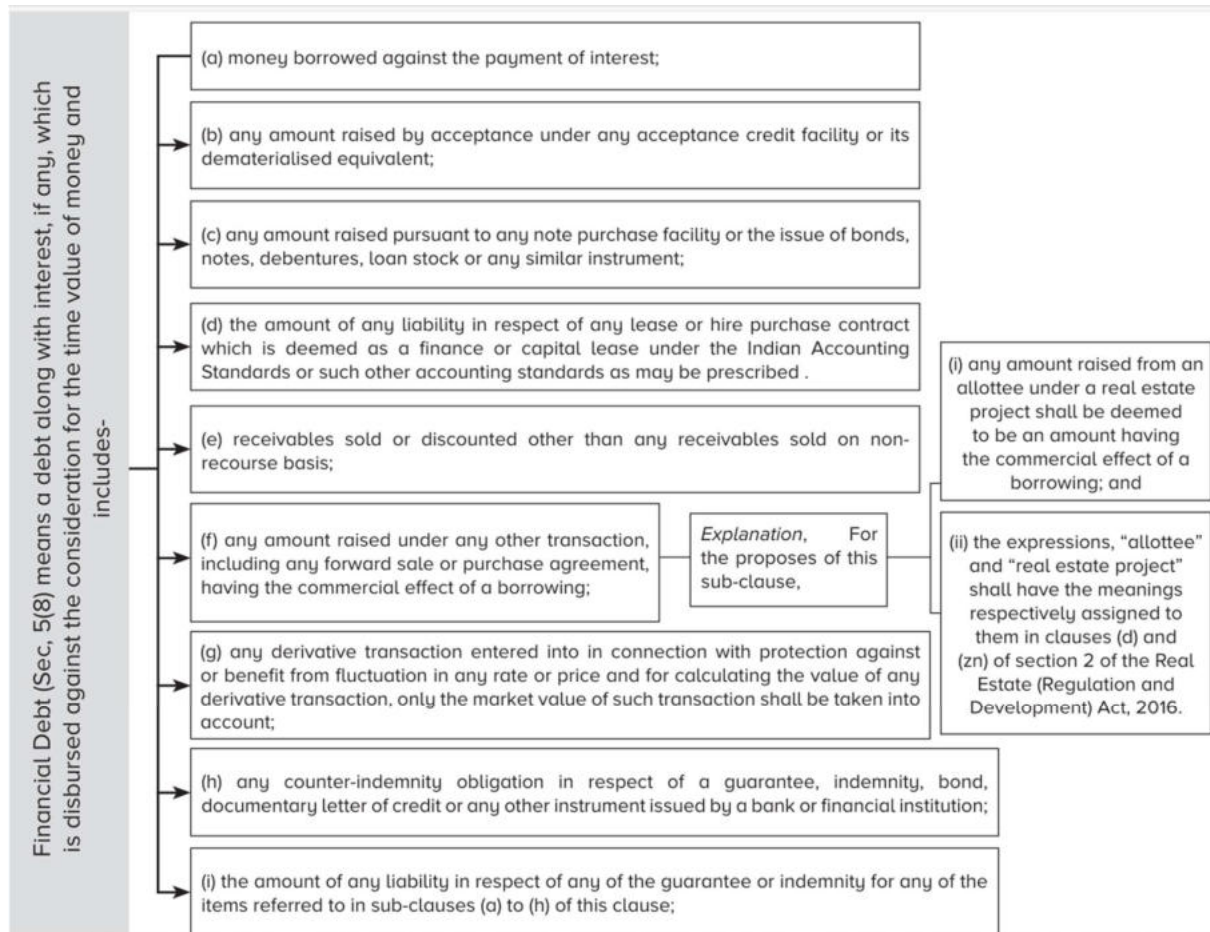


The term “**default**” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be [Section 3(12)].

According to section 3(8), a “**corporate debtor**” means a corporate person who owes a debt to any person.

The Insolvency and Bankruptcy Code, 2016 also defines the expressions “**financial creditor**” and “**operational creditor**”. According to Section 5(7), a “**financial creditor**” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to and according to section 5(20) an “**operational creditor**” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

The Insolvency and Bankruptcy Code, 2016 also defines the expressions “**financial debt**” and “**operational debt**” in sections 5(8) and 5(21) of the Code respectively.



First proviso to section 7(1) provides that an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less if financial creditors belong to clauses (a) and (b) of sub-section (6A) of section 21

Section 21(6A) provides for following creditors in clause (a) and (b) as follows:

(a) Where a financial debt is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors

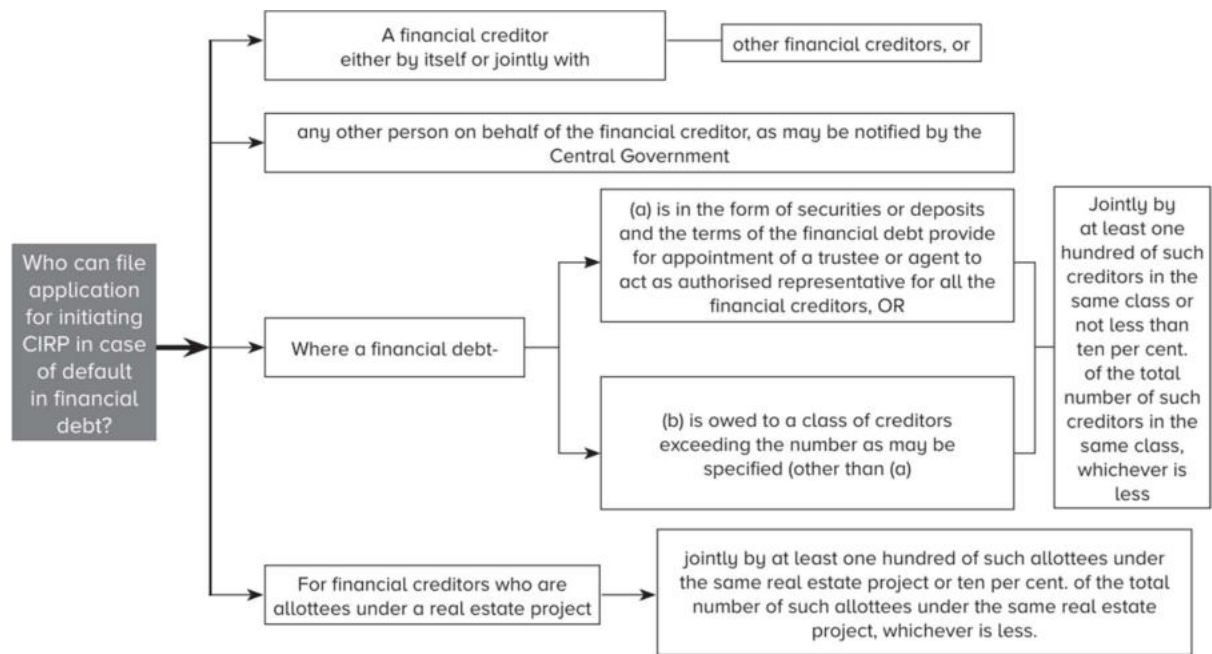
(b) Where a financial debt- is owed to a class of creditors exceeding the number as may be specified (i.e., ten) but do not fall in

- Clause (a) or
- Section 21(6) i.e., where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility do not provide for a single trustee or agent to act for all financial creditors

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 defines in Regulation 2(1) (aa) "**class of creditors**" which means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, "creditors in a class" shall be construed accordingly

As explanation to section 5(8) (f) has clarified that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and therefore, a financial debt, It is further provided in section 7(1) that an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less.

It is to be noted that applicant shall be allottees under the same real estate project



The expression “**operational debt**” as defined in section 5(21) of the Code means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Thus, where any corporate debtor commits a minimum default of **one crore** rupees as provided under section 4 of the Code, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in the manner as provided under Chapter II of Part II of the Code.

The Insolvency and Bankruptcy Code, 2016 provides a simple test to initiate corporate insolvency resolution process. The Code adopts a default based test for initiating the corporate insolvency resolution process. A default based test for initiating the insolvency resolution process permits early intervention when the corporate debtor shows early signs of financial distress. Early recognition of financial distress is very important for timely resolution of insolvency.

The Insolvency and Bankruptcy Code, 2016 not only permits the corporate debtor itself to initiate the insolvency resolution process once it has defaulted on a debt but also the operational creditors to initiate the insolvency resolution process. These provisions bring the law in line with international practices, which permit unsecured creditors (including employees, suppliers etc. who fall under the definition of operational creditors) to file for the initiation of insolvency resolution proceedings.

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY FINANCIAL CREDITOR

Section 7 of the Insolvency and Bankruptcy Code, 2016 lays down the procedure for the initiation of the corporate insolvency resolution process by a financial creditor or two or more financial creditors jointly.

Section 7 of the Insolvency and Bankruptcy Code, 2016 reads as follows:

1. A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Provided that for the financial creditors, referred to in clauses (a) and (b) of subsection (6A) of section 21, an application for initiation corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said act, failing which the application shall be deemed to be withdrawn before its admission.

Explanation – For the purposes of this sub- section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

2. The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.
3. The financial creditor shall, along with the application furnish
 - a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
 - b) the name of the resolution professional proposed to act as an interim resolution professional; and
 - c) any other information as may be specified by the Board.
4. The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub- section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same.

5. Where the Adjudicating Authority is satisfied that
 - (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
 - (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub- section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

6. Insolvency commencement date: The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).
7. The Adjudicating Authority shall communicate –
 - (a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;
 - (b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.

Filing of application against a corporate debt or before the Adjudicating Authority – Section 7 of the Insolvency and Bankruptcy Code, 2016 lays down the procedure for the initiation of the corporate insolvency resolution process by a financial creditor. Section 7(1) of the Code provides that a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the National Company Law Tribunal when a default has occurred.

It was further amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019. Prior to the amendment, a single deposit holder, debenture holder or home buyer was entitled to file an insolvency application under the Code, to which the developers had alleged that home buyers were misusing the law as thousands of cases were filed against real estate companies for delay in possession and completion of projects. After the said Amendment, a single home buyer cannot file an insolvency application against the Company.

The Government had amended the definition of Financial Debt vide Insolvency and Bankruptcy Code (Second Amendment) Act 2018, which included that, any amount raised from allottees under the real estate project shall be deemed to be an amount having the commercial effect of borrowing and hence will be treated as Financial debt and thereby allottees were granted the status of 'Financial Creditor' u/s 5(7). The aggrieved Real Estate Companies filed a writ petition in the Hon'ble Supreme Court and challenged the amendment. Hon'ble Supreme Court in the matter of 'Pioneer Urban Land and Infrastructure Limited vs. Union of India' upheld the constitutional validity of the amendment and stated that the home buyers are Financial Creditors. With this amendment, the Government has introduced the threshold for filing insolvency application by the home buyers against the builder companies. Aggrieved by this amendment, the aggrieved home buyers had filed a writ petition in the Hon'ble Supreme Court, challenging the amendment. The Supreme Court, in the matter of 'Manish Kumar & Ors. Vs. Union of India & anr.', passed an interim order to maintain the status quo of the pending applications till the matter is decided by it. Thereby, the IBC amendment shall hold hold and continue to be in force as at present.

The aforesaid section 7 of the Code was amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Originally only the financial creditors were entitled to file an application for initiating corporate insolvency resolution process against a corporate debtor but after the enactment of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, a financial creditor or any other person on behalf of the financial creditor, as may be notified by the Central Government, may also file an application for initiating corporate insolvency resolution process against a corporate debtor before the National Company Law Tribunal when a default has occurred.

The explanation appended to section 7(1) makes it clear that for the purposes of section 7(1), a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. Thus, a financial creditor can file an application for corporate insolvency resolution process even if the default is in respect of debt of another financial creditor.

The Financial Creditor shall file **Form 1** with NCLT to initiate insolvency proceedings against the Corporate Debtor.

Furnishing of information by the financial creditor – Section 7(3) of the Code mandates that the financial creditor shall, along with the application for initiating corporate insolvency resolution process, furnish a proof of default and the name of a resolution professional proposed to act as the interim resolution professional in respect of the corporate debtor.

The NCLT vide Order dated 12th May, 2020 stated that default record from Information Utility must be filed with all new petitions filed under Section 7 of the Code and no new petition shall be entertained without record of default.

The requirement to provide proof of default aims at ensuring that financial creditors do not file frivolous applications or applications which prematurely put the corporate debtor into insolvency resolution proceedings for extraneous considerations.

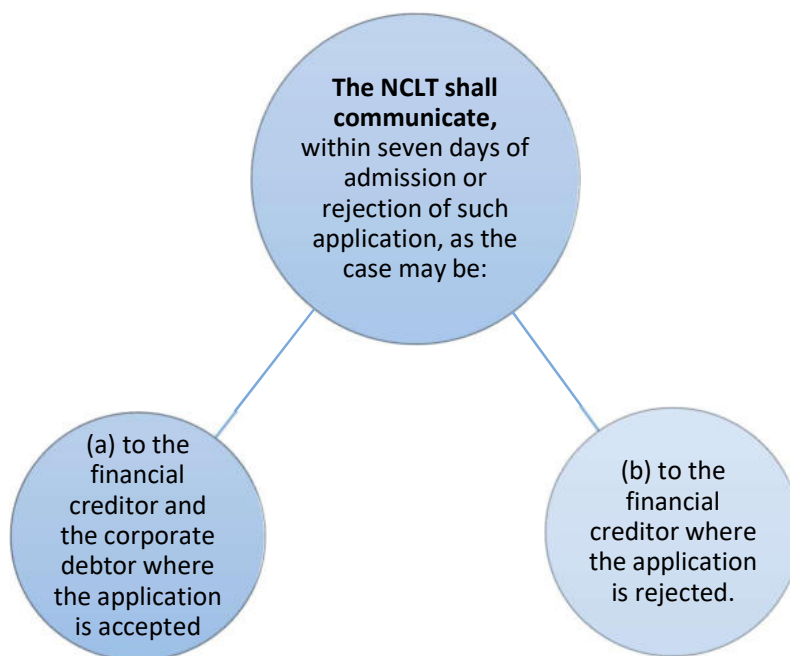
Supreme Court judgment: time period of 14 days is directory and not mandatory held in the matter of Surendra trading Company v. Juggilal Kamlapat Jute Mills Company limited and others.

Time frame for ascertaining the existence of default – After the filing of the application, the National Company Law Tribunal shall ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the if creditor within fourteen days of the receipt of the application Provided that if the Adjudicating Authority has not ascertained the existence of default and passed an order under sub-section (5) within such time, it shall record its reasons in writing for the same. [Section 7(4)].

Admission of application– If the National Company Law Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application [Section 7(5)]. The National Company Law Tribunal is not required to look in to any other criteria for admission of the application.

Rejection of application – But if the National Company Law Tribunal finds that the default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may reject the application under section 7(5)(b). Before rejecting the application under section 7(5) (b), the National Company Law Tribunal shall give a notice to the applicant to rectify the defect in the application within seven days of receipt of such notice from the National Company Law Tribunal.

Commencement of corporate insolvency resolution process – Sub-section (6) provides that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of section 7.



The Central Government has made the **Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016** in exercise of the powers conferred by clauses (c), (d), (e) and (f) of sub-section (1) of section 239 read with sections 7, 8, 9 and 10 of the Insolvency and Bankruptcy Code, 2016.

The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 apply to matters relating to the corporate insolvency resolution process and has come into force with effect from 1st day of December, 2016.

Practical Questions

Case: There are three financial creditors AM Bank, BN financial institution, CP Bank of XYZ Limited. An application for initiating CIRP has to be made against XYZ Limited as it has made default in repaying debt of AM Bank of Rs 70 Lakhs and BN financial institution of Rs 50 Lakhs. However, there is no default in repayment of debt of CP Bank having outstanding of Rs. 30 Lakhs. Answer the following queries:

Q. Can Corporate Insolvency Resolution Process (CIRP) be initiated against XYZ Limited?

Ans: Yes, CIRP can be initiated against XYZ Limited by the financial creditor as it has committed default in repayment of debt worth Rs. 1.2 crore (70+50 Lakhs) whereas section 4 of the Code provides that CIRP can be initiated against a corporate debtor if it commits default of Rs. 1 crore or more. Section 7(1) of the Code states that a financial creditor, either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating a CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred in payment of financial debt by the financial creditor. For the purpose of section 7(1), a default includes a default on a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. Therefore, as joint application is permitted, default of both financial creditors will be clubbed for knowing whether it has committed default in repayment of debt of Rs 1 cr or more.

Q. Can CP Bank initiate CIRP against XYZ Limited?

Ans: Yes, CP Bank can initiate CIRP against XYZ Limited as Explanation to section 7(1) provides that for the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor

Q. Whether AM Bank and BN financial institution have to file joint application or they may file it individually?

Ans: Pursuant to provisions of section 7(1) of the Code, AM Bank and BN financial institution can file application to initiate CIRP individually or jointly too.

Q. Whether a Power of Attorney holder of Financial Creditor can initiate insolvency proceedings under the Code?

Ans:

Legal Provision

1. Entry 5 & 6 (Part I) of Form 1 mandates the Financial Creditor to submit name and address of person authorized to submit application. Further, the particulars shall be signed by person authorized to act on behalf of financial creditor at the end.
2. Similar provision is made with regard to application by Operational Creditor and corporate applicant i.e., the application must be signed by a person authorized.
3. Rule 23(1) of NCLT Rules reads as under: "23. Presentation of petition or appeal – (1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

In **Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd.** [Company Appeal (AT) (Insol.) No. 30 of 2017], NCLAT held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'. NCLAT held that a power of attorney holder is not authorised to present application for CIRP under sections 7, 9 and 10 of the Code. It is only authorised representatives, duly authorised by board resolution, who are eligible to present the same.

Q. Whether NCLT, in exercise of its inherent powers, can convert an application under section 9 of the Code by an operational creditor to an application under section 7 of the Code by a Financial Creditor?

Ans: In *Sanjeev Jain vs. M/s Eternity Infracon Pvt. Ltd.* [Company Petition no. (IB) 113(ND)/2017], the NCLT observed as under:

16... The Code prescribes stipulated time frame to be followed at every relevant stage of the resolution proceedings. Besides the insolvency resolution process has serious civil consequences, which suggests for a cautious approach strictly in accordance with the procedure prescribed by the Code.

17. ...It is also pertinent to note that the provisions and scope of Section 9 including the applicable rules, forms and procedure are totally distinct and separate from that of Section 7 of the Code. There is no provision in the Code to convert a section 9 application into a section 7 as prayed. On the contrary, the Code provides that applications filed under section 7, 9 or 10 as the case may be, should either be admitted or rejected in accordance with respective provisions.

INSOLVENCY RESOLUTION BY OPERATIONAL CREDITOR

Section 8 of the Insolvency and Bankruptcy Code, 2016 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. The procedure for insolvency resolution by operational creditor laid down in section 8 differs from the procedure applicable to financial creditors under section 7 of the Code.

The rationale for a different procedure in case of operational creditor is based on the premise that the operational debts (such as trade debts, salary or wage claims, government dues) generally tend to be of smaller amounts (in comparison to financial debts) or are recurring in nature. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions.

Section 8 of the Code reads as follows:

1. An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.
2. The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –
 - a. existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
 - b. the payment of unpaid operational debt–
 - i. by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
 - ii. by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

The procedure established in Section 8 of the Code ensures that operational creditors, whose debt claims are usually smaller, are not prematurely putting the corporate debtor into the insolvency resolution process or initiating the process for extraneous considerations. The procedure laid down in section 8 also facilitates informal negotiations between such creditors and the corporate debtor. Such negotiations may result in a restructuring of the debt outside the formal proceedings.

Demand notice or copy of invoice demanding payment of the debt – Section 8 provides that in case of a default, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the debt in default to the corporate debtor. A “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred. [Section 8(1)]

Existence of dispute or payment of debt—The corporate debtor has a period of ten days from the receipt of the demand notice or invoice to inform the operational creditor of the existence of a dispute regarding the debt claim or of the payment of the debt by either sending:

- (i) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor, or
- (ii) an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor. [Section 8(2)]

APPLICATION FOR INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY OPERATIONAL CREDITOR

Section 9 of the Code reads as follows:

1. After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.
2. The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.
3. The operational creditor shall, along with the application furnish –

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;	(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;	(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;	(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and	(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations 2B): Record or evidence of transaction, debt and default by operational creditor (Regulation 2B): The operational creditor shall, along with application under section 9, furnish copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of e-way bill wherever applicable:

Provided that provisions of this regulation shall not apply to those operational creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax

4. An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.
5. The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order –
 - (i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if, –
 - a. the application made under sub-section (2) is complete
 - b. there is no payment of the unpaid operational debt
 - c. the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor
 - d. no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility and

- e. there is no disciplinary proceeding pending any resolution professional proposed under subsection (4), if any
- (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if–
 - a) the application made under sub-section (2) is incomplete
 - b) there has been payment of the unpaid operational debt
 - c) the creditor has not delivered the invoice or notice for payment to the corporate debtor
 - d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
 - e) any disciplinary proceeding is pending against any proposed resolution professional.

Provided that adjudicating authority, shall before rejecting an application under sub-clause (a) of clause give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating authority.

- 6. The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

Application by operational creditor before NCLT – Section 9(1) of the Code provides that if the operational creditor does not receive either the payment of the debt or a notice of existence of dispute in relation to the debt claim from the corporate debtor within a period of ten days from the date of receipt of the invoice or demand notice under section 8, he can file an application with the National Company Law Tribunal for initiating the insolvency resolution process in accordance with section 9 of the Code.

The Operational Creditor shall file Form 5 with NCLT to initiate insolvency proceedings against the corporate debtor.

Furnishing of information by operational creditor– Section 9(3) of the Code lays down that such application by the operational creditor shall be accompanied with requisite documents.

Section 9(3) of the Code was amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. The (Second Amendment) Act, 2018 has amended sub-clause (c) and made the condition of filing certificate from financial institutions maintaining accounts of operational creditor to prove non-payment of operational debt optional. The (Second Amendment) Act, 2018 has also added sub-clauses (d) and (e) which provide other means of proving non-payment of operational debt by the corporate debtor.

Admission of application–The National Company Law Tribunal shall admit the application and communicate such decision to the operational creditor and the corporate debtor within fourteen days of the receipt of such application if the conditions laid down under the Code have been fulfilled.

Rejection of Application–The National Company Law Tribunal shall reject the application and communicate such decision to the operational creditor and the corporate debtor within **fourteen days** of the receipt of such application if any of the prescribed conditions under the Code is not satisfied.

The National Company Law Tribunal shall before rejecting an application under sub-clause (a) of clause (ii) (i.e., where the application is incomplete) give a notice to the applicant to rectify the defect in his application within **seven days of the date of receipt of such notice** from the National Company Law Tribunal.

Commencement of corporate insolvency resolution process – The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of section 9. [Section 9(6)]

Query: Whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore for operational debt as stipulated under Section 4 of IBC, 2016?

Ans:

NCLT Chandigarh Bench in the matter of M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016 dated 18.04.2017 held that – “There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’. Under Section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive definition. In the definition of the term ‘operational debt’ under section 5(21) the word ‘interest’ has not been mentioned...”

In the light of the above decision, it was held by NCLT, New Delhi Bench in CBRE South Asia Private Limited vs. M/s. United Concepts and Solutions Private Limited, (IB)-797(ND)2021, that the Interest amount cannot be clubbed with the principal amount of operational debt to arrive at the minimum threshold of Rs.1 Crore for

complying with the provision of Section 4 of IBC, 2016.

Whether two or more operational creditors can file a joint application under section 9 of the Code?

Ans:

In **Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.** [Company Appeal (AT) (Insolvency) 39 of 2017], decided on 28th July, 2017, an application was filed by two Operational Creditors namely M/s DF Deutsche Forfait AG ("Deutsche") and Misr Bank Europe GmbH ("Misr Bank") against Uttam Galva Steels Limited, Corporate Debtor ("Uttam Galva") stating that the Corporate Debtor had defaulted in making payment of an amount payable towards 20,000 tons of prime steel billets supplied by German Company named AIC Handels GmbH ("AIC Handels"). The debt, running to the tune of around Rs. 110 crores, was initially assigned by AIC Handels to Deutsche by entering into a discount agreement, thereafter Deutsche, in turn, subsequently assigned a part of this debt to Misr Bank. This is how the application came to be filed by above two Operational Creditors. The application was accepted by NCLT and CIRP was initiated against Uttam Galva. In appeal before NCLAT, a contention was raised by Uttam Galva that the joint application filed two Operational Creditors was not maintainable. NCLAT, upon perusal of definition of section 9 and section 7 of the Code, came to the conclusion that since the language used in section 9 of the Code is different from section 7 of the Code, two or more operational creditors cannot file a joint application under section 9 of Code. NCLAT noted that in section 7 of Code, it is specifically written that a Financial Creditor can file application either by 'itself or jointly with other financial creditors', whereas, such phrase is not used in section 9 of Code.

The Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

- As per regulation 20 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 ("IU Regulations"), a creditor needs to submit financial information to the IU in Form C of the schedule. The documents to be uploaded as evidence for 'debt' or 'default of debt', have been specified by the Board in Form C.
- Vide notification dated 14th June, 2022, Sub-regulation (1A) has been inserted in the Regulation 20 which makes it mandatory for the creditor to file the information of default, with the information utility before filing an application to initiate corporate insolvency resolution process under section 7 or 9, as the case may be and the information utility shall process the information for the purpose of issuing record of default in accordance with Regulation 21.
- Sub-regulation (4) of Regulation 21 provides that after recording the status of information of default under sub-regulation (3), the information utility shall communicate the status of authentication in physical or electronic form of the relevant colour, indicating whether default is authenticated or disputed, as the case may be, by issuing a record of default in Form D of the Schedule, to the registered users who are-
 - creditors of the debtor who has defaulted in payment of a debt;
 - (b) parties and sureties, if any, to the debt in respect of which the information of default has been received.

Other requisites in filing application u/s 7 or 9:

Submission of information along with application. The financial creditor or operational creditor shall, while filing application under section 7 or 9, as the case may be, also furnish details of his/ its— (a) Permanent Account Number; and (b) Email-ID.

Details of debt, default and limitation in respect of applications under section 7 or section 9.

While filing an application under section 7 or 9, the financial creditor or the operational creditor, as the case may be, shall also submit along with evidence, chronology of the debt and default including the date when the debt became due, date of default, dates of part payments, if any, date of last acknowledgment of debt and the limitation applicable.

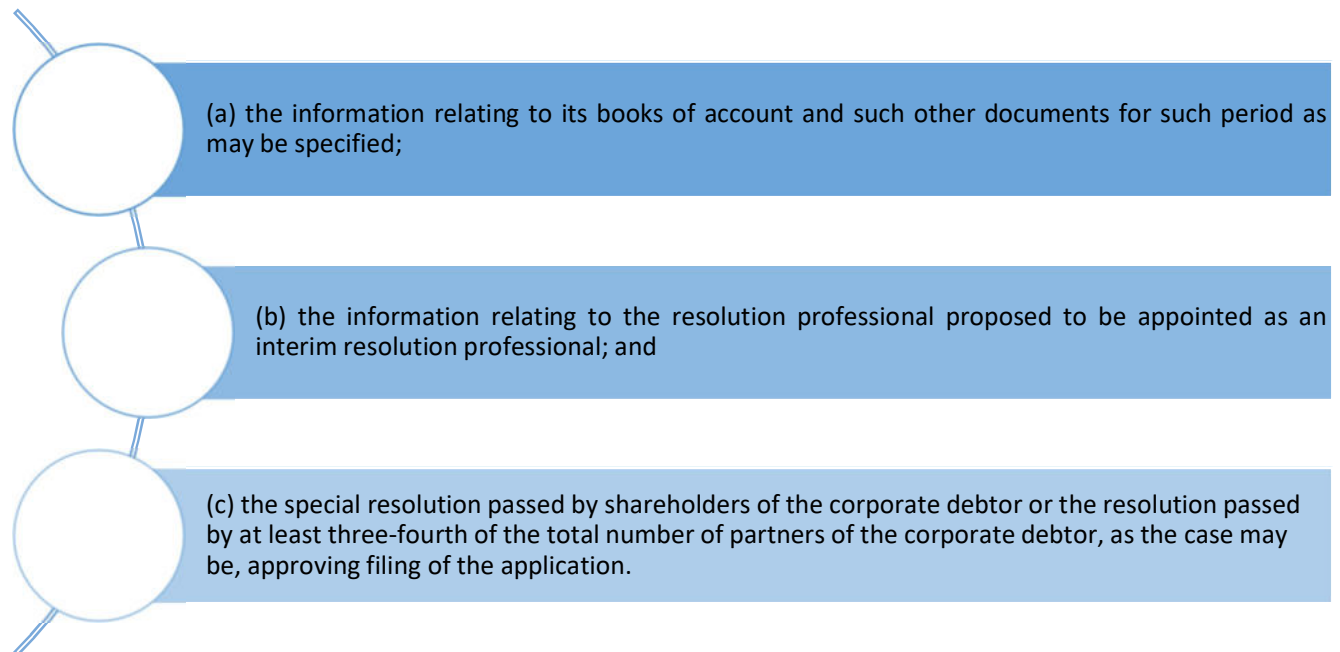
INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY CORPORATE APPLICANT

Corporate applicant – Section 10(1) of the Code uses the expression “corporate applicant” and not a “corporate debtor”. According to section 5(5) of the Code, a “**corporate applicant**” means –

- a) corporate debtor; or
- b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
- c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
- d) a person who has the control, and supervision over the financial affairs of the corporate debtor.

Section 10 of the Insolvency and Bankruptcy Code, 2016 provides for the initiation of corporate insolvency resolution process by the corporate debtor itself. Section 10 reads as follows:

1. Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.
2. The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.
3. The corporate applicant shall, along with the application, furnish–



4. The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order–
 - a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or
 - b) reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

5. The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

Default by corporate debtor– In case of a default by corporate debtor, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority. The authorization of a corporate applicant to file the application for initiating corporate insolvency resolution process is based on the premise that since they are the people likely to have the best information about the financial affairs of the corporate debtor and permitting such applicants to initiate the corporate insolvency resolution process would ensure timely intervention that is crucial for any corporate insolvency resolution process to succeed.

The corporate applicant can only initiate the corporate insolvency resolution process upon the occurrence of a default and not on mere likelihood of inability to pay debts. Therefore, a corporate applicant cannot trigger the corporate insolvency resolution process prematurely to abuse the provisions of the Code. Further, as the Code envisages the displacement of the management of the corporate debtor during the insolvency resolution process (which can also be permanent, depending on the outcome of the resolution process), corporate applicants would be deterred from initiating the insolvency resolution process for extraneous considerations.

The corporate applicant shall file Form 6 with NCLT to initiate insolvency proceedings.

Furnishing of information by corporate applicant – Under section 10(3) of the Code, the corporate applicant is required to furnish, along with such application, (a) the information relating to its books of account, (b) the information relating to the resolution proposed to be appointed as an interim resolution professional, (c) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.

Admission or rejection of application – The NCLT shall thereafter admit the application within fourteen days from the date of receipt of the application if it is complete and no disciplinary proceeding is pending against the proposed resolution professional. The NCLT shall reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional. The NCLT shall, before rejecting an application give a notice to the applicant to rectify the defects in the application within seven days from the date of receipt of such notice from the NCLT. [Section 10(4)]

Commencement of corporate insolvency resolution process – The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of section 10.

In **M/s. Unigreen Global Private Limited Vs. Punjab National Bank and Others** [Company Appeal (AT) (Insolvency) No. 81 of 2017], the NCLAT examined the scope of discretion available to an Adjudicating Authority in admitting or rejecting a section 10 application. The NCLAT held that the Adjudicating Authority must admit an application filed by a Corporate Debtor to initiate a CIRP if it is satisfied that:

- the default has occurred
- the application is complete, and
- the Corporate Debtor is not barred under section 11 of the IBC.

Facts unrelated to or beyond the requirement of the IBC or the forms prescribed cannot amount to suppression of facts and cannot be looked at by the AA for denying admission.

Intimation to Information Utility IBBI vide Circular No.

IBBI/IU/51/2022 dated 15th June 2022 decided to forward all the applications received for initiating insolvency to the Information Utility (IU) and, the IU is required to (a) inform other creditors of the CD by sharing the application; (b) issue notice to the applicant, requiring it to file 'information of default' as per IU Regulations; and (c) process the 'information of default' for the purpose of issuing ROD as per the IU.

Fraudulent or Malicious Initiation of Proceedings

While evaluating whether to initiate a corporate insolvency resolution process, the applicant(s) should be aware of the potential impact of section 65 of the IBC, which deals with fraudulent or malicious initiation of proceedings. This provision says that if any person initiates a corporate insolvency resolution process or liquidation process fraudulently, or with malicious intent, for any purpose other than the resolution of insolvency, or liquidation, the Adjudicating Authority may impose on him/her a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

Applicability of the Limitation Act

Section 238A was inserted in the IBC through the Insolvency and Bankruptcy (Amendment) Ordinance 2018 (later replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018), to make the provisions of the Limitation Act, 1963, apply to proceedings or appeals before the Adjudicating Authority, the NCLAT, the Debt Recovery Tribunal, and the Debt Recovery Appellate Tribunal. Thus, applications under sections 7, 9, or 10 cannot be admitted for time-barred debts.

Timeline for admission or rejection of Application filed to initiate Corporate Insolvency Resolution Process, whether mandatory or directory

In all cases where an application to initiate a CIRP is filed, the IBC provides that the Adjudicating Authority (AA) should admit it within 14 days of receiving the application. The AA can reject such an application on the grounds mentioned in the respective sections 7, 9 or 10, as may be applicable. However, if AA reject such an application on ground of being incomplete, the Adjudicating Authority shall, before rejecting such application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

Now, question arises whether this timeline of 14 days or 7 days is mandatory or discretionary for Adjudicating Authority.

M/s. Surendra Trading Company Vs. M/s. Juggilal Kambat Jute Mills Company Ltd. and Others [(2017) 16 SCC 143] The question for consideration before the Supreme Court was whether the period of seven days to rectify errors was mandatory or a guideline (directory).

The appeal arose from an order of the NCLAT that held that the period of 14 days for admitting/rejecting the application under sections 7, 9, and 10 was directory and the period of seven days given to the applicant for rectifying errors was mandatory.

The Supreme Court upheld the NCLAT's view on 14 days for admission/rejection being directory and also held that there was no reason to make the proviso (that is, seven days for rectifying errors) mandatory. It held that the proviso is directory in nature; however, it also considered that there may be cases where:

- (a) applicants or their counsel may not remove the objections in time, or
- (b) frivolous applications may be filed with ulterior/oblique motives and kept pending without any removal of errors.

Hence, the Supreme Court, while interpreting the provisions to be directory in nature, held that the applicant/counsel is required to submit, in writing, why the removal of objections could not be completed within the stated seven days. If the court/tribunal is satisfied with the reasons given, it will entertain the application on merit; if not, the court/tribunal will have the right to dismiss it.

OPPORTUNITY OF BEING HEARD TO CORPORATE DEBTOR

Before admitting a Corporate Insolvency Resolution Process application in respect of a Corporate Debtor, the Corporate Debtor must be given an opportunity to be heard.

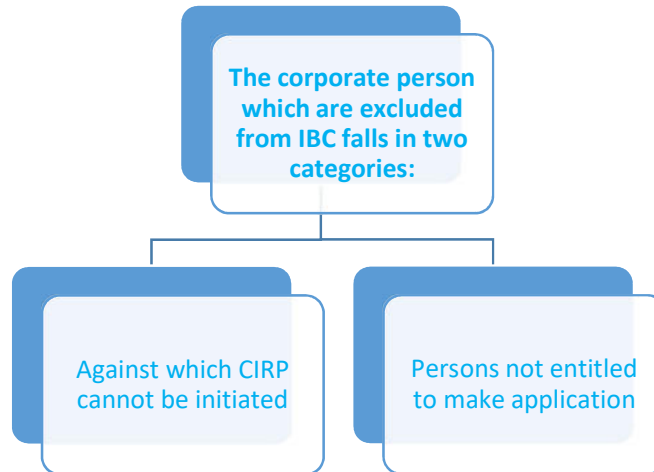
Rules 4(3), 6(2), and 7(2) of the Application to Adjudicating Authority Rules mandate that the applicant (Financial Creditor, Operational Creditor, and Corporate Applicant, respectively) shall serve a copy of the application to the registered office of the corporate debtor and to the IBBI, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.

In practice, however, a prior service is made to the Corporate Debtor because the relevant registry of the NCLT may not accept filings any other way. Further, once the application is submitted to the Adjudicating Authority, the acknowledged copy of it should be served on the Corporate Debtor. The AA then allocates a company petition number to it. Thereafter, the application comes up for hearing before the Adjudicating Authority.

The relevant NCLT registry allocates a date and a courtroom number for the matter when it receives the covering letter. The matter is then listed for hearing by the Adjudicating Authority. If the Adjudicating Authority decides that the matter should be heard, it issues a notice to the Corporate Debtor. The copy of the application is served again on the Corporate Debtor when the Adjudicating Authority issues the notice. If the Corporate Debtor does not appear

before the Adjudicating Authority, the Adjudicating Authority may require the filing of a service affidavit before it (showing evidence of service to the Corporate Debtor. Such practices are adopted to ensure that the Corporate Debtor is provided enough opportunity of being heard if it wishes to oppose the application for admission under the I.

EXCLUDED CATEGORIES



Against which Corporate Insolvency Resolution Process cannot be initiated:

Corporate Insolvency Resolution Process can be initiated against a corporate debtor. A corporate debtor is defined in section 3(8) of the Code as a corporate person who owes a debt to any person. A “corporate person” is defined in section 3(7) to mean

- a company under the Companies Act, 2013,
- an LLP under the Limited Liability Partnership Act, 2008, or
- any other person incorporated with limited liability under any law in force at the time excluding financial service providers.

Therefore, a financial service provider is not a corporate debtor for the purposes of the Code and, consequently, a Corporate Insolvency Resolution Process against a financial service provider cannot be initiated under section 7, 9, or 10 of the IBC.

A “financial service provider” is defined in section 3(17) of the IBC as a person authorized and registered by a financial sector regulator to provide financial services. The terms “financial services” and “financial sector regulator” are defined in section 3(15) and section 3(18) respectively.

Section 239 of the Code entrust upon the Central Government power to make rules, by notification, carrying out the provisions of this Code. Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for any of the following matters, namely:

“(zk) the manner of conducting insolvency and liquidation proceedings under section 227;” Section 227 of the IBC empowers the Central Government, in consultation with the appropriate financial sector regulators, to notify financial service providers or categories of financial service providers about their insolvency and liquidation proceedings, which may be conducted under the IBC with such modifications and in such manner as may be prescribed. Pursuant to its powers, the MCA introduced and notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Financial Service Provider Rules empower the government to commence the Corporate Insolvency Resolution Process in terms of the IBC against financial service providers, in consultation with the appropriate financial sector regulator as prescribed by the law. In terms of the notification dated November 18, 2019, issued by the MCA, the Financial Service Provider Rules would apply to non-banking finance companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet with the RBI as the appropriate financial service regulator.

Further, the MCA, in its notification dated January 30, 2020 notified the manner of dealing with the third-party assets in custody or possession of such financial service provider.

PERSONS NOT ENTITLED TO MAKE APPLICATION

Section 11 of the Code lists out the persons who are not eligible to make an application to initiate the corporate insolvency resolution process.

According to section 11, the following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under Chapter II of Part II of the Insolvency and Bankruptcy Code, 2016:

(a) a corporate debtor undergoing a corporate insolvency resolution process; or (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or	(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or	(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved Twelve months before the date of making of an application under this Chapter; or	(d) a corporate debtor in respect of whom a Liquidation order has been made.

The explanation appended to section 11 makes it clear that for the purposes of section 11, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

The second explanation clarifies 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. [inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019].

Clause (a) and (b) of section 11 ensure that corporate debtors do not have **repeated recourse to the corporate insolvency resolution process** in order to delay payment of debts or to keep assets out of the reach of creditors.

Similarly, a corporate debtor or a financial creditor who has violated any of the terms of the resolution plan that was approved twelve months before making an application for initiating the process is also not entitled to make an application for initiating the corporate insolvency resolution process. Further, a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process are not entitled to make an application to initiate corporate insolvency resolution process against such corporate debtor. Clause (c) aims at ensuring that corporate debtors or financial creditors do not abuse the corporate insolvency resolution process for extraneous considerations in addition to ensuring compliance with the terms of the resolution plan. Lastly, a corporate debtor in respect of which a liquidation order has been passed is not allowed to initiate the insolvency resolution process again. Thus clause (d) ensures finality of the liquidation order.

Thus, according to section 11, a corporate debtor which is undergoing a corporate insolvency resolution process/ pre-packaged insolvency resolution process (at the time of such application) or has completed a corporate insolvency resolution process or in respect of whom a resolution plan has been approved in the preceding twelve months is not entitled to file an application for initiating the corporate insolvency resolution process.

DISPOSAL OF APPLICATIONS UNDER SECTION 54C AND UNDER SECTION 7 OR SECTION 9 OR SECTION 10

Section 11A of the Insolvency and Bankruptcy Code, 2016 inserted by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 provides that:

1. Where an application filed under section 54C (Application to initiate pre-packaged insolvency resolution process) is pending, the Adjudicating Authority shall pass an order to admit or reject such application, before considering any application filed under section 7 or section 9 or section 10 during the pendency of such application under section 54C, in respect of the same corporate debtor.

2. Where an application under section 54C is filed within fourteen days of filing of any application under section 7 or section 9 or section 10, which is pending, in respect of the same corporate debtor, then, notwithstanding anything contained in sections 7, 9 and 10, the Adjudicating Authority shall first dispose of the application under section 54C.
3. Where an application under section 54C is filed after fourteen days of the filing of any application under section 7 or section 9 or section 10, in respect of the same corporate debtor, the Adjudicating Authority shall first dispose of the application under section 7, section 9 or section 10.
4. The provisions of this section shall not apply where an application under section 7 or section 9 or section 10 is filed and pending as on the date of the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2021.

The above section deals with following three scenarios when an application to initiate pre-packaged insolvency resolution process is filed under Section 54C of the Insolvency and Bankruptcy Code, 2016:

1. **When application under Section 54C is pending:** NCLT shall pass an order to admit or reject such application before considering any application filed under section 7/9/10 of the Insolvency and Bankruptcy Code, 2016 against the same corporate debtor.
2. **When application under Section 54C is filed within 14 days of filing of any application u/s 7/9/10 Insolvency and Bankruptcy Code, 2016 against the same corporate debtor:** NCLT shall first dispose of the application filed under section 54C.
3. **When application under Section 54C is filed after 14 days of filing of any application u/s 7/9/10 Insolvency and Bankruptcy Code, 2016 against the same corporate debtor:** NCLT shall first dispose of the application filed u/s 7/9/10 of the Insolvency and Bankruptcy Code, 2016.

TIME-LIMIT FOR COMPLETION OF INSOLVENCY RESOLUTION PROCESS

Section 12 of the Code which prescribes a time limit for completion of insolvency resolution process reads as follows:

1. Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
2. The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty- six per cent. of the voting shares.
3. On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."

Extension of time –Section 12(2) provides that the resolution professional shall file an application with the NCLT to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if he is instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty- six per cent of the voting shares.

Time limit for completion of resolution process

Section 12(1) lays down that subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and **eighty days** from the date of admission of the application to initiate such process.

On receipt of application, if the NCLT is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within **one hundred and eighty days**, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but such period cannot exceed **ninety days**. [Section 12(3)]

Thus, section 12 prescribes a time limit of 180 days, extendable by a further 90 days, for the completion of corporate insolvency resolution process. The application for the extension can only be made by the resolution professional and has to be supported by a resolution passed at a meeting of the committee of creditors by a majority of 66 per cent of the voting shares. Any such extension of the period of corporate insolvency resolution process under section 12 shall not be granted more than once.

“Voting share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. [Section 5(28)]

The well-defined time limit is aimed at ensuring that commercially unviable corporate debtors are not kept in the resolution process for long periods and are liquidated based on the decision of the financial creditors at the earliest opportunity. The time limit would not only reduce the cost to creditors and other stakeholders (including employees and workmen) of a long-drawn out procedure but also avoid any depletion in value of the corporate debtor's business/returns to creditors and other stakeholders. This would also enable promoters of failed businesses to exit the ventures swiftly.

Regulation 40 of CIRP Regulations, 2016: It lays down similar provisions as follows:

Extension of the corporate insolvency resolution process period.

1. The committee may instruct the resolution professional to make an application to the Adjudicating Authority under section 12 to extend the insolvency resolution process period.
2. The resolution professional shall, on receiving an instruction from the committee under this Regulation, make an application to the Adjudicating Authority for such extension.

WITHDRAWAL OF APPLICATION ADMITTED UNDER SECTION 7, 9 OR 10

Section 12A was added by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. The newly added section 12A provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

Before admission of the application, however, the Adjudicating Authority may permit withdrawal of the application on the request of the applicant under rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Form FA given under Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is required to be filed for withdrawal of the CIRP.

Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that an application for withdrawal under section 12A may be made to the Adjudicating Authority –

- (a) before the constitution of the committee, by the applicant through the interim resolution professional or
- (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be.

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

Regulation 30A of the CIRP Regulations specifies the manner for such withdrawal after admission as follows:

Particulars	Provisions where an application for withdrawal is made before the constitution of the committee	Provisions where an application for withdrawal is made after the constitution of the committee
1. Through whom applicant can apply	the interim resolution professional	- the interim resolution professional; or - the resolution professional, as the case may be. In this case if application is made after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.
2. Bank Guarantee to be given (Regulation 30A (2))	(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application before the constitution of the committee	(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application before the constitution of the committee
3. Time period for submitting application to AA	By the interim resolution professional on behalf of the applicant within three days of its receipt.	- The committee shall consider the application, within seven days of its receipt. - If application is approved by COC with 90% voting share, the resolution professional shall submit such application along with the approval of the committee, to the AA on behalf of the applicant, within three days of such approval.
4. AA may approve or reject the application. If AA approves withdrawal	Actions required: - The applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, - The amount of deposit shall be determined by the interim resolution professional or resolution professional, as the case may be. - The applicant shall deposit the amount within three days of such approval, in the bank account of the corporate debtor. - If applicant fails to deposit the amount in three days of approval, the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.	

In **Ashok G. Rajani Vs. Beacon Trusteeship Ltd. & Ors. (Sep 2022)**, Supreme Court held that the question of approval of withdrawal of corporate insolvency resolution process by the Committee of Creditors by the requisite percentage of votes, can only arise after the Committee of Creditors is constituted. Before the Committee of Creditors is constituted, there is no bar to withdrawal by the applicant of an application admitted under Section 7 of the Code. Also, the withdrawal of an application for CIRP by the applicant would not prevent any other financial creditor from taking recourse to a proceeding under IBC.

In **Maharashtra Seamless Ltd. Vs. State Bank of India & Ors. (Dec 2020)**, NCLAT (New Delhi) held that withdrawal of the application based on consideration by Committee of Creditors and settlement are part of the same corporate insolvency resolution process but whatever emerges, same should materialize within the prescribed timelines under the Code.

TIMELINES WITHIN THE CORPORATE INSOLVENCY RESOLUTION PROCESS

The IBC and the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016 detail a timeline for each step to be taken by various participants in the CIRP. Regulation 40A of CIRP Regulations, 2016 lays down model time-line for corporate insolvency resolution process in tabular form on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:

[Section / Regulation]	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP		T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Application for appointment of AR	T+23
	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(2)	1st meeting of the CoC	Within 7 days of filing of the report certifying constitution of the CoC, but with five days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47

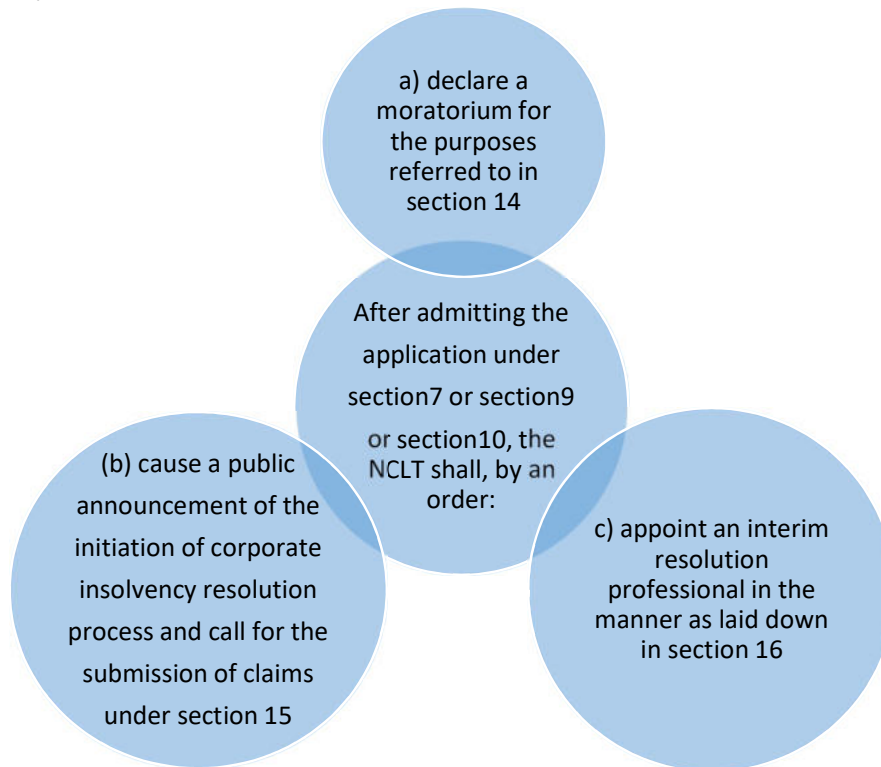
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 130 days of commencement	T+130
Regulation 36 (1)	Submission of IM to CoC	Within 95 days of commencement	T+95
Regulation 36A	Publish Form G	Within 60 days of commencement	T+60
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+75
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+85
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+90
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+100
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the final list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T+180

Terms used in Table:

- RP –Resolution Professional
- AA-Adjudicating Authority
- CoC-Committee of Creditors
- IRP-Interim Resolution Professional
- IM- Information Memorandum
- RAs- Resolution Applicants
- EOI-Expression of Interest
- RFRP- Request for Resolution Plan
- IM- Information Memorandum
- AR-Authorised Representative
- CIRP-Corporate Insolvency Resolution Process.

DECLARATION OF MORATORIUM AND PUBLIC ANNOUNCEMENT

Section 13 of the Code lists the actions that the NCLT shall take after an application for initiating the corporate insolvency resolution process has been admitted.



According to Section 13(2), the public announcement referred to in Section 13(1)(b) shall be made immediately after the appointment of the interim resolution professional. The explanation to Regulation 6(1) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 prescribes that immediately means three days from the date of his appointment.

The public announcement shall be made in Form A as provided under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and shall be published in one English and one regional language newspaper with wide circulation at the location:

- Where registered office and principal office (if any) of the corporate debtor is situated.
- Any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations.
- on the website, if any, of the corporate debtor;
- and on the website, if any, designated by the Board for the purpose

FEE TO BE PAID TO INTERIM RESOLUTION PROFESSIONAL AND RESOLUTION PROFESSIONAL (CIRP)

Regulation 34B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the fee of interim resolution professional or resolution professional, under regulation 33 and 34, shall be decided by the applicant or committee in accordance with this regulation.

The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022, shall not be less than the fee specified in clause 1 for the period specified in clause 2 of Schedule-II of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations.

Provided that the applicant or the committee may decide to fix higher amount of fee for the reasons to be recorded, taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

MORATORIUM

Section 14 describes the effect of the moratorium declared under section 13 of the Code. Section 14 reads as follows:

1. Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the adjudicating authority shall by order declare moratorium for prohibiting all of the following, namely:
 - (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation – For the purposes of this sub-section, 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; [inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019]

2. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

2A. Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. [Inserted vide The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019]

3. The provisions of sub-section (1) shall not apply to –
 - (a) such transaction, agreements or other arrangement as may be notified by the Central Government in consultation with any financial regulator or any other authority; [Amended vide The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019]
 - (b) a surety in a contract of guarantee to a corporate debtor.
4. The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

Prohibition of certain acts – On the insolvency commencement date, the NCLT shall by order declare moratorium for prohibiting certain acts laid down under the Code.

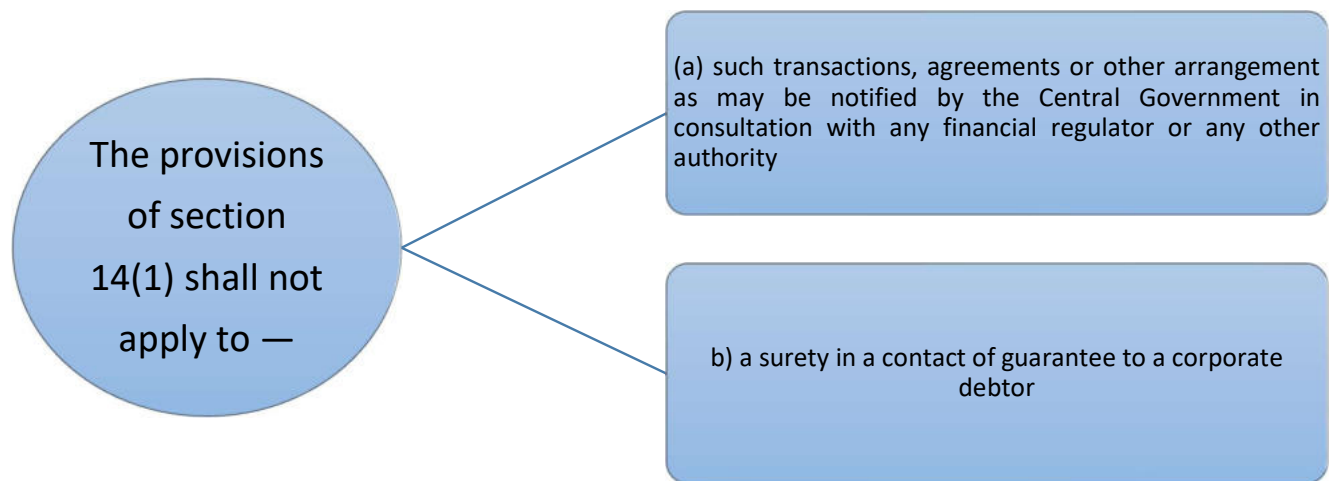
The explanation inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ensures that the corporate debtor retains its going concern status by protecting the corporate debtor from suspension and/or termination of its licenses/permits/concession owing to initiation on insolvency proceedings. However, the corporate debtor should not make any defaults in payment for the use or continuation of such licenses/permits/concession.

Supply of essential goods or services – The supply of essential goods or services to the corporate debt or as may be specified shall not be terminated or suspended or interrupted during the moratorium period. [Section 14(2)]

Access to certain goods and services during the insolvency resolution process may be important for ensuring orderly completion of the proceedings. However, the costs for such goods or services will have to be paid in priority to other costs as part of a resolution plan or during distribution of assets, in case the corporate debtor goes into liquidation.

Section 14(2a) inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 provides that the supply of goods and services, which as per the RP's discretion are essential to keep the corporate debtor a going concern and to protect and preserve the value of the corporate debtor, shall not be terminated/suspended/interrupted due to the commencement of insolvency process. However, there should not be any delay in payment for such supplies.

Exclusion of certain acts–



The Central Government has been given the power to notify transactions (in consultation with the appropriate financial sector regulators and other authorities), which will be exempted from the moratorium in the interest of smooth functioning of the financial markets.

In **Shailesh Verma, RP of Lavasa Corporation Ltd. Vs. Maharashtra State Electricity Distribution Company Ltd.**, NCLAT held that the direction of Adjudicating Authority to continue to supply electricity to corporate debtor during CIRP was subject to payment of outstanding dues within 90 days as directed by Adjudicating Authority. Corporate Debtor cannot enjoy the benefit of direction on one part, that is, to continue the supply of electricity and deny the payment of electricity dues of the CIRP period on other part. Section 14(2) of IBC provides for supply of essential goods or services to the CD during CIRP and same shall not be terminated or suspended or interrupted during the moratorium period.

Section 14(3) of the Code was substituted by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** to provide that the moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

Effect of order of moratorium – The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. Provided that where at any time during the corporate insolvency resolution process period, if the NCLT approves the resolution plan under section 31(1) or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be [Section 5(12)]

“Insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be [Section 5(12)].

Thus, the moratorium will continue to be in effect till the completion of the corporate insolvency resolution process or the approval of a resolution plan by the Adjudicating Authority or passing of order by the Adjudicating Authority for liquidation of the corporate debtor, whichever is earlier.

Declaration of moratorium serves the following purposes:

- Ensures that multiple proceedings are not taking place simultaneously and thus avoids the possibility of potentially conflicting outcomes of related proceedings.
- Keeps the corporate debtor’s assets together during the insolvency resolution process and facilitates orderly completion of the process.
- Ensures that the company may continue as a going concern while the creditors assess the options for resolution of default.
- Prohibition on disposal of the corporate debtor’s assets ensures that the corporate debtor/ management does not transfer its assets, thereby stripping the corporate debtor of value during the corporate insolvency resolution process.

In **Indian Overseas Bank Vs. M/s RCM Infrastructure Ltd. and Anr**, Supreme Court held that once the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by CD in respect of its property including any action under the SARFAESI Act. IBC is a complete Code in itself and in view of the provisions of Section 238 of the IBC, the provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

PUNISHMENT FOR CONTRAVENTION OF MORATORIUM

Section 74 (1) & (2) of the Code provides for punishment for contravention of moratorium as follows:

Section of the Code	Who violates the provisions of section 14	Who shall be liable for punishment	punishment
74(1)	the corporate debtor or any of its officer	any such officer who knowingly or wilfully committed or authorised or permitted such contravention	• Imprisonment: • Minimum three years to maximum five years, Fine: • Minimum Rs 1 Lakh to maximum three lakh rupees, or Both.
74(2)	any creditor	any person who knowingly and wilfully authorised or permitted such contravention by a creditor	• Imprisonment: • Minimum one years to maximum five years, Fine: Minimum Rs one Lakh to maximum one crore rupees, or • Both.

Filing of Application and Application Fee

Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for the rules to be followed for filing application to initiate CIRP as follows:

1. Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the Code shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.
2. An applicant under these rules shall immediately after becoming aware, notify the Adjudicating Authority of any winding-up petition presented against the corporate debtor.
3. The application shall be accompanied by such fee as specified in the Schedule.
4. The application and accompanying documents shall be filed in electronic form, as and when such facility is made available and as prescribed by the Adjudicating Authority:

Provided that till such facility is made available, the applicant may submit the accompanying documents, and wherever they are bulky, in electronic form, in scanned, legible portable document format in a data storage device such as a compact disc or a USB flash drive acceptable to the Adjudicating Authority.

Rules 20, 21, 22, 23, 24 and 26 of the National Company Law Tribunal Rules, 2016

Procedure for filing petition: Rule 20 lays down procedure for filing petition with NCLT-

1. Every appeal or petition or application or caveat petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form.
2. The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.
3. Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.
4. Where Saka or other dates are used, corresponding dates of Gregorian Calendar shall also be given.
5. Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.
6. The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.
7. These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.
8. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.
9. Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

Particulars to be set out in the address for service -Rule 21 lays provisions for the address for service:

The address for service of summons shall be filed with every appeal or petition or application or caveat on behalf of a party and shall as far as possible contain the following items namely: -

- a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house;
- b) the name of the town or village;
- c) the post office, postal district and PIN Code, and

- d) any other particulars necessary to locate and identify the addressee such as fax number, mobile number, valid e-mail address, if any.

Initiating Alteration-Rule 22 specifies that –

“Every interlineation, eraser or correction or deletion in any appeal or petition or application or document shall be initiated by the party or his authorised representative presenting it.”

Presentation of petition or appeal

Rule 23 prescribes the manner of filing petition with NCLT:

1. Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorized representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
2. Every petition or application or appeal may be accompanied by documents duly certified by the authorised representative or advocate filing the petition or application or appeal duly verified from the originals.
3. All the documents filed in the Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.
4. Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed under these rules.
5. In the pending matters, all applications shall be presented after serving copies thereof in advance on the opposite side or his authorised representative.
6. The processing fee prescribed by these rules, with required number of envelopes of sufficient size and notice forms shall be filled alongwith memorandum of appeal.

Number of copies to be filed (Rule 24)

The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or petition or application or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

Endorsement and Verification (Rule 26)

1. At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorised representative.
2. Every petition or appeal shall be signed and verified by the party concerned in the manner provided by these rules.

PUBLIC ANNOUNCEMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 15 lists out the particulars that a public announcement of the initiation of the corporate insolvency resolution process for the corporate debtor shall contain. The section provides that the public announcement of the corporate insolvency resolution process shall contain the following information:

- a) Name and address of the corporate debtor under the corporate insolvency resolution process
- b) Name of the authority with which the corporate debtor is incorporated or registered
- c) Last date for submission of claim, as may be specified
- d) Details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims
- e) Penalties for false or misleading claims, and
- f) Date on which the corporate insolvency resolution process shall close, which shall be the one hundred and eightieth day from the admission of the application under sections 7,9 or section 10, as the case may be.

COMMUNICATION TO CREDITORS

Regulation 6A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the interim resolution professional shall send a communication along with a copy of public announcement made under regulation 6, to all the creditors as per the last available books of accounts of the corporate debtor through post or electronic means wherever the information for communication is available. Provided that where it is not possible to send a communication to creditors, the public announcement made under regulation 6 shall be deemed to be the communicated to such creditors.

APPOINTMENT AND TENURE OF INTERIM RESOLUTION PROFESSIONAL

Section 16 provides for the appointment and term of the interim resolution Professional by the adjudicating authority. The section reads as follows:

1. The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement date.
2. Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.
3. Where the application for corporate insolvency resolution process is made by an operational creditor and –
 - (a) no proposal for an interim resolution professional is made, the adjudicating authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
 - (b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.
4. The Board shall, within ten days of the receipt of a reference from the adjudicating authority under sub-section (3), recommend the name of an insolvency professional to the adjudicating authority against whom no disciplinary proceedings are pending.
5. The term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22.

Appointment of Interim Resolution Professional – Section 16 provides that the NCLT shall appoint an interim resolution professional on the insolvency commencement date. [Section 16(1)] this ensures that there is no delay in the insolvency resolution process and the corporate debtor is managed by the Interim Resolution Professional from the first day itself, leaving no room for the promoters/directors of the corporate debtor to take any fraudulent or wrong step with regard to the business of the corporate debtor during their solvency period.

Section 16(2) provides that where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, and the name of the resolution professional is proposed, then such person shall be appointed as the interim resolution professional provided no disciplinary proceedings are pending against him.

Section 16(3) provides that where the corporate insolvency resolution process is initiated on an application by an operational creditor and the operational creditor proposes the name of interim resolution professional, the adjudicating authority shall appoint such professional as the interim resolution professional if no disciplinary proceedings are pending against him.

Section 16(3) further provides that if the name is not proposed by the operational creditor, then the adjudicating authority shall make a reference to the Insolvency and Bankruptcy Board of India for recommending the name of a person to be appointed as the interim resolution professional.

The Board shall recommend the name of a resolution professional who meets the criteria stipulated in Clause 16(3) within ten days from the receipt of the reference. [Section 16(4)].

Tenure of Interim Resolution Professional

The term of the interim resolution professional continues till the date of appointment of the resolution professional under section 22 of the Code. This ensures that the business and dealings of the corporate debtor are always under the supervision of the IRP/RP appointed under the Code.

MANAGEMENT OF AFFAIRS OF CORPORATE DEBTOR BY INTERIM RESOLUTION PROFESSIONAL

Section 17(1) of the Code provides that from the date of appointment of the Interim Resolution Professional,

- (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional,
- (b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional,
- (c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional,
- (d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

Section 17(2) of the Code further provides that the interim resolution professional vested with the management of the corporate debtor, shall:

- (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any,
- (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board,
- (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor,
- (d) have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified, and
- (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

Thus, section 17 lists out the various powers that an interim resolution professional shall have, including the power to do all acts and execute documents in the name of the corporate debtor as these powers are important for effective discharge of his responsibilities.

In the case of **M/s. Subasri Realty Private Limited v. Mr. N. Subramanian & Anr.**, the NCLAT directed that after the appointment of the RP and declaration of moratorium, the Board of directors stands suspended, but that does not amount to a suspension of Managing Director, or any of the directors or officers or employees of the Corporate Debtor ('CD'). To ensure that the CD remains a going concern, all the directors/employees are required to function and to assist the RP who manages the affairs of the CD during the moratorium. If one or other officer or employee had the power to sign a cheque on behalf of the CD prior to the order of moratorium, such power does not stand suspended on suspension of Board of directors nor can it be taken away by the RP. If the person empowered to sign cheque refuses to function on the direction of the RP or misuse the power, it is always open to the RP to take away such power, after issuing notice to the person concerned.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has added clause (e) in sub-section 2 of section 17 to provide that the interim resolution professional shall be responsible for complying with the statutory requirements under applicable laws while managing the affairs of the corporate debtor.

Section 17 has been inserted keeping in mind the experience of a debtor-in-possession regime under **the Sick Industrial Companies (Special Provisions) Act, 1985**. Various committee reports which had analysed the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 had highlighted the debtor-in-possession regime as one of its fatal flaws. A debtor-in-possession regime which allows the existing management to remain in possession during the resolution process gives incentives to the management to propose and implement risky rescue measures, as the costs of failure (leading to liquidation) would largely be borne by creditors.

The Sick Industrial Companies (Special Provisions) Act, 1985 now stands repealed (with effect from 1st December, 2016) as the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has been notified by the Government.

DUTIES OF INTERIM RESOLUTION PROFESSIONAL

1. The interim resolution professional shall perform the following duties, namely: -
 - (a) to collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to:
 - (i) business operations for the previous two years;
 - (ii) financial and operational payments for the previous two years;
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified;
 - (b) receive and collate all the claims submitted by creditors to him pursuant to the public announcement made;
 - (c) constitute a committee of creditors;
 - (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
 - (e) file the information collected with the information utility, if necessary; and
 - (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including:
 - (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
 - (ii) assets that may or may not be in possession of the corporate debtor;
 - (iii) tangible assets, whether movable or immovable;
 - (iv) intangible assets including intellectual property;
 - (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
 - (vi) assets subject to the determination of ownership by a court or authority.
 - (g) to perform such other duties as may be specified by the Board.

Section 18 also specifies the assets that cannot be taken over under the said section. The explanation appended to section 18 provides that for the purposes of this section, the term “assets” shall not include the following

- a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

The RP is not only required to give notice of the meeting to the members of CoC, but also to the members of suspended Board of directors or partners of the corporate person, as the case may be.

The OCs or their representatives are also to be informed to attend the meeting of CoC, if the amount of the aggregate dues is not less than ten percent of the debt.

In M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr., Supreme Court held that once an insolvency professional is appointed to manage the company undergoing corporate insolvency resolution process, the erstwhile directors who are no longer in management cannot maintain an appeal on behalf of such company.

In Canara Bank Vs. Ms. Mamta Binani, RP of Aristo Texcon Pvt. Ltd., NCLAT (New Delhi) held that Resolution Professional is an officer of the Court and he is obligation to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him during the corporate insolvency resolution process.

PERSONNEL TO EXTEND CO-OPERATION TO INTERIM RESOLUTION PROFESSIONAL

Section 19 imposes an obligation on the personnel, promoters and any other person associated with the management of the corporate debtor to extend all assistance and cooperation required by the Interim Resolution Professional in the management of the affairs of the corporate debtor. Where the personnel of the corporate debtor, promoter or any other person required to co-operate with the interim resolution professional do not extend cooperation or assistance to the interim resolution professional, the interim resolution professional may apply to the Adjudicating Authority for an order. The Adjudicating Authority may, by order, direct the person to comply with the instructions of the interim resolution professional or to provide information to the interim resolution professional.

“Personnel” includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor. [Section 5(23)]

Personnel, promoters or any other person associated with the management –The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor. [Section 19(1)]

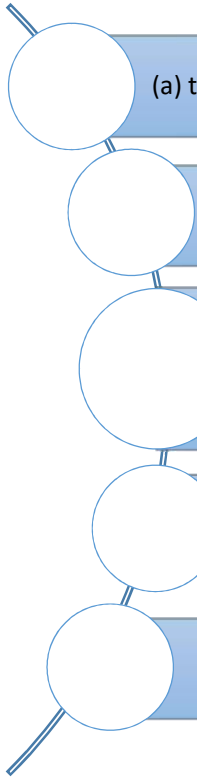
Application to Adjudicating Authority for necessary directions – Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions. [Section 19(2)]

Order by Adjudicating Authority–The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor. [Section 19(3)]

MANAGEMENT OF OPERATIONS OF CORPORATE DEBTOR AS GOING CONCERN

Section 20 of the Code lays down that the Interim Resolution Professional has to manage the operations of the corporate debtor as a going concern to enable him to protect and preserve the value of the property of the corporate debtor. Section 20 of the Code reads as follows:

1. The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
2. For the purposes of sub-section (1), the interim resolution professional shall have the authority –



(a) to appoint accountants, legal or other professionals as may be necessary

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property:

Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern

“Interim finance” means any financial debt raised by the resolution professional during the insolvency resolution process period and such other debt as may be notified [Section 5(15)] [The term “and such other debt as may be notified” was included vide The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 which had widened the term of interim finance by including other debts within its ambit].

Amount of any interim finance and the costs incurred in raising such finance is included in the “insolvency resolution process costs” [Section 5(13)].

In case the corporate debtor goes into liquidation, the insolvency resolution process costs which includes interim finance and the costs incurred in raising such finance are paid from the sale of the liquidation assets in priority during the distribution of assets [Section 53].

Interim Finance – The Interim Resolution Professional has the power to raise interim finance as well as to enter into, amend or modify contracts on behalf of the corporate debtor. Clause (c) of sub-section (2) to section 20 provides that the Interim Resolution Professional shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. Thus, any interim finance raised by providing security of an encumbered property of the corporate debtor will require prior permission of the concerned creditor.

The proviso appended to clause (c) of sub-section (2) to section 20 clarifies that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

Section 20 of the Code makes provision for raising interim finance while managing the operations of the corporate debtor as a going concern. A company which enters the insolvency resolution proceedings finds it extremely difficult to obtain credit, as lenders are often hesitant to lend to a troubled debtor. In order to address this issue, such interim finance is treated as a part of the insolvency resolution costs and is repaid in priority to other debt as part of resolution plan. Such priority also applies in distribution of assets in case the corporate debtor goes into liquidation.

In **Sunil Kumar Jain and others vs. Sundaresh Bhatt and others**, the Supreme Court ruled that in order for wages or salaries of workmen or employees for the CIRP period to be included in CIRP costs, it must be proven that the Resolution Professional managed the Corporate Debtor's operations as a Going Concern during the CIRP and that the relevant workmen or employees actually worked during the CIRP.

REGULATORY FEE

Regulation 31A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a regulatory fee calculated at the rate of 0.25 per cent of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value: Provided that this sub-regulation shall be applicable where resolution plan is approved under section 31, on or after 1st October 2022.

A regulatory fee calculated at the rate of one per cent of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the interim resolution professional or resolution professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, in the manner as specified in regulation (7)(2) (cb) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

APPOINTMENT OF RESOLUTION PROFESSIONAL

One of the main functions of the committee of creditors (constituted by the Interim Resolution Professional under section 21 of the Code) is the appointment of the Resolution Professional.

Appointment of Resolution Professional – Section 22 provides that at the first meeting of the committee of creditors, which is held within seven days of its constitution, the committee of creditors by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, may either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional. [Section 22(1) and Section 22(2)]

Communication of decision – According to clause (a) of sub-section 3 of section 22, where the committee of creditors resolves to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the adjudicating authority. The appointment of interim resolution professional as resolution professional will be subject to a **written consent** from the interim resolution professional in the specified form.

Application before Adjudicating Authority—In case, if the committee of creditors resolves to replace the interim resolution professional, it shall file an application before

the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form. [Section 22(3)(b)]

Confirmation by Insolvency and Bankruptcy Board – The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board. [Section 22(4)]

If the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional. [Section 22(5)]

ELIGIBILITY FOR RESOLUTION PROFESSIONAL

Regulation 3 of the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** lays down the following eligibility criteria for a resolution professional:

1. An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.
A person shall be considered independent of the corporate debtor, if he:
 - a) Is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the companies' act, (18 of 2013), where the corporate debtor is a company.
 - b) Is not related party, of the corporate debtor; or
 - c) Of a legal or consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm,
in the last three financial years.
- 1A. Where the committee decides to appoint the interim resolution professional as resolution professional or replace the interim resolution professional under section 22 or replace the resolution professional under section 27, it shall obtain the written consent of the proposed resolution professional in Form AA of the Schedule I.
2. An interim resolution professional or resolution professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.
3. An interim resolution professional or resolution professional, who is a director or a partner of an insolvency professional entity, shall not continue as a resolution professional in a corporate insolvency resolution process if the insolvency professional entity or any other partner or director of such insolvency professional entity represents any of the other stakeholders in the same corporate insolvency resolution process.

RESOLUTION PROFESSIONAL TO CONDUCT CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 23 provides that the Resolution Professional shall be responsible for carrying out the entire corporate insolvency resolution process and managing the operations of the corporate debtor during such process. For this purpose, the Resolution Professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under Chapter II of Part II of the Code.

Section 23 also provides that where the resolution professional is appointed, under sub-section (4) of section 22, by the Adjudicating Authority upon confirmation by the Board, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

Section 23 of the Code reads as follows:

1. Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:
Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the adjudicating authority.
2. The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.
3. In case of any appointment of a resolution professional under sub-sections (4) of section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

The insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 amended section 23 of the code to provide that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of corporate insolvency resolution process period until an order has been passed by the Adjudicating Authority under section 31 or section 34. This amendment clarifies that managing the affairs of the corporate debtor during the period between conclusion of CIRP and implementation of the successful resolution plan/ commencement of liquidation shall be the responsibility of the RP.

The NCLAT (New Delhi) ruled in **Ashok Kumar Tyagi vs. UCO Bank** that once the CIRP admission order under Section 7 of the IBC has been stayed by the NCLAT, IRP is not entitled to discharge any functions, and the Corporate Debtor also cannot be restored because it was operating prior to the admission of Section 7 application.

DUTIES OF RESOLUTION PROFESSIONAL

Section 25 sets out the duty of resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor and lays down the functions he may perform for the same. [Section 25(1)]

Section 25(2) provides that in order to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor, the resolution professional shall undertake the following actions:

- a) Take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
- b) Represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial or arbitration proceedings
- c) Raise interim finances subject to the approval of the committee of creditors under section 28
- d) Appoint accountants, legal or other professionals in the manner as specified by board
- e) Maintain an updated list of claims
- f) Convene and attend all meetings of the committee of creditors
- g) Prepare the information memorandum in accordance with section 29
- h) Invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the board, to submit a resolution plan or plans
- i) Present all resolution plans at the meetings of the committee of creditors, file application for avoidance of transaction in accordance with chapter III, if any and
- j) Such other actions as may be specified by the board.

The resolution professional is also empowered to raise interim finance (whether secured or unsecured), with the prior approval of the committee of creditors. The interim finance raised under this section will also be covered as part of the “insolvency resolution process costs”.

Regulation 3A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for assistance and cooperation by the personnel of the corporate debtor as follows:

1. Duty to take custody and control:

The interim resolution professional or resolution professional, as the case may be, shall take custody and control as specified under this regulation from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case may be, of the following:

- a) the records of information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such other information required under regulation 36;
- b) the assets recorded in the balance sheet of the corporate debtor or in any other records referred in clause (f) of section 18.

2. Obligation of personnel/promoter etc. to provide list of assets and records while handing over their custody and control:

The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide to the interim resolution professional or resolution professional, as the case may be, a list of assets and records while handing over their custody and control, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held.

3. Duty of IRP/RP to prepare list of assets and records:

Where any asset or record has not been handed over or the list has not been provided under sub-regulation (2), the interim resolution professional or resolution professional, as the case may be, shall himself prepare a list of assets and records while taking custody and control of assets and records, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held.

4. Signing of list of assets and records:

Each list of assets and records under sub-regulation (2) and (3) shall be signed by the parties present and by at least two individuals who have witnessed the act of taking control and custody of such assets and records.

5. Requisition by IRP/RP for information required under the Code but not handed over:

The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case maybe, the information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such information required under regulation 36 which were required to be maintained by the corporate debtor but have not yet been handed over.

6. Requisition by IRP/RP for assets in records but not handed over:

The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case maybe, the assets which are recorded in the balance sheet or in any other records referred in clause (f) of section 18 and whose custody has not been handed over.

An application made under sub-section (2) of section 19 in respect of failure to provide any asset or record as requisitioned under the Code and this regulation, shall show presence of such asset or record in the notice of requisition and absence of such asset or record in the list of assets and records taken in control and custody under sub-regulation (2) and (3).

Regulation 4 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for right of Interim Resolution Professional (IRP)/Resolution Professional as follows:

1) Access to Books:

Without prejudice to section 17(2)(d), the interim resolution professional or the resolution professional, as the case may be, may access the books of account, records and other relevant documents and information, to the extent relevant for discharging his duties under the Code, of the corporate debtor held with-

- a) depositories of securities;
- b) professional advisors of the corporate debtor;
- c) information utilities;
- d) other registries that records the ownership of assets;
- e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and

f) contractual counterparties of the corporate debtor.

2) Duty of the personnel to provide information to IRP/RP:

The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide the information within such time and in such format as sought by the interim resolution professional or the resolution professional, as the case may be. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for following duties of IRP/Resolution Professional:

4B. Disclosure of change in name and address of corporate debtor:

Where a corporate debtor has changed its name or registered office address during the period of two years preceding the insolvency commencement date, the interim resolution professional or resolution professional, as the case may be, shall disclose all the former name(s) and registered office address(es) so changed along with the current name and registered office address in every communication, record, proceeding or any other document.

4C. Process e-mail:

(1) The interim resolution professional shall open an email account and use it for all correspondences with stakeholders and in the event of his replacement by a resolution professional, shall handover the credentials of the email to him.

(2) The resolution professional shall, in case of his replacement with another resolution professional or a liquidator, hand over the credentials of the email to the other resolution professional or the liquidator, as the case may be.

4D. Operating separate bank account for each real estate project: Where the corporate debtor has any real estate project, the interim resolution professional or the resolution professional, as the case may be, shall operate a separate bank account for each real estate project.

Clause (h) of sub-section (2) of section 25 was substituted by the **Insolvency and Bankruptcy Code (Amendment) Act, 2018**. Clause (h), before substitution, read as follows:

“(h) invite prospective lenders, investors, and any other persons to put forward resolution plans”.

COMMITTEE OF CREDITORS

Committee of Creditors is a committee typically consisting of the financial creditors of the Corporate Debtor. It is the supreme decision-making body in a Corporate Insolvency Resolution Process (CIRP). Decisions regarding the administration of the corporate debtor are taken at the meetings of the Committee, based on a requisite vote of the members. It is responsible for giving approval to the IRP/ RP to carry out actions that might affect the CIRP.

REGULATORY PROVISIONS

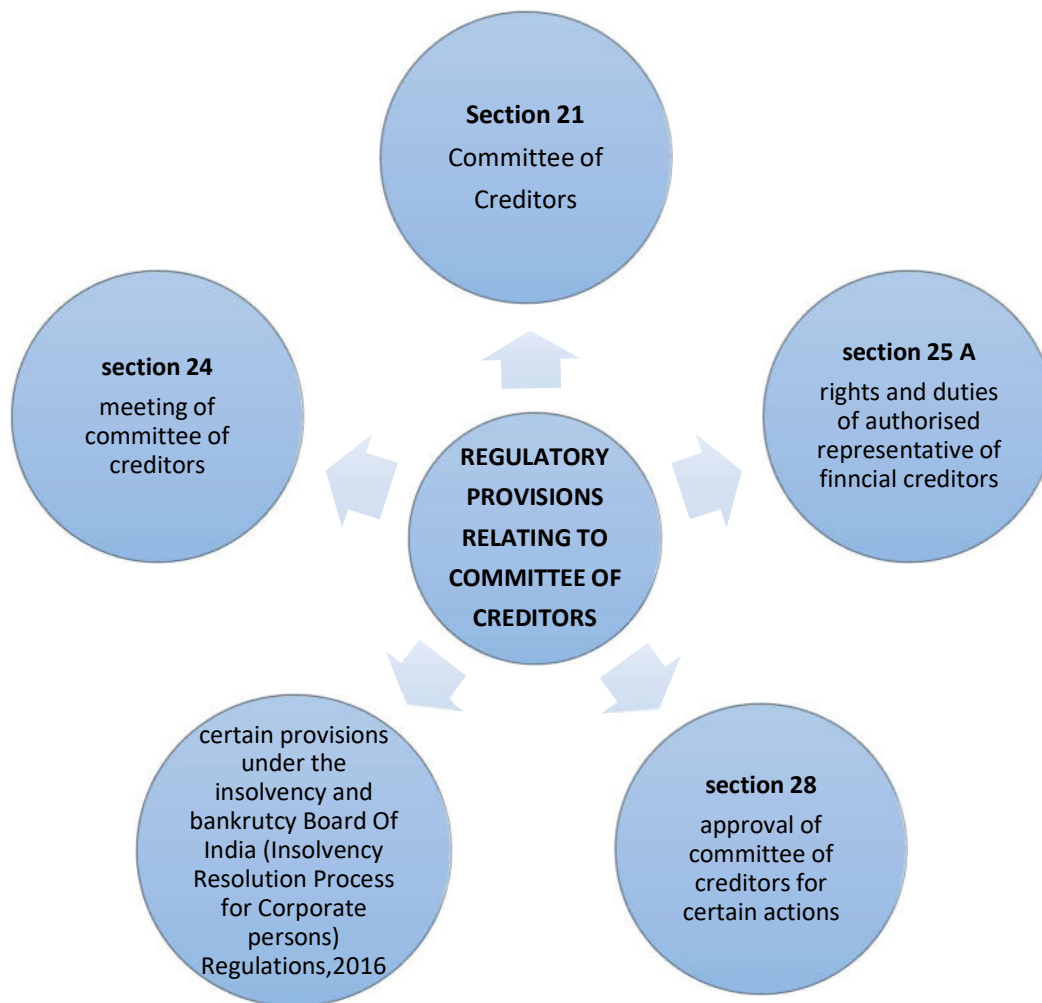
The Supreme Court ruled in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.* that the adjudicating authority cannot challenge the CoC's commercial judgement on the basis of merits. According to the limited court review that is available, the CD must continue operating as a going concern throughout the insolvency resolution process, maximise the value of its assets, and ensure that the interests of all parties, including operational creditors, have been protected.

Section 21 and 24 of the Insolvency and Bankruptcy Code, 2016 make provisions relating to the committee of creditors. Section 21 deals with the **constitution** of committee of creditors while section 24 prescribes the **modalities for the meeting** of the committee of creditors.

Section 28 of the Code lists out certain actions that may be taken by the resolution professional only with the prior approval of the committee of creditors by a vote of 66 per cent of the voting shares.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has added a new section 25A to provide for **rights and duties of authorised representative** of financial creditors.

The Insolvency and Bankruptcy Board of India has made **the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** in exercise of the powers conferred under sections 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016. These regulations make detailed provisions for effectively regulating the Insolvency Resolution Process for Corporate Persons and are amended from time to time by the Insolvency and Bankruptcy Board of India.



Section 21 of the Code provides as follows:

1. The interim resolution professional shall after collation of all claims received against the corporate debtor, the interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.
2. The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6a) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

3. Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.
4. Where any person is a financial creditor as well as an operational creditor,
 - (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
 - (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

5. Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.
 6. Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may:
 - (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
 - (b) represent himself in the committee of creditors to the extent of his voting share;
 - (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
 - (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.
- 6A. Where a financial debt –
- (a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;
 - (b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;
 - (c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.
- 6B. The remuneration payable to the authorised representative-
- (i) under clauses (a) and (c) of sub-section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and
 - (ii) under clause (b) of sub-section (6A) shall be as specified which shall be form part of the insolvency resolution process costs.
7. The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6a).
 8. Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one percent. Of voting share of the financial creditors:
Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.
 9. The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.
 10. The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition."

Constitution of committee of creditors

Section 18 of the Code which lists out the duties of Interim Resolution Professional specifically provides that the Interim Resolution Professional shall collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor as well as receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15 of the Code. It also prescribes the constitution of Committee of Creditors as one of the duties of the Interim Resolution Professional.

Section 21(1) further provides that the Interim Resolution Professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

Definition of Claim

According to section 3(6), a “claim” means –

- a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
- b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

Composition of committee of creditors –Section 21(2) provides that the committee of creditors shall comprise all financial creditors of the corporate debtor.

According to section 5(7) of the Code, a “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Exclusion of related party – First proviso to section 21(2) provides that a financial creditor or the authorised representative of the financial creditor, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Sub-Section 1 of Section 21 of the Code provides that the interim resolution professional after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, shall constitute a committee of creditors

Can home buyers be considered as financial creditors?

The Supreme Court in the case of **Pioneer Urban Land & Infrastructure Ltd. & Anr. vs. Union of India & Ors.** upheld the constitutional validity of the introduction of homebuyers as “financial creditors” to the IBC, made by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, enabling homebuyers to trigger IBC against the real estate developer.

Committee of Creditors to consist of only financial creditors of the corporate debtor

Sub-Section 2 of Section 21 of the Code provides that the committee of creditors shall comprise of all financial creditors of the corporate debtor.

- First proviso of Section 21 of the Code provides that the financial creditor or the authorised representative of the financial creditor as referred under sub-section (6) or sub-section (6A) or sub-section (5) of Section 24 of the Code, shall not have any right of representation, participation or voting in a meeting of the committee of creditors if it is a related party of the corporate debtor.
- Subject to sub-sections (6) and (6A) of Section 21 of the Code where corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.
- Second proviso of Section 21 of the Code provides that the first proviso shall not apply to a financial creditor that is regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed prior to the insolvency commencement date.

When creditor is financial creditor as well as operational creditor of the corporate debtor

Sub-Section 4 read with Sub-Section 5 of Section 21 of the Code provides that where any person is a financial creditor as well as an operational creditor:

- Such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor; and
- Such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.
- Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer

According to section 5(24), a “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 percent 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.

In the matter of 'Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.', the Supreme Court elucidates the two-way relationship in related parties that "The definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X. The definition of 'related party' under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of inter-relationships between the financial creditor and the corporate debtor."

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 also added second proviso to section 21(2) which clarified that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, or completion of such transactions as may be prescribed, prior to the insolvency commencement date. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 added the words "or completion of such transactions as may be prescribed in the said Section, thus, widening the condition in which a financial creditor would not be considered to be a related party.

Whether the relatedness of the related party could merely have existed in the past or whether they must continue in praesent i.e. at the present time?

The Supreme Court in the matter of 'Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.', clarified that while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the Committee, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21 (2), should also be considered as being covered by the exclusion there under. Thus, relatedness of related parties at the present time would be considered for exclusion from the Committee, in addition, any parties that were related in the past and cease to be related parties at present in order to become a member of the Committee must also be considered for exclusion from the Committee.

According to section 3(18) of the Code, a **"financial sector regulator"** means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government.

The committee of creditors is composed of financial creditors of the corporate debtor as the financial creditors have the capability to assess the commercial viability of the corporate debtor and are willing to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor.

Operational creditors, on the other hand, are not equipped to decide on matters relating to commercial viability of the corporate debtor, nor are they generally willing to take the risk of restructuring their debts in order to ensure the management of operation of corporate debtor a going concern.

According to section 5(28), **"voting share"** means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

Assignment or legal transfer of operational debt—Section 21(5) further provides that where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

Financial debts to two or more financial creditors as part of consortium or agreement – Section 21(3) provides that subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Hon'ble Supreme Court has in the matter of **Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors** (date of judgment 25.01.2019) held that the classification under IBC between financial creditors and operational creditors is based on an intelligible criteria and is neither discriminatory nor arbitrary nor violative of Article 14 of Constitution of India;

A single trustee or agent to act for all financial creditors: Section 21 (6) of the Code provides that where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may:	(a) authorize the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
	(b) represent himself in the committee of creditors to the extent of his voting share;
	(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
	(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

Sub-section 6A – The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has added a new sub-section 6a to section 21 to provide for a mechanism to allow participation of security holders, deposit holders and all other classes of financial creditors which exceed a certain number, in meetings of committee of creditors through an **authorised representative**.

A TRUSTEE OR AGENT TO ACT AS AUTHORISED REPRESENTATIVE

Where a financial debt is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors [Section 21(6A)(a)]

FINANCIAL DEBT OWED TO A CLASS OF CREDITORS EXCEEDING THE SPECIFIED NUMBER

Where a financial debt is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors. [Section 21(6A)(b)] Clause (aa) of Sub-Regulation (1) of Regulation 2 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that under Clause (b) of sub-section (6A) of Section 21 of IBC, **class of creditors means a class with at least ten financial creditors**.

GUARDIAN, EXECUTOR OR ADMINISTRATOR

Where a financial debt is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors [Section 21(6A)(c)]

All such authorised representative under clause (a) or clause (b) or clause (c) of sub-section 6a shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

Board to specify the manner of voting and the determining of the voting share—the Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A). [Section 21(7)]

Remuneration payable to authorized representative— The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has also added sub-section (6B) to section 21. it provides that the remuneration payable to the authorised representative under clauses (a) and (c) of sub- section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and under clause (b) of sub-section (6A) shall be as specified which shall be form part of the insolvency resolution process costs.

Decisions of the committee of creditors—Sub-section (8) to section 21 of the Code provides that except as otherwise provided in the Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors.

According to section 3(13), **“financial information”**, in relation to a person, means one or more of the following categories of information, namely:

- a) records of the debt of the person;
- b) records of liabilities when the person is solvent;
- c) records of assets of person over which security interest has been created;
- d) records, if any, of instances of default by the person against any debt;
- e) records of the balance sheet and cash-flow statements of the person; and
- f) such other information as may be specified.

According to section 5(13), of the Code, the **“insolvency resolution process costs”** means –

- a) the amount of any interim finance and the costs incurred in raising such finance;
- b) the fees payable to any person acting as a resolution professional;
- c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- e) any other costs as may be specified by the Board.

The proviso to this sub-section clarifies that in the event there are no financial creditors for a corporate debtor, the committee of creditors shall be constituted consisting of such persons and exercise such function in such manner as may be specified.

Financial information – the committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process. [Section 21(9)]

The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition. [Section 21(10)]

COMMITTEE WITH ONLY OPERATIONAL CREDITORS

Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deals with situations where either the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor. Regulation 16 provides as follows:

1. Where the corporate debtor has no financial debt where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this regulation.
2. The committee formed under this regulation shall consist of members as under:
 - (a) Eighteen largest operational creditors by value, provided if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;
 - (b) One representative elected by all workmen other than those workmen included under sub-clause(a); and
 - (c) One representative elected by all employees other than those employees included under sub-clause(a).
3. A member of the committee formed under this regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.
Explanation—For the purposes of this sub-regulation, ‘total debt’ is the sum of-
 - (a) The amount of debt due to the creditors listed in sub-regulation 2(a);
 - (b) The amount of the aggregate debt due to workmen under sub-regulation 2(b); and
 - (c) The amount of the aggregate debt due to employees under sub-regulation 2(c).
4. A committee formed under this regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.

COMMITTEE WITH ONLY CREDITORS IN A CLASS

Regulation 16B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deals with situations where the corporate debtor has only creditors in a class and no financial creditor is eligible to join the committee. Regulation 16B reads as follows:

“Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).” [Inserted by Notification No. IBBI/2018-19/ GN/ REG031, dated 03rd July, 2018]

AUTHORISED REPRESENTATIVE OF CREDITORS IN A CLASS:

Regulation 16A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lists down the provisions with regard to authorized representative. The main provisions of the said regulation have been summarized below:

The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors to act as the authorised representative of the creditors of the respective class Provided that the choice of an insolvency professional to act as an authorised representative by a financial creditor in a class in Form CA shall not be considered, if the Form CA is received after the time stipulated in the public announcement. and shall apply to the Adjudicating Authority for appointment of the authorised representatives within two days of the verification of claims. Provided that till the application for appointment of the authorised representative for a class of creditors is under consideration before the Adjudicating Authority, the insolvency professional selected under sub-regulation (1) shall act as an interim representative for such class of creditors, and shall be entitled to attend the meetings of the committee and shall have such rights and duties as that of an authorised representative.

However, any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

Regulation 16A(3A) of the IBBI(CIRP) Regulations 2016 provides that the financial creditors in the class, representing not less than ten per cent. voting share may seek replacement of the authorised representative with an insolvency professional of their choice by making a request to the interim resolution professional or resolution professional who shall circulate such request to the creditors in that class and announce a voting window open for at least twenty-four hours.

As per Regulation 16A(3B) Subject to clauses (a) and (b) of sub-regulation (2) of regulation 4A, the interim resolution professional or resolution professional, as the case may be, shall offer choice of at least three insolvency professionals to the financial creditors in the class including such insolvency professional(s) proposed under sub regulation (3A) along with the existing authorised representative.

Regulation 16A(3C) of the IBBI(CIRP) Regulations 2016 provides that the resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representative who receives the highest percentage of voting share of financial creditors in that class.

On appointment of the authorized representative, the interim resolution professional shall:

- (a) Provide the list of creditors in each class to the respective authorised representative appointed by the Adjudicating Authority.
- (b) Provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.
- (c) Provide electronic means of communication between the authorised representative and the creditors in the class.

Voting share of creditor in a class:

It shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

Fee of authorized representative:

(a) The authorised representative shall be entitled to a fee for every meeting attended by him in the following manner:

Number of creditors in the class	Fee per meeting of the committee (Rs.)
10-100	30,000
101-1000	40,000
Morethan1000	50,000

(b) The authorised representative shall be entitled to receive fee for every meeting of the class of creditors convened by him in the following manner, namely: -

Number of creditors in the class	Fee per meeting of creditors in class with authorised representative (Rs.)
10-100	10,000
101-1000	12000
More than 1000	15000

(c) The payment of fee to authorised representative shall be part of insolvency resolution process cost in respect of two meeting with the creditors he represents corresponding to a meeting of the committee of creditors.

(d) The fee for any additional meeting beyond two meetings corresponding to a meeting of the committee of creditors shall be part of insolvency resolution process cost subject to approval of committee of creditors

Authorised representative to seek preliminary views:

The authorised representative shall circulate the agenda to creditors in a class and may seek their preliminary views on any item in the agenda to enable him to effectively participate in the meeting of the committee. In this regard, the creditors shall be provided with a time window of at least twelve hours to submit their preliminary views, and the said window should open at least twenty-four hours after the authorised representative seeks preliminary views. However, such preliminary views shall not be considered as voting instructions by the creditors.

DUTIES OF AUTHORISED REPRESENTATIVE

The Duties of Authorised Representative shall: -

- assist the creditors in a class he represents in understanding the discussions and considerations of the committee meetings and facilitate informed decision making;
- review the contents of minutes prepared by the resolution professional and provide his comments to the resolution professional, if any; 2
- help the creditors in a class he represents during the consultations made by the resolution professional to prepare a strategy for marketing of the assets of the corporate debtor in terms of sub-regulation (1) of regulation 36C
- work in collaboration with the creditors in a class he represents to enhance the marketability of the assets of the corporate debtor in terms of sub-regulation (3) of regulation 36C;
- assist the creditors in a class he represents in evaluating the resolution plans submitted by resolution applicants;
- ensure that the creditors in a class he represents have access to any information or documents required to form an opinion on issues discussed in the committee meetings;
- update regularly the creditors in a class he represents on the progress of the corporate insolvency resolution process;
- make suggestions for modifications of the resolution plan as may be required by the creditors in class he represents;
- record proceedings and prepare the minutes of the meeting with the creditors in a class he represents; (The provisions regarding minutes of meetings in this regulation shall apply mutatis mutandis to class meetings) and
- act as a representative for the creditors in a class he represents in representations before the Adjudicating Authority, National Company Law Appellate Tribunal, and other regulatory authorities.

The creditors in a class may propose any additional responsibility upon the authorised representative in relation to the representation of their interest in the committee.

16C. Appointment of facilitators.

(1) Where the number of creditors in a class exceeds one thousand, the committee may, direct the interim resolution professional or resolution professional, as the case may be, to appoint an insolvency professional other than the interim resolution professional, resolution professional and authorised representative, or any other person, as facilitator for a sub-class within the creditors in a class, subject to the following conditions: -

- a) the appointment of facilitator shall be considered only if, after the first meeting of the committee, a sub-class comprising of at least one hundred creditors out of the total number of creditors in a class, request for the inclusion of an agenda for such appointment along with the name of the proposed facilitator;
- b) the total number of facilitators shall not exceed five; and
- c) the fee for facilitator for each sub-class shall be twenty per cent. of the fees specified for the authorised representative and such fee shall be part of the insolvency resolution process cost.

(2) The committee may replace the facilitator on the recommendation of a majority of the members of the sub-class.

16D. Roles and responsibilities of the facilitator. The roles and responsibilities of the facilitator(s) shall include the following: -

- a) facilitating communication between the authorised representative and the creditors of the sub-class;
- b) attending the meetings of the committee, as observers, to facilitate communication between creditors of the respective sub-class;
- c) providing information and clarifications to the creditors in a sub-class about the insolvency resolution process, as per advice of the authorised representative; and (d) any other tasks assigned by the committee to improve representation and communication.]

MEETING OF COMMITTEE OF CREDITORS

Section 24 of the Code prescribes the following modalities for the meeting of the committee of creditors.

1. The members of the committee of creditors may meet in person or by such other electronic means as may be specified. [Section24(1)]
2. All meetings of the committee of creditors shall be conducted by the resolution professional. [Section24(2)]
3. The resolution professional shall give notice of each meeting of the committee of creditors to:
 - (a) Members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub – section (5),
 - (b) Members of the suspended Board of directors or the partners of the corporate persons, as the case may be,
 - (c) Operational creditors or their representatives if the amount of their aggregated dues is not less than ten percent of the debt [Section24(3)]
4. The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings. The absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting. [Section24(4)]
5. Subject to sub-sections (6), (6a) and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than there solution professional to represent such creditor in a meeting of the committee of creditors:
Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor. [Section24(5)]
6. Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor. [Section24(6)]

7. The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board. [Section24(7)]
8. The meetings of the committee of creditors shall be conducted in such manner as may be specified. [Section24(8)]

Regulation 18: Meetings of the committee.

(1) A resolution professional shall convene a meeting of the committee before lapse of thirty days from the last meeting: Provided that the committee may decide to extend the interval between such meetings subject to the condition that there shall be at least one meeting in each quarter.

(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

[Explanation: For the purposes of sub- regulation (2) it is clarified that meeting (s) may be convened under this sub-regulation till the resolution plan is approved under sub-section (1) of section 31 or order for liquidation is passed under section 33 and decide on matters which do not affect the resolution plan submitted before the Adjudicating Authority.

(3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

(4) Where the corporate debtor has any real estate project, the committee may direct the resolution professional to invite the 'competent authority' as defined in clause (p) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016) related to such project to attend such meeting(s) of the committee, as the committee may decide, without voting rights, for providing inputs on matters associated with the development of such project.

(5) The committee may direct the resolution professional to invite the providers of interim finance to attend as observers without voting rights, such meeting(s) of the committee, as the committee may decide.

NOTICE OF THE MEETING OF THE COMMITTEE OF CREDITORS

Time period for notice:

A meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means. The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit, however, if there is any authorised representative, the committee may reduce the period to not less than forty-eight hours. (Regulation 19 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016).

SERVICE OF NOTICE BY ELECTRONIC MEANS

As per Regulation 20 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

- A notice may be circulated electronically by sending it to the participants via email as a text message, as an attachment, or as a notification that includes an electronic link or Uniform Resource Locator (URL) for viewing the notice.
- The name of the corporate debtor, the location, if any, the time, and the date of the meeting must all be stated in the subject line of emails.
- If notice is sent as a non-editable email attachment, it must be in Portable Document Format (PDF) or another non-editable format and include a "link or instructions" for the recipient to obtain the appropriate software version.
- The resolution professional must use a system that generates confirmation of the total number of email recipients as well as a record of each recipient to whom the notice has been sent and a copy of such record.

- Any notices of any failed transmissions and subsequent resending shall be retained as “proof of sending” when notice or notifications of availability of notice are sent via email.
- The duty of resolution professional is fulfilled when he sends the email, and he is not liable for transmission errors that are beyond his or her control.
- The notice circulated through an electronic link or Uniform Resource Locator must be legible, and the recipient must be able to obtain and keep copies of the notice.
- The resolution professional must also provide the full Uniform Resource Locator, website address, and instructions on how to access the document or information. The failure of a participant, other than a member of the committee, to supply or update the appropriate e-mail address to the resolution professional will prevent that participant from receiving notice of any meetings but will not render the decisions made at those meetings invalid.

Contents of the notice:

As per Regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means. It shall also provide that a participant may attend and vote in the meeting either in person or through an authorised representative., however, such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf.

The notice of the meeting shall contain the following:

- A list of the matters to be discussed at the meeting;
- A list of the issues to be voted upon at the meeting; and
- copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

The notice of the meeting shall:

- state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast;
- provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and
- provide contact details of the person who will address the queries connected with the electronic voting.

QUORUM OF MEETING

Regulation 22 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that:

- A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means: Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.
- Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.
- In the event a meeting of the committee is adjourned in accordance with sub regulation (2), the adjourned meeting shall be quorate with the members of the committee attending the meeting.

PARTICIPATION THROUGH VIDEO CONFERENCING

Regulation 23 of Corporate Insolvency Resolution Process Regulations provides for participation of the members of Committee of Creditors through video conferencing by laying down essentials of contents of notice and duties of RP in this regard as follows:

(i) Notice to provide option to attend meeting through video conferencing: The notice convening the meetings of the committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with this Regulation.

(ii) Duties of the Resolution Professional:

The resolution professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.

The resolution professional shall take due and reasonable care:

- to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
- to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;
- to record proceedings and prepare the minutes of the meeting;
- to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;
- to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and
- to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting. It is provided that the persons, who are differently abled, may make request to the resolution professional to allow a person to accompany him at the meeting.

(iii) Deemed Venue of the meeting: Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

CONDUCT OF THE MEETINGS

Regulation 24 of the Corporate Insolvency Resolution Process Regulations states that

- Chairman of the meeting: The resolution professional shall act as the chairman of the committee of creditors' meeting.
- Attendance at the commencement of the meeting:

At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following,	(a) his name;
	(b) whether he is attending in the capacity of a member of the committee or any other participant;
	(c) whether he is representing a member or group of members;
	(d) the location from where he is participating
	(e) that he has received the agenda and all the relevant material for the meeting; and
	(f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

Confirmation of quorum: After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

Quorum throughout the meeting: The resolution professional shall ensure that the required quorum is present throughout the meeting.

Restricted access to the meeting: From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.

Minutes of the meeting of Committee of Creditors

Regulation 24 of Corporate Insolvency Resolution Process Regulations provides for the duty of resolution professional to prepare minutes of each meeting of committee of creditors and circulate the same as follows:

Disclosure in minutes: The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.

Circulation of minutes: The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty-eight hours of the said meeting.

VOTING PROCEDURES

Regulation 25 Voting by the committee.

- 1) The actions listed in section 28(1) shall be considered in meetings of the committee.
- 2) Any action other than those listed in section 28(1) requiring approval of the committee may be considered in meetings of the committee.
- 3) The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same.
- 4) At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

In the case of K. Shashidhar, the Supreme Court read Regulation 25(5) of the CIRP Regulations and with Section 30(4) of the Code and concluded as follows; “For approval of the resolution plan, the “percent of voting share of the financial creditors” approving vis à vis dissenting is required to be reckoned. It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfil the threshold percent of voting share of the financial creditors.” Therefore, the Hon’ble Supreme Court has rejected the principle of “present and voting” for the calculation of votes and has interpreted Regulation 25(5) to also cover members who may be absent for a given meeting. Moreover, Regulation 25(5) of the CIRP Regulations provides that where a member remains absent for meeting, he shall nonetheless have the opportunity to review the Minutes of the Meeting and cast his/her vote via electronic means

- 5) The resolution professional shall-
 - (a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorised representative, if any, within forty-eight hours of the conclusion of the meeting; and
 - (b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open, from the circulation of the minutes, for such time as decided by the committee which shall not be less than twenty-four hours and shall not exceed seven days:

Provided that on a request for extension made by a creditor, the voting window shall be extended in increments of twenty-four hours’ period:

Provided further that the resolution professional shall not extend the voting window where the matters listed for voting have already received the requisite majority vote and one extension has been given after the receipt of requisite majority vote.]

- 6) The authorised representative shall circulate the minutes of the meeting received under sub-regulation (5)

to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

25A. Voting by Authorised Representative.

The authorised representative shall cast his vote in respect of each financial creditor or on behalf of all financial creditors he represents in accordance with the provisions of sub section (3) or sub-section (3A) of section 25A, as the case may be.

As far as voting by an authorised representative is concerned, section 25A(3) provides that if the authorised representative represents several financial creditors, he shall cast his vote on behalf of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share. If any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of these creditors.

However, the voting provision of creditors in a class is different from voting by other financial creditors. By the Insolvency and Bankruptcy Code (Amendment) Act, 2019, sub-clause 3A was inserted in section 25A to overcome a peculiar situation where the committee of creditors comprised a substantial number (or only) of creditors in a class (primarily home buyers). It was noticed that in these cases, the total voting share being polled by home buyers was very small (since they were scattered all over the country and not organized), thereby creating a deadlock in decision making as the requisite voting majorities were not being obtained. Hence, the newly inserted provision provides that an authorised representative under section 21(6A) (that is, an AR of creditors in a class) shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than 50 percent of the voting share of the financial creditors he represents who have cast their vote. Further, it is provided that for a vote to be cast in respect of a withdrawal application under section 12A of the IBC, the financial creditors shall cast his vote in accordance with the provisions of section 25A(3) of the IBC.

(vi) Voting by electronic means:

Regulation 26 provides for the procedure for voting by electronic means in the following manner:

- The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation
- At the end of the voting period, the voting portal shall forthwith be blocked.
- At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.
- The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty-four hours of the conclusion of the voting.

It is further explained- For the purposes of these Regulations

a) the expressions "voting by electronic means" or "electronic voting system" means	a "secured system" based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security;
b) the expression "secured system" means computer hardware, software, and procedure that	(i) are reasonably secure from unauthorized access and misuse;
	(ii) provide a reasonable level of reliability and correct operation
	(iii) are reasonably suited to perform the intended functions; and
	(iv) adhere to generally accepted security procedures

Duties of resolution professional. – Section 25 (2) of the Code states that the resolution professional shall (e) maintain an updated list of claims (f) convene and attend all meetings of the committee of creditors; (i) present all resolution plans at the meetings of the committee of creditors.

(vii) Decision by Committee of Creditors: Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors.

(viii) Right of Committee of Creditors to require information from RP: The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process which shall be furnished within a period of seven days of such requisition. [Section 21(9&10)].

(ix) Voting rights of members of Committee consisting of operational creditors: A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation – For the purposes of voting by Operational Creditors -‘total debt’ is the sum of

(a) the amount of debt due to the creditors listed in subregulation 2(a)	(b) the amount of the aggregate debt due to workmen under subregulation 2(b); and	(c) the amount of the aggregate debt due to employees under subregulation 2(c).

A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

RIGHTS AND DUTIES OF AUTHORISED REPRESENTATIVE OF FINANCIAL CREDITORS

Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has added a new section 25A to provide for rights and duties of authorised representative of financial creditors.

- The authorised representative under sub-section (6) or sub-section (6a) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means. [Section 25A(1)].
- It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor here presents. [Section 25A(2)].
- The authorised representative shall not act against the interest of the financial creditor here presents and shall always act in accordance with their prior instructions:
 Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:
 Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor. [Section 25A(3)].
- Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote:
 Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3).

Section 12A of the Code prescribes the withdrawal of application admitted under Section 7, 9 or 10. As the per the Section, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

4. The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be. [Section 25A(4)].

The explanation appended to section 25A makes it clear that for the purposes of section 25A, the “electronic means” shall be such as may be specified.

The rights and duties of authorised representative of financial creditors are highlighted below:

- The authorised representative under sub-section (6) or sub-section (6A) of Section 21 or sub-section (5) of Section 24 of the Code shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
- It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.
- The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions.
- However, if authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor to the extent of his voting share.
- If any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.
- The authorised representative shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than 50% of the voting share of the financial creditors he represents who have cast their vote.
- The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor here presents, for voting in accordance there with, to ensure that the appropriate voting instructions of the financial creditor here presents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

REPLACEMENT OF RESOLUTION PROFESSIONAL BY COMMITTEE OF CREDITORS

Section 27 provides that a resolution professional may be replaced at any time during the corporate insolvency resolution process by the committee of creditors by a sixty-six percent majority of voting shares.

Section 27 of the Code reads as follows:

1. Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.
2. The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.
3. The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.
4. The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.
5. Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

The power under section 27 assumes significance particularly in a corporate insolvency resolution process initiated by a corporate debtor where the corporate debtor has appointed a resolution professional of its choice. The committee of creditors has the right to replace such resolution professional if they suspect collusion between the resolution professional and corporate debtor/ management.

Right of Committee of Creditors to replace Resolution Professional

Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may resolve to replace him with another resolution professional at a meeting, by a vote of sixty-six per cent of voting shares, subject to a written consent from the proposed resolution professional in the specified form. The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority. (Section 27)

Is it necessary for CoC to give reason for replacement of IRP/RP?

Punjab National Bank Vs. Mr. Kirah Shah, Interim Resolution Professional of ORG Informatics Ltd. [CA (AT) (Ins) No. 749/2019]

In the impugned order, the AA noted that the application does not explain why the Interim Resolution Professional was replaced. Immediately after the first meeting of the Committee of Creditors, it is supposed to prefer an application under section 22, which was not done in this case. On appeal, the NCLAT held that the Committee of Creditors is not required to record any reason for replacing the RP that may otherwise call for proceedings against such Resolution Professional. Having decided to remove the Resolution Professional with 88 percent of the voting share, the Committee of Creditors was not open to the AA interfering with such decision, till it is shown that the decision of the Committee of Creditors is perverse or without jurisdiction.

Can CoC replace RP in any of its meeting without recording reason for the same?

Bank of India Vs. M/s Nithin Nutritions Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 497 of 2020 (with connected appeals)]

In the third Committee of Creditors meeting, the Interim Resolution Professional was replaced by another person as the RP. The appellant had filed an application before the AA for confirmation of the RP's appointment. The AA rejected the application on the basis that the Committee of Creditors decision was taken in its third meeting (and not the first meeting, as prescribed in the IBC) and no reasons were given for not adopting the resolution to replace the Interim Resolution Professional in the first meeting. In the appeal against the AA's order, the NCLAT observed that neither section 22 nor section 27 of the IBC requires the Committee of Creditors to give any reasons. The reason is that the relationship between the RP and the Committee of Creditors is that of confidence. If there is loss of confidence and the RP continues in the role, the corporate debtor would be put to loss because of the bad relationship between the Interim Resolution Professional/RP and the Committee of Creditors. The NCLAT further noted that initially section 16 of the IBC specified a 30-day term for the Interim Resolution Professional. This provision was substituted with effect from June 6, 2018, and now the term of the Interim Resolution Professional shall continue till the date of appointment of the RP under section 22. It also referred to regulation 17 of the Corporate Insolvency Resolution Process Regulations and observed that the Interim Resolution Professional continues as such by performing the functions of an RP from day 40. Considering these provisions, the NCLAT held that the Committee of Creditors has the requisite powers to propose changing the Interim Resolution Professional even in meeting/s subsequent to the first one and there is no requirement that they should give particular reasons for the change.

APPROVAL OF COMMITTEE OF CREDITORS FOR CERTAIN ACTIONS

Section 28 of the Code lists out certain actions that may be taken by the resolution professional only with the prior approval of the committee of creditors by a vote of **66 per cent** of the voting shares. The aim of this section is to secure consent of the committee of creditors for certain specific matters. If the resolution professional takes any of the actions listed in section 28(1) without obtaining the consent of the committee of creditors, such action shall be void. The resolution professional may also be liable to be replaced.

- Raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting.
- Create any security interest over the assets of the corporate debtor.
- Change the capital structure of the corporate debtor, including by way of issuance of additional securities creating a new class of securities or buying back or redemption of issued securities, in case the corporate debtor is a company.
- Record any change in the ownership interest of the corporate debtor.

- Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting.
- Undertake any related party transaction.
- Amend any constitutional documents of the corporate debtor.
- Delegate its authority to any other person.
- Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
- Make any change in the management of the corporate debtor or its subsidiary.
- Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.
- Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors.
- Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Section 28(2) mandates that the resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of sixty-six per cent of the voting shares. [Section 28(3)]

1. Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. [Section 28(4)]
2. The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this code. [Section 28(5)]

The Supreme Court of India in **Ngaitlang Dhar vs. Panna Pragati Infrastructure Pvt. Ltd. & Ors.** Held that it is trite law that the CoC has been given supreme status without any judicial interference in order to ensure that the processes are completed within the time frames outlined by the IBC.

PREPARATION OF INFORMATION MEMORANDUM

Section 29 read with Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down the preparation of an information memorandum as one of the main functions of the resolution professional. An information memorandum is envisaged to be prepared in order for the resolution applicants (market participants) to provide solutions for resolving the insolvency of the corporate debtor.

Section 29(1) provides that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

Section 29(2) further provides that the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes:

- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading,
- (b) to protect any intellectual property of the corporate debtor it may have access to, and
- (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

The Explanation appended to Section 29 clarifies that for the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

“Resolution applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 [Section 5(25)]

Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states the following:

In Regulation 36 of IBBI (Insolvency resolution for corporate person) Regulation, 2016, the resolution professional shall submit the information memorandum in electronic form to each member of the committee on or before the ninety fifth day from the insolvency commencement date.

The information memorandum shall highlight the key selling propositions and contain all relevant information which serves as a comprehensive document conveying significant information about the corporate debtor including its operations, financial statements, to the prospective resolution applicant and shall contain the following details of the corporate debtor –

- a) assets and liabilities [including contingent liabilities] with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.
Explanation: 'Description' includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, [geographical coordinates of fixed assets] and any other relevant details.
 - b) the latest annual financial statements;
 - c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;
 - d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;
 - e) particulars of a debt due from or to the corporate debtor with respect to related parties;
 - f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;
 - g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;
 - h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;
 - i) the number of workers and employees and liabilities of the corporate debtor towards them;
 - j) company overview including snapshot of business performance, key contracts, key investment highlights and other factors which bring out the value as a going concern over and above the assets of the corporate debtor such as brought forward losses in the income tax returns, input credit of GST, key employees, key customers, supply chain linkages, utility connections and other pre-existing facilities;
 - k) details of business evolution, industry overview and key growth drivers in case of a corporate debtor having book value of total assets exceeding one hundred crores rupees as per the last available financial statements;
 - ka) fair value
(Provided that the committee may decide not to disclose the fair value if, for reasons to be recorded in writing, it considers such non-disclosure to be beneficial for the resolution process.)
 - l) other information, which the resolution professional deems relevant to the committee.
1. A member of the committee may request the resolution professional for further information of the nature described in this regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.
3A The creditors shall provide to the resolution professional the latest financial statements and other relevant financial information of the corporate debtor available with them.
 2. The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

APPOINTMENT OF REGISTERED VALUER (REGULATION 26)

A key objective of the IBC is maximization of the value of assets of the corporate debtor and consequently value for its stakeholders. A critical element toward achieving this objective is transparent and credible determination of the value of the assets to facilitate comparison and informed decision making by the Committee of Creditors.

In Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others [Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67], the Supreme Court observed that it appears that the aim of prescribing such valuation process is to help the committee of creditors make a decision on a resolution plan properly. The CIRP Regulations assign the valuation responsibility to registered valuers. By way of a circular dated October 17, 2018, the IBBI has directed that every valuation required under the IBC or any of the regulations made thereunder is required to be conducted by a registered valuer, that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. Further, with effect from February 1, 2019, no insolvency professional (IP) shall appoint a person other than a registered valuer to conduct any such valuation. By way of another circular, dated August 13, 2019, the IBBI has reiterated that appointing any person, other than a registered valuer, on or after February 1, 2019, to conduct such valuation is illegal and payment, whether as a fee or otherwise, to such person shall not form part of the insolvency resolution process costs or liquidation cost.

Appointment of Registered Valuer: Regulation 27, Chapter VIII of CIRP Regulations provides for appointment of registered valuer as: (1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

Regulation 2(1) (hb) of CIRP Regulations: “Fair value” means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion. Regulation 2(1) (k) of CIRP Regulations: “Liquidation value” means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.

As per regulation 2(1)(m), “Registered valuer” means a person registered as such in accordance with the Companies Act, 2013, and rules made thereunder.

Who shall not be appointed as Registered Valuer by Resolution Professional: Regulation 27(3) of CIRP Regulations, 2016 provides that the resolution professional, as the case may be, shall appoint a professional under this regulation on an arm’s length basis following an objective and transparent process, provided that the following persons shall not be appointed, namely: -

- (a) a relative of the resolution professional;
- (b) a related party of the corporate debtor;
- (c) an auditor of the corporate debtor at any time during the period of five years preceding the insolvency commencement date;
- (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

Regulation 35 provides for determining the fair value and liquidation value of the corporate debtor as follows: (1) Fair value and liquidation value shall be determined in the following manner: -

- (a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;
Provided that the resolution professional shall facilitate a meeting wherein registered valuers shall explain the methodology being adopted to arrive at valuation to the members of the committee before computation of estimates.

- (b) if the two estimates of a value in an asset class are significantly different, or on receipt of a proposal to appoint a third registered valuer from the committee of creditors, the resolution professional may appoint a third registered valuer for an asset class for submitting an estimate of the value computed in the manner provided in clause (a).
- (c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be

Explanation. - For the purpose of clause (b),

- (i) "Asset class" means the definition provided under the Companies (Registered Valuers and Valuation) Rules, 2017;
- (ii) "Significantly different" means a difference of twenty-five per cent in liquidation value under an asset class and the same shall be calculated as $(L1-L2)/L1$, where, L1= higher valuation of liquidation value L2= lower valuation of liquidation value.

Duty of RP w.r.t. confidentiality of fair value and liquidation value so determined: The resolution professional is required to provide the fair value and the liquidation value to the members of the committee of creditors in electronic form after receiving resolution plans in accordance with the IBC and CIRP Regulations. Further, to maintain confidentiality of the values, the resolution professional should provide these values only on receiving an undertaking from all members to the effect that they shall maintain confidentiality of the fair value and the liquidation value, shall not use such values to cause an undue gain or undue loss to themselves or any other person, and shall comply with the requirements under section 29(2). The RP and registered valuers are also required to maintain confidentiality of the values.

30C. Report on the status of development rights and permissions of real estate projects.

Where the corporate debtor has any real estate project, the resolution professional shall:

- (a) prepare a report detailing the status of development rights and permissions required for development of such project;
- (b) submit the report to the committee for its comments; and
- (c) submit to the Adjudicating Authority, the report referred to in clause (a) along with the comments of the committee referred to in clause (b), on or before the sixtieth day from the insolvency commencement date.]

PROCESS OF INVITING RESOLUTION PLAN BY THE COMMITTEE

The process of inviting resolution plan by the committee of creditors is the most crucial step in the revival and rehabilitation of the stressed corporate debtor which in turn will decide the future of the corporate debtor. The process includes following measures to be taken on part of the Resolution Professional:

- A. Issuance of Expression of interest
- B. Request for Resolution Plan
- C. Strategy for marketing of assets of the corporate debtor
- D. Receipt of Resolution Plan from the prospective resolution applicant Each of the stage is discussed below in detail.

Below is a summary of the timelines for a resolution plan as provided in the CIRP Regulations, all of which are explained in detail thereafter:

Regulation	Action	Timeline
Reg 36A (1)	Publish brief particulars of the invitation for expression of interest in Form G of the Schedule-I.	at the earliest, not later than sixtieth day from the insolvency commencement date, Clarification: The resolution professional after the approval of the committee may invite a resolution plan for each real estate project or group of projects of the corporate debtor
Reg 36A (3)	Last date for submission of expression of interest.	Not less than fifteen days from the date of issue of detailed invitation

Reg 36A (10)	RP to issue a provisional list of eligible prospective resolution applicants.	Within ten days of the last date for submission of expression of interest.
Reg 36A (11)	Objection for inclusion or exclusion of a prospective RA in the provisional list.	Within five days from the date of issue of the provisional list.
Reg 36A (12)	Issue of final list of prospective resolution applicants (PRAs).	Within ten days of the last date for receipt of objections, to the committee.
Reg 36B (1)	Issue of information memorandum, evaluation matrix and a request for resolution plans.	Within five days of the date of issue of the final list.

A. ISSUANCE OF EXPRESSION OF INTEREST

Form and manner of issuing Expression of Interest

Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 inserted by way of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 provides for Invitation of Expression of Interest as follows:

- Within 60 days of the insolvency commencement date, the resolution professional shall publicise brief details of the invitation for expressions of interest in Form G (as provided under Schedule I) from interested and qualified potential resolution applicants to submit resolution plans.
Clarification: The resolution professional after the approval of the committee may invite a resolution plan for each real estate project or group of projects of the corporate debtor.]
- The resolution professional may, with the approval of the committee, invite expression of interest for submission of resolution plans for the corporate debtor as a whole, or for sale of one or more of assets of the corporate debtor, or for both.]
- Form G shall be published in:
 - a) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;
 - b) on the website, if any, of the corporate debtor;
 - c) on the website, if any, designated by the Board for the purpose; and
 - d) in any other manner as may be decided by the committee.
- The Form G shall state from where the detailed invitation for expression of interest can be downloaded. It should also provide for the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of the detailed invitation.
- The detailed invitation referred above shall include:
 - a) The criteria for prospective resolution applicant as approved by the committee;
 - b) Ineligibility norms under Section 29A of the Code;
 - c) Information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and
 - d) Shall not require payment of any fee or any non-refundable deposit for submission of expression of interest.
 - e) provide details of the corporate debtor's registration status as a micro, small, or medium enterprise in accordance with the Micro, Small and Medium Enterprises Development Act, 2006
(Provided that where the corporate debtor has any real estate project, the committee, for an association or group of allottees in such real estate project, representing not less than ten per cent. or one hundred creditors out of the total number of creditors in a class, whichever is lower, may relax the following:
 - (a) eligibility criteria for submission of expression of interest provided in clause (a) above; and
 - (b) conditions regarding the refundable deposit.)
- Any modification for expression of interest shall not be made more than once.
- The prospective resolution applicant meeting the requirements of the invitation for expression of interest may

submit expression of interest within the time specified in the invitation. The expression of interest received beyond the timeline specified in the invitation shall be rejected by the Resolution Professional.

“Resolution Applicant” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section 25 2 or pursuant to Section 54K. (Section 5(25))

“Resolution Plan” means a plan proposed by the resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. Resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger. [Section 5(26)]

Contents of Expression of Interest

As per sub-regulation 7 of Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an expression of interest shall be unconditional and shall be accompanied by-

- a) An undertaking by the prospective resolution applicant that it meets the criteria specified by the committee;
- b) Relevant records in evidence of meeting the criteria under clause (a);
- c) An undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under Section 29A;
- d) Relevant information and records to enable an assessment of ineligibility under Section 29A;
- e) An undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;
- f) An undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and
- g) An undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person.

Issuance of provisional list of eligible prospective resolution by the Resolution Applicant

The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days from the last date for submission of expression of interest to:

- a) The members of the Committee of Creditors; and
- b) To all prospective resolution applicants who submitted the expression of interest.

Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list may be made with supporting documents within five days from the date of issue of the provisional list. On considering the objections received, if any the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the Committee of Creditors.

B. REQUEST FOR RESOLUTION PLAN

Regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted by way of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 provides as follows:

- The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans within five days of the date of issue of the final list to:
 - a) every prospective resolution applicant in the final list;
 Provided that where such documents are available, the same may also be provided to every prospective resolution applicant in the provisional list. {(Regulation 36B (1))}

- b) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.
- c) The request for resolution plans shall allow prospective resolution applicants a minimum of 30 days to submit the resolution plan(s).
- d) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.
- e) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.
Provided that where the corporate debtor has any real estate project, the committee may relax the requirement to provide for performance security for an association or group of allottees in such real estate project, representing not less than ten per cent. or one hundred creditors out of the total number of creditors in a class, whichever is lower.
- f) Performance Security shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.
- g) Any modification in the request for resolution plan or the evaluation matrix issued shall be deemed to be a fresh issue, shall be subject to the above- mentioned timeline and such modifications shall not be made more than once.
- h) The resolution professional may with the approval of the committee, may extend the timeline for submission of resolution plans.
- i) The resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list.

Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-regulation (minimum 30 days requirement)

“Evaluation Matrix” means such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval. (Regulation 2(ha) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

In the case of **Tata Steel Ltd Vs. Liberty House Group Pte Ltd. & Others** The CoC gave equal opportunity to all three RAs to submit improved financial offer. Instead of filing an improved financial offer, the appellant filed an application before the NCLAT for restraining the RP and the CoC from considering improved financial offer. The NCLAT noted that the process document does not curtail the powers of the CoC to maximise value and as per the process document, the CoC has absolute discretion, but without being under any obligation, to update, amend or supplement the information, assessment or assumptions and right to change, update, amend, supplement, modify, add to, delay or otherwise annul or cease the resolution process at any point in time. It observed that granting more opportunity to all the eligible resolution applicants to revise their financial offers, even by giving more opportunity, is permissible in law. However, all such process should be complete within the time frame.

Can insolvency proceedings be withdrawn even after invitation of Resolution Plan?

In the matter of **‘Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors.’**, the Supreme Court held that Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has to be read subject to Section 12A of the Insolvency and Bankruptcy code, 2016 which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest. Thus, the Apex Court upheld withdrawal of CIRP even after the Resolution Professional issued invitation for expression of interest from resolution applicants to submit resolution plans under Regulation 36A of IBBI

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

C. STRATEGY FOR MARKETING OF ASSETS OF THE CORPORATE DEBTOR

According to Regulation 36C of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall prepare a strategy for marketing of the assets of the corporate debtor in consultation with the committee, where the total assets as per the last available financial statements exceed one hundred crore rupees and may prepare such strategy in other cases.

Decision of implementing such strategy along with its cost shall be subject to the approval of the committee. The member(s) of committee may also take measures for marketing of the assets of the corporate debtor.

D. RECEIPT OF RESOLUTION PLAN FROM THE PROSPECTIVE RESOLUTION APPLICANT

Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the resolution plan shall provide for the measures for resolution of the insolvency of the corporate debtor along with maximization of value of its assets including but not limited to the following:

- Transfer of all or part of the assets of the corporate debtor to one or more persons;
- Sale of all or part of the assets whether subject to any security interest or not;
- Restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- Substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- Cancellation or delisting of any shares of the corporate debtor, if applicable;] (d) satisfaction or modification of any security interest;
- Curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- Reduction in the amount payable to the creditors;
- Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor; amendment of the constitutional documents of the corporate debtor;
- Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- Change in portfolio of goods or services produced or rendered by the corporate debtor; (k) change in technology used by the corporate debtor;
- Obtaining necessary approvals from the Central and State Governments and other authorities and
- Sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets.

REGULATION 38: MANDATORY CONTENTS OF RESOLUTION PLAN

- The amount payable under a resolution plan –
 - (a) to the operational creditors shall be paid in priority over financial creditors; and
 - (b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan
 Provided that where a resolution plan provides for payment in stages, the financial creditors who did not vote in favour of the resolution plan shall be paid at least pro rata and in priority over financial creditors who voted in favour of the plan, in each stage.
- A statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors of the corporate debtor.
- A statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.
- The term of the plan and its implementation schedule.
- The management and control of the business of the corporate debtor during its term.
- The adequate means for supervising its implementation.
- Manner in which proceedings with respect to the avoidance transactions of the corporate debtor will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such

proceedings shall be distributed.

- A resolution plan shall demonstrate that it addresses the cause of default, is feasible and viable and resolution applicant has capacity to implement the same.
- A resolution plan should have provision for its effective implementation; approvals required and the timeline for the same.
- (a) The committee shall consider setting up a monitoring committee for monitoring and supervising the implementation of the resolution plan.

(b) The monitoring committee may consist of the resolution professional or any other insolvency professional, or any other person, including representatives of the committee and representatives of resolution applicant(s), as its members:

Provided that where the resolution professional is proposed to be part of the monitoring committee, the monthly fee payable to him shall not exceed the monthly fee received by him during the corporate insolvency resolution process.

(c) The monitoring committee shall submit quarterly reports to the Adjudicating Authority regarding the status of implementation of resolution plan.]

In **M/S Bhaskara Agro Agencies Vs. M/S Super Agri Seeds Private Limited & Ors.**, the NCLAT ruled that regardless of whether a “Resolution Plan” is viable and practicable or not, the Appellate Tribunal or Adjudicating Authority cannot review the CoC’s decision in an appeal. Given that the aforementioned variables are of a technical nature and can be assessed by professionals such as “Financial Creditors,” CoC is the best place to turn for information on the viability and feasibility of a resolution plan and the assessment matrix.

In the case of **Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Others** [Company Appeal (AT) (Insolvency) No. 169 to 173 of 2017], the AA’s order dated August 2, 2017, approving a resolution plan was challenged on the basis that the resolution plan provided for merger and amalgamation, which is not permissible as it violates section 30(2)(e) of the IBC. It was noted that a resolution plan may provide for merger or consolidation of the corporate debtor with one or more persons in terms of regulation 37(1)(c) of the CIRP Regulations. The NCLAT held: “The I&B Code is a code by itself and section 238 provides overriding effect of it over the provisions of the other Acts, if any of the provisions of an Act is in conflict with the provisions of the I&B Code.”

PERSONS NOT ELIGIBLE TO BE RESOLUTION APPLICANT

Section 29A of the Code expressly prohibits certain groups of people from taking part in the resolution process. As per Section 29A of the Code, following persons shall not be eligible to submit a resolution plan, if such person or any other person acting jointly or in concert with such person is:

- a) is an undischarged insolvent;
- b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.

It is provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

Further proviso is an exception to clause (c) which states that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor

Explanation I.— For the purposes of this proviso, the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed], prior to the insolvency commencement date.

Non applicability of ineligibility criterion of clause (c):

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code.

- d) has been convicted for any offence punishable with imprisonment
- i. for two years or more under any Act specified under the Twelfth Schedule; or
 - ii. for seven years or more under any law for the time being in force: Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment.

Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I;

- e) is disqualified to act as a director under the Companies Act, 2013:

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

- f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code.

Exception:

It is provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction.

- (h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

It may be noted that pursuant to Section 240A (1) of the Code, notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process or pre-packaged insolvency resolution process of any micro, small and medium enterprises.

- h) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- i) has a connected person not eligible under clauses (a) to (i).

Explanation 5 — For the purposes of this clause, the expression “connected person” means—

- (i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii) except where such resolution applicant is a financial entity and is not a related party of the corporate debtor.

Provided further that the expression “related party” shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Explanation II—For the purposes of this section, “financial entity” shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:

- (a) a scheduled bank;
- (b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India (which is FATF Standards compliant and Signatory to IOSCO MoU)
- (c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor,
- (d) an asset reconstruction company
- (e) an Alternate Investment Fund
- (f) such categories of persons as may be notified by the Central Government

In the case of **Bank of Baroda & Anr. Vs. MBL Infrastructures Limited & Ors. [Civil Appeal No. 84 I I of 2019]**: The judicial interpretation of section 29A (h) of the Code was an issue in this appeal before the SC. Loans/credit facilities were obtained by the CD from a consortium of banks (State Bank of Mysore, now State Bank of India as lead bank). On the failure of the CD to act in tune with the terms of repayment, some of the lender banks were forced to invoke the personal guarantees extended by promoter of the CD for the credit facilities availed by it. Lenders including RBL Bank issued a notice under section 13(2) of the SARFAESI Act after duly invoking the personal guarantee of the promoter. Later, RBL Bank initiated CIRP under section 7 against the CD which was admitted by AA. Two resolution plans were received by the RP of which, one was authored by the personal guarantor promoter prior to the introduction of section 29A of the Code.

AA, vide its order dated December 18, 2017 held that the personal guarantor was eligible to submit a resolution plan, notwithstanding the fact that he did extend his personal guarantees on behalf of the CD which were duly invoked by some of the creditors. It ruled that in as much as the personal guarantee having not been invoked and the personal guarantor merely having extended his personal guarantee, as such there is no disqualification per se under section 29A(h) of the Code as the liability under a guarantee arises only upon its invocation. Thus, only those guarantors who had antecedents which might adversely impact the credibility of the process are alone to be excluded. As debt payable by personal guarantor was not crystallized, he could not be construed as a defaulter for breach of the guarantee. While the appeal was pending before NCLAT against this order of AA, section 29A(h) went through an amendment which came into effect from January 18, 2018 where by it was declared that a person shall not be eligible to submit a resolution plan if he has executed an enforceable guarantee in favour of a creditor, in respect of a CD against which an application for insolvency resolution made by such creditor has been admitted under the Code.

The resolution plan of promoter was approved by CoC with 78.50% voting and the pending appeal before the NCLAT was withdrawn on February 27, 2018. The AA approved the resolution plan by its order dated April 18, 2018 inter alia holding that the issue qua the eligibility under section 29A(h) decided already, coupled with the resolution plan crossing the requisite threshold of approval by the CoC i.e., 75% vote share, having considered the techno economic viability and feasibility of the plan, the application filed for approval of the resolution plan submitted by the promoter was liable to be allowed. A direction was accordingly given, holding that the approved resolution plan shall come into force with immediate effect.

NCLAT confirmed the order of AA. On appeal, SC observed that:

- Once a person executes a guarantee in favour of a creditor for credit facilities availed by a CD, and the matter has been admitted, and the guarantee having been invoked, the bar qua eligibility under section 29A(h) would certainly come into play;
- What is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of CIRP; and
- If the submission of the plan is maintainable at the time when petition was filed, and thereafter, by the operation of the law, a person becomes ineligible, which continues either till the time of approval by the CoC, or adjudication by AA, then the subsequent amended provision would govern the question of eligibility.

Supreme Court held that the resolution plan submitted by the promoter of CD was not maintainable due to his ineligibility under section 29A(h) of the Code. However, SC disposed of the matter without disturbing the approved plan on merits considering socio economic factors viz., the employment of several workers and that the CD is a running concern.

In the case of **Arun Kumar Jagatramka Vs. Jindal Steel and Power Ltd. &Anr. [CA No. 9664/2019]** Upholding the constitutional validity of regulation 2B of the Liquidation Process Regulations, the SC held that prohibition in section 29A and section 35(1)(f) of the Code must also attach to a scheme of compromise or arrangement under section 230 of the Companies Act, 2013 (scheme), where a company is undergoing liquidation under the Code. Even in the absence of said regulation, a person ineligible under section 29A read with section 35(1)(f) is not permitted to propose a scheme for revival of a company undergoing liquidation under the Code. In case of a company undergoing liquidation pursuant to the provisions of Chapter III of the Code, a scheme is a face to the liquidation process. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a solution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debt or as a 'going concern', are somehow permitted to propose a scheme. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of section 29A permeates the liquidation process under Chapter III (by virtue of the provisions of section 35(1)(f)). The SC clarified that three modes of revival are contemplated under the Code. The first is in the form of the CIRP elucidated in the provisions of Chapter II. The second is where the CD or its business is sold as a going concern within the purview of clauses (e) and (f) of regulation 32. The third is when a revival is contemplated through the modalities provided in section 230 of the Companies Act. It further clarified that the scheme cannot certainly be equated with a withdrawal simpliciter of an application, as contemplated under section 12A of the Code.

In the case of **Chitra Sharma v. Union of India, Writ Petition (Civil) No. 744 of 2017** [decided on 09.08.2018], Supreme Court observed as follows:

Parliament has introduced Section 29A into the IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Court must bear in mind that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a back-door entry to erstwhile managements in the CIRP.

In the case of **Swiss Ribbons Pvt. Ltd. vs. Union Of India on 25 January, 2019, Supreme Court of India** was of view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24A) show that such persons must be — connected with the resolution applicant within the meaning of Section 29A(j). This being the case, the said categories of persons who are collectively mentioned under the caption—relative obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is — connected with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29A(j). All the categories in Section 29A(j) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression—related party, therefore, and — relative contained in the definition Sections must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the

resolution applicant.

In the case of **Saravana Global Holdings Ltd. & Another Vs. Bafna Pharmaceuticals Ltd. & Others** [Civil Appeal No(s). 5344/2019], the Supreme Court upheld the order of the NCLAT, which had held that the CD is an MSME and the promoters are not ineligible in terms of section 29A of the IBC. Therefore, it is not necessary for the CoC to find out whether the resolution applicant is ineligible in terms of section 29A or not. (Source: IBBI Handbook 2019)

In **Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others** [(2019) 2 SCC 1], the Supreme Court delved into the interpretation of section 29A of the IBC and held that the stage at which ineligibility in section 29A(c) attaches is when the resolution plan is submitted by a resolution applicant and not from the insolvency commencement date (or any other anterior point in time). The ineligibility under section 29A(c) can only be removed if the person submitting the plan pays all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submitting a resolution plan. On the other hand, the ineligibility under section 29A(g) cannot be cured by paying off the debts of the corporate debtor. Persons in erstwhile management or control of the corporate debtor can become eligible to submit a resolution plan for the corporate debtor by paying off the debts of the company only if they are not disqualified under section 29A(g)

SUBMISSION OF RESOLUTION PLAN

Once the RFRP, IM, and evaluation matrix are provided to the prospective resolution applicants (PRAs), they undertake diligence of the CD and submit the resolution plan to the RP as per the provisions of the IBC, CIRP Regulations, and RFRP. Section 30 of the Code prescribes the manner in which a resolution plan may be submitted by a resolution applicant.

1. Documents accompanying Resolution Plan
Affidavit for eligibility u/s 29A to be filed with RP: A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum. {Section 30(1)}
2. Modification in the resolution plan: The resolution professional may, if envisaged in the request for resolution plan-
 - a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or
 - b) use a challenge mechanism to enable resolution applicants to improve their plans. {Regulation 39 (1A)}
3. Examination of resolution plan by Resolution Professional Section 30(2) of the Code provides that the resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –
 - (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
 - (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-
 - (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
 - (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53 whichever is higher, and Each resolution plan shall provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.
 - (c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;
 - (d) the implementation and supervision of the resolution plan;
 - (e) does not contravene any of the provisions of the law for the time being in force
 - (f) conforms to such other requirements as may be specified by the Board.

Further explanations for clause (b) is provided as:

Explanation 1. — For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2. — For the purpose of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor- (i) where a resolution plan has not been approved or rejected by the Adjudicating Authority; (ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or (iii) where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan

Deemed approval of shareholders Explanation. — For the purposes of clause (e), if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

APPROVAL OF RESOLUTION PLAN BY THE COMMITTEE

The Code has provided the Committee with exclusive access to negotiations and also the final hand in dealing with business decisions. There by, the Committee of Creditors is also endowed with the mammoth responsibility of evaluating resolution plans and there after voting and approving the best resolution plan.

Regulation 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down the provisions of the approval of the resolution plan by the committee.

A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans along with an:

- a. Affidavit stating that it is eligible under section 29A to submit resolution plans; and
- b. Undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

The resolution professional may if envisaged in the request for resolution plan, allow modification of the resolution plan but not more than once or use a challenge mechanism to enable resolution applicants to improve their plans.

The committee shall not consider any resolution plan in the following scenarios (regulation 39(3))

- a. If resolution plan is received after the time as specified by the committee under regulation 36B; or
- b. received from a person who does not appear in the final list of prospective resolution applicants; or
- c. If resolution plan does not comply with the provisions of sub-section (2) of section 30.

Section 30(4) of the Code provides that the committee of creditors may approve a resolution plan by a vote **of not less than sixty-six per cent** of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board:

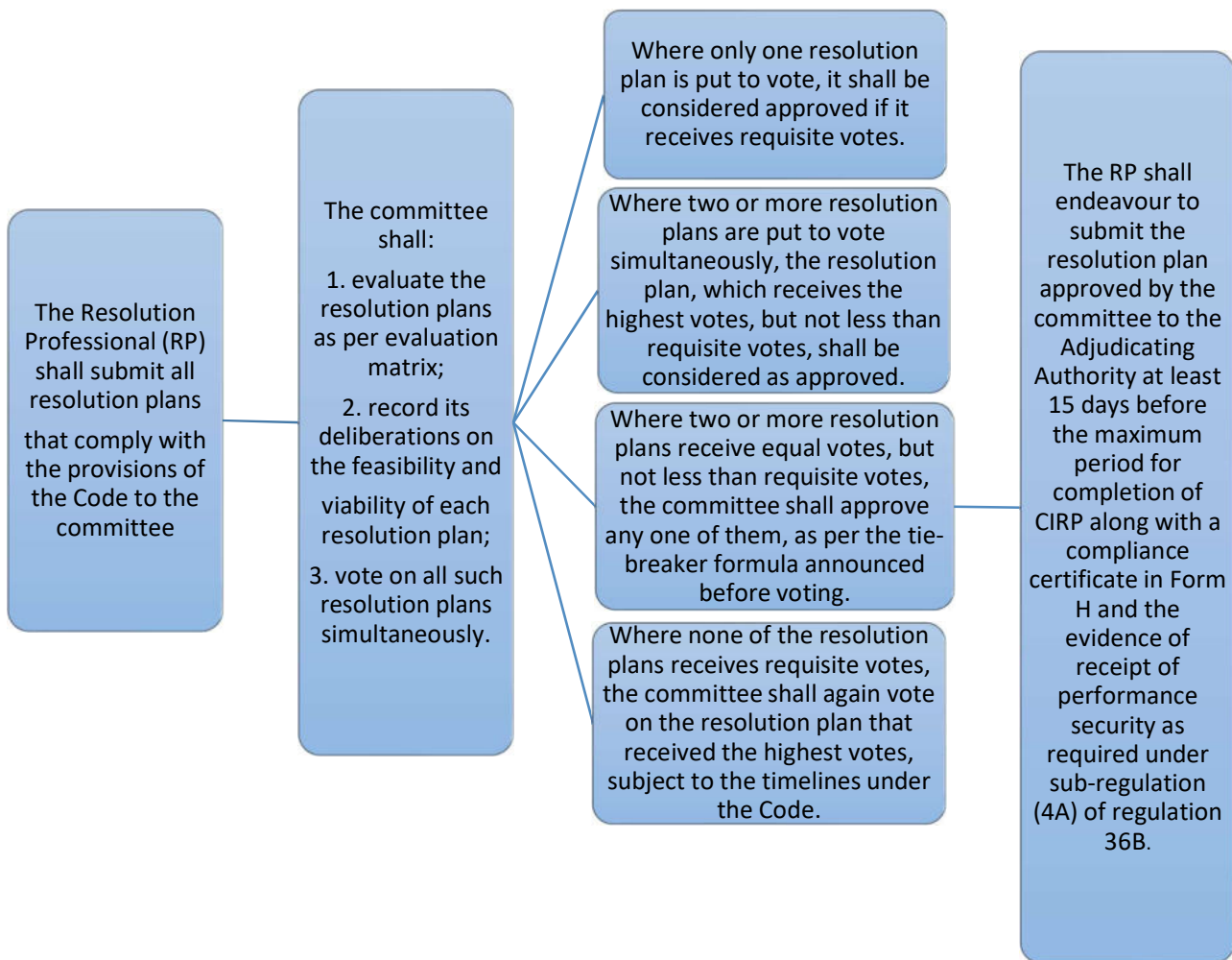


Illustration. - The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under:

Voting outcome	% of votes in favour of		Status of approval
	Plan A	Plan B	
1	55	60	No Plan is approved, as neither of the Plans received requisite votes. The committee shall vote again on Plan B, which received the higher votes, subject to the timelines under the Code.
2	70	75	Plan B is approved, as it received higher votes, which is not less than requisite votes.
3	75	75	The committee shall approve either Plan A or Plan B, as per the tiebreaker formula announced before voting.

Can resolution applicant attend meeting of CoC considering resolution plan?

The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered. {Section 30(5)} Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor

Submission of resolution plan to CoC:

- Section 30(6) of the Code provides that the resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority
- Timeline for submission of Resolution plan approved by CoC: Regulation 39(4) of the Code provides that the resolution professional shall endeavour to submit the resolution plan approved by the committee to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process under section 12, along with a compliance certificate in Form H of the Schedule-I and the evidence of receipt of performance security required under sub regulation (4A) of regulation 36B.

According to Section 30 –

- A resolution applicant to file an affidavit stating that it is eligible under section 29A.
- Added an Explanation to sub-section (2) of section 30 to clarify that if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.
- Substituted sub-section (4) of section 30, inter alia, reducing the threshold for voting from 75% to 66% for approving a resolution plan by committee of creditors.

The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule. {Regulation 36B(4A)}

APPROVAL OF RESOLUTION PLAN BY AA (SECTION 31)

Approval of resolution plan by the Adjudicating Authority (AA) {Section 31(1)}:

- If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan.
- Resolution plan, so approved, shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.
- It is provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

Rejection of resolution plan by the Adjudicating Authority {Section 31(2)}:

- Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

Consequences of Approval of Resolution Plan {Section 31(3)}: After the order of approval under sub-section (1), -

- (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
- (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its.

Duty of Resolution Applicant to obtain necessary approval {Section 31(4)}: The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India

under that Act prior to the approval of such resolution plan by the committee of creditors

Provisions of Regulation 39 of CIRP Regulations

- The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant. {Regulation 39(5)}
- The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan.
- It is provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; {Regulation 39(5A)}
- A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained. {Regulation 39(6)}
- No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date. {Regulation 39(7)}
- A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan. {Regulation 39(8)}
- A creditor, who is aggrieved by non-implementation of a resolution plan approved under sub-section (1) of section 31, may apply to the Adjudicating Authority for directions. {Regulation 39(9)}

ASSESSMENT AND COMPROMISE

Regulation 39BA(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that while deciding to liquidate the corporate debtor under section 33, the committee shall examine whether to explore compromise or arrangement as referred to under sub - regulation (1) of regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 and the resolution professional shall submit the committee's recommendation to the Adjudicating Authority while filing application under section 33

Where a recommendation has been made under sub-regulation (1), the resolution professional and the committee shall keep exploring the possibility of compromise or arrangement during the period the application to liquidate the corporate debtor is pending before the Adjudicating Authority.

EFFECT OF APPROVAL OF THE RESOLUTION PLAN BY THE ADJUDICATING AUTHORITY

- The resolution professional shall within fifteen days of the order of the Adjudicating Authority approving a resolution plan inform intimate each claimant for payment of debts under such resolution plan.
- No proceedings shall be initiated against the interim resolution professional or the resolution professional for any actions of the corporate debtor, prior to the insolvency commencement date.
- A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.
- A creditor who is aggrieved by non-implementation of the approved resolution plan approved may apply to the Adjudicating Authority for directions.
- Sub-Section 1 of Section 31 of the Code provides that if Adjudicating Authority has approved the resolution plan, then such plan shall be binding on the corporate debtor and its employees, members, creditors, Central Government, any State Government or any local authority, guarantors and other stakeholders involved in the resolution plan.

- Sub-Section 2 of Section 31 of the Code provides that where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requisite requirements, it may by an order reject the resolution plan.
- Sub-Section 3 of Section 31 of the Code provides that after the approval of resolution plan, the moratorium order passed under Section 14 of the Code shall cease to have effect.
- Section 32A of the Code also provides that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority, if the resolution plan results in the change in the management or control of the corporate debtor.

The Supreme Court ruled in **Ebix Singapore PTE v. CoC of Educomp Solutions & Anr.** that a resolution plan that has been approved by the CoC (but not yet by Adjudicating Authority) cannot be viewed solely as a “contract” covered by the Contract Act. Due to the nature of the IBC, CoC approved Resolution Plans do not fall under the common law remedies of withdrawal or change for force majeure or frustration. It would be contrary to the IBC’s insolvency system to permit Resolution Applicants to seek remedies that are not provided for by the IBC by turning to the Contract Act.

In **PNC Infratech Ltd. v. Deepak Maini, NCLAT** held that there is no such mechanism under IBC that gives the right to the unsuccessful resolution applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations. If the Resolution Plan is approved by CoC and the CoC has sole authority over the evaluation and score matrix and there are no material irregularities, the Adjudicating Authority will not address the technical questions pertaining to those matters.

In **Vallal RCK v. Siva Industries and Holding Limited & Others**, Supreme Court held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the processes within the time lines under IBC. Financial Creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed resolution plan.

APPEAL (SECTION 32)

Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of section. 61

GROUND FOR APPEAL

- The insolvency resolution process costs have not been provided for repayment in priority to all other debts
- There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period
- The approved resolution plan is in contravention of the provisions of any law for the time being in force
- The debts owed to operational creditors of the corporate debtor have not been provided for in there solution plan in the manner specified by the Board
- The resolution plan does not comply with any other criteria specified by the Board

Section 61(3) of the Code provides that an appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely: –

- i. the approved resolution plan is in contravention of the provisions of any law for the time being in force;
- ii. there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- iii. the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
- iv. the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
- v. the resolution plan does not comply with any other criteria specified by the Board.

LIABILITY FOR PRIOR OFFENCES (SECTION 32A)

Section 32A provides relief to the resolution applicant or the persons who shall be in charge of the management of the company in the future by way of immunity from the liability of offences that the promoters or the persons in charge of the corporate debtor had committed prior to the initiation of CIRP, subject to certain conditions. The Section also bars any action being taken against the property of the corporate debtor pursuant to an offence committed prior to the CIRP, subject to the condition that the property is covered under the resolution plan approved by the AA or sale under liquidation and the resolution plan should have resulted in change in management/control of the corporate debtor such that debarred persons are not in management/control of the corporate debtor post resolution. However, the immunity is not provided for the property of any other person, other than the corporate debtor. The Section further provides that notwithstanding the immunity given in subsections (1) & (2), the corporate debtor or any person who may be required to extend assistance/co-operation to any authority investigating an offence committed prior to the commencement of CIRP, has been mandated to assist and co-operate accordingly.

1. Immunity to Corporate Debtor from pre CIRP offences: Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled: Provided further that every person who was a “designated partner” as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 or an “officer who is in default”, as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor’s liability has ceased under this sub-section.

2. Property covered under resolution plan approved by AA also immune from pre-CIRP offences: No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court. Explanation- For the purposes of this sub-section, it is hereby clarified that, -

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
- (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution

process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

3. Assistance by CD to investigating authority: Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

SPECIAL PROVISION RELATING TO TIMELINE

Regulation 40C of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was inserted vide notification No. IBBI/2020-21/GN/REG059 dated 20th April, 2020 which stated the following:

Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to corporate insolvency resolution process.

Regulation 40A provides the model time-line for corporate insolvency resolution process.

Commercial Wisdom of Committee of Creditors

The Code places the CoC in control of the insolvency process. The courts have subsequently sanctified the decision-making power of the CoC. CoC's decision with requisite voting share in relation to the resolution plan is sacrosanct. The approved plan as stamped by the court is binding on all stakeholders including the dissenting creditors. The choice of resolution plan has been placed under the ambit of the 'commercial wisdom' of the CoC and is unchallenged. The courts have reiterated the primacy of the CoC's commercial wisdom on several occasions and restrained from interfering with its decision or commenting on the plan on merit.

CASELAWS

LAWYER CAN ISSUE DEMAND NOTICE ON BEHALF OF OPERATIONAL CREDITOR

In the matter of **Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.**, the Supreme Court settled the legal proposition under the Insolvency and Bankruptcy Code, 2016 to hold that:

- (i) Section 9(3)(c) of the Code is directory and not mandatory in nature;
- (ii) Demand notice under the Code can be issued by the lawyer on behalf of the operational creditor.

The two issues that were raised in this case pertained to Insolvency and Bankruptcy Code, 2016. Firstly, whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

With reference to the aforesaid issues, Two-Judge Bench of the Supreme Court made the following observations:

- (i) Under section 9(3)(c) of the Code a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirmed" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Therefore, section 9(3)(c) of the Code would have to be construed as being directory in nature.
- (ii) Supreme Court observed that Section 8 of the Code speaks of an operational creditor delivering a demand notice and if the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent.

CORPORATE DEBTOR CANNOT MAINTAIN APPEAL

In the matter of **Radius Infratel Pvt. Ltd. v. Union Bank of India**, the National Company law appellate tribunal (NCLAT) has reiterated Supreme Court's decision in the landmark case **Innovative Industries Ltd. v. ICICI Bank and Ors.**, whereby the Supreme Court had held that once an insolvency professional is appointed to manage the Company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the Company.

In the instant case, the Company being the Corporate debtor had preferred appeal against order passed by National Company Law Tribunal, whereby the Tribunal had admitted Financial Creditor's i.e. Union Bank of India application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for appointment of the Interim Resolution Professional.

In that view of the matter, the appellant sought to substitute the 'Corporate debtor' with a shareholder of the Corporate debtor and to transpose 'Radius Infratel Private Limited' through 'Resolution Professional' as a Respondent. Since no such application for substitution was filed when matter was taken-up, the Appellate tribunal dismissed the appeal as not maintainable, following the SC precedent. However, liberty was granted to shareholder or director of the corporate debtor to file appropriate application, if not barred by limitation.

FLAT BUYERS CAN INITIATE INSOLVENCY PROCEEDINGS AGAINST BUILDERS UNDER THE CODE

In the matter of **Nikhil Mehta & Sons (HUF) & Ors. v. AMR Infrastructures Ltd.**, the NCLAT has ruled that a purchaser of real estate, under an 'assured-return' plan, would be considered as a 'Financial Creditor' for the purposes of Code and is, therefore, entitled to initiate corporate insolvency process against the builder, in case of non-payment of such 'assured/Committed return' and non-delivery of unit. NCLAT further went on to rule that the 'debt' in this case was disbursed against the consideration for the 'time value of money' which is the primary ingredient that is required to be satisfied in order for an arrangement to qualify as 'Financial Debt' and for the lender to qualify as a 'Financial Creditor', under the scheme of Code.

The Insolvency and Bankruptcy Code (Second Amendment) Act of 2018 has however, added an explanation to sub-clause (f) of Section 5(8) of IBC clarifying that for the purposes of sub-clause (f), any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. In the matter of **Pioneer Urban Land and Infrastructure Ltd. & Ors. v. UOI**, Hon'ble Supreme Court has held that amounts raised from allottees under a real estate project would be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the amendment act. As such, all the allottees under real estate projects, whether under assured return plan or not, shall fall under the definition of "Financial Creditor".

TIME-LIMIT FOR ACCEPTING OR REJECTING A PETITION UNDER THE CODE IS DIRECTORY OR MANDATORY

The Supreme Court in the matter of **Surendra Trading Company v. Juggilal Kamlatpat Jute Mills Company Limited and Others** held that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.

It was further held that provision of removing the defects in an application within seven days is directory and not mandatory in nature. The court clarified that while interpreting the provisions to be directory in nature, if the objections are not removed within seven days, the applicant while re-filing the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days.

Time-limit for completion of insolvency resolution process

The Supreme Court, in the matter of **Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors.** while interpreting Section 29a(c) of the Insolvency and Bankruptcy Code, 2016, has observed the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant and not at any anterior stage. The bench further held that the time limit for completion of the insolvency resolution process as laid down under Section 12 of the Code is mandatory and it cannot be extended beyond 270 days.

ROLE OF COMMITTEE OF CREDITORS IN CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

The Hon'ble Supreme Court of India in the matter of Committee of Creditors of **Essar Steel India Limited v. Satish Kumar Gupta & ors.**, while upholding the constitutional validity of the Code made, inter alia, important ruling with regard to the role of the Committee of Creditor in the CIR process. It had emphasized the primacy of the commercial wisdom of the CoC in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility and viability" of the resolution plan, which takes into account "all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case to case basis.

WITHDRAWAL OF APPLICATION ADMITTED UNDER SECTION 7, 9 OR 10

In the matter of **Ms. Ashish Ispat Private Limited Vs. Primuss Pipes & Tubes Ltd.**, NCLAT held that when a withdrawal application u/s 12A of the Code is filed prior to constitution of CoC, the requirement of 90% vote of CoC is not applicable, and the Adjudicating Authority has to consider the application without requiring any approval from CoC. Approval of 90% shall be applicable only when Committee of Creditors is constituted and withdrawal application u/s 12A of IBC has been filed post that.

MORATORIUM

NCLAT in the matter of **Nimitaya Infotech Pvt. Ltd. And Ors. Vs. Cox & Kings Ltd.** (Through its Resolution Professional, Mr. Ashutosh Agarwala) ruled that any action taken by landowner to enforce their security interest over their security deposits or maintenance advance by making any deduction from the same post initiation of CIRP would be in violation of Section 14 of the Code on the account of moratorium in place.

Supreme Court in the matter of **P. Mohanraj & Ors. v. M/s Shah Brothers Ispat Pvt. Ltd** held that Section 141 of the Negotiable Instruments Act, 1881 relates to persons in charge of and responsible to the company for the conduct of the business of the company, "as well as the company". For the period of CIRP, since no Section 138/141 proceeding can continue or be initiated against the CD because of a moratorium, such proceedings can be initiated or continued against the persons in charge of, and responsible to the company during the pre-CIRP period.

In the case of **Gujarat Urja Vikas Nigam Ltd. vs. Yes Bank Limited**, a Power Purchase Agreement (PPA) was signed between Gujarat Urja and Lanco Infratech Limited, a company that generates and supplies solar energy wherein the Lanco Infratech Limited agreed to produce and supply 15 MW of solar power to the Gujarat Urja. The AA approved liquidation order after the CIRP against Lanco Infratech Limited failed to result in an effective resolution. Gujarat Urja subsequently sent Lanco Infratech Limited a notice of termination for the Power Purchase Agreement (PPA).

Gujarat Urja made no mention of a circumstance in which CD was not carrying out its duty to produce and provide solar power to Gujarat Urja in the default notice. Therefore, CD's supply of solar energy does not constitute a breach of the contract on CD's side. Since the PPA and the Solar Power Project must work together to maximise the worth of the assets, it does not seem justified to terminate the PPA.

In **Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited** [(2018) 16 SCC 94], the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the corporate debtor is non-est (does not exist) in law.

Powers of High Court under Article 226 and of Supreme Court under Article 32 of the Constitution are not affected by Moratorium: In **Canara Bank Vs. Deccan Chronicle Holdings Limited** [Company Appeal (AT) (Insolvency) No. 147 of 2017], the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.

Proceeding in moratorium do not include prosecution: In **Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other** [Criminal Original Petition No. 34996 of 2019], the corporate debtor underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the corporate debtor was approved with a change in management and control. The Managing Director (MD) of the erstwhile corporate debtor sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include prosecution.

Moratorium does not apply to criminal proceedings: In the matter of **Varrsanalspat Limited Vs. Deputy Director, Directorate of Enforcement** [Company Appeal (AT) (Insolvency) No. 493 of 2018], the Resolution Professional (RP) had sought de-attachment of properties attached with the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002, a considerable time prior to the initiation of corporate insolvency resolution process. The NCLAT had held that section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having the essence of crime or crime proceedings.

The Supreme Court also upheld the order passed by the NCLAT [**Varrsanalspat Limited Vs. Deputy Director, Directorate of Enforcement**, Civil Appeal No. 5546 of 2019]. While the bar under IBC is automatic, practically the IRPs/RPs may need to file an application before various forums where proceedings against the corporate debtor is continuing, bringing to their attention the commencement of CIRP and the moratorium declared by the AA under section 14 of the IBC, and requesting the relevant forums to pass an order staying proceedings.

Moratorium also applies on the Regulatory Authorities: In the matter of **Ms. Anju Agarwal Resolution Professional For Shree Bhawani Paper Mills Ltd. Vs Bombay Stock 19 Exchange & Ors.**, the NCLAT observed that Section 28A of the SEBI Act, 1992 being inconsistent with Section 14 of IBC, it held that Section 14 of IBC will prevail over Section 28A of the SEBI Act, 1992 and SEBI cannot recover any amount including the penalty from the CD. The 'Bombay Stock Exchange' cannot suspend trading of shares of CD for the same reason.

Penalty imposed by Regulator may be claimed as Operational Creditor but cannot be recovered during the Resolution Process: In the matter of **Maharashtra Seamless Ltd. Vs. Shri Padmanabhan Venkatesh & Ors.**, the NCLAT held that the statutory dues i.e. the dues to Central Government or the State Government arising under any law for the time being in force and payable come within the meaning of 'Operational Debt'. If penalty is imposed or amount is payable to the 'Securities Exchange Board of India' in such case, it may claim as an 'Operational Creditor' but cannot recover the same during the 'Resolution Process'.

In the matter of **Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority (MHADA)** and 17 Another, the Supreme Court held that Section 14(1)(d) of the IBC, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property:

In **M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Others** [2019 SCC Online SC 1542], one of the issues before the Supreme Court was whether the AA had the power under the IBC to review the order passed by the Government of Karnataka during the moratorium period, rejecting the auto extension of a mining lease granted by it to the Corporate Debtor. The Supreme Court observed, among other things, that the moratorium under section 14 did not impact the right of the government to refuse extension of the lease. It observed that the purpose of section 14 was to preserve the status quo and not to create a new right. Even section 14(1)(d), which prohibits, during the period of moratorium, the recovery of any property by the owner/ lessor will not go to the rescue of the corporate debtor since what is prohibited is only right not to be dispossessed, but not the right to have renewal of the lease of such property. It was further observed that this right not to be dispossessed will have nothing to do with the rights conferred by a mining lease especially on government land. It was noted that what was granted to the Corporate Debtor was not an exclusive possession of the land in question so as to enable the RP to invoke

section 14(1)(d) of the IBC.

In **Dakshin Gujarat VIJ Company Ltd. Vs. M/s. ABG Shipyard Ltd. and Another** [Company Appeal (AT) (Insolvency) No. 334 of 2017], The question that came before the NCLAT was whether the moratorium under section 14 of the IBC will cover the current charges payable by the corporate debtor for supply of such services as water and electricity. The NCLAT held that:

- There is no prohibition or bar imposed on the payment of current charges for essential services. Such payment is not covered by the order of the moratorium.
- The law does not stipulate that essential goods, including water and electricity, should be supplied free of charge until the moratorium is ended. The amount paid for these services by the RP shall be part of the CIRP cost. The RP was directed to pay current charges for the supply of electricity during the moratorium.

TIME-LIMIT FOR COMPLETION OF INSOLVENCY RESOLUTION PROCESS

In the matter of **Whispering Tower Flat Owner Welfare Association Vs. Abhay Narayan Manudhane, RP of Corporate Debtor and Ors.**, NCLAT held that:

- When expression of interest was invited in respect of Housing Development & Infrastructure Limited (a real estate company) it was observed that 25 prospective resolution applicants have shown interest in different projects of corporate debtor instead of entire real estate as a project.
- Accordingly, CoC approved the division of the assets of the corporate debtor into eight Project for the purpose of exploring possibility of partial/piecemeal resolution and authorised RP to explore the possibility of re-run the process by inviting Expression of Interest with an option to submit Resolution Plan for one or more Project individually or jointly with other Projects. Accordingly, RP filed an application in the said context before NCLT further requesting extension of timeline in order to re-invite Expression of Interest. The said application was rejected by NCLT on the ground that period of 730 days has already been elapsed in CIRP and there appears no sign of resolution of the corporate debtor.
- On preferring appeal before NCLAT, it was held that object of the Code is the resolution of the corporate debtor and efforts of all stakeholders has to be towards resolution of insolvency. Accordingly, NCLAT allowed extension of 90 days period during which RP and CoC may complete the project wise resolution.

COMMITTEE OF CREDITORS

Supreme Court in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors.** Held that:

- The AA has limited jurisdiction in the matter of approval of a resolution plan. In the adjudicatory process concerning a resolution plan under IBC, NCLT does not have scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC.
- There is no scope for the NCLT or the NCLAT to proceed on basis of perceptions or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.
- There is no prohibition in the scheme of IBC and CIRP Regulations, that CoC cannot simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available plans. i.e. CoC can vote upon multiple resolution plans at the same time.

In **Mr. Manoharlal Mehta & Ors. v. Anil Vrijdas Rajkotia, RP of KK Welding Ltd**, NCLAT held that the CoC is in a superior position to make such business decisions in the exercise of their commercial wisdom even when a Resolution Plan duly approved by it with the necessary vote share is pending before the AA for approval. The CoC is empowered to decide to liquidate the CD at any time following its constitution and prior to the confirmation of Resolution Plan.

APPROVAL OF RESOLUTION PLAN BY THE COMMITTEE

The Supreme Court in the matter of **Lalit Kumar Jain Vs. Union of India & Ors.** upheld the validity of notification dated November 15, 2019 enforcing the provisions related to personal guarantor to corporate debtor under the Code. Approval of resolution plan of a corporate debtor undergoing CIRP does not per se operate as a discharge to its surety/guarantor of their liabilities under the contract of guarantee. The nature and extent of liability would depend upon the terms of guarantee.

In the matter of **Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Others**, Supreme Court held that:

- Any debt due to government (Central/State/Local Authority) including statutory dues is covered under the term “Creditor” and in any other case by the term “Other Stakeholders” as provided u/s 31(1) of IBC, 2016 and hence an approved resolution plan is also binding on government.
- After the approval of Resolution Plan no surprise claim should be flung upon the successful resolution applicant. Once a resolution plan is approved by an Adjudicating Authority, the claim forming part of Resolution Plan stands frozen and claims not forming part of Resolution Plan stand extinguished and no one would be entitled to initiate or continue any proceeding in respect of the claim which is not part of the approved Resolution Plan.
- An approved Resolution Plan is binding upon the Corporate Debtor, its employees, members, creditors, government (Central/State/Local Authority) and any other stakeholder.

In the matter of **Next Orbit Ventures Fund Vs. Print House (India) Pvt. Ltd. & Ors.**, NCLAT held that if resolution plan requires a change in the nature of business of the corporate debtor undergoing insolvency proceeding when existing business has become non-viable then addition of new business line will not make the resolution plan unfeasible or unviable.

MISCELLANEOUS

1. In **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Limited** [(2018) 1 SCC 353], the Supreme Court undertook a detailed analysis of the provisions relating to applications by an operational creditor (OC) under section 9 of the IBC and laid down the following principles:

When examining an application under section 9 of the IBC, the NCLT will have to determine:

- i. whether there is an operational debt exceeding Rs 100,000;
- ii. whether the documentary evidence furnished with the application demonstrates that the debt is due and has not yet been paid;
- iii. whether there are any disputes between the parties over the debt, or a record of pendency of any suit or arbitration proceeding filed before the receipt of the demand notice in relation to the dispute.

If any of the above conditions are not satisfied, the operational creditor's application will be rejected by the Adjudicating Authority. Any “notice of dispute” issued by the corporate debtor under section 8(2) of the IBC must bring to the notice of the operational creditor the “existence of a dispute,” or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. What is important is that the dispute must predate the receipt of the demand notice. The definition of “dispute” in section 5(6) is inclusive. It must relate to one of the three sub-clauses of section 5(6)—(a) the existence of the amount of debt, (b) the quality of goods or service, or (c) the breach of a representation or warranty, either directly or indirectly.

2. The difference between initiating CIRP by financial creditor and operational Creditor was laid down by Apex Court in **Innoventive Industries Ltd. Vs. ICICI Bank & Another** [(2018) 1 SCC 407]

The first application to be filed under section 7 of the IBC was by ICICI Bank, financial creditor (the FC) against Innoventive Industries Limited, corporate debtor (the CD). The application was admitted by the Mumbai bench of the Adjudicating Authority (AA). The directors of the CD appealed against the admission order. The NCLAT upheld the order passed by the AA. The directors then appealed to the Supreme Court. The Supreme Court observed that since the application filed by the financial creditor was the very first application that had been moved under the IBC, it was necessary to deliver a detailed judgment so that all courts and tribunals would take notice of a paradigm shift in the law. The Supreme Court noted that entrenched managements are no longer

allowed to continue in management if they cannot pay their debts and went on to examine various aspects of the IBC, especially section 7.

The Supreme Court held that:

- A financial creditor can trigger section 7(1) of the IBC for default of a financial debt owed by the corporate debtor to any financial creditor. It need not be a debt owed to the financial creditor who is the applicant.
- Under section 8 of the IBC, a dispute that existed before the receipt of a demand notice/invoice by the corporate debtor will make the application of an operational creditor inadmissible. On the other hand, under section 7, the moment the AA is satisfied that a default has occurred, the application of the financial creditor must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the errors within seven days of receiving a notice from the Adjudicating Authority.
- The concept of “default” under the IBC is very wide. It is simply a non-payment of debt that has become due and includes non-payment of even a part of it. Even non-payment of a disputed financial debt when due would constitute a default under the IBC. In other words, so long as the debt is due it does not matter if it is disputed.

3. In **Swiss Ribbons Private Limited and Another Vs. Union of India and Others** [(2019) 4 SCC 17], the Supreme Court held that a review of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with any interest that is disbursed against the consideration for the time value of money.

It may further be money that is borrowed or raised in any of the manners prescribed in section 5(8) or otherwise, as section 5(8) provides an inclusive definition. On the other hand, an “operational debt” would include a claim for the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law, and payable to the government or any local authority.

The court further observed that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured—payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors has been made since the earliest of the Companies Acts was passed both in the United Kingdom and in this country. Moreover, the nature of the loan agreements with financial creditors differs from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to set up or operate its business. On the other hand, contracts with operational creditors relate to the supply of goods and services in the operation of the business. Financial contracts generally involve large sums of money. In contrast, the dues of operational contracts are generally lower. In the running of a business, operational creditors can be many as opposed to financial creditors. In addition, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. The court observed that operational debts also tend to be recurring in nature and the possibility of genuine disputes in the case of operational debts is much higher compared to financial debts.

The court held that, most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can and do engage in restructuring the loan as well as reorganizing the corporate debtor’s business when there is financial stress. These are steps that operational creditor do not and cannot take. Thus, to preserve the corporate debtor as a going concern, while ensuring maximum recovery for all creditors, the IBC needs to distinguish between financial creditors and operational creditors. The difference directly relates to the IBC’s objectives.

4. In **B.K. Educational Services Private Limited Vs. Parag Gupta and Associates** [(2019) 11 SCC 633], the Supreme Court observed that the intention of lawmakers, from the very beginning, was to apply the Limitation Act, 1963, to the NCLT and the NCLAT while deciding applications filed under section 7 and section 9 of the IBC and appeals. The relevant section of the Limitation Act is section 137. No doubt, the right to sue accrues when a default occurs. But if the default has occurred more than three years before the date of filing the application, it would be barred by section 137, except in cases where the delay can be condoned under section 5 of the Limitation Act. It also held that section 238A of the Code should apply the provisions of the Limitation Act, “as far

as may be.” Therefore, where periods of limitation have been laid down in the IBC, they will apply notwithstanding anything to the contrary contained in the Limitation Act.

5. In **Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr.** 2021 SCC Online SC 543, Supreme Court held that entries in books of accounts and/or Balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. Placing reliance upon same, the NCLT, New Delhi Bench, while adjudicating an application filed under section 9 of Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) in *M/s SKC Infratech Pvt. Ltd vs M/s EOS Hospitality Pvt. Ltd.* has reiterated that entries made in the Balance Sheet amounts to acknowledgement of debt as per section 18 of Limitation Act, 1963.
6. In **Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited** & Another [Civil Appeal No. 6347 of 2019], the Supreme Court examined the limitation period for filing section 7 applications and observed:
7. The period of limitation for an application to initiate a corporate insolvency resolution process under section 7 of the IBC is governed by article 137 of the Limitation Act and is, therefore, three years from the date when the right to apply accrues.
8. The right to apply under the IBC accrues on the date when the default occurs. If the default had occurred over three years prior to the date of filing the application, the application would be time-barred, save and except in those cases where, on facts, the delay in filing may be condoned.
9. An application under section 7 of the IBC is not for enforcing mortgage liability and article 62 of the Limitation Act does not apply to this application.
10. The date of the IBC’s coming into force on 01.12.2016 is irrelevant to the triggering of any limitation period for the purposes of the IBC.
11. In this case, the court observed that the Financial Creditor never made any arguments other than stating the date of default as “08.07.2011” in the application. Therefore, no case for extending the period of limitation is available to be examined. In other words, even if section 18 of the Limitation Act – (which allows the period of limitation to be extended if the defaulter had acknowledged the debt) – and the principles thereof were applicable, they would not apply to the application under consideration, looking at the averment made in the application regarding default and for want of any other averment in regard to acknowledgement. The court annulled the insolvency proceedings, holding that because the application of the financial creditor is barred by limitation, no proceedings undertaken after the order of admission could be of any effect.
12. Dewan Housing Financial Corporation is the first financial service provider to come under the ambit of the IBC in the matter of **RBI Vs. Dewan Housing Financial Corporation** in C.P. (IB)-4258/MB/2019. The RBI, in its capacity as appropriate regulator, in terms of rule 5 of the Financial Service Provider Rules, initiated the CIRP against Dewan Housing Financial Corporation. It was admitted by the NCLT, Mumbai bench, on December 3, 2019.
13. In **Hindustan Construction Company Limited & Another Vs. Union of India & Others** [WP (Civil) No. 1074/2019 with other Civil Appeals], a CIRP was sought to be initiated against the National Highway Authority of India. The Supreme Court held that the National Highway Authority of India is a statutory body that functions as an extended limb of the Central Government and performs governmental functions that cannot be taken over by an RP under the IBC or by any other corporate body. Nor can such authority ultimately be wound up under the IBC. For all these reasons, it is not possible to either read in or read down the definition of “corporate person” in section 3(7) of the IBC.
14. The National Company Law Appellate Tribunal (Chennai Bench) in a significant ruling in the matter of **Nirej Vadakkedathu Paul & Ors Vs Sunstar Hotels & Estate Private Limited and Mcdowell Holdings Ltd** (Company Appeal (AT) (CH) (Ins) No. 142/2022) dealt with the issue of objection by group of shareholders (which included some Foreign Portfolio Investors) of corporate debtor against which corporate insolvency resolution process (CIRP) has been initiated by the NCLT (Adjudicating Authority/AA) under section 7 of the I&B Code, 2016.

NCLAT Findings:

The NCLAT after going through the factual matrix of the case primarily decided the following two issues: -

- (a) Whether the shareholder of the 'Corporate Debtor' has any locus in Section 7 application filed by the 'Financial Creditor'?
- (b) Whether the shareholders can make payment to satisfy financial debt of financial creditor in order to take away the 'Corporate Debtor' from the clutches of the 'Corporate Insolvency Resolution Process'?

The NCLAT having regard to the provision under I&B Code, 2016 held that

- The shareholders have no 'locus' once an application under Section 7 of the I & B Code, 2016 filed by a Financial Creditor is accepted and CIRP is initiated by the Adjudicating Authority.
- Once debt and default is established before the Adjudicating Authority, there is no law which allows a shareholder of a corporate debtor to challenge the initiation of corporate insolvency resolution process of the corporate debtor.
- The NCLAT further held that shareholders cannot be aggrieved merely by the admission of the corporate debtor into the corporate insolvency resolution process since such objection may render the object of I & B Code, 2016 redundant since any shareholder of a corporate debtor against which insolvency proceedings have been initiated can seek to maintain a derivative action and question and sabotage a valid CIRP initiated by the Adjudicating Authority. A shareholder is technically an investor who owns limited investment in the company to the extent of share capital subscribed by him.
- The NCLAT relied on its judgment in the case of *Anant Kajare Vs Eknath Aher & Anr CA (AT) (Insolvency) No.296 of 2017* wherein it has been held that since appellant is an investor therefore it cannot claim to be an aggrieved person for preferring an appeal against the order passed by the Adjudicating Authority. However, the NCLAT held that an investor is entitled to file its claim before the Insolvency Resolution Professional. The NCLAT further held that in an appeal filed under section 61 of the I & B Code, no direction can be given to any party to the settlement (particularly to a third party) to perform certain duties to ensure settlement between other parties.
- Similarly, on the issue of settling of claims of the Financial Creditor by a third party, the NCLAT held that there is no law which allows a third party to settle claims of the Financial Creditor on behalf of the corporate debtor more so without the consent of the corporate debtor and in the teeth of opposition by the Financial Creditor.

15. Supreme Court of India: Case title: **Sabarmati Gas Limited vs. Shah Alloys Limited** Case no.: Civil Appeal No. 1669 of 2020 Decision Date: 4th January, 2023

Facts:

- The respondent, for its manufacturing needs, required commercial supply of natural gas. To facilitate the same the appellant and the respondent entered into a Gas Sales Agreement (GSA) whereby and where under the appellant was obligated to supply natural gas.
- On later stage the Respondent defaulted in the payment and made only partial irregular payments.
- Meanwhile, the respondent approached BIFR to get it declared as a 'sick unit' and for recommendation of a plan for its rehabilitation, in terms of the provisions under SICA.
- After the enactment of IBC, the Appellant issued a demand notice, under Section 8 of the IBC, 2016 demanding payment of operational debt. Respondent gave a reply to the aforesaid demand notice stating that there was shortfall in supply of natural gas and it caused huge loss due to the disconnection of gas supply. Therefore, Respondent declined the liability to pay the amount demanded.
- Thereafter, an application was filed by under section 9 of Insolvency and Bankruptcy Code, 2016 (IBC) by Operational Creditor (Sabarmati Gas Limited) seeking initiation of Corporate Insolvency Resolution Process (CIRP) of Shah Alloys Limited.

16. The significance of “Commercial wisdom of Committee of Creditors” was discussed in details by Supreme Court in the case of **Committee of Creditors of Essar Steel India Ltd. V. Satish Kumar Gupta & Ors** (2019) where the Apex Court held that-
- At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors.
 - In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision making process to the Committee Of Creditors without the interference of the legislature as well as judiciary. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors.
 - The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.
 - It is always open to the Committee of Creditors to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in *K. Sashidhar vs Indian Overseas Bank & Ors.* (Civil Appeal No. 10673 of 2018), such commercial decision of the Committee of Creditors is not subject to appeal under the Code.
 - The Hon’ble Apex Court specifically ruled that the NCLT must limit its judicial review to the parameters outlined in Section 30 (2) of IBC, while the NCLAT must adhere to the guidelines set forth in Section 32 in conjunction with Section 61(3) of the IBC.
 - The NCLT and NCLAT must never interfere with a commercial decision made by the majority of the Committee of Creditors.
17. The Supreme Court passed its order in the case of **K. Sashidhar v. Indian Overseas Bank & Ors.** (Civil Appeal No. 10673 of 2018) wherein the SC, inter alia, has held that
- the National Company Law Tribunal (“NCLT”) and the National Company Law Appellate Tribunal (“NCLAT”) have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the committee of creditors (“Committee of Creditors”).
 - Non recording of reasons for approving or rejecting the resolution plan by the concerned financial creditors during the voting in the meeting of Committee of Creditors, would not render the final collective decision of Committee of Creditors nullity per se.
 - Concededly, if the objection to the resolution plan is on account of infraction of ground(s) specified in section 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For the approval of resolution plan by the Committee of Creditors can be challenged on those grounds.
 - However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, non-recording of any reason for taking such commercial decision will be of no avail.
 - The Hon’ble National Company Law Appellate Tribunal has held that the Committee of Creditors has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. (Ref: *Kannan Tiruvengandram Vs. M.K. Shah Exports Ltd. & Ors.* in and *Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors. E.*)

18. In *Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another*, 2021 SC, the Hon'ble Supreme Court, has reiterated that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous and the commercial wisdom of Committee of Creditors is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.
19. In **Vallal Rck vs M/S Siva Industries And Holdings ...** on 3 June, 2022, Supreme Court held that this Court has consistently held that the commercial wisdom of the Committee of Creditors has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. Neither the learned NCLT nor the learned NCLAT were justified in not giving due weightage to the commercial wisdom of Committee of Creditors. Therefore, supremacy of commercial wisdom of Committee of Creditors has been held persistently by the Apex Court since the inception of the Code.
20. **Jindal Stainless Ltd. v. Mr. Shailendra Ajmera, Resolution Professional of Mittal Corp Ltd. &Ors.** Case no.: Comp. App. (AT) (Ins.) No. 1058 of 2022 Decision Date: January 18, 2023, National Company Law Appellate Tribunal, Delhi:

Facts:

1. Mittal Corp Limited (Corporate Debtor) was admitted into Corporate Insolvency Resolution Process on 10.11.2021 by the Adjudicating Authority.
2. The Resolution Applicants were communicated the rules of Challenge Process and gave their unconditional acceptance to the same.
3. All the Resolution Applicants were notified that the signed and compliance Resolution Plan must be submitted by 18.07.2022. Jindal Stainless Ltd., Shyam Sel and Power Ltd. along with two other resolution applicants submitted their amended Resolution Plans by 18.07.2022.
4. An application for consideration of amended resolution plans was also filed with the Adjudicating Authority.

Issue:

Can decision of CoC to vote on a resolution modified in given timeline and refuse to consider other modified after time stipulated for same be questioned?

Held:

1. Taking note of Regulation 39 (1A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the regulation has been brought in place to enable the Committee of Creditors to negotiate with all the Resolution Applicants by one alternative mechanism to find out the best resolution plan.
2. Clause 7 of the Challenge Process clearly contemplates that after conclusion of the Challenge Process, the eligible Resolution Applicants shall not revise their bid/commercial offer. It is relevant to note that Challenge Process also reserves the unconditional right of the Committee of Creditors to cancel/ modify/ withdraw/ abandon/ amend the process of the Challenge Process at any stage. The approval of the plan submitted in Corporate Insolvency Resolution Process is in the domain of the Committee of Creditors. Under Regulation 39 of the Corporate Insolvency Resolution Process Regulations, the committee is entitled to record its deliberation and vote on such resolution plan simultaneously.
3. There can be no fetter on the power of the Committee of Creditors to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the Committee of Creditors to take a decision in that regard. Committee of Creditors, in the facts of the present case, did not take any decision to disregard the Challenge Process, rather it decided to vote on the plan.
4. It is well settled that the timeline in the IBC has its salutary value, and it was the wisdom of the Committee of Creditors which decided to vote on the Resolution Plan after completion of Challenge Process and not to

proceed to take any further negotiation or further modification of the plan, that decision ought not to have been interfered with.

5. The decision of Committee of Creditors to vote on the Resolution Plan after completion of Challenge Process and not to further accept any modification of the plan, should not be interfered with. The Application was filed by Shyam Sel and Power Ltd. on 07.08.2022, when Committee of Creditors had already resolved the vote on all the plans and voting had also commenced w.e.f. 07.08.2022.
21. In **Binani Industries Limited Vs. Bank of Baroda**, Company Appeal (AT) (Insolvency) No. 82 of 2018, the NCLAT observed that the objective of the IBC is Resolution. The Purpose of Resolution is for maximization of value of assets of the Corporate Debtor (CD) and thereby for all creditors. It is not maximization of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is "resolution". The second order objective is "maximization of value of assets" of the CD and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objectives is sacrosanct.
22. Significance of resolution is highlighted by Supreme Court in **Swiss Ribbons Pvt. Ltd. & Another Vs. UOI & Others** [WP (Civil) No. 99/2018 with connected matters where the preamble does not refer to liquidation, which is only pursued as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark
23. Principles for a Resolution Plan The National Company Law Appellate Tribunal (NCLAT), in the matter of **Binani Industries Limited v. Bank of Baroda & Anr.**, while approving the revised resolution plan submitted by Ultratech Cement Limited in the insolvency resolution process initiated against the corporate debtor-Binani Cement Limited, laid down certain principles that a resolution plan should comply with. These include, inter alia that:
 - (a) Functionally, the resolution plan shall resolve insolvency, maximise the value of assets of the corporate debtor, and promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders. The resolution plan is not a sale, or auction, or recovery or liquidation but a resolution of the Corporate Debtor as a going concern.
 - (b) A resolution process under IBC is not an auction. Feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.
 - (c) A resolution process under IBC is not recovery. Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. The 'I&B Code' prohibits and discourages recovery. A resolution process is not a liquidation. The IBC does not allow liquidation of a Corporate Debtor directly and permits liquidation only on failure of the resolution process.
 - (d) The IBC aims to balance the interests of all stakeholders and does not maximise value for financial creditors. Therefore, the dues of operational creditors must get at least similar treatment as compared to the due of financial creditors.
 - (e) Any resolution plan if shown to be discriminatory against one or other financial creditor or the operational creditor, can be held to be against the provisions of IBC. The Supreme Court, dismissed an appeal against the NCLAT order. The NCLAT order is significant since it clarifies the underlying principles that a resolution plan should comply with.
24. Former directors of Corporate Debtor are entitled to receive Resolution Plan In the matter of **Vijay Kumar Jain v. Standard Chartered Bank** and others, an appeal was filed with Supreme Court against orders rejecting the prayer of an erstwhile director for getting copy of the resolution plans from the RP. Both the NCLT and NCLAT ruled that appellant had no right to receive the resolution plans. The Resolution Professional (RP) has contended that only the members of CoC are entitled to have resolution plans, as per Section 30(3) IBC read with Regulation 39(2) CIRP Regulations. Relying on the Notes on Clauses to Section 24 of the Code, they argued that the members of suspended Board of Directors are permitted to participate in CoC meetings only for the purpose of giving information regarding the financial status of the debtor. The Supreme Court expressly rejected the argument based on Notes on Clauses to Section 24 of the Code and noted that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the

meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide Regulation 21(3)(iii). Court said the expression “documents” is a wide expression which would certainly include resolution plans. The judgment also clarified that the RP can take an undertaking from the erstwhile director to maintain confidentiality of the information.

25. Whether NCLAT can direct successful resolution applicant to modify its resolution plan?

In **Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others** [Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67], an appeal was preferred against an order passed by the NCLAT wherein it had directed the successful resolution applicant to modify its resolution plan because the value of the resolution plan was lower than the liquidation value of the CD. The Supreme Court observed that the IBC and its underlying provisions do not provide that the resolution applicant has to match the liquidation value and that the object behind the valuation process is to assist the CoC to take a decision on the resolution plan. Relying on the Essar judgment, the Supreme Court held that the court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis.

26. In **Committee of Creditors of Essar Steel India Limited Through Authorised Signatory Vs. Satish Kumar Gupta & Others** [Civil Appeal No. 8766-67/2019 Diary No. 24417/2019 with other Civil Appeals and WP(C)s], the Supreme Court provided clarity on the roles of various stakeholders, namely the RP, the resolution applicant, the CoC, and the AA and the NCLAT, regarding the resolution plan in a CIRP and settled the following among other issues:

Subrogation: Section 31(1) makes it clear that once a resolution plan is approved by the CoC, it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts running the business of the CD on a fresh slate as it were. It is difficult to accept the argument that, the part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the CD.

Claims: All claims must be submitted to and decided by the RP so that a prospective resolution applicant knows exactly what must be paid in order that it may then take over and run the business of the CD. A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by it

27. In **Hem Singh Bharana Vs. Pawan Doot Estate Pvt. Ltd. & Ors.** [CA (AT) (Ins.) No. 1481 of 2022], During pendency of approval of the resolution plan before the AA, ex-promoter submitted revised settlement proposal under section 12A of the Code and filed an application seeking to keep the resolution in abeyance. As the AA rejected the said application, an appeal was filed before the NCLAT on the ground that there is no bar on CoC in accepting the settlement proposal under section 12A even if they have already approved a resolution plan. The NCLAT dismissed the appeal while relying on the judgment of SC in *Ebix Singapore Pvt. Ltd. V. Committee of Creditors of Eudcomp Solutions Limited and Anr.*, wherein it was held that after approval of a resolution plan by the CoC, it itself is bound by its decision and cannot be allowed to go back from its decision

28. In **Hindalco Industries Ltd. Vs. Hiralak Industrial Works Ltd. & Ors.** [CA AT (Ins.) No. 42,43,52 and 53 of 2022] the resolution plan approved by the AA was challenged on the grounds of fraudulent initiation of CIRP and illegal constitution of CoC. The NCLAT quashed the resolution plan and observed that the CoC was formed without admission and verification of claims of the FCs; thereby, violating CIRP Regulations. It observed that collusion existed between FC and CD, as they belonged to the same group. The inter-connections existed between the CD, FC, members of CoC and the holding companies of the successful resolution applicant (SRA) through common directors sitting on the board of more than one company with common registered addresses and email ids. The NCLAT imposed penalty on FC and CD and ordered for a complete investigation by IBBI.

29. In **Jindal Stainless Ltd. Vs. Shailendra Ajmera** [CA (AT) (Ins.) No. 1058 of 2022], after closure of challenge process, ShyamSel and Power Ltd., one of the resolution applicants filed the revised plan after the last date of submission of amended resolution plan. The AA directed CoC to consider their revised resolution plan. Jindal Stainless Ltd., one of the resolution applicants preferred on appeal before the NCLAT against this order of the AA. The NCLAT while relying on SC judgment in *Ngaitlang Dhar v. Panna Pragati Infrastructure Private Limited & Ors.* set aside the order passed by AA and directed the RP to initiate fresh voting process on the resolution plans received in the due time. It further held that after adoption of Swiss challenge method to find out the best plan, one resolution applicant cannot be allowed to submit a revised plan.

30. **CoC of Essar Steel India Limited Vs. Satish Kumar Gupta** [(2019) SCC Online SC 1478]

In this case, the Supreme Court examined the constitutionality of the amendment made in section 12(3) of the IBC (which provided that the corporate insolvency resolution process must mandatorily be completed within 330 days). While leaving the provision otherwise intact, it struck down the word “mandatorily” as being manifestly arbitrary under Article 14, as well as placing an excessive and unreasonable restriction on the litigant’s right to carry on business under Article 19(1) (g) of the Constitution. The court held that the effect of this declaration is that ordinarily the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or the NCLAT that only a short period is needed beyond the 330 days to complete the corporate insolvency resolution process; that it would be in the interest of all stakeholders for the corporate debtor to be put back on its feet instead of being liquidated; and that the time taken in legal proceedings is largely due to factors that cannot be ascribed to the litigants before the Adjudicating Authority and/or the NCLAT, the delay or a large part thereof being attributable to the tardy process of the AA and/or the NCLAT itself, the Adjudicating Authority and/or the NCLAT may extend the time beyond 330 days. The general rule is that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place. Beyond this period, the corporate debtor is to be liquidated.

31. **In State Bank of India Vs. Ramkrishnan**

the Supreme Court held that section 14 did not apply to the personal guarantor of the corporate debtor but only to the corporate debtor. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order.

32. **In the case of Vishal Chelani & Ors. vs. Debashis Nanda (Civil Appeal No. 3806 of 2023)**

The issue before Hon’ble Supreme Court was whether there could be different treatment of allottees in the resolution plan for the one who had invoked RERA and of others who did not approach RERA? Hon’ble Apex Court while setting aside the order of NCLAT held that allottees who approached RERA were FCs under explanation to section 5(8)(f) of the Code. It was observed that per se there can be no distinction between different classes of FC for the purposes of drawing a resolution plan. Such a distinction is artificial and amounts to hyper classification, is thus contradictory to Article 14 of the Indian Constitution. It further observed that ‘to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable’.

33. **In the case of Pooja Menghani vs. Insolvency and Bankruptcy Board of India & Anr, judgement dated November 20, 2023,**

Hon’ble High Court of Delhi inter alia observed that Section 17 of the IBC which deals with management of affairs of corporate debtor by interim resolution professional stipulates that from the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the board of directors or the partners of the corporate debtor shall stand suspended and will be exercised by the interim resolution professional. It also stipulates that the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

It also stipulates that the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

34. In Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others [(2019) SCC Online SC 1479],

the Supreme Court observed that The Interim Resolution Professional selected by the NCLT has to constitute a Committee of Creditors comprising all the financial creditors of the corporate debtor. This provision is aimed at creditors adopting a collective approach toward insolvency resolution instead of proceeding individually. Key decisions of the process and the resolution plan are approved by the Committee of Creditors if it is satisfied that the provisions of the most acceptable plan would ensure that their dues are cleared

35. Hon'ble Supreme Court has in the matter of Swiss Ribbon Pvt. Ltd. & Anr. Vs. Union of India & Ors. (date of judgment 25.01.2019)

held that the classification under IBC between financial creditors and operational creditors is based on an intelligible criteria and is neither discriminatory nor arbitrary nor violative of Article 14 of Constitution of India;

36. In the case of Vishal Chelani & Ors. vs. Debashis Nanda [Civil Appeal No. 3806 of 2023],

the issue before Supreme Court was whether there could be different treatment of allottees in the resolution plan for the one who had invoked RERA and of others who did not approach RERA? Hon'ble Supreme Court in its order dated October 06, 2023, inter alia observed that the Resolution Professional's view appears to be that once an allottee seeks remedies under RERA, and opts for return of money in terms of the order made in her favour, it is not open for her to be treated in the class of home buyer. This Court is unpersuaded by the submission. It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Mr. Natwar Agrawal (HUF) vs. Ms. Ssakash Developers & Builders Pvt. Ltd. by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to "hyper classification" and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced. The impugned order of NCLAT set aside by the Supreme Court and Hon'ble Apex Court ordered that the appellants are declared as financial creditors within the meaning of Section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for the purposes of the resolution plan which is awaiting final decision before the adjudicating authority.

37. In the case of Saravana Global Holdings Ltd. & Another Vs. Bafna Pharmaceuticals Ltd. & Others [Civil Appeal No(s). 5344/2019],

the Supreme Court upheld the order of the NCLAT, which had held that the CD is an MSME and the promoters are not ineligible in terms of section 29A of the IBC. Therefore, it is not necessary for the CoC to find out whether the resolution applicant is ineligible in terms of section 29A or not. (Source: IBBI Handbook 2019)

38. In Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others [(2019) 2 SCC 1],

the Supreme Court delved into the interpretation of section 29A of the IBC and held that the stage at which ineligibility in section 29A(c) attaches is when the resolution plan is submitted by a resolution applicant and not from the insolvency commencement date (or any other anterior point in time). The ineligibility under section 29A(c) can only be removed if the person submitting the plan pays all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submitting a resolution plan. On the other hand, the ineligibility under section 29A(g) cannot be cured by paying off the debts of the corporate debtor. Persons in erstwhile management or control of the corporate debtor can become eligible to submit a resolution

plan for the corporate debtor by paying off the debts of the company only if they are not disqualified under section 29A(g)

39. In the case of Ramkrishna Forgings Limited Vs. Ravindra Loonkar, Resolution Professional of ACIL Limited & Anr, Civil Appeal No.1527 of 2022, judgement dated November 21, 2023,

Hon'ble Supreme Court inter alia observed that having considered the matter in depth, the Court is unable to uphold the decisions rendered by the Adjudicating Authority-NCLT as also the NCLAT. The moot question involved is the extent of the jurisdiction and powers of the Adjudicating Authority to go on the issue of revaluation in the background of the admitted and undisputed factual position that no objection was raised by any quarter with regard to any deficiency/irregularity, either by the RP or the appellant or the CoC, in finally approving the Resolution Plan which was sent to the Adjudicating Authority-NCLT for approval. Further, the statutory requirement of the RP involving two approved valuers for giving reports apropos fair market value and liquidation value was duly complied with and the figures in both reports were not at great variance. Significantly, the same were then put up before the CoC, which is the decision-maker and in the driver's seat, so to say, of the Corporate Debtor. K Sashidhar (supra) and Committee of Creditors of Essar Steel India Ltd. (supra) are clear authorities that the CoC's decision is not to be subjected to unnecessary judicial scrutiny and intervention. This came to be reiterated in Maharashtra Seamless Limited (supra), which also emphasised that the CoC's commercial analysis ought not to be qualitatively examined and the direction therein of the NCLAT to direct the successful Resolution Applicant to enhance its fund flow was disapproved of by this Court. Thus, if the CoC, including the FC(s) to whom money is due from the Corporate Debtor, had undertaken repeated negotiations with the appellant with regard to the Resolution Plan and thereafter, with a majority of 88.56% votes, approved the final negotiated Resolution Plan of the appellant, which the RP, in turn, presented to the Adjudicating Authority-NCLT for approval, unless the same was failing the tests of the provisions of the Code, especially Sections 30 & 31, no interference was warranted. In Kalpraj Dharamshi v Kotak Investment Advisors Limited, (2021) 10 SCC 401, the Court concluded that '... in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of "commercial wisdom", NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.' (Para 27

LESSON 3 - PROFESSIONAL AND ETHICAL PRACTICES FOR INSOLVENCY PRACTITIONERS

REGULATORY FRAMEWORK

- The Insolvency and Bankruptcy Code 2016
- The IBBI (Insolvency Professionals) Regulations, 2016
- The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- The IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies)

INTRODUCTION

The Banking Law Reform Committee (BLRC) Report- Volume 1, Rationale for the Code elaborated the significance of role of Insolvency Professional as follows:

Insolvency professionals play a vital role in the insolvency and bankruptcy resolution process as envisaged by the Committee. As mentioned in the report -insolvency and bankruptcy resolution under the Code will proceed in two phases, for registered entities as well as for individuals.

The first phase of the insolvency and bankruptcy process is the period of insolvency resolution during which insolvency is assessed and a solution is reached within a stipulated time period.

In case a solution is not reached within the specified time limit, the second phase of the process begins wherein the entity is declared bankrupt. At this point a registered entity enters into Liquidation whereas an individual enters into bankruptcy resolution.

This entire insolvency and bankruptcy process is managed by a regulated and licensed professional namely the Insolvency Professional or an IP, appointed by the adjudicator. In an insolvency and bankruptcy resolution process driven by the law, there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.

An IP may hold any of the following roles under the Code:

1. Resolution professional (RP) to resolve insolvency for a firm or an individual;
2. Bankruptcy Trustee in an individual bankruptcy process;
3. Liquidator in a firm liquidation process.

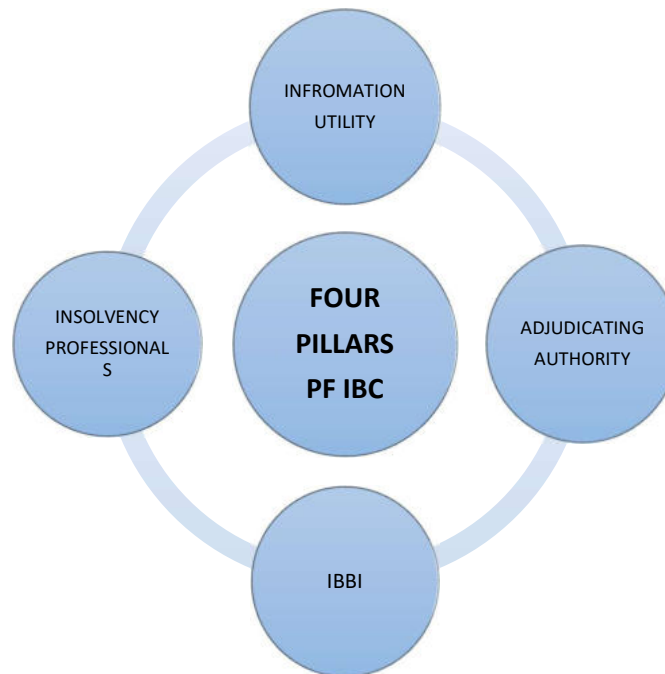
In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.

The REPORT also describes the mandates for the IPs and delineate a framework for regulating IPs as follows:

In the case of insolvency resolution, a failure of the process may result from two main sources: collusion between the parties involved and poor quality of execution of the process itself. Hence, it is important that the professionals responsible for implementing the insolvency resolution process adhere to certain minimum standards so as to prevent failures of the process and enhance credibility of the system as a whole.

In India today, there are professionals and intermediaries that offer services to resolve financial distress of both registered entities as well as individuals. These include lawyers, accountants and auditors, valuers and specialist resolution managers. However, given the critical role that the Code envisages for these entities in the resolution process, the Committee believes that the Board should set minimum standards for the selection of these professionals, along with their licensing, appointment, functioning and conduct under the Code.

To this end, the Code empowers the Board to lay down the minimum professional standards and the code of conduct to be followed to by IPs at each stage of the insolvency and bankruptcy resolution process.



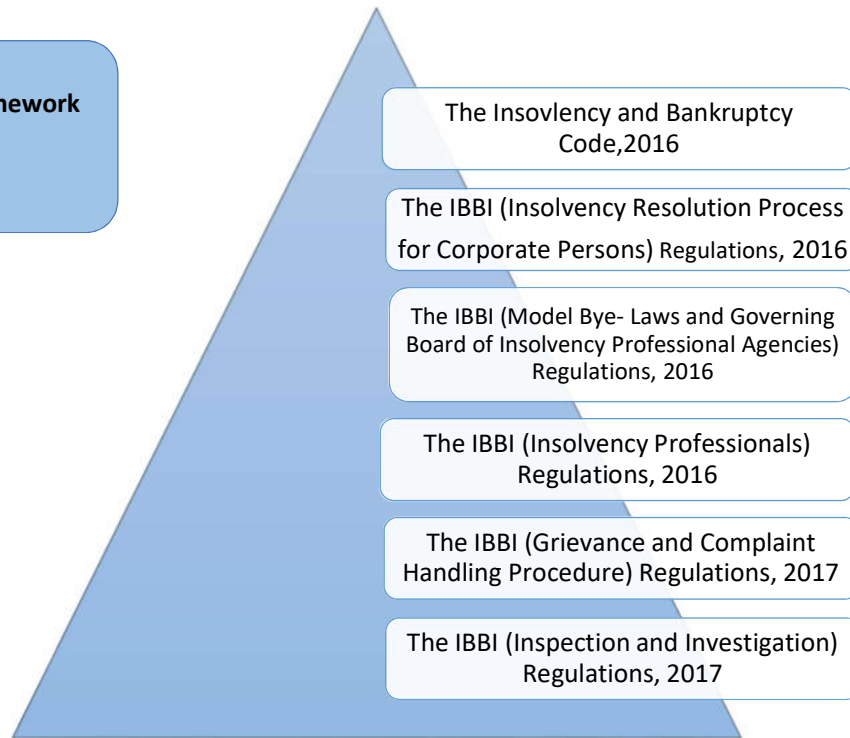
- Out of the four pillars of IBC, 2016, the first pillar of the IBC's institutional infrastructure is insolvency professionals (IPs).
- An IP is one of the most important components of the IBC ecosystem.
- An IP is a regulated and licensed professional, responsible for managing and overseeing the CIRP and/or the liquidation process of the CD, and the resolution and bankruptcy process for partnerships and individuals.
- IPs form a crucial pillar on which the entire edifice of the insolvency and bankruptcy process rests.
- The Disciplinary Committee set up by the IBBI and the Insolvency Professional Agencies also play a crucial role in ensuring that the IPs adhere to ethical standards and the Code of Conduct.

The IBC gives various powers to IPs, while subjecting them to regulatory and judicial oversight. The first level of regulatory oversight of an IP is provided by the insolvency professional agency (IPA) with which the IP is registered. To support IPs, the concept of an insolvency professional entity (IPE), a regulated service provider supporting IPs, is also recognized.

IPs are aided in the insolvency resolution, liquidation, and bankruptcy process by information utilities (IUs), which form the second pillar of the institutional infrastructure. The IUs are regulated and licensed repositories of information relating to the CD. IUs collect, collate, authenticate, and disseminate financial information to be used in insolvency resolution, liquidation, and bankruptcy proceedings.

The judicial oversight of IPs is provided by adjudicating authorities (AAs), the third pillar of the IBC's institutional infrastructure. The AAs are specialized tribunals tasked with ensuring that the insolvency resolution, liquidation, and bankruptcy process is being performed as per the IBC and its related rules and regulations.

Regulatory framework for Insolvency Professionals



An IP is defined in section 3(19) of the IBC as a person enrolled under section 206 with an IPA as a member and registered with the IBBI as an IP under section 207.

The AA appoints an IRP or an RP to run the CIRP of a CD, and a liquidator to run the liquidation process. A bankruptcy trustee runs the insolvency and bankruptcy process for partnerships and individuals. Hence, the IP—acting as an IRP, RP, liquidator, or bankruptcy trustee—is the foundation of the IBC.

Only an IP can be appointed under the IBC as

- an interim resolution professional (IRP),
- a resolution professional (RP),
- a liquidator, or
- a bankruptcy trustee.

ROLE OF INSOLVENCY PROFESSIONALS	
As an Interim Resolution Professional (IRP)	Chapter II (Part II of the Code)- Insolvency Resolution Process of Corporate Persons
	Chapter IV (Part II of the Code)- Fast track corporation insolvency resolution process
As a Resolution Professional	Chapter II (Part II of the Code)- Insolvency Resolution Process of Corporate Persons
	Chapter III-A (Part II of the Code) Pre-Packaged Insolvency Resolution Process
	Chapter IV (Part II of the Code)- Fast track corporation Insolvency resolution process
As a Liquidator	Chapter III (Part II of the Code)- Liquidation Process of corporate persons
	Chapter V (Part II of the Code)- Voluntary Liquidation Process of corporate
As a Bankruptcy Trustee	PART III of the Code-Insolvency Resolution And Bankruptcy For Individuals And Partnership Firms

In the corporate insolvency resolution process, the insolvency professional runs the debtor's business during the moratorium period, verifies the claims of the creditors and constitutes a creditor's committee and helps the committee of creditors in arriving at a consensus for the revival and rehabilitation of the corporate debtor's business. In liquidation, the insolvency professional acts as a liquidator and in case of individual and partnership insolvency resolution, he performs the role of bankruptcy trustee.

The Resolution Professional (RP) holds a central position in conducting the CIRP and his role is vital to the efficient operation of the resolution process. The RP acts as a bridge between the debtor and the creditor and plays a significant role in aligning the interests of the CD with those of the creditors. The RP is appointed as an officer of the AA to conduct the resolution process and is vested with various statutory duties and powers. It is the RP who communicates with AA on behalf of CoC.

Definitions in the Insolvency and Bankruptcy Code, 2016:

Section 3(19): **"Insolvency Professional"** means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

Section 5(18): **"Liquidator"** means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of Part II, as the case may be.

Section 5(27): **"Resolution Professional"**, for the purposes of Part II, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim-resolution professional.

Section 79(9): **"Bankruptcy Trustee"** means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125.

Section 79(21): **"Resolution Professional"** means an insolvency professional appointed under Part III as a resolution professional for conducting the fresh start process or insolvency resolution process.

An IP is a person who is enrolled with an IPA as a member and registered with the IBBI after qualifying Limited Insolvency Examination. Any eligible person having the required experience and qualifications including a chartered accountant, cost accountant, company secretary, advocate, managerial person can seek registration with an IPA and IBBI after meeting the requirements of the regime.

Thus, an IP is a crucial pillar responsible for the effective, timely and credible functioning of the entire edifice of the insolvency and bankruptcy resolution process. In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as general management and finance related functions.

The IP is required to adhere to a strict code of conduct while performing his obligations under the Code and also ensuring there are adequate procedures and policies laid down and implemented by his team deployed on any ongoing CIRP.

Part IV of the Code lays down Regulation of Insolvency Professionals, Agencies and Information Utilities. Chapter IV of Part IV deals with registration, functions and obligations of Insolvency Professionals.

The Code has provided for a two-tier regulation of IPs: -

- (i) The first-tier regulation of IPs is steered by the IPAs who administer the registration of IPs and promote and supervise their continuous development.
- (ii) The second-tier regulation is steered by the IBBI which maintains a panel of IPs who have no disciplinary proceedings pending or against them and who hold Authorisation for Assignment or consented for assignments.

This saves judicial time in appointments. Thus, an IP is a crucial pillar responsible for the effective, timely and credible functioning of the entire edifice of the insolvency and bankruptcy resolution process. In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as general management and finance related functions.

The IP is required to adhere to a strict code of conduct while performing his obligations under the Code and also ensuring there are adequate procedures and policies laid down and implemented by his team deployed on any ongoing CIRP.

ELIGIBILITY FOR RESOLUTION PROFESSIONAL UNDER THE IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016

Regulation 3(1) lays down the criterion for a person who can be appointed as an interim resolution professional or resolution professional as follows:

1. An insolvency professional shall be eligible to be appointed as an interim resolution professional or a resolution professional, as the case may be, for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation is provided to determine when a person shall be considered independent of the corporate debtor i.e. if he:

- (a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;
- (b) is not a related party of the corporate debtor; or
- (c) is not an employee or proprietor or a partner:
 - (i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or
 - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

(1A) Where the committee decides to appoint the interim resolution professional as resolution professional or replace the interim resolution professional under section 22 or replace the resolution professional under section 27, it shall obtain the written consent of the proposed resolution professional in Form AA of the Schedule-I.

2. An interim resolution professional or a resolution professional, as the case may be, shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.
3. An interim resolution professional or a resolution professional, who is a director or a partner of an insolvency professional entity, shall not continue as the interim resolution professional or resolution professional, as the case may be, in a corporate insolvency resolution process, if the insolvency professional entity or any other partner or director of such insolvency professional entity represents any other stakeholder in that corporate insolvency resolution process.

ELIGIBILITY FOR REGISTRATION OF INSOLVENCY PROFESSIONALS

Regulation 4(1) of the IBBI (Insolvency Professionals) Regulations, 2016 provides that no individual shall be eligible to be registered as an insolvency professional if he-

1. is a minor;
2. is not a person resident in India;
3. does not have the qualification and experience specified in Regulation 5 or Regulation 9, as the case may be;
4. has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

5. he is an undischarged insolvent, or has applied to be adjudicated as an insolvent;
6. he has been declared to be of unsound mind; or
7. he is not a fit and proper person; Explanation:
8. For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-
 - integrity, reputation and character,
 - absence of convictions and restraint orders, and

- competence, including financial solvency and net worth.

No insolvency professional entity, recognised by the Board under regulation 13, shall be eligible to be registered as an insolvency professional, if the entity and/or any of its partner or director, as the case may be, is not fit and proper person under clause (g)(i).

RELATED PROVISIONS UNDER IBC

APPOINTMENT AND TENURE OF INTERIM RESOLUTION PROFESSIONAL (IRP)

Section 16 of the Code provides for the Appointment and Tenure of Interim Resolution Professional (IRP) as follows

- (1) **Who appoints IRP:** The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement date.
- (2) **Appointment of IRP in case of application made by financial creditor or corporate applicant:** Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.
- (3) **Appointment of IRP in case of application made by operational creditor:** Where the application for corporate insolvency resolution process is made by an operational creditor and-
 - (a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
 - (b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.
- (4) **Recommendation by the Board:** The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.
- (5) **Term of IRP:** The term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22.

Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for submission of written consent of insolvency professional whose name is recommended for appointment as an Interim Resolution Professional (IRP) while filing application to initiate CIRP under section 7, 9 or 10 of the Code. It states that:

- (1) The applicant, wherever he is required to propose or proposes to appoint an insolvency resolution professional, shall obtain a written communication in Form 2 from the insolvency professional for appointment as an interim resolution professional and enclose it with the application made under rules 4, 6 or 7, as the case may be.
- (2) The application under sub-rule (1) shall be accompanied by a certificate confirming the eligibility of the proposed insolvency professional for appointment as a resolution professional in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

MANAGEMENT OF AFFAIRS OF CORPORATE DEBTOR BY INTERIM RESOLUTION PROFESSIONAL

Section 17 of the Code provides for the management of affairs of corporate debtor by interim resolution professional i.e., powers and duties of IRP after appointment, as follows:

- (1) From the date of appointment of the interim resolution professional, -
 - (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
 - (b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;

- (c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
 - (d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.
- (2) The interim resolution professional vested with the management of the corporate debtor, shall-
- (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
 - (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
 - (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
 - (d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
 - (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

In the case of Pooja Menghani vs. Insolvency and Bankruptcy Board of India & Anr,

Judgement dated November 20, 2023, Hon'ble High Court of Delhi inter alia observed that Section 17 of the IBC which deals with management of affairs of corporate debtor by interim resolution professional stipulates that from the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the board of directors or the partners of the corporate debtor shall stand suspended and will be exercised by the interim resolution professional. It also stipulates that the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional. It also stipulates that the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

Section 18 of the Code enumerates "Duties of interim resolution professional. According to it, the interim resolution professional shall perform the following duties, namely: -

- (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –
 - (i) business operations for the previous two years;
 - (ii) financial and operational payments for the previous two years;
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified.
- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
- (c) constitute a committee of creditors;
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
- (e) file information collected with the information utility, if necessary; and
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
- (ii) assets that may or may not be in possession of the corporate debtor;
- (iii) tangible assets, whether movable or immovable;
- (iv) intangible assets including intellectual property;
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
- (vi) assets subject to the determination of ownership by a court or authority;
- (g) to perform such other duties as may be specified by the Board

Explanation. – For the purposes of this section, the term “assets” shall not include the following, namely: -

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

PERSONNEL TO EXTEND CO-OPERATION TO INTERIM RESOLUTION PROFESSIONAL

Section 19 of the Code requires personnel to extend co-operation to interim resolution professional.

- (1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.
- (2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.
- (3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

MANAGEMENT OF OPERATIONS OF CORPORATE DEBTOR AS GOING CONCERN

Section 20 of the Code mandates IRP to run management of operations of corporate debtor as going concern.

- (1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
- (2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-
 - (a) to appoint accountants, legal or other professionals as may be necessary;
 - (b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;
 - (c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. It is provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt;
 - (d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and
 - (e) to take all such actions as are necessary to keep the corporate debtor as a going concern.

Section 5(15) of the Code defines “interim finance” which means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre- packaged insolvency resolution process period, as the case may be [and such other debt as may be notified.

Section 21 of the Code imposes duty on IRP to constitute “Committee of creditors – It states that the interim resolution professional (IRP) shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

If required by the committee of creditors at any time during the corporate insolvency resolution process, the resolution professional shall make available any financial information so required within a period of seven days of such requisition.

Appointment of resolution professional. – Section 22 of the Code provides for the appointment of resolution professional in the first meeting of the committee of creditors (CoC) in following ways:

- (i) When CoC resolves to appoint IRP as resolution professional or replace IRP by another resolution professional: The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.
- (ii) When CoC resolves to continue IRP as resolution professional: Subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority.
- (iii) When CoC resolves to replace the interim resolution professional: It shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.
- (iv) Forwarding name of new proposed RP to the AA: The Adjudicating Authority shall forward the name of the resolution professional proposed to replace IRP to the Board for its confirmation and shall make such appointment after confirmation by the Board.
- (v) IRP to continue as RP: Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional

RESOLUTION PROFESSIONAL TO CONDUCT CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 23 of the Code provides for that subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

It further provides that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.

The section also states that the resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

It also requires the interim resolution professional to provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional in case of any appointment of a resolution professional in lieu of interim resolution professional by committee of creditors under sub-sections (4) of section 22,

MEETING OF COMMITTEE OF CREDITORS

Section 24 of the Code provides that all meetings of the committee of creditors shall be conducted by the resolution professional. Sub-section (3) provides that the resolution professional shall give notice of each meeting of the committee of creditors to

- (a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);

- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

It also casts a duty on the resolution professional that he shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

DUTIES OF RESOLUTION PROFESSIONAL

Section 25 of the Code lists out the mandatory duties of resolution professional as follows:

- (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.
- (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -
 - (a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
 - (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
 - (c) raise interim finances subject to the approval of the committee of creditors under section 28;
 - (d) appoint accountants, legal or other professionals in the manner as specified by Board;
 - (e) maintain an updated list of claims;
 - (f) convene and attend all meetings of the committee of creditors;
 - (g) prepare the information memorandum in accordance with section 29;
 - (h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.
 - (i) present all resolution plans at the meetings of the committee of creditors;
 - (j) file application for avoidance of transactions in accordance with Chapter III, if any; and (k) such other actions as may be specified by the Board.

REGULATION 3A OF THE IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 PROVIDES FOR ASSISTANCE AND COOPERATION BY THE PERSONNEL OF THE CORPORATE DEBTOR AS FOLLOWS:

1. Duty to take custody and control:

The interim resolution professional or resolution professional, as the case may be, shall take custody and control as specified under this regulation from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case may be, of the following: -

- the records of information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such other information required under regulation 36;
- the assets recorded in the balance sheet of the corporate debtor or in any other records referred in clause (f) of section 18.

2. Obligation of personnel/promoter etc. to provide list of assets and records while handing over their custody and control:

The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide to the interim resolution professional or resolution professional, as the case may be, a list of assets and records while handing over their custody and control, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held.

3. Duty of IRP/RP to prepare list of assets and records:

Where any asset or record has not been handed over or the list has not been provided under sub-regulation (2), the interim resolution professional or resolution professional, as the case may be, shall himself prepare a list of assets and records while taking custody and control of assets and records, and the interim resolution professional or resolution professional may, after taking such custody and control, if deemed necessary, identify person(s) in whose possession these assets and records will be held

4. Signing of list of assets and records:

Each list of assets and records under sub-regulation (2) and (3) shall be signed by the parties present and by at least two individuals who have witnessed the act of taking control and custody of such assets and records.

5. Requisition by IRP/RP for information required under the Code but not handed over:

The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case maybe, the information relating to the assets, finances and operations of the corporate debtor referred in clause (a) of section 18 and such information required under regulation 36 which were required to be maintained by the corporate debtor but have not yet been handed over.

6. Requisition by IRP/RP for assets in records but not handed over:

The interim resolution professional or resolution professional, as the case may be, shall requisition from the personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor as the case maybe, the assets which are recorded in the balance sheet or in any other records referred in clause (f) of section 18 and whose custody has not been handed over.

An application made under sub-section (2) of section 19 in respect of failure to provide any asset or record as requisitioned under the Code and this regulation, shall show presence of such asset or record in the notice of requisition and absence of such asset or record in the list of assets and records taken in control and custody under sub-regulation (2) and (3)

REGULATION 4 OF THE IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 PROVIDES FOR RIGHT OF INTERIM RESOLUTION PROFESSIONAL (IRP)/RESOLUTION PROFESSIONAL AS FOLLOWS:

- (1) **Access to Books:** Without prejudice to section 17(2)(d), the interim resolution professional or the resolution professional, as the case may be, may access the books of account, records and other relevant documents and information, to the extent relevant for discharging his duties under the Code, of the corporate debtor held with- (a) depositories of securities; (b) professional advisors of the corporate debtor; (c) information utilities; (d) other registries that records the ownership of assets; (e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and (f) contractual counterparties of the corporate debtor.
- (2) **Duty of the personnel to provide information to IRP/RP:** The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall provide the information within such time and in such format as sought by the interim resolution professional or the resolution professional, as the case may be.

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for following duties of IRP/Resolution Professional:

4B. Disclosure of change in name and address of corporate debtor: Where a corporate debtor has changed its name or registered office address during the period of two years preceding the insolvency commencement date, the interim resolution professional or resolution professional, as the case may be, shall disclose all the former name(s) and registered office address(es) so changed along with the current name and registered office address in every communication, record, proceeding or any other document.

4C. Process e-mail: (1) The interim resolution professional shall open an email account and use it for all correspondences with stakeholders and in the event of his replacement by a resolution professional, shall handover the credentials of the email to him. (2) The resolution professional shall, in case of his replacement with another resolution professional or a liquidator, hand over the credentials of the email to the other resolution professional or the liquidator, as the case may be.

4D. Operating separate bank account for each real estate project: Where the corporate debtor has any real estate project, the interim resolution professional or the resolution professional, as the case may be, shall operate a separate bank account for each real estate project.

REPLACEMENT OF RESOLUTION PROFESSIONAL BY COMMITTEE OF CREDITORS

Section 27 of the Code lays down provisions for replacement of resolution professional by CoC during CIRP:

- (1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.
- (2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.
- (3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.
- (4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.
- (5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

PREPARATION OF INFORMATION MEMORANDUM

Resolution Professional to prepare information memorandum: Section 29(1) of the Code states that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

Section 5(10) defines “information memorandum” which means a memorandum prepared by resolution professional under sub-section (1) of section 29.

Duty of the creditor to provide information to IRP/RP: Regulation 4(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 casts duty on the creditor that he/they shall provide to the interim resolution professional or resolution professional, as the case may be, the information in respect of assets and liabilities of the corporate debtor from the last valuation report, stock statement, receivables statement, inspection reports of properties, audit report, stock audit report, title search report, technical officers report, bank account statement and such other information which shall assist the interim resolution professional or the resolution professional in preparing the information memorandum, getting valuation determined and in conducting the corporate insolvency resolution process.

Resolution Professional to provide information to the resolution applicant: Section 29 (2) states that the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading; (b) to protect any intellectual property of the corporate debtor it may have access to; and (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation. – For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified

Submission of resolution plan. – Section 30(2) of the Code states that it is the duty of the resolution professional to confirm that each resolution plan –

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- (b) provides for the payment of debts of operational creditors and financial creditors, who do not vote in favour of the resolution plan in the manner specified in the section.

Submission of resolution professional to CoC: Section 30(3) provides that the resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

Duty of the resolution professional to submit approved resolution plan to AA: According to section 30(6), the resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Protection of action taken in good faith. - Section 233 of the Code provides, “No suit, prosecution or other legal proceeding shall lie against an insolvency professional or liquidator for anything which is in done or intended to be done in good faith under this Code or the rules or regulations made thereunder.”

ENROLLED AND REGISTERED PERSONS TO ACT AS INSOLVENCY PROFESSIONALS

Section 206 of the Code makes it mandatory for a person before rendering his services as insolvency professional under this Code

- (i) to be enrolled as a member of an insolvency professional agency; and
- (ii) registered with the Board.

i.e. both the conditions should be complied with before rendering services as an Insolvency Professional.

RECOGNITION OF INSOLVENCY PROFESSIONAL ENTITIES

Regulation 12 of the IBBI (Insolvency Professionals) Regulations, 2016 states that a company, a registered partnership firm or a limited liability partnership may be recognized as an insolvency professional entity, if –

- (a) its objective is to provide support services to insolvency professionals or to carry on the activities of an insolvency professional or both.
- (b) it has a net worth of not less than one crore rupees;
- (c) majority of its equity shares and voting rights are held by insolvency professionals, who are its directors, in case it is a company,
- (d) majority of capital contribution is made by insolvency professionals, who are its partners, in case it is a limited liability partnership firm or a registered partnership firm;
- (e) majority of its partners or directors, as the case may be, are insolvency professionals;

(f) majority of its whole-time directors are insolvency professionals; in case it is a company; and

(g) none of its partners or directors is a partner or a director of another insolvency professional entity.

It may be noted that 'net worth' means- (i) the net worth as defined under section 2(57) of the Companies Act, 2013 in case of a company; (ii) sum of partners' contribution in the capital account and their undistributed profits net of accumulated losses, if any, in case of a registered partnership firm or limited liability partnership.

REGISTRATION OF INSOLVENCY PROFESSIONALS

Section 207(1) of the Code provides that to become an Insolvency Professional (IP), an individual shall first enroll with an Insolvency Professional Agency (IPA) as a member, and then register with the IBBI within such time, manner and after payment of fee as may be specified by the regulations.

Sub-section (2) of section 207 (2) vests in the Board power to specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit.

APPLICATION FOR CERTIFICATE OF REGISTRATION

According to Regulation 6(1) an individual enrolled with an insolvency professional agency as a professional member may make an application to the Board through the insolvency professional agency of which he is a member, in Part – II of Form A of the Second Schedule to these Regulations, along with a nonrefundable application fee of twenty thousand rupees to the Board.

(1A) An insolvency professional entity eligible for registration as an insolvency professional under sub-regulation (2) of regulation 4 may make an application to the Board through the insolvency professional agency of which it is a member, in Part – II of Form AA of Second Schedule to these Regulations, along with a non-refundable application fee of two lakh rupees to the Board. The insolvency professional agency shall acknowledge an application made under this Regulation within seven days of its receipt.

(2A) The insolvency professional agency shall verify and forward the application to the Board within thirty days from the date of payment of fee under sub-regulations (1) or (1A), as the case may be, excluding the time given by the insolvency professional agency to the professional member for submitting additional documents, information, or clarification, as the case may be.

(3) The Board may require the applicant to submit, within reasonable time, additional documents, information or clarification that it deems fit.

(4) The Board may require the applicant to appear, within reasonable time, before the Board in person, or through its authorised representative for clarifications required for processing the application.

SURRENDER OF CERTIFICATE OF REGISTRATION

Regulation 10A provides that an insolvency professional may surrender its certificate of registration by making a request to the Board, in writing along with the certificate of registration in original.

If the Board is satisfied, it may accept the request for surrender of certificate of registration within thirty days of its receipt and upon acceptance, the registration of such insolvency professional shall stand cancelled.

On and from the date of cancellation of certificate of registration, the concerned person shall not represent itself to be a holder of the certificate for carrying out the activity for which such certificate had been granted.

Regulation 10B, Special Procedure for Action on Surrender, Expulsion, etc.

According to Regulation 10A (1), while disposing of the matter under this regulation, the Board shall not be bound by the procedure specified in regulation 11.

- (2) On receipt of information under clause (e) and (f) of sub-regulation (1) of regulation 10, the Board may issue a notice, if required, to such professional member, calling upon it to explain as to why the certificate of registration, granted under the regulations, should not be cancelled.
- (3) The professional member may make written submission(s), if any, within a period not exceeding twenty-one days from the date of service of notice.
- (4) On being satisfied with the submission(s) made under sub-regulation (3), the Board may decide to cancel the registration or issue directions to complete the ongoing assignments, make pending compliances including payment of fee, etc.
- (5) The Board shall communicate its decision under sub-regulation (4) within thirty days from date of receipt of written submissions under sub-regulation (3).
- (6) On receipt of information under clause (g) of sub-regulation (1) of regulation 10, the registration of such insolvency professional with the Board shall be deemed to have been cancelled from the date of demise or winding up or dissolution, as the case may be.
- (7) On and from the date of cancellation of the certificate of registration, under this regulation, the legal heirs or assignee of the insolvency professional shall take steps for delivery of any record(s) or document(s) or assets that may be in its custody or control, within the time period and in the manner, as may be required under the relevant regulations or as may be directed by the Board.

FUNCTIONS AND OBLIGATIONS OF INSOLVENCY PROFESSIONALS

Section 208 of the Code prescribes functions and obligations of insolvency professionals:

- (1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely:
- (a) a fresh start order process under Chapter II of Part III;
 - (b) individual insolvency resolution process under Chapter III of Part III;
 - (c) corporate insolvency resolution process under Chapter II of Part II;
 - (ca) pre-packaged insolvency resolution process under Chapter III-A of Part II;
 - (d) individual bankruptcy process under Chapter IV of Part III; and
 - (e) liquidation of a corporate debtor firm under Chapter III of Part II.
- (1A) Where the name of the insolvency professional proposed to be appointed as a resolution professional, is approved under clause (e) of sub-section (2) of section 54A, it shall be the function of such insolvency professional to take such actions as may be necessary to perform his functions and duties prior to the initiation of the pre-packaged insolvency resolution process under Chapter III-A of Part II.
- (2) Every insolvency professional shall abide by the following code of conduct: –
- (a) to take reasonable care and diligence while performing his duties;
 - (b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
 - (c) to allow the insolvency professional agency to inspect his records;
 - (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
 - (e) to perform his functions in such manner and subject to such conditions as may be specified.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016

In exercise of the powers conferred by sections 196, 207 and 208 read with section 240 of the Insolvency and Bankruptcy Code, 2016, the Board has made the Regulations hereinafter called as the “IBBI (Insolvency Professionals) Regulations, 2016.” These regulations came into force with effect from 29th November 2016.

The IBBI (Insolvency Professionals) Regulations, 2016 makes provisions for the examination and registration of Insolvency Professionals with the Insolvency and Bankruptcy Board of India. These regulations also make provisions for the disciplinary proceedings against the insolvency professional as well as prescribes the code of conduct for insolvency professionals. There are two schedules provided in the Regulation: -

- (i) FIRST SCHEDULE [Regulation 7(2)(h)]: It provides for Code of Conduct for Insolvency Professionals.
- (ii) SECOND SCHEDULE: It provides for the FORMS applicable w.r.t. Insolvency Professionals.

THE CODE OF CONDUCT**FIRST SCHEDULE [Under Regulation 7(2)(h)] - CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS**

1. Integrity and Objectivity
2. Independence and impartiality
3. Professional competence
4. Representation of correct facts and correcting misapprehensions.
5. Timeliness.
6. Information management
7. Confidentiality
8. Occupation, employability and restrictions
9. Remuneration and costs
10. Gifts and hospitality

Regulation 7(2) of the IP Regulations provides that the registration of an IP is subject to the conditions that the IP shall:

- A) at all times abide by the code, rules, regulations, and guidelines thereunder and the bye-laws of the IPA with which he is enrolled;

The First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides for the Code of Conduct for Insolvency Professionals to ensure best practices in the profession of Insolvency Professionals.

The code of conduct is explained as follows:

INTEGRITY AND OBJECTIVITY

Integrity and Objectivity are among the fundamental principles of ethics for Insolvency Professionals (IP). As per the First Schedule of the IP Regulations:

1. An Insolvency Professional (IP) must maintain integrity by being honest and straight forward in all professional relationships.

Integrity envisages being straightforward and honest in all professional and business relationships. It implies fair dealing and truthfulness. The most important attribute of a professional for which he is accountable is integrity in character and conduct. Integrity, reputation and character are also pre-requisites for being considered as ‘fit and proper’ for registration as IP under regulation 4 of the IP Regulations. A profession is only as good as its members. Thus, it is necessary to ensure that a person with clean hands only can enter this profession to manage the operation of the corporate debtor and conduct the insolvency resolution process.

Objectivity requires IP not to compromise professional or business judgements because of bias, coercion, conflict of interest or undue influence of others, whether directly or indirectly. The IP must visibly demonstrate his impartiality and lack of bias by

- being transparent in all his interactions and decisions,
 - being collaborative and consultative with all participants of the Committee of Creditors, and
 - ensuring that all decisions are arrived at by active consensus and are not bull-dozed by a dominant participant or by the IP himself.
2. An Insolvency Professional (IP) must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.
 3. An Insolvency Professional (IP) must act with objectivity in its professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest, coercion, or undue influence of any party, whether directly connected to the insolvency proceedings or not.
- 3A. An insolvency professional must disclose the details of any conflict of interests to the stakeholders, whenever he comes across such conflict of interest during an assignment.
- This is required to avoid a threat to compliance with objectivity or other fundamental principles of the Code of Conduct. Timely disclosure of any conflict whether identified prior to appointment or during the performance of duties under the appointment to all stakeholders is critical. This might also require consent from Committee of Creditors to continue the appointment.
4. An insolvency professional appointed as an interim resolution professional, resolution professional, liquidator, or bankruptcy trustee should not itself acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any relative to do so.

In **Asset Reconstruction company Ltd. vs. Shivam Water Treaters Pvt Ltd, CP(IB) 1882/MB/2018, 16.01.2019**, NCLT, Mumbai Bench vide its order dated 2nd Jan, 2019 had clarified that IRP is acting as a Court Officer and any hindrance in the work of CIRP will amount to contempt of Court. The NCLT directed the promoter/ director, officials and auditor the Corporate Debtor Company to fully co-operate the RP in the completion of CIRP.

Further, in the aforesaid matter, the NCLT ordered that Police assistance to be given to the Resolution Professional so that the RP can take full control of the company without any interference from Ex-Director's or his officials. The Police Commissioner, Ahmadabad is directed to provide police assistance to RP and his team, so that the Resolution Professional can take control of the entire unit.

In **Sanjay Kumar Ruia Vs. Catholic Syrian Bank Ltd. & Anr, Company Appeal (AT) (Insolvency) No. 876 of 2019, 11.09.2019**, NCLAT, New Delhi remitted the matter to the Liquidator, in view of the fact that liquidation proceeding has already been started. Hon'ble NCLAT further held that if the amount based on bills and ledger have been approved by the Committee of Creditors, the Liquidator cannot reject, the same being the 'resolution cost' and not claim of any creditor.

Hon'ble NCLAT disposed off the appeal and made it clear that the fee of the Resolution Professional and the cost incurred by Resolution Professional, will be treated as 'resolution cost'. Further, allowed the Liquidator to determine the claim under Section 40 of the Code. Once the amount is shown as 'fees' and 'resolution cost' the same to be paid in terms of Section 53 of the Code.

In **BMW India Financial Services Private Limited v. SK Wheels Private Limited, MA NO. 2319/2019 in C.P. (IB)4301/2018, 16.10.2019** Hon'ble NCLT held:

"15. It is trite law that this tribunal has been provided with vast powers under section 60 (5) of the Code. Therefore, based on the above this bench is of the view that the actions or rather inaction on the part of the Resolution Professional in not taking a decision with respect to the claim of the Applicant is an abuse of the powers given to him under the code and contrary to justice and public policy. His actions are nothing more but an abuse of his dominant position.

18. This kind of injustice carried out by the Resolution Professional herein is completely unacceptable. The landowner is just not entitled to receive the license fee but also, he has to right to receive the possession of the said premises. The tenancy rights automatically get terminated, the moment default in payment of rent is committed.”

In **Ruchita Modi v. Mrs. Kanchan Ostwal & Anr**, Company Appeal (AT) (Ins) No.1000 of 2019, 15.11.2019, Hon’ble NCLAT held:

“As the IRP is functioning since 18th September, 2019 on admission of Section 9 Application, we compute the fees of IRP @ Rs.1,50,000/-. The IRP would be entitled to also recover CIRP costs as may have been incurred. The Appellant – for CD undertakes to contact IRP and pay fees as above and CIRP costs as may have been incurred by the IRP in 3 weeks, after deducting amount already received by IRP under the Impugned Order. In case IRP has any difficulty regarding CIRP costs, he would be entitled to move the Adjudicating Authority and the Appellant will be bound to pay the CIRP costs concerned, as may be directed by Adjudicating Authority.”

Hon’ble NCLAT vide its order dated 04.11.2019 set aside the impugned order dated 18th September, 2019 passed by NCLT, Jaipur bench for initiation of CIRP and disposed of application u/s 9 of the code as withdrawn. Further, NCLAT also directed that if there is default in payment in terms of the settlement, it will be open for the Operational Creditor to move to the Appellate Tribunal for recall of this Order and to revive the CIRP process against the CD”

INDEPENDENCE AND IMPARTIALITY

5. An insolvency professional must maintain complete independence in its professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
6. In cases where the insolvency professional is dealing with assets of a debtor during liquidation or bankruptcy process, he must ensure that he or his relatives do not knowingly acquire any such assets, whether directly or indirectly unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the approval of the Board has been obtained in the matter.
7. An insolvency professional shall not take up an assignment under the Code if he, any of his relatives, any of the partners or directors of the insolvency professional entity of which he is a partner or director, or the insolvency professional entity of which he is a partner or director is not independent, in terms of the Regulations related to the processes under the Code, in relation to the corporate person/ debtor and its related parties.
8. An insolvency professional shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under sections 53 or 178 of the Code, and the concerned corporate person/ debtor as soon as he becomes aware of it, by making a declaration of the same to the applicant, committee of creditors, and the person proposing appointment, as applicable.

8A. An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

8B. An insolvency professional shall disclose its relationship, if any, with the corporate debtor, other professionals engaged by it, financial creditors, interim finance providers, and prospective resolution applicants to the insolvency professional agency of which he is a member, within the time specified hereunder.

Relationship of the insolvency professional with	Disclosure to be made within three days of
(1)	(2)
Corporate debtor	his appointment.
Registered valuers / accountants/ legal professionals/ other professionals appointed by him	appointment of the professionals.
Financial creditors	the constitution of committee of creditors.

Interim finance providers	the agreement with the interim finance provider.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant.
If relationship with any of the above, comes to notice or arises subsequently	of such notice or arising

8C. An insolvency professional shall ensure disclosure of the relationship, if any, of the other professionals engaged by it with itself, the corporate debtor, the financial creditor, the interim finance provider, if any, and the prospective resolution applicant, to the insolvency professional agency of which he is a member, within the time specified as under:

Relationship of the other professional with	Disclosure to be made within three days of
(1)	(2)
Insolvency professional	the appointment of the other professional.
Corporate debtor	the appointment of the other professional.
Financial creditors	constitution of committee of creditors.
Interim finance providers	the agreement with the interim finance provider or three days of the appointment of the other professional, whichever is later.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant or three days of the appointment of the other professional, whichever is later.
If relationship with any of the above, comes to notice or arises subsequently	of such notice or arising.

Explanation: For the purposes of clause 8B and 8C above, 'relationship' shall mean any one or more of the following four kinds of relationships at any time or during the three years preceding the appointment of other professionals:

Kind of relationship	Nature of relationship
(1)	(2)
A	Where the insolvency professional or the other professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.
B	Where the insolvency professional or the other professional, as the case may be, is a shareholder, director, key managerial personnel or partner of the related party.
C	Where a relative (spouse, parents, parents of spouse, sibling of self and spouse, and children) of the insolvency professional or the other professional, as the case may be, has a relationship of kind A or B with the related party.
D	Where the insolvency professional or the other professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an insolvency professional entity or registered valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

8D. An insolvency professional shall ensure timely and correct disclosures by it, and other professionals appointed by it and shall provide a confirmation to the insolvency professional agency of which he is a professional member to the effect that the appointment, if any, of every other professional has been made at arms' length relationship.

9. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue or unlawful gains for itself or its related parties, or cause any undue preference for any other persons for undue or unlawful gains and shall not adopt any illegal or improper means to achieve any mala fide objectives.

In the case of **State Bank of India Vs. M/s. Metenere Ltd.**, C.P. No. IB-639(PB)/2018 an appeal was preferred by State Bank of India, financial creditor against the order of Hon'ble NCLT wherein it was observed that there is an apprehension of bias against the appointment of proposed Interim Resolution Professional, as he was ex-employee of financial creditor and has been drawing pension from the financial creditor. Therefore, Hon'ble NCLT directed financial creditor to substitute name of Interim Resolution Professional.

Hon'ble NCLAT held that:

"the Adjudicating Authority was perfectly justified in seeking substitution of Mr. Shailesh Verma to ensure that the 'Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. Shailesh Verma was not disqualified or ineligible to act as an 'Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- 'Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."

The Disciplinary Committee of IBBI vide an order dated November, 2019 found that an Insolvency Professional:

- Failed to make disclosures with respect to appointment of an LLP (in which he was a partner) as an IPE contravening the directions under the Circular issued by IBBI;
- Allowed charging fee of Rs. 12,09,90,185/- payable to lender's legal counsel as an IRPC and abdicated his authority in favour of CoC. He paid expenses of third party from CD and included in IRPC. He deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose;
- Shared the fee, which can be paid only to an individual acting as an IP, with an LLP (in which he was a partner) against the provisions of the Code and the Regulations.

The Disciplinary Committee of IBBI observed that there was understanding between CoC and RP to contravene a law and willingness to remedy the situation only if they are caught. Thus, the RP has deliberately compromised his independence. The Disciplinary Committee Imposed penalty of ten percent of the RP's fee and Directed the RP to make good the loss by securing reimbursement and deposit the amount of Rs. 12,09,90,185/- in the account of Corporate Debtor.

PROFESSIONAL COMPETENCE

10. An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

Insolvency professionals play the role of regulator's 'eyes and ears' into the workings of the assignments and thus shoulder immense responsibility and are accountable not only to the immediate user of their services but also to a wider stakeholder group, including regulators and the society as a whole.

REPRESENTATION OF CORRECT FACTS AND CORRECTING MISAPPREHENSIONS.

11. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.
12. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

During the corporate insolvency resolution process (CIRP) either on the own analysis of the resolution professional (RP) or on the forensic audit report submitted by the forensic auditor, the RP may become aware of any misapprehension or wrongful consideration of any fact. In that case, as per the code of conduct, the RP is expected to duly inform the same to the concerned stakeholder. Also, while disseminating information to stakeholders like CoC, Resolution Applicant, IBBI etc. the RP shall not conceal any material information or make any misleading statements. As an Officer of the Court, the RP is expected to be unbiased and diligent.

TIMELINESS

13. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines thereunder for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan its actions, and promptly communicate with all stakeholders involved for the timely discharge of its duties.
14. An insolvency professional must not act with mala fide or be negligent while performing its functions and duties under the Code.

Bye-law 13 of the Model Bye-laws of an IPA, as specified by the IBBI under Schedule to Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, states that an IP must perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code

In the matter of **M/s. Surendra Trading Company V. M/s. Juggilal Kamlapat Jute Mills Company Limited and Others, Civil Appeal No. 8400 of 2017**, the Hon'ble Supreme Court held that the timelines provided in sections 7, 9 and 10 of the Code, for deciding a matter within 14 days as well as the time to remove a defect within 7 days, are directory and not mandatory.

In the matter of **Committee of Creditors of Essar Steel India Limited V. Satish Kumar Gupta & Ors, Civil Appeal No. 8766-67 of 2019**, the Hon'ble Supreme Court held that "ordinarily the time taken in CIRP must be completed within the time limit of 330 days from the insolvency commencement date, including the time taken in litigation process. However, in few cases where it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short time is left in completion of corporate insolvency resolution process beyond 330 days, and it would be interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/ or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days."

INFORMATION MANAGEMENT

15. An insolvency professional must make efforts to ensure that all communication to the stakeholders, whether in the form of notices, reports, updates, directions, or clarifications, is made well in advance and in a manner which is simple, clear, and easily understood by the recipients.
 - 15A. An insolvency professional shall prominently state in all its communications to a stakeholder, its (i) name, (ii) address, (iii) e-mail, (iv) registration number and (v) validity of authorisation for assignment, if any, issued by the insolvency professional agency of which he is a member.
16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of its decisions and actions.
17. An insolvency professional must not make any private communication with any of the stakeholders unless required by the Code, rules, regulations and guidelines thereunder, or orders of the Adjudicating Authority.
18. An insolvency professional must appear, co-operate and be available for inspections and investigations carried out by the Board, any person authorised by the Board or the insolvency professional agency with which he is enrolled.
19. An insolvency professional must provide all information and records as may be required by the Board or the insolvency professional agency with which he is enrolled.

20. An insolvency professional must be available and provide information for any periodic study, research and audit conducted by the Board.

CONFIDENTIALITY

21. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent it from disclosing any information with the consent of the relevant parties or required by law.

In the matter of **Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors.**, NCLAT vide its order dated 15th May 2018 held that the Resolution Professional is required to examine whether resolution plan confirm the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(s), who has submitted the resolution plan. The resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.

In Re.: **Vijay Kumar Jain Vs Standard Chartered Bank & Ors** Civil Appeal No. 8430-2018 Order dated 31.01.2019, Hon'ble Supreme Court inter alia observed that - "It is clear that the resolution professional can take an undertaking from members of the erstwhile Board of Directors, as has been taken in the facts of the present case, to maintain confidentiality. The source of this power is Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, read with paragraph 21 of the First Schedule thereto. This can be in the form of a non-disclosure agreement in which the resolution professional can be indemnified in case information is not kept strictly confidential."

"The resolution professional does not seek information at a meeting of the committee of creditors, which is what Section 24 is all about. The resolution professional only seeks information from the erstwhile Board of Directors under Section 29 before preparing an information memorandum, which then includes the financial position of the corporate debtor and information relating to disputes by or against the corporate debtor etc."

OCCUPATION, EMPLOYABILITY AND RESTRICTIONS

22. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

Clarification (Inserted by Notification No. IBBI/2021-22/GN/REG077, dated 22nd July, 2021 (w.e.f. 21.07.2021).: An insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each.

23. An insolvency professional must not engage in any employment when he holds a valid authorisation for assignment or when he is undertaking an assignment.

23A. Where an insolvency professional has conducted a corporate insolvency resolution process, he and his relatives shall not accept any employment, other than an employment secured through open competitive recruitment, with, or render professional services, other than services under the Code, to a creditor having more than ten percent voting power, the successful resolution applicant, the corporate debtor or any of their related parties, until a period of one year has elapsed from the date of his cessation from such process.

23B. An insolvency professional shall not engage or appoint any of his relatives or related parties, for or in connection with any work relating to any of his assignment.

23C. An insolvency professional shall not provide any service for or in connection with the assignment which is being undertaken by any of his relatives or related parties.

Explanation- For the purpose of clauses 23A to 23C, “related party” shall have the same meaning as assigned to it in clause (24A) of section 5, but does not include an insolvency professional entity of which the insolvency professional is a partner or director.

24. An insolvency professional must not conduct business which in the opinion of the Board is inconsistent with the reputation of the profession.

In the matter of **IDBI Bank Ltd. v. Lanco Infratech Ltd, C.P.(IB)No. 111/7/HDB/2017**, the Hon’ble NCLT Hyderabad Bench in its order dated 7th August, 2017 stated that “Therefore, we agreed with the submissions of the respondents considering his previous three assignments to large companies and the current corporate debtor itself is a large company we are of the prima facie view that the proposed IRP would not find sufficient time to act as IRP for the respondent company.”

In the matter of **Anil Goel v. LML Ltd.**, C P No. (IB) 55/ALD/2007 with CA No.73/2018, the Hon’ble NCLT Allahabad Bench in its order dated 23rd March, 2018 stated that “.....He is also appointed the Liquidator in another two matters...”

“In the case in hand, the Resolution Profession Process was to be completed within the extended period of CIRP, by dated 25.02.2018. But the Resolution Professional failed to submit the progress report/ the resolution plan within the statutory period i.e. 270 days. The Resolution Professional has filed this application on 19.03.2018, after the issuance of notice by order of this Tribunal dated 13.03.2018 for submission of progress report/ Resolution Plan against him. The RP was also directed to remain present in the Court in person on 19.03.2018. The above act of the RP shows that he was not careful in following the timeline prescribed under the Insolvency and Bankruptcy Code.”

REMUNERATION AND COSTS

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.
- 25A. An insolvency professional shall disclose the fee payable to it, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by it to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.
- 25B. An insolvency professional shall raise bills or invoices in its name towards its fees, and such fees shall be paid to it through banking channel.
- 25C. An insolvency professional shall ensure that the insolvency professional entity or the professional engaged by it raises bills or invoices in their own name towards their fees, and such fees shall be paid to them through banking channel.
26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing its remuneration.
- 26A. An insolvency professional shall not accept /share any fees or charges from any professional and/or support service provider who are appointed under the processes.
27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.
- 27A. An insolvency professional shall, while undertaking assignment or conducting processes, exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person complies with the applicable laws.
- 27B. An insolvency professional shall not include any amount towards any loss, including penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting the insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process, under the Code.

In **Anurag Nirbhaya Vs. Anuj Maheshwari & Ors, Order dated 14.10.2019, NCLT**, IRP claimed Rs. 12 Lakhs for the first month and Rs. 11 Lakhs per month for the period of rest of the two and half months and he was paid Rs.6 Lakhs for the total period of three and half months. The AA observed that the exorbitant fee has been claimed by the IRP and stated that generally they allow fee @ Rs. 1 Lakh per month to the professionals.

In **Punjab National Bank Vs. Divyajyoti Sponge Iron Pvt. Ltd NCLT, Order dated 13.03.2018**, the AA took notice of fixation of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind as regards to the fate of CD, the volume, nature and complexity of CIRP. It is observed that it is time to have legitimate guidelines or regulation in this regard so as to safeguard and to ensure the prospects and revival of a dying CD not be at the highest cost which cannot be affordable by the CD. It hoped that IBBI would frame necessary regulations/guidelines for fixation of fees and resolution cost by a RP.

An IP should not charge abnormally high fee in relation to the services: The Disciplinary Committee of IBBI found that an IP attempted to charge abnormally high fee in relation to the services. Besides, he acted mala fide by seeking increase of his fee after approval of fee by the AA and displayed professional incompetence by using stale information for decision making. He, then IRP signed the term sheet with the applicant, who is not legally competent to appoint RP or fix his fee, and thereby attempted to deprive the CoC of its legitimate right to appoint a RP of its choice and fix his fee. The Disciplinary Committee suspended the registration of the IP for two years, directed the IP to undergo the pre-registration educational course and work for at least six months as an intern with a senior insolvency professional, at any time during the period of suspension.

Fee paid to the professionals appointed on the direction of CoC should not be included as IRPC: The Disciplinary Committee of IBBI observed that Despite the IBBI Circular dated 12.06.2018 clearly stating that Insolvency Resolution Process Cost (IRPC) shall not include any expense incurred by a member of CoC or a professional engaged by them, the RP charged the fee of lender's legal counsel from the Insolvency Resolution Process Cost. Resolution Professional, on the direction of COC, finalized the appointment of a Professional to conduct second forensic audit. The fees should have been borne by the CoC members themselves but the same was included as IRPC. The Disciplinary Committee suspended the registration of IP for six months, directed to secure reimbursement of the amount which was paid to lender's legal counsel and professional for conducting second forensic audit and charged to IRPC.

GIFTS AND HOSPITALITY

28. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.
29. An insolvency professional shall not offer gifts or hospitality or a financial or any other advantage to a public servant or any other person, intending to obtain or retain work for himself, or to obtain or retain an advantage in the conduct of profession for himself.

CASE LAWS

1. In **Re.: Manish Kumar Vs. Union of India & Anr., Writ Petition (C) No.26 of 2020 with other writ petitions ordered dated 19.01.2021**, Hon'ble Supreme Court inter alia observed that "The resolution professional has to examine each resolution plan received by him on the basis of the invitation made by the resolution professional under Section 25(h) and ascertain whether the plan is in conformity with the various criteria mentioned in Section 30(2) of the Code."

"The IRP may or may not continue as the Resolution Professional (RP) but a RP is, undoubtedly, to be appointed under the scheme of the Code. The management passes into the hands of the RP. Thereafter, depending upon the receipt of the Resolution Plan and its acceptability to the Committee of Creditors and finally the approval by the Adjudicating Authority of the Resolution Plan, which is approved by the Committee of Creditors, depends the Resolution of the Insolvency."

"In short, the show is run by the Resolution Professional, subject to the control of the Committee of Creditors."

2. **In the case of Pooja Menghani vs. Insolvency and Bankruptcy Board of India & Anr**, Judgement dated November 20, 2023, Hon'ble High Court of Delhi inter alia observed that an Insolvency Professional performs very important functions in the insolvency resolution process of a company. An Insolvency Professional virtually takes over the company during the period it goes through the insolvency resolution process. An Insolvency Professional in fact becomes the heart and brain of the company under the insolvency resolution process and a person having slightest of disqualification cannot be permitted to be appointed as an Insolvency Professional otherwise the entire purpose of the IBC will get vitiated.
3. **In Re: V Nagarajan Vs. SKS Ispat and Power Ltd. & Ors, Civil Appeal No. 3327 of 2020 order dated 22.10.2021**, Hon'ble Supreme Court inter alia observed that "The Resolution Professional is responsible for ensuring the timeliness of the process and has to file several forms, as detailed under Regulation 40B, and explain all delays that occur in the intervening period, when filing the final Form H upon submitting a successful resolution plan under Section 30 of the IBC.
4. **In Re.: Sandeep Khaitan, Resolution Professional for National Plywood Industries Ltd. Vs. JSVM Plywood Industries Ltd. & Anr. Criminal Appeal No.447 of 2021 Order dated 22.04.2021**, Supreme Court inter alia observed that

"With the appointment of Committee of Creditors, a Resolution Professional is to be appointed. The Resolution Professional is thereafter to conduct the resolution process and manage the operations. Section 23 (2) makes it clear that his power is the same as the powers of the Interim Resolution Professional. Undoubtedly, the Resolution Professional is bound to seek prior approval of the Committee of Creditors in matters covered by Section 28."

"The IRP/RP must take a decision guided purely by the object of the IBC and the provisions and the factual matrix." "The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the Corporate Debtor is to vest in the Interim Resolution Professional. With such appointment, the powers of the Board of Directors or the partners of the Corporate Debtor as the case may be are to stand suspended. Section 17 further declares that the powers of the Board of Directors or partners are to be exercised by the Interim Resolution Professional. The financial institutions are to act on the instructions of the Interim Resolution Professional. Section 14 is emphatic, subject to the provisions of sub section (2) and (3). The impact of the moratorium includes prohibition of transferring, encumbering, alienating or disposing of by the Corporate Debtor of any of its assets."

5. **In Re.: Manish Kumar Vs. Union of India & Anr., Writ Petition (C) No.26 of 2020 with other writ petitions order dated 19.01.2021**, Hon'ble Supreme Court inter alia observed that "The resolution professional has to examine each resolution plan received by him on the basis of the invitation made by the resolution professional under Section 25(h) and ascertain whether the plan is in conformity with the various criteria mentioned in Section 30(2) of the Code." "The IRP may or may not continue as the Resolution Professional (RP) but a RP is, undoubtedly, to be appointed under the scheme of the Code. The management passes into the hands of the RP. Thereafter, depending upon the receipt of the Resolution Plan and its acceptability to the Committee of Creditors and finally the approval by the Adjudicating Authority of the Resolution Plan, which is approved by the Committee of Creditors, depends the Resolution of the Insolvency." "In short, the show is run by the Resolution Professional, subject to the control of the Committee of Creditors."
6. **In Re.: Arcelor Mittal India Private Limited Vs Satish Kumar Gupta & Ors. Civil Appeal Nos. 9402-9405 -2018, Order dated 04.10.2018**, Hon'ble Supreme Court inter alia observed as:

"However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2)." "A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors." "The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors

that a law has or has not been contravened.” “Section 30(2)(e) does not empower the Resolution Professional to “decide” whether the resolution plan does or does not contravene the provisions of law.”

“Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order.” “Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

LESSON 4 - RESOLUTION STRATEGIES

REGULATORY FRAMEWORK

- Section 30(2) of the Insolvency and Bankruptcy Code, 2016
- Regulation 37 & 38 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- Regulation 32 to 40 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

INTRODUCTION

The legislative framework in India for insolvency and bankruptcy proceedings provides for a wide range of resolution measures, viz. re-organization by way of a merger or amalgamation, acquisition of control and change of management, demerger, slump sale and reconstruction or financial, capital and business/ operational restructuring and as such a resolution strategy may consist of one or more of such measures and/or any measure other than the said measures. Failure to reach an understanding/resolution with the creditors under the Code could lead to liquidation of the corporate debtor.

Part II of the Insolvency and Bankruptcy Code, 2016 deals with the insolvency resolution and liquidation for corporate persons. Section 4 of the Insolvency and Bankruptcy Code, 2016 provides that Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees.

Part II of the Insolvency and Bankruptcy Code, 2016 lays down the following two independent stages:

- i) Corporate Insolvency Resolution Process [Sections 4 and 6 to 32]; and
- ii) Liquidation [Sections 33 to 54] and Voluntary Liquidation [Section 59]

Chapter II of Part II deals with corporate insolvency resolution process while Chapter III together with Chapter V of Part II governs the liquidation process for corporate persons.

The procedure for restructuring encompasses schemes of mergers, amalgamations, demergers, transfer/ sale of assets, restructuring of capital by way of cancellation/ delisting or any other modification in share capital, and restructuring of debts by ways of satisfaction or modification of security charge/ interest as suggested in Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) by way of which the liabilities of the distressed companies can be restructured and the state of insolvency can be resolved. In the event of initiation of a Corporate Insolvency Resolution Process against the Corporate Debtor under IBC 2016, the Resolution Professional shall invite resolution plans from the prospective resolution applicants, subject to the compliance of the conditions as laid down under Section 30(2) of the IBC, 2016 read with Regulation 38 of the CIRP regulations.

Issuance of securities of corporate debtor in exchange for claims/ interests (of the creditors) can be used as a tool for restructuring in the resolution plans which has also been duly recognized/provided for in restructurings suggested under Regulation 37 of the CIRP regulations that may be submitted by the resolution applicants to the Resolution Professional for onward consent of the Committee of Creditors and thereafter the approval of the adjudicating authority. The same is done to bring the debt to a sustainable level either by waiver of excess debt or conversion into equity, or a combination of both.

Apart from the above, the Asset Reconstruction Companies (ARCs) set-up under the provisions of SARFAESI Act, 2002 may also acquire the debts of the corporate debtor from the lending banks/ Financial Institutions (FIs) and subsequently restructure the same in post discussions and arrangement with the corporate debtor.

The provisions of SARFAESI Act, 2002 also empower the lenders/ARCs to effect a change in management as a restructuring mechanism which can be achieved by applying to become resolution applicant or partnering with resolution applicant.

The SARFAESI Act, 2002 established ARCs as organizations for banks and other financial entities to sell distressed financial assets. Prior to SARFAESI Act, ARCs were not allowed to engage in any activities other than securitization or asset reconstruction without RBI approval. However, the RBI has permitted ARCs with a minimal net owned fund of INR 1000 crores to serve as resolution applicant under the provisions of the IBC, 2016, via its circular dated October 11, 2022 on “Review of Regulatory Framework for Asset Reconstruction Companies.” However, after five years from the date the Adjudicating Authority under the IBC approved the resolution plan, the ARCs shall not have any major influence or control over the corporate debtor with regard to a particular CIRP. The ARCs shall not be permitted to file any new resolution plans under IBC, either as a resolution applicant or a resolution co-applicant, in the event that this condition is not complied with.

Nonetheless, a resolution applicant shall opt for corporate restructuring in the CD (which might be mix of different methods of operational and financial restructuring) to revive it and improve its further financial performance. The Code has not specifically defined measures of restructuring for the resolution however the resolution applicant may introduce the required measures as per the situation of the corporate debtor.

CORPORATE RESTRUCTURING

Corporate restructuring is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resources, and fulfilment of stakeholders’ expectations. It serves different purposes for different companies at different points of time and may take up various forms.

Restructuring typically occurs to address challenges or it can be driven by the necessity to make financial adjustments to its assets and liabilities. Mergers, amalgamations, demergers, or reconstruction of capital structure are various forms of corporate restructuring exercises. The purpose of each of these restructuring exercises may be different but each of these exercises attempts to bring in more efficiency in the system so that the distress can be addressed.

The Insolvency and Bankruptcy Board of India (‘IBBI’) has made the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to regulate the insolvency resolution process for corporate persons. Corporate restructuring process in India under Insolvency and Bankruptcy Code, 2016 Regulation 37 of CIRP regulations provides that:

A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets including but not limited to the following:

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;
- (ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- (ca) cancellation or delisting of any shares of the corporate debtor, if applicable;
- (d) satisfaction or modification of any security interest;
- (e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- (f) reduction in the amount payable to the creditors;
- (g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
- (h) amendment of the constitutional documents of the corporate debtor;
- (i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- (j) change in portfolio of goods or services produced or rendered by the corporate debtor;
- (k) change in technology used by the corporate debtor;
- (l) obtaining necessary approvals from the Central and State Governments and other authorities;

- (m) sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets.

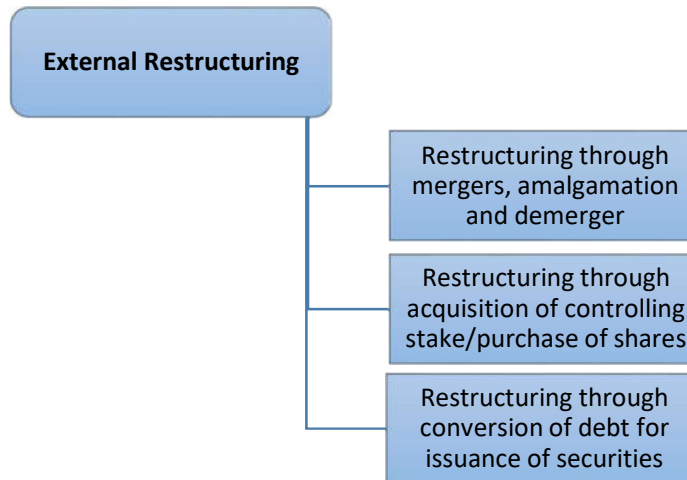
Corporate restructuring may be broadly categorized as follows:

- Internal restructuring
- External restructuring

These categories are briefly explained below.

1. External restructuring

It consists of merger and amalgamation of one company with another or demerger of one or more undertakings of a company into another company, acquisition of controlling stake in a company through purchase of majority stake in it, conversion of debt into equity, etc. The same are briefly explained hereunder.



(i) Restructuring through mergers, amalgamation and demerger

A company is merged, amalgamated or demerged to achieve improvement in efficiency in operational and financial performance of the company. In the insolvency proceedings of a corporate debtor, the resolution plan may provide for merger, forward or reverse of the corporate debtor with the resolution applicant (company) or any of its group companies to maximize the utilization of the assets of the corporate debtor. Similarly, the resolution applicant may provide to demerge one or more units of the corporate debtor to gain operational and financial efficiency.

In case of mergers/amalgamations or demergers, the consideration is in the form of equity shares in the merged/transferee entity, which are issued to the shareholders of the merging/transferor company based on the share exchange ratio determined on the basis of valuation of equity shares of each company. The funds available in the transferee company or its cash flow for the period after the merger/ amalgamation or demerger is used for meeting capital expenditure and working capital requirements of the entity which has merged or transferred and for resolving the debt of the said entity. In addition, the entity, which has merged, gets the benefit of resources of the transferee company including its brands, goodwill, managerial inputs, technology, funds, expert manpower, etc. and the same helps it to improve its profitability. The restructuring through mergers /amalgamation and demerger may, in addition, require financial and operational restructuring, in order to make an effective resolution of the insolvency of the transferor entity.

In Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Ors.,

NCLAT (New Delhi Bench) held that merger and amalgamation of the companies can be proposed in the Resolution Plan. IBC,2016 is a Code by itself and Section 238 of IBC,2016 provides over riding effect of it over the provisions of the other Acts. Therefore, the arguments of the Appellant that merger and amalgamation of the companies cannot be proposed in the 'Resolution Plan' is violative of clause (e) of sub-section (2) of Section 30 cannot be upheld.

(ii) Restructuring through acquisition of controlling stake/ purchase of shares

The resolution applicant may, through a resolution plan, acquire the controlling stake in the corporate debtor by either reducing or cancelling its existing paid up share capital and recapitalizing it by infusing further equity capital. Alternatively, the resolution applicant may acquire the existing equity share capital of the company partly or fully by making payment of some nominal consideration to the shareholders of the Corporate debtor and for meeting the requirement of funds of the Corporate debtor, the resolution applicant may infuse the funds partly in equity or partly in the form of debt or fully in the form of debt only. The management of the corporate debtor including its board is also changed by the resolution applicant by appointing his nominee directors on the board and by appointing other key managerial personnel.

(iii) Restructuring through conversion of debt for issuance of securities

It can be understood that the insolvency of a corporate debtor is mainly due to default in its debt, whether financial debt or operational debt, where it could not fulfill its repayment obligation. The Resolution applicant on the basis of the assessment of the corporate debtor, may propose the conversion of debt of the corporate debtor into securities of the corporate debtor issued in favor of the creditors, thereby, changing the nature and terms of the debt. The said securities may be in the form of equity share; preference share or debentures/ bonds. As a result of the said restructuring, the existing debt of the Corporate debtor is reduced to a sustainable level by conversion of the same into equity and by waiving substantial part of the unsustainable debt.

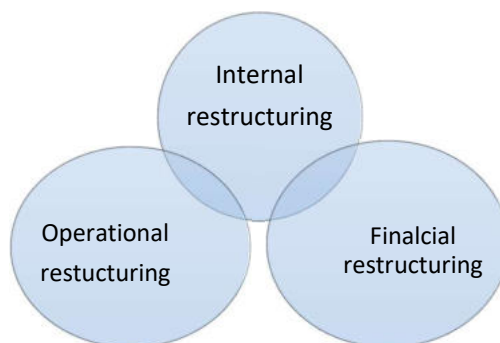
The same kind of restructuring was used in acquisition of Bhushan Steel Limited (after acquisition by Tata Group, it is named as Tata Steel BSL Limited, ("TBSL") by resolution applicant Bamnival Steel Limited (subsidiary of Tata Steel limited). Pursuant to the Resolution Plan, Bamnival Steel Limited subscribed to 72.65% of the equity share capital of TBSL for an aggregate amount of Rs.158.89 crore and provided additional funds aggregating to Rs. 35,073.69 crore to TBSL by way of debt/ convertible debt, which were utilized to repay the dues of the corporate debtor.

2. Internal restructuring

These two restructurings can be used simultaneously as required to resolve the insolvency of a corporate debtor. Following explanation can derive the need of the two restructurings in the resolution of the corporate debtor:

In the insolvency proceedings, the restructuring of corporate debtor is achieved through approval of the Resolution Plan by the adjudicating authority subsequent to the approval by its Committee of the Creditors.

The resolution plan should opt for restructuring required for the corporate debtor depending upon various factors of the corporate debtor such as nature and size of business, industry, market size and situation, the financial creditors, internal policies, business relationship with the vendors and customers, applicable laws, etc. A resolution applicant is required to analyze all these factors and prepare/ formulate the resolution plan containing the appropriate restructuring strategies to take over the corporate debtor and to resolve its insolvency. As mentioned in earlier sections, the Regulation 37 of CIRP Regulations briefly lays down the external as well as internal restructuring strategies that may be opted by the resolution applicants. The internal restructuring includes operational and financial restructuring. These are discussed in detail as follows:



(i) Operational restructuring

Operational Restructuring involves improving the operational efficiency of the corporate debtor so as to increase its business receipts and profitability. It may consist of creation of new departments to serve growing markets or downsizing or eliminating departments to conserve overheads. A company may undertake restructuring to focus on a particular market segment leveraging its core competencies or may undertake restructuring to make the organization lean and efficient. This type of restructuring affects employees and involves layoffs or collaboration with third parties to upgrade skills and technical know-how.

In the corporate insolvency resolution process of the corporate debtor, the resolution applicant is advised to present their strategy backed by a business plan where the Operational restructuring to be introduced by it (resolution applicant) to resolve the insolvency state of the corporate debtor. Regulation 37 also suggests different methods of the Operational restructuring to bring out the efficiency of the corporate debtor. Operational restructuring in the corporate debtor undergoing corporate insolvency resolution process may be made through change in portfolio of goods or services produced or rendered by it, change in technology used by it or introducing any other changes in the operational structure as may be required.

Additionally, the Regulation 38 of CIRP Regulations also advocates a detailed business plan where Regulation 38(3), which was amended, by Notification No. IBBI/2018-19/GN/REG031, dated 03rd July, 2018 (w.e.f. 04-07-2018) provides for the following:

“A resolution plan shall demonstrate that –

- (a) **it addresses the cause of default;**
- (b) **it is feasible and viable;**
- (c) **it has provisions for its effective implementation;**
- (d) **it has provisions for approvals required and the timeline for the same; and**
- (e) **the resolution applicant has the capability to implement the resolution plan”.**

It clarifies that the Resolution Plan in itself should be complete in every aspect by detailing Corporate restructuring including operational restructuring as required, to resolve the insolvency of the corporate debtor. It is, thus, an essential element of the resolution Plan to provide for the future way forward for the working of the corporate debtor.

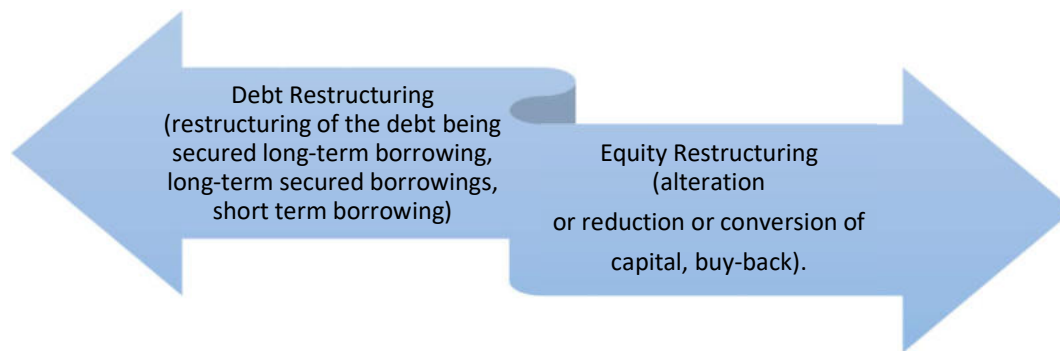
(ii) Financial restructuring

Financial restructuring is the process of reorganizing the financial structure, which primarily comprises of equity capital and debt capital. There may be several reasons (financial and non-financial) that trigger the need for financial restructuring. Financial restructuring is undertaken either because of compulsion (to recover from financial distress) or as part of company's financial strategy to achieve better financial performance.

Financial restructuring is done for various business reasons such as to overcome poor financial performance, to gain market share, or to seize emerging market opportunities. Financial restructuring undertaken to recover from financial distress involves negotiations with various stakeholders such as banks, financial institutions, creditors in order to reduce liabilities.

Corporate financial restructuring involves a considerable change in the company's financial structure and is undertaken for various business reasons such as:					
To overcome poor financial performance by reduction of debt and interest cost	To address external competition	To regain market share	To seize emerging market opportunities	To seize emerging market opportunities	Development of core competencies

The two components of financial restructuring are:



DEBT RESTRUCTURING

Debt restructuring is the process of reorganizing the whole debt capital of the company in negotiation with bankers, creditors, vendors to the terms to favor in improving the financial performance of the company. Debt capital of the company includes secured long-term borrowing, unsecured long-term borrowing, and short-term borrowings. Debt restructuring involves a reduction of debt and an extension of payment term or change in terms and conditions. Debt restructuring is more commonly used as a financial tool than compared to equity restructuring.

The resolution plan provides for restructuring of debt of the corporate debtor by different ways which include payment of their dues. These are briefly detailed as follows:

- (a) Modification in payment period, where the resolution applicant may propose for partial upfront/ immediate payment of the claims of the financial creditors and balance in a period that is acceptable to them. Presently, the financial creditors depending upon the situation of the corporate debtor may agree for such restructuring however, it is desirable by Financial Creditors to get most of the payment upfront as their dues had not been paid/ honored by the corporate debtor for long which led to the initiation of the CIRP.

Restructuring includes alteration of (a) repayment period, (b) repayable amount, (c) the amount of instalments, (d) rate of interest; rollover of credit facilities, sanction of additional credit facility, enhancement of existing credit limits, compromise settlements etc.

- (b) Conversion of the debt in some other instrument where the resolution applicant proposes to convert the debt or part of debt in equity or some other instruments such as redeemable debentures/ preference shares or optional convertible debentures/ preference shares etc. this restructuring may provide the corporate debtor with a feasible and viable manner to honor its obligations and it may provide the financial creditors with a safer and faster way to get the payment of their dues. In case of insolvent companies, however, the lenders may not be interested in converting the entire amount of their debt into equity and that they insist for the payment of the settlement amount over a very short period of time say from three months to one year and in addition to the said payment, they may agree for accepting some percentage of restructured equity share capital of the Corporate debtor, so that in case the Corporate Debtor revives and starts making profits, they may offload their equity and compensate them for the loss /sacrifice they have made while settling with the Corporate Debtor.
- (c) Waiver of part of the principal, interest or other charges where the resolution applicant proposes for waiver for outstanding principal, interest and other charges, which in his opinion is not sustainable. The resolution applicant proposes to pay the agreed settlement amount after waivers as above said over a short period of time and in addition accept some percentage of the restructured equity capital of the Corporate debtor.
- (d) Modification in security of the secured financial creditors of the corporate debtor can also be used to restructure the debt to resolve its insolvency. The securities may be offered to be disposed off/released to discharge the entire or part of the claims of the financial creditors. The resolution applicant may bring in another financial partner/ investor for infusion of funds while the some or the total securities held by the Financial Creditors may be released in the favor of the new investor.

- (e) Modification in credit limits may also be introduced through resolution plan where the fund based and non-fund-based credit facilities are restructured and the credit limits are modified based on the actual requirement of the corporate debtor post resolution. Continuation of the credit limits, however, depends upon the creditworthiness of the resolution applicant.
- (f) Restructuring of secured long-term borrowings – it is undertaken for reducing the cost of capital, improving liquidity and increasing the cash flow and is effected by making the modifications, conversion etc. as stated above.
- (g) Restructuring of unsecured long-term borrowing – it depends on the type of borrowing which can be in form of public deposits, private loans (unsecured), unsecured bonds or debentures. Here also, objective is to reduce the interest cost, synchronization of the cash inflow and outflow by changing existing dues and /or the repayment period etc. The said restructuring also involves modification conversion etc. as stated above.
- (h) Restructuring of short-term borrowings – these borrowings are restructured by converting some part of them as long term, reducing interest rate and /or existing dues and also by renegotiating the existing terms.

Until recently, there had been several debt restructuring mechanisms such as framework for revitalizing distressed assets, Corporate Debt Restructuring Scheme (CDR), the Joint Lenders' Forum (JLF), Flexible Structuring of existing long term Project loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A). These schemes, based on various circulars and guidelines issued by the Reserve Bank of India (RBI), were used as a tool for restructuring the debt of a Corporate Debtor.

In order to harmonize and simplify the framework for the resolution of stressed assets, the Reserve Bank of India (RBI), vide a circular dated 07.06.2019 has withdrawn these schemes. The Joint Lenders' Forum (JLF), an institutional mechanism for resolution of stressed accounts, also stands discontinued. Therefore, before initiating insolvency proceedings against the corporate debtor, the banks/ financial institutions are required to recourse the formal restructuring as per the guidelines issued in the circular by RBI on 07.06.2019. The framework as provided by the RBI through circular issued on 07.06.2019; provides the procedure for debt restructuring of the company to resolve the distress situation.

EQUITY RESTRUCTURING

Equity restructuring involves reorganization of equity capital. Under the provisions of the Code, the equity restructuring can be brought out by various ways, which is generally part of the greater corporate restructuring process, operational or financial or both. The same includes the following:

- Alteration of share capital
- Reduction of share capital
- Buy-back of shares

Alteration of share capital Legal Provisions:

- Section 61 to 64 read with Section 13 and 14 of the Companies Act, 2013
- Companies (Share Capital and Debentures) Rules, 2014.
- National Company Law Tribunal Rules, 2016

Reduction of share capital Legal Provisions:

- Section 66 of the Companies Act, 2013
- Rule 2 to 6 of the National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016
- SEBI (LODR) Regulations, 2015

Buy-Back Legal Provisions:

- Section 68 to 70 of the Companies Act, 2013
- Rule 17 of Companies (Share Capital and Debentures) Rules, 2014
- Securities and Exchange Board of India (Buyback of Securities) Regulations, 2018

The strategies for restructuring can be used jointly or independently depending upon the operational and financial assessment by the resolution applicant and negotiation with the CoC. The restructuring strategies of mergers/ amalgamations/ demergers, etc. are mostly used for the purposes of corporate restructuring and have rarely been employed as a tool for debt restructuring. It may also be noted that the schemes of mergers, amalgamations and demergers may be approved by CoC and thereafter by Adjudicating Authority (NCLT).

CASE LAW

The acquisition of Bhushan Steel Ltd (BSL) for Rs. 35,200 crores by Bamnival Steel Ltd (BNL), a subsidiary of Tata Steel Ltd. in May 2018, has been the first major case of acquisition of a major stressed asset under the insolvency and Bankruptcy Code. BNL completed the acquisition of controlling stake of 72.65 per cent in BSL in accordance with the approved resolution plan under the Corporate insolvency resolution Process (CIRP) of the IBC. Tata Steel has paid Rs. 35,200 crores in cash to acquire Bhushan Steel. It would pay another Rs. 1,200 crores over next 12 months to operational creditors.

The promoters of BSL approached the National Company Law Appellate Tribunal (NCLAT) over issue of ineligibility of Tata Steel to acquire BSL. L&T, an operational creditor also approached the Hon'ble NCLAT over issue of unfair distribution of settlement amount for its claim under the provisions of IBC, 2016.

NCLAT upheld the acquisition of Bhushan Steel, rejecting allegations of its ineligibility by the promoters of the company. The NCLAT also rejected the claims of L&T, an operational creditor of Bhushan Steel Ltd, opposing Tata Steel's resolution plan seeking a higher priority in debt settlement.

The NCLAT said that Tata Steel UK, a foreign subsidiary of Tata Steel, which was fined by an English Court in February 2018 under UK Act, had a provision of 'imprisonment for a term not exceeding twelve months, or a fine, or both'. While, the provision in section 29A(d) of the Code, which deals with eligibility, stipulates "has been convicted for any offence punishable with imprisonment for two years or more", cannot be equated with Section 33(1)(a) of the U.K Act, said NCLAT. Section 29A of the IBC mandates that a person convicted for any offence punishable with imprisonment for two years or more is ineligible for submitting a resolution plan.

ACQUISITION UNDER THE CODE: EXEMPTION FROM SEBITAKEOVER CODE

- The provision is envisaged to boost acquisitions of such companies.
- The acquisition of Bhushan Steel Ltd. by Tata Steel Ltd., acquisition of Electrosteel Steels Ltd. by Vedanta resources Ltd., acquisition of Monnet Ispat & Energy Ltd. by JSW Steel Ltd. under IBC were exempted from the open offer requirements.
- The acquirers of distressed companies are not under the obligation to make an open offer. The relaxation is granted with an intention to ease the additional burden on the acquirer from infusing an additional capital pursuant to acquiring the stake in the company. Moreover, in majority of the distressed companies under CIRP or where process is over, the dues of even the secured creditors have not been paid in full and as a result the liquidation value in respect of equity shareholders is nil.

Over the claims of L&T, which had supplied goods and machineries over Rs.900 crores, NCLAT said that Tata Steel's resolution plan was fair towards operational creditors of Bhushan Steel which has a total demand of Rs. 1,422 crores. The NCLAT observed that the company has allotted Rs. 1,200 crores for them and L&T plea for a higher priority could not be accepted.

Moreover, it also declined the plea of the promoter's family, contending Tata Steel's Resolution Plan' was illegal as it purports to transfer shares' of the 'preference shareholders' of Bhushan Steel without their consent for a fixed consideration of Rs.100 as against Rs. 2,269 crores.

RESOLUTION MEASURES UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

As stated earlier, the Insolvency and Bankruptcy Code, 2016 read with Regulation 37 of CIRP Regulations provides for various measures to resolve the insolvency of the corporate debtor. These measures are detailed as follows:

- **Transfer of all or part of the assets of the corporate debtor to one or more persons:**

The resolution applicant may acquire part of the assets and may opt to transfer some assets to one or more persons in order to fetch a better value towards the resolution of the corporate debtor. The consideration towards the said assets is utilized to repay the dues of corporate debtor to its creditors.

- **Sale of all or part of the assets whether subject to any security interest or not:**

The resolution applicant, as its resolution strategy, may provide for sale of the assets of the Corporate Debtor in full or in part whether subject to any security interest or not. For example, if the Corporate Debtor holds assets which may be subject to the security interest and which may bring benefit to the Corporate Debtor on their sale (through sale of all or part of assets), the resolution applicant may provide for sale of such assets and provide for settlement of debt of the Corporate Debtor or infusion for improvement of operations of the Corporate Debtor or for activity of any other similar nature through the funds as realized from sale of such assets.

- **Restructuring of the corporate debtor, by way of merger, amalgamation and demerger:**

As discussed earlier, the Resolution Plan may also provide for merger/amalgamation/demerger or combination of such arrangements in order to resolve the Corporate Debtor, as best suited to it.

- **The substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons:**

The resolution applicant may provide for the substantial acquisition of the shares of the Corporate Debtor or the merger or consolidation with one or more persons as may be beneficial to the corporate debtor to fetch the maximized value of its assets and resolve the state of insolvency. The prohibition set out under the proviso to Regulation 3(2) of the takeover regulations, which restricts an acquirer from acquiring shares or voting rights in a target company, resulting in aggregate shareholding of the acquirer, along with persons acting in concert, exceeding the maximum permissible non-public shareholding of 75%, will not be applicable to an acquirer acquiring shares pursuant to a resolution plan approved under Section 31 of the Code.

The following sub-regulation (2a) was added to regulation 10 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 vide Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Second Amendment) regulations, 2020 on 22nd June, 2020 which states the following:

“(2a) any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164a of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub-regulation (1) of regulation 3 and regulation 4.”

- **Cancellation or delisting of any shares of the corporate debtor, if applicable:**

Equity restructuring by cancellation or reduction or delisting of shares of the corporate debtor may be quite useful in resolution of the corporate debtor as the same may save the RA from time consuming transfer procedures and other problems. Moreover, the delisting procedure under the SEBI (Delisting of Equity Shares) Regulations 2009 will no longer apply to any delisting of equity shares pursuant to a resolution plan approved under Section 31 of the Code, if the resolution plan satisfies the following conditions:

- ✓ the plan sets out a specific delisting procedure; or
- ✓ the plan provides an exit option to existing public shareholders at a price specified in the plan which shall not be less than the liquidation value determined under regulation 35 of the Insolvency and Bankruptcy Board of

India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and;

- ✓ further, if the promoters are provided with the opportunity of exiting under the plan at a price, then the delisting should be at a price not less than the price at which the promoters are provided exit.

- **Satisfaction or modification of any security interest:**

The resolution applicant may also satisfy or modify any of the security interest(s) as held by the Financial Creditor(s) as part of the debt restructuring.

- **Curing or waiving of any breach of the terms of any debt due from the corporate debtor:**

The Corporate Debtor may suffer from breach(es) of terms of the debt owed by it to the creditors which may play a vital role in the process of its acquisition by the resolution applicant. Thus, the resolution applicant in order to acquire the Corporate Debtor free from past breaches, non-compliances which may create problems in the future, as per its due diligence, may provide for cure of such breach(es) or may provide for waiver of such breach(es).

- **Reduction in the amount payable to the creditors:**

The resolution applicant as part of the debt restructuring may provide for settlement of the debt of the creditors at a price lower than their dues/ claims since the payment of the entire dues/claims of the creditors may not be feasible and viable for the resolution applicant in order to acquire the Corporate Debtor and resolve its insolvency.

- **Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor:**

The debt restructuring, as designed/ formulated by the resolution applicant for the Corporate Debtor (as a part of the Resolution Plan), may provide for the extension of maturity date or change in the interest rate or other terms of the debt due from the Corporate Debtor.

- **Amendment of the constitutional documents of the corporate debtor:**

Resolution applicant, as part of the corporate restructuring may require the amendments in terms of the constitutional documents of the corporate debtor, Memorandum of Association and Articles of the Association which inter-alia other things, define the powers and duties of the members and Board of directors of the Company. The amendments of the constitutional documents of the corporate debtor can aid the resolution applicant in process of acquisition of the Corporate debtor and implementation of the Resolution Plan effectively.

- **Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose:**

The Resolution Plan by the resolution applicant may provide for the issuance of the securities including shares or debentures of the Corporate debtor in lieu of cash, property, securities or in exchange for the claims/ interests or other appropriate purpose. The resolution applicant may provide for issuance of securities of the Corporate debtor to itself for the funds it might bring in, for the property it might bring in and may provide for issuance of the securities to creditors in conversion of their debt/ claims in full or in part as consideration to them or for any other appropriate purpose as may be beneficial or helpful in resolution of the Corporate debtor.

- **Change in portfolio of goods or services produced or rendered by the corporate debtor:**

For operational/ organizational restructuring, the resolution applicant may provide for change in portfolio of goods or services produced or rendered by the corporate debtor which may or may not be part of its current portfolio.

- **Change in technology used by the corporate debtor:**

The resolution applicant may provide for the change in technology or process used by the corporate debtor for the resolution of insolvency of the corporate debtor as there may be case that the Corporate Debtor may be suffering from obsolete technologies or process.

- **Obtaining necessary approvals from the Central and State Governments and other authorities:**

The resolution applicant, if required, would provide for obtaining the necessary approvals (on basis of current processes/ goods/ services of the corporate debtor or on the basis of the future operational processes/goods/ services of the Corporate Debtor as required under the resolution plan from the Central and State Government and other authorities.

- **Sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets:**

It has been noted that some Corporate Debtors have assets in both functional and non-functional locations across the country. The Resolution Applicant who are interested in the functional asset or the asset in one location/business are not interested in the others in such circumstances. It is also observed that the Resolution Applicant is unwilling to implement a resolution plan because the extra investment demand for the non-functional asset or the assets in other locations/businesses becomes too high. CIRP Regulations also allow CoC to explore resolutions of part assets/businesses by allowing submission of different resolution plans for these part assets/businesses.

ACQUISITION OF CORPORATE DEBTOR UNDER LIQUIDATION THROUGH SALE OF ASSETS AS A GOING CONCERN

Regulation 32A of IBBI (Liquidation Process) Regulations, 2016

In common usage, a “going concern” sale occurs on a “as is, where is” basis and covers all of the company’s assets, liabilities, properties, and business. According to the IBBI (Liquidation) Regulations, 2016 the liquidator may consider selling the CD or its company as a going concern based on recommendations from the CoC or Stakeholder Consultation Committee. According to Section 53 of the Code, the Liquidator will use the sale profits to pay off the CD’s debts. It is outlined in Regulation 32A of the IBBI (Liquidation) Regulations, 2016, how and when CD will be sold as a going concern during the bankruptcy process.

Regulation 32A states as follows:

1. Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.
2. For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.
3. Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of Regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.
4. The liquidator may sell the assets of the corporate debtor under clause (e) of regulation 32 exclusively only at the first auction.

Explanation: For the purpose of this sub-regulation, it is hereby clarified that the sale of the corporate debtor under clause (e) of regulation 32 cannot be offered as the only option for bidders after the first auction.

5. Where the liquidator is of the opinion that it is viable to run the corporate debtor as a going concern, he shall consult the consultation committee and only on its advice he shall run the affairs of the corporate debtor as a going concern to the extent approved.

Chapter VI (comprising regulations 32 to 40) of the IBBI (Liquidation Process) Regulations, 2016 makes the following provisions for the realization of assets. The IBBI had inserted Regulation 32A in the IBBI (Liquidation Process) Regulations, 2016 to provide for methods for sale of assets as a going concern as a resolution measure for the CD.

Regulation 32 of liquidation regulations provides as below: The liquidator 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.

In Dr. Devaiah Pagidipati v. Southern Online Bio Technologies Limited, NCLT Hyderabad held that sale of assets of Corporate Debtor undergoing liquidation as a going concern does not require NCLT approval under IBC. However, given the lacuna in the IBC framework on measures that can be adopted in case of such sale, NCLT order may be needed to effectuate the sale of CD as a going concern and for claiming certain reliefs and concessions. Without granting additional reliefs that are essential and required to operate the company as an ongoing concern, the simple purchase of the unit as a going concern is useless. To put it another way, buying the business/assets of business as a going business without giving the applicant the reliefs defeats the purpose of doing so.

In M/s. Visisth Services Limited, v. S. V. Ramani, & Ors., NCLAT held that Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 provides that Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. It means sale of both assets and liabilities, if it is stated on 'as is where is basis.

In Bank of Baroda v. Topworth Pipes & Tubes Pvt. Ltd., NCLT held that successful bidder may not be held liable for any past liabilities of the Corporate Debtor prior to the effective date including liabilities arising in enquiries, investigations, assessments, claims, litigations, arbitrations or other judicial, regulatory, administrative proceedings in relation to or in connection with the Corporate Debtor during sale of corporate debtor as going concern during liquidation.

What is the mode of sale provided to Liquidator?

As per Regulation 33 of the IBBI (Liquidation Process) Regulations, 2016, the liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I. The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when

- a) the asset is perishable;
- b) the asset is likely to deteriorate in value significantly if not sold immediately;
- c) the asset is sold at a price higher than the reserve price of a failed auction; or
- d) the prior permission of the Adjudicating Authority has been obtained for such sale:

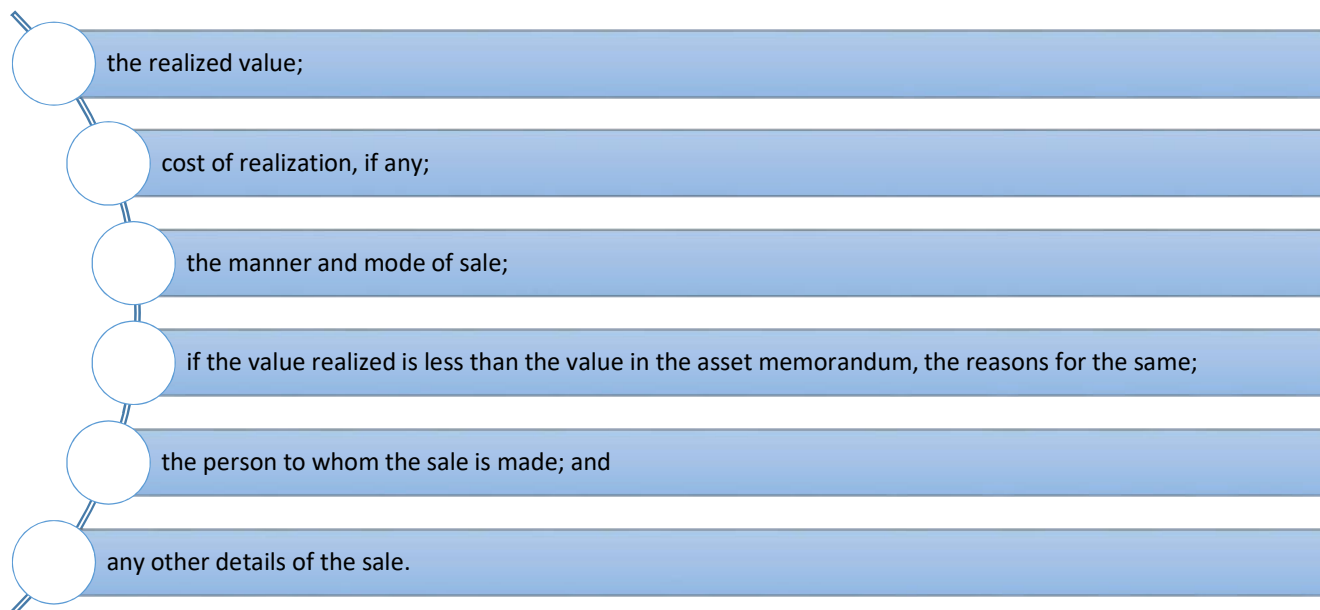
Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

- a) a related party of the corporate debtor;
- b) his related party; or any professional appointed by him.
- c) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

In Alchemist Asset Reconstruction Co. Ltd. Vs. Moser Baer India Ltd. [CA-769(PB)/2019 in C.P. No. IB 378(PB)/2017] NCLT, New Delhi order dt. 16.07.2019, It was stated that the proper interpretation on clauses (a) and(b) of the regulation 33 of Liquidation Process Regulations would be that a liquidator is entitled to sell the assets without requirement of prior permission after reaching the conclusion that the assets are perishable and it is likely to deteriorate significantly in value if not sold immediately. Otherwise, the purpose of Regulation would be defeated if time is required to be spent in filing an application and taking permission, because the assets which are perishable may not remain available for sale and perish or it may deteriorate significantly in value, if not sold immediately.

In MRG Estates LLP Vs. Akash Shinghal, Liquidator, Amira Pure Foods Pvt. Ltd. &Ors. [W.P.(C) 10023/2020] HC, New Delhi order dt. 15.12.2020, The HC directed IBBI to consider the petition as a representation on the issue of adoption of Swiss Challenge method as a form of an auction under the Liquidation Process Regulations.

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When shall the liquidator distribute the proceeds from realization to the stakeholders?

As per Regulation 42 of the IBBI (Liquidation Process) Regulations, 2016, 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. Further the insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made.

CASE LAWS

In the matter of **Y. Shivram Prasad & Ors. v. S. Dhanapal & Ors.**, the NCLAT passed the impugned order of liquidation as Committee of Creditors did not find any resolution plan viable and feasible. The promoters submitted that they should have been given an opportunity to settle the dues. While rejecting the said submission, the NCLAT clarified that settlement can be made only at three stages, i.e., before admission, before constitution of CoC and in terms of section 12A of the Code and such stages were over in this instant matter. It, however, observed that during the liquidation process, it is necessary to take steps for revival and continuance of the Corporate debtor by protecting it from its management and from a death by liquidation.

Wherein this appellate tribunal having noticed the decision of the Hon'ble Supreme Court in **"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra)"** and **"Meghal Homes Pvt. Ltd."** observed and referring to the matter of **"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra)"** where Hon'ble Supreme Court observed that "What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern" and NCLAT in its matter further held that "in view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' and 'Swiss Ribbons Pvt. Ltd.', we direct the 'liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation, etc. as prescribed under Section 35 of the Code. If the members or the 'Corporate debtor' or the 'creditors' or a class of creditors like 'Financial Creditor' or 'Operational Creditor' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the adjudicating authority i.e. National Company

Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the 'Corporate debtor' so as to enable the employees to continue".

In the matter of **Edelweiss Asset Reconstruction Company Ltd. v. Bharati Defence and Infrastructure Ltd.**, the Resolution Professional (RP) filed an application seeking approval of the resolution plan submitted by an resolution applicant, who is a Financial Creditor with 82.7% voting share in the CoC. The plan provided that the resolution applicant will sell the Corporate debtor in two years. NCLT, Mumbai Bench noted that the plan does not give due consideration to the interest of all stakeholders, seeks several exemptions, and contains a lot of uncertainties and speculations. It provides for generation of income from ongoing operations and no upfront money is brought in by the resolution applicant. The NCLT Bench also noted that the resolution applicant has proposed to hold majority equity in the Corporate debtor, run its operations, enhance its value and over a period endeavour to find a suitable investor/buyer for the same.

Relying on the judgment in the matter of Binani Industries Limited, the NCLT Bench observed: ".....resolution plan is for insolvency resolution of the Corporate Debtor as a going concern and not for the addition of value and intended to sale the corporate debtor". It observed that resolution applicant is essentially extending the CIRP period to find an investor, which is not the intention of the legislature. It further observed: "if the ultimate object in the resolution plan is to sell the company, then it can be achieved by sale as a going concern during the liquidation process". Accordingly, it rejected the resolution plan and ordered for liquidation.

LESSON 5 - LIQUIDATION OF CORPORATE PERSON

REGULATORY FRAMEWORK

- Section 33 to 54 of the Insolvency and Bankruptcy Code, 2016
- The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

INTRODUCTION

Liquidation of corporate person is considered to be the last resort in order to recover money under the Insolvency and Bankruptcy Code, 2016 ('Code'). When the resolution plan fails and no other way can be adopted, then dissolution of the company is the only resort. An auction is conducted where the assets of the company is sold to realize money in order to return it to the lenders. The provisions dealing with the liquidation of corporate persons are covered in the Chapter III of the Part II of the Code.

Sections 33 to 54 in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 lays down the law relating to liquidation process for corporate persons.

An attempt is first made to resolve the insolvency of corporate debtor through corporate insolvency resolution process laid down in Chapter II of Part II of the Code. The provisions relating to liquidation in Chapter III of Part II of the Code comes into effect if the attempts to resolve corporate insolvency under Chapter II of the Code fail.

It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation.

The Insolvency and Bankruptcy Board of India has made the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('Liquidation Regulations') to regulate the liquidation process under Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India ('Board').

The Hon'ble Supreme Court in the matter of '**Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.**', observed:

"What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern

INITIATION OF LIQUIDATION

Section 33 of the Code lists out the triggers for initiating the liquidation process for corporate persons. Section 33 of the Code reads as follows:

1. Where the Adjudicating Authority,
 - (a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or
 - (b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –
 - (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
 - (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
 - (iii) require such order to be sent to the authority with which the corporate debtor is registered.
2. Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation. – For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the

information memorandum.

3. Where the resolution plan approved by the Adjudicating Authority under Section 31 or under sub-section (1) of section 54L is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii), (iii) of clause (b) sub-section (1).
4. On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).
5. Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority,
6. The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
7. The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

1. Where the Adjudicating Authority does not receive a resolution plan before the expiry of Corporate Insolvency Resolution Process or Fast Track Insolvency Process under the Code

2. Where the Adjudicating Authority rejects the resolution plan for non-compliance of requirements under Section 31 of the Code

WHEN CAN LIQUIDATION BE ORDERED

3. Where, at any time before confirmation of resolution plan, including at any time before the preparation of the information memorandum, the committee of creditors resolve to liquidate the corporate debtor

4. Where the corporate debtor contravenes the terms of the resolution plan

1. **Where the Adjudicating Authority does not receive a resolution plan** – If the adjudicating authority (AA), before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30, it shall pass an order requiring the corporate debtor to be liquidated in the manner as laid down in Chapter III of Part II of the Code. [Section 33(1)]
2. **Where the Adjudicating Authority rejects the resolution plan** – if the adjudicating authority rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall pass an order requiring the corporate debtor to be liquidated in the manner as laid down in Chapter III of Part II of the Code. In both the scenarios above i.e., where the Adjudicating Authority does not receive a resolution plan or where the Adjudicating Authority rejects the resolution plan, it shall:
 - pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
 - issue a public announcement stating that the corporate debtor is in liquidation; and
 - require such order to be sent to the authority with which the corporate debtor is registered. [Section 33(1)]

3. **Where, at any time before confirmation of resolution plan, the committee of creditors resolve to liquidate corporate debtor** – Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six percent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1). [Section 33(2)]

It may be noted that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum. [Explanation to Section 33(1)]

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has amended sub-section (2) of section 33 to provide for a reduced threshold from seventy-five percent to sixty-six percent of voting share for obtaining the approval of the committee of creditors for making an application to the Adjudicating Authority to pass a liquidation order.

4. **Where the corporate debtor violates the terms of the resolution plan** – Where the resolution plan approved by the Adjudicating Authority under section 31 (Corporate Insolvency Resolution Process) or under sub-section (1) of section 54L (Pre- packaged Insolvency Resolution Process), is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii), (iii) of clause (b) sub-section (1). [Section 33(3)]

In the matter of **Small Industries Development Bank of India v. Tirupati Jute Industries Limited**, the Adjudicating Authority noted that the resolution plan, which has been submitted for its approval, was subject to extinguishment of all claims (except criminal proceedings) against the Corporate Debtor, exemption of all taxes/dues by the Government/ local authorities, and closure of all proceedings pending against the Corporate Debtor relating to such dues. The Adjudicating Authority rejected the plan and ordered for liquidation. It observed that such a plan should not have been approved by the CoC, as it was not consistent with the provisions of section 30(2) (e) of the Code. It also observed that the Resolution Professional did not give correct advice when he submitted the plan for approval of CoC and therefore, it would not be proper to appoint him as the Liquidator.

On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1). [Section 33(4)]

Bar to filing of suits and legal proceedings – Section 33(5) provides that subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority,

Section 33(6) further provides that the provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

“Financial Sector Regulator” means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government. [Section 3(18)]

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has amended section 34 so as to require a written consent of resolution professional in specified form for appointment as a liquidator.

APPOINTMENT OF LIQUIDATOR AND FEE TO BE PAID

Section 34 of the Code provides for the appointment of liquidator and the fees to be paid to him.

According to section 5(18) of the Code, a “liquidator” means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be.

Resolution Professional to act as liquidator – Section 34(1) provides that where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II or for the pre-packaged insolvency resolution process under Chapter III -A shall, subject to submission of a written consent by the resolution professional to the Adjudicating Authority in specified form, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under subsection (4).

As per Regulation 3 of the Liquidation Regulations, an insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director, is independent of the corporate debtor.

A person shall be considered as independent of the corporate debtor if he is:

- eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013;
- not a related party of the corporate debtor; or
- has not been an employee or proprietor or a partner in the last three financial years:
 - (i) of a firm of auditors or secretarial auditors or cost auditors of the corporate debtor; or
 - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor contributing 10% or more of the gross turnover of such firm.

Powers to vest in liquidator – Section 34(2) further provides that on the appointment of a liquidator under section 34, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

Personnel of corporate debtor to extend all assistance and cooperation to the liquidator – Section 34(3) mandates that the personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of section 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

Replacement of resolution professional – Sub-section (4) of section 34 makes provision for the replacement of resolution professional. According to sub-section (4), the Adjudicating Authority shall by order replace the resolution professional, if:

(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or

(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or

(c) the resolution professional fails to submit written consent under sub-section (1).

For the purposes of clause (a) and clause (c) of sub-section (4), the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator. [Section 34(5)]

The Board shall propose the name of another insolvency professional along with written consent from the insolvency professional in the specified form within ten days of the direction issued by the Adjudicating Authority under sub-section (5). [Section 34(6)]

In the matter of **CA V. Venkata Sivakumar Vs. IDBI Bank Ltd.**, NCLAT (Chennai Bench) with respect to removal of liquidator held that the Code does not explicitly state the grounds for removal of liquidator. In the absence of specific provisions, Adjudicating Authority may resort to Section 33 & 34 of the Code and Section 276 of the Companies Act, 2013, which provides for the removal and replacement of liquidators on various grounds. It also held that no Liquidator has any personal right to continue in Liquidation and the Adjudicating Authority can order for replacement of the Liquidator, recording sufficient reasons, as per law. It is by the virtue of the Section 16 of the General Clauses Act, 1897 an Adjudicating Authority has the power to remove the Liquidator.

Taking charge as liquidator

In the case of 'S. Muthuraju Vs. Commissioner of Police and Another', a group / mob of unknown persons hurled threats with weapons and did not allow the liquidator to enter the premise of the corporate debtor (CD) and carry out his functions. The Hon'ble NCLT directed the Superintendent of Police to give adequate police protection to the liquidator to enable him to perform his duties.

Can CoC challenge the appointment of liquidator after the liquidation order is passed by the Adjudicating Authority?

In the case of '**Punjab National Bank Vs. Mr. Kiran Shah**, Liquidator of ORG Informatics Ltd.', NCLAT held that after the liquidation order, the CoC has no role to play and that they are simply claimants, whose matters are to be determined by the liquidator and hence cannot move an application for his removal.

The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator. [Section 34(7)]

Fee for the conduct of liquidation proceedings – Section 34(8) provides that an insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

The fees for the conduct of the liquidation proceedings under sub-section (8) shall be paid to the liquidator from the proceeds of the liquidation estate under section 53. [Section 34(9)]

As per Regulation 4 of the Liquidation Regulations, the fee payable to the liquidator must be in accordance with the decision taken by the Committee of Creditors under Regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. In cases where the Committee of Creditors has not set a fee for the liquidator, the Consultation Committee may do so at its first meeting. Consultation Committee means Stakeholders Consultation Committee.

In cases other than the above-mentioned scenarios, the liquidator shall be entitled to a fee at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, or as a percentage of the amount realised net of other liquidation costs, and of the amount distributed.

The matter of replacing the Resolution Professional (RP) was considered by the National Company Law Appellate Tribunal (NCLAT) in the matter of '**Devendra Padamchand Jain v. State Bank of India**'. This case dealt with an appeal by the then RP of VNR Infrastructures, against the order of the National Company Law Tribunal (NCLT), Hyderabad bench, removing him and appointing another liquidator.

The NCLAT held that apart from the committee of creditors, the NCLT is also empowered to remove the RP, but it should be for the reasons and in the manner provided under the relevant section. In this case, RP had failed to properly examine the resolution plan and had not stated that the plan he submitted met all the requirements of section 30(2) of the Code. The NCLAT held that the NCLT has jurisdiction to remove the RP if it is not satisfied with its functioning, which amounts to non-compliance with section 30(2) of the Code.

PUBLIC ANNOUNCEMENT BY LIQUIDATOR

As per Regulation 12 of the Liquidation Regulations, the liquidator shall make a public announcement calling upon stakeholders to submit their claims or update their claims submitted during the corporate insolvency resolution process in **Form B** of Schedule II within five days from his appointment.

The Liquidator shall cause Public Announcement to be published via following mediums:

- in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the corporate debtor conducts material business operations;
- on the website, if any, of the corporate debtor; and
- on the website, if any, designated by the Board for this purpose.

Due to the corporate debtor's lack of liquid assets in the case of Hind Motors India Limited, it was challenging to cover the liquidation expenses. As a result, the Adjudicating Authority ordered that the applicant should pay for the costs associated with the public announcement and other process related cost which inter alia shall form part of the liquidation costs.

REPORTING

- (i) As per Regulation 5 of the Liquidation Regulations, the Liquidator shall prepare and submit the following documents to the Adjudicating Authority in the manner specified under these Regulations:
 - Preliminary Report
 - Asset Memorandum
 - Progress Report
 - Asset Sale Report
 - Minutes of consultation with stakeholders
 - Final Report prior to dissolution
- (ii) The liquidator shall preserve a physical as well as an electronic copy of the above-mentioned reports and minutes for eight years after the dissolution of the corporate debtor.
- (iii) Liquidator shall also make the reports and minutes referred above available to a stakeholder in either electronic or physical form, on receipt of:
 - an application in writing;
 - costs of making such reports and minutes available to it; and
 - an undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person.

PRELIMINARY REPORT

Regulation 13 of the Liquidation Regulation provides that the liquidator shall submit a Preliminary Report to the corporate person within 75 days from the liquidation commencement date containing details w.r.t:

- a) the capital structure of the corporate person;
- b) the estimates of its assets and liabilities as on the liquidation commencement date based on the books of the corporate person;
- c) Whether he intends to make any further inquiry in to any matter relating to the promotion, formation or failure of the corporate person or the conduct of the business thereof; and
- d) the proposed plan of action for carrying out the liquidation, including the timeline within which he proposes to carry it out and the estimated liquidation costs.

EARLY DISSOLUTION

According to Regulation 14 of the Liquidation Regulation, if the liquidator believes that the corporate debtor's realizable assets are insufficient to cover the cost of the liquidation process and that further investigation into the affairs of the corporate debtor is not necessary, the liquidator may apply to the adjudicating authority for an early dissolution of the corporate debtor and for the necessary directions.

PROGRESS REPORT

Time Period for submission of Progress Report: As per Regulation 15(1) of the Liquidation Regulations, the liquidator shall submit Progress Reports to the Adjudicating Authority and the Board as follows:

- The First Progress Report within fifteen days after the end of the quarter in which he is appointed.
- The subsequent Progress Report within fifteen days after the end of every quarter during which he acts as liquidator.

Content of the Progress Report: As per Regulation 15(2) of the Liquidation Regulations, a Progress Report shall provide all the following information relevant to liquidation:

- Appointment, tenure of appointment and cessation of appointment of professionals;
- Statement indicating progress in liquidation;
- Details of fee or remuneration;
- Developments in any material litigation, by or against the corporate debtor;
- Filing of and developments in applications for avoidance of transactions and;
- changes, if any, in estimated liquidation costs;

As per Regulation 15(3) of the Liquidation Regulations, a Progress Report shall enclose an account maintained by the liquidator showing his receipts and payments during the quarter and the cumulative amount of his receipts and payments since the liquidation commencement date.

ASSET MEMORANDUM

According to Regulation 34 of the Liquidation Regulation, the Asset Memorandum prepared by the Liquidator shall contain the following details:

- value of the asset, valued in accordance with Regulation 35 of the Liquidation Regulations;
- value of the assets or business, valued in accordance with Regulation 35 of the Liquidation Regulations;
- intended manner and mode of sale of assets or business and reasons for the same;
- expected amount of realization from sale; and
- any other information that may be relevant for the sale of the asset.

The liquidator shall file the Asset Memorandum along with the Preliminary Report to the Adjudicating Authority. The liquidator shall also share the Asset Memorandum with the Board and members of the Stakeholders Consultation Committee having voting rights after receiving an undertaking from each member of the Stakeholders Consultation Committee that such member shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person.

ASSET SALE REPORT

According to Regulation 36 of the Liquidation Regulation, pursuant to the sale of assets of the corporate debtor undergoing liquidation, the liquidator shall prepare an Asset Sale Report in respect of said asset, to be enclosed with the Progress Reports containing details with respect to the:

- realized value;
- cost of realization;
- manner and mode of sale;
- if the value realized is less than the value in the asset memorandum, the reasons for the same;
- the person to whom the sale is made; and

➤ any other details of the sale.

POWERS AND DUTIES OF LIQUIDATOR

Section 35 provides a non-exhaustive list of powers and duties of the liquidator to ensure orderly completion of the liquidation proceedings.

Section 35(1) provides that subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties:

- (a) to verify claims of all the creditors;
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report.
- (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;
- (e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;
- (f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

- (g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business
- (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;
- (i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
- (j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- (k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;
- (l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;
- (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- (o) to perform such other functions as may be specified by the Board.

Section 35(2) further provides that the liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53.

First proviso to section 35(2) provides that any such consultation shall not be binding on the liquidator. The second proviso further provides that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

In the matter of **Rajive Kaul Vs. Vinod Kumar Kothari & Ors.**, liquidator approached Adjudicating Authority for removal of the nominee directors of the corporate debtor on account of their non-cooperation, active obstruction, breach of duty and breach of code of conduct. The Adjudicating Authority held that the liquidator has the power to remove and also appoint nominee directors of the corporate debtor which the company is bound to follow. The above Adjudicating Authority order was subject to an appeal. Accordingly, the Appellate Authority upheld the Adjudicating Authority's order and held that it is a fundamental principle of law that a company in liquidation acts through the liquidator who fills the role of the company's board of directors for the purpose of carrying out its legal obligations. It was further held that the liquidator is armed with requisite powers to remove the nominee directors and is entitled to nominate the directors, and the company is mandated to act upon the replacement proposal of the existing nominee directors and liquidator is not required to inform the reasons for replacing nominee directors

As per Regulation 7 of the Liquidation Regulations, Liquidator also has power to appoint professionals to assist him in the discharge of his duties during the liquidation process. Remuneration payable to such appointed professionals shall form part of the liquidation cost. While appointing the professionals, Liquidator should refrain from appointing a professional:

- who is his relative or;
- is a related party of the corporate debtor or;
- has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date.

LIQUIDATION ESTATE

Section 36 provides for the creation of a liquidation estate comprising the assets of the corporate debtor as set out in section 36(3). Section 36 also lists out the assets which are to be excluded from the liquidation estate. The Central Government has been given the power to notify assets, in consultation with the appropriate financial sector regulators, which will be excluded from the estate in the interest of efficient functioning of the financial markets.

Section 36(1) provides that for the purpose of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

Section 36(2) further provides that the liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

Liquidation estate shall comprise all liquidation estate assets – Section 36(3) provides that Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following

Assets to be included in the liquidation estate:

- (a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
- (c) tangible assets, whether movable or immovable;
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the determination of ownership by the court or authority;

- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

What shall not be included in the liquidation estate assets?

- (a) assets owned by a third party which are in possession of the corporate debtor, including –
 - (i) assets held in trust for any third party;
 - (ii) bailment contracts;
 - (iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;
 - (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
 - (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.
- (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;
- (c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) assets of any Indian or foreign subsidiary of the corporate debtor; or
- (e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Regulation 46A of the IBBI (Liquidation Process) Regulations, 2016, provides for exclusion of certain assets from the liquidation estate. It specifies that wherever the corporate debtor has given possession to an allottee in a real estate project, such asset shall not form a part of the liquidation estate of the corporate debtor for the purposes of clause (e) of sub-section (4) of section 36.

Are the dues in respect to Provident Fund/Pension Fund/Gratuity Fund part of the liquidation estate?

In the case of '**Precision Fasteners Ltd. vs. Employees Provident Fund Organisation**', the liquidator sought a declaration regarding attachment of movable and immovable properties of the CD (under liquidation) under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 as null and void to enable him to dispose of these properties alongside other assets of the CD. The AA noted that in terms of the Code, the dues in respect to Provident Fund/Pension Fund/Gratuity Fund are not part of the liquidation estate. The AA vacated the attachment with a direction to the liquidator to sell the assets and pay off the provident fund dues in priority to all claims payable by the CD in liquidation.

POWERS OF LIQUIDATOR TO ACCESS INFORMATION

Section 37 provides that the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of assets to be held in the liquidation estate. This power to access information ensures easier verification of claims and identification of assets and liabilities of the corporate debtor.

Power to access any information systems – Section 37(1) provides that notwithstanding anything contained in any other law for the time being in force, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources:

- a) an information utility;
- b) credit information systems regulated under any law for the time being in force;
- c) any agency of the Central, State or Local Government including any registration authorities;

- d) information systems for financial and non-financial liabilities regulated under any law for the time being
- e) information systems for securities and assets posted as security interest regulated under any law for the time being in force;
- f) any database maintained by the Board; and
- g) any other source as may be specified by the Board.

Financial information required by creditors – the creditors may require the liquidator to provide them any financial information relating to the corporate debtor in such manner as may be specified. [Section 37(2)]

The liquidator shall provide information referred to in sub-section (2) to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information. [Section 37(3)]

Further, as per Regulation 9 of the Liquidation Regulations, following persons shall also co-operate with Liquidator for collecting information necessary to conduct the liquidation process: h Person who is or has been an officer, auditor, employee, promoter or partner of the corporate debtor; h Person who was the interim resolution professional, resolution professional or the previous liquidator of the corporate debtor; or 1 Anyone who has possession of any of the properties of the corporate debtor.

The liquidator claimed that even after the liquidation order was passed, the corporate debtor did not transfer ownership of the assets or records in **Vijisan Jewels Pvt. Ltd. vs. Cimme Jewels Limited**. It was assumed that the former directors of the corporate debtor had intentionally stolen documents with the goal of enriching themselves as well as syphoned off all the assets without even bringing it to the liquidator's attention. In the aforementioned case, the NCLAT (New Delhi Bench) instructed the liquidator to report the theft of information pertaining to the corporate debtor to the authorities so that the proper legal action could be taken. Additionally, it also instructed the police station officer to file the report and take the necessary legal action against the former directors.

CONSOLIDATION OF CLAIMS

Section 38 prescribes a time period for the collection of claims by the liquidator. It also specifies the methods by which different categories of creditors can submit and prove their claims.

Receipt or collection of claims – Section 38(1) provides that the liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.

As per Regulation 16 of the Liquidation Regulations, 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.

Submission of claim by financial creditor – According to section 38(2), a financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility.

In cases where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner provided for the submission of claims for the operational creditor under sub-section (3).

A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the liquidator in electronic means in **Form D of Schedule II**.

Submission of claim by operational creditor – An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board. [Section 38(3)]

A person claiming to be an operational creditor of the corporate debtor, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in **Form C of Schedule II**.

A person claiming to be a workman or an employee of the corporate debtor shall submit proof of claim to the liquidator in person, by post or by electronic means in **Form E of Schedule II**.

Claims by creditor who is partly a financial and partly an operational creditor – a creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt in the manner as provided in sub-section (2) and to the extent of his operational debt under sub-section (3). [Section 38(4)].

A person, claiming to be a stakeholder other than those mentioned above shall submit proof of claim to the liquidator in person, by post or by electronic means in **Form G of Schedule II**.

Withdrawal or variation of claims – a creditor may withdraw or vary his claim under section 38 within fourteen days of its submission. [Section 38(5)]

VERIFICATION OF CLAIMS

Section 39 prescribes the procedure to be followed for the verification of claims by the liquidator.

According to section 39(1), the liquidator shall verify the claims submitted under section 38 within such time as specified by the Board. As per Regulation 30 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the verification must be done within thirty days from the last date of receipt of claims.

The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim. [Section 39(2)]

Whether a liquidator can decide a claim of an appellant where a resolution plan is not approved and order of liquidation is passed?

In the case of 'Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. & Ors.', it was held that ".....In case the resolution plan is not approved and the order of liquidation is passed, in such case, it will be open to the appellant to file claim before the liquidator in accordance with the provisions as referred to above and the liquidator will decide the claim under section 40 of the Code."

ADMISSION OR REJECTION OF CLAIMS

Section 40 lays down the procedure for the admission and rejection of claims.

Admission or rejection of claims – The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be. But if the liquidator rejects a claim, he shall record in writing the reasons for such rejection. [Section 40(1)]

Communication of decision – The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims. [Section 40(2)]

In **Vijay Kumar Gupta Vs. Canara Bank**, NCLAT held that there is no quarrel with the scheme provided under Section 38 to 42 of the Code about consolidation of claims, verification, rejection of claims and the appeal against the decision of the Liquidator. If the Liquidator gets any information after the claim has been admitted and submitted to the adjudicating authority pursuant to Section 40 of the Code, he shall not have the authority to reject or modify the admitted claim.

In the matter of **Indian Oil Corporation Ltd. Vs. Mr. Ashish Arjun Kumar Rathi, Liquidator of SBQ Steels Pvt. Ltd.**, NCLAT upheld the decision of the liquidator to reject the claims of the appellant while noting that though the liquidator has not clearly mentioned in many words as to why he rejected those two claims, he has mentioned that there is no binding agreement between the parties obligating the corporate debtor to pay interest and that reason is more than sufficient for rejecting the claim. Additionally, the NCLAT ruled that failing to provide justification for a claim rejection order is not a "prudent and reasonable course of action." A liquidator being an 'Authority' decides the matter in a quasi-judicial manner and his decision is open to challenge. Liquidator is an officer of the court and is expected to perform his duties fairly, justly, and honorably in dealing with the claims of persons.

DETERMINATION OF VALUATION OF CLAIMS

Section 41 provides that the liquidator shall determine the value of claims admitted under section 40 in such manner as may be specified by the Insolvency and Bankruptcy Board of India.

APPEAL AGAINST THE DECISION OF LIQUIDATOR

According to Section 42, a creditor may appeal to the Adjudicating Authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 amended section 42 to provide clarity that a creditor may appeal to the Adjudicating Authority against the decision of the liquidator in both the scenarios i.e, acceptance and rejection of claims.

TRANSFER OF DEBT DUE TO CREDITORS (REGULATION 30A)

1. A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.
2. Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.
3. The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31.

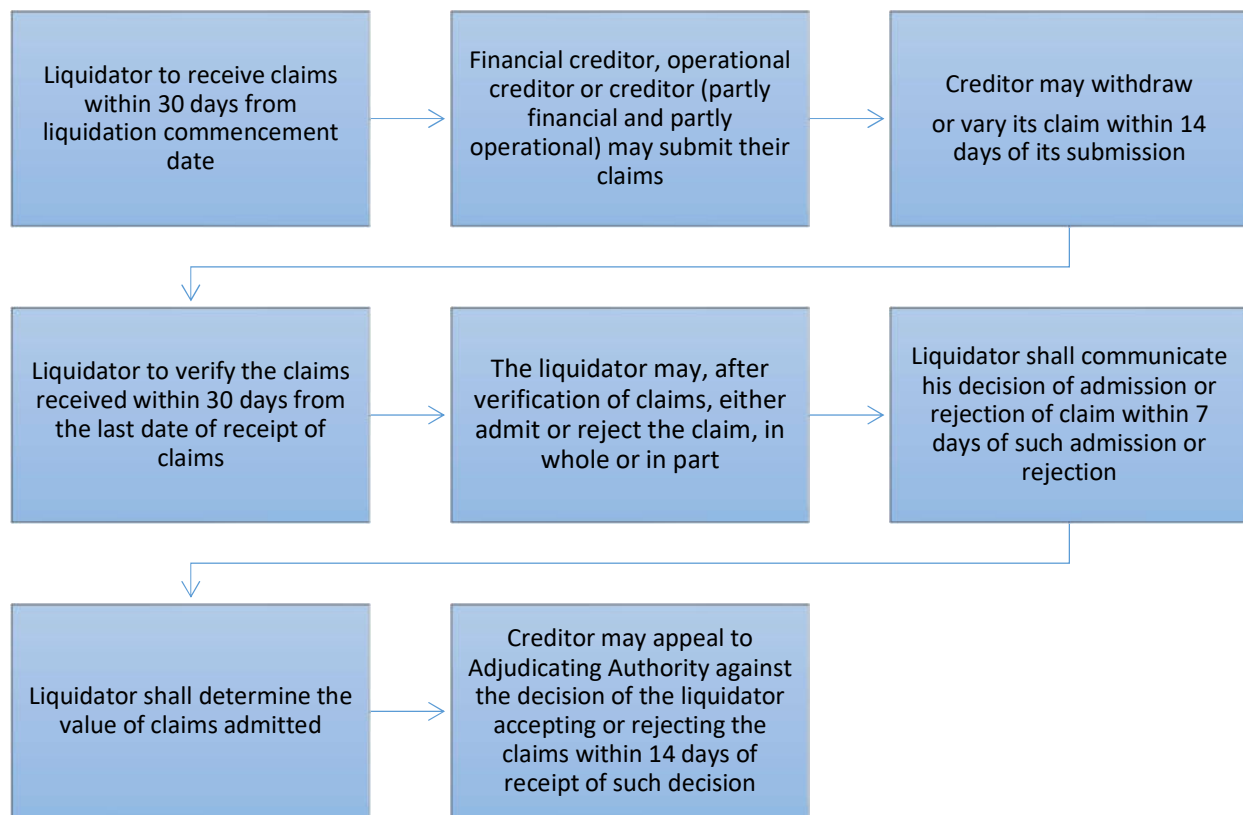
LIST OF STAKEHOLDERS

As per Regulation 31 of the Liquidation Regulations, the liquidator shall prepare a list of stakeholders on the basis of proofs of claims submitted and accepted under these Regulations mentioning:

- amounts of claim admitted
- extent to which the debts or dues are secured or unsecured, if applicable
- details of the stakeholders, and the proofs admitted or rejected in part, and the proofs wholly rejected.

The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of the claims. The list of stakeholders, as modified from time to time, shall be:

- available for inspection by the persons who submitted proofs of claim;
- available for inspection by members, partners, directors and guarantors of the corporate debtor;
- displayed on the website, if any, of the corporate debtor; and
- filed on the electronic platform of the Board for dissemination on its website.



STAKEHOLDERS CONSULTATION COMMITTEE (Regulation 31A)

Constitution of Stakeholders Consultation Committee: Pursuant to the provisions of Regulation 31A of the Liquidation Regulations, the liquidator shall constitute a Stakeholders Consultation Committee comprising of all creditors of the corporate debtor within sixty days from the liquidation commencement date based on the list of stakeholders.

Chairman of Stakeholders Consultation Committee: The Stakeholders Consultation Committee meetings must be presided over by the liquidator, who will also take minutes of the discussions. Within seven days of the liquidation commencement date, the liquidator must call the first meeting of the Stakeholders Consultation Committee. He may also call additional meetings as he deems essential in response to requests from one or more members of the consultation committee.

Scope of Stakeholders Consultation Committee: The Stakeholders Consultation Committee should advise the Liquidator on the following matters:

- remuneration of professionals appointed by the Liquidator;
- manner of sale, pre-bid qualifications, reserve price, marketing strategy and auction process;
- fees of the liquidator;
- valuation;
- manner in which proceedings in respect of preferential transactions, undervalued transaction, extortionate credit transaction or fraudulent or wrongful trading, if any, shall be pursued after closure of liquidation proceedings and the manner in which the proceeds, if any, from these proceedings shall be distributed.

The Stakeholders Consultation Committee shall advise the liquidator by a vote of not less than 66% of the representatives of the Stakeholders Consultation Committee. Also, the advice of the Stakeholders Consultation Committee shall not be binding on the liquidator.

Note: The Committee of Creditors under Section 21 of the Code shall function as the Stakeholders Consultation Committee with same voting rights till constitution of the Stakeholders Consultation Committee. The voting share of a member of the Stakeholders Consultation Committee shall be in proportion of the admitted claim.

PREFERENTIAL TRANSACTIONS AND RELEVANT TIME

Related parties often possess information of the corporate debtor's financial affairs and may collude with him to siphon off assets with the knowledge that the corporate debtor might become insolvent in the near future. Section 43 invalidates transfer of property or an interest thereof given during the relevant time to a person for the benefit of a creditor, surety or guarantor on account of antecedent debt or other liabilities which have the effect of putting such creditor, surety or guarantor in a better position than the position which he would have been in if such transfer had not been made.

Section 43 also prescribes the relevant time for avoidance of transactions which may amount to preferences.

What constitutes preferential transaction?

As per Section 43(2) of the Code, a corporate debtor shall be deemed to have given a preference, if–

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

Application to Adjudicating Authority for avoidance of preferential transactions – Section 43(1) lays down that where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) of section 43 to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

Exceptions – Section 43(3) provides that for the purposes of sub-section (2), a preference shall not include the following transfers:

- (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that

- (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and
- (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation – For the purpose of sub-section (3) of section 43, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Relevant time for preferential transactions

As per Section 43(4), the preferential transaction is at a relevant time if:

It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or
a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

ORDERS IN CASE OF PREFERENTIAL TRANSACTIONS

Section 44 specifies the orders that may be passed by the Adjudicating Authority in relation to the avoidance of a preferential transaction. These orders are passed to reverse the effects of the preferential transaction and require the person to whom the preference is granted to pay back any gains he may have made as a result of such preference.

Section 44 lays down that the Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;
- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Transactions in good faith and for value – an order by the Adjudicating Authority under section 44 shall not –

- (a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;
- (b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Presumption – For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, -

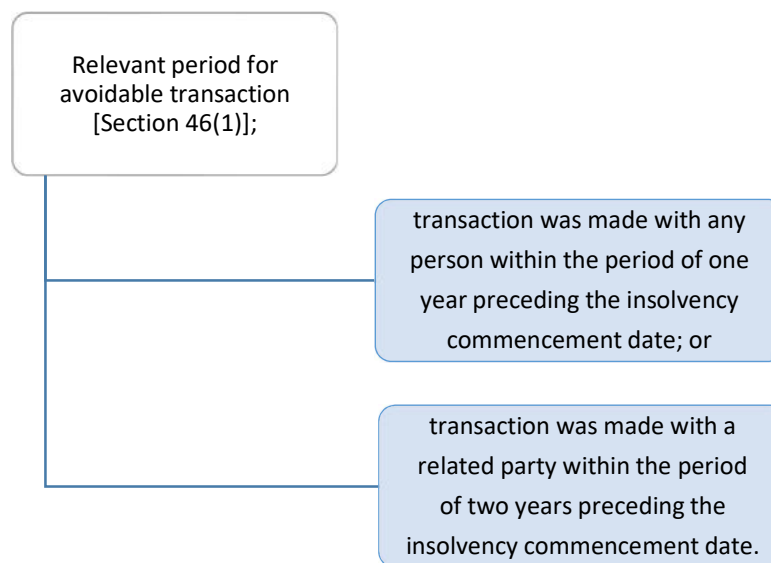
- (a) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;
- (b) is a related party, it shall be presumed that the interest was acquired, or the benefit was received otherwise than in good faith unless the contrary is shown. [Explanation I to section 44]

Effect of public announcement – A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13. [Explanation II to section 44].

AVOIDANCE OF UNDERVALUED TRANSACTIONS

Section 45 provides for the avoidance of undervalued transactions.

Application to Adjudicating Authority – According to section 45(1), if the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.



What constitutes undervalued transaction?

As per Section 45(2), a transaction shall be considered undervalued where the corporate debtor:

- (a) makes a gift to a person; or
- (b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Sub-section (2) of section 46 empowers the Adjudicating Authority to require an independent expert to assess evidence relating to the value of the transactions mentioned in section 46.

APPLICATION BY CREDITOR IN CASES OF UNDERVALUED TRANSACTIONS

Section 47 provides for an application to the Adjudicating Authority by creditors, shareholders or partners of the corporate debtor to set aside a transaction at undervalue where the liquidator or resolution professional has not reported such transaction to the Adjudicating Authority.

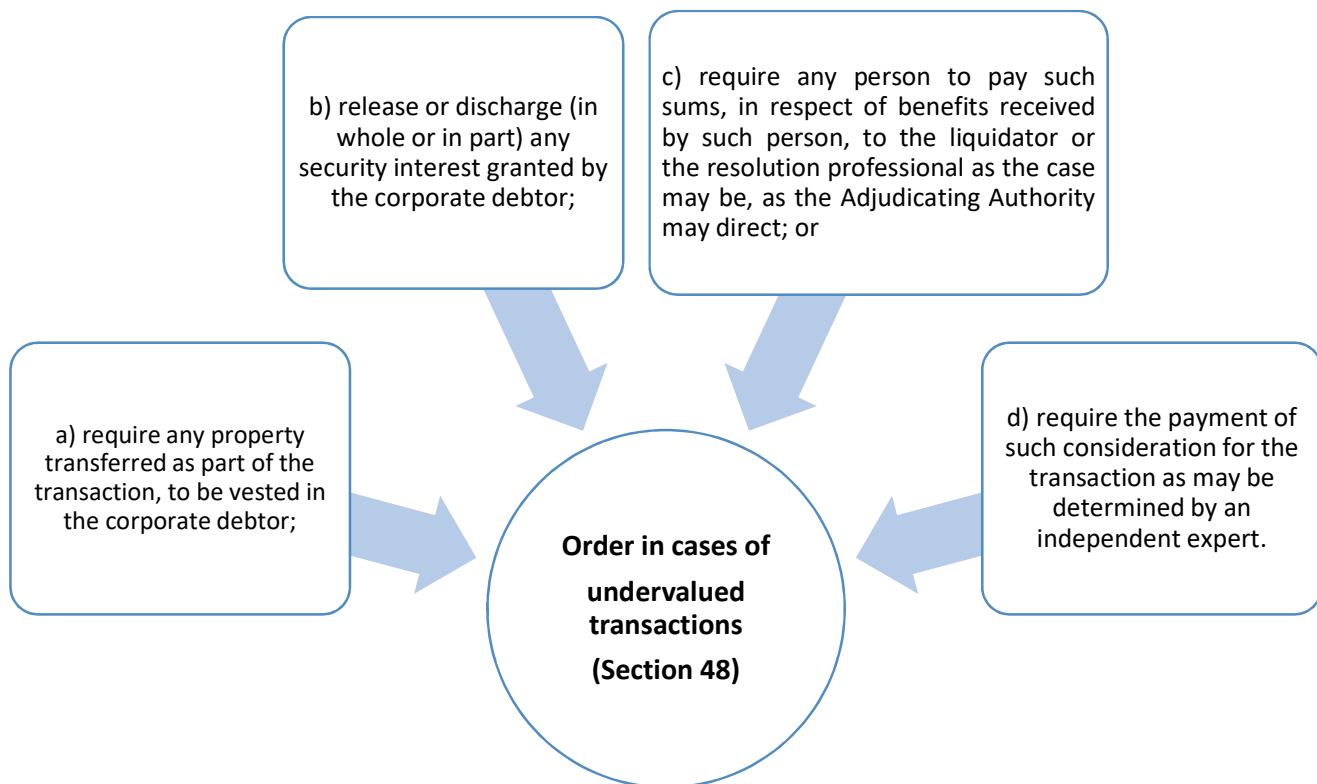
Application by creditor, member or a partner of a corporate debtor – according to section 47(1), where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.

Order by Adjudicating Authority – Sub-section (2) further lays down that where, the Adjudicating Authority, after examination of the application made under sub-section (1), is satisfied that –

- undervalued transactions had occurred; and
- liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

it shall pass an order-

- (a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;
- (b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

**TRANSACTIONS DEFRAUDING CREDITORS**

Section 49 strikes at transactions entered into with the intention of prejudicing the interests of a person who has made or may make a claim against the corporate debtor. According to section 49, where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45, the Adjudicating Authority shall make an order-

- (i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and
- (ii) protecting the interests of persons who are victims of such transactions.

The proviso appended to section 49 makes it clear that an order under section 49 –

- (a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and
- (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

What constitutes transactions defrauding creditors?

As per Section 49 of the Code, a transaction shall be considered as defrauding creditors where transaction was deliberately entered into by such corporate debtor –

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or
- (b) in order to adversely affect the interests of such a person in relation to the claim.

In the matter of **Mrs. Dipti Mehta, Resolution Professional, Prag Distillery Private Limited Vs. Shivani Amit Dahanukar and Ors.** Resolution Professional filed an application for avoidance transactions under Section 43, 49, 60(5) and 66 of the Code against five directors of the Corporate Debtor, which in turn was further pursued by the liquidator of the corporate debtor. In the said matter Adjudicating Authority held that “it is clear that the impugned assets were transferred to the holding company with an intent to protect the value of the assets. However, there is no consideration received by the Corporate Debtor against the said transfer, and the assets were not sold but only transferred to the holding company for its utilisation. Had the assets not being transferred, there was a risk of them getting wasted and spoiled. It is not disputed that the ownership of the assets is still with the Corporate Debtor, and they are part of the liquidation estate of the Corporate Debtor. The respondents have submitted that the holding company agree to transfer the machinery back to the Corporate Debtor. Given the circumstances above, it is directed that the assets of the Corporate Debtor shall be returned and restored to the Corporate Debtor by the holding company within one month from the date of this order.”

EXTORTIONATE CREDIT TRANSACTIONS

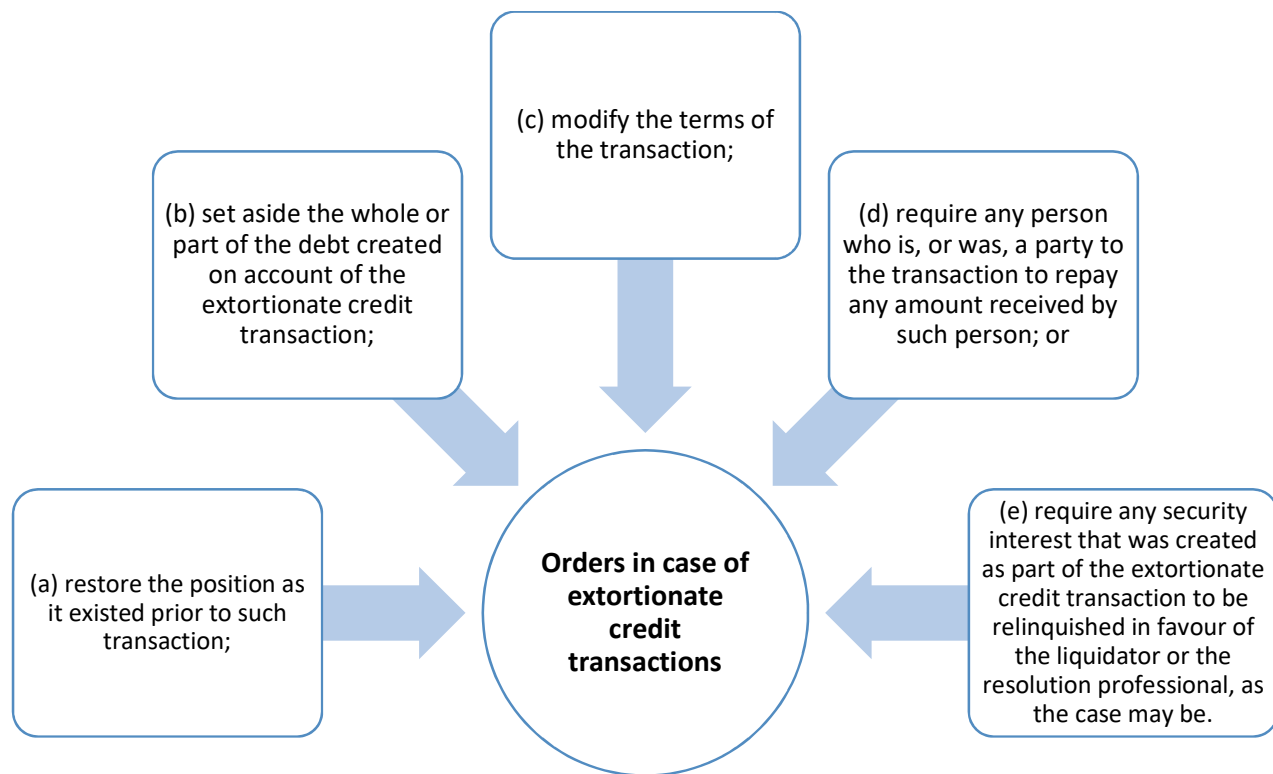
Section 50 strikes at extortionate credit transactions entered into by the corporate debtor in the period of two years preceding the insolvency commencement date.

As per Regulation 11 of the Liquidation Regulations, a transaction shall be considered as an extortionate credit transaction where the terms:

- (1) require the corporate debtor to make exorbitant payments in respect of the credit provided; or
- (2) are unconscionable under the principles of law relating to contracts.

Application for avoidance of extortionate credit transactions – Section 50(1) lays down that where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

Board to specify the circumstances – according to sub-section (2), the Board may specify the circumstances in which a transaction which shall be covered under sub-section (1).



Exception – The Explanation appended to section 50 clarifies that for the purpose of this section, any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

SECURED CREDITOR IN LIQUIDATION PROCEEDINGS

Section 52 provides for options exercisable by a secured creditor. In a liquidation proceeding, the secured creditor may realise its security interest outside the liquidation proceedings or choose to relinquish its security interest and participate in the distribution of assets or he may decide to realise its security, the amount of insolvency resolution process costs payable by the secured creditor shall be deducted from the realised proceeds. If there is a surplus realised from the enforcement of a security interest, the secured creditor has to account for the same to the liquidator. Similarly, if the proceeds of the realisation of the secured assets are not sufficient to pay the debts owed to the secured creditor, he may claim under section 53 for such unpaid amount.

What are the options available for a secured creditor?

As per Section 52 (1) of the Code, a secured creditor in the liquidation proceedings may -

- (a) 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;
- (b) realise its security interest in the manner specified in this section.

“Security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee. [Section 3(31)]

Liquidator to be informed – Where the secured creditor realises security interest under clause (b) of subsection (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised. [Section 52(2)]

Verification by liquidator – Sub-section (3) lays down that before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –

- (a) by the records of such security interest maintained by an information utility; or
- (b) by such other means as may be specified by the Board.

Secured assets – a secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it. [Section 52(4)]

Realization of secured asset – Section 52(5) provides that 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 of 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 under sub-section (5) 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. [Section 52(6)]

Deduction of insolvency resolution process costs – Sub-section (8) lays down that the amount of insolvency resolution process costs, due from secured creditors who realize their security interests in the manner provided in section 52, shall be deducted from the proceeds of any realization by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

What shall a secured creditor do when the enforcement of security interest yields an amount in excess of the debts due to him?

As per Section 52(7) of the Code, 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.

Unpaid debts of secured creditor – Where the proceeds of the realization 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 clause (e) of sub-section (1) of section 53. [Section 52(9)]

In the matter of **Edelweiss Asset Reconstruction Co. Ltd. Vs. Reid and Taylor India Limited**, a financial creditor of the corporate debtor approached the NCLT (Mumbai Bench) for claiming sole first charge over all the fixed assets and first pari-passu charge over the current assets of the corporate debtor by taking approval to realise the security interest by selling the secured assets of the corporate debtor on “as is where is” basis as a going concern. Another financial creditor of the corporate debtor objected to the action of former financial creditor stating that Section 52 of the Code does not empower a secured creditor to stand outside the liquidation process to enforce its security to the exclusion of other secured creditors having same ranking pari-passu charge over the same security interest, more particularly when the issue of priority of charges had not been adjudicated.

In the said matter, NCLT held that “only the first charge holder/ the secured creditor with first pari-passu charge can stay outside the liquidation process and realize his security interest. The applicant being the first charge holder is entitled to realise security interest under Section 52.”

In **Clutch Auto Ltd.**, the liquidator submitted an application requesting instructions for the secured creditor to renounce their security interest in accordance with Section 52 of the Code. In the aforementioned case, the adjudicating authority decided that the liquidator must give the creditor permission to exercise its right under Section 52 of the Code if the liquidator determines that the creditor has a security interest in the corporate debtor's assets. It came to the conclusion that the Code does not uphold directives requiring a creditor to give up their security interest.

DISTRIBUTION OF THE ASSETS

Section 53 deals with distribution of assets in liquidation. The Code makes significant changes in the priority of claims for distribution of liquidation proceeds. In case of liquidation, the assets will be distributed in the following order, in case of liquidation:

- i. fees of insolvency professional and costs related to the resolution process,
- ii. workmen's dues for the preceding 24 months and secured creditors,
- iii. employee wages,
- iv. unsecured creditors,
- v. government dues and remaining secured creditors (any remaining debt if they enforce their collateral),
- vi. any remaining debt, and
- vii. shareholders.

According to priority of claims, unsecured financial creditors shall be paid before the Government. This is intended to promote alternative sources of finance and the consequent development of bond markets in India.

"Liquidation cost" means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board. [Section 5(16)]

"Liquidation commencement date" means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be. [Section 5(17)]

As per Regulation 2(1) (ea) of Liquidation Regulations, Liquidation Cost under Section 5(16) of the Code includes:

- fee payable to the liquidator;
- remuneration payable by the liquidator;
- all costs incurred by the liquidator including cost for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;
- costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;
- 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;
- any other cost incurred by the liquidator which is essential for completing the liquidation process:

Note: Cost incurred by the liquidator in relation to Compromise or Arrangement under section 230 of the companies Act, 2013 shall not form part of the liquidation cost.

- Insolvency resolution process cost and liquidation cost
- Workmen dues (24 months preceding the liquidation commencement date)
- Secured creditor who has relinquished security as provided under Section 52 of the Code
- Employees' wages and unpaid dues (12 months preceding the liquidation commencement date)
- Financial debts owed to unsecured creditors
- Central or State Government dues
- Secured creditor who has enforced security interest
- Remaining debts and dues
- Preference shareholders
- Equity shareholders or partners

In the matter of **Om Prakash Agarwal Vs. Chief Commissioner of Income Tax (TDS) & Anr.**, liquidator filed an application seeking a directive against the successful bidder and the Income Tax Authority not to deduct TDS from the sale of assets made in the bidder's favour on the grounds that tax obligations cannot be collected by the Government prior to the waterfall mechanism under section 53 and the provisions of Section 238 has precedence over other laws.

In the said matter, Adjudicating Authority held that while TDS deductions are not covered by the overriding impact under section 238 of the Code, creditor-debtor disputes are. The provisions of Section 53 and 238 of the Code apply to the Government when it appears before the administrator as a creditor. The Adjudicating Authority held that even though it ordered the buyer to pay the TDS sum, the deduction of TDS does not equate to paying government debts ahead of other creditors because it is not a demand for the realisation of tax liabilities.

Contractual arrangements between recipients with equal ranking – Sub-section (2) lays down that any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

Deduction of fees payable to liquidator – Sub-section (3) makes provision for deduction of fees payable to liquidator. It provides that the fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

The Explanation appended to Section 53 clarifies that for the purpose of this section-

- (i) at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

MANNER AND MODE OF SALE OF ASSETS DURING LIQUIDATION

As per Regulation 32 of the Liquidation Regulations, a liquidator may sell the assets of the corporate debtor undergoing liquidation by the following ways:

- Sale of an asset on a standalone basis;
- Sale of the assets in a slump sale;
- Sale of a set of assets collectively;
- Sale of the assets in parcels;
- Sale of the corporate debtor as a going concern; or
- Sale of the business of the corporate debtor as a going concern.

As per Regulation 33 of the Liquidation Regulations, the liquidator may sell the assets of the corporate debtor by way of an auction or private sale.

The liquidator may sell the assets of the corporate debtor by means of private sale under the following circumstances:

- When asset is perishable;
- When asset is likely to deteriorate in value significantly if not sold immediately;
- When the asset is sold at a price higher than the reserve price of a failed auction; or
- When prior permission of the Adjudicating Authority has been obtained for such sale.

Note: Liquidator shall not sell the assets by way of private sale without prior permission of the Adjudicating Authority to a related party of the corporate debtor; his related party; or any professional appointed by him.

COMPLETION OF LIQUIDATION

In accordance with Regulation 44 of the Liquidation Regulations, the Liquidator is required to liquidate the corporate debtor within a year of the liquidation commencement date, regardless of the status of any avoidance transaction applications pending before the Adjudicating Authority. If the liquidator is unable to liquidate the corporate debtor within a year, he must apply to the Adjudicating Authority for permission to continue the liquidation and submit a report outlining the reasons why it has not yet been completed as well as the additional time that will be needed.

TIME FOR COMPLETION OF COMPROMISE OR ARRANGEMENT (LIQUIDATION UNDER CHAPTER III)

Regulation 2B of the IBBI (Liquidation Process) Regulations 2016 provides that where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013, it shall be completed within ninety days of the order of liquidation under section 33.

It is provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

Provided further that the liquidator shall not file such proposal after expiry of thirty days from the liquidation commencement date.

The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

In **Mr. S. S. Chockalingam Vs. Mr. CA Mahalingam Suresh Kumar**, the applicant was an H1 bidder during e-auction of the assets of the corporate debtor and accordingly was required to pay 25% of the bid amount within 24 hours and the remaining 75% within 15 days. After three days, the H1 bidder made a 25% deposit and asked for more time to settle the remaining balance. Twice, the liquidator extended the deadline. The liquidator then cancelled the sale, went on to haggle with H2 bidder, and sold the asset to it after the bidding process. As he had already paid 57% of the bid amount and the liquidator lacks the power to forfeit the said amount, the applicant submitted an application to direct the liquidator to extend the last date of payments.

In the said matter, Adjudicating Authority observed that “there does not appear any provisions in the I&B Code, 2016 to give extension of time as far as the bidding process is concerned. Moreover, the Liquidator has already negotiated with the 2nd highest bidder who has already made payment, which is equivalent to the amount, which was offered by the applicant being the highest bidder. In other words, the 2nd bidder, being in a position to make the payment of the same amount, has become the successful bidder and made the payment well in time. Therefore, in the circumstances, the application has become infructuous, and the same stands dismissed.”

In the matter of **Alchemist Asset Reconstruction Co. Ltd. Vs. Moser Baer India Limited**, an application was filed by the liquidator under Regulation 33(2)(d) of the Liquidation Regulations for seeking prior permission from the Adjudicating Authority to sell the assets of the corporate debtor by means of a private sale.

The AA considered the issue whether all the requirements of Regulation 33(2)(d) of the Liquidation Regulations are complied and held that “To our mind the proper interpretation on clauses (a) & (b) would be that a liquidator is entitled to sell the assets without requirement of prior permission after reaching the conclusion that the assets are perishable, and it is likely to deteriorate significantly in value if not sold immediately. Otherwise the purpose of regulation would be defeated if the time is required to be spent in filing an application and taken permission because the assets which are perishable may not remain available for sale and perish or it may deteriorate significantly in value if not sold immediately.”

Supreme Court of India in the matter of **R.K. Industries (Unit-II) LLP Vs. H.R. Commercials Pvt. Ltd. and Other** held that once Liquidator applies to the NCLT for the decision to sell the movable and immovable assets of the Corporate Debtor in liquidation by adopting a particular mode of sale and NCLT grants approval to such a decision, there is no provision under the Code that empowers the NCLAT to suo motu conduct a judicial review of the said decision of NCLT.

FINAL REPORT PRIOR TO DISSOLUTION

In accordance with Regulation 45 of the Liquidation Regulations, post completion of the liquidation of the corporate debtor 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.

If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same. The liquidator shall submit an application for dissolution of the corporate debtor along with the final report and the compliance certificate in **form H** to the Adjudicating Authority for closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or for the dissolution of the corporate debtor.

DISSOLUTION OF CORPORATE DEBTOR

Section 54 provides that after the affairs of the corporate debtor have been wound up and its assets are completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of the corporate debtor.

Application to the Adjudicating Authority – Sub-section (1) of section 54 lays down that where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

Date of dissolution – According to sub-section (2), the Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

As per Regulation 45(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the liquidator shall submit an application along with the final report prior to dissolution and the compliance certificate in **Form H** to the Adjudicating Authority for –

- closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or
- for the dissolution of the corporate debtor, in cases not covered above.

Copy of Order – a copy of an order under sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered. [Section 54(3)]

Pursuant to the provisions of Regulation 45A(3) of the Liquidation Regulation, the liquidator shall preserve electronic copy of all records for a minimum period of eight years and physical copy of records for a minimum period of three years from the date of dissolution of the corporate debtor or closure of the liquidation process or the conclusion of any proceeding relating to the liquidation process before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

SALE OF CORPORATE DEBTOR AS A GOING CONCERN

In common usage, a “going concern” sale occurs on a “as is, where is” basis and covers all of the company's assets, liabilities, properties, and business. According to the Liquidation Regulations, the liquidator may consider selling the corporate debtor or its company as a going concern based on recommendations from the Committee of Creditors or Stakeholder Consultation Committee. According to Section 53 of the Code, the Liquidator will use the sale profits to pay off the corporate debtor's debts. It is outlined under Regulation 32A of the Liquidation Regulations that how and when corporate debtor will be sold as a going concern during the bankruptcy process.

Regulation 32A of the Liquidation Regulations states as follows:

1. Where the committee of creditors has recommended sale under clause (e) or (f) of Regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

Chapter VI (comprising regulations 32 to 40) of the IBBI (Liquidation Process) Regulations, 2016 makes the following provisions for the realization of assets. The IBBI had inserted Regulation 32A in the IBBI (Liquidation Process) Regulations, 2016 to provide for methods for sale of assets as a going concern as a resolution measure for the CD.

2. For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as

identified by the committee of creditors under sub-regulation (2) of Regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

3. Where the Committee of Creditors has not identified the assets and liabilities under sub-regulation (2) of Regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.
4. If the liquidator is unable to sell the corporate debtor or its business within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.

Regulation 32 of liquidation regulations provides as below: The liquidator 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.

In **Dr. Devaiah Pagidipati v. Southern Online Bio Technologies Limited, NCLT Hyderabad** held that sale of assets of Corporate Debtor undergoing liquidation as a going concern does not require NCLT approval under IBC. However, given the lacuna in the IBC framework on measures that can be adopted in case of such sale, NCLT order may be needed to effectuate the sale of CD as a going concern and for claiming certain reliefs and concessions. Without granting additional reliefs that are essential and required to operate the company as an ongoing concern, the simple purchase of the unit as a going concern is useless. To put it another way, buying the business/assets of business as a going business without giving the applicant the reliefs defeats the purpose of doing so.

In **M/s. Visisth Services Limited, v. S. V. Ramani, & Ors., NCLAT** held that Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 provides that Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. It means sale of both assets and liabilities, if it is stated on 'as is where is basis.

In **Bank of Baroda v. Topworth Pipes & Tubes Pvt. Ltd**, NCLT held that successful bidder may not be held liable for any past liabilities of the Corporate Debtor prior to the effective date including liabilities arising in enquiries, investigations, assessments, claims, litigations, arbitrations or other judicial, regulatory, administrative proceedings in relation to or in connection with the Corporate Debtor during sale of corporate debtor as going concern during liquidation.

CASE LAWS

Case No.1

In the matter of **Sharad Sanghi v. Ms. Vandana Garg & Ors.**, the resolution plan initially received approval of 62.66% voting share. Subsequently, some creditors who had not voted, voted later or who had dissented, later assented, resulting in 81.31% of voting share in favour of resolution plan. The resolution Professional submitted the resolution plan before Adjudicating Authority for approval and requested to exclude certain period. the Adjudicating Authority rejected the prayer and passed order of liquidation on the ground that total period of 270 days had expired on the day when the last voting took place and before expiry of period only 62.66% voting was in favour of resolution plan, which was less than the required 66% of voting share. Regulation 26(2), which has been repealed, prohibited change of vote once it was cast.

The NCLAT held "... as we have already held that the 'Resolution Process' took place within 270 days and the 'Committee of Creditors' had the jurisdiction to change its opinion in favour of the 'Resolution Plan' to make it a success and regulation 26(2) being directory which also stands deleted, we set aside the impugned order and hold that the 'Resolution Plan' being in conformity with Section 30(2) warranted approval by the Adjudicating Authority."

Case No.2

In the matter of **S. C. Sekaran v. Amit Gupta & Ors.** appeals were filed by the management of the corporate debtor against the liquidation order passed by the Adjudicating Authority, following the failure of resolution plan. It was stated that the liquidator is supposed to keep the corporate debtor as a 'going concern' even during the period of liquidation and can take steps under section 230 of the Companies Act, 2013.

The NCLAT directed "we direct the 'liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property. effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the Code.... Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the liquidator will take steps in terms of Section 230 of the Companies act, 2013. The Adjudicating Authority if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law... the 'liquidator' if initiates the process, will complete it under Section 230 of the Companies act within 90 days..."

Case No.3

In the matter of **Corporation Bank v Amtek Auto Ltd. & Ors.**, the Financial Creditors filed an Application for a declaration that the resolution applicant, Liberty House Group Pte Ltd. and its promoters have knowingly contravened the terms of the resolution plan, having failed to implement the same and for the reinstatement of the Committee of Creditors (CoC) to run the Corporate debtor, as a going concern.

The NCLT held that the resolution applicant is not capable of implementation of resolution plan. It allowed the application and excluded the time from the date when Decan Valuers Investors IP, the only other resolution applicant, submitted its plan upto the date of the receipt of this order from the CIRP period. It observed: "No matter if the corporate debtor ultimately has to face liquidation, but the permission to restart the process, make advertisement and invite fresh plans etc., would defeat the very mandate of Section 12 of the Code. The Committee of Creditors can only discuss the Resolution Plan which was submitted by DVI (Decan Valuers Investors IP) only by exclusion of certain period of time while calculating 270 days." It, however, granted liberty to any member of the CoC or the Resolution Professional to file a complaint before the IBBI or the Central Government with a request to file a criminal complaint.

LESSON 6 - VOLUNTARY LIQUIDATION OF COMPANIES

REGULATORY FRAMEWORK

- Section 59 of the Insolvency and Bankruptcy Code, 2016
- The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ('Code') not only enables the insolvency proceedings of the insolvents but also contains provisions for solvent entities that want to surrender their business and refrain from carrying on their business. To be eligible for voluntary liquidation, the solvent entity must be in a state to pay off its debts.

Voluntary liquidation of a company is now governed by the provisions of Section 59 of the Code and relevant regulations issued under the Code. The corresponding provisions under the Companies act, 2013 in this regard have been repealed.

A corporate person will be eligible to opt for voluntary liquidation under the Code provided it fulfills the two mandatory conditions i.e. (i) either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and (ii) the company is not being liquidated to defraud any person.

The Code reduces the intervention of the regulatory authorities drastically that fasten up the process. Once the liquidation process is completed, the liquidator has to make an application to the Tribunal for passing the order of dissolution of the company. Only solvent companies can file for voluntary liquidation and approval of creditors is mandatory.

With the removal of the concept of official liquidator, the onus of the entire process is on company liquidator, which might improve the liquidation process. The Code appears to be in harmony with the global practices removing overall obstacles which prevailed in older laws, due to which closure of solvent companies has become a lot smoother.

Reasons for Voluntary liquidation of companies:

- Not carrying business operations
- Commercially unviable
- Running into losses
- No revenue
- Promoters unable to manage affairs of the company
- Purpose for which company was formed accomplished
- Contract termination

VOLUNTARY LIQUIDATION OF CORPORATE PERSONS

Section 59 in Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016 provides for the initiation of voluntary liquidation proceedings by a corporate debtor who has not defaulted on any debt due to any person.

Procedural requirements – Sub-section (2) of section 59 provides that the voluntary liquidation of a corporate person under sub- section (1) shall meet such conditions and procedural requirements as may be specified by the Insolvency and Bankruptcy Board of India.

The Insolvency and Bankruptcy Board of India has made the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 to regulate the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016.

Who may initiate voluntary liquidation proceedings?

As per Section 59(1) of the Code, a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of Part II of the Code.

Conditions for voluntary liquidation proceedings of corporate person registered as company – Section 59(3) of the Code lays down that without prejudice to sub-section (2), voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions:

- (a) a declaration from majority of the directors of the company verified by an affidavit stating that:
 - they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
 - the company is not being liquidated to defraud any person;
- (b) the declaration under sub-clause (a) shall be accompanied with the following documents:
 - audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
 - a report of the valuation of the assets of the company, if any prepared by a registered valuer;
- (c) within four weeks of a declaration under sub-clause (a), there shall be:
 - a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
 - a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator

When does a corporate person require approval of creditors for voluntary liquidation process?

As per the proviso to Section 59(3) of the Code, if the company owes any debt to any person, then creditors representing two-thirds in value of the debt to the company shall approve the resolution passed at the general meeting, within seven days of such resolution.

Though the procedure to be followed for voluntary liquidation proceedings under Chapter III of Part III of the code is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Code yet there are marked differences:

1. To initiate voluntary liquidation proceedings, where the corporate debtor is a company, the directors have to provide a **declaration of solvency** (A sample format of the Declaration of Solvency is placed as Annexure 2) and a declaration that the company is not being liquidated to defraud any person.
2. The declarations have to be accompanied by (a) the audited financial statements of the company and (b) a record of its business operations for the previous two years or the period since its incorporation, whichever is later.
3. Further, a report of the valuation of the assets of the company prepared by a registered valuer has to be provided.
4. A resolution in favour of the voluntary winding up of the company and appointment of an insolvency professional as the liquidator has to be passed within four weeks of the declaration under clause (a) of sub-section (3) of section 59.
5. Where the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

Requirement of notification – Sub-section (4) lays down that the company shall notify the Registrar of Companies and the Board about the resolution under sub-section (3) to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Date of Commencement of voluntary liquidation proceedings – According to sub-section (5), subject to approval of the creditors under sub-section (3), the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the special resolution under sub-clause (c) of sub-section (3).

Provisions to apply – The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary. [Section 59(6)]

Application to Adjudicating Authority – As per sub-section (7) of section 59, where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of such corporate person.

Order by Adjudicating Authority – The Adjudicating Authority shall on an application filed by the liquidator under sub-section (7), pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly. [Section 59(8)]

Thus, once the affairs of the corporate debtor have been wound up and its assets completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the corporate debtor and the corporate debtor shall be dissolved by the order of the adjudicating authority.

Order by Adjudicating Authority – The Adjudicating Authority shall on an application filed by the liquidator under sub-section (7), pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly. [Section 59(8)]

Thus, once the affairs of the corporate debtor have been wound up and its assets completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the corporate debtor and the corporate debtor shall be dissolved by the order of the adjudicating authority.

Copy of Order – A copy of an order under sub-section (8) shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered. [Section 59(9)]

In case of **Central Inland Water Transport Corporation Ltd.** [C.A. (IB) No. 791/KB/2018] NCLT, Kolkata order dt. 28.09.2018, it was stated that voluntary liquidation can only be done, as required under regulation 38 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, if the debt of the CD has been discharged to the satisfaction of the creditors and no litigation is pending against CD. Since the CD did not satisfy the twin requirements in the matter, the voluntary liquidation of the CD was suspended.

BROAD STEPS INVOLVED IN THE VOLUNTARY LIQUIDATION



INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (VOLUNTARY LIQUIDATION PROCESS) REGULATIONS, 2017

Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("VL Regulations") came into force on 1st April 2017. These Regulations shall apply to the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016. Some of the salient provisions are discussed below:

INITIATION OF LIQUIDATION

1. Regulation 3 of VL Regulations provides that without prejudice to Section 59(2) of the Code, liquidation proceedings of a corporate person shall meet the following conditions, namely:
 - (a) a declaration from majority of
 - (i) the designated partners, if a corporate person is a limited liability partnership,

- (ii) individuals constituting the governing body in case of other corporate persons, as the case may be, verified by an affidavit stating that-
 - (a) they have made a full inquiry into the affairs of the corporate person and they have formed an opinion that either the corporate person has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the liquidation; and
 - (b) the corporate person is not being liquidated to defraud any person;
 - (c) the corporate person has made sufficient provision to meet the obligations arising on account of pending matters mentioned in sub-clause (iii) of clause (b).
- (b) the declaration under sub-clause (a) shall be accompanied with the following documents, namely:
 - (i) audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later;
 - (ii) a report of the valuation of the assets of the corporate person, if any, prepared by a registered valuer; and
 - (iii) disclosure about pending proceedings or assessments before statutory authorities, and pending litigations, in respect of the corporate person.
- (c) within four weeks of a declaration under sub-clause (a), there shall be:
 - (i) a resolution passed by a special majority of the partners or contributories, as the case may be, of the corporate person requiring the corporate person to be liquidated and appointing an insolvency professional to act as the liquidator; or
 - (ii) a resolution of the partners or contributories, as the case may be, requiring the corporate person to be liquidated as a result of expiry of the period of its duration, if any, fixed by its constitutional documents or on the occurrence of any event in respect of which the constitutional documents provide that the corporate person shall be dissolved, as the case may be, and appointing an insolvency professional to act as the liquidator:

Provided that the corporate person owes any debt to any person, creditors representing two-thirds in value of the debt of the corporate person shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

2. The corporate person shall notify the registrar and the Board about the resolution under sub-regulation (1) to liquidate the corporate person within seven days of such resolution or the subsequent approval by the creditors, as the case may be.
3. Subject to approval of the creditors under sub-regulation (1), the liquidation proceedings in respect of a corporate person shall be deemed to have commenced from the date of passing of the resolution under sub-clause (c) of sub-regulation (1).

Explanation: For the purposes of sub-regulations (1) to (3), corporate person means a corporate person other than a company.

4. The declaration under sub-regulation (1)(a) or under section 59(3)(a) shall list each debt of the corporate person as on that date and state that the corporate person will be able to pay all its debts in full from the proceeds of assets to be sold in the liquidation.

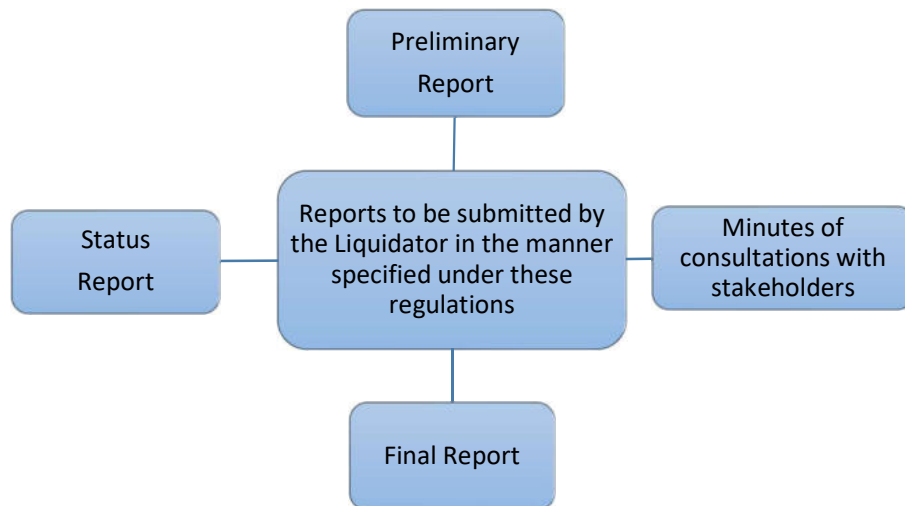
EFFECT OF LIQUIDATION**(Regulation 4 of VL Regulations)**

1. The corporate person shall from the liquidation commencement date cease to carry on its business except as far as required for the beneficial winding up of its business.
2. Notwithstanding the provisions of sub-section (1), the corporate person shall continue to exist until it is dissolved under section 59(8).

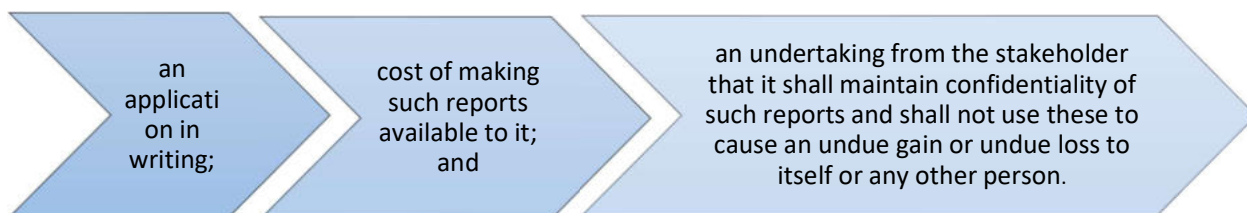
PUBLIC ANNOUNCEMENT BY LIQUIDATOR

Provisions pertaining to making public announcement of the voluntary liquidation process of the corporate debtor is contained under Regulation 14 of VL Regulations which provides that liquidator shall make public announcement in Form A of the VL Regulations, calling upon the claims from the stakeholders within five days from the liquidation commencement date.

Such public announcement shall be published in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate person and any other location where in the opinion of the liquidator, the corporate person conducts material business operations.

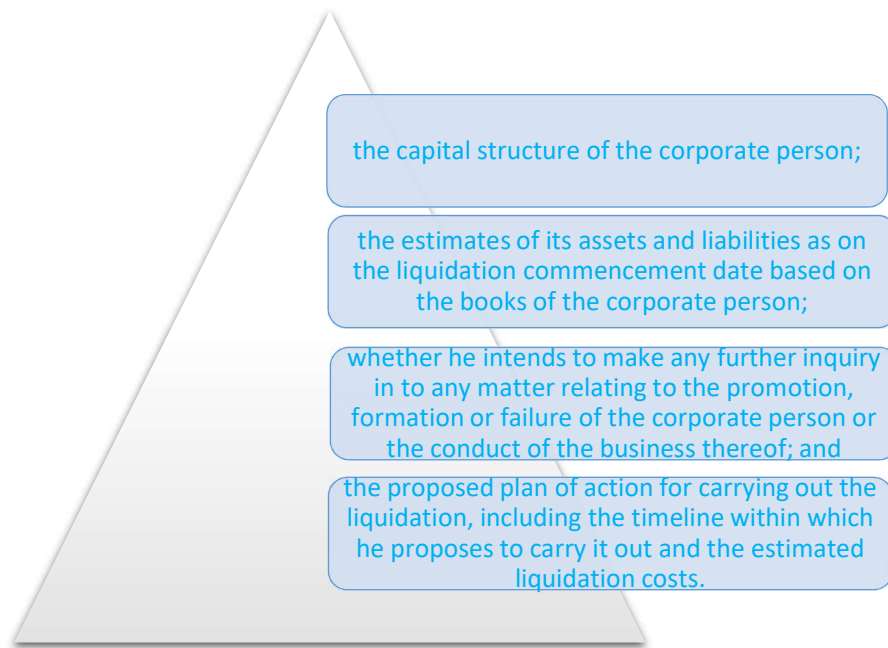
REPORTING

The liquidator shall prepare and submit Preliminary Report, Annual Status Report, minutes of consultations with stakeholders; and Final Report. The liquidator shall also make such reports and minutes available to a stakeholder in either electronic or physical form, on receipt of –



PRELIMINARY REPORT

Regulation 9 of the VL Regulation provides that the liquidator shall submit a Preliminary Report to the corporate person within forty-five days from the liquidation commencement date containing details w.r.t:



What is the process for submission of proof of claim to the liquidator by stakeholders in Voluntary liquidation process?

As per Regulation 16, 17, 18 & 19 of IBBI (Voluntary Liquidation Process) Regulations, 2017, the following is the process for submission of proof of claim to the liquidator by stakeholders in voluntary liquidation process-

1. A person claiming to be an operational creditor of the corporate person, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form B of Schedule I.
2. A person claiming to be a financial creditor of the corporate person shall submit proof of claim to the liquidator in electronic means in Form C of Schedule I.
3. A person claiming to be a workman or an employee of the corporate person shall submit proof of claim to the liquidator in person, by post or by electronic means in Form D of Schedule I.
4. A person, claiming to be a stakeholder other than those as mentioned above, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form F of Schedule I.

APPOINTMENT OF LIQUIDATOR

Regulation 5 of Voluntary Liquidation Regulations provides that-

- the corporate person shall appoint an insolvency professional as liquidator, and, wherever required, may replace him by appointing another insolvency professional as liquidator.
- Appointment or replacement of liquidator shall be made by a resolution passed under clause (c) of sub-section (3) of section 59 or clause (c) of sub-regulation (1) of regulation 3, as the case may be.
- Only an insolvency professional who meets the eligibility criterion laid down in Regulation 6 can be appointed as Liquidator.
- It is provided that such resolution, passed by the members, partners, or contributories, shall contain the terms and conditions of appointment of the liquidator, including the remuneration payable to him.
- A duty has been casted on the insolvency professional that he shall, within seven days of his appointment as liquidator, intimate the Board about such appointment.

ELIGIBILITY FOR APPOINTMENT AS LIQUIDATOR

Regulation 6 sets out the eligibility requirement, which is similar to the eligibility requirement for appointment of a liquidator under the Liquidation Process Regulations. Primarily, it deals with the requirement of a liquidator to be “independent.” Regulation 6 lays down following criterion for appointment of liquidator:

(1) An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person:

Explanation:

1. A person shall be considered independent of the corporate person, if he-
 - a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;
 - b) is not a related party of the corporate person; or
 - c) has not been an employee or proprietor or a partner-
 - i. of a firm of auditors or secretarial auditors or cost auditors of the corporate person at any time in the last three years; or
 - ii. of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm at any time in the last three years.
2. An insolvency professional shall not be eligible to be appointed as a liquidator if he, or the insolvency professional entity of which he is a partner or director is under a restraint order of the Board.
3. A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.
4. An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.

Liquidator’s remuneration: Regulation 7 of Voluntary Liquidation Regulations provides for that the remuneration payable to the liquidator shall form part of the liquidation cost.

REGISTERS AND BOOKS OF ACCOUNT (REGULATION 10)

Completion of registers and books of account: Where the books of account of the corporate person are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought upto-date, with all convenient speed. [Regulation 10(1)]

Registers and books of accounts to be maintained: The liquidator shall maintain the following registers and books, as may be applicable, in relation to the liquidation of the corporate person:- (a) Cash Book; (b) Ledger; (c) Bank Ledger; (d) Register of Fixed Assets and Inventories; (e) Securities and Investment Register; (f) Register of Book Debts and Outstanding Debts; (g) Tenants Ledger; (h) Suits Register; (i) Decree Register; (j) Register of Claims and Dividends; (k) Contributories Ledger; (l) Distributions Register; (m) Fee Register; (n) Suspense Register; (o) Documents Register; (p) Books Register; (q) Register of unclaimed dividends and undistributed proceeds; and] (r) such other books or registers as may be necessary to account for transactions entered into by him in relation to the corporate person. [Regulation 10(2)]

Forms for maintaining the registers and books: The registers and books under sub-regulation (2) may be maintained in the forms indicated in Schedule II, with such modifications as the liquidator may deem fit in the facts and circumstances of the liquidation. [Regulation 10(3)]

Duty of Liquidator to keep account of expenses: Regulation 10(4) also makes it mandatory for the liquidator to keep receipts for all payments made or expenses incurred by him.

CLAIMS**Proof of claim**

As per Regulation 15 of the VL Regulations, a person, who claims to be a stakeholder, shall prove his claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

Proof of Security Interest

As per Regulation 20 of the said Regulations, the existence of a security interest may be proved by a secured creditor on the basis of-

- the records available in an information utility;
- certificate of registration of charge issued by the Registrar of Companies;
- proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India; or
- other relevant documents which adequately establish the security interest.

When will the person who is seeking to prove debt against corporate debtor shall produce bills of exchange, promissory note and other negotiable instrument?

As per Regulation 21 of IBBI (Voluntary Liquidation Process) Regulations, 2017 where a person seeks to prove a debt in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature for which the corporate person is liable, such bill of exchange, note, instrument or security, shall be produced before the liquidator before the claim is admitted.

Substantiation of claims

As per Regulation 22 of the VL Regulations, the liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim.

Cost of proof (Regulation 23)

A claimant shall bear the cost of proving its claim. Costs incurred by the liquidator for verification and determination of a claim shall form part of liquidation cost. It is provided that if a claim or part of the claim is found to be false, the liquidator shall endeavor to recover the costs incurred for verification and determination of claim from such claimant, and shall provide the details of the claimant to the Board.

Determination of amount of claim

As per Regulation 24 of the VL Regulations, where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim, based on consultation with the claimant and the corporate person and the information available with him.

Debt in foreign currency (Regulation 25)

The claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the liquidation commencement date. Explanation- "The official exchange rate" is the reference rate published by the Reserve Bank of India or derived from such reference rates.

Periodical payments (Regulation 26)

In the case of rent, interest and such other payments of a periodical nature, a person may claim only for any amounts due and unpaid up to the liquidation commencement date.

Debt payable at future time (Regulation 27)

A person may prove for a claim whose payment was not yet due on the liquidation commencement date and is entitled to distribution in the same manner as any other stakeholder. Subject to any contract to the contrary, where a stakeholder has proved for a claim under sub-regulation (1), and the debt has not fallen due before distribution, he is entitled to distribution of the admitted claim reduced as follows:

$$x / (1+r)^n$$

where—

- “x” is the value of the admitted claim;
- “r” is the closing yield rate (%) of government securities of the maturity of “n” on the date of distribution as published by the Reserve Bank of India; and
- “n” is the period beginning with the date of distribution and ending with the date on which the payment of the debt would otherwise be due, expressed in years and months in a decimalized form.

Mutual credits and set-off (Regulation 28)

Where there are mutual dealings between the corporate person and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate person or to the other party. Illustration: X owes Rs.100 to the corporate person. The corporate person owes Rs.70 to X. After set off, Rs.30 is payable by X to the corporate person.

Verification of claims

As per Regulation 29 of the VL Regulations:

- The liquidator shall verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be, as per Section 40 of the Code.
- A creditor may appeal to the Adjudicating Authority against the decision of the liquidator as per Section 42 of the Code.

In **Viyes Consultancy (P.) Ltd. vs. Registrar of Companies**, NCLT held that when no claims were received pursuant to public announcement made by the liquidator and all the compliances were duly made under Section 59, the Tribunal held the company to be liquidated.

List of stakeholders (Regulation 30)

Contents of list of stakeholders:

The liquidator shall prepare a list of stakeholders on the basis of proofs of claims submitted and accepted under these Regulations, with-

- the amounts of claim admitted, if applicable,
- the extent to which the debts or dues are secured or unsecured, if applicable,
- the details of the stakeholders, and
- the proofs admitted or rejected in part, and the proofs wholly rejected. [Regulation 30 (1)]

Timeline for preparing list of stakeholders [Regulation 30 (2)]:

When claim is filed by stakeholder: The liquidator shall prepare the list of stakeholders within forty-five days from the last date for receipt of claims.

When no claim is filed by stakeholder: It is provided that where no claim from creditors has been received till the last date for receipt of claims, the liquidator shall prepare the list of stakeholders within fifteen days from the last date for receipt of claims.

List of stakeholders available for inspection or display: The list of stakeholders, as modified from time to time, shall be-

- available for inspection by the persons who submitted proofs of claim;
- available for inspection by members, partners, directors and guarantors of the corporate person;
- displayed on the website, if any, of the corporate person;
- displayed on the website, if any, designated by the Board for this purpose. [Regulation 30 (3)]

MANNER OF SALE

As per Regulation 31 of the VL Regulations, the liquidator may value and sell the assets of the corporate person in the manner and mode approved by the corporate person in compliance with provisions, if any, in the applicable statute.

Explanation: “Assets” include an asset, all assets, a set of assets or parcel of assets, as the case may be, in relation to sale of assets.

Recovery of monies due (Regulation 32)

Maximization of value of assets and dues: The liquidator shall endeavor to recover and realize all assets of and dues to the corporate person in a time-bound manner for maximization of value for the stakeholders.

PROCEEDS OF LIQUIDATION AND DISTRIBUTION OF PROCEEDS**ALL MONEY TO BE PAID IN TO BANK ACCOUNT**

Regulation 34 of the VL Regulations prescribes the following:

1. The liquidator shall open a bank account in the name of the corporate person followed by the words ‘in voluntary liquidation’, in a scheduled bank, for the receipt of all moneys due to the corporate person.
2. The liquidator shall pay to the credit of the bank account opened under sub regulation (1) all moneys, including cheques and demand drafts received by him as the liquidator of the corporate person, and the realizations of each day shall be deposited into the bank account without any deduction not later than the next working day.
3. The money in the credit of the bank account shall not be used except in accordance with section 53(1).
4. All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account.

DISTRIBUTION

Regulation 35 of the VL Regulations prescribes the following with regard to distribution of assets:

1. The liquidator shall distribute the proceeds from realization within 30 days from the receipt of the amount to the stakeholders.
2. The liquidation costs shall be deducted before such distribution is made.
3. The liquidator may, with the approval of the corporate person, distribute amongst the stakeholders, an asset that cannot be readily or advantageously sold due to its peculiar nature or other special circumstances.

RETURN OF MONEY (REGULATION 36)

Refund of money to which stakeholder is not entitled to: A stakeholder shall forthwith return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to.

COMPLETION OF LIQUIDATION

1. Regulation 37 of the VL Regulation provides that the liquidator shall endeavour to complete the liquidation process of the corporate person and submit the Final Report under Regulation 38 within: -
 - a. 270 days from the liquidation commencement date where the creditors have approved the resolution under Section 59(3) (c) of the Code or Regulation 3(1) (c) of the VL Regulations and;
 - b. 90 days from the liquidation commencement date in all other cases.
2. In the event of the liquidation process continuing for more than the period stipulated in sub regulation (1), the liquidator shall-
 - (a) hold a meeting of the contributories of the corporate person within fifteen days –
 - i. from the end of two hundred and seventy days or ninety days, as the case may be, and
 - ii. thereafter at the end of every succeeding two hundred and seventy days or ninety days, as the case may be, as stipulated in sub-regulation (1), till submission of application for dissolution of the corporate person; and shall present a Status Report(s) indicating progress in liquidation, including-
 - settlement of list of stakeholders;

- details of any assets that remains to be sold and realized
 - distribution made to the stakeholders;
 - distribution of unsold assets made to the stakeholders;
 - developments in any material litigation, by or against the corporate person; and
 - filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code.
 - the reasons for not completing the process within stipulated time period and the additional time required for completing the process.
3. The Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.
 4. The liquidator shall file the Status Report with the Board within seven days of the meeting of contributories.

Where shall the liquidator deposit the amount of unclaimed dividends?

As per Regulation 39 of IBBI (Voluntary Liquidation Process) Regulations, 2017 –

The Board shall operate and maintain an Account to be called the Corporate Voluntary Liquidation Account in the Public Accounts of India:

A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidation Account before he submits an application under sub-section (7) of section 59.

A liquidator, who holds any amount of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the IBBI (Voluntary Liquidation Process) (Amendment) Regulations, 2020, shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit.

A liquidator, who fails to deposit any amount into the Corporate Voluntary Liquidation Account under this regulation, shall deposit the same along with interest thereon at the rate of twelve percent per annum from the due date of deposit till the date of deposit.

What will liquidator do if there is detection of fraud or insolvency in case of voluntary liquidation process?

As per Regulation 40 of IBBI (Voluntary Liquidation Process) Regulations, 2017 where the liquidator is of the opinion that the liquidation is being done to defraud a person, he shall make an application to the Adjudicatory Authority to suspend the process of liquidation and pass any such orders as it deems fit.

Where the liquidator is of the opinion that the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the liquidation, he shall make an application to the Adjudicating Authority to suspend the process of liquidation and pass any such orders as it deems fit.

FINAL REPORT

On completion of the liquidation process, the liquidator shall prepare the Final Report consisting of –

- a. audited accounts of the liquidation, showing receipts and payments pertaining to liquidation since the liquidation commencement date;
- b. a statement demonstrating that:
 - the assets of the corporate person has been disposed of;
 - the debt of the corporate person has been discharged to the satisfaction of the creditors;
 - no litigation is pending against the corporate person or sufficient provision has been made to meet the obligations arising from any pending litigation.
- c. a sale statement in respect of all assets containing details with respect to their realized value, cost of realization, the manner and mode of sale, an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets etc.

The liquidator shall send the Final Report to the Registrar and the Board. The liquidator shall also submit the Final Report along with Compliance Certificate in Form-H of VL Regulations along with the application under sub-section (7) of section 59 to the Adjudicating Authority.

CORPORATE VOLUNTARY LIQUIDATION ACCOUNT (REGULATION 39)

Open Corporate Voluntary Liquidation Account: The Board shall operate and maintain an Account to be called the Corporate Voluntary Liquidation Account in the Public Accounts of India. It is provided that until the Corporate Voluntary Liquidation Account is operated as part of the Public Accounts of India, the Board shall open a separate bank account with a Scheduled bank for the purposes of this regulation. [Regulation 39(1)]

Unclaimed dividend and undistributed proceeds to be deposited in the account: A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidation Account before he submits an application under sub-section (7) of section 59 for dissolution of the corporate person. [Regulation 39(2)]

15 days' time for deposit of unclaimed dividends or undistributed proceeds in hand: A liquidator, who holds any amount of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020, shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit. [Regulation 39(3)]

Interest for delay in deposit in the Account: A liquidator, who fails to deposit any amount into the Corporate Voluntary Liquidation Account under this regulation, shall deposit the same along with interest thereon at the rate of twelve percent per annum from the due date of deposit till the date of deposit. [Regulation 39(4)]

Submission of evidence of deposit of the amount in the Account to Regulatory Authorities: A liquidator shall submit to the authority with which the corporate person is registered and the Board, the evidence of deposit of the amount into the Corporate Voluntary Liquidation Account under this regulation, and a statement in Form-G setting forth the nature of the amount deposited into the Corporate Voluntary Liquidation Account, and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds. [Regulation 39(5)]

Receipt of Deposit: The liquidator shall be entitled to a receipt from the Board for any amount deposited into the Corporate Voluntary Liquidation Account under this regulation. [Regulation 39(6)]

Form for filing claim for amount deposited in the account: A stakeholder, who claims to be entitled to any amount deposited into the Corporate Voluntary Liquidation Account, may apply to the Board in Form-I for an order for withdrawal of the amount. Provided that if any other person other than the stakeholder claims to be entitled to any amount deposited to the Corporate Voluntary Liquidation Account, he shall submit evidence to satisfy the Board that he is so entitled. [Regulation 39(7)]

Release of amount of claim by Board: The Board may, if satisfied that the stakeholder or any other person referred to under sub-regulation (7) is entitled to withdrawal of any amount from the Corporate Voluntary Liquidation Account, make an order for the same in favour of that stakeholder or that other person. [Regulation 39(8)]

Maintenance of corporate person wise ledger account of deposit into and withdrawal from the account: The Board shall maintain a corporate person-wise ledger of the amount deposited into and the amount withdrawn from the Corporate Voluntary Liquidation Account under this regulation. [Regulation 39(9)]

Nomination of officer: The Board shall nominate an officer of the level of Executive Director of the Board as the custodian of the Corporate Voluntary Liquidation Account and no proceeds shall be withdrawn without his approval. [Regulation 39(10)]

Annual audit of accounts: The Board shall maintain proper accounts of the Corporate Voluntary Liquidation Account and get the same audited annually. [Regulation 39(11)]

Audit Report to be placed before Governing Board and forwarded to CG: The audit report along with the statement of accounts of the Corporate Voluntary Liquidation Account referred to in sub-regulation (11) shall be placed before the Governing Board and shall be forwarded to the Central Government. [Regulation 39(12)]

Transfer of unclaimed or undistributed amount to the Corporate Voluntary Liquidation Account: Any amount deposited into the Corporate Voluntary Liquidation Account in pursuance of this regulation, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the corporate person and any amount of income or interest received or earned in the Corporate Voluntary Liquidation Account shall be transferred to the Consolidated Fund of India. [Regulation 39(13)]

DETECTION OF FRAUD OR INSOLVENCY (REGULATION 40)

Application to AA to suspend the process of liquidation: Regulation 40 lays down following situations in which the liquidator shall make an application to the Adjudicatory Authority to suspend the process of liquidation and pass any such orders as it deems fit: (i) Where the liquidator is of the opinion that the liquidation is being done to defraud a person [Regulation 40(1)] (ii) Where the liquidator is of the opinion that the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the liquidation [Regulation 40(2)]

PRESERVATION OF RECORDS

Records to be preserved: Without prejudice to the generality of the obligations under sub-regulation (1), the liquidator shall preserve copies of records relating to or forming the basis of:- [Regulation 41(2)]

- a) his appointment as liquidator, including the terms of appointment;
- b) handing over / taking over of the assignment;
- c) initiation of voluntary liquidation process;
- d) public announcement;
- e) claims, verification of claims, and list of stakeholders;
- f) engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;
- g) all filings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;
- h) statutory filings with Board and insolvency professional agencies;
- i) correspondence during the voluntary liquidation process;
- j) cost of voluntary liquidation process;
- k) all reports, registers, documents such as preliminary report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in Regulation 8 and 10 of principal regulations; and
- l) any other records, which is required to give a complete account of the process.

Minimum period of preservation of records

The liquidator shall preserve:

- a) electronic copy of all records (physical and electronic) for a minimum period of eight years; and
- b) a physical copy of records for a minimum period of three years; from the date of dissolution of the corporate person, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later. [Regulation 41(3)]

Duty to handover records to new liquidator: In case of replacement of liquidator during the process, the outgoing liquidator shall handover the records under sub-regulation (1) and (2) to the new liquidator. [Regulation 41(4)]

Duty of liquidator to preserve record at safe place and produce them: The liquidator shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the principal regulations. [Regulation 41(5)]

Details of preservation of records to be filed with the application for dissolution of corporate person: The liquidator shall, along with the application filed under sub-section (7) of section 59 to the Adjudicating Authority, provide the details and manner of preservation of records under sub-regulation (1) and (2). Explanation - The records referred to in this regulation includes records pertaining to the period of a liquidation process during which the liquidator acted as such, irrespective of the fact that he did not take up the assignment from its commencement or continue the assignment till its conclusion. [Regulation 41(6)]

Convening a Board Meeting



Filing declaration of solvency with ROC, verified by an affidavit to be provided by majority of directors/ designated partners (T)



- To approve Voluntary Liquidation.
- To approve declaration of Solvency.
- For appointment of Liquidator and registered valuer (subject to shareholder's approval).
- To approve notice of EGM considering voluntary liquidation.

- To be accompanied by latest two years audited financial statements or for a period since incorporation as the case may be.
- Report of valuation of the company if any by registered valuer.



Sending notice of EGM (to be held within 4 weeks of filing declaration of solvency)



Convening EGM (T+28) (i.e. voluntary liquidation commencement date)



- To approve voluntary liquidation.
- To appoint liquidator and fix his remuneration.



Approval from creditors representing 2/3rd of value of debt (T+28+7)



To make a public announcement in FORM A (T+28+5)



- To be made:
 1. In English and Regional daily (T+28+5);
 2. On the website of corporate debtor;
 3. At public.and@ibbi.gov.in.
- To be made within 5 days from the date of his appointment.
- To specify the last date of claim which shall be 30 days from liquidation commencement date.



Intimation of resolution to IBBI and ROC (T+28+7)



Opening of bank account followed by the words: In liquidation

- For receiving realization amount to pay liquidation cost.

Receipt of claims and preparing a list of stakeholders (T+30)

- Last date within 30 days from Voluntary Liquidation commencement date.

Submission of Preliminary Report (T+45)

- Within 45 days from voluntary liquidation commencement date.

Distribution of assets

- Within 30 days from the receipt of amount to stakeholders.

Completion of liquidation within 270/90 days , as the case may be

The liquidator shall endeavour to complete the liquidation process of the corporate person and submit the Final Report under regulation 38 within:
(a) two hundred and seventy days from the liquidation commencement date where the creditors have approved the resolution under clause (c) of sub section (3) of section 59 or clause (c) of sub-regulation (1) of regulation 3, and
(b) ninety days from the liquidation commencement date in all other cases.] (2) In the event of the liquidation process continuing for more than 21[the period stipulated in sub-regulation (1)], the liquidator shall- (a) hold a meeting of the contributories of the corporate person within fifteen days – (i) from the end of two hundred and seventy days or ninety days, as the case may be, and (ii) thereafter at the end of every succeeding two hundred and seventy days or ninety days, as the case may be, as stipulated in sub-regulation (1), till submission of application for dissolution of the corporate person; and]

Unclaimed proceeds of liquidation or undistributed assets

Submission of final report to ROC, IBBI and NCLT

- Liquidator shall apply to NCLT for an order to pay into the Companies Liquidation Account in the public account of India any unclaimed proceeds on the date of order of dissolution
- Any retained amount by the liquidator paid in the companies liquidation account along with an interest @12%p.a.

Application to NCLT for dissolution of corporate person

Copy of order to be submitted to the authority with which the corporate person is registered

Within 14 days from the date of such order.

FILING FORMS TO MONITOR VOLUNTARY LIQUIDATION PROCESSES UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016, AND THE REGULATIONS MADE THEREUNDER:

A corporate person (CP) may initiate voluntary liquidation in terms of section 59 of the Insolvency and Bankruptcy Code and the IBBI (Voluntary Liquidation Process) Regulations, 2017. During the process, the liquidator invites claims and prepares a list of stakeholders based on the verified claims, sells assets of the CP in the manner and mode approved by the CP, and distributes proceeds as per section 53 of the Code. Upon completion, the liquidator submits the Final Report and an application for dissolution of CD, to the Adjudicating Authority. The Insolvency Professional (IP), functioning as a liquidator, is also required to ensure compliance with legal requirements and reporting to the Adjudicating Authority (AA) and IBBI. Presently, the IPs submit the details regarding the voluntary liquidation process to the Board through emails, which is time-consuming and inefficient.

To alleviate the compliance burden for Insolvency Professionals (IPs), a set of forms on an electronic platform has been created by the IBBI to capture the details of the voluntary liquidation process. These forms are vital for the voluntary liquidation procedure under the Insolvency and Bankruptcy Code (IBC), as they enable systematic and transparent recordkeeping and seamless reporting. The primary advantages of these forms include:

- Boosting the efficiency and effectiveness of the voluntary liquidation process.
- Allowing liquidators to conveniently access and submit forms online, reducing delays and enhancing efficiency.
- Decreasing the chances of errors and omissions, ensuring more accurate and reliable information.

ANNEXURE 1

Resolution for Voluntary Winding Up

RESOLUTION FOR VOLUNTARY WINDING-UP AS APPROVED BY THE MEMBERS OF (NAME OF THE CORPORATE PERSON)
 AT THE EXTRA ORDINARY GENERAL MEETING HELD ON (DAY AND DATE) AT..... (PLACE) AT (TIME)

Approval of Voluntary Liquidation of the Company and appointment of Insolvency Professional as Liquidator

RESOLVED THAT pursuant to the provisions of Section 59 of the Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy Board (Voluntary liquidation Process) Regulations, 2017, any other legislations governing voluntary liquidation and the provisions of the Companies act, 2013 as may be applicable and subject to approval of creditors having at least two-thirds in value of the debts of the corporate person within seven days of this resolution, the consent of the members of (Name of the Corporate Person) be and is hereby accorded to initiate voluntary liquidation of (Name of the Corporate Person).

RESOLVED FURTHER THAT Ms/Mr. Insolvency Professional, holding registration Number, being eligible to be appointed as liquidator pursuant to the provisions of regulation 6 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulation, 2017, be and is hereby appointed to act as the liquidator of (name of the Corporate Person) and subject to approval of creditors having at least two-thirds in value of the debts of the corporate person within seven days of this resolution, on the remuneration of Rs. (rupees in Words) exclusive of costs of engaging other professionals, statutory expenses, expenses incurred on publication of notices, other incidental expenses and applicable taxes.

RESOLVED FURTHER THAT all the directors of the Company and liquidator be and are hereby severally and/or jointly authorised to take such steps and to do all such acts, deeds and things as may be necessary to give effect to the aforesaid resolution.

MINUTES OF EXTRA ORDINARY GENERAL MEETING

MINUTES OF EXTRA ORDINARY GENERAL MEETING OF THE MEMBERS/CONTRIBUTORIES OF (NAME OF THE CORPORATE PERSON) HELD ON (DAY AND DATE) AT ITS REGISTERED OFFICE SITUATED AT

..... COMMENCED AT A.M./P.M. AND CONCLUDED AT A.M./P.M.

Members present at the meeting:

1. Mr. XYZ (Member/authorised representative)
2. Mr. ABC (Member/ authorised representative)

Chairman of the meeting:

Mr. XYZ was appointed as the chairman with the consent of all the Members/Contributories present at the meeting.

Quorum:

After ascertaining that the requisite quorum for the Meeting was present, the Chairman confirmed that the quorum was present and called the Meeting to order. He then welcomed the members to the Extra Ordinary General Meeting.

Notice:

With the consent of the Members/contributories at the meeting, the notice convening the meeting was read.

Declaration:

The Chairman informed members that no proxies had been received by the corporate person.

Approval of voluntary liquidation and appointment of insolvency professional as liquidator:

The Chairman informed the Members that it is proposed to voluntarily wind up the affairs of (name of the Corporate Person) and after detailed deliberations, the following resolution was passed unanimously:

RESOLVED THAT pursuant to the provisions of Section 59 of the insolvency and Bankruptcy Code, 2016 read with

insolvency and Bankruptcy Board (Voluntary liquidation Process) regulations, 2017, any other legislations governing voluntary liquidation and the provisions of the Companies act, 2013 as may be applicable, and subject to approval of creditors having two-thirds in value of the debts of corporate person within seven days of this resolution, the consent of the members of (name of the Corporate Person) be and is hereby accorded to initiate voluntary liquidation of (name of the Corporate Person).

RESOLVED FURTHER THAT Ms/Mr.....Insolvency Professional holding Registration Number..... being eligible to be appointed as liquidator pursuant to the provisions of Regulation 6 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulation, 2017, be and is hereby appointed to act as the liquidator of (name of the Corporate Person), subject to approval of creditors having at least two-third in value of the debts of the corporate person within seven days of this resolution, on the remuneration of Rs. (Rupees in words), exclusive of costs of engaging other professional(s), statutory expenses, expenses incurred on publication of notices, other incidental expenses and applicable taxes.

RESOLVED THAT all the directors of the Company and Mr, liquidator, be and are hereby severally and/or jointly authorised to take such steps and to do all such acts, deeds and things as may be necessary to give effect to the aforesaid resolution.

ANNEXURE 2

Declaration of Solvency

We, Mr. X and Mr. P, only directors of ABC Private Limited do solemnly affirm and declare that we have made a full enquiry into the affairs of this company, and that having done so, we have formed the opinion that this Company has no debts or if claimed during the liquidation process, the company will be able to pay its debts/ claims in full from the proceeds of assets to be sold in liquidation within a period of six months from the date of commencement of liquidation, and we append a statement of the Company's assets and liabilities as at being the latest practicable date before the making of this declaration. We also solemnly affirm and declared that no business and no transaction of any kind has been carried for the period from till the date of the Board Meeting to be held on xx.xx.xx21 in which declaration of solvency has been placed, and we make this solemn declaration believing the same to be true.

The declaration of solvency has been submitted to the Board Meeting not to defraud the Creditors, Government, any other company, firm and other person.

Solemnly affirmed and declare at (PLACE) on (DATE), before me. Mr. X DIN: xxxxx Address: Mr. Y
DIN: xxxxx Address:

SPECIMEN FORMAT - PRELIMINARY REPORT

Under Regulation 9 of IBBI (Voluntary Liquidation Process) Regulations, 2017 Name of the company (in Voluntary Liquidation)

CIN:

Liquidator Name:

Registration No.: Address:

Mail :

Phone :

Background:

Shareholders of [Company Name] [CIN:] (the Company) have passed a special resolution at its Annual/Extra-Ordinary General Meeting held on [date] to liquidate the company by way of voluntary liquidation under

Section 59 of Insolvency and Bankruptcy Code, 2016 read with Insolvency and Bankruptcy Board of India (Voluntary liquidation Process) regulations, 2017. I, [Name of IP], Insolvency Professional, having registration number [], have been appointed as a liquidator for the purpose. The Company will be liquidated in accordance with applicable provisions of the law and its assets distributed to the stakeholders as per their entitlement. This report is the Preliminary Report as required to be prepared under regulation 9 of Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.

Mandatory contents:

(a) Capital Structure of the Company:

Description	No. & Type of shares	Amount per share (INR)	Total Amount(INR)
Authorised Capital		Rs.	Rs.
Issued Capital		Rs.	Rs.
Subscribed Capital		Rs.	Rs.
Paid up Capital		Rs.	Rs.

(b) Estimate of Assets and Liabilities as on liquidation commencement date. All amounts in Indian Rupees

Liabilities:	
Shareholders' Funds:	
Share Capital	Rs.
Reserve & Surplus	Rs.
	Rs.
	Rs.
Current liabilities	
	Rs.
Total liabilities	Rs.

Assets:	
Non- Current assets:	
Non-Current investment	Rs.
Long term loans & advances	Rs.
Other Non- Current assets	Rs.
Current assets:	
Cash and Bank Balances	Rs.
Short-term loans and advances	Rs.
Other Current assets	Rs.
Total assets	Rs

The above figures are based on the audited Balance Sheet of Corporate Person as on (Date, just before the liquidation commencement date)..... and on our verification and information provided by corporate person there is no change between audited Balance Sheet date and liquidation commencement date. there are no other assets or liabilities in the Company except as mentioned above.

Note: It is advisable that a Provisional Balance Sheet should to be prepared (preferably get audited by auditor of the Company) just before passing the Board resolution for Voluntary liquidation of the Company.

(c) I do not intend to make any further inquiry into any matter relating to the promotion, formation or failure of the corporate person or the conduct of the business thereof.

- (d) Directors of the company have stated on affidavit dated that there is/are operational creditor(s) and financial creditor(s) details of which are as follows:

Financial creditors

Sl. no.	Name	Address	Amount	Remarks, if any

Operational creditors

Sl. no.	Name	Address	Amount	Remarks, if any

Other creditors

Sl. no.	Name	Address	Amount	Remarks, if any

Details of claims received and admitted by me are as follows:

Financial creditors

Sl. no.	Name	Address	Amount claimed	Amount	Remarks, if any

Operational creditors

Sl. no.	Name	Address	Amount claimed	Amount	Remarks, if any

Other creditors

Sl. no.	Name	Address	Amount claimed	Amount	Remarks, if any

- (e) Based on these facts, I can, prima facie, conclude that there are no outstanding demands as on liquidation commencement date, except those mentioned above.

The following steps are planned to carry out liquidation of the Company:

- (i) Current Account No. of the Company will be closed and new account will be opened with. Regulation 34 of Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 requires liquidator to open a bank account in the name of corporate person for receipt of all moneys due to the corporate person.
(If already new Bank Account has been opened by liquidator in terms of regulation 34 of Insolvency and Bankruptcy Board of India (Voluntary liquidation Process) Regulations, 2017, then detail of said account should be given)
- (ii) Unless some other factors/information emerges during liquidation, the liquidation proceeds will be distributed in the order as mentioned in Section 53 of the Code.
- (iii) For calculation of TDS payable to distribution of liquidation proceeds, services of a qualified
- (iv) Chartered accountant will be used as required under the Indian Income Tax Act, 1961.
- (v) Liquidation accounts will be prepared, and a chartered accountant will be appointed to audit those accounts.
- (vi) Necessary records and registers will be prepared.
- (vii) Final report will be prepared which will be sent as follows:
 - to Registrar of Companies;
 - to Insolvency and Bankruptcy Board of India; and
 - National Company Law Tribunal with application to dissolve the Company.
- (f) The estimated liquidation cost of the Company is INR plus applicable taxes, wherever applicable, with following break up:
 - (i) Liquidator Fee - plus GST
 - (ii) Audit Fee for pre-liquidation period – INR plus GST
 - (iii) Audit Fee for liquidation period – INR plus GST
 - (iv) Fee for TDS Certificates/Income Tax Related Assignment – INR plus GST
 - (v) Other Liquidation Expenses – INR
- (g) The liquidation of the Company is estimated to be over by –

Summary of Proceedings:

Sl. no.	Event	Date	Annexure
1	Board Meeting to decide on liquidation and convening of Annual/Extra-Ordinary General Meeting		
2	Annual/extra-ordinary General Meeting for taking decision on voluntary liquidation of the Company and appointment of, IP as liquidator		
3	Public announcement on website maintained by Insolvency and Bankruptcy Board of India (IBBI)		
4	Public Announcement in Newspapers – (In English Language) and (In Hindi Language)		
5	Filing of forms MGT 14 with Registrar of Companies		
6	Filing of forms GNL 2 with Registrar of Companies		
7	Intimation to Income Tax Department – Circle		
8	Intimation to Bank for change of authorised signatory.		
9	Proof of Claim Received from .		

Concluded Liquidator [Company Name]

Date:

Place:

CASE LAW

Nippei Toyoma India Private Limited

The petition was filed by Nippei Toyoma India Private limited to initiate voluntary liquidation proceedings under Section 59 of Insolvency and Bankruptcy Code, 2016 (IBC) before NCLT, Mumbai Bench.

Facts of the case

The Company was incorporated under the provisions of Companies Act, 1956 on 27.04.2007. It was engaged in the business of providing engineering services and trading of automotive components for automotive industries. The Company does not have any operations as not carrying on any business activities. Considering the cost and time involved in ensuring compliances regarding the Company, the members of the Company in their Extra Ordinary General Meeting held on 28.09.2017 resolved to voluntarily liquidate the Company.

Judgement

The directors of the Company declared on affidavit dated 27.09.2017 that they have made full inquiry into the affairs of the Company, and are of the opinion that the Company has no debts/will be able to pay its debt in full from the proceeds of assets to be sold in the voluntary liquidation and that it is not being wound-up to defraud any person. The directors have appended to the aforesaid affidavit, audited financial statements and record of business operations of the company of previous two financial years viz. year ending on 31.03.2016 and 31.03.2017.

The statement of payment to stakeholders, annexed to the petition, detailed the payment made to various stakeholders and Dividend Distribution Tax. Post the aforementioned payment, the accumulated profit of Rs.53,06,973/- as dividend and investment in share capital of Rs.1,00,00,000/- were paid to the members of the company thereby the assets of the company were fully liquidated.

The Independent Auditor certified that during the liquidation period 28.09.2017 to 23.07.2018 the proper books of accounts were kept and the said financial statements comply with the accounting standards under section 133 of Companies Act 2013. Further, it certified that there is no pending litigation involving the Company, there are no long term contracts with the Company for which there may be any foreseeable losses and there is no amount which is to be transferred to the Investor Education and Protection Fund by the Company.

The copy of the final report of the Liquidator dated 12.09.2018 was annexed to the petition, stating how the liquidation process has been conducted from 28.09.2017 to 12.09.2018, that all the assets of the Company have been discharged to the satisfaction of the creditors and that no litigation is pending against the company. The said Final report of the liquidator was submitted with the registrar of Companies vide Form GNL-2 dated 13.09.2018. The Liquidator had filed this petition before the Tribunal under section 59(7) of The Code seeking order of dissolution of the Company.

NCLT noted that on examining the submission made by the counsel appearing for the petitioner and the documents annexed to the petition, it appears that the affairs of the company have been completely wound-up, and its assets completely liquidated.

NCLT in view of the above facts and circumstances and Final report of the liquidator directed that the Company shall be dissolved from the date of its order. The Petitioner was further directed to serve a copy of the order upon the registrar of Companies, with which the Company is registered, within fourteen days of receipt of the order.

Yogeshwar Enterprise Pvt Ltd, Order delivered on: 23/01/2023, National Company Law Tribunal Ahmedabad

Application under Section 59 of the Insolvency and Bankruptcy Code, 2016 read with the Regulation 38 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 was filed for voluntary liquidation of Yogeshwar Enterprise Private Limited ("Company")

Facts of the case:

The Company was incorporated as a Private Limited Company under the provisions of the Companies Act, 1956, on 18.10.2010. The main objects of the Company were doing business and real estate activities and construction. It is submitted that the Board of Directors of the Company were of the opinion to close down the business of the company by way of voluntarily liquidation, because of non-availability of business prospects and lack of long-term financial resources for the company. It was not financially viable to carry on the business activity of the company. Thus, the Directors (BOD) in their board meeting held on 28.10.2021 resolved to voluntarily liquidate the Company.

All the directors have declared on Affidavit dated 27.10.2021 that they have made full enquiry into the affairs of the Company and formed an opinion that the Company will be able to pay its debt in full within 12 months from the commencement of winding up, and further affirmed that by way of voluntary liquidation, the company is not being liquidated to defraud any person.

Audited financial statements and records of business operations of the Company of previous two financial years, viz. year ending 31.03.2020 and 31.03.2021 are also annexed. The members of the Company in Extra-Ordinary General meeting held on 10.11.2021, as per provision of the Companies Act, 2013, had passed a Special Resolution to liquidate the Company voluntarily and appointed Insolvency Professional, to act as Liquidator. The Liquidator had notified the Registrar of Companies, Ahmedabad (ROC) about the passing of a Special Resolution under sub-section (4) of Section 59 of the IBC to liquidate the Corporate Person and appointment of Liquidator in Form MGT and Form GNL 2.

The liquidator submitted that they have received no claims as there are no other stakeholders than equity shareholders. The Liquidator has also submitted the IBBI Circular No. IBBI/LIQ/45/2021 dated 15.11.2021 stating that the point 5 of that circular hereby clarified that "as per the provisions of the Code and the Regulations read with Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income-Tax Department as part of compliance in the said process." However, the liquidator had served notice of appointment by email and speed post to the Income Tax Department informing them about the voluntary liquidation of the Company and that he has made compliance with the Regulation 14 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. However, no response was received nor any request for extension was made by the Income Tax Department.

Judgement:

Necessary compliances as per provisions of the Code have been made by the Corporate Person and the Liquidator. In exercise of the powers conferred under sub-section (8) of Section 59 of the Insolvency and Bankruptcy Code, 2016 Application is allowed with the following directions:

- i. Yogeshwar Enterprise Private Limited having CIN U45200GJ2010PTC062656, stands dissolved from the date of this Order.
- ii. The Liquidator is directed to file this order with the concerned Registrar of Companies, Income Tax Department and IBBI within 14 days from the date of receipt of an authentic copy this order, for information and necessary action.
- iii. The Liquidator is also directed to file this order with all other Statutory Authorities connected with the affairs of the Company.
- iv. The Liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account referred to in Regulations 8 and 10 of IBBI Regulations for at least eight years after the dissolution of the Corporate Person, either with himself or with an information utility.
- v. Copy of the order be served to the respective parties.

LESSON 7 - PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

REGULATORY FRAMEWORK

- Section 54A to 54P of the Insolvency and Bankruptcy Code, 2016
- Insolvency and Bankruptcy Board of India (Pre - packaged Insolvency Resolution Process) Regulations, 2021

INTRODUCTION

It appears that 'pre-pack' has no statutory definition. It is probably because it has evolved over the time, differently in different jurisdictions and every jurisdiction has a unique variant(s) of pre-pack, which allows the stakeholders to modify it further to an extent to suit their needs. It has different nomenclature such as pre-packaged insolvency resolution, pre-arranged insolvency resolution and pre-plan sale in the USA, pre-pack sale in the UK, scheme of arrangement in Singapore, etc. As nomenclature suggests, pre-pack is a restructuring plan which is agreed to by the debtor and its creditors prior to the insolvency filing, and then sanctioned by the court on an expedited basis. In the UK context, it generally refers to a pre-agreed business sale by an insolvency practitioner which does not require prior court and/or creditor sanction.

With the background of the formal process in India being afflicted with high costs, pre-pack allows for a cost-effective and speedy resolution process. Pre-pack also identifies and alienates the role of the Insolvency/Resolution professional as an expert in the process.

Benefits of pre - pack insolvency resolution process

- It consolidates the benefit of both formal and informal proceedings of resolution, thus broadening the options for stakeholders
- It enables faster resolution as the corporate debtor can prepare a settlement plan or resolution plan with the creditors before going to NCLT
- Reduced burden on NCLT due to out of court settlements
- With the suspension of CIRP until March 2021, pre-pack has come as a relief to promoters and corporate debtors
- It allows the corporate debtor retain control till a settlement is reached with the creditors

Section 54A to 54P provided under Chapter IIIA of Part II of the Code read with the Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 ("PPIRP Regulations") lays down the provisions of a pre-packaged insolvency resolution process with respect to its initiation, manner of carrying out the process, appointment of resolution professional, termination etc.

CORPORATE DEBTORS ELIGIBLE FOR PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54A)

- (1) An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.

As per Section 5(5) of the Code, application for initiating pre-packaged insolvency resolution process may be made by a corporate applicant which means any of the following:

- Corporate Debtor
- Member or partner of the corporate debtor who is authorized to make an application for CIRP under the constitutional document of the corporate debtor.
- An individual who is in charge of managing the operations and resources of the corporate debtor.
- A person who has the control and supervision over the financial affairs of the corporate debtor.

MSME Threshold			
Class	Capital Investment in Plant and Machinery or Equipment (Crore)	Cap in Turnover (crore)	Applicability of Pre-pack
Micro Enterprise	Not more than 2.5 Crore	Not more than 10 Crore	✓
Small Enterprise	Not more than 25 Crore	Not more than 100 Crore	✓
Medium Enterprise	Not more than 125 Crore	Not more than 500 Crore	✓

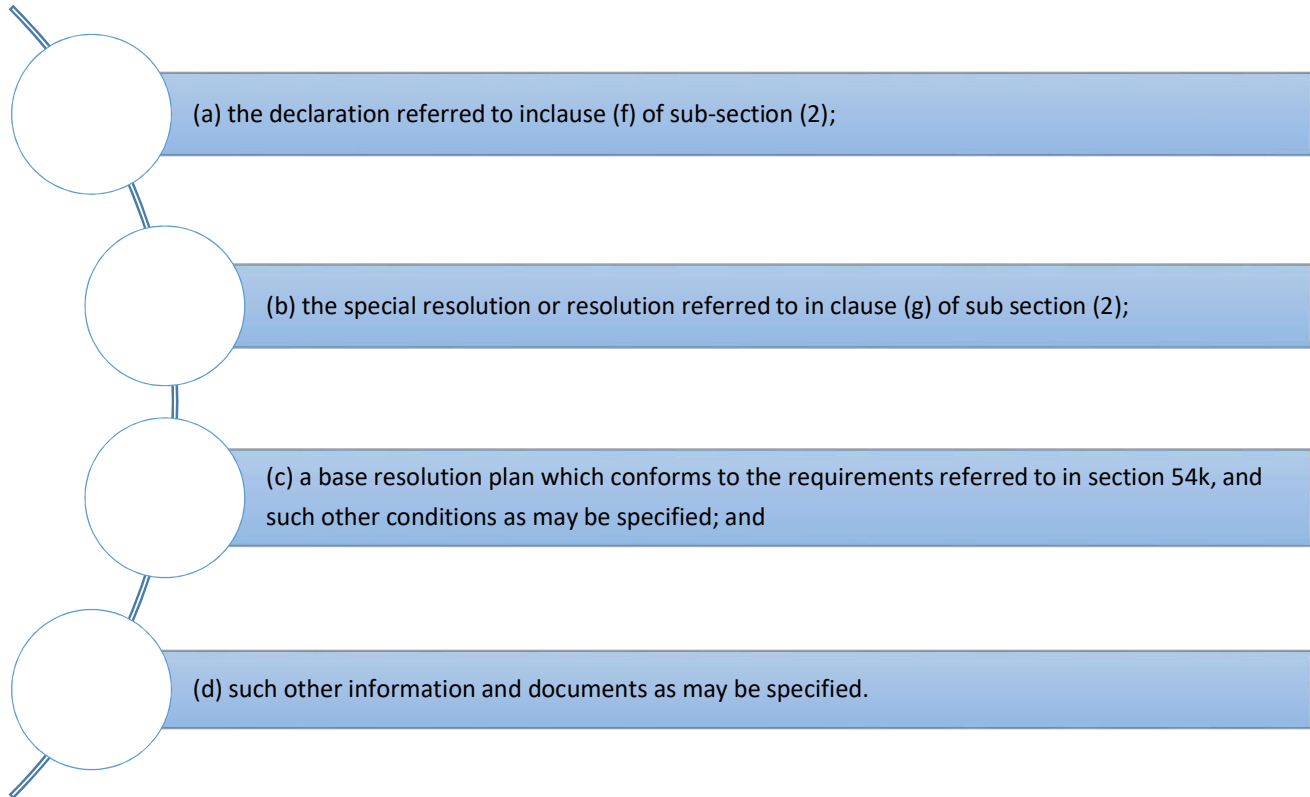
- (2) Without prejudice to sub-section (1), an application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, who commits a default referred to in section 4, subject to the following conditions, that--
- it has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date;
 - it is not undergoing a corporate insolvency resolution process;
 - no order requiring it to be liquidated is passed under section 33;
 - it is eligible to submit a resolution plan under section 29A;
 - the financial creditors of the corporate debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as resolution professional for conducting the pre-packaged insolvency resolution process of the corporate debtor, and;
 - the financial creditors of the corporate debtor, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, have approved such proposal in such form as may be specified.

Provided that where a corporate debtor does not have any financial creditors, not being its related parties, the proposal and approval under this clause shall be provided by such persons as may be specified;
 - the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia -
 - that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;
 - that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and
 - the name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e).
 - the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution, approving the filing of an application for initiating prepackaged insolvency resolution process.

What is the minimum default amount for pre-pack cases?

The Ministry of Corporate Affairs vide its notification dated April 09, 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor.

- (3) The corporate debtor shall obtain an approval from its financial creditors, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, for the filing of an application for initiating pre-packaged insolvency resolution process, in such form as may be specified:
- Provided that where a corporate debtor does not have any financial creditors, not being its related parties, the approval under this sub-section shall be provided by such persons as may be specified.
- (4) Prior to seeking approval from financial creditors under sub section (3), the corporate debtor shall provide such financial creditors with –



ELIGIBILITY FOR RESOLUTION PROFESSIONAL

As per Regulation 7 of the PPIRP Regulations, subject to consent of insolvency professional in Form P1, such insolvency professional shall be eligible to be appointed as an interim resolution professional or resolution professional, if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

If an insolvency professional entity or any partners or directors of such an insolvency professional entity represents any of the stakeholders in the same process, the insolvency professional entity or any partner or director of such insolvency professional entity shall be ineligible to continue as a resolution professional in the process.

A person shall be considered independent of the corporate debtor if:

- a) He is eligible to be appointed as an independent director on the board of the corporate debtor under Section 149 of the Companies Act, 2013 where the corporate debtor is a company;
- b) He is not a related party of the corporate debtor; or c) He is not an employee or proprietor or a partner-
 - of a firm of auditors or secretarial auditors or cost auditors of the corporate debtor; or
 - of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent. or more of the gross turnover of such firm, in any of the preceding three financial years.

DUTIES OF RESOLUTION PROFESSIONAL BEFORE INITIATION OF PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54B)

As per Section 54B(1), the insolvency professional, proposed to be appointed as the resolution professional, shall have the following duties commencing from the date of the approval under clause (e) of sub-section (2) of section 54A, namely:-

- (a) prepare a report in such form as may be specified, confirming whether the corporate debtor meets the requirements of section 54A, and the base resolution plan conforms to the requirements referred to in clause (c) of sub-section (4) of section 54A;
- (b) file such reports and other documents, with the Board, as may be specified; and
- (c) perform such other duties as may be specified.

When will the duties of insolvency professional under Section 54B (1) of the Code cease?

Section 54B(2) provides the following circumstances:

- (a) If the corporate debtor fails to file an application for initiating pre- packaged insolvency resolution process within the time period as stated under the declaration referred to in clause (f) of sub- section (2) of section 54A; or
- (b) the application for initiating pre- packaged insolvency resolution process is admitted or rejected by the Adjudicating Authority, as the case may be.

Section 54B (3) provides that the fees payable to the insolvency professional in relation to the duties performed under sub-section (1) shall be determined and borne in such manner as may be specified and such fees shall form part of the pre-packaged insolvency resolution process costs, if the application for initiation of pre-packaged insolvency resolution process is admitted.

As per Section 5(23C) of the Code, Pre-Packaged Insolvency Resolution Process Costs means:

- the amount of any interim finance and the costs incurred in raising such finance;
- the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of section 54F;
- any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J;
- any costs incurred at the expense of the Government to facilitate the pre-packaged insolvency resolution process; and
- any other costs as may be specified.

APPLICATION TO INITIATE PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54C)

- (1) Where a corporate debtor meets the requirements of section 54A, a corporate applicant thereof may file an application with the Adjudicating Authority for initiating prepackaged insolvency resolution process.
- (2) The application under sub-section (1) shall be filed in such form, containing such particulars, in such manner and accompanied with such fee as may be prescribed.
- (3) The corporate applicant shall, along with the application, furnish-
 - a) the declaration, special resolution or resolution, as the case may be, and the approval of financial creditors for initiating pre-packaged insolvency resolution process in terms of section 54A;
 - b) the name and written consent, in such form as may be specified, of the insolvency professional proposed to be appointed as resolution professional, as approved under clause (e) of sub- section (2) of section 54A, and his report as referred to in clause (a) of sub-section (1) of section 54B;

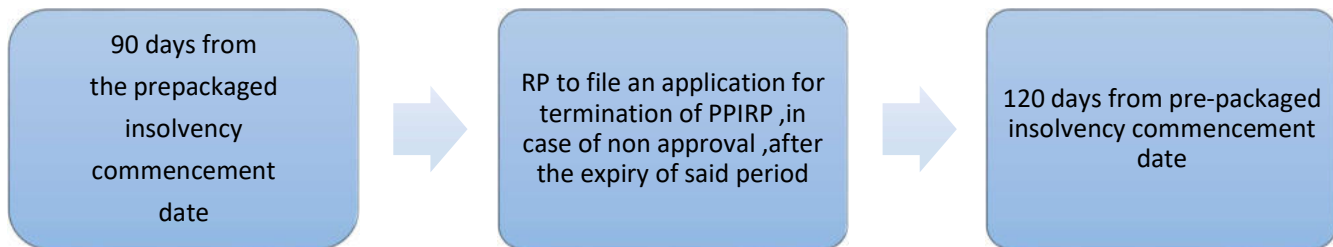
- c) a declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, in such form as may be specified;
 - d) information relating to books of account of the corporate debtor and such other documents relating to such period as may be specified.
- (4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order,-
- (a) admit the application, if it is complete; or
 - (b) reject the application, if it is incomplete.

Provided that the Adjudicating Authority shall, before rejecting an application, give notice to the applicant to rectify the defect in the application within seven days from the date of receipt of such notice from the Adjudicating Authority.

Applicant: As per Regulation 2(1) (a) of IBBI (PIRP) Regulations, 2021, 'applicant' means the corporate applicant, filing an application for initiation of pre- packaged insolvency resolution process under section 54C.

TIME LIMIT FOR COMPLETION OF PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54D)

- (1) The pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.
- (2) Without prejudice to sub-section (1), the resolution professional shall submit the resolution plan, as approved by the committee of creditors, to the Adjudicating Authority under sub-section (4) or sub- section (12), as the case may be, of section 54K, within a period of ninety days from the pre-packaged insolvency commencement date.
- (3) Where no resolution plan is approved by the committee of creditors within the time period referred to in sub-section (2), the resolution professional shall, on the day after the expiry of such time period, file an application with the Adjudicating Authority for termination of the pre-packaged insolvency resolution process in such form and manner as may be specified.



DECLARATION OF MORATORIUM AND PUBLIC ANNOUNCEMENT DURING PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54E)

- (1) The Adjudicating Authority shall, on the pre-packaged insolvency commencement date, along with the order of admission under section 54C -
 - (a) declare a moratorium for the purposes referred to in sub-section (1) read with sub-section (3) of section 14, which shall, mutatis mutandis apply, to the proceedings under this Chapter;
 - (b) appoint a resolution professional -
 - (i) as named in the application, if no disciplinary proceeding is pending against him; or
 - (ii) based on the recommendation made by the Board, if any disciplinary proceeding is pending against the insolvency professional named in the application.

- (c) cause a public announcement of the initiation of the pre- packaged insolvency resolution process to be made by the resolution professional, in such form and manner as may be specified, immediately after his appointment.
- (2) The order of moratorium shall have effect from the date of such order till the date on which the pre- packaged insolvency resolution process period comes to an end.

Timeline for public announcement:

The RP shall make a public announcement within two days of the commencement of the process.

As per Section 5(23D) of the Code, Pre-Packaged Insolvency Resolution Process Period means the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order u/s 54L(1), 54N(1) or 54O(1), as the case may be, is passed by the Adjudicating Authority

As per Regulation 19 of the PPIRP Regulations, the resolution professional shall make a public announcement within two days of the commencement of the process in Form P9 and shall be sent to every creditor listed in Form P2, to information utilities; and published on the website, if any, of the corporate debtor and the Insolvency and Bankruptcy Board of India.

DUTIES AND POWERS OF RESOLUTION PROFESSIONAL DURING PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54F)

- (3) The resolution professional shall conduct the pre-packaged insolvency resolution process of a corporate debtor during the pre-packaged insolvency resolution process

Duties of Resolution Professional [Section 54F(2)]

- (a) confirm the list of claims submitted by the corporate debtor under section 54G, in such manner as may be specified;
- (b) inform creditors regarding their claims as confirmed under clause (a), in such manner as may be specified;
- (c) maintain an updated list of claims, in such manner as may be specified;
- (d) monitor management of the affairs of the corporate debtor;
- (e) inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this chapter and the rules and regulations made thereunder;
- (f) constitute the committee of creditors and convene and attend all its meetings;
- (g) prepare the information memorandum on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information, in such form and manner as may be specified;
- (h) file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any; and
- (i) such other duties as may be specified.

Powers of Resolution Professional [Section 54F(3)]

- (a) access all books of accounts, records and information available with the corporate debtor;
- (b) access the electronic records of the corporate debtor from an information utility having financial information of the corporate debtor;
- (c) access the books of accounts, records and other relevant documents of the corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified;
- (d) attend meetings of members, Board of Directors and committee of directors, or partners, as the case

may be, of the corporate debtor;

- (e) appoint accountants, legal or other professionals in such manner as may be specified;
 - (f) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor and the existence of any transactions that may be within the scope of provisions relating to avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, including information relating to:
 - (i) business operations for the previous two years from the date of pre- packaged insolvency commencement date;
 - (ii) financial and operational payments for the previous two years from the date of pre-packaged insolvency commencement date;
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified;
 - (g) take such other actions in such manner as may be specified.
- (4) From the date of appointment of the resolution professional, the financial institutions maintaining accounts of the corporate debtor shall furnish all information relating to the corporate debtor available with them to the resolution professional, as and when required by him.
 - (5) The personnel of the corporate debtor, its promoters and any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the resolution professional as may be required by him to perform his duties and exercise his powers, and for such purposes, the provisions of subsections (2) and (3) of section 19 shall, mutatis mutandis apply, in relation
 - (6) The fees of the resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process shall be determined in such manner as may be specified:
Provided that the committee of creditors may impose limits and conditions on such fees and expenses: Provided further that the fees and expenses for the period prior to the constitution of the committee of creditors shall be subject to ratification by it.
 - (7) The fees and expenses referred to in sub-section (6) shall be borne in such manner as may be specified.

Who shall bear the fee of RP where the corporate debtor fails to file an application or the application for initiation of the process is rejected?

In such a case, the fee payable to the resolution professional for performing duties under sub-section (3) of section 54B shall be borne by the corporate debtor.

LIST OF CLAIMS AND PRELIMINARY INFORMATION MEMORANDUM (SECTION 54G)

- (1) The corporate debtor shall, within two days of the pre- packaged insolvency commencement date, submit to the resolution professional the following information, updated as on that date, in such form and manner as may be specified, namely:-
 - (a) A list of claims, along with details of the respective creditors, their security interests and guarantees, if any; and
 - (b) a preliminary information memorandum containing information relevant for formulating a resolution plan.
- (2) Where any person has sustained any loss or damage as a consequence of the omission of any material information or inclusion of any misleading information in the list of claims or the preliminary information memorandum submitted by the corporate debtor, every person who -
 - (a) is a promoter or director or partner of the corporate debtor, as the case may be, at the time of submission of the list of claims or the preliminary information memorandum by the corporate debtor; or

- (b) has authorised the submission of the list of claims or the preliminary information memorandum by the corporate debtor, shall, without prejudice to section 77A, be liable to pay compensation to every person who has sustained such loss or damage.
- (3) No person shall be liable under sub-section (2), if the list of claims or the preliminary information memorandum was submitted by the corporate debtor without his knowledge or consent.
- (4) Subject to section 54E, any person, who sustained any loss or damage as a consequence of omission of material information or inclusion of any misleading information in the list of claims or the preliminary information memorandum shall be entitled to move a court having jurisdiction for seeking compensation for such loss or damage.

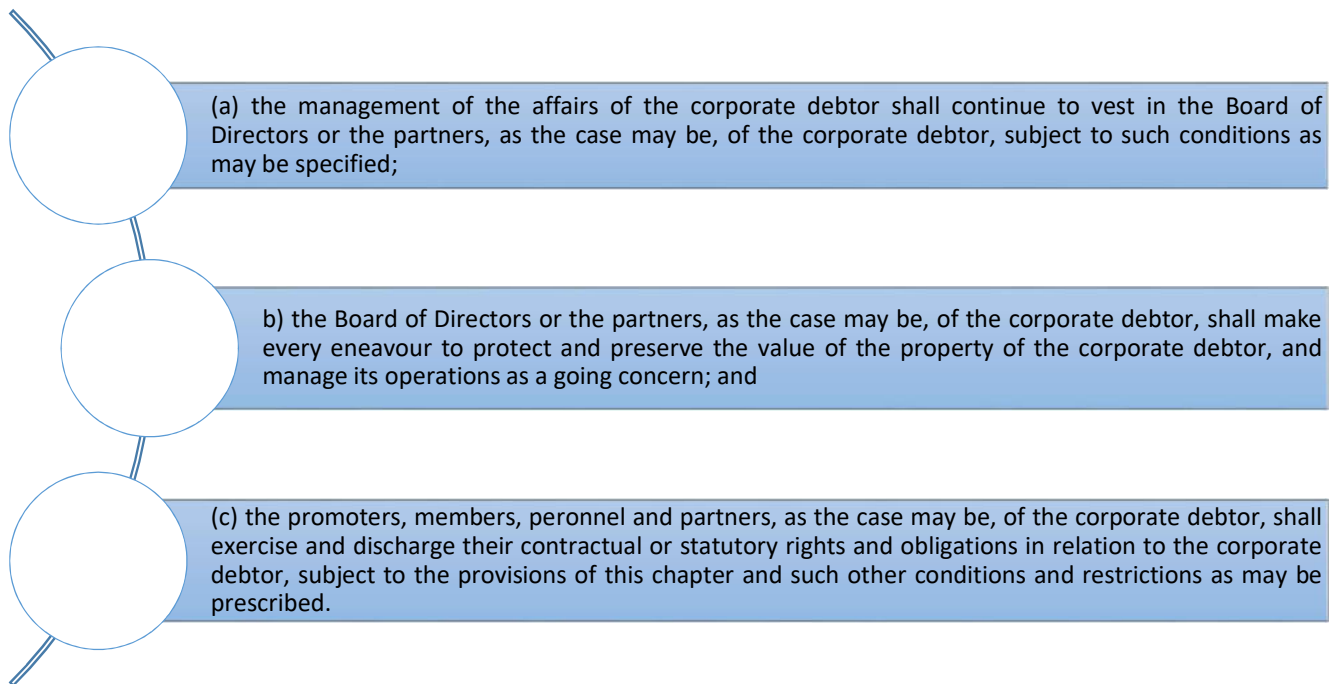
Preliminary information memorandum

Section 5(23A) of the Code states that “preliminary information memorandum” means a memorandum submitted by the corporate debtor under clause (b) of sub-section (1) of section 54G.

The corporate debtor must provide the resolution professional with a list of in Form P10 in accordance with Regulation 20 of the PPIRP Regulations. The resolution professional must validate the information provided in Form P10 based on the corporate debtor’s documents and other pertinent information on file. The resolution professional must notify each creditor of their confirmed claims and request objections (if any).

MANAGEMENT OF AFFAIRS OF CORPORATE DEBTOR (SECTION 54H)

During the pre-packaged insolvency resolution process period-



COMMITTEE OF CREDITORS (SECTION 54I)

- (1) The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed under clause (a) of sub-section (2) of section 54F:

Provided that the composition of the committee of creditors shall be altered on the basis of the updated list of claims, in such manner as may be specified, and any such alteration shall not affect the validity of any past decision of the committee of creditors.

- (2) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- (3) Provisions of section 21, except sub-section (1) thereof, shall, mutatis mutandis apply, in relation to the committee of creditors under this Chapter: Provided that for the purposes of this sub-section, references to the “resolution professional” under sub-sections (9) and (10) of section 21, shall be construed as references to “corporate debtor or the resolution professional”.

As per Regulation 3 of the PPIRP Regulations, all meetings as required may be held either in physical or electronic mode or in a combination of both. All communications with respect to such meetings shall be made by electronic means as far as possible.

Committee with only one creditor in class: According to Regulation 24 of the PPIRP Regulations, the committee must only include the authorised agent if the corporate debtor has only creditors in a class and no other financial creditors who are not related parties of the corporate debtor.

Committee with only operational creditors: According to Regulation 25 of the PPIRP Regulations, where the corporate debtor has no financial debt or all financial creditors are related parties, the committee shall consist of operational creditors, being not related to the corporate debtor as follows:

- a) ten largest operational creditors by value, and if the number of operational creditors is less than ten, the committee shall include all such operational creditors;
- b) one representative elected by all workmen other than those workmen included under clause (a); and
- c) one representative elected by all employees other than those employees included under clause (a).

VESTING MANAGEMENT OF CORPORATE DEBTOR WITH RESOLUTION PROFESSIONAL (SECTION 54J)

Section 54J(1) provides that where the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional, the resolution professional shall make an application for this purpose to the Adjudicating Authority, in such form and manner as may be specified.

Section 54J(3) provides that notwithstanding anything to the contrary contained in this chapter, the provisions of:

- (a) sub-sections (2) and (2A) of section 14 (moratorium);
- (b) section 17 (Management of affairs of corporate debtor by IRP);
- (c) clauses (e) to (g) of section 18 (Duties of IRP);
- (d) sections 19 and 20 (Personnel to extend co-operation to IRP and management of operations of corporate debtor as going concern);
- (e) sub-section (1) of section 25 (Duty of RP to preserve and protect the assets of corporate debtor);
- (f) clauses (a) to (c) and clause (k) of sub-section (2) of section 25 (duties of RP); and
- (g) section 28 (Approval of COC for certain actions) shall, mutatis mutandis apply, to the proceedings under this chapter, from the date of the order under sub-section (2), until the pre-packaged insolvency resolution process period comes to an end.

Section 54J(2) of the Code provides that on an application made under sub-section (1), if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process —

- (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or
- (b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the resolution professional.

In accordance with Regulation 50 of the PPIRP Regulations, a corporate debtor is prohibited from conducting its business fraudulently or in a way that is detrimental to the interests of its debtors. Also, the corporate debtor shall not undertake any of the following actions without obtaining prior approval of the committee:

- a) transaction above a threshold as decided by the committee; and
- b) any other matter as decided by the committee and not covered under Section 28 of the Code.

CONSIDERATION AND APPROVAL OF RESOLUTION PLAN (SECTION 54K)

- (1) The corporate debtor shall submit the base resolution plan, referred to in clause (c) of sub-section (4) of section 54A, to the resolution professional within two days of the prepackaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.
- (2) The committee of creditors may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval under sub-section (4) or invitation of prospective resolution applicants under sub-section (5) as the case may be.
- (3) The resolution plans and the base resolution plan, submitted under this section shall conform to the requirements referred to in sub-sections (1) and (2) of section 30, and the provisions of sub-sections (1), (2) and (5) of section 30 shall, mutatis mutandis apply, to the proceedings under this Chapter.

Explanation I – For the removal of doubts, it is hereby clarified that, the corporate debtor being a resolution applicant under clause (25) of section 5, may submit the base resolution plan either individually or jointly with any other person.

As per Regulation 43 of the PPIRP Regulations, the resolution professional shall publish brief particulars of the invitation for resolution plans in Form P11 not later than 21 days from the pre-packaged insolvency commencement date. The Form P11 shall state where the invitation for resolution plans can be downloaded or obtained from and shall provide the last date for submission of resolution plan which shall not be less than 15 days from the date of issue of invitation for resolution plan.

As per Section 5(2A), Base Resolution Plan means a resolution plan provided by the corporate debtor under clause (c) of sub-section (4) of Section 54A. As per Section 5(23A,) Preliminary Information Memorandum means a memorandum submitted by the corporate debtor under clause (b) of subsection (1) of Section 54G. In accordance with Regulation 44 of the PPIRP Regulations, a resolution plan must include any measures that may be required to maximise the value of the corporate debtor's assets during the prepackaged insolvency resolution process.

Explanation II – For the purposes of subsections (4) and (14), claims shall be considered to be impaired where the resolution plan does not provide for the full payment of the confirmed claims as per the updated list of claims maintained by the resolution professional.

- (4) The committee of creditors may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors.
- (5) Where -
 - (a) the committee of creditors does not approve the base resolution plan under sub-section (4); or
 - (b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors, the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan, in such manner as may be specified.
- (6) The resolution applicants submitting resolution plans pursuant to invitation under sub-section (5), shall fulfil such criteria as may be laid down by the resolution professional with the approval of the committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified.
- (7) The resolution professional shall provide to the resolution applicants -
 - (a) the basis for evaluation of resolution plans for the purposes of sub-section (9), as approved by the committee of creditors subject to such conditions as may be specified; and
 - (b) the relevant information referred to in section 29, which shall, mutatis mutandis apply, to the proceedings under this chapter, in such manner as may be specified.
- (8) The resolution professional shall present to the committee of creditors, for its evaluation, resolution plans which conform to the requirements referred to in sub-section (2) of section 30.
- (9) The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select a resolution plan from amongst them.

- (10) Where, on the basis of such criteria as may be laid down by it, the committee of creditors decides that the resolution plan selected under sub-section (9) is significantly better than the base resolution plan, such resolution plan may be selected for approval under sub-section (12):

Provided that the criteria laid down by the committee of creditors under this sub-section shall be subject to such conditions as may be specified.

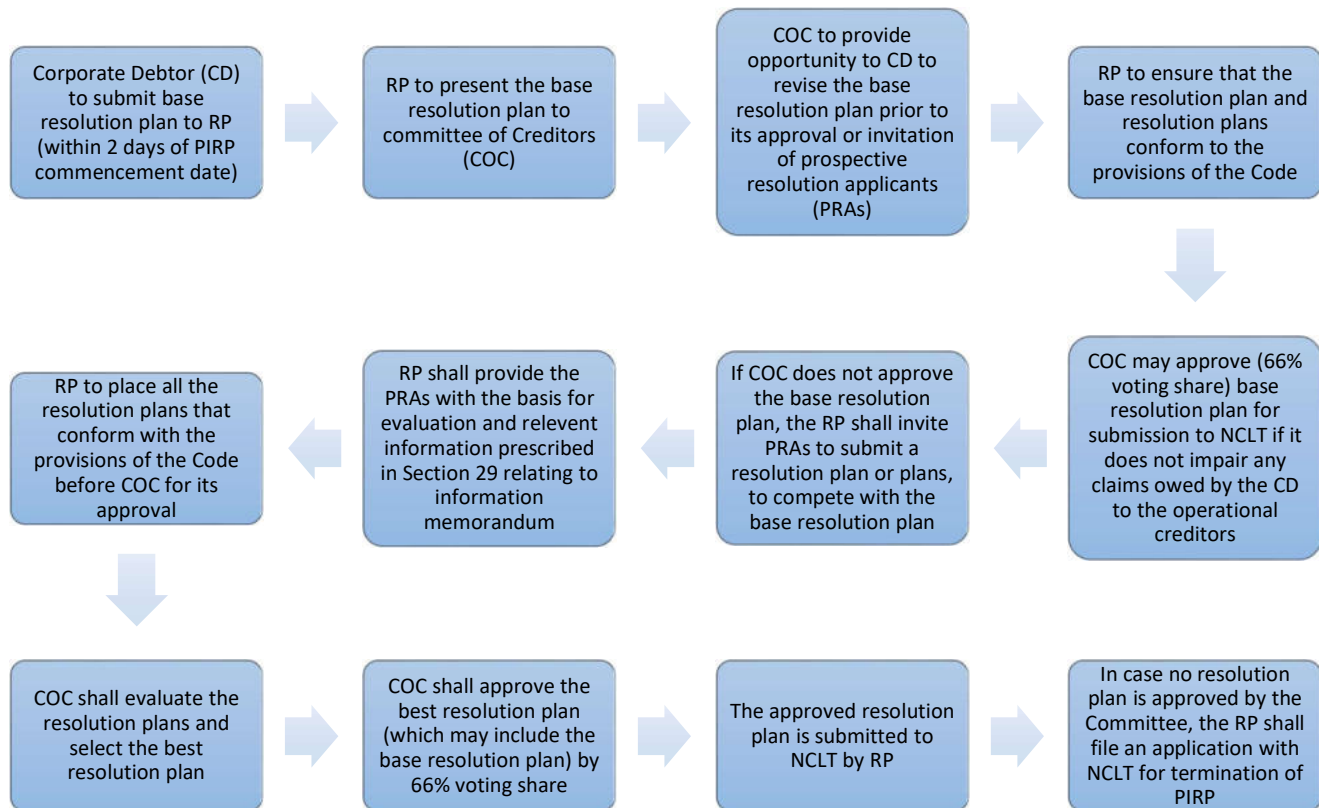
- (11) Where the resolution plan selected under sub-section (9) is not considered for approval or does not fulfil the requirements of sub-section (10), it shall compete with the base resolution plan, in such manner and subject to such conditions as may be specified, and one of them shall be selected for approval under sub-section (12).
- (12) The resolution plan selected for approval under sub-section (10) or sub-section (11), as the case may be, may be approved by the committee of creditors for submission to the Adjudicating Authority:

Provided that where the resolution plan selected for approval under sub-section (11) is not approved by the committee of creditors, the resolution professional shall file an application for termination of the pre-packaged insolvency resolution process in such form and manner as may be specified.

- (13) The approval of the resolution plan under sub-section (4) or sub-section (12), as the case may be, by the committee of creditors, shall be by a vote of not less than sixty-six per cent. of the voting shares, after considering its feasibility and viability, the manner of distribution proposed, taking into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified.
- (14) While considering the feasibility and viability of a resolution plan, where the resolution plan submitted by the corporate debtor provides for impairment of any claims owed by the corporate debtor, the committee of creditors may require the promoters of the corporate debtor to dilute their shareholding or voting or control rights in the corporate debtor:

Provided that where the resolution plan does not provide for such dilution, the committee of creditors shall, prior to the approval of such resolution plan under sub-section (4) or sub-section (12), as the case may be, record reasons for its approval.

- (15) The resolution professional shall submit the resolution plan as approved by the committee of creditors under sub-section (4) or sub-section (12), as the case may be, to the Adjudicating Authority.



REQUIREMENTS OF RESOLUTION PLAN

A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan

- a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-
 - i. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
 - ii. the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.
- c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;
- d) The implementation and supervision of the resolution plan;
- e) does not contravene any of the provisions of the law for the time being in force;
- f) confirms to such other requirements as may be specified by the Board.

APPROVAL OF RESOLUTION PLAN BY COMMITTEE OF CREDITORS

COC may approve (66% voting share) base resolution plan for submission to NCLT if it does not impair any claims owed by the CD to the operational creditors. In case no resolution plan is approved by the Committee, the RP shall file an application with NCLT for termination of PIRP.

As per **Regulation 48** of the PPIRP Regulations, the resolution plan shall be considered by the committee of creditors, if it is significantly better than the base resolution plan. Where no resolution plan is received, then the base resolution plan may be considered by the committee for approval.

As per **Regulation 49(1)** of the PPIRP Regulations, where a resolution plan is approved by the committee of creditors, the resolution professional shall submit an application along with a compliance certificate in Form P12 to the Adjudicating Authority for approval. The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

As per Regulation 49(4) of the PPIRP Regulations, where no resolution plan is approved by the committee or where the committee has approved the termination of process, the resolution professional shall file an application in Form P13 to the Adjudicating Authority for termination of process.

APPROVAL OF RESOLUTION PLAN (SECTION 54L)

- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) or sub-section (12) of section 54K, as the case may be, subject to the conditions provided therein, meets the requirements as referred to in sub-section (2) of section 30, it shall, within thirty days of the receipt of such resolution plan, by order approve the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of a resolution plan under this sub-section, satisfy itself that the resolution plan has provisions for its effective implementation.

- (2) The order of approval under sub-section (1) shall have such effect as provided under sub-sections (1),(3) and (4) of section 31, which shall, mutatis mutandis apply, to the proceedings under this Chapter.
- (3) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, within thirty days of the receipt of such resolution plan, by an order, reject the resolution plan and pass an order under section 54N.
- (4) Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J and the resolution plan approved by the committee of creditors under sub-section (4) or sub-section (12), as the case may be, of section 54K, does not result in the change in the management or control of the corporate debtor to a person who was not a promoter or in the management or control of the corporate debtor, the Adjudicating Authority shall pass an order -
 - (a) rejecting such resolution plan;
 - (b) terminating the pre-packaged insolvency resolution process and passing a liquidation order in respect of the corporate debtor as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of section 33; and
 - (c) declaring that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

APPEAL AGAINST ORDER UNDER SECTION 54L (SECTION 54M)

Any appeal against an order approving the resolution plan under sub-section (1) of section 54L, shall be on the grounds laid down in sub-section (3) of section 61.

TERMINATION OF PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (SECTION 54N)

- (1) Where the resolution professional files an application with the Adjudicating Authority, -
 - (a) under the proviso to sub-section (12) of section 54K; or
 - (b) under sub-section (3) of section 54D, the Adjudicating Authority shall, within thirty days of the date of such application, by an order, -

- (i) terminate the pre-packaged insolvency resolution process; and
 - (ii) provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.
- (2) Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).
- (3) Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.

Any appeal from an order approving the resolution plan under sub-section (1) of section 54L, shall be on the grounds laid down in sub-section (3) of section 61 (Section 54M).

What happens when the Adjudicating Authority has passed an order for termination of pre-packaged insolvency resolution process pursuant to the decision of COC?

- (4) As per Section 54N (4) of the Code, the Adjudicating Authority shall further pass an order —
- a) of liquidation of corporate debtor;
 - b) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS (SECTION 54O)

- (1) The committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, by a vote of sixty-six per cent. of the voting shares, may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.
- (2) Notwithstanding anything to the contrary contained in Chapter II, where the resolution professional intimates the Adjudicating Authority of the decision of the committee of creditors under sub-section (1), the Adjudicating Authority shall, within thirty days of the date of such intimation, pass an order to -
- (a) terminate the pre-packaged insolvency resolution process and initiate corporate insolvency resolution process under Chapter II in respect of the corporate debtor;
 - (b) appoint the resolution professional referred to in clause (b) of sub-section (1) of section 54E as the interim resolution professional, subject to submission of written consent by such resolution professional to the Adjudicatory Authority in such form as may be specified; and
 - (c) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of insolvency resolution process costs for the purposes of the corporate insolvency resolution process of the corporate debtor.
- (3) Where the resolution professional fails to submit written consent under clause (b) of sub-section (2), the Adjudicating Authority shall appoint an interim resolution professional by making a reference to the Board for recommendation, in the manner as provided under section 16.

Section 54(O)(4) of the Code provides that where the Adjudicating Authority passes an order undersubsection (2):

(a) such order shall be deemed to be an order of admission of an application under section 7 and shall have the same effect;	(b) the corporate insolvency resolution process shall commence from the date of such order;	(c) the proceedings initiated for avoidance of transaction under Chapter III or proceedings initiated under section 66 and section 67 A, if any, shall continue during the corporate insolvency resolution process;	(d) for the purposes of sections 43, 46 and 50, references to “insolvency commencement date” shall mean “pre-packaged insolvency commencement date”; and	(e) in computing the relevant time or the period for avoidable transactions, the time period for the duration of the prepackaged insolvency resolution process shall also be included, notwithstanding anything to the contrary contained in sections 43, 46 and 50.

APPLICATION OF PROVISIONS OF CHAPTERS II, III, VI AND VII TO THIS CHAPTER (SECTION 54P)

- (1) Save as provided under this Chapter, the provisions of sections 24, 25A, 26, 27, 28, 29A, 32A, 43 to 51, and the provisions of Chapters VI and VII of this Part shall, mutatis mutandis apply, to the pre-packaged insolvency resolution process, subject to the following, namely:
 - (a) reference to “members of the suspended Board of Directors or the partners” under clause (b) of sub-section (3) of section 24 shall be construed as reference to “members of the Board of Directors or the partners, unless an order has been passed by the Adjudicating Authority under section 54J”;
 - (b) reference to “clause (j) of sub-section (2) of section 25” under section 26 shall be construed as reference to “clause (h) of sub-section (2) of section 54F”;
 - (c) reference to “section 16” under section 27 shall be construed as reference to “section 54E”;
 - (d) reference to “resolution professional” in sub-sections (1) and (4) of section 28 shall be construed as “corporate debtor”;
 - (e) reference to “section 31” under sub-section (3) of section 61 shall be construed as reference to “sub-section (1) of section 54L”;
 - (f)) reference to “section 14” in sub-sections (1) and (2) of section 74 shall be construed as reference to “clause (a) of sub-section (1) of section 54E”;
 - (g) reference to “section 31” in sub-section (3) of section 74 shall be construed as” reference to “sub-section (1) of section 54L”.
- (2) Without prejudice to the provisions of this Chapter and unless the context otherwise requires, where the provisions of Chapters II, III, VI and VII are applied to the proceedings under this Chapter, references to -
 - (a) “insolvency commencement date” shall be construed as references to “prepackaged insolvency commencement date”;
 - (b) “resolution professional” or “interim resolution professional”, as the case may be, shall be construed as references to the resolution professional appointed under this Chapter;
 - (c) “corporate insolvency resolution process” shall be construed as references to “pre-packaged insolvency resolution process”; and
 - (d) “insolvency resolution process period” shall be construed as references to “prepackaged insolvency resolution process period.”

BASIS FOR EVALUATION:

“**basis for evaluation**”, includes the parameters to be applied and the manner of applying such parameters, as approved by the committee, for evaluating a resolution plan to assign a score to the plan, and disclosed in the invitation for resolution plans.

SIGNIFICANTLY BETTER:

“**Significantly better**” in relation to resolution plan, means that the score of the resolution plan is higher than that of another resolution plan by a certain number or percentage, as approved by the committee and disclosed in the invitation for resolution plans.

TICK SIZE:

“**Tick size**” means minimum improvement over another resolution plan in terms of score, as approved by the committee and disclosed in the invitation for resolution plans.

DIFFERENCE BETWEEN CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP) AND PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PPIRP):

Basis	CIRP	PPIRP
Legal Framework	More in statute and less in Regulations	Relatively less in statute and more in Regulations
Threshold for initiating the process	Default above INR 1 Crore	Default above INR 10 Lakhs
Initiation by	FC, OC or CD	CD with consent of majority of unrelated FCs
Management of CD	IP in possession with creditor in control	Debtor in possession with creditor in control
Invitation and collation of claim	IRP to invite and collate the claims	CD to submit list of claims to RP and RP also to invite and collate the claims
Information Memorandum	Prepared by RP	Draft prepared by CD and finalised by RP
Process Resolution Cost	Includes cost of running the operations of the corporate debtor	Doesn't include the cost of running the operations of the corporate debtor
Swiss Challenge	May/not to be followed while calling resolution plan	Swiss Challenge is followed while calling the resolution plan
Right of promoter to offer resolution plan	If eligible under Section 29A and promoter is at par with other resolution applicants	Promoters have first right to offer resolution plan subject to eligibility under Section 29A
Early closure of the process	By withdrawal under Section 12A or at the request of applicant	Suo moto by CoC or with approval of 66% of voting share of members of CoC present and voting
Consequence of the failure of the process	Liquidation	Closure or termination
Role of RP and Adjudicating Authority	Relatively more	Relatively less
Timeline of the process	180 days followed by 90 days extension subject to Adjudicating Authority approval	120 days

LESSON 8 - DEBT RECOVERY & SECURITIZATION

REGULATORY FRAMEWORK

- Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Recovery of Debts due to Banks and Financial Institutions Act, 1993

An Act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and to provide for a Central database of security interests created on property rights, and for matters connected therewith or incidental thereto.

INTRODUCTION

In the traditional lending process, a bank makes a loan, maintaining it as an asset on its balance sheet, collecting principal and interest, and monitoring whether there is any deterioration in borrower's creditworthiness.

This requires a bank to hold assets till repayment of loan. The funds of the bank are blocked in these loans and to meet its growing fund requirements, a bank has to raise additional funds from the market. Securitization is a way of unlocking these blocked funds.

The process leads to the creation of financial instruments that represent ownership interest in, or are secured by a segregated income producing asset or pool of assets. The pool of assets collateralizes securities. These assets are generally secured by personal or real property (e.g. automobiles, real estate, or equipment loans), but in some cases are unsecured (e.g. credit card debt, consumer loans).

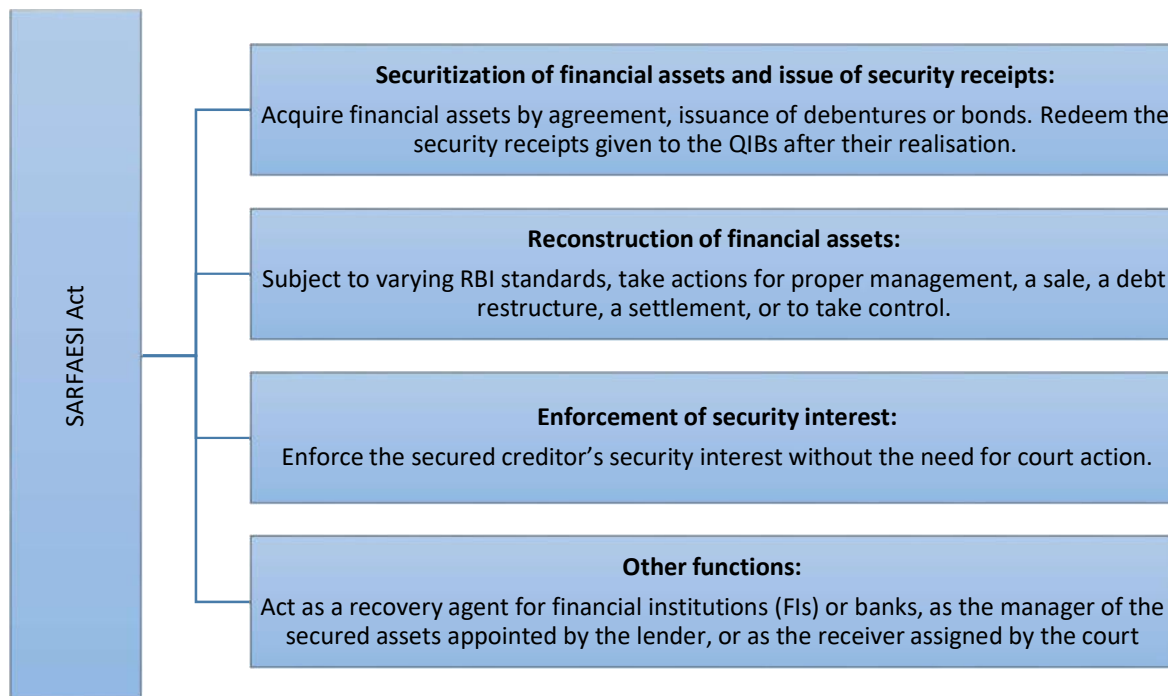
One of the most prominent developments in international finance in recent decades and the one that is likely to assume even greater importance in future is securitization. Securitization is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. Basically, Securitization is a method of raising funds by way of selling receivables for money.

INTRODUCTION

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance enabled banks and financial institutions to manage problems of liquidity, asset liability mismatches and improvement in recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them. The Banks can now issue notices to the defaulters to pay up the dues and if they fail to do so within 60 days of the date of the notice, the banks can take over the possession of assets like factory, land and building, plant and machinery etc. charged to them including the right to transfer by way of lease, assignment or sale and realize the secured assets. In case the borrower refuses peaceful handing over of the secured assets, the bank can also file an application before the District Magistrate or Chief Metropolitan Magistrate for taking possession of assets. The Banks can also take over the management of business of the borrower. The bank in addition can appoint any person to manage the secured assets the possession of which has been taken over by the bank. Banks can package and sell loans via "Securitization" and the same can be traded in the market like bonds and shares.

The main purpose of the SARFAESI Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court and also alternatively to authorize any securitization or reconstruction company to acquire financial assets of any bank or financial institution.



CONSTITUTIONAL VALIDITY OF THE SARFAESI ACT

The SARFAESI Act, 2002 was challenged in various courts on grounds that it was loaded heavily in favour of law enders, giving little chance to the borrowers to explain their views once recovery process is initiated under the legislation. Leading the charge against the said Act was Mardia Chemicals in its plea against notice served by ICICI Bank. The Government had, however, argued that the legislation would bring about a financial discipline and reduce the burden of Non-Performing Assets (NPAs) of banks and institutions.

In **Mardia Chemicals Ltd. v. UOI** [2004] 59 CLA 380 (SC), it was urged by the petitioner that:

- there was no occasion to enact such a draconian legislation to find a short-cut to realise non- performing assets ('NPAs') without their ascertainment when there already existed the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('Recovery of Debt Act') for doing so;
- no provision had been made to take into account lenders liability;
- that the mechanism for recovery under Section 13 does not provide for an adjudicatory forum of inter se disputes between lender and borrower; and
- that the appeal provisions were illusory because the appeal would be maintainable after possession of the property or management of the property was taken over or the property sold and the appeal is not entertainable unless 75 per cent of the amount claimed is deposited with the Debts Recovery Tribunal ('DRT').

The Hon'ble Supreme Court held that though some of the provisions of the Act 2002 were a bit harsh for some of the borrowers but on those grounds the impugned provisions of the Act cannot be said to unconstitutional in the view of the fact that the objective of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would sub-serve the public interest.

The Supreme Court observed that the Act provides for a forum and remedies to the borrower to ventilate his grievances against the bank or financial institution, inter alia, with respect to the amount of the demand of the secured debt. After the notice is sent, the borrower may explain the reasons why the measures may or may not be taken under Sub-section (4) of Section 13. The creditor must apply its mind to the objections raised in reply to such notice. There must be meaningful consideration by the Court of the objections raised rather than to ritually reject them and to proceed to take drastic measures under Sub-section (4) of Section 13. The court held that such a procedure/mechanism was conducive to the principles of fairness and that such a procedure was also important from

the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would serve as guidance to secured debtors in general in conducting their affairs.

The court opined that the fairness doctrine, cannot be stretched too far, such communication is only for the purposes of the secured debtors knowledge and cannot give an occasion to the secured debtor to resort to any proceeding, which are not permissible under the provisions of the Act. Thus, a secured debtor is not allowed to challenge the reasons communicated or challenge the action likely to be taken by the secured creditor at that point of time unless his right to approach the DRT as provided under section 17 matures on any measure having been taken under Sub-section (4) of Section 13.

Moreover, another safeguard is also available to a secured borrower within the framework of the Act i.e. to approach the DRT under Section 17 though such a right accrues only after measures are taken under Sub-section (1) of Section 13.

The Hon'ble Supreme Court, however, found that the requirement of deposit of 75 per cent of the amount claimed before entertaining an appeal (petition) under Section 17 is an oppressive, onerous and arbitrary condition and against all the canons of reasonableness. It held this provision to be invalid and ordered that it was liable to be struck down. The amount of deposit for making an appeal has since been reduced to 5% of the amount claimed, to keep it reasonable and also to check the genuineness of the Appellant.

It may be noted that-

“Non-performing asset” means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset—

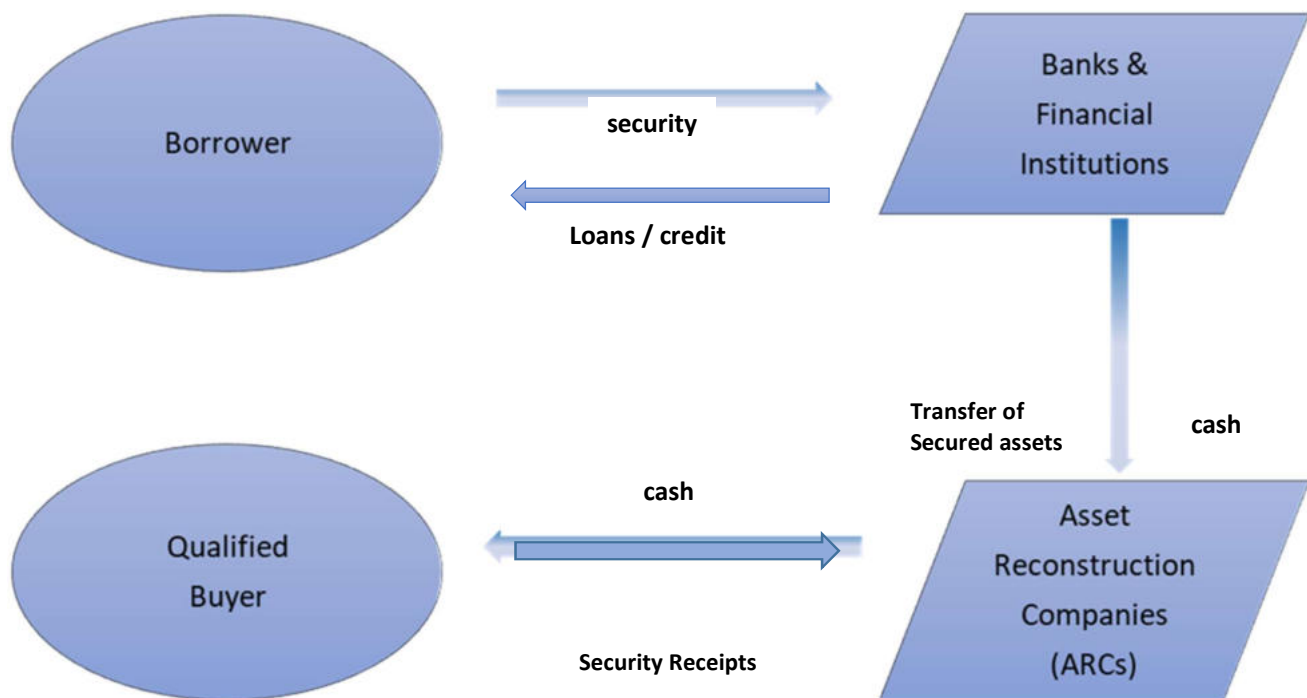
- (a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
- (b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank; [Section 2(1)(o)]

ASSET RECONSTRUCTION COMPANY

Asset reconstruction company means a company registered with Reserve Bank under section 3 of SARFAESI Act for the purposes of carrying on the business of asset reconstruction or securitisation, or both.

The problem of non-performing loans created due to systematic banking crisis world over has become acute. Focused measures to help the banking systems to realise its NPAs has resulted into creation of specialised bodies called asset management companies which in India have been named asset reconstruction companies ('ARCs'). The buying of impaired assets from banks or financial institutions by ARCs will make their balance sheets cleaner and they will be able to use their time, energy and funds for development of their business. ARCs may be able to mix up their assets, both good and bad, in such a manner to make them saleable.

The main objective of asset reconstruction company ('ARC') is to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges, to act as manager of the borrowers' asset taken over by banks, or financial institution, to act as the receiver of properties of any bank or financial institution and to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary. If an ARC carries on any business other than the business of asset reconstruction or securitisation or the business mentioned above, it shall cease to carry on any such business within one year of doing such other business.



REGISTRATION OF ASSET RECONSTRUCTION COMPANIES

As per Section 3(1) of the Act, no asset reconstruction company shall commence or carry on the business of securitization or asset reconstruction without—

- obtaining a certificate of registration granted under this section; and
- having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify;

Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of asset reconstruction companies:

Provided further that an asset reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

Every asset reconstruction company shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

Sub-clause 3 states that the Reserve Bank may, for the purpose of considering the application for registration of an asset reconstruction company to commence or carry on the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such asset reconstruction company, or otherwise, that the following conditions are fulfilled, namely:—

- that the asset reconstruction company has not incurred losses in any of the three preceding financial years;
- that such asset reconstruction company has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons;

- iii. that the directors of asset reconstruction company have adequate professional experience in matters related to finance, securitisation and reconstruction;
- iv. that any of its directors has not been convicted of any offence involving moral turpitude;
- v. that a sponsor of an asset reconstruction company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;
- vi. that asset reconstruction company has complied with or is in a position to comply with prudential norms specified by the Reserve Bank;
- vii. that asset reconstruction company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.

The Reserve Bank may, after being satisfied that the conditions specified in sub-section (3) are fulfilled, grant a certificate of registration to the asset reconstruction company to commence or carry on business of securitisation or asset reconstruction, subject to such conditions, which it may consider, fit to impose.

The Reserve Bank may reject the application made under sub-section (2) if it is satisfied that the conditions specified in sub-section (3) are not fulfilled:

Provided that before rejecting the application, the applicant shall be given a reasonable opportunity of being heard.

Every asset reconstruction company shall obtain prior approval of the Reserve Bank for any substantial change in its management including appointment of any director on the board of directors of the asset reconstruction company or managing director or chief executive officer thereof or change of location of its registered office or change in its name:

Provided that the decision of the Reserve Bank, whether the change in management of an asset reconstruction company is a substantial change in its management or not, shall be final.

Explanation—For the purposes of this section, the expression “substantial change in management” means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.

It may be noted that-

“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; [Section 2(1)(b)]

“Asset reconstruction company” means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both; [Section 2(1)(ba)]

“Bank” means –

- i) a banking company; or
- ii) a corresponding new bank; or
- iii) the State Bank of India; or
- iv) a subsidiary bank; or
- iva) a multi-State co-operative bank; or
- v) such other bank which the Central Government may, by notification, specify for the purposes of this Act. [Section 2(1)(c)]

“Securitisation” means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise; [Section 2(1)(z)]

In 2013, the government amended the Act to include co-operative banks formally under the definition of banks eligible to use it. However, petitions were filed questioning the authority of the notification and the power of Parliament to amend the SARFAESI Act.

The Supreme Court vide order dated 05th May, 2020 in the matter of '**Pandurang Ganpati Chaugule vs Vishwasrao Patil Murgud Sahakari Bank Limited**' held that co-operative are banks under the State legislation and multi-State co-operative banks are 'banks' under section 2(1)(c) of SARFESI Act, 2002. The order also stated that it is permissible for the Parliament to enact the law to provide recovery procedures for bank dues that have been done by providing speedy recovery of secured interest without intervention of the court/tribunal.

This move helps the co-operative banks to avoid inordinate delays in the recovery of their bad loans due to the involvement of civil courts and co-operative tribunals. The Indian banking system has 1,544 urban co-operative banks (UCBs) and 96,248 rural co-operative banks, with substantial deposits from retail investors. Considering their size, for the smooth functioning of these co-operative banks, speedy recovery of defaulting loans is critical.

CANCELLATION OF CERTIFICATE OF REGISTRATION

Section 4 provides for cancellation of certificate of registration. It states that Reserve Bank may cancel a certificate of registration granted to an asset reconstruction company, if such company—

- a. ceases to carry on the business of securitisation or asset reconstruction; or
- b. ceases to receive or hold any investment from a qualified buyer; or
- c. has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
- d. at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or
- e. fails to—
 - i. comply with any direction issued by the Reserve Bank under the provisions of this Act; or
 - ii. maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or
 - iii. submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
 - iv. obtain prior approval of the Reserve Bank required under sub-section (6) of section 3:

Provided that before cancelling a certificate of registration on the ground that the asset reconstruction company has failed to comply with the provisions of clause (c) or has failed to fulfil any of the conditions referred to in clause (d) or sub-clause (iv) of clause (e), the Reserve Bank, unless it is of the opinion that the delay in cancelling the certificate of registration granted under sub-section (4) of section 3 shall be prejudicial to the public interest or the interests of the investors or the asset reconstruction company, shall give an opportunity to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfilment of such conditions.

Section 4(2) states that an asset reconstruction company aggrieved by the order of cancellation of certificate of registration may prefer an appeal, within a period of thirty days from the date on which such order of cancellation is communicated to it, to the Central Government:

Provided that before rejecting an appeal such company shall be given a reasonable opportunity of being heard.

Section 4(3) states an asset reconstruction company, which is holding investments of qualified buyers] and whose application for grant of certificate of registration has been rejected or certificate of registration has been cancelled shall, notwithstanding such rejection or cancellation be deemed to be an asset reconstruction company until it repays the entire investments held by it (together with interest, if any) within such period as the Reserve Bank may direct.

ACQUISITION OF RIGHTS OR INTEREST IN FINANCIAL ASSETS

Section 5 states that, notwithstanding anything contained in any agreement or any other law for the time being in force, any asset reconstruction company may acquire financial assets of any bank or financial institution—

- (a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or
- (b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899:

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.

If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the asset reconstruction company, such asset reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).

Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers- of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the asset reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, asset reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of asset reconstruction company, as the case may be.

If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the asset reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the asset reconstruction company, as the case may be.

On acquisition of financial assets under sub-section (1), the asset reconstruction company, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the asset reconstruction company in such pending suit, appeal or other proceedings.

It may be noted that-

“Financial asset” means debt or receivables and includes—

- i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- iii) a mortgage, charge, hypothecation or pledge of movable property; or
- iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
- (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or
- vi) any financial assistance;

[Section 2(1)(l)] “Financial institution” means—

- i) a public financial institution within the meaning of section 4A of the Companies Act, 1956;
- ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;
- iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958;
- iiia) a debenture trustee registered with the Board and appointed for secured debt securities;
- iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be;
- iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act; [Section 2(1)(m)]

TRANSFER OF PENDING APPLICATIONS TO ANY ONE OF DEBTS RECOVERY TRIBUNALS IN CERTAIN CASES

Section 5A stipulates that if any financial asset, of a borrower acquired by an asset reconstruction company, comprise of secured debts of more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals the asset reconstruction company may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.

Notwithstanding anything contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any order passed by the Appellate Tribunal under sub-section (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall, accordingly, apply to such execution.

It may be noted that-

“Debt” shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and includes –

- (a) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;
- (b) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset; [Section 2(1)(ha)]

“Debts Recovery Tribunal” means the Tribunal established under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993; name changed Recovery of Debts and Bankruptcy Act, 1993. [Section 2(1)(i)]

NOTICE TO OBLIGOR AND DISCHARGE OF OBLIGATION OF SUCH OBLIGOR

Section 6 of this Act states that the bank or financial institution may, if it considers appropriate, give a notice of acquisition of financial assets by any asset reconstruction company, to the concerned obligor and any other concerned person and to the concerned registering authority including Registrar of Companies in whose jurisdiction the mortgage, charge, hypothecation, assignment or other interest created on the financial assets had been registered.

Where a notice of acquisition of financial asset under sub-section (1) is given by a bank or financial institution, the obligor, on receipt of such notice, shall make payment to the concerned asset reconstruction company, as the case may be, and payment made to such company in discharge of any of the obligations in relation to the financial asset specified in the notice shall be a full discharge to the obligor making the payment from all liability in respect of such payment.

Where no notice of acquisition of financial asset under sub-section (1) is given by any bank or financial institution, any money or other properties subsequently received by the bank or financial institution, shall constitute monies or properties held in trust for the benefit of and on behalf of the asset reconstruction company, as the case may be, and such bank or financial institution shall hold such payment or property which shall forthwith be made over or delivered to asset reconstruction company, as the case may be, or its agent duly authorised in this behalf.

What should the obligor do on receipt of notice of acquisition of financial asset by a bank or financial institution?

As per Section 6(2) of SARFAESI Act, the obligor shall make payment to the concerned asset reconstruction company, as the case may be, and payment made to such company in discharge of any of the obligations in relation to the financial asset specified in the notice shall be a full discharge to the obligor making the payment from all liability in respect of such payment.

ISSUE OF SECURITY BY RAISING OF RECEIPTS OR FUNDS BY ASSET RECONSTRUCTION COMPANY

Without prejudice to the provisions contained in the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992, any asset reconstruction company, may, after acquisition of any financial asset under sub-section (1) of section 5, offer security receipts to qualified institute buyers or such other category of investors including non-institutional investors as may be specified by the Reserve Bank in consultation with the Board, from time to time, for subscription in accordance with the provisions of those Acts.

A asset reconstruction company may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

The scheme for the purpose of offering security receipts under sub-section (1) or raising funds under sub-section (2), may be in the nature of a trust to be managed by the asset reconstruction company, and the asset reconstruction company shall hold the assets so acquired or the funds so raised for acquiring the assets, in trust for the benefit of the qualified buyers holding the security receipts or from whom the funds are raised.

The provisions of the Indian Trusts Act, 1882 shall, except in so far as they are inconsistent with the provisions of this Act, apply with respect to the trust referred to in clause (a) above.

In the event of non-realisation under sub-section (2) of financial assets, the qualified buyers of an asset reconstruction company, holding security receipts of not less than seventy-five percent of the total value of the security receipts issued under a scheme by such company, shall be entitled to call a meeting of all the qualified buyers and every resolution passed in such meeting shall be binding on the company.

The qualified buyers shall, at a meeting called under sub-section (3), follow the same procedure, as nearly as possible as is followed at meetings of the board of directors of the asset reconstruction company, as the case may be.

It may be noted that-

“Qualified buyer” means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992 or regulations made thereunder, any category of non-institutional investors as may be specified by the Reserve Bank under sub-section (1) of section 7 or any other body corporate as may be specified by the Board. [Section 2(1)(u)]

How will an asset reconstruction company raise fund from qualified buyers?

As per Section 7(2) of SARFAESI Act, an asset reconstruction company may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

EXEMPTION FROM REGISTRATION OF SECURITY RECEIPT

Section 8 of the Act contains exemption from registration of security receipt. Notwithstanding anything contained in sub-section (1) of section 17 of the Registration Act, 1908,

- (a) any security receipt issued by the asset reconstruction company, as the case may be, under sub-section (1) of section 7, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument; or

(b) any transfer of security receipts, shall not require compulsory registration. It may be noted that –
 “Security receipt” means a receipt or other security, issued by a asset reconstruction company to any qualified buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation; [Section 2(1)(zg)]

MEASURES FOR ASSETS RECONSTRUCTION

Without prejudice to the provisions contained in any other law for the time being in force, an asset reconstruction company may, for the purposes of asset reconstruction, provide for any one or more of the following measures, namely:—

- (a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;
- (b) the sale or lease of a part or whole of the business of the borrower;
- (c) rescheduling of payment of debts payable by the borrower;
- (d) enforcement of security interest in accordance with the provisions of this Act;
- (e) settlement of dues payable by the borrower;
- (f) taking possession of secured assets in accordance with the provisions of this Act;
- (g) conversion of any portion of debt into shares of a borrower company:

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

The Reserve Bank shall, for the purposes of sub-section (1), determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.

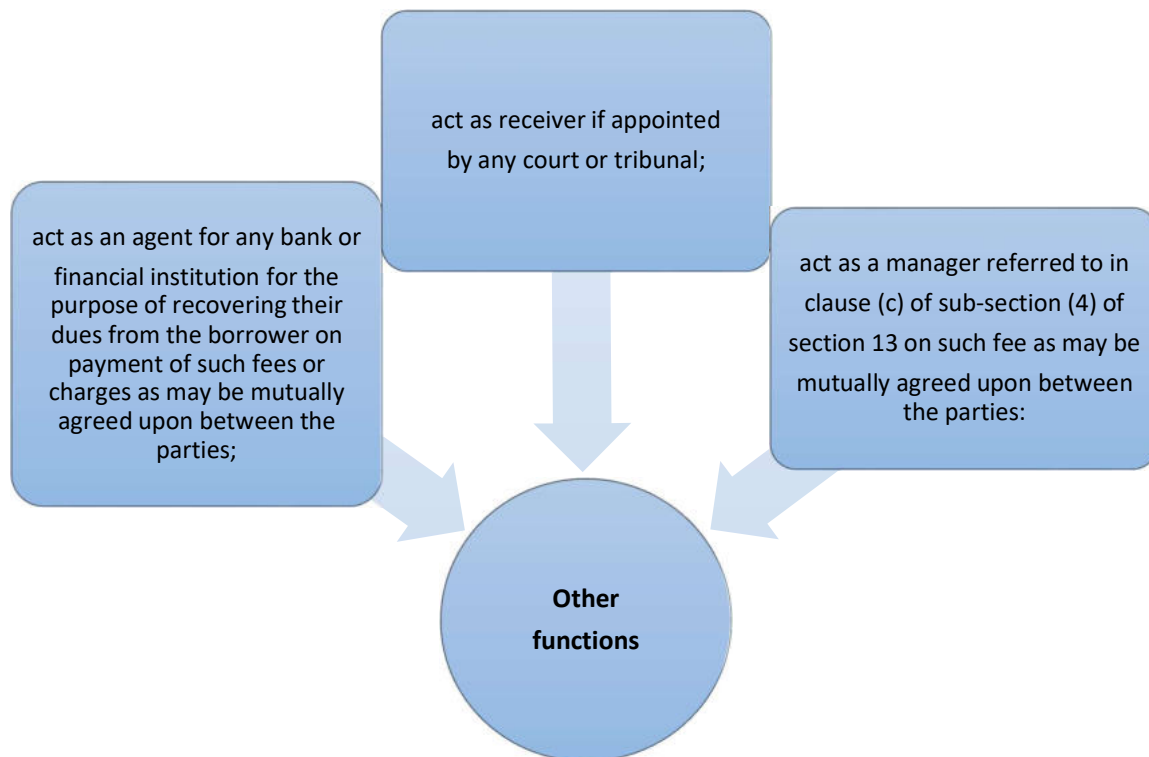
The asset reconstruction company shall take measures under sub-section (1) in accordance with policies and directions of the Reserve Bank determined under sub-section (2).

It may be noted that –

“Borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of an asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities. [Section 2(1)(f)]

Other functions of asset reconstruction company

Section 10 of the acts states that, any asset reconstruction company registered under section 3 may—



Provided that no asset reconstruction company shall act as a manager if acting as such gives rise to any pecuniary liability.

Save as otherwise provided in sub-section (1), no asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction:

Provided that an asset reconstruction company which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.

Explanation—For the purposes of this section, “asset reconstruction company” or “asset reconstruction company” does not include its subsidiary.

How are disputes relating to securitisation or reconstruction resolved?

According to Section 11 of SARFAESI Act, where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank, or financial institution, or asset reconstruction company or qualified buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996, as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly

POWER OF RESERVE BANK TO DETERMINE POLICY AND ISSUE DIRECTIONS

Under Section 12 of the Act, if the Reserve Bank is satisfied that in the public interest or to regulate financial system of the country to its advantage or to prevent the affairs of any asset reconstruction company from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such asset reconstruction company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any asset reconstruction company in matters relating to income recognition, accounting standards, making provisions

for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the asset reconstruction company, as the case may be, and such company shall be bound to follow the policy so determined and the directions so issued.

Without prejudice to the generality of the power vested under sub-section (1), the Reserve Bank may give directions to any asset reconstruction company generally or to a class of asset reconstruction companies or to any asset reconstruction company in particular as to—

- (a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;
- (b) the aggregate value of financial assets which may be acquired by any asset reconstruction company;
- (c) the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company;
- (d) transfer of security receipts issued to qualified buyers.

POWER OF RESERVE BANK TO CALL FOR STATEMENTS AND INFORMATION

The Reserve Bank may at any time direct an asset reconstruction company to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such asset reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act.

POWER OF RESERVE BANK TO CARRY OUT AUDIT AND INSPECTION

The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection under sub-section (1).

Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order—

- (a) remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or
- (b) appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company:

Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.

It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to the affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

ENFORCEMENT OF SECURITY INTEREST**ENFORCEMENT OF SECURITY INTEREST**

According to Section 13, notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

Sub-clause 2 states that, where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that—

- (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and
- (ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.

Sub-clause 3 states that, the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

Sub-clause 3A states that, if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

Sub-clause 4 states that, in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

- a. take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- b. take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

- c. appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- d. require at any time by notice in writing, any person who has acquired any of the secured assets from the

borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Sub-clause 5 states that, any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

Sub-clause 5A states that, where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

Sub-clause 5B states that, where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

Sub-clause 5C states that, the provisions of section 9 of the Banking Regulation Act, 1949 shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).

Sub-clause 6 states that, any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

Under section 13(7), where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

Under section 13(8), where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

- i. the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and
- ii. in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

Under section 13(9), subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.—For the purposes of this sub-section,—

- a. "record date" means the date agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding on such date;
- b. "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

Sub-clause 10 states that, where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

Sub-clause 11 states that, without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifics in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

It may be noted that- "Default" means –

- (i) non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor; or
- (ii) non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities; [Section 2(1)(j)]

"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 property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid 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

incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset. [Section 2(1)(zf)]

CHIEF METROPOLITAN MAGISTRATE OR DISTRICT MAGISTRATE TO ASSIST SECURED CREDITOR IN TAKING POSSESSION OF SECURED ASSET

Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him—

- a) take possession of such asset and documents relating thereto; and
- b) forward such asset and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

- i. the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
- ii. the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- iii. the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- iv. the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
- v. consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;
- vi. affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 3, demanding payment of the defaulted financial assistance has been served on the borrower;
- vii. the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- viii. the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- ix. that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of

commencement of this Act.

The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,—

- a) to take possession of such assets and documents relating thereto; and
- b) to forward such assets and documents to the secured creditor.

For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

It may be noted that-

“Financial assistance” means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution including funds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities. [Section 2(1)(k)]

“Financial lease” means a lease under any lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor’s right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where the lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be. [Section 2(1)(ma)]

“Secured creditor” means—

- (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- (ii) debenture trustee appointed by any bank or financial institution; or
- (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iv) debenture trustee registered with the Board and appointed for secured debt securities; or
- (v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance. [Section 2(1)(zd)]

MANNER AND EFFECT OF TAKEOVER OF MANAGEMENT

When the management of business of a borrower is taken over by an asset reconstruction company under clause (a) of section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of section 13, the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit—

- a) in a case in which the borrower is a company as defined in the Companies Act, 1956, to be the directors of that borrower in accordance with the provisions of that Act; or
- b) in any other case, to be the administrator of the business of the borrower.

On publication of a notice under sub section(1),

- a) in any case where the borrower is a company as defined in the Companies Act, 1956, all persons holding office as directors of the company and in any other case, all persons holding any office having

power of superintendence, direction and control of the business of the borrower immediately before the publication of the notice under sub-section (1), shall be deemed to have vacated their offices as such;

- b) any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the notice under sub-section (1), shall be deemed to be terminated;
- c) the directors or the administrators appointed under this section shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the business of the borrower is, or appears to be, entitled and all the property and effects of the business of the borrower shall be deemed to be in the custody of the directors or administrators, as the case may be, as from the date of the publication of the notice;
- d) the directors appointed under this section shall, for all purposes, be the directors of the company of the borrower and such directors or as the case may be, the administrators appointed under this section, shall alone be entitled to exercise all the powers of the directors or as the case may be, of the persons exercising powers of superintendence, direction and control, of the business of the borrower whether such powers are derived from the memorandum or articles of association of the company of the borrower or from any other source whatsoever.

Where the management of the business of a borrower, being a company as defined in the Companies Act, 1956, is taken over by the secured creditor, then, notwithstanding anything contained in the said Act or in the memorandum or articles of association of such borrower,—

- a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
- b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;
- c) no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

Where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him.

Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower. (Section 15)

NO COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE

Notwithstanding anything to the contrary contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office or for the premature termination under this Act of any contract of management entered into by him with the borrower.

Nothing contained in sub-section (1) shall affect the right of any such managing director or any other director or manager or any such person in charge of management to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

APPLICATION AGAINST MEASURES TO RECOVER SECURED DEBTS

As per section 17(1), any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty- five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

As per section 17(1A), an application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

- a) the cause of action, wholly or in part, arises;
- b) where the secured asset is located; or
- c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

As per section 17(2), the Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

- a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and
- b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and
- c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

As per section 17(4), if, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

Where —

- i. any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—
 - a) has expired or stood determined; or
 - b) is contrary to section 65A of the Transfer of Property Act, 1882; or

- c) is contrary to terms of mortgage; or
 - d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and
- ii. the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act

As per section 17(5), any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

Making of application to Court of District Judge in certain cases (Section 17A)

In the case of a borrower residing in the State of Jammu and Kashmir, the application under section 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.

APPEAL TO APPELLATE TRIBUNAL

Section 18 provides for Appeal to Appellate Tribunal. It states that any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five percent of debt referred to in the second proviso.

Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and rules made thereunder.

RIGHT TO LODGE A CAVEAT

Section 18C states that where an application or an appeal is expected to be made or has been made under sub-section (1) of section 17 or section 17A or sub-section (1) of section 18 or section 18B, the secured creditor or any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.

Where a caveat has been lodged under sub-section (1),—

- (a) the secured creditor by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1);
- (b) any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1).

Where after a caveat has been lodged under sub-section (1), any application or appeal is filed before the Tribunal or the court of District Judge or the Appellate Tribunal or the High Court, as the case may be, the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.

Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal referred to in sub-section (1) has been made before the expiry of the said period.

RIGHT OF BORROWER TO RECEIVE COMPENSATION AND COSTS IN CERTAIN CASES

If the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the concerned borrowers or any other aggrieved person, who has filed the application under section 17 or section 17A or appeal under section 18 or section 18A, as the case may be, the borrower or such other person shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.

CENTRAL REGISTRY**CENTRAL REGISTRY**

Under section 20, the Central Government may, by notification, set up or cause to be set up from such date as it may specify in such notification, a registry to be known as the Central Registry with its own seal for the purposes of registration of transaction of securitisation and reconstruction of financial assets and creation of security interest under this Act.

The head office of the Central Registry shall be at such place as the Central Government may specify and for the purpose of facilitating registration of transactions referred to in sub-section (1), there may be established at such other places as the Central Government may think fit, branch offices of the Central Registry.

The Central Government may, by notification, define the territorial limits within which an office of the Central Registry may exercise its functions.

The provisions of this Act pertaining to the Central Registry shall be in addition to and not in derogation of any of the provisions contained in the Registration Act, 1908, the Companies Act, 1956, the Merchant Shipping Act, 1958, the Patents Act, 1970, the Motor Vehicles Act, 1988, and the Designs Act, 2000 or any other law requiring registration of charges and shall not affect the priority of charges or validity thereof under those Acts or laws.

INTEGRATION OF REGISTRATION SYSTEMS WITH CENTRAL REGISTRY

Section 20A deals with the integration of registration systems with Central Registry. Section 20A states that:

1. The Central Government may, for the purpose of providing a Central database, in consultation with State Governments or other authorities operating registration system for recording rights over any property or creation, modification or satisfaction of any security interest on such property, integrate the registration records of such registration systems with the records of Central registry established under section 20, in such manner as may be prescribed.
2. The Central Government shall after integration of records of various registration systems referred to in sub-section (1) with the Central Registry, by notification, declare the date of integration of registration systems and the date from which such integrated records shall be available; and with effect from such date, security interests over properties which are registered under any registration system referred to in sub-section (1) shall be deemed to be registered with the Central Registry for the purposes of this Act.

Delegation of powers (Section 20B)

It provides that the Central Government may, by notification, delegate its powers and functions under this Chapter, in relation to establishment, operations and regulation of the Central Registry to the Reserve Bank, subject to such terms and conditions as may be prescribed.

Central Registrar

The Central Government may, by notification, appoint a person for the purpose of registration of transactions relating to securitisation, reconstruction of financial assets and security interest created over properties, to be known as the Central Registrar.

The Central Government may appoint such other officers with such designations as it thinks fit for the purpose of discharging, under the superintendence and direction of the Central Registrar, such functions of the Central Registrar under this Act as he may, from time to time, authorise them to discharge.

REGISTER OF SECURITISATION, RECONSTRUCTION AND SECURITY INTEREST TRANSACTIONS

Section 22 deals with the Register of securitisation, reconstruction and security interest transactions. Section 22 states that:

1. For the purposes of this Act, a record called the Central Register shall be kept at the head office of the Central registry for entering the particulars of the transactions relating to
 - (a) securitisation of financial assets;
 - (b) reconstruction of financial assets; and
 - (c) creation of security interest.
2. Notwithstanding anything contained in sub-section (1), it shall be lawful for the Central Registrar to keep the records wholly or partly in computer, floppies, diskettes or in any other electronic form subject to such safeguards as may be prescribed.

3. Where such register is maintained wholly or partly in computer, floppies, diskettes or in any other electronic form, under sub-section (2), any reference in this act to entry in the Central Register shall be construed as a reference to any entry as maintained in computer or in any other electronic form.

4. The register shall be kept under the control and management of the Central Registrar.

FILING OF TRANSACTIONS OF SECURITISATION, RECONSTRUCTION AND CREATION OF SECURITY INTEREST

Section 23(1) provides that the particulars of every transaction of securitisation, asset reconstruction or creation of security interest shall be filed, with the Central Registrar in the manner and on payment of such fee as may be prescribed.

Provided that the Central Government may, by notification, require registration of all transactions of securitisation, or asset reconstruction or creation of security interest which are subsisting on or before the date of establishment of the Central registry under sub-section (1) of section 20 within such period and on payment of such fees as may be prescribed.

2. The Central Government may, by notification, require the registration of transaction relating to different types of security interest created on different kinds of property with the Central Registry.

3. The Central Government may, by rules, prescribe forms for registration for different types of security interest under this section and fee to be charged for such registration.

Modification of security interest registered under this Act

Section 24 provides that whenever the terms or conditions, or the extent or operation, of any security interest registered under this Chapter are or is modified, it shall be the duty of the asset reconstruction company or the secured creditor, as the case may be, to send to the Central Registrar, the particulars of such modification, and the provisions of this Chapter as to registration of a security interest shall apply to such modification of such security interest.

SATISFACTION OF SECURITY INTEREST (SECTION 25)

Section 25 deals with the Asset Reconstruction Company or secured creditor to report satisfaction of security interest. Section 25 states that:

1. The asset reconstruction company or the secured creditor as the case may be, shall give intimation to the Central Registrar of the payment or satisfaction in full, of any security interest relating to the asset reconstruction company or the secured creditor and Requiring registration under this Chapter, within thirty days from the date of such payment or satisfaction.

1A. On receipt of intimation under sub-section (1), the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

2. If the concerned borrower gives an intimation to the Central Registrar for not recording the payment or satisfaction referred to in sub-section (1), the Central Registrar shall on receipt of such intimation, cause a notice to be sent to the asset reconstruction company or the secured creditor calling upon it to show cause within a time not exceeding fourteen days specified in such notice, as to why payment or satisfaction should not be recorded as intimated to the Central Registrar.

3. If no cause is shown, the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

4. If cause is shown, the Central Registrar shall record a note to that effect in the Central Register, and shall inform the borrower that he has done so.

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993**ESTABLISHMENT OF TRIBUNAL AND APPELLATE TRIBUNAL****Establishment of Tribunal**

Section 3 provides for establishment of Tribunal. It states that, the Central Government shall, by notification, establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act.

The Central Government shall by notification establish such number of Debts Recovery Tribunals and its benches as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under the Insolvency and Bankruptcy Code, 2016.

The Central Government shall also specify, in the notification referred to in sub-section (1), the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.

Composition of Tribunal

A Tribunal shall consist of one person only hereinafter referred to as the Presiding Officer to be appointed, by notification, by the Central Government.

Notwithstanding anything contained in sub-section (1), the Central Government may—

- (a) authorise the Presiding Officer of any other Tribunal established under any other law for the time being in force to discharge the function of the Presiding Officer of a Debt Recovery Tribunal under this Act in addition to his being the Presiding Officer of that Tribunal; or
- (b) authorise the judicial Member holding post as such in any other Tribunal, established under any other law for the time being in force, to discharge the functions of the Presiding Officer of Debts Recovery Tribunal under this Act, in addition to his being the judicial Member of that Tribunal.

JURISDICTION, POWERS AND AUTHORITY OF TRIBUNALS**JURISDICTION, POWERS AND AUTHORITY OF TRIBUNALS**

According to Section 17, tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

Without prejudice to sub-section (1),—

- (a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016 (31 of 2016).
- (b) the Tribunal shall have circuit sittings in all district headquarters.

An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016.

PROCEDURE OF TRIBUNALS

Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—

- a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or
- b) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or
- c) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or
- d) the cause of action, wholly or in part, arises:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (30 of 2004) for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, if no such action had been taken earlier under that Act:

Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.

Every bank being, multi-State co-operative bank referred to in sub-clause (vi) of clause (d) of section 2, may, at its option, opt to initiate proceedings under the Multi-State Co-operative Societies Act, 2002, to recover debts, whether due before or after the date of commencement of the Enforcement of the Security Interest and Recovery of Debts Laws (Amendment) Act, 2012, from any person instead of making an application under this Chapter.

In case, a bank being, multi-State co-operative bank referred to in sub-clause (vi) of clause (d) of section 2 has filed an application under this Chapter and subsequently opts to withdraw the application for the purpose of initiating proceeding under the Multi-State Co-operative Societies Act, 2002 to recover debts, it may do so with the permission of the Tribunal and every such application seeking permission from the Tribunal to withdraw the application made under sub-section (1A) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided that in case the Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.

Section 19(2) states that where a bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under sub-section (1) and against the same person another bank or financial institution also has claim to recover its debt, then, the later bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings, before the final order is passed, by making an application to that Tribunal.

Section 19(3) states that every application under sub-section (1) or sub-section (2) shall be in such form, and shall be accompanied with true copies of all documents relied on in support of the claim along with such fee, as may be prescribed:

Provided that the fee may be prescribed having regard to the amount of debt to be recovered:

Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to the Tribunal under sub-section (1) of section 31.

Explanation.—For the purposes of this section, documents includes statement of account or any entry in banker's book duly certified under the Bankers' Books Evidence Act, 1891.

Section 19(3A) states that every applicant in the application filed under sub-section (1) or sub-section (2) for recovery of debt, shall—

- (a) state particulars of the debt secured by security interest over properties or assets belonging to any of the defendants and the estimated value of such securities;
- (b) if the estimated value of securities is not sufficient to satisfy the debt claimed, state particulars of any other properties or assets owned by any of the defendants, if any; and
- (c) if the estimated value of such other assets is not sufficient to recover the debt, seek an order directing the defendant to disclose to the Tribunal particulars of other properties or assets owned by the defendants.

If any application filed before the Tribunal for recovery of any debt is settled prior to the commencement of the hearing before that Tribunal or at any stage of the proceedings before the final order is passed, the applicant may be granted refund to the fees paid by him at such rates as may be prescribed.

On receipt of application under sub-section (1) or sub-section (2), the Tribunal shall issue summons with following directions to the defendant—

- a) to show cause within thirty days of the service of summons as to why relief prayed for should not be granted;
- b) direct the defendant to disclose particulars of properties or assets other than properties and assets specified by the applicant under clauses (a) and (b) of sub-section (3A); and
- c) to restrain the defendant from dealing with or disposing of such assets and properties disclosed under clause (c) of sub-section (3A) pending the hearing and disposal of the application for attachment of properties.

Notwithstanding anything contained in section 65A of the Transfer of Property Act, 1882 (4 of 1882), the defendant, on service of summons, shall not transfer by way of sale, lease or otherwise except in the ordinary course of his business any of the assets over which security interest is created and other properties and assets specified or disclosed under sub-section (3A), without the prior approval of the Tribunal:

Provided that the Tribunal shall not grant such approval without giving notice to the applicant bank or financial institution to show cause as to why approval prayed for should not be granted:

Provided further that defendant shall be liable to account for the sale proceeds realised by sale of secured assets in the ordinary course of business and deposit such sale proceeds in the account maintained with the bank or financial institution holding security interest over such assets.

Section 19(5) states that,

- i) the defendant shall within a period of thirty days from the date of service of summons, present a written statement of his defence including claim for set-off under sub-section (6) or a counter-claim under sub-section (8), if any, and such written statement shall be accompanied with original documents or true copies thereof with the leave of the Tribunal, relied on by the defendant in his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, the Presiding Officer may, in exceptional cases and in special circumstances to be recorded in writing, extend the said period by such further period not exceeding fifteen days to file the written statement of his defence;

- ii) where the defendant makes a disclosure of any property or asset pursuant to orders passed by the Tribunal, the provisions of sub-section (4A) of this section shall apply to such property or asset;
- iii) in case of non-compliance of any order made under clause (ii) of sub-section (4), the Presiding Officer may, by an order, direct that the person or officer who is in default, be detained in civil prison for a term not exceeding three months unless in the meantime the Presiding Officer directs his release:

Provided that the Presiding Officer shall not pass an order under this clause without giving an opportunity of being heard to such person or officer.

Explanation.—For the purpose of this section, the expression ‘officer who is in default’ shall mean such officer as defined in clause (60) of section 2 of the Companies Act, 2013

On receipt of the written statement of defendant or on expiry of time granted by the Tribunal to file the written statement, the Tribunal shall fix a date of hearing for admission or denial of documents produced by the parties to the proceedings and also for continuation or vacation of the interim order passed under sub-section (4).

Where a defendant makes an admission of the full or part of the amount of debt due to a bank or financial institution, the Tribunal shall order such defendant to pay the amount, to the extent of the admission within a period of thirty days from the date of such order failing which the Tribunal may issue a certificate in accordance with the provisions of sub-section (22) to the extent of the amount of debt due admitted by the defendant.

Section 19(6) states that, where the defendant claims to set-off against the applicant’s demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt the debt sought to be set-off along with original documents and other evidence relied on in support of claim of set-off in relation to any ascertained sum of money, against the applicant.

The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

Section 19(8) states that, a defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be prescribed.

Every application under sub-section (3) or written statement of defendant under sub-section (5) or claim of set-off under sub-section (6) or a counter-claim under sub-section (8) by the defendant, or written statement by the applicant in reply to the counter-claim, under sub-section (10) or any other pleading whatsoever, shall be supported by an affidavit sworn in by the applicant or defendant.

Provided that if there is any evidence of witnesses to be led by any party, the affidavits of such witnesses shall be filed simultaneously by the party with the application or written statement or replies filed under sub-section (10A).

If any of the facts or pleadings in the application or written statement are not verified in the manner provided under sub-section (10A), a party to the proceedings shall not be allowed to rely on such facts or pleadings as evidence or any of the matters set out therein.

Where a defendant sets up a counter-claim in the written statement and in reply to such claim the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the Tribunal shall decide such issue along with the claim of the applicant for recovery of the debt.

Where, at any stage of the proceedings, the Tribunal on an application made by the applicant along with particulars of property to be attached and estimated value thereof, or otherwise is satisfied, that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him,—

- i) is about to dispose of the whole or any part of his property; or
- ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or
- iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest.

the Tribunal may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of the debt, or to appear and show cause why he should not furnish security.

It also states that, where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.

The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under sub-section (13).

If an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void.

In the case of disobedience of an order made by the Tribunal under sub-sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release.

Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order—

- a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;
- b) remove any person from the possession or custody of the property;
- c) commit the same to the possession, custody or management of the receiver;
- d) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending applications before the Tribunal and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and
- e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.

Where a certificate of recovery is issued against a company as defined under the Companies Act, 2013 and such company is under liquidation, the Tribunal may by an order direct that the sale proceeds of secured assets of such company be distributed in the same manner as provided in section 326 of the Companies Act, 2013 or under any other law for the time being in force.

The Tribunal may, after giving the applicant and the defendant, an opportunity of being heard, in respect of all claims, set-off or counter-claim, if any, and interest on such claims, within thirty days from the date of conclusion of the hearings, pass interim or final order as it deems fit which may include order for payment of interest from the date on which payment of the amount is found due up to the date of realisation or actual payment.

Where it is proved to the satisfaction of the Tribunal that the claim of the applicant has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant has repaid or agreed to repay the claim of the applicant, the Tribunal shall pass orders recording such agreement, compromise or satisfaction of the claim.

While passing the final order under sub-section (20), the Tribunal shall clearly specify the assets of the borrower which security interest is created in favour of any bank or financial institution and direct the Recovery Officers to distribute the sale proceeds of such assets as provided in sub-section (20AB).

Notwithstanding anything to the contrary contained in any law for the time being in force, the proceeds from sale of secured assets shall be distributed in the following orders of priority, namely:—

- (i) the costs incurred for preservation and protection of secured assets, the costs of valuation, public notice for possession and auction and other expenses for sale of assets shall be paid in full;
- (ii) debts owed to the bank or financial institution.

Explanation.—For the purposes of this sub-section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency and bankruptcy proceedings are pending in respect of secured assets of the borrower, the distribution of proceeds from the sale of secured assets shall be subject to the order of priority as provided in that Code.

As per sub-clause 21, the Tribunal shall send a copy of its final order and the recovery certificate, to the applicant and defendant. The applicant and the defendant may obtain copy of any order passed by the Tribunal on payment on such fee as may be prescribed.

The Presiding Officer shall issue a certificate of recovery along with the final order, under sub-section (20), for payment of debt with interest under his signature to the Recovery Officer for recovery of the amount of debt specified in the certificate.

Any recovery certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the purposes of initiation of winding up proceedings against a company registered under the Companies Act, 2013 or Limited Liability Partnership registered under the Limited Liability Partnership Act, 2008 or insolvency proceedings against any individual or partnership firm under any law for the time being in force, as the case may be.

Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated:

Provided that in a case where the Tribunal to which the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it.

The application made to the Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and every effort shall be made by it to complete the proceedings in two hearings, and] to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.

The Tribunal may made such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

FILING OF RECOVERY APPLICATIONS, DOCUMENTS AND WRITTEN STATEMENTS IN ELECTRONIC FORM

Section 19A provides that notwithstanding anything to the contrary contained in this Act, and without prejudice to the provisions contained in section 6 of the Information Technology Act, 2000, the Central Government may by rules provide that from such date and before such Tribunal and Appellate Tribunal, as may be notified,—

- (a) application or written statement or any other pleadings and the documents to be annexed thereto required to be filed shall be submitted in the electronic form and authenticated with digital signature of the applicant, defendant or any other petitioner in such form and manner as may be prescribed;

- (b) any summons, notice or communication or intimation as may be required to be served or delivered under this Act, may be served or delivered by transmission of pleadings and documents by electronic form and authenticated in such manner as may be prescribed.

Any interim or final order passed by the Tribunal or Appellate Tribunal displayed on the website of such Tribunal or Appellate Tribunal shall be deemed to be a public notice of such order and transmission of such order by electronic mail to the registered address of the parties to the proceeding shall be deemed to be served on such party.

The Central Government may by rules provide that the electronic form for the purpose specified in this section shall be exclusive, or in the alternative or in addition to the physical form, therefor.

The Tribunal or the Appellate Tribunal notified under sub-section (1), for the purpose of adopting electronic filing, shall maintain its own website or common website with other Tribunals and Appellate Tribunal or such other universally accessible repositories of electronic information and ensure that all orders or directions issued by the Tribunal or Appellate Tribunal are displayed on the website of the Tribunal or Appellate Tribunal, in such manner as may be prescribed.

Explanation.—For the purpose of this section,—

- a) 'digital signature' means the digital signature as defined under clause (p) of section 2 of the Information Technology Act, 2000;
- b) 'electronic form' with reference to an information or a document means the electronic form as defined under clause (r) of section 2 of the Information Technology Act, 2000.

Under Section 19A, the application made to Tribunal for exercising the powers of the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 shall be dealt with in the manner as provided under that Code.

APPEAL TO THE APPELLATE TRIBUNAL

Section 20 provides for appeal to Appellate Tribunal. It states that save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

Every appeal under sub-section (1) shall be filed within a period of thirty days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal under sub-section (1), or under sub-section (1) of section 181 of the Insolvency and Bankruptcy Code, 2016, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal. The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

DEPOSIT OF AMOUNT OF DEBT DUE, ON FILING APPEAL

According to Section 21, where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal fifty percent of the amount of debt so due from him as determined by the Tribunal under section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, reduce the amount to be deposited by such amount which shall not be less than twenty-five percent of the amount of such debt so due to be deposited under this section.

PROCEDURE AND POWERS OF THE TRIBUNAL AND THE APPELLATE TRIBUNAL

The Tribunal and the Appellate Tribunal shall not be bound the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, 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:—

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

requiring the discovery and production of documents;

receiving evidence on affidavits;

issuing commissions for the examination of witnesses or documents;

reviewing its decisions;

dismissing an application for default or deciding it ex parte;

setting aside any order of dismissal of any application for default or any order passed by it ex parte;

any other matter which may be prescribed.

Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

For the purpose of proof of any entry in the 'bankers' books', the provisions of the Bankers' Books Evidence Act, 1891 shall apply to all the proceedings before the Tribunal or Appellate Tribunal.

UNIFORM PROCEDURE FOR CONDUCT OF PROCEEDINGS

According to Section 22A, The Central Government may, for the purpose of this Act, by rules, lay down uniform procedure consistent with the provisions of this Act for conducting the proceedings before the Tribunals and Appellate Tribunals.

RIGHT TO LEGAL REPRESENTATION AND PRESENTING OFFICERS

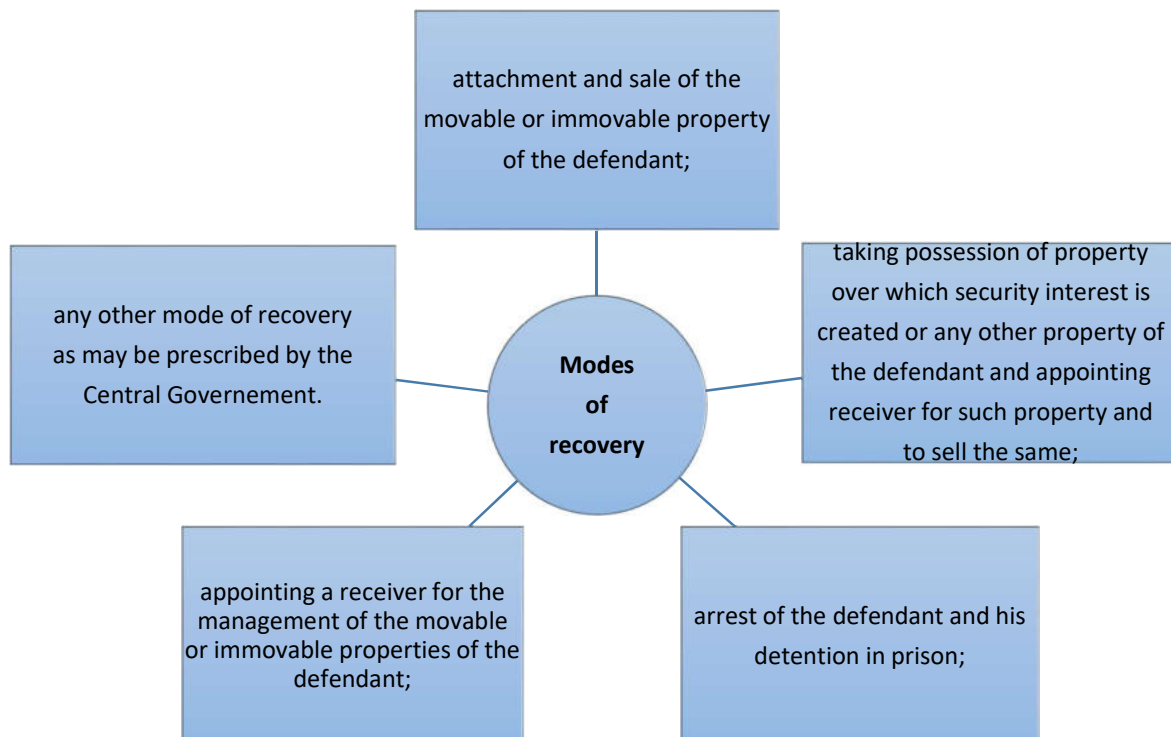
Section 23 states that, a bank or a financial institution making an application to a Tribunal or an appeal to an Appellate Tribunal may authorise one or more legal practitioners or any of its officers to act as Presenting Officers and every person so authorised by it may present its case before the Tribunal or the Appellate Tribunal.

The defendant may either appear in person or authorise one or more legal practitioners or any of his or its officers to present his or its case before the Tribunal or the Appellate Tribunal.

RECOVERY OF DEBT DETERMINED BY TRIBUNAL

MODES OF RECOVERY OF DEBTS

Section 25 provides for modes of recovery of debts. It states that the Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:—



VALIDITY OF CERTIFICATE AND AMENDMENT THEREOF

According to section 26, it shall not be open to the defendant to dispute before the Recovery Officer the correctness of the amount specified in the certificate, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer.

Notwithstanding the issue of a certificate to a Recovery Officer, the Presiding Officer shall have power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending intimation to the Recovery Officer.

The Presiding Officer shall intimate to the Recovery Officer any order withdrawing or cancelling a certificate or any correction made by him under sub-section (2).

STAY OF PROCEEDINGS UNDER CERTIFICATE AND AMENDMENT OR WITHDRAWAL THEREOF

Section 27, states that notwithstanding that a certificate has been issued to the Recovery Officer for the recovery of any amount, the Presiding Officer, may by an order, grant time for payment of the amount, provided the defendant makes a down payment of not less than twenty-five per cent of the amount specified in the recovery certificate and gives an unconditional undertaking to pay the balance within a reasonable time, which is acceptable to the applicant bank or financial institution holding recovery certificate.

The Recovery Officer shall, after receipt of the order passed under sub-section (1), stay the proceedings until the expiry of the time so granted.

Where defendant agrees to pay the amount specified in the Recovery Certificate and proceeding are stayed by the Recovery Officer, the defendant shall forfeit right to file appeal against the orders of the Tribunal.

Where the defendant commits any default in payment of the amount under sub-section (1), the stay of recovery proceedings shall stand withdrawn and the Recovery Officer shall take steps for recovery of remaining amount of debt due and payable.

Where a certificate for the recovery of amount has been issued, the Presiding Officer shall keep the Recovery Officer informed of any amount paid or time granted for payment, subsequent to the issue of such certificate to the Recovery Officer.

Where the order giving rise to a demand of amount for recovery of debt has been modified in appeal, and, as a consequence thereof the demand is reduced, the Presiding Officer shall stay the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal remains pending.

Where a certificate for the recovery of debt has been received by the Recovery Officer and subsequently the amount of the outstanding demands is reduced or enhanced as a result of an appeal, the Presiding Officer shall, when the order which was the subject matter of such appeal has become final and conclusive, amend the certificate or withdraw it, as the case may be.

OTHER MODES OF RECOVERY

According to Section 28(1), where a certificate has been issued to the Recovery Officer under sub-section (7) of section 19, the Recovery Officer may, without prejudice to the modes of recovery specified in section 25, recover the amount of debt by any one or more of the modes provided under this section.

If any amount is due from any person to the defendant, the Recovery Officer may require such person to deduct from the said amount, the amount of debt due from the defendant under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Recovery Officer:

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908.

Sub clause 3 states that -

- i) The Recovery Officer may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the defendant or to any person who holds or may subsequently hold money for or on account of the defendant, to pay to the Recovery Officer either forthwith upon the money becoming due or being held or within the time specified in the notice not being before the money becomes due or is held so much of the money as is sufficient to pay the amount of debt due from the defendant or the whole of the money when it is equal to or less than that amount.
- ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the defendant jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such amount shall be presumed, until the contrary is proved, to be equal.
- iii) A copy of the notice shall be forwarded to the defendant at his last address known to the Recovery Officer and in the case of a joint account to all the joint holders at their last addresses known to the Recovery Officer.
- iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section

shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank, financial institution, or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like to be made before the payment is made notwithstanding any rule, practice or requirement to the contrary.

- v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.
- vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or the part thereof is not due to the defendant or that he does not hold any money for or on account of the defendant, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant on the date of the notice, or to the extent of the defendant's liability for any sum due under this Act, whichever is less.
- vii) The Recovery Officer may, at any time or from time to time, amend or revoke any notice under this sub-section or extend the time for making any payment in pursuance of such notice.
- viii) The Recovery Officer shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the defendant to the extent of the amount so paid.
- ix) Any person discharging any liability to the defendant after the receipt of a notice under this sub-section shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant so discharged or to the extent of the defendant's liability for any debt due under this Act, whichever is less.
- x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Recovery Officer, he shall be deemed to be a defendant in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were a debt due from him, in the manner provided in sections 25, 26 and 27 and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under section 25.

The Recovery Officer may apply to the court in whose custody there is money belonging to the defendant for payment to him of the entire amount of such money, or if it is more than the amount of debt due, an amount sufficient to discharge the amount of debt so due.

The Recovery Officer may, by order, at any stage of the execution of the certificate of recovery, require any person, and in case of a company, any of its officers against whom or which the certificate of recovery is issued, to declare on affidavit the particulars of his or its assets.

The Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid down in the Third Schedule to the Income-tax Act, 1961.

APPLICATION OF CERTAIN PROVISIONS OF INCOME-TAX ACT

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

APPEAL AGAINST THE ORDER OF RECOVERY OFFICER

Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).

DEPOSIT OF AMOUNT OF DEBT DUE FOR FILING APPEAL AGAINST ORDERS OF THE RECOVERY OFFICER

Section 30A provides for deposit of amount of debt due for filing appeal against orders of the Recovery Officer. It states that where an appeal is preferred against any order of the Recovery Officer, under section 30, by any person from whom the amount of debt is due to a bank or financial institution or consortium of banks or financial institutions, such appeal shall not be entertained by the Tribunal unless such person has deposited with the Tribunal fifty percent of the amount of debt due as determined by the Tribunal.

TRANSFER OF PENDING CASES

Section 31 stipulates that every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal:

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any court:

Provided further that any recovery proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002, shall be continued and nothing contained in this section shall apply to such proceedings.

Where any suit or other proceeding stands transferred from any court to a Tribunal under sub-section (1),—

- (a) the court shall, as soon as may be after such transfer, forward the records of such suit or other proceeding to the Tribunal; and
- (b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application made under section 19 from the stage which was reached before such transfer or from any earlier stage as the Tribunal may deem fit.

POWER OF TRIBUNAL TO ISSUE CERTIFICATE OF RECOVERY IN CASE OF DECREE OR ORDER

Section 31B states that where a decree or order was passed by any court before the commencement of the Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000 and has not yet been executed, then, the decree-holder may apply to the Tribunal to pass an order for recovery of the amount.

On receipt of an application under sub-section (1), the Tribunal may issue a certificate for recovery to a Recovery Officer. On receipt of a certificate under sub-section (2), the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a debt recoverable under this Act.

PRIORITY TO SECURED CREDITORS

Section 31A provides that notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.

Will Insolvency and Bankruptcy Code, 2016 prevails over SARFAESI Act, 2002?

In the case of *Canara Bank v. Sri Chandramoulisvar Spg. Mills (P) Ltd.*, the NCLAT while referring to Supreme Court's verdict in *Innoventive* case has ruled that when two proceedings are initiated, one under the Insolvency and Bankruptcy Code, 2016 (the Code) and the other under the SARFAESI Act, 2002, then the proceeding under the Code shall prevail.

The appeal in the case was preferred by the Financial Creditor i.e. Canara Bank against the NCLT's (National Company law Tribunal) order, whereby the application preferred by Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (application for initiation of corporate insolvency resolution process by operational creditor) against the Corporate Debtor i.e. M/s. Sri Chandra Moulisvar Spinning Mills Private Limited was admitted by the Tribunal. The Appellant's main grievance in the case was that he had already initiated proceedings under the SARFAESI Act, 2002 for recovery against the Corporate Debtor.

The NCLAT in view of the issue involved in the case, made reference to Supreme Court's verdict in the case of *Innoventive Industries Ltd. v. ICICI Bank*, whereby the Apex Court was of the view that if the application under Section 9 is complete and there is no 'existence of dispute' and there is a 'debt' and 'default' then the Adjudicating Authority is bound to admit the application. Thus, NCLAT upheld NCLT's decision and also noted that such action cannot continue as the Code will prevail over SARFAESI Act, 2002.

In the Matter of -

NATIONAL SPOT EXCHANGE LIMITED VERSUS UNION OF INDIA & ORS. (May 2025)

1. The question was whether Secured Creditors will get Priority over properties attached by MPID? Whether SARFAESI will override State act MPID?
2. "Whether the properties of Judgment Debtors and Garnishees attached under the MPID Act would be available for the execution of decrees against the Judgment Debtors in view of the provisions of Moratorium under Section 14 of the IBC, 2016?"

Supreme Court held that -

1. No priority of interest can be claimed by the Secured Creditors against the properties attached under In that view of the matter, it is held that the MPID Act and that the provisions of MPID Act would override any claim for priority of interest by the Secured Creditors in respect of the properties which have been attached under the MPID Act.
2. In that view of the matter, it is held that the properties of the Judgment Debtors and Garnishees attached under the provisions of the MPID Act, would be available for the execution of the decrees against the Judgment Debtors by the S.C. Committee, despite the provision of Moratorium under Section 14 of the IBC.

LESSON 9 - WINDING-UP BY TRIBUNAL

REGULATORY FRAMEWORK

- Section 59 & 255 of the Insolvency and Bankruptcy Code, 2016.
- Section 270 to 303 & 324 to 365 of Companies Act, 2013.
- Companies (Winding Up) Rules, 2020.

INTRODUCTION

Winding up is a means by which the dissolution of a company is brought about. The main purpose of winding up of a company is to realize the assets and pay the company's debts expeditiously and fairly in accordance with the law. If any surplus is left, it is distributed among the members in accordance with their rights.

It may be noted that on winding up, the company does not cease to exist as such, except when it is dissolved. Even after the commencement of winding-up, the property and assets of the company belong to the company until the dissolution takes place. On dissolution, the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus, in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

The terms "Winding up" and "Dissolution" are sometimes erroneously used to mean the same thing. But, the legal implications of these two terms are quite different and there are fundamental differences between them as regards the legal procedure involved.

The entire procedure for bringing about a lawful end to the life of a company is divided into two stages i.e., 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law. Dissolution brings about an end to the legal entity of the company.

IMPORTANT CHANGES BROUGHT ABOUT BY THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 ('Code') was passed with the objective of consolidating and amending the laws relating to re organisation and insolvency resolution 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 other matters connected.

The Ministry of Corporate Affairs has notified section 255 of the Insolvency and Bankruptcy Code, 2016. Section 255 of the Insolvency and Bankruptcy Code, 2016 amends the Companies Act, 2013, in accordance with the Eleventh Schedule of the Insolvency and Bankruptcy Code, 2016.

The Central Government had appointed 15th November, 2016 as the date on which the provisions of section 255 of the Insolvency and Bankruptcy Code, 2016 shall come into force.

The Insolvency and Bankruptcy Code, 2016 has made significant amendments to provisions relating to winding up in the Companies Act, 2013. The important ones are discussed below:

"Winding up" – The expression "winding up" was not defined in the Companies Act, 2013 or in the erstwhile Companies Act of 1956. The eleventh Schedule has added sub-section (94A) to section 2 of the Companies Act, 1956. The definition of "winding up" reads as follows:

Voluntary winding up

Provisions relating to voluntary winding up in the Companies Act, 2013 i.e., sections 304 to 323 have been omitted by the Insolvency and Bankruptcy Code, 2016. Voluntary liquidation is now dealt with under section 59 of the insolvency and Bankruptcy Code, 2016 read with IBBI (Voluntary liquidation Process) Regulations, 2017.

“Winding up” means winding up under the Companies Act, 2013 or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable” [Section 2(94A)]

Inability to pay debts – The Insolvency and Bankruptcy Code, 2016 has substituted section 271 of the Companies Act, 2013. Section 271 of the Companies Act, 2013, before its substitution by the Insolvency and Bankruptcy Code, 2016, provided the following seven grounds for winding up by Tribunal:

- a) if the company is unable to pay its debts;
- b) if the company has, by special resolution, resolved that the company be wound up by the tribunal;
- c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
- d) if the Tribunal has ordered the winding up of the company under Chapter XIX;
- e) if on an application made by the registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
- f) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
- g) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Now after its substitution, section 271 provides the following five grounds where a company may be wound up by a Tribunal:

- a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality
- c) if on an application made by the register or any other person authorized by the central government notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
- d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
- e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up

The following two grounds have been deleted from section 271: “

- (a) if the company is unable to pay its debts;
- (d) if the tribunal has ordered the winding up of the company under Chapter XIX”.

Thus, if a company is unable to pay its debts, creditors cannot file petition in Tribunal for winding up of the Company. However, the Companies Act, 2013 shall continue to govern winding up of companies on various other grounds excluding inability to pay debts

WINDING UP BY TRIBUNAL UNDER THE COMPANIES ACT, 2013

The Companies Act, 2013 continues to govern winding up of companies on various other grounds excluding inability to pay debts. Sections 270 to 288, Sections 290 to 303, Section 324 and Sections 326 to 365 of Chapter XX of the Companies Act, 2013 contain the provisions relating to winding up of a company.

The Ministry of Corporate Affairs has notified these sections on 7th December, 2016 and these sections have come into force with effect from 15th December 2016?

WHO MAY FILE PETITION FOR WINDING UP?

Section 272 lays down that a petition to the Tribunal for the winding up of a company shall be presented by

- 
- (a) the company;
 - (b) any contributory or contributories;
 - (c) all or any of the persons specified in clauses (a) and (b);
 - (d) the registrar;
 - (e) any person authorised by the Central Government in that behalf; or
 - (f) in a case falling under clause (b) of section 271, by the Central Government or a State Government.

POWERS OF TRIBUNAL

According to section 273(1), the Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely: –

- a) dismiss it, with or without costs;
- b) make any interim order as it thinks fit;
- c) appoint a provisional liquidator of the company till the making of a winding up order;
- d) make an order for the winding up of the company with or without costs; or
- e) any other order as it thinks fit:

Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. [Section 273(2)]

FILING STATEMENT OF AFFAIRS OF THE COMPANY

Section 274 lays down that in case, where the Tribunal is satisfied that on a petition that the winding up of the company is to be made out, he may by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order which can be allowed a further period of thirty days in a situation of contingency or special circumstances.

Further, the director or the officer of the company who is in default will be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company liquidator or any person authorised by the Tribunal.

In case, where the Company fails to file the statement of affairs, the tribunal shall forfeit the right of the company to oppose the petition and right of such directors and officers of the company as found responsible for such non-compliance.

COMPANY LIQUIDATORS AND THEIR APPOINTMENTS

For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained under sub-section as the Company liquidator. [Section 275(1)]

The provisional liquidator or the Company liquidator, as the case may, shall be appointed by the Tribunal from amongst the insolvency professionals registered under the Insolvency and Bankruptcy Code, 2016. [Section 275(2)]

Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator. [Section 275(3)]

The terms and conditions of appointment of a provisional liquidator or Company liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company. [Section 275(5)]

On appointment as provisional liquidator or Company liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment. [Section 275(6)]

“Company Liquidator”, means a person appointed by the Tribunal as the Company liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act. [Section 2(23)]

While passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-section (1) of section 273, as the Company liquidator for the conduct of the proceedings for the winding up of the company. [Section 275(7)]

REMOVAL AND REPLACEMENT OF LIQUIDATOR

Section 276 lays down that in case where the reasonable cause being shown and for reasons to be recorded in writing, the Tribunal may remove the provisional liquidator or the Company liquidator, on any of the following grounds:

- 
- (a) misconduct;
 - (b) fraud or misfeasance;
 - (c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;
 - (d) inability to act as provisional liquidator or as the case may be, Company liquidator;
 - (e) conflict of interest or lack of independence during the term of his appointment that would justify removal.

Further, in the event of death, resignation or removal of the liquidator the Tribunal may transfer the work assigned to him or it to another Company liquidator for reasons to be recorded in writing.

INTIMATION FOR WINDING UP

According to Section 277, upon the order for appointment of provisional liquidator or for the winding up of a company, the Tribunal shall within a period not exceeding seven days from the date of passing of the order give intimation of the appointment to the Company liquidator or provisional liquidator and the Registrar.

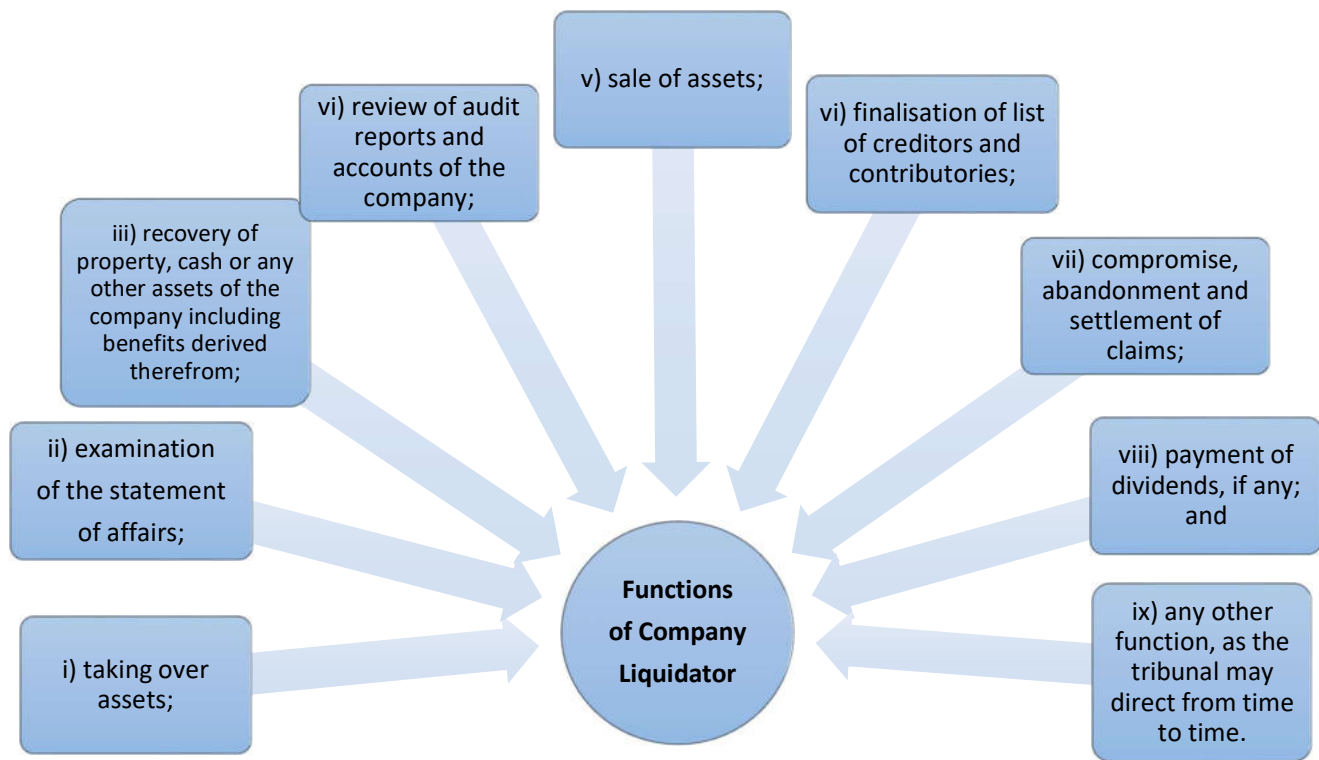
The Registrar on receipt of the copy of order of appointment of provisional liquidator or winding up order shall make an endorsement to that effect in his records relating to the company and notify in the Official Gazette that such an order has been made and in the case of a listed company, the registrar shall intimate about such appointment or order, to the stock exchange or exchanges where the securities of the company are listed.

Such winding up order shall be deemed to be a notice of discharge to the officers, employees and work men of the company, except when the business of the company is continued.

Within three weeks from the date of passing of winding up order, the Company liquidator shall make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company liquidator in carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely: —

- i) Official Liquidator attached to the Tribunal;
- ii) nominee of secured creditors; and
- iii) a professional nominated by the tribunal.

The Company liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—



The Company liquidator shall place before the Tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal. He shall also prepare the draft final report for consideration and approval of the winding up committee. The final report, so approved by the winding up committee, shall be submitted by the Company liquidator before the Tribunal for passing of a dissolution order in respect of the company.

STAY OF SUITS ON WINDING UP ORDER

When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the tribunal may impose: Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days. [Section 279(1)]

Effect of winding up order

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories. [Section 278]

Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court. [Section 279(2)]

SUBMISSION OF REPORT BY COMPANY LIQUIDATOR

According to section 281(1), where the Tribunal has made a winding up order or appointed a Company liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:

a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;

b) amount of capital issued, subscribed and paid-up;

c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;

e) guarantees, if any, extended by the company;

f) list of contributories and dues, if any, payable by them and details of any unpaid call;

h) details of subsisting contracts, joint ventures and collaborations, if any;

i) details of holding and subsidiary companies, if any;

j) details of legal cases filed by or against the company; and

k) any other information which the tribunal may direct or the Company liquidator may consider necessary to include.

The Company liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal. [Section 281(2)]

The Company liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company. [Section 281(3)]

The Company Liquidator may also, if he thinks fit, make any further report or reports. [Section 281(4)]

Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts therefrom on payment of the prescribed fees. [Section 281(5)]

DIRECTIONS OF TRIBUNAL ON REPORT OF COMPANY LIQUIDATOR

The Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved:

Provided that the Tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Company liquidator and after hearing the Company liquidator, creditors or contributories or any other interested person, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved. [Section 282(1)]

The Tribunal may, on examination of the reports submitted to it by the Company liquidator and after hearing the Company liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof:

Provided that the Tribunal may, where it considers fit, appoint a sale committee comprising such creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale under this sub-section. [Section 282(2)]

Where a report is received from the Company liquidator or the Central Government or any person that a fraud has been committed in respect of the company, the tribunal shall, without prejudice to the process of winding up, order for investigation under section 210, and on consideration of the report of such investigation it may pass order and give directions under sections 339 to 342 or direct the Company Liquidator to file a criminal complaint against persons who were involved in the commission of fraud. [Section 282(3)]

Custody of company's properties

Upon the winding up order made by the Tribunal the Company liquidator or the provisional liquidator take into his or its custody or control all the property, effects and actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company which shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company. [Section 283]

The Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company. [Section 282(4)]

The Tribunal may pass such other order or give such other directions as it considers fit. [Section 282(5)]

ADVISORY COMMITTEE

The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company liquidator and to report to the Tribunal on such matters as the Tribunal may direct. [Section 287(1)]

The advisory committee appointed by the Tribunal shall consist of not more than twelve members, being creditors and contributories of the company or such other persons in such proportion as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct. [Section 287(2)]

The Company liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee. [Section 287(3)]

The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time. [Section 287(4)]

The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed. [Section 287(5)]

The meeting of advisory committee shall be chaired by the Company liquidator. [Section 287(6)]

POWERS AND DUTIES OF COMPANY LIQUIDATOR

Section 290 of the Companies Act, 2013 lays down that subject to directions by the Tribunal, if any, in this regard, the Company liquidator, in a winding up of a company by the Tribunal, shall have the power –

- (a) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
- (b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;
- (c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;
- (d) to sell the whole of the undertaking of the company as a going concern;
- (e) to raise any money required on the security of the assets of the company;
- (f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
- (g) to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this act;
- (h) to inspect the records and returns of the company on the files of the Registrar or any other authority;
- (i) to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;
- (j) to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
- (k) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company liquidator himself;
- (l) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company liquidator is unable to do himself;
- (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary, –
 - (i) for winding up of the company;
 - (ii) for distribution of assets;
 - (iii) in discharge of his duties and obligations and functions as Company liquidator; and
- (n) to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.

EXERCISE AND CONTROL OF COMPANY LIQUIDATOR'S POWER

Sub-section (1) of section 292 lays down that subject to the provisions of this Act, the Company liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the advisory committee.

Professional assistance to company liquidator

The Company liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners or such other professionals on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act. [Section 291(1)]

Any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment. [Section 291(2)]

Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee. [Section 292(2)] The Company liquidator –

- (a) may summon meetings of the creditors or contributories, whenever he thinks fit, for the purpose of ascertaining their wishes; and
- (b) shall summon such meetings at such times, as the creditors or contributories, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories, as the case may be. [Section 292(3)]

Any person aggrieved by any act or decision of the Company liquidator may apply to the tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances. [Section 292(4)]

AUDIT OF COMPANY LIQUIDATOR'S ACCOUNTS

The Company liquidator shall maintain proper and regular books of account including accounts of receipts and payments made by him in such form and manner as may be prescribed. [Section 294(1)]

The Company liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed. [Section 294(2)]

The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company liquidator shall furnish to the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company liquidator. [Section 294(3)]

Books to be kept by Company Liquidator

The Company liquidator shall keep proper books in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed. [Section 293(1)]

Any creditor or contributory may, subject to the control of the tribunal, inspect any such books, personally or through his agent [Section 293(2)]

When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested. [Section 294(4)]

Where an account referred to in sub-section (4) relates to a Government company, the Company liquidator shall

forward a copy thereof –

- (a) to the Central Government, if that Government is a member of the Government company; or
- (b) to any State Government, if that Government is a member of the Government company; or
- (c) to the Central Government and any State Government, if both the Governments are members of the Government company. [Section 294(5)]

The Company liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory:

Provided that the Tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit. [Section 294(6)]

PAYMENT OF DEBTS BY CONTRIBUTORY AND EXTENT OF SET-OFF

The Tribunal may, at any time after passing of a winding up order, pass an order requiring any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this act. [Section 295(1)]

The Tribunal, in making an order, under sub-section (1), may, –

- a) in the case of an unlimited company, allow to the contributory, by way of setoff, any money due to him or to the estate which he represents, from the company, on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and
- b) in the case of a limited company, allow to any director or manager whose liability is unlimited, or to his estate, such set-off. [Section 295(2)]

In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call. [Section 295(3)]

POWER TO SUMMON PERSONS SUSPECTED OF HAVING PROPERTY OF COMPANY

The Tribunal may, at any time after the appointment of a provisional liquidator or the passing of a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property or books or papers, of the company, or known or suspected to be indebted to the company, or any person whom the tribunal thinks to be capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, or affairs of the company. [Section 299(1)]

Power to Order Costs

The Tribunal may, in the event of the assets of a company being insufficient to satisfy its liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Tribunal thinks just and proper. [Section 298]

The Tribunal may examine any officer or person so summoned on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories or on affidavit and may, in the first case, reduce his answers to writing and require him to sign them. [Section 299(2)]

The Tribunal may require any officer or person so summoned to produce any books and papers relating to the company in his custody or power, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the Tribunal shall have power to determine all questions relating to that lien. [Section 299(3)]

The Tribunal may direct the liquidator to file before it a report in respect of debt or property of the company in possession of other persons. [Section 299(4)].

If the Tribunal finds that –

- (a) a person is indebted to the company, the Tribunal may order him to pay to the provisional liquidator or, as the case may be, the liquidator at such time and in such manner as the Tribunal may consider just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Tribunal thinks fit, with or without costs of the examination;
- (b) a person is in possession of any property belonging to the company, the Tribunal may order him to deliver to the provisional liquidator or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the Tribunal may consider just. [Section 299(5)]

If any officer or person so summoned fails to appear before the Tribunal at the time appointed without a reasonable cause, the Tribunal may impose an appropriate cost. [Section 299(6)]

Every order made under sub-section (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908. [Section 299(7)]

Any person making any payment or delivery in pursuance of an order made under sub-section (5) shall by such payment or delivery be, unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property. [Section 299(8)]

EXAMINATION OF PROMOTERS, DIRECTORS, ETC.

As per Section 300(1) of the Act, upon the report of the Company liquidator to the Tribunal stating that in his opinion a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation, the Tribunal may, after considering the report, direct that such person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as an officer thereof.

The Company liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the Tribunal in that behalf, employ such legal assistance as may be sanctioned by the Tribunal. [Section 300(2)]

The person shall be examined on oath and shall answer all such questions as the Tribunal may put, or allow to be put, to him. [Section 300(3)]

A person ordered to be examined under this section –

(a) shall, before his examination, be furnished at his own cost with a copy of the report of the Company liquidator; and	(b) may at his own cost employ chartered accountant or company secretaries or cost accountant or legal practitioners entitled to appear before the Tribunal under section 432, who shall be at liberty to put to him such questions as the tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him. [Section 300(4)]

DISSOLUTION OF COMPANY BY TRIBUNAL

When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company. [Section 302(1)]

The Tribunal shall on an application filed by the Company Liquidator under sub-section (1) or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly. [Section 302(2)]

Arrest of person trying to leave India or abscond

The Tribunal, if satisfied that a contributory or a person having property, accounts or papers of the company in his possession is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, the Tribunal may cause – (a) the contributory to be detained until such time as the Tribunal may order; and (b) his books and papers and movable property to be seized and safely kept until such time as the Tribunal may think fit. [Section 301]

A copy of the order shall, within thirty days from the date thereof, be forwarded by the Company liquidator to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company. [Section 302(3)]

If the Company Liquidator makes a default in forwarding a copy of the order within the period specified in subsection (3), the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues. [Section 302(4)]

Kerala High Court in the matter of **Mathew Philip v. Malayalam Plantation LTD. 1994** held that there are three contingencies for dissolution of company:

1. When company has been completely wound-up.
2. When the court is of the opinion that liquidator cannot proceed with the winding-up of company for want of funds and assets
3. When the court is of the opinion that liquidators cannot proceed with the winding-up for any other reason.

FRAUDULENT PREFERENCE

Section 328 of the Companies Act, 2013 deals with fraudulent preference. Sub-section (1) of section 328 provides that where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

According to sub-section (2), if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

LIABILITIES AND RIGHTS OF CERTAIN PERSONS FRAUDULENTLY PREFERRED

Where a company is being wound up and anything made, taken or done after the commencement of this Act is invalid under section 328 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then, without prejudice to any rights or liabilities arising, apart from this provision, the person preferred shall be subject to the same liabilities, and shall have the same rights, as if he had undertaken to be personally liable as a surety for the debt, to the extent of the mortgage or charge on the property or the value of his interest, whichever is less. [Section 331(1)]

The value of the interest of the person preferred under sub-section (1) shall be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances other than those to which the mortgage or charge for the debt of the company was then subject. [Section 331(2)]

On an application made to the Tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Tribunal shall have jurisdiction to determine any questions with respect to

the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid. [Section 331(3)]

The provisions of sub-section (3) shall apply mutatis mutandis in relation to transactions other than payment of money. [Section 331(4)]

COMPANIES (WINDING-UP) RULES, 2020

Ministry of Corporate Affairs notified Companies (Winding-Up) Rules, 2020 through Notification No. G.S.R. 46(e) on 24th January, 2020. These rules shall apply to winding-up under the Companies Act 2013. These rules came into force from 1st April, 2020.

The rules are applicable to companies going into winding-up for the circumstances mentioned under section 271 as well as summary procedure for liquidation under section 361 of the Companies Act, 2013. The summary procedure entails appointment of an official liquidator by the Central Government, followed by the official liquidator immediately thereafter taking into his custody all the assets, effects and actionable claims to which the company is or appears to be entitled, who will then submit a report to the Central Government within 30 days of his appointment. The rules have been divided into 6 parts comprising of 191 rules and 95 forms.

'Winding-up rules' among other things provide for summary procedure for winding-up of companies having specified thresholds. The winding-up of companies falling within the specified thresholds will henceforth require the approval of the Central Government instead of the National Company Law Tribunal (NCLT).

An important feature of these rules is the summary procedure for liquidation introduced through Part V. An important factor for such summary winding-up is that the Central Government will provide required approvals to such companies for the normal winding-up process which is otherwise undertaken through the NCLT, thereby reducing the burden on NCLT and greatly shortening the overall winding-up timelines.

Notification of these rules is expected to reduce the burden at the level of NCLT as summary procedure for liquidation can now be filed with the Central Government.

Currently, the proceedings pertaining to voluntary winding up and winding up on the grounds of inability to pay debts are governed by the Insolvency and Bankruptcy Code 2016, which provides for time-bound speedy dissolution of a company.

However, winding-up proceedings on the ground other than inability to pay debts continues to be governed by the Companies (Court) Rules, 1959 which were notified nearly 60 years ago by the Supreme Court and required suitable amendments in view of the notification of the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016.

SUMMARY PROCEDURE FOR LIQUIDATION

These rules allow following classes of companies to close their business by making a winding-up application to Central Government without going to NCLT.

Companies accepting deposit and having total outstanding deposits	upto Rs.25 lacs*
Companies having total outstanding loan including secured loan	upto Rs.50 lacs*
Companies having total turnover	upto Rs.50 Crores*
Companies with paid-up capital	upto Rs.1 Crore*

*based on latest audited balance sheet.

- In addition, companies having book value of assets upto Rs.1 Crore [currently specified under section 361(1) (i)] of the Companies Act, 2013, can also approach Central Government for liquidation.
- The provisions of the Rules related to filing and audit of the Company Liquidator's accounts and its procedure (Rule 91 to 99 of the Rules) and disposing of assets (Rule 165 to 167 of the Rules) shall be applicable to above

class of companies with modification that the word 'Tribunal' shall be considered as 'Central Government'.

Other procedural aspects are as under:

- The rules lay down the process for meeting of creditors and contributories of the company, and specify the scenarios in which creditors can vote.
- The rules make it necessary for all the money lying in the bank account of Company liquidator which is not immediately required for the purposes of winding up, to be invested in government securities or in interest bearing deposits in any scheduled bank.
- The rules lay down the procedure for maintenance of registers and books of accounts by the Company liquidator.
- The rules also outline the procedure for creditors to prove their debts and claims against the company and if the proof of such debt gets rejected by the Company liquidator, there is also a provision and process for creditor to make an appeal to tribunal.

CASE LAWS

Case-1

In the matter of **Indiabulls Housing Finance Ltd. v. Shree Ram Urban Infrastructure Ltd.**, the Indiabulls Housing Finance Ltd. (Appellant) had initiated Corporate insolvency resolution Process against Shree Ram Urban Infrastructure Ltd. (Corporate Debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016.

The National Company law tribunal, Mumbai Bench by impugned order dated 18th May, 2018 dismissed the application as not maintainable in view of the fact that the winding-up proceeding against the Corporate Debtor had already been initiated by the High Court of Bombay.

Thus, the issue that fell for consideration before the National Company Law Appellate Tribunal was whether an application under Section 7 of the Code is maintainable when winding-up proceeding against the Corporate debtor has already been initiated?

NCLAT decision

In the said appeal the NCLAT examined judgments governing the issue to hold that the High Court of Bombay has already ordered for winding-up of Corporate debtor, which is the second stage of the proceeding, thus question of initiation of 'Corporate Insolvency Resolution Process' which is the first stage of resolution process against the same Corporate debtor does not arise.

While arriving at its judgment, the NCLAT relied on the case of *Forech India Pvt. Ltd. Vs. Edelweiss assets reconstruction Company Ltd. & Anr.*, wherein the NCLAT observed that if a Corporate insolvency resolution has started or on failure, if liquidation proceeding has been initiated against the Corporate debtor, the question of entertaining another application under Section 7 or Section 9 against the same very Corporate debtor does not arise, as it is open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

The NCLAT further opined that once second stage i.e. liquidation (winding-up) proceedings has already been initiated, the question of reverting back to the first stage of Corporate Insolvency Resolution Process or preparation of Resolution Plan does not arise.

In view of the facts of the present case, the NCLAT concluded that as the High Court of Bombay had already ordered winding-up of Corporate debtor and the same has been initiated, therefore, initiation of Corporate Insolvency Resolution Process against the Corporate debtor did not arise.

Case-2

In the matter of '**Amar Remedies Limited**', the applicant filed an application before NCLT, Mumbai Bench under section 10 of the Insolvency and Bankruptcy Code, 2016 suppressing the material facts that liquidation order had been passed in a winding-up petition against the corporate debtor.

The NCLT Mumbai Bench observed: "...the corporate applicant suppressed this material fact, knowing it to be material, and filed the petition under section 10 and in contravention of Rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The alleged act of the corporate applicant is punishable under section 77(a) of the Insolvency and Bankruptcy Code 2016.

Accordingly, it directed the Registrar of Companies to lodge prosecution against the applicant under section 77(a) of the Code. It rejected application with costs of Rs.10 lakh, which shall be paid by the applicant in the account of the Prime Minister's National Relief Fund.

LESSON 10 - CROSS BORDER INSOLVENCY

REGULATORY FRAMEWORK

- Section 234 & 235 of the Insolvency and Bankruptcy Code, 2016
- UNCITRAL Model Law

INTRODUCTION

Cross-border insolvency (sometimes called international insolvency) regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country. In recent times, the number of cross-border insolvency cases has increased significantly. The increasing frequency of cross-border insolvencies reflects the continuing expansion of global trade and investment. However, national insolvency laws are often ill-equipped to deal with cases of a cross-border nature and they have by and large not kept pace with the trend. Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is another increasing problem, in terms of both its frequency and its magnitude.

There is also a lack of communication and coordination among courts and administrators from concerned jurisdictions. These deficiencies frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses. Such inadequate and uncoordinated legal approaches, unconducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor and affect the maximization of the value of those assets. Such approaches are not only unpredictable and time-consuming in their application, but also lack transparency and the necessary tools to address the issues. All these factors adversely affect the value of the assets of financially troubled businesses and hamper their rescue. Moreover, the absence of predictability in the cross-border insolvency processes impedes capital flow and is a disincentive to cross-on border investment.

Cross-border insolvency problems are not limited to the failure of major international businesses. A domestic business may have foreign branches or subsidiaries, or a foreign business may have domestic branches or subsidiaries. Property located in a foreign country may provide security for a debt so that domestic assets can be used to pay unsecured creditors. Foreign creditors may have valid claims in domestic bankruptcy cases, and domestic creditors may have valid claims in foreign bankruptcy cases. Any one of these situations raises a transnational insolvency problem.

The organisation of insolvency proceedings with an international element is not an easy or straightforward matter. Solutions to the phenomenon of cross-border insolvency are reliant a number of complex and interrelated questions to which the courts and legislatures in different jurisdictions have provided varying answers.

CURRENT CROSS BORDER INSOLVENCY SCENARIO

Insolvency laws aim to assist both the debtor and the creditor in the management and disposition of the debtor's assets. Recently insolvency petitions against numerous companies are being admitted. A few of these companies also have assets in other jurisdictions, and one of the crucial questions that arise is the treatment of such assets. This is the sphere of cross-border insolvency laws.

The Insolvency Law Committee constituted by the Ministry of Corporate Affairs submitted its first Report in March 2018 which recommended amendments to the Insolvency and Bankruptcy Code, 2016 based on the experience gained from implementation of the Code. With respect to cross-border insolvency, the Committee noted that the existing provisions in the Code (sections 234 and 235) do not provide a comprehensive framework for cross- border insolvency matters. The Committee decided to attempt to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997 which could be made a part of the Code by inserting a separate part for this purpose.

Further, the Standing Committee on Finance (2020-2021) in its Thirty- Second Report on “Implementation of Insolvency & Bankruptcy Code-Pitfalls and Solutions” noted that the Insolvency Law Committee on cross border Insolvency (2018) had suggested the Incorporation of UNCITRAL Model Law on cross Border Insolvency into the Insolvency and Bankruptcy Code. The Committee also noted that an expert Committee on Cross-Border Insolvency Rule/Regulations Committee (CBIRC) had been constituted for recommending rules and regulations for smooth implementation of proposed cross border insolvency provisions, which are under consideration. Once the recommendations are adopted, the committee hope that the cross-border insolvency framework would go a long way in ensuring coordination and communication between jurisdictions to successfully address the resolution of cross border insolvency cases. The committee, therefore, recommended in a situation where an insolvency that the adoption of the provision of the cross- border Insolvency petition is admitted against a Framework should be expedited.

Globally, cross-border insolvency laws are based on one country providing assistance to the other in taking control of the assets and eventual disposition of such assets of the debtor company. Such aims are achieved by the mutual recognition of each country’s insolvency regime. For example, the UK recognizes the insolvency provisions of certain Commonwealth jurisdictions and courts in the UK are bound to assist courts in such Commonwealth jurisdictions. India is not one of the jurisdictions that qualify for the benefit under this route. The European Union has one of the most effective cross-border regimes where, under Insolvency Regulations, the country where proceedings are initiated against the debtor and the Centre of Main interest is located in such country, the laws of that country automatically take priority and have the same effect in all other member states and govern all issues except those specifically excluded.

In a situation where an insolvency petition is admitted against a company and the committee of creditors (CoC) fails to arrive at a resolution plan, the company is ordered to be liquidated under the Insolvency and Bankruptcy Code, 2016. In this situation, the regime governing the disposition of the foreign assets of a company is inadequate, and there is an urgent need for a framework on cross-border insolvency.

Some countries have adopted the UN Commission on International Trade Law (UNCITRAL) Model law on cross- border insolvency, adopted in 1997.

The model law is designed to provide a harmonized approach to the treatment of cross-border insolvency proceedings, facilitate cooperation between the courts and office holders involved in the insolvency in diff jurisdictions, and provide for the mutual recognition of judgements and direct access of foreign representatives to the courts of the enacting state. India has not adopted the model law.

As regards cross-border insolvency laws in India, under the Companies Act, 1956, a court could order the winding-up of an unregistered company, which included a foreign company. However, if an Indian company with assets abroad was sought to be wound up, there was no specific statutory process for the proceedings. It was based on the mutual recognition of foreign decrees as in the Code of Civil Procedure, 1908, in India. Foreign creditors could also independently proceed against the assets of the company located in the foreign jurisdiction. In the absence of such recognition, it is difficult for a liquidator to gather information on the assets and enforce the disposition of foreign assets in a liquidation.

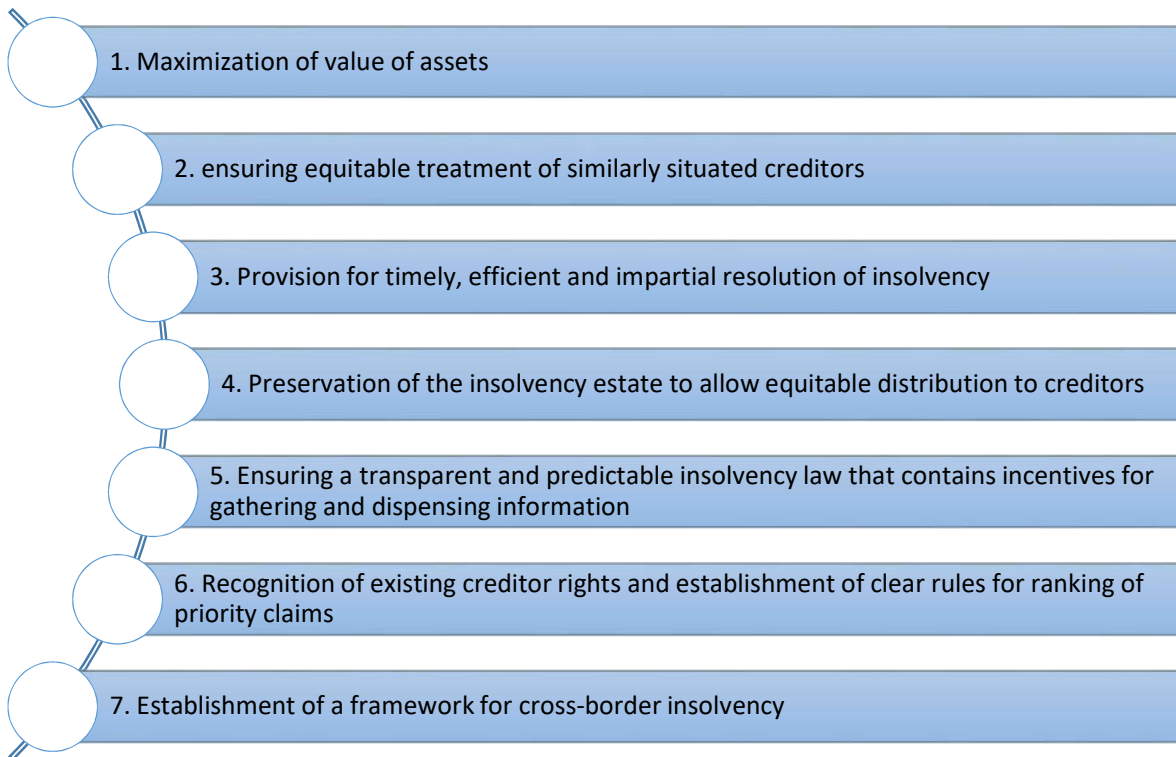
This problem was recognized by the Justice Eradi Committee in 2000 which called for the urgent adoption of the UNCITRAL Model Law, in whole or in part, for India to have an effective cross-border insolvency regime. Thereafter, the N.L. Mitra committee report set out in detail the then prevailing cross-border insolvency regime and once again reiterated the recommendation for the adoption of the UNCITRAL Model law. The Banking Law Reforms Committee (BLRC) report, on the basis of which the Insolvency and Bankruptcy Code, 2016 is formulated, decided to take-up question of cross-border insolvency in the next stage of deliberations.

In its current form, the Code contains only two provisions that may possibly enable and assist the liquidator with respect to a company having assets in a foreign jurisdiction. Section 234 of the Code allows the union government to enter into reciprocal agreements with other countries to enforce the provisions of the Code. Section 235 envisages a 'letter of request' by the liquidator for action on the assets of the company situated in another country. However, there must exist a reciprocal arrangement with such country. It is important to appreciate that the Code does not envisage the adoption of the UNCITRAL Model law or any cross-border insolvency regime.

The Insolvency Law Committee Report (ILC) on cross-border insolvency, observed that Sections 234 and 235 of the Code did not provide a comprehensive framework on cross-border insolvency matters and stated that it has attempted to formulate a framework based on the UNCITRAL Model Law. If the code is to be effective in the management and disposition of foreign assets of debtor companies, it is the need of the hour that India put in place a framework for cross-border insolvency. Till such time, liquidation of foreign assets will be a long-drawn process.

KEY OBJECTIVES OF EFFECTIVE AND EFFICIENT INSOLVENCY LAW

Although approaches in different countries may vary but there is a broad agreement that an effective and efficient insolvency regime should aim to achieve the following key objectives in a balanced manner:

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1. Maximization of value of assets
 2. ensuring equitable treatment of similarly situated creditors
 3. Provision for timely, efficient and impartial resolution of insolvency
 4. Preservation of the insolvency estate to allow equitable distribution to creditors
 5. Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information
 6. Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims
 7. Establishment of a framework for cross-border insolvency

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General assembly. The United Nations Commission on International Trade Law (UNCITRAL) was established by the General assembly in 1966 [resolution 2205 (XXi) of 17 December 1966].

The Commission carries out its work at annual sessions, which are held in alternate years at united Nations Headquarters in New York and at the Vienna international Centre at Vienna.

The united Nations Commission on international trade law prepares international legislative texts for use by States in modernizing commercial law and non-legislative texts for use by commercial parties in negotiating transactions.

Examples of Legislative texts:

- UNCITRAL Model Law on International Commercial Arbitration
- UNCITRAL Model Law on Cross Border Insolvency
- UNCITRAL Model Law on Procurement of Goods, Construction and Services
- UNCITRAL Model Law on International Credit Transfers
- UNCITRAL Model Law on Electronic Commerce

Examples of Non-Legislative texts:

- UNCITRAL Arbitration Rules
- UNCITRAL Conciliation Rules
- UNCITRAL Notes on Organizing Arbitral Proceedings
- UNCITRAL Legal Guide on International Countertrade Transactions

UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAWS

The Legislative Guide on insolvency law was prepared by the United Nations Commission on International Trade Law (UNCITRAL). The project arose from a proposal made to the Commission in 1999 that UNCITRAL should undertake further work on insolvency law, specifically corporate insolvency, to foster and encourage the adoption of effective national corporate insolvency regimes.

An exploratory meeting to consider the feasibility of such a project was held in December 1999. On the basis of the recommendation of that meeting, the Commission gave Working Group V (insolvency law) a mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor- creditor regime, including out-of- court restructuring, and a legislative guide containing flexible approaches to the implementation of to such objectives and features, including a discussion of the alternative approaches possible and the perceived and detriments of such approaches.

The first draft of the legislative guide on insolvency law was considered by Working Group V in July 2001 and work developed through seven one-week sessions, the final meeting taking place in late March 2004. In addition to representatives of the 36 member States of the representatives of many other States and a number of international organizations, both intergovernmental and non-governmental, participated actively in the work. The work was also undertaken in close with Working Group VI (Security interests), to ensure collaboration entered into voluntarily between a debtor and coordination of the treatment of security in insolvency with the legislative guide on secured transactions being developed by UNCITRAL.

The final negotiations on the draft legislative guide on insolvency law were held during the thirty-seventh session of UNCITRAL in New York from 14th to 21st June 2004 and the text was adopted by consensus on 25th June 2004. Subsequently, the General assembly adopted resolution 59/40 of 2nd December 2004 in which it expressed its appreciation to UNCITRAL for completing and adopting the Legislative Guide.

Organization and Scope of the Legislative Guide

The legislative Guide on insolvency law is intended be used as a reference by national authorities and legislative bodies when preparing new laws benefits and regulations or reviewing the adequacy of existing laws and regulations.

The Guide discusses issues central to the design of an effective and efficient insolvency law, which, despite numerous differences in policy and legislative treatment, are recognized in many legal Commission, systems.

The legislative Guide also discusses the increasing use and importance of other tools for addressing preparatory insolvency, specifically restructuring negotiations entered into voluntarily between a debtor and its key creditors, which are not regulated by the insolvency law.

PURPOSE

The purpose of the Legislative Guide on Insolvency Law is to assist the establishment of an efficient and effective legal framework to address the financial difficulties of debtors. The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. It is intended to inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided aims at achieving a balance between the need to address a debtor's financial difficulties as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulties, principally creditors and other stakeholders in the debtor's business; and public policy concerns, such as employment and taxation. The Legislative Guide assists the reader to evaluate the different approaches and solutions available and to choose the one most suitable to the local context.

RELEVANCE TO INTERNATIONAL TRADE

It is increasingly recognized that strong and effective insolvency regimes are important for all States as a means of preventing or limiting financial crises and facilitating rapid and orderly workouts from excessive indebtedness. Such regimes can facilitate the orderly reallocation of economic resources from businesses that are not viable to more efficient and profitable activities; provide incentives that not only encourage entrepreneurs to undertake investment, but also encourage managers of failing businesses to take early steps to address that failure and preserve employment; reduce the costs of business; and increase the availability of credit. Comparative analysis of the effectiveness of insolvency systems has become both common and essential for lending purposes, affecting States at all levels of economic development.

Much of the legislation relating to corporations and particularly to their treatment in insolvency deals with the single corporate entity, notwithstanding that the business of corporations is increasingly being conducted, both nationally and internationally, through enterprise groups - groups of corporations, sometimes very large, that are interconnected by various forms of ownership and control. These groups, found extensively in both emerging and developed markets, are a common vehicle for conducting international trade and finance. When some or all of the constituent parts of such groups become insolvent, there are currently very few domestic law regimes and no international or regional legal regimes that can effectively coordinate the conduct of the resulting insolvency proceedings, often involving multiple jurisdictions.

KEY PROVISIONS

The legislative guide is divided into four parts. They are as follows:

Part one discusses the key objectives of an insolvency law, structural issues such as the relationship between insolvency law and other law, the types of mechanisms available for resolving a debtor's financial difficulties and the institutional framework required to support an effective insolvency regime.

Part two deals with core features of an effective insolvency law, following as closely as possible the various stages of an insolvency proceeding from their commencement to discharge of the debtor and closure of the proceedings. Key elements are identified as including: standardized commencement criteria; a stay to protect the assets of the insolvency estate that includes actions by secured creditors; post-commencement finance; participation of creditors; provision for expedited reorganization proceedings; simplified requirements for submission and verification of claims; conversion of reorganization to liquidation when reorganization fails; and clear rules for discharge of the debtor and closure of insolvency proceedings.

Part three addresses the treatment of enterprise groups in insolvency, both nationally and internationally. While many of the issues addressed in parts one and two are equally applicable to enterprise groups, there are that only apply in the enterprise group context. Part three thus builds upon and supplements parts one and two. At the domestic level, the commentary and recommendations of part three cover various mechanisms that can be used to streamline

insolvency proceedings involving two or more members of the same enterprise group. These include: procedural coordination of multiple proceedings concerning different debtors; issues concerning post-commencement and post-application finance in a group context; avoidance provisions; substantive consolidation of insolvency proceedings affecting two or more group members; appointment of a single or the same insolvency representative to all group members subject to insolvency; and coordinated reorganization plans. In terms of the international treatment of groups, part three focuses on cooperation and coordination, extending provisions based upon the Model law on Cross-Border insolvency to the group context and, as appropriate, considering the applicability to the international context of the mechanisms proposed to address enterprise group insolvencies in the national context.

Part four focuses on the obligations that might be imposed upon those responsible for making decisions with respect to the management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and to provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise.

UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW VIS-A-VIS UNCITRAL MODEL LAW ON CROSS- BORDER INSOLVENCY

A model law generally is used differently than a legislative guide. Specifically, a model law is a legislative text recommended to States for enactment as part of national law, with or without modification. As such, model laws generally propose a comprehensive set of legislative solutions to address a particular topic and the language employed supports direct incorporation of the provisions of the model law into a national law.

The focus of a legislative guide, on the other hand, is upon providing guidance to legislators and other users and for that reason guides generally include a substantial commentary discussing and analyzing relevant issues. It is not intended that the recommendations of a legislative guide be enacted as part of national law as such. Rather, they outline the core issues that it would be desirable to address in that law, with some recommendations providing specific guidance on how certain legislative provisions might be drafted.

UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY

The UNCITRAL Model law on Cross-Border insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

The Model law is designed to assist states to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

RELEVANCE TO INTERNATIONAL TRADE

Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of national or international legal regimes equipped to address the issues raised by those cases has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches to cross-border insolvency that are not only unpredictable and time-consuming in their application, but lack both transparency and the tools necessary to address the disparities and, in some cases, conflicts that may occur between national laws and insolvency regimes. These factors have impeded the protection of the value of the assets of financially troubled businesses and hampered their rescue.

The UNCITRAL Model law has been adopted in as many as 44 countries and, therefore, forms part of international best practices in dealing with cross border insolvency issues. The model law deals with four major principles of cross-border insolvency, namely:

(a) direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor;	(b) recognition of foreign proceedings & provision of remedies;	(c) cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and	(d) coordination between two or more concurrent insolvency proceedings in different countries. The main proceeding is determined by the concept of centre of main interest (COMI).

KEY PROVISIONS

The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation. They are:

- (a) **Access** - These provisions give representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to seek assistance and authorize representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.
- (b) **Recognition** - One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects - principal amongst them is the relief accorded to assist the foreign proceeding.
- (c) **Relief** - A basic principle of the Model law is that the relief considered necessary for the orderly and fair conduct of cross-border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model law neither imports the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State. Key elements of the relief available include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the court for both main and non-main proceedings following recognition.
- (d) **Cooperation and coordination** - These provisions address cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor. The Model law expressly empowers courts to cooperate in the areas governed by the Model law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

PURPOSE OF MODEL LAW

The Preamble to UNCITRAL Model law on Cross-Border insolvency provides that - the purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- b) Greater legal certainty for trade and investment;
- c) Fair and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- d) Protection and maximization of the value of the debtor's assets; and
- e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

SCOPE OF APPLICATION

UNCITRAL Model law on Cross-Border insolvency applies where:

- (a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) assistance is sought in a foreign State in connection with a proceeding under identify laws of the enacting State relating to insolvency; or
- (c) foreign proceeding and a proceeding under identify laws of the enacting State relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under identify laws of the enacting State relating to insolvency.

UNCITRAL Model law on Cross-Border insolvency does not apply to a proceeding concerning designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this law. [Article 1]

PRINCIPLE OF SUPREMACY OF INTERNATIONAL OBLIGATIONS

Article 3 provides that to the extent the Model Law conflicts with an obligation of the State enacting the Model law arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

INTERPRETATION

In the interpretation of Model law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. [Article 8]

DEFINITIONS

- a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

- d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;
- e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;
- f) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
- g) “State”, as used in the preamble and throughout the Model law, refers to the country that enacts the law (the “enacting State”). The term should not be understood as referring, for example, to a state in a country with a federal system.

Competent court or authority

The functions under the Model law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the court, courts, authority or authorities as specified in the Model Law who are competent to perform those functions in the enacting State. [Article 4]

GENERAL PROVISIONS

Scope of Application (Article 1)

According to article 1 of the Model law, it applies where:

- (a) Assistance is sought in the enacting State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under the laws of the enacting State relating to insolvency; or
- (c) A foreign proceeding and a proceeding under the laws of the enacting State relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under the laws of the enacting State relating to insolvency.

It further says that the Model law does not apply to a proceeding concerning any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in a State and that State wishes to exclude from the law (the type of entity to be excluded may be designated).

Banks or insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the scope of the Model law. the reason for the exclusion would be that the insolvency of such entities gives rise to the particular need to protect vital interests of a large number of individuals, or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entities is in many States administered under a special regulatory regime. the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies.

Types of Foreign Proceedings Covered

To fall within the scope of the Model law, a foreign insolvency proceeding needs to possess certain attributes. these include the basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Within those parameters, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding- up or reorganization. It also includes those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, “debtor in possession”). An inclusive approach is also used as regards the possible types of debtors covered by the Model law.

Principle of supremacy of international obligations (Article 3)

Article 3 provides that to the extent the Model Law conflicts with an obligation of the State enacting the Model law arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Competent court or authority (Article 4)

The functions under the Model law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the court, courts, authority or authorities as specified in the Model Law who are competent to perform those functions in the enacting State.

ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN STATE ENACTING MODEL LAW**Right of direct access (Article 9)**

A foreign representative is entitled to apply directly to a court in the State enacting law. Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action.

Application by a Foreign Representative to Commence a Proceeding (Article 11)

According to Article 11, a foreign representative is entitled to apply to commence a proceeding under the laws of the enacting State relating to insolvency, if the conditions for commencing such proceeding otherwise met.

A foreign representative has this right without prior recognition of the foreign proceeding because the commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor.

The Model law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible.

In addition to establishing the principle of direct court access for the foreign representative, the Model law:

- (a) Establishes simplified proof requirements for seeking recognition and relief for foreign proceedings, which avoid time-consuming “legalization” requirements involving notarial or consular procedures (Article 15);
- (b) Provides that the foreign representative has procedural standing for commencing an insolvency proceeding in the enacting State (under the conditions applicable in the enacting State) and that the foreign representative may participate in an insolvency proceeding in the enacting State (Articles 11 and 12);
- (c) Confirms, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of commencing in the enacting State an insolvency proceeding or participating in such a proceeding (Article 13);
- (d) Gives the foreign representative the right to intervene in proceedings concerning individual actions in the enacting State affecting the debtor or its assets (Article 24);
- (e) Provides that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over all the assets and affairs of the debtor (Article 10).

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the laws of the enacting State relating to insolvency (Article 12).

Article 12 is limited to giving the foreign representative procedural standing (or “procedural legitimation”) to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding and does not vest the foreign representative with any specific powers or rights.

Protection of creditors and other interested persons

Foreign creditors have the same rights regarding the commencement of and participation in a proceeding under the laws of the enacting State relating to insolvency as creditors in the State.

The Model law contains following provisions to protect the interests of the creditors (in particular local creditors), the debtor and other affected persons:

In addition to those specific provisions, the Model Law in a general way provides that the court may refuse to take an action governed by the Model law if the action would be manifestly contrary to the public policy of the enacting State (Article 6).

Availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (Article 22, paragraph 1);

The court may subject the relief it grants to conditions it considers appropriate; and

The court may modify or terminate the relief granted, if so requested by a person affected thereby (Article 22, paragraphs 2 and 3).

Notification to Foreign Creditors of a Proceeding (Article 14)

Article 14 of the Model law provides that whenever under laws of the enacting State relating to insolvency, a notification is to be given to creditors, such notification shall also be given to the known creditors that do not have addresses in the State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. The main purpose of notifying foreign creditors is to inform them of the commencement of the insolvency proceeding and of the time-limit to file their claims.

Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

- (a) Indicate a reasonable time period for filing claims and specify the place for their filing;
- (b) Indicate whether secured creditors need to file their secured claims; and
- (c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Application for Recognition of a Foreign Proceeding (Article 15)

Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond these requirements. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. An application for recognition shall be accompanied by:

- (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) In the absence of evidence referred to in sub-paragraphs (a) and (b) above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. The court may require a translation of documents supplied in support of the application for recognition into an official language of State.

The Model law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization. According to Article 16, the court is entitled to presume that those documents are authentic whether or not they have been legalized. “Legalization” is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

In respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents. According to Article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail. In order not to prevent recognition because of non-compliance with a mere technicality, the law allows evidence other than that specified; that provision, however, does not compromise the court’s power to insist on the presentation of evidence acceptable to it.

It further requires that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. In order to tailor such relief appropriately and make sure that the relief is consistent with any other insolvency proceeding concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States.

Decision to Recognize a Foreign Proceeding (Article 17)

Subject to Article 6, a foreign proceeding shall be recognized if:

- a) the foreign proceeding is a proceeding within the meaning as defined under Article 2;
- b) the foreign representative applying for recognition is a person or body within the meaning as defined under Article 2;
- c) the application meets the requirements of Article 15; and
- d) the application has been submitted to the court referred to in Article 4.

The foreign proceeding shall be recognized as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of Article 2 in the foreign State.

The purpose of Article 17 is to indicate that, if recognition is not contrary to the public policy of the enacting State and if the application meets the above said requirements, recognition will be granted as a matter of course. a decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision.

Subsequent Information (Article 18)

The foreign representative shall inform the court immediately, if from the time of filing the application for recognition of the foreign proceeding, there is:

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

It is possible that, after the application for recognition or after recognition, changes may occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition.

For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding, or the terms of the appointment of the foreign representative may be modified or the appointment itself terminated. The technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision

granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of “substantial” changes.

Relief That may be Granted upon Application for Recognition of a Foreign Proceeding (Article 19)

According to Article 19, from the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor’s assets;

(b) entrusting the administration or realization of all or part of the debtor’s assets located in a State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(c) any relief mentioned in Article 21.

Relief available under Article 19 is provisional in the sense that, the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in Article 21. The court may refuse to grant relief under this Article if such relief would interfere with the administration of a foreign main proceeding.

Effects of Recognition of a Foreign main Proceeding (Article 20)

Once foreign proceeding is recognized which is a foreign main proceeding, the following are the effects:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed;
- b) execution against the debtor’s assets is stayed; and
- c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

The effects provided by Article 20 are not discretionary in nature. These flow automatically from recognition of the foreign main proceeding. The automatic effects under Article 21 apply only to main proceedings.

Relief that may be Granted upon Recognition of a Foreign Proceeding (Article 21)

Upon recognition of a foreign proceeding, whether main or non-main, where it is necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20;	(b) Staying execution against the debtor's assets to the extent it has not been stayed under article 20;	(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20;	(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;	(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;	(f) Extending relief granted under article 19; and	(g) Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting State under the laws of that State.

Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the State enacting the Model law to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors are adequately protected.

In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Protection of creditors and other interested persons (Article 22)

The court may under Article 22, at the request of the foreign representative or a person affected by relief granted, or at its own motion, modify or terminate such relief. In granting or denying relief under article 19 or 21, or in modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.

Actions to Avoid acts Detrimental to Creditors (Article 23)

Under many national laws both individual creditors and insolvency administrators have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the civil code); the right is not necessarily tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. the person having such a right is typically only an affected creditor and not another person such as the insolvency administrator. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency administrator.

The procedural standing conferred by Article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of Article 23.

The Model law expressly provides that a foreign representative has “standing” to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in the enacting State.

Cooperation with Foreign Courts and Foreign Representatives

Chapter IV (Articles 25-27), on cross-border cooperation, is a core element of the Model law. Its objective is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. Cooperation as described the chapter is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets.

Articles 25 and 26 not only authorize cross-border cooperation, also mandate it by providing that the court and the insolvency administrator “shall cooperate to the maximum extent possible”. The articles are designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border foreign representative insolvencies.

Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited.

However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful. To the extent that cross-border judicial cooperation in the enacting State is based on the principle of comity among nations, the enactment of Articles 25-27 offers an opportunity for making that principle more concrete and adaptable to the particular circumstances of cross-border insolvencies.

The articles in chapter IV leave certain decisions, in particular when and how to cooperate, to the courts and, subject to the supervision of the courts, to the insolvency administrators. For a court to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the Model law does not require a previous formal decision to recognize that foreign proceeding.

Intervention by a foreign representative in proceedings (Article 24)

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of the State are met, intervene in any proceedings in which the debtor is a party. The purpose of Article 24 is to avoid the denial of standing to the foreign representative to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

Cooperation and direct communication between courts or foreign representatives (Article 25)

The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives. The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory.

Cooperation and direct communication between a person or body administering a reorganization or liquidation under the law of the enacting state and foreign courts or foreign representatives (Article 26)

Article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency administrator acts under the overall supervision of the competent court. The Model law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency administrator.

According to Article 27, Cooperation may be implemented by any appropriate means, including:

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- (a) appointment of a person or body to act at the direction of the court;
 - (b) communication of information by any means considered appropriate by the court;
 - (c) coordination of the administration and supervision of the debtor's assets and affairs;
 - (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
 - (e) coordination of concurrent proceedings regarding the same debtor;
 - (f) the enacting State may wish to list additional forms or examples of cooperation.

CONCURRENT PROCEEDINGS

Commencement of a Proceeding after Recognition of a Foreign main Proceeding (Article 28)

After recognition of a foreign main proceeding, a proceeding under the laws of the enacting State relating to insolvency may be commenced only if the debtor has assets in the State enacting the Model Law. The effects of that proceeding shall be restricted to the assets of the debtor that are located in such State and to the extent necessary to implement cooperation and coordination under Articles 25, 26 and 27 to other assets of the debtor that, under the law of such State, should be administered in that proceeding.

Article 28, in conjunction with Article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

Coordination of a Proceeding (Article 29)

Article 29 gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. Where a foreign proceeding and a proceeding under the laws of the enacting State relating to insolvency are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under Articles 25, 26 and 27, and the following shall apply:

- (a) When the proceeding in the State (which has enacted Model law) is taking place at the time the application for recognition of the foreign proceeding is filed,
- (i) any relief granted under Article 19 or 21 must be consistent with the proceeding in such State; and
 - (ii) if the foreign proceeding is recognized in such State as a foreign main proceeding, article 20 does not apply;
- (b) When the proceeding in such State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
- (i) any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
 - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in Article 20 shall be modified or terminated, if inconsistent with the proceeding in such State;
- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets which, according to the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The salient principle embodied in Article 29 is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

Coordination of more than one Foreign Proceeding (Article 30)

Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both Article 29 and Article 30.

In respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under Articles 25, 26 and 27, and the following shall apply:

- a) any relief granted under Article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding; and
- c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

The objective of Article 30 is similar to that of Article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted. Unlike Article 29, which, as a matter of principle, gives primacy to the local proceeding, Article 30 gives preference to the foreign main proceeding, if there is one.

Rule of Payment in Concurrent Proceedings (Article 32)

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding, pursuant to a law relating to insolvency, in a foreign State, may not receive a payment for the same claim in a proceeding under the laws of the enacting State relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

The rule set forth in Article 32, also referred to as the hotchpotch rule, is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.

WORLD BANK PRINCIPLES — EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS

The World Bank Principles were originally developed in 2001 in response to a request from the international community in the wake of the financial crises in emerging markets in the late 90s. At the time, there were no internationally recognized benchmarks or standards to evaluate the effectiveness of domestic creditor rights and insolvency systems. The World Bank's initiative began in 1999, with the constitution of an ad hoc committee of partner organizations, and with the assistance of leading international experts who participated in the World Bank's Task Force and Working Groups. The Principles were vetted in a series of five regional conferences, involving officials and experts from some 75 countries, and drafts were placed on the World Bank's website for public comment. The Bank's Board of directors approved the Principles in 2001 for use in connection with the joint IMF-World Bank program to develop Reports on the Observance of Standards and Codes (ROSC), subject to reviewing the experience and updating the Principles as needed.

From 2001 to 2004, the Principles were used to assess country systems under the ROSC and Financial Sector Assessment Program (FSAP) in some 24 countries in all regions of the world. Assessments using the Principles have been instrumental to the Bank's developmental and operational work, and in providing assistance to member countries. This has yielded a wealth of experience and enabled the Bank to test the suffix of the Principles as a benchmark in a wide range of diverse country systems. In taking stock of that experience, the Bank has consulted a wide range of interested parties at the national and international level, including civil society, business and financial sectors, investors, professional groups, and others.

In 2003, the World Bank convened the Global Forum on Insolvency Risk Management (FIRM) to discuss the experience and lessons from the application of the Principles in the assessment program. The forum consisted of over 200 experts from 31 countries to discuss the lessons from the principles and to discuss further refinements with them. During 2003 and 2004, the Bank also convened three working group sessions of the Global Judges Forum, involving judges from approximately 70 countries, who have assisted the Bank in its review of the institutional framework principles and in developing more detailed recommendations for strengthening court practices for commercial enforcement and insolvency proceedings. Other regional fora have also provided a means for sharing experience and obtaining feedback in areas of the Principles, including the Forum on Asian insolvency reform (Fair) from 2002-2004 (organized by OECD and co-sponsored with the Bank and the Asian Development Bank), and Forum on insolvency in Latin America (Fila) in 2004 organised by the Bank.

In the area of the insolvency law framework and creditor rights systems, staffs of the Bank maintained participation in the UNCITRAL working groups on insolvency law and security interests and liaised with UNCITRAL staff and experts to ensure consistency between the Bank's Principles and the UNCITRAL Legislative Guide on Insolvency Law. The Bank has also benefited from an ongoing collaboration with the

International Association of Insolvency Regulators (IAIR) to survey regulatory practices of IAIR member countries and develop recommendations for strengthening regulatory capacity and frameworks for insolvency systems. A similar collaboration with INSOL International has provided feedback and input in the area of directors' and officers' liability and informal workout systems.

Based on the experience gained from the use of the Principles, and following extensive consultations, the Principles have been thoroughly reviewed and updated. The revised Principles have benefited from wide consultation and, more importantly, from the practical experience of using them in the context of the Bank's assessment and operational work.

The World Bank Principles have been designed as a broad-spectrum assessment tool to assist countries in their efforts to evaluate and improve core aspects of their commercial law systems that are fundamental to a sound investment climate, and to promote commerce and economic growth. Efficient, reliable and transparent creditor rights and insolvency systems are of key importance for reallocation of productive resources in the corporate sector, for investor confidence and forward looking corporate restructuring. These systems also play a pivotal role in times of crisis to enable a country and stakeholders to promptly respond to and resolve matters of corporate financial distress on systemic scales.

The Principles emphasize contextual, integrated solutions and the policy choices involved in developing those solutions. The Principles highlight the relationship between the cost and flow of credit (including secured credit) and the laws and institutions that recognize and enforce credit agreements (Part A). The Principles also outline key features and policy choices relating to the legal framework for risk management and informal corporate workout systems (Part B), formal commercial insolvency law frameworks (Part C) and the implementation of these systems through sound institutional and regulatory frameworks (Part D).

The principles have broader application beyond corporate insolvency regimes and creditor rights. the Principles are designed to be flexible in their application, and do not offer detailed prescriptions for national systems. The Principles embrace practices that have been widely recognized and accepted as good practices internationally. as legal systems and business and commerce are evolutionary in nature, so too are the Principles, and it is anticipated that these will continue to be reviewed going forward to take account of significant changes and developments.

THE WORLD BANK PRINCIPLES – A SUMMARY

A brief summary of the key elements of the World Bank Principles for effective insolvency and creditor rights systems is given below:

1. Credit Environment

Compatible credit and enforcement systems: A regularized system of credit should be supported by mechanisms that provide efficient, transparent and reliable methods for recovering debt, including seizure and sale of immovable and movable assets and sale or collection of intangible assets, such as debt owed to the debtor by third parties. An efficient system for enforcing debt claims is crucial to a functioning credit system, especially for unsecured credit. a creditor's ability to take possession of a debtor's property and to sell it to satisfy the debt is the simplest, most effective means of ensuring prompt payment. It is far more effective than the threat of an insolvency proceeding, which often requires a level of proof and a prospect of procedural delay that in all but extreme cases make it not credible to debtors as leverage for payment.

Collateral systems: One of the pillars of a modern credit economy is the ability to own and freely transfer ownership interests in property, and to grant a security interest to credit providers with respect to such interests and rights as a means of gaining access to credit at more affordable prices. Secured transactions play an enormously important role in a well-functioning market economy. Laws on secured credit mitigate lenders' risks of default and thereby increase the flow of capital and facilitate low cost financing. Discrepancies and uncertainties in the legal framework governing security interests are the main reasons for high costs and unavailability of credit, especially in developing countries.

The legal framework for secured lending addresses the fundamental features and elements for the creation, recognition and enforcement of security interests in all types of assets, movable and immovable, tangible and intangible, including inventories, receivables, proceeds and future property, and on a global basis, including both possessory and non-possessory interests. the law should encompass any or all of a debtor's obligations to a creditor, present or future and between all types of persons. In addition, it should provide for effective notice and registration rules to be adapted to all types of property, and clear rules of priority on competing claims or interests in the same assets. For security rights and notice to third parties to be effective, they must be capable of being publicized at reasonable costs and easily accessible to stakeholders. A reliable, affordable, public registry system is therefore essential to promote optimal conditions for asset-based lending. Where several registries exist, the registration system

should be integrated to the maximum extent possible so that all notices recorded under the secured transactions legislation can be easily retrieved.

Enforcement systems: A modern, credit-based economy requires predictable, transparent and affordable enforcement of both unsecured and secured credit claims by efficient mechanisms outside of insolvency, as well as a sound insolvency system. These systems must be designed to work in harmony. Commerce is a system of commercial relationships predicated on express or implied contractual agreements between an enterprise and a wide range of creditors and constituencies. Although commercial transactions have become increasingly complex as more sophisticated techniques are developed for pricing and managing risks, the basic rights governing these relationships and the procedures for enforcing these rights have not changed much. These rights enable parties to rely on contractual agreements, fostering confidence that fuels investment, lending and commerce. Conversely, uncertainty about the enforceability of contractual rights increases the cost of credit to compensate for the increased risk of non-performance or, in severe cases, leads to credit tightening.

Credit information systems: A modern credit-based economy requires access to complete, accurate and reliable information concerning borrowers' payment histories. This process should take place in a legal environment that provides the framework for the creation and operation of effective credit information systems. Permissible uses of information from credit information systems should be clearly circumscribed, especially regarding information about individuals. Legal controls on the type of information collected and distributed by credit information systems may often be used to advance public policies, including anti-discrimination laws.

Privacy concerns should be addressed through notice of the existence of such systems, notice of when any information from such systems is used to make adverse decisions, and access by data subjects to stored credit information with the ability to dispute and have corrected inaccurate or incomplete information. An effective enforcement and supervision mechanism should be in place that provides efficient, inexpensive, transparent and predictable methods for resolving disputes concerning the operation of credit information systems along with proportionate sanctions which encourage compliance but that are not so stringent as to discourage operations of such systems.

Informal corporate workouts: Corporate workouts should be supported by an environment that encourages participants to restore an enterprise to financial viability. Informal workouts are negotiated in the "shadow of the law." Accordingly, the enabling environment must include clear laws and procedures that require disclosure of or access to timely and accurate financial information on the distressed enterprise; encourage lending to, investment in or recapitalization of viable distressed enterprises; support a broad range of restructuring activities, such as debt write-offs, rescheduling's, restructurings and debt-equity conversions; and provide favourable or neutral tax treatment for restructurings. A country's financial sector should promote an informal out-of-court process for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure— especially in markets where enterprise insolvency is systemic.

2. Insolvency Law Systems

Commercial insolvency: Though approaches vary, effective insolvency systems have a number of aims and objectives. Systems should aspire to:

- I. integrate with a country's broader legal and commercial systems;
- II. maximize the value of a firm's assets and recoveries by creditors;
- III. provide for both efficient liquidation of non-viable businesses and those where liquidation is likely to produce a greater return to creditors and reorganization of viable businesses;
- IV. strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one proceeding to another;
- V. provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- VI. provide for timely, efficient and impartial resolution of insolvencies;
- VII. provide for timely, efficient and impartial resolution of insolvencies;

- VIII. prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;
- IX. provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;
- X. recognize existing creditor rights and respect the priority of claims with a predictable and established process; and
- XI. establish a framework for cross border insolvencies, with recognition of foreign proceedings.

Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation. The rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the enterprise, potentially produces a return for owners and obtains for the country the fruits of the rehabilitated enterprise.

The rescue of a business should be promoted through formal and informal procedures. rehabilitation should permit quick and easy access to the process, protect all those involved, permit the negotiation of a commercial plan, enable a majority of creditors in favor of a plan or other course of action to bind all other creditors (subject to appropriate protections) and provide for supervision to ensure that the process is not subject to abuse.

3. Implementation: Institutional and Regulatory Frameworks

Strong institutions and regulations are crucial to an effective insolvency system. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions— recognizing that the integrity of the insolvency system is the linchpin for its success

4. Overarching Considerations of sound Investment Climates

Transparency, accountability and corporate governance: Minimum standards of transparency and corporate governance should be established to foster communication and cooperation. Disclosure of basic information including financial statements, operating statistics and detailed cash flows – is recommended for sound risk assessment. Accounting and auditing standards should be compatible with international best practices so that creditors can assess credit risk and monitor a debtor's financial viability. A predictable, reliable legal framework and judicial process are needed to implement reforms, ensure fair treatment of all parties and deter unacceptable practices.

Corporate law and regulation should guide the conduct of the borrower's options are preferable because shareholders. a corporation's board of directors should be responsible, accountable and independent of management, subject to best practices on corporate governance. The law should be imposed impartially and consistently. Creditor rights and insolvency systems interact with and are affected by these additional systems, and are most effective when good practices are adopted in other relevant parts of the legal system, especially the commercial law.

Transparency and Corporate Governance: Transparency and good corporate governance are the cornerstones of a strong lending system and corporate sector. Transparency exists when information is assembled and made readily available to other parties and, when combined with the good behavior of "corporate citizens," creates an informed and communicative environment conducive to greater cooperation among all parties. Transparency and corporate governance are especially important in emerging markets, which are more sensitive to volatility from external factors. Without transparency, there is a greater likelihood that loan pricing will not reflect underlying risks, leading to higher interest rates and other charges. transparency and strong corporate governance are needed in both domestic and cross-border transactions and at all phases of investment—at the inception when making a loan, when managing exposure while the loan is outstanding, and especially once a borrower's financial difficulties become apparent and the lender is seeking to exit the loan.

Transparency increases confidence in decision making and so encourages the use of out of court restructuring options. Such options are preferable because they often provide higher returns to lenders than straight liquidation through the legal process—and because they avoid the costs, complexities and uncertainties of the legal process.

Predictability: Investment in emerging markets is discouraged by the lack of well-defined and predictable risk allocation rules and by the inconsistent application of written laws. Moreover, during systemic crises investors often demand uncertainty risk premiums too onerous to permit markets to clear. Some investors may avoid emerging markets entirely despite expected returns that far outweigh known risks. Rational lenders will demand risk premiums to compensate for systemic uncertainty in making, managing and collecting investments in emerging markets. The likelihood that creditors will have to rely on risk allocation rules increases as fundamental factors supporting investment deteriorate. That is because risk allocation rules set minimum standards that have considerable application in limiting downside uncertainty, but that usually do not enhance returns in non-distressed markets. During actual or perceived systemic crises, lenders tend to concentrate on reducing risk, and risk premiums soar. At these times the inability to predict downside risk can cripple markets. The effect can impinge on other risks in the country, causing lender reluctance even towards untroubled borrowers.

UNITED STATES BANKRUPTCY CODE

In the United States of America, all bankruptcy cases are handled in federal courts under rules outlined in the “Bankruptcy Code”, a federal law. It is a uniform federal law that governs all bankruptcy cases in America. The Bankruptcy Code was enacted in 1978 by § 101 of the Bankruptcy Reform Act, 1978 and is codified as title 11 of the United States Code. The procedural aspects of the bankruptcy process are governed by the Federal rules of Bankruptcy Procedure (Bankruptcy rules).

Six basic types of bankruptcy cases are provided for under the US Bankruptcy Code. They are:

- Chapter 7 titled “liquidation” in Chapter 7 Bankruptcy, a court-appointed trustee or administrator takes possession of non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors.
- Chapter 9 titled “adjustment of debts of a Municipality” Chapter 9 Bankruptcy proceedings provides for reorganization which is available to municipalities. In Chapter 9 Bankruptcy proceedings a municipality (which includes cities, towns, villages, counties, taxing districts, municipal utilities, and school districts) get protection from creditors and a municipality can pay back debt through a confirmed payment plan.
- Chapter 11 titled “reorganization”. Unlike Chapter 7 where the business ceases operations and a trustee sells all of its assets, under Chapter 11 the debtor remains in control of its business operations and repay creditors concurrently through a court-approved reorganization plan.
- Chapter 12 was added to the Bankruptcy Code in 1986. It allows a family farmer or fisherman to continue to operate the business while the plan is being carried out.
- Chapter 13 enables individuals with regular income to develop a plan to repay all or part of their debts.
- Chapter 15 was added to the Bankruptcy Code in 2005. It provides mechanism for dealing with insolvency cases involving debtors, claimants and other interested parties involving more than one country. Under Chapter 15 a representative of a corporate bankruptcy proceeding outside the country can get access to the United States courts.

Chapter 11 Reorganization

American bankruptcy procedures enable sick Companies to restructure its debt obligations even while remaining operational. In this context, one must recognise that in the US the well-known Chapter 11 bankruptcy proceedings are considered as re-organization/ resurrection process for corporates.

Many companies are known to have revived under Chapter 11. Further, Chapter 11 ensures the emergence of companies with sustainable debt levels and profitable working. Chapter 11 bankruptcy proceedings are available to every business, whether organized as a corporation, partnership or sole proprietorship, and to individuals, although it is most prominently used by corporate entities. One of the most remarkable events in recent business history has been

the decision of General Motors Corporation USA to file bankruptcy proceedings — a decision forced on the company after it lost market share in the ongoing recession. Its assets were significantly lower than its liabilities. It has emerged from 40 days bankruptcy protection after creating a “new GM” made up of the best assets with fewer brand, fewer employees, etc. For that matter, Chapter 11 could even recover WorldCom which emerged from bankruptcy as MCI during 2004. Section 363 under Chapter 11 of US Bankruptcy law is an established procedure which enables companies to sell assets free of debts and encumbrances to preserve the value of the enterprise. A company under Chapter 11 can choose to sell off particular assets. A bankrupt company, the “debtor,” might use this Code to “reorganize” its business and become profitable again.

The key to a successful Chapter 11 case is the continued operation of the debtor’s business. In addition to running the business, the debtor or the trustee must fulfill additional duties required by the Bankruptcy Code and work with creditors, the court, and other parties to obtain financing for ongoing business operations.

Chapter 11 consists of sections 1101 to 1174 and is divided into following four sub chapters:

Sub-chapter I – Office and administration (Sections 1101 to 1116)

Sub-chapter II – The plan (Sections 1121 to 1129)

Sub-chapter III – Post confirmation matters (Sections 1141 to 1146)

Sub-chapter IV – Reorganization (Sections 1161 to 1174)

Salient Features of Chapter 11

- Chapter 11 is not a declaration of insolvency
- Companies don’t file under Chapter 11 to liquidate; they do so in order to continue operating and to take the necessary steps to emerge as a financially stronger business, reorganizing their operations or balance sheet or in some cases by selling substantially all its assets.
- Management remains in control of the business during the chapter 11 rehabilitative process. Trustees, administrators and monitors typically are not appointed.
- Chapter 11 normally does not cause interruption to business operations.
- The company is given breathing room during the process - an “automatic stay” generally prevents parties from taking legal action against the company or taking the company’s assets.
- Most publicly-held companies prefer to file under Chapter 11 rather than Chapter 7 because they can still run their business and control the bankruptcy process. Chapter 11 provides a process for rehabilitating the business of the company.

Sometimes the company successfully works out a plan to return to profitability; sometimes, in the end, it liquidates. Under Chapter 11 reorganization, a company usually keeps doing business and its stock and bonds may continue to trade in securities markets.

The U.S. trustee, the bankruptcy arm of the department of Justice, appoints one or more committees to represent the interests of creditors and stockholders in working with the company to develop a plan of reorganization to enable it to get out of debt. The plan must be accepted by the creditors, bondholders, and stockholders, and confirmed by the court. However, even if creditors or stockholders vote against the plan, the court can disregard the vote and still confirm the plan if it finds that the plan treats creditors and stockholders fairly.

Committees of creditors and stockholders negotiate a plan with the company to relieve the company from repaying part of its debt so that the company is able to get back to its normal condition.

After the committees work with the company to develop a plan, the bankruptcy court must find that it legally complies with the Bankruptcy Code before the plan can be implemented.

Thus, Chapter 11 bankruptcy involves a reorganization plan that accommodates debt reorganization through a payment plan and the major advantage is that the debtors generally remain in possession of their property and

operate their business under the supervision of Court. Chapter 11 debtors also often keep a substantial portion of their assets. The provisions of Chapter 11 allow the debtor, relief from pending obligations and the opportunity to reorganize its business and restructure debts while continuing to operate the business. Under this chapter a company can choose to sell off particular assets. Accordingly, subsidiaries outside US need not be included in the Chapter 11 filings.

There is therefore no change in the legal status of its subsidiaries that are kept out of Chapter 11 filings. Further, debtors audit, debtors counselling, Mandatory debtor education, etc. are provided under US Bankruptcy laws which help in minimizing the fraudulent bankruptcies. In the light of the above, a need is felt to have similar legal framework in India which allows continuity of business during bankruptcy proceedings, control over the management of company filing bankruptcy application, keeping subsidiaries / certain assets outside the purview of bankruptcy application, etc. in line with Chapter 11 of US Bankruptcy Code.

CROSS BORDER INSOLVENCY AROUND THE GLOBE

• SINGAPORE

Singapore International Commercial Court ("SICC") was established in 2015 to handle international commercial disputes. Singapore also adopted the UNCITRAL Model Law on Cross-Border Insolvency as to its debt restructuring regime in 2017. Further, the Insolvency, Restructuring and Dissolution Act ("IRDA") became effective in 2020 to consolidate the restructuring and insolvency framework of Singapore.

The Singapore International Commercial Court Rules 2022 and the Legal Profession (Representation in Singapore International Commercial Court Rules 2022 became effective from 1 October 2022. These changes introduce new processes in the Singapore International Commercial Court ("SICC") relating to corporate insolvency, restructuring or dissolution proceedings that are international and commercial in nature, and offer restructuring outcomes that would appeal to both debtors and creditors.

The amended rules also allowed foreign counsel to work together with Singapore counsel to facilitate the process. The Legal Profession (Representation in Singapore International Commercial Court) Rules 2022 facilitate the participation of foreign lawyers in corporate insolvency, restructuring and dissolution proceedings before the SICC. However, the SICC Rules require a foreign company to have a substantial connection with Singapore and a foreign element before the court. For example, connection by way of asset or business.

• UNITED KINGDOM

The UK has left the EU, and 31 December 2020 marks the end of the transitional period in which the EU rules continue to apply in and to the United Kingdom under the Withdrawal Agreement with the EU. The end of the transitional period affects the way that insolvencies can be managed across borders with EU member states: the legal framework provided by the EU Insolvency Regulation (EU 2015/848) no longer applies to main insolvency proceedings opened after 31 December. From 31 December 2020, the European Regulation on Insolvency Proceedings (the "EIR") ceased to apply in the UK.

Accordingly, insolvency proceedings opened after 31 December 2020 at England will no longer be automatically recognised throughout the EU.

Five main Principles of EIR are as under:

1. Jurisdiction to open insolvency proceedings is governed by a debtor's centre of main interests ("COMI"). Within the EU, only the courts of the member state in which a debtor has its COMI have jurisdiction to open main proceedings.
2. The courts of another member state may open secondary proceedings where the debtor has an establishment within that member state. These proceedings are generally limited so that they only deal with assets within

that member state.

3. Where insolvency proceedings have been opened in the courts of a member state, those courts will also have jurisdiction in relation to actions deriving directly from and closely linked with the insolvency proceedings.
4. The courts in each member state apply their own laws to insolvency proceedings opened in that member state. However, that law will not be applied in certain, limited circumstances prescribed in the EIR.
5. Insolvency proceedings in one member state are automatically recognised in all other member states and shall have the effect in each member state as they would have in the state in which proceedings have been opened.

From 31 December 2020, the courts in England are no longer courts of a member state and English law is no longer the law applicable in a member state.

A significantly slimmed down version of the EIR was retained in English law from 31st December 2020, amended by the UK Insolvency (Amendment) (EU Exit) Regulations (the “Retained EIR”). The Retained EIR preserves aspects of the EIR including the jurisdiction of the English courts to open insolvency proceedings in relation to debtors who have their COMI in England. This means that insolvency proceedings may still be opened in England where the debtor has its COMI in England, although those proceedings will not benefit from any automatic recognition in the EU as the Retained EIR has no effect in the EU.

The Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/46 (Exit Regulations)) retain the existing jurisdiction in the UK under the Recast Insolvency Regulation.

The Exit Regulations came into force on 31st December 2020 and generally seek to:

- reinforce the position that the UK courts will largely continue to apply the Recast Insolvency Regulation (renamed the Retained Recast Regulation) to insolvencies opened prior to end of the transition period without any changes (Regulation 4).
- grant jurisdiction to the UK courts to open proceedings where (i) the debtor’s COMI is in the UK or (ii) the debtor has an establishment in the UK. In practice this opens the possibility of English insolvency proceedings in respect of EU companies without the need for a COMI shift (subject to meeting the UK jurisdictional tests).
- make necessary changes to the Insolvency Act 1986.

The remainder of the Recast Insolvency Regulation has been repealed. As such, insolvencies opened in the EU after the end of the transitional arrangement will no longer benefit from automatic recognition in the UK.

The Recast Regulation governs:

- The proper jurisdiction of insolvency proceedings (by reference to the debtor’s centre of main interests (COMI) or any establishments). If a debtor’s COMI is located in one member state, insolvency proceedings can only be opened in another member state if the debtor has an establishment there.
- The applicable law to be used in those proceedings (subject to exceptions, the law of the state of opening of the proceedings).
- The mandatory automatic recognition of those proceedings in other member states.
- Methods by which coordination and cooperation is to be, or may be, achieved within more than one member state and for insolvent groups of companies.

• UNITED ARAB EMIRATES

The United Arab Emirates has three legal regimes that potentially operate in cross-border insolvency situations. These are the UAE civil law system and the common law systems which apply in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM). The Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) are financial free zones in the United Arab Emirates (UAE) established pursuant to Federal Laws of the UAE, specifically pursuant to the UAE Constitution and UAE Federal Law No. 8 of 2004 (Financial Free Zone Law).

The UAE civil law regime does not specifically address the recognition of a foreign insolvency order or proceeding, rather any such orders would be treated as foreign judgments and dealt with under the provisions of the Civil Procedures Law which deal with the enforcement of foreign judgments onshore in the UAE.

The DIFC and ADGM, have embraced the UNCITRAL Model Law on Cross-Border Insolvency, which is incorporated with certain modifications into each of the DIFC's and ADGM's Insolvency Law, in furtherance of their objectives to establish themselves as key players in the business world and the international insolvency arena.

- **CANADA**

The Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act allow for the recognition of foreign proceedings based on the UNCITRAL Model Law on Cross-Border Insolvencies. The proceedings are commenced by way of application by a foreign representative who should demonstrate that they have been appointed as a 'foreign representative' and that the application relates to a 'foreign proceeding', as defined in the Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act.

The Definition of Foreign Representative; Foreign Proceedings: The Bankruptcy and Insolvency Act.

"Foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

"Foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

- administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
- act as a representative in respect of the foreign proceeding.

"Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding. If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

The cooperation may be provided by any appropriate means, including

- the appointment of a person to act at the direction of the court;
- the communication of information by any means considered appropriate by the court;
- the coordination of the administration and supervision of the debtor's assets and affairs;
- the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- the coordination of concurrent proceedings regarding the same debtor

RECOGNITION OF FOREIGN PROCEEDINGS IN INDIA

For foreign proceedings to be recognised in India, Civil Procedure Code, 1908 is applicable along with principles developed in English common Law.

Section 44A of the Code of Civil Procedure of 1908 allows Indian courts to enforce orders passed by non-Indian courts in "reciprocating territories". A country would be considered a reciprocating territory if it was declared by the Government of India through publication in the Official Gazette.

ENABLING PROVISIONS FOR CROSS BORDER TRANSACTIONS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 make provisions to deal with cases involving cross border insolvency.

Agreements with foreign countries – Section 234 empowers the central government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency. Section 234 of the Code provides that:

- The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. [Section 234(1)]
- The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified. [Section 234(2)]

Letter of request to a country outside India in certain cases – Section 235 of the Code lays down that notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the adjudicating authority that evidence or action relating to such assets is required in connection with such process or proceeding. [Section 235(1)]

The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request. [Section 235(2)]

The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries. Finalisation of bilateral agreements is a long drawn process as it involves long term negotiations and thus takes a lot of time. Moreover, every trade is distinct and thus it would be difficult for the adjudicating authorities to enforce the agreements/treaties entered into with other countries.

INSOLVENCY LAW COMMITTEE (ILC) ON CROSS BORDER INSOLVENCY

The Ministry of Corporate Affairs has constituted the Insolvency Law Committee (ILC) to recommend amendments to the Insolvency and Bankruptcy Code of India, 2016. The Committee has submitted its 2nd report to the Government on 16 October 2018 recommending amendments in the Insolvency and Bankruptcy Code, 2016 with respect to cross-border insolvency.

The necessity of having Cross Border insolvency Framework under the Insolvency and Bankruptcy Code arises from the fact that many Indian companies have a global presence and many foreign companies have presence in India. Inclusion of comprehensive legal framework dealing with cross border insolvency will be a major step forward and will bring Indian insolvency law on a par with that of matured jurisdictions.

The ILC has recommended the adoption of the UNCITRAL Model law of Cross Border insolvency, 1997, as it provides for a comprehensive framework to deal with cross-border insolvency issues. The Committee proposed a draft 'Part Z' in the Insolvency and Bankruptcy Code, 2016, based on an analysis of the UNCITRAL Model law. The Committee has also recommended a few carve outs to ensure that there is no inconsistency between the domestic insolvency framework and the proposed Cross Border insolvency Framework.

The UNCITRAL Model law has been adopted in as many as 44 countries and, therefore, forms part of international best practices in dealing with cross border insolvency issues. The advantages of the Model law are the precedence given to domestic proceedings and protection of public interest. The other advantages include greater confidence generation among foreign investors, adequate flexibility for seamless integration with the domestic insolvency law and a robust mechanism for international co-operation.

The Model law deals with four major principles of cross-border insolvency, namely direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor; recognition of foreign proceedings & provision of remedies; cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and coordination between two or more concurrent insolvency proceedings in different countries.

The main proceeding is determined by the Concept of Centre of Main Interest (COMI).

The necessity of having Cross Border insolvency Framework under the insolvency and Bankruptcy Code arises from the fact that many Indian companies have a global footprint and many foreign companies have presence in multiple countries including India. although the proposed Framework for Cross Border insolvency will enable us to deal with Indian companies having foreign assets and vice versa, it still does not provide for a framework for dealing with enterprise groups, which is still work in progress with UNCITRAL and other international bodies. The inclusion of the Cross Border insolvency Chapter in the Insolvency and Bankruptcy Code of India, 2016, will be a major step forward and will bring Indian insolvency law at par with that of matured jurisdictions.

KEY RECOMMENDATIONS OF THE COMMITTEE

Applicability: The Committee recommended that at present, draft Part Z should be extended to corporate debtors only.

Duplicity of regimes: The Committee noted that currently the Companies act, 2013 contains provisions to deal with insolvency of foreign companies. It observed that once Part Z is enacted, it will result in a dual regime to handle insolvency of foreign companies. It recommended that the Ministry of Corporate Affairs undertake a study of such provisions in the Companies act, 2013 to assess whether to retain them.

Reciprocity: The Committee recommended that the Model law may be adopted initially on a reciprocity basis. This may be diluted subsequently upon re-examination. Reciprocity indicates that a domestic court will recognise and enforce a foreign court's judgment only if the foreign country has adopted similar legislation to the domestic country.

Access to Foreign representatives: The Model law allows foreign insolvency professionals and foreign creditors access to domestic courts to seek remedies directly. Direct access with regards to foreign creditors is envisaged under the Code even presently. With respect to access by foreign insolvency professionals to Indian courts, the Committee recommended that the Central Government be empowered to devise a mechanism that is practicable in the current Indian legal framework.

Centre of Main Interests (COMI): The Model law allows recognition of foreign proceedings and provides relief based on this recognition. Relief may be provided if the foreign proceeding is a main proceeding or non-main proceeding. If the domestic courts determine that the debtor has its COMI in a foreign country, such foreign proceedings will be recognised as the main proceedings. This recognition will result in certain automatic relief, such as allowing foreign representatives greater powers in handling the debtor's estate.

For non-main proceedings, such relief is at the discretion of the domestic court. The Committee recommended that a list of indicative factors comprising COMI may be inserted through rule-making powers. Such factors may include location of the debtor's books and records, and location of financing.

Cooperation: The Model law lays down the basic framework for cooperation between domestic and foreign courts, and domestic and foreign insolvency professionals. Given that the infrastructure of adjudicating authorities under the Code 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.

Concurrent Proceedings: The Model law provides a framework for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in diff countries by encouraging cooperation between courts. The Committee recommended adopting provisions in relation to these in draft Part Z.

Public policy considerations: Part Z provides that the adjudicating authority may refuse to take action under the Code if it is contrary to public policy. The Committee recommended that in proceedings where the authority is of the opinion that a violation of public policy may be involved, a notice must be issued to the Central Government. If the authority does not issue notice, the Central Government may be empowered to apply to it directly.

RECENT DEVELOPMENTS

The ILC examined the suggestions/representations from public & stakeholders, deliberated on the provisions among its members and accordingly submitted its report on cross border insolvency. The Committee has also recommended a few carve outs to ensure that there is no inconsistency between the domestic insolvency framework and the proposed cross border insolvency framework. For smooth implementation of the cross border insolvency provisions under the Code, it was decided to refer the matter to a Committee to suggest its recommendations on rules & regulatory framework for smooth implementation of proposed cross border insolvency provisions in the Code to this ministry on certain terms of reference. The Committee shall submit its recommendations within three months from its first meeting.

CASE LAW

Jet Airways (India) Ltd. v. State Bank of India & Anr. Company Appeal (AT) (Insolvency) No. 707 of 2019

This is the first case touching the realm of cross border insolvency in India. In the instant case Jet Airways (India) limited, ('Company') was subjected to parallel insolvency proceedings in India as well as in the Netherlands. In India, the Company has been admitted into a corporate insolvency resolution process under the insolvency and Bankruptcy Code, 2016 (the "Indian Proceedings"). Pursuant to the order of the NCLT and resolutions duly passed at the meeting of the committee of creditors of the Company ("CoC") dated 16 July 2019, the Resolution Professional (RP) had been appointed, resulting in the powers of the board of directors of the Company being vested with the RP.

In the Netherlands, the Company has been declared bankrupt and the Dutch trustee had been appointed to manage the estate of the Company (the "Dutch Proceedings").

On an application made by the Dutch trustee, appealing the 20 June 2019 order of the NCLT before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT"), the NCLAT, by its orders dated 12 July 2019 and 21 August 2019 ("NCLAT Order"), inter alia, directed the RP, in consultation with the CoC, to consider the prospect of cooperating with the Dutch trustee so as to have joint "corporate insolvency resolution process of the Company" and further vide its order dated 04 September 2019 directed the RP under the Indian proceedings to reach an arrangement/agreement with the Dutch trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch trustee in the best interest of the Company and all its stakeholders ("Proposed Cooperation").

The NCLAT set aside the order dated 20th June, 2019 passed by the National Company law tribunal, Mumbai Bench in so far it related to the observations that the 'Dutch Court' has no jurisdiction in the matter of 'corporate insolvency resolution process' of 'Jet Airways (India) Limited, (Offshore Regional Hub) and the consequential directions as given to the 'Resolution Professional' in respect of 'Offshore proceedings'. However, NCLAT did not interfere with the order of admission of application under Section 7 of the Code filed by the 'State Bank of India' against 'Jet Airways (India) limited', therefore, joint 'Corporate Insolvency Resolution Process' will continue in accordance with Insolvency and Bankruptcy Code, 2016.

The Parties facilitated the Proposed Cooperation with formulation of a 'Cross Border insolvency Protocol'. The key agreements under the said Protocol was as follows:

- (i) this Protocol represents a statement of intentions and guidelines designed to minimize the costs and maximize value of assets/recoveries for all creditors of the Proceedings, by promoting the sharing of relevant information among the Parties and the international coordination of related activities in the Proceedings, while respecting the separate interests of creditors and other interested parties to the Proceeding, and the independence, sovereignty, and authority of the NCLT/NCLAT and Dutch Bankruptcy Court.
- (ii) in recognition of the substantive differences among the Proceedings in both jurisdictions, this Protocol shall not impose on the RP or the Dutch trustee any duties or obligations (i) that may be inconsistent with or that may conflict with the duties or obligations to which the Parties are subject under applicable law, or (ii) that are not in the interests of the Company's estate represented by the Parties and/or its creditors. Furthermore, nothing in this Protocol should be interpreted in any way so as to interfere with (i) the proper discharge of any duty, obligation or function of the Parties, or (ii) the exercise of statutory or other powers otherwise available to a Party under applicable law.
- (iii) the Parties should coordinate with each other and cooperate in all aspects of the Proceedings in terms of this Protocol. In doing so, the Parties acknowledge and agree that the Parties shall deal in good faith with each other in the interests of maximizing value of assets/recovery for all of the Company's creditors.

The Parties recognised that the Company being an Indian company with its centre of main interest in India, the Indian Proceedings are the main insolvency proceedings and the Dutch Proceedings are the non-main insolvency proceedings:

- (a) Coordination – to promote international cooperation and the coordination of activities in the Proceedings; and to provide for the orderly, effective, efficient, and timely administration of the Proceedings in order to reduce their cost and maximize recovery for creditors.
 - (b) Communication – to promote communication among the Parties and the CoC; and to provide, wherever possible, for direct communication among NCLT, NCLAT and Dutch Bankruptcy Court.
 - (c) Information and data sharing – to provide for the sharing of relevant information and data among the Parties in order to promote effective, efficient, and fair proceedings, and to avoid duplication of effort and activities by the parties.
 - (d) Preservation – to identify, preserve, and maximize the value of the Company's worldwide assets for the collective benefit of all creditors and other interested parties.
 - (e) Claims Reconciliation – to coordinate an efficient and transparent claims process.
 - (f) Maximize value of assets/recoveries – to cooperate in marshalling the assets of the Company in order to maximize value of assets/recovery for all of the Company's creditors.
 - (g) Comity – to maintain the independent jurisdiction, sovereignty, and authority of NCLT, NCLAT and Dutch Bankruptcy Court.
- (iv) the Dutch trustee in the Indian Proceedings:
- a) in the spirit of cooperation, the Dutch trustee aims to not take any decision under the Dutch Proceedings that would adversely impact the interests of the Company or the creditors. in the event it becomes necessary for the Dutch trustee in compliance of the Dutch Bankruptcy Court or any other court, or under any applicable law, to take any decision that might adversely impact the interests of the Company or the creditors, the Dutch trustee shall give advance intimation of such decision to the RP.
 - b) in the event a resolution plan for the Company is submitted to the NCLT, the Dutch trustee shall facilitate the submission (by the Company) of a consistent reorganization plan in the Dutch Proceedings ("schuldeisersakkoord") in order to implement the resolution plan in the Dutch jurisdiction incorporating the payout mechanism that is included in such resolution plan so submitted to the NCLT for distribution of various amounts to various stakeholders including the creditors of the Company, in accordance with applicable Dutch laws.
- (v) the Dutch trustee shall seek inputs, notify the RP and consult the RP, and will be mindful of the Indian Proceedings prior to any material decision being taken in the Dutch Proceedings, which may, inter alia, include:
- a) Matters relating to any proposal or approval of a plan of reorganization or a resolution plan or plan of compromise or any other similar arrangement in the Dutch Proceedings;
 - b) matters relating to assuming, ratifying, rejecting, repudiating, modifying or assigning executory contracts having a material impact on the assets, operations, obligations, rights, property or business of the Company; and
 - c) matters which are otherwise prohibited under Section 14 of the Insolvency and Bankruptcy Code, 2016.
- (vi) The 'Committee of Creditors' have no role to play as the agreement reached between the 'Dutch administrator' and the 'Resolution Professional' of India is on the basis of the direction of this appellate tribunal. In spite of the same, unfortunately the 'Committee of Creditors' interfered with the matter and put its view to the 'Resolution Professional' resulting into difference of the suggestions.
- (vii) The NCLAT clarified that the 'Dutch Trustee (Administrator) will work in co-operation with the 'Resolution Professional of India' and, if any, suggestion is required to be given, he may give it to the 'Resolution Professional'. The draft of 'Cross Border Insolvency Protocol' clause is made final and should be treated as a direction of this appellate tribunal and it would be mandatory to comply with the order of this appellate tribunal subject to the other procedures which are to be followed in terms of the 'Insolvency and Bankruptcy Code, 2016'.

Compuage Infocom Limited and Anr. [Originating Application No. 1272 of 2024]

Compuage Infocom Limited (CD) is a company incorporated in India specialising in IT distribution, with a subsidiary registered in Singapore. The CD had entered into a loan agreement with the FC for certain credit facilities. On default, the FC initiated CIRP against the CD, which was allowed by the AA vide order dated 02.11.2023. Subsequently, RP filed an application before the High Court of the Republic of Singapore (HC) seeking details concerning the bank accounts of the CD's subsidiary, so that the assets of the CD's subsidiary can be vested in the RP for repatriating to India. The RP sought recognition of CIRP proceedings in India under Article 15 of the UNICTRAL Model Law on Cross-Border Insolvency, in order to include the assets of the Singaporean-incorporated subsidiary in the CIRP of the CD. The issues before the said HC were as follows: (i) whether the CIRP is a foreign proceeding; (ii) whether the RP is a foreign representative, and whether he was appointed in the CIRP; (iii) whether the procedural requirements under Article 15 of the Model Law have been satisfied. The HC delineated five grounds to be fulfilled for a proceeding to qualify as a "foreign proceeding" under the Model Law. They should be collective in nature, must be a judicial or administrative proceeding in a foreign State, must be conducted under a law relating to insolvency or adjustment of debt, the property and affairs of the CD must be subject to control or supervision by a foreign court and that proceeding must be for the purpose of reorganisation or liquidation. The HC found that CIRP of the CD in India qualify as a foreign main proceeding under the Model Law as the COMI of CD was determined in India. On the second issue, the HC granted recognition to the RP as a foreign representative within the meaning of Article 2(i) of the Model Law. As regard the third issue, the HC held that procedural requirements in terms of Article 15 of the Model Law were met and also satisfied by the RP

LESSON 11 – STRIKE OFF AND RESTORATION OF NAME OF THE COMPANY AND LLP

REGULATORY FRAMEWORK

- Companies Act, 2013
- Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016
- Limited Liability Partnership Act, 2008
- Limited Liability Partnership Rules, 2009

INTRODUCTION

The Ministry of Corporate Affairs (“MCA”) vide Notification dated 26th December, 2016 notified Sections 248 to 252 of the Companies Act, 2013 (“Act”) dealing with the provisions for Removal of Names of Companies from the Register of Companies (“ROC”). The provisions relating to strike off provide an opportunity to the non-working companies to get their names struck off from the records of the ROC. The MCA had also issued the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 (“Rules”) to be effective from the same date i.e. 26th December, 2016 in order to provide procedural aspects of striking off.

WAYS OF STRIKING OFF OF COMPANIES

A company can be struck off by any of the following modes:

- Suo Moto by the ROC under section 248(1) of the Act: or
- An application by the company for removal of name/ strike off of company under Section 248(2) of the Act.

A company which is undergoing the process of ‘Striking Off’ either voluntarily or by an action of the ROC is given the status as ‘Striking Off’ and the status of the company is changed to ‘Dissolved’ or ‘Liquidated’ when affairs of the company are completely wound-up by following the provisions of winding-up of company. After dissolution or liquidation, the company ceases to exist.

The provisions of Sections 248 to 252 of the Companies Act, 2013 read with Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 deal with the removal of names of companies from the Register of Companies.

Legal Framework dealing with the provisions of:**(i) Strike Off by ROC**

In case of an existing company which has failed to commence its business within one year of its incorporation or is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Act or the subscribers to the memorandum have not paid the subscription and a declaration to this effect has not been filed within 180 days of incorporation or it is revealed after a physical verification that the company is not carrying on any business or operations, the Registrar can suo moto after giving notice and opportunity of being heard, strike off the name of the company from the register of companies, and publish notice thereof of the striking off of the name of the company from the register of companies in the Official Gazette and on the publication of this notice in the Official Gazette, the company shall stand dissolved.

(ii) Strike Off by the company

Striking off under Chapter XVIII of the Companies Act, 2013 can also be by way of an application filed by the company with the ROC for removing its name from the Register of Companies on all or any of the grounds mentioned above. A company may file such an application, after extinguishing all its liabilities, by a special resolution or consent of seventy-five percent members in terms of paid-up share capital. On receipt of the application along with necessary fees, the Registrar shall issue a public notice for intimating the general public about the receipt of an application for removal of name of the company and giving a chance to the creditors and general public to submit their objection, if any, to the proposed application. In case no objection is received after the expiry of the time mentioned in the notice, the ROC may proceed to strike off the name of the company from the Register of Companies and shall publish a notice thereof

in the Official Gazette. On publication in the Official Gazette of this notice, the name of the company stands struck off with effect from the date mentioned therein and the company shall stand dissolved.

STRIKE OFF BY ROC SUO MOTO

Subject to the provisions of section 248(1) of the Act read with Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, in the following cases, the Registrar can suo moto remove the name of the company from the Register:

- a) a company has failed to commence its business within one year of its incorporation or;
- b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013; or
- c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this affect has not filed within 180 days of its incorporation under section 10A(i). This provision is applicable to companies incorporated after 02nd November, 2018 ; or
- d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9) of the Act.

Before removal of the name of the company from the Register, the ROC is required to send a notice in Form STK 1 to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies. Such a notice should contain the reasons for which the name of the company is to be removed from the Register of Companies. Such a notice should be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post. On receipt of such a notice, the company and all the directors of the company are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the company should not be removed from the Register of Companies. Such representations should be given within a period of thirty days from the date of the notice.

Procedure to be followed by ROC for striking of the name of the company on suo motu basis:

Service of notice by ROC
Reply to the notice from the company
Consideration of the representation made by the company
Publication of notice of strike off by the ROC
Intimation to regulatory authorities
Striking off / Removal of the name of the company
Provision for realization of amount due
Notice of dissolution of the company by the ROC

1. **Service of notice by ROC:** The ROC is required to send a notice in Form STK 1 to the company and all the directors of the company, of his intention to remove the name of the company from the Register of Companies. Such a notice shall contain the reasons on the basis of which the name of the company is to be removed from the Register of Companies. Such a notice should be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post.
2. **Reply to the Notice from the company:** On receipt of such a notice, the company and all the directors of the company, are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the company should not be removed from the Register of Companies. Such a representation should be given within a period of thirty days from the date of the notice.

3. **Consideration of the representation made by the company:** The ROC will consider the representation made by the company and all the directors of the company. If the ROC is not satisfied with the representation made by the company and its directors, it may proceed to strike off the name of company.
4. **Publication of notice of strike off by ROC:** The notice for removal of the name of the company should be in form STK 5 for the information of the general public and should be:
 - (i) placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard;
 - (ii) published in the Official Gazette;
 - (iii) published in Form No. STK 5A in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

Such a publication is required to be given for the information of the general public in order to enable the general public to give their objections, if any, to the proposed removal / striking off of name of the companies from the Register of Companies and requiring them to send their objection to the ROC within thirty days from the date of publication of the notice.
5. **Intimation to regulatory authorities:** Intimation about the proposed action of removal or striking off the names of company should be sent to the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over such a company. Such intimation should be given to enable the authorities to give their objections, if any. Such objections are required to be given within a period of thirty days from the date of issue of the letter of intimation.
6. **Striking off / Removal of the name of the company:** After expiry of thirty days from the date of issue of the letter of intimation, if there are no objections received within thirty days from the general public or respective authority and unless cause to the contrary is shown by the company, the ROC can proceed to strike off or remove the name of the company from the Register of Companies.
7. **Provision for realization of amount due:** The ROC before passing an order for Striking off / Removal of the name of the company should satisfy himself that sufficient provision has been made for realization of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time. The ROC can obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company. Notwithstanding the undertakings, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the Register of Companies.
8. **Notice of dissolution of the company by the ROC:** After the expiry of the time mentioned in the notice, the ROC can strike off the name of the company from the Register. The notice of striking off the name of the company from the Register of Companies and its dissolution should be published in the Official Gazette in Form STK 7 and the same should also be placed on the official website of the Ministry of Corporate Affairs. The company shall stand dissolved on the publication of this notice in the Official Gazette.

STRIKE OFF BY WAY OF FILING AN APPLICATION BY THE COMPANY

Strike off provisions gives a choice or an option to non-working companies to remove its name from the Register of Companies. There are many companies which are registered with ROC but due to various reasons they are not operative. The strike off gives an option to such companies to apply to ROC for removal of their name from the Register of Companies. The procedure of this exit is now governed under section 248(2) of Companies Act, 2013 read with Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. This act is a speedy way to close down a company being non-operational over a period of time.

Subject to the provisions of section 248 (2) of companies Act 2013 read with Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, the company can on its own file an application for removal of name of company from the Register of companies.

Type of Companies which cannot be removed under these provisions, viz., Section 248(1) & (2) of the Act:

- (i) Listed Companies;
- (ii) Companies registered under section 8;
- (iii) Companies having charges which are pending for satisfaction;
- (iv) Companies whose application for compounding is pending for compounding of offences committed by the company or any of its officers in default;
- (v) Companies against which any prosecution for an offence is pending in any court;
- (vi) Vanishing Companies;
- (vii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
- (viii) Companies where inspection or investigation is ordered and being carried out or actions or such order are yet to be taken up or were complete but prosecutions arising out of such inspection or investigation are pending in the court;
- (ix) Companies which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
- (x) Companies where notices under section 234 of CA 1956 or 206 or 207 of the CA 2013 have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the court.

A company through its board of directors, can file an application for removal of name of company from the Register of Companies on the following grounds:

- a) Where a company has failed to commence its business within one year of its incorporation; or
- b) Where a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013; or
- c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation. This provision is applicable to companies incorporated after 02nd November, 2018; or
- d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9).

Before making an application to the ROC for removal of the name of the company, the board of directors of the company shall take all the steps necessary in order to extinguish all its liabilities. Approval of the shareholders by way of special resolution or consent of seventy five percent members in terms of paid up share capital is also required to be taken for filing an application to the ROC for the removal of the name of the company from the Register of Companies. In the case of a company regulated under a Special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

Situations in which a company cannot apply for strike off under Section 248(2) of the Act:

The Company shall not make any application for the strike off of the company, if at any time in the previous 3 months, the company has done any of the below mentioned activities:

- a) Has changed its name; or
- b) Has shifted its registered office from one State to another; or
- c) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business; or
- d) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement; or
- e) has made an application to the Tribunal for the sanctioning of a scheme of compromise or arrangement and the matter has not been finally concluded; or
- f) is being wound up under Chapter XX of the Companies Act, 2013 or under the Insolvency and Bankruptcy

Code, 2016.

An application for striking off the name of the company under Section 248(2) of the Act shall be withdrawn by the company or rejected by the ROC as soon as the above stated conditions are brought to notice. In case of violation of the above provision, the company shall be punishable with fine which may extend to one lakh rupees.

PROCEDURE OF STRIKING OFF OF THE NAME OF THE COMPANY BY WAY OF AN APPLICATION TO ROC

The board of directors of the company shall follow the following procedure for removal of name of the company from the Register of Companies maintained by the ROC:

- (i) Call and hold Board Meeting to pass Board resolution for the purpose of striking off of the name of the company from the Register maintained by the ROC, subject to the approval of the shareholders of the company, and to authorize any director to file an application and for fixing date, time and venue for the Extraordinary General Meeting of the shareholder.
- (ii) After passing of Board resolution, if there is any liability in the company, the company will set off / pay all its liabilities.
- (iii) Every director of the company should sign and execute indemnity bond duly notarised by every director in Form STK 3 and Affidavit in Form STK 4. In case director is a foreign national or non-resident Indian, the documents should be notarized or apostilled or consularised.
- (iv) Company should get the statement of accounts in Form STK-8 containing the assets and liabilities of the company made up to a day, not more than thirty days before the date of application. Such a statement should be certified by a Chartered Accountant.
- (v) General Meeting should be held on the day, date, time and venue as fixed earlier for passing of the special resolution.
- (vi) Within thirty days from the date of the passing of the special resolution in the General Meeting or after obtaining consent, company should file MGT-14.
- (vii) Approval of concerned authorities is required in case of a company regulated by any other authority.
- (viii) Thereafter, an application for removal of the name of the company shall be made in Form STK-2 along with the fee of ten thousand rupees.

Application for Removal of Name of Company

Rule 4(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that an application for removal of name of a company under sub-section (2) of section 248 shall be made to the Registrar, Centre for Processing Accelerated Corporate Exit in Form No. STK-2 along with fee of ten thousand rupees.

Provided that the company shall not file an application unless it has filed overdue financial statements under section 137 and overdue annual returns under section 92, up to the end of the financial year in which the company ceased to carry its business operations:

Provided further that in case a company intends to file the application after the action under subsection (1) of section 248 has been initiated by the Registrar, it shall file all pending financial statements under section 137 and all pending annual returns under section 92, before filing the application:

Provided also that once notice under sub-section (5) of section 248 has been issued by the Registrar for publication pursuant to the action initiated under sub-section (1) of section 248, a company shall not be allowed to file the application under this sub-rule.

Rule 4(2) provides that every application under sub-rule (1) shall accompany a no objection certificate from appropriate Regulatory Authority concerned in respect of following companies, namely: -

- (i) companies which have conducted or conducting non-banking financial and investment activities as referred to in the Reserve Bank of India Act, 1934 or rules and regulations thereunder;
- (ii) housing finance companies as referred to in the Housing Finance Companies (National Housing Bank) Directions, 2010 issued under the National Housing Bank Act, 1987;
- (iii) insurance companies as referred to in the Insurance Act, 1938 or rules and regulations thereunder;
- (iv) companies in the business of capital market intermediaries as referred to in the Securities and Exchange Board of India Act, 1992 or rules and regulations thereunder;
- (v) companies engaged in collective investment schemes as referred to in the Securities and Exchange Board of India Act, 1992 or rules and regulations thereunder;
- (vi) asset management companies as referred to in the Securities and Exchange Board of India Act, 1992 or rules and regulations thereunder;
- (vii) any other company which is regulated under any other law for the time being in force.

As per Rule 4(3), the application in Form STK 2 shall be accompanied by –

- (i) indemnity bond duly notarised by every director in Form STK 3; Provided that in case of a –
 - a) Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments; or
 - b) subsidiary of a Government company, referred to in clause (a), in which the entire paid up share capital is held by that Government company, a duly notarised indemnity bond in Form STK-3A shall be given by an authorised representative, not below the rank of Under Secretary or its equivalent, in the administrative Ministry or Department of the Government of India or the State Government, as the case may be, on behalf of the company.
- (ii) a statement of accounts in Form No. STK-8 containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;
- (iii) An affidavit in Form STK 4 by every director of the company;
- (iv) a statement regarding pending litigations, if any, involving the company.

Rule (3A) states that the Registrar, Centre for Processing Accelerated Corporate Exit established under sub-section (1) of section 396, shall be the Registrar of Companies for the purposes of exercising functional jurisdiction of processing and disposal of applications made in Form No. STK-2 and all matters related thereto under section 248 having territorial jurisdiction all over India.

According to Rule (4) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

- (a) Where the Registrar, on examining the application made in Form STK-2, finds that it is necessary to call for further information or finds such application or any document annexed therewith is defective or incomplete in any respect, he shall inform to the applicant to remove the defects and re-submit the complete Form within fifteen days from the date of such information, failing which the Registrar shall treat the Form as invalid in the electronic record, and shall inform the applicant, accordingly.
- (b) After the re-submission of the Form or document, if the Registrar finds that the Form or document is defective or incomplete in any respect, he shall give further time of fifteen days to remove such defects or complete the Form, failing which the Registrar shall treat the Form as invalid in the electronic record and shall inform the applicant, accordingly.

- (c) Any re-submission of the application in Form STK-2 made prior to the commencement of the Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022 shall not be counted for the purposes of reckoning the maximum number of re-submissions of such Form.

Manner of Filing of Application

As per Rule 5 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

- 1) The application in Form STK 2 shall be signed by a director duly authorised by the Board in their behalf
- 2) Where the director concerned does not have a registered digital signature certificate, a physical copy of the form duly filled in shall be signed manually by the director duly authorised in that behalf and shall be attached with the Form STK 2 while uploading the form.

Form to be Certified

Rule 6 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that the Form STK 2 shall be certified by a Chartered Accountant in whole time practice or **Company Secretary in whole time Practice** or Cost Accountant in whole time practice, as the case may be.

Manner of Publication of Notice

According to Rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

- 1) The notice under sub-section (1) or sub-section (2) of section 248 shall be in Form STK 5 or STK 6, as the case may be, and be-
 - (i) placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard;
 - (ii) published in the Official Gazette;
 - (iii) published in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

Provided that in case of any application made under sub-section (2) of section 248 of the Act, the company shall also place the application on its website, if any, till the disposal of the application.

Provided further that the publications of notice under clause(iii) of this sub-rule, in respect of cases falling under sub-section (1) of section 248 shall be in Form No. STK 5A.
- 2) The Registrar of Companies shall, simultaneously intimate the concerned regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any, to be furnished within a period of thirty days from the date of issue of the letter of intimation and if no objections are received within thirty days from the respective authority, it shall be presumed that they have no objections to the proposed action of striking off or removal of name.

Manner of Notarisation, Apostilisation or Consularisation of Indemnity Bond and declaration in case of Foreign Nationals or Non-Resident Indians

Rule 8 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that if the person is a foreign national or non-resident Indian, the indemnity bond, and declaration shall be notarised or apostilised or consularised.

Notice of Striking Off and Dissolution of Company

Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 states that the Registrar shall cause a notice under subsection (5) of section 248 of striking off the name of the company from the register of companies and its dissolution to be published in the Official Gazette in Form STK 7 and the same shall also be placed on the official website of the Ministry of Corporate Affairs.

LIABILITIES OF DIRECTORS, MANAGERS, OFFICERS AND MEMBERS TO BE CONTINUE

The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under section 248(5) of the Act, shall continue and may be enforced as if the company had not been dissolved.

LIST OF STK FORMS

Sr. No	Name of Form	Purpose	Governed by
1	Form STK-1	Notice by ROC for removal of name of a company from the Register of Companies.	Section 248(1) of the Companies Act, 2013 & rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
2	Form STK-2	Application by company to ROC for removing its name from register of Companies.	Section 248(2) of the Companies Act, 2013 & Rule 4(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
3	Form STK-3	Indemnity Bond (to be given individually or collectively by every director).	Pursuant to clause (i) of sub-rule (3) of rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016
4	Form STK-4	Affidavit (to be given individually by every Director).	Section 248(2) of the Companies Act, 2013 & clause (iii) of sub-rule (3) of Rule 4.
5	Form STK-5	Public Notice	Section 248(1) & (4) of the Companies Act, 2013 & rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
6	Form STK-5A	Public Notice	Section 248(1) & (4) of the Companies Act, 2013 & rule 7(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
7	Form STK-6	Public Notice	Section 248(2) & (4) of the Companies Act, 2013 & rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
8	Form STK-7	Notice of Striking Off and Dissolution	Section 248(5) of the Companies Act, 2013 & rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.

RESTORATION OF THE COMPANY

The ROC can suo moto, after issuing the notice under section 248(1) of the Act, strike off the name of the company. It may so happen that the name of the company may be struck off from the Register of Companies by the ROC even though the company is active company due to non-filing of reply to the said notice. In such a case, the directors of such a company have no option but to approach National Company Law Tribunal (“NCLT”) by making an appeal for the restoration of the name of the company in the Register of Companies maintained by the ROC. The legal provisions related to restoration of name of the struck off companies are given in Section 248 to 252 of the Act read with Rule 87A of the NCLT (Amendment) Rules, 2017 and the Companies (Removal of Name of Companies from the Register of Companies) Rules, 2016.

APPEAL TO NCLT FOR RESTORATION OF THE NAME OF THE COMPANY

Any person aggrieved by the order of the ROC may file an appeal before the Tribunal within 3 years of the order passed by ROC and if the Tribunal is of the opinion that the removal of name of company from the Register is not justified in view of the absence of any of the grounds on which the order was passed by the ROC, it may pass an order for restoration of the name of the company in the Register of Companies after giving a reasonable opportunity of making representations and of being heard to the ROC, the company and all the persons concerned.

APPLICATION TO NCLT BY ROC FOR RESTORATION OF THE NAME OF THE COMPANY

The ROC may, within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company, if it is satisfied that the name of the company has been struck off from the Register of Companies, either inadvertently or on the basis of incorrect information furnished by the company or its directors.

Application to NCLT for restoration of the name of the company by Company or any member or creditor or workmen: The Tribunal, on an application made by the company, member, creditor or workman, aggrieved by the company having its name struck off from the Register of Companies, before the expiry of 20 years from the publication in the Official Gazette of the notice of dissolution of the company, if satisfied that:

- (a) the company was, at the time of its name being struck off, carrying on business or in operation; or
- (b) otherwise it is just that the name of the company be restored to the Register of Companies, may order the name of the company to be restored to the Register of Companies. Further, the Tribunal may also pass an order and give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the Register of Companies.

A copy of the order passed by the Tribunal shall be filed by the company with the ROC within thirty days from the date of the order and on receipt of the order, the ROC shall cause the name of the company to be restored in the Register of Companies and shall issue a fresh certificate of incorporation.

STRIKING OFF THE NAME OF THE LIMITED LIABILITY PARTNERSHIP (LLP) FROM THE REGISTER OF LIMITED LIABILITY PARTNERSHIPS

Similar to the provision of section 248 to 252 of the Companies Act, 2013 read with Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 dealing with the provision for Removal of Names of Companies from the Register of Companies, Section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of the Limited Liability Partnership Rules, 2009 deals with the provision for striking off the name of the Limited Liability Partnership from the Register of limited liability partnerships.

The Ministry of Corporate Affairs (“MCA”) had amended Limited Liability Partnership Rules, 2009 by introducing the Limited Liability Partnership (Amendment) Rules, 2017 with effect from 20th May, 2017. With this amendment, LLP Form 24 has been introduced by the MCA to allow easy closure of a LLP by making an application to the ROC for striking off the name of LLP.

LEGAL FRAMEWORK

In case of an existing LLP which is not carrying on any business or operation for a period of one year or more, it can make an application in Form 24 to the ROC, with the consent of all partners of the limited liability partnership for striking off its name from the register. Similarly, where the Registrar has reasonable cause to believe that a limited liability partnership is not carrying on business or its operation, in accordance with the provisions of this Act for a period of two years or more, the name of limited liability partnership may be struck off from the register of limited liability partnerships by ROC by taking suo moto action for striking off the name of the LLP. However, before striking off the name of the LLP by the ROC, the ROC shall give reasonable opportunity of being heard to the limited liability partnership and all its partners.

STRIKE OFF BY THE ROC ON SUO MOTO BASIS

Subject to the provisions of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of Limited Liability Partnership Rules, 2009 as amended from time to time, the ROC can suo moto remove the name of the LLP from the Register in case a limited liability partnership is not carrying on any business or operation for a period of two years or more and the ROC has reasonable cause to believe the same. In such a case, the ROC can suo moto take the action for striking off the name of the LLP.

Procedure to be followed by the ROC for striking of the name of the LLP on suo moto basis:

Service of Notice by the ROC to the LLP
Reply to Notice
Consideration of the representation made
Publication of Notice
Striking off of the name of the LLP
Provision for realisation of amount due
Notice of dissolution of the LLP

1. **Service of notice by the ROC to the LLP:** Before striking off the name of the LLP, the ROC is required to send a notice to the LLP and all the partners of the LLP of his intention to remove the name of the LLP from the Register of LLP. Such a notice shall contain the reasons for which the name of the LLP is to be removed from the Register.
2. **Reply to Notice:** On receipt of such a notice, the LLP and all the partners of the LLP are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the LLP should not be removed from the Register. Such a representation should be given within a period of one month from the date of the notice.
3. **Consideration of the representation made:** The ROC will consider the representation made. If the Registrar is not satisfied with the representation made by the LLP and its partners, it may proceed to strike off the name of LLP.
4. **Publication of Notice:** The Notice shall be placed on the website of the Ministry of Corporate Affairs for the information of the general public for the period of one month. Such publication is required to be given for the information of the general public in order to enable the general public to give their objections, if any, to the proposed striking off of name of the LLP from the Register and requiring them to send their objection to the ROC within one month from the date of publication of the notice.

5. **Striking off of the name of the LLP:** After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the ROC can proceed to strike off the name of the LLP from the Register of LLP.
6. **Provision for realisation of amount due:** The ROC before passing an order for striking off of the name of the LLP should satisfy that sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. The ROC can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership. Notwithstanding the undertakings, the assets of the limited liability partnership shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the limited liability partnership from the Register.
7. **Notice of dissolution of the LLP:** After the expiry of the time mentioned in the notice of one month for receiving objections from the general public, the ROC can strike off the name of the LLP from the Register and publish notice thereof in the Official Gazette. The LLP shall stand dissolved on the publication of this notice in the Official Gazette.

STRIKE OFF BY WAY OF FILING AN APPLICATION BY THE LLP

Subject to the provision of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of the Limited Liability Partnership Rules, 2009, where a limited liability partnership is not carrying on any business or operation for a period of one year or more, such a LLP can make an application for purpose of suo moto striking off the name of the LLP.

Procedure of striking off of the name of the LLP by way of an application to ROC:

1. Calling and holding the meeting of the partners of LLP for making an application in Form 24 for the striking off of the name of the LLP and authorizing the partner to make the application to ROC. The consent of all partners of the limited liability partnership should be obtained before making an application to the ROC for striking off of the name of the LLP.
2. All the pending filings including the Annual Filing of Form 8 and Form 11 up to the end of the financial year in which the limited liability partnership ceased to carry on its business or commercial operations should be completed before making of an application for striking off of the name of the LLP.
3. Approval of concerned authorities should be obtained in case of a LLP regulated by any Special Law.
4. All the Designated Partners of the LLP must execute an affidavit, either jointly or severally, as mentioned as point 5(d) below. Thereafter, an application for striking of the name of the LLP shall be made in Form 24 along with fees as prescribed and along with following documents:
 - (a) a statement of account disclosing nil assets and nil liabilities, certified by a Chartered Accountant in practice made up to a date not earlier than thirty days of the date of filing of Form 24.
 - (b) copy of acknowledgement of latest Income tax return, where the limited liability partnership has carried out any business and has filed such a return.
 - (c) copy of the initial limited liability partnership agreement, if entered into and not filed, along with changes thereof in cases where the LLP has not commenced business or commercial operations since its incorporation.
 - (d) an affidavit signed by the designated partners, either jointly or severally, to the effect, —
 - (i) that the Limited Liability Partnership has not commenced business or where it commenced business, it ceased to carry on such business from (dd/mm/yyyy);
 - (ii) that the limited liability partnership has no liabilities and indemnifying any liability that may arise even after striking off its name from the Register;
 - (iii) that the Limited Liability Partnership has not opened any Bank Account and where it had opened, the said bank account has since been closed together with certificate(s) or statement from the respective bank demonstrating closure of Bank Account;

- (iv) that the Limited Liability Partnership has not filed any Income-tax return where it has not carried on any business since its incorporation, if applicable.
 - (e) Copy of the initial limited liability partnership agreement, if entered into and not filed, along with changes thereof in cases where the Limited Liability Partnership has not commenced business or commercial operations since its incorporation.
 - (f) Copy of detailed application- mention full details of LLP plus reasons for closure.
 - (g) Copy of Authority to Make the Application- Duly signed by all the Partners.
- The date of cessation of commercial operation is the date from which the Limited Liability Partnership ceased to carry on its revenue generating business and the transactions such as receipt of money from debtors or payment of money to creditors, subsequent to such cessation will not form part of revenue generating business.
5. **Publication of Notice:** The Notice shall be placed on the website of Ministry of Corporate Affairs for the information of the general public for the period of one month.
 6. **Striking off of the name of the LLP:** After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the ROC can proceed to strike off the name of the LLP from the Register of LLP.
 7. **Provision for realisation of amount due:** The ROC, before passing an order for striking off of the name of the LLP, should satisfy that sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. The ROC can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership. Notwithstanding the undertakings, the assets of the limited liability partnership shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the limited liability partnership from the Register.
 8. **Notice of dissolution of the LLP:** After the expiry of the time mentioned in the notice of one month and if the application filed by the company is found acceptable, the concerned ROC can strike off the name of the LLP from the Register and publish notice thereof in the Official Gazette. The LLP shall stand dissolved on the publication of this notice in the Official Gazette.

LIABILITIES OF PARTNERS TO BE CONTINUED AFTER STRIKING OFF

The liability of all designated partners of the limited liability partnership would continue and may be enforced as if the limited liability partnership had not been dissolved.

POWER OF THE TRIBUNAL TO WIND UP

Nothing in these provisions shall affect the power of the Tribunal to wind up a limited liability partnership, the name of which has been struck off from the Register of LLP.

RESTORATION OF THE LLP

The ROC can suo moto after issuing the notice under section 75, strike off the name of the LLP. In such a case, it may happen that the name of the LLP may be struck off even though the LLP is active, but the ROC removed the name of the LLP from the Register, either inadvertently or due to incorrect information furnished by the LLP or its partners.

In such a case, there is no relief provided in the Limited Liability Partnership Act, 2008 or in the Limited Liability Partnership Rules, 2009 to restore the name of the LLP in the Register, hence, the partners of such a LLP have to approach the jurisdictional High Court by filing writ petition under Article 226 of the Constitution of India for restoration of the name of the LLP in the Register of LLP.