PROFESSIONAL PROGRAMME

GROUP 2
ELECTIVE PAPER 7.5

INSOLVENCY AND BANKRUPTCY – LAW & PRACTICE

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

STUDY MATERIAL

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PROFESSIONAL PROGRAMME

INSOLVENCY AND BANKRUPTCY – LAW & PRACTICE

Businesses need efficient and speedy procedures for exit. All over the world, insolvency procedures help entrepreneurs close clown unviable businesses and start up new ones. This ensures that the human and economic resources of a country are continuously rechannelised to efficient use thereby increasing the overall productivity of the economy. The Indian system provides an opportunity for speedy and effective rehabilitation for an efficient exit under the Insolvency and Bankruptcy Code, 2016. Insolvency and Bankruptcy Code, 2016 (Code/IBC) is the umbrella legislation for insolvency resolution of all entities in India—both corporate and individuals.

In the light of above, this study material has been prepared to provide an understanding of insolvency and bankruptcy law which has direct bearing on the functioning of companies.

This study material has been published to aid the students in preparing for the insolvency and bankruptcy law and practice paper of the CS Professional Programme. It has been prepared to provide understanding of of insolvency and bankruptcy legislations thereunder, which have a bearing on the conduct of corporate affairs. It is part of the educational kit and takes the students step by step through each phase of preparation stressing key concepts, principle, pointers and procedures.

Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982 as amendment thereto, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read along with the original Bare Acts, Rules, Regulations, Case Law, Student Company Secretary & Chartered Secretary Journal published by the Institute every month.

The legislative changes made upto May 31, 2023 have been incorporated in the study material. In addition to Study Material students are advised to refer to the updations at the Regulator's website, supplements relevant for the subject issued by ICSI and ICSI Journal Chartered Secretary and other publications. Specifically, students are advised to read "Student Company Secretary" e-Journal which covers (iv) regulatory and other relevant developments relating to the subject, which is available at academic portal *https://www.icsi.edu/student-n/academic-portal/*. In the event of any doubt, students may contact the Directorate of Academics at academics@icsi.edu.

The amendments to law made upto 31st May of the Calendar Year for December Examinations and upto 30th November of the previous Calendar Year for June Examinations shall be applicable.

Although care has been taken in publishing this study material yet the possibility of errors, omissions and/or discrepancies cannot be ruled out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and/or discrepancies or any action taken in that behalf.

PROFESSIONAL PROGRAMME

Group 2

Elective Paper 7.5

INSOLVENCY AND BANKRUPTCY – LAW & PRACTICE

(Max. Marks 100)

SYLLABUS

OBJECTIVE:

To provide Expert Knowledge in Insolvency & Bankruptcy Laws in India & International Perspective.

Level of Knowledge: Expert Knowledge

Detailed Contents

1. **Introduction to Insolvency and Bankruptcy Code:** ● Concepts and Evolution; Historical Background ● Report of the Bankruptcy Law Reforms Committee, Need for the Insolvency and Bankruptcy Code, 2016 ● Overall scheme of the Insolvency and Bankruptcy Code ● Important Definitions ● Institutions under Insolvency and Bankruptcy Code, 2016
2. **Corporate Insolvency Resolution Process**: ● Legal Provisions ● Contents of Resolution Plan ● Submission of Resolution Plan ● Approval of Resolution Plan ● Committee of Creditors ● Procedure ● Documentation ● Appearance ● Approval
3. **Resolution Strategies:** ● Restructuring of Equity and Debt ● Compromise and Arrangement ● Acquisition ● Takeover and Change of Management ● Sale of Assets
4. **Fast Track Corporation Insolvency Resolution Process:** ● Applicability for Fast Track Process ● Time Period for Completion of Fast Track Process ● Procedure for Fast Track Process
5. **Liquidation of Corporate Person:** ● Initiation of Liquidation ● Powers and Duties of Liquidator ● Liquidation Estate ● Distribution of Assets ● Dissolution of Corporate Debtor
6. **Voluntary Liquidation of Companies:** ● Procedure for Voluntary Liquidation ● Initiation of Liquidation ● Effect of Liquidation ● Appointment ● Remuneration ● Powers and Duties of Liquidator ● Completion of Liquidation
7. **Adjudication and Appeals for Corporate Persons:** ● Adjudicating Authority in relation to Insolvency Resolution and Liquidation for Corporate Persons ● Jurisdiction of NCLT ● Grounds for Appeal against Order of Liquidation ● Appeal to Supreme Court on Question of Law ● Penalty of Carrying on Business Fraudulently to Defraud Traders
8. **Pre-Packaged Insolvency Resolution Process:** ● Governing Framework ● Eligibility for PPIRP ● Approval of Resolution Plan ● Closure of PPIRP

9. **Debt Recovery and Securitization:** ● Non-performing Assets ● Asset Reconstruction Companies [ARC] ● Security Interest (Enforcement) Rules, 2002 ● Options available with Banks e.g. SARFAESI, DRT, etc. ● Application to the Tribunal/Appellate Tribunal

10. **Winding-Up by Tribunal:** ● Introduction ● Is Winding up and Dissolution Synonymous? ● Winding up under the Companies Act, 2013 ● Powers of the Tribunal Fraudulent Preferences

11. **Insolvency Resolution of Individual and Partnership Firms:** ● Application for Insolvency Resolution Process ● Procedural Aspects ● Discharge Order

12. **Bankruptcy Order for Individuals and Partnership Firms:** ● Bankruptcy if Insolvency Resolution Process fails ● Application for Bankruptcy ● Conduct of Meeting of Creditors ● Discharge Order ● Effect of Discharge Order

13. **Bankruptcy for Individuals and Partnership Firms:** ● Background ● Overview of the provisions ● Adjudicating Authority ● Appeal against order of DRT ● Appeal to Supreme Court

14. **Fresh Start Process:** ● Background ● Application for Fresh Start Order ● Procedure after Receipt Of Application ● Discharge Order

15. **Professional and Ethical Practices for Insolvency Practitioners:** ● Responsibility and Accountability of Insolvency Practitioners ● Code of Conduct ● Case Laws ● Case Studies and Practical Aspects

16. **Group Insolvency:** ● Framework Dealing with the Insolvency of Companies in Corporate Groups ● Issue and Challenges Group Insolvency in India ● Case laws ● Case Studies and Practical Aspects

*17. **Cross Border Insolvency & IBC:** ● Applicability of the IBC to a Foreign Company ● Applicability of the Cross-border Insolvency Framework ● Foreign Assets, Liabilities and Operations ● Structures likely to Trigger Cross-Border Insolvency Provisions

*18. **Cross Border Insolvency:** ● Introduction ● Evolution of Cross Border Insolvency Regimes ● Global Developments ● UNCITRAL Legislative Guide on Insolvency Laws ● UNCITRAL Model Law on Cross Border Insolvency ● World Bank Principles for Effective Insolvency and Creditor Rights ● ADB principles of Corporate Rescue and Rehabilitation ● International Perspective – UK, Canada, UAE, Singapore ● US Bankruptcy Code

* *Note* – Lesson 17 and Lesson 18 have been merged together into one lesson titled "Lesson 17- Cross Border Insolvency"

ARRANGEMENT OF STUDY LESSONS

INSOLVENCY AND BANKRUPTCY – LAW & PRACTICE

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LESSON WISE SUMMARY

INSOLVENCY AND BANKRUPTCY – LAW & PRACTICE

Lesson 1: Introduction to Insolvency and Bankruptcy Code

The word "bankruptcy" is widely believed to have originated from an Italian phrase "bancarotta"-"banca" means bench and "rotta" means broken. 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. A sound bankruptcy process is one that helps creditors and debtors realize and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realize the maximum value of the business in the insolvency. 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 lesson is to familiarize the students with:

- Historical background of Insolvency Resolution
- Government Committees on Bankruptcy Reform
- Salient Features of Insolvency and Bankruptcy Code
- Pillars of Insolvency and Bankruptcy Code.

Lesson 2: Corporate Insolvency Resolution Process

The expression "corporate insolvency resolution process" is not defined in the Insolvency and Bankruptcy Code. 2018. 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 predominant objective of the Insolvency and Bankruptcy Code, 2016 is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner.

The objective of the lesson is to facilitate students to acquaint with:

- Moratorium and public announcement
- Appointment and functions of IRP
- Duties of RP
- Preparation of Information Memorandum & Resolution Plan
- Voting and approval by the Committee.

Lesson 3: Resolution Strategies

The legislative framework in India for insolvency and bankruptcy proceedings provides for a wide range of resolution measures, viz. re-organisation 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. 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, acquisitions, compromises, arrangement or reconstruction 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.

The objective of the lesson is to familiarize the students with:

- Important Concepts like Debt Restructuring Equity Restructuring, corporate Restructuring etc.
- Acquisition and Takeover in case of liquidation.
- Sale of Assets.

Lesson 4: Fast Track Corporate Insolvency Resolution Process

Corporate failure may be due to business or financial failure. Business failure is break-down of business model and inability to generate enough revenues. Financial failure is due to mismatch between payments and receivables of an enterprise. A sound bankruptcy process helps the creditors and debtors to come to a platform that brings remedy for business or financial failures. It is not necessary that the defaulting companies go for liquidation. There may be situations in which a viable mechanism can be found through which the companies may be protected as a going concern. The aim of the Fast Track Insolvency Resolution Process under the insolvency and Bankruptcy Code. 2016 ('Code') is to conclude the procedure within half of the default time period specified under the Code. The person or entity seeking the fast relief will have onus on the process at set-off and that person or entity that sets off the fast track process must support that the case is fit for the fast track

It is expected that, at the end of this lesson, student will inter alia, will learn about:

- Legal framework for Fast Track Corporate Insolvency Resolution Process in India
- Concept of Fast Track Corporate Insolvency Resolution Process
- Time period for completion
- Initiation of the process
- Conduct and conclusion of the process.

Lesson 5: Liquidation of Corporate Person

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. An attempt is first made to resolve the insolvency of corporate debtor through corporate insolvency regulation process laid liquidation of corporate persons are covered in the Chapter III of the Part II of the Code. 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 goal of the lesson is to familiarize the students to acquaint with:

- Initiation of Liquidation
- Appointment and Role of Liquidator

- Liquidation Estate
- Distribution of assets in Liquidation
- Dissolution of Corporate Debtor.

Lesson 6: Voluntary Liquidation of Companies

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 sued under the Code. The corresponding provisions under the Companies Act, 2013 in this regard have been repealed. 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.

The objective of the lesson is to familiarize the students to acquaint with:

- Concept of Voluntary Liquidation
- Initiation of Voluntary Liquidation
- Power and duties of Liquidator in Voluntary Liquidation
- Effect of Voluntary Liquidation.

Lesson 7: Adjudication and Appeals for Corporate Persons

Understanding of Adjudicating Authority and its jurisdiction enables an applicant to file the application in right forum. Time is the essence of the Insolvency and Bankruptcy Code, 2016 ('Code') and to ensure effective and successful implementation of the Code, adherence to the timelines prescribed under the Code is of utmost importance. Adjudicating authority is one of the key institutional pillars and backbone of the insolvency ecosystem of India. Adjudicating authority plays a two-fold role while functioning under the Code. One role is administrative in nature and other is judicial is nature. By administrative, it means that adjudicating authority has to ascertain whether a particular case is complete in terms of Section 7/8/10 of the Code (as the case may be) or it suffers from some defect. Whereas by judicial, it means to decide whether to admit corporate insolvency resolution process or liquidation of a corporate debtor or not. To ensure better understanding of readers about the Insolvency and Bankruptcy Code, 2016 and its applicability, reference to which case laws have also been made.

The objective of the lesson is to familiarize the students to acquaint with:

- Adjudicating Authority for corporate persons
- Appeals and Appellate Authority
- NCLT benches
- Fraudulent and malicious proceedings and penalties thereof.

Lesson 8: Pre-Packaged Insolvency Resolution Process

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.

The objective of the lesson is to familiarize the students with the:

- Concept of Pre-packaged Insolvency Resolution Process (PPIRP)
- Time period for completion of PPIRP Initiation of the process
- Duties and powers of Resolution Professional
- Conduct and conclusion of the process.

Lesson 9: Debt Recovery & Securitization

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 race additional funds from the market. Securitization is a way of unlocking these blocked funds. A sound banking system is an essential requirement for maintaining financial stability in any country. One of the parameters of soundness is the level of non-performing assets (NPA) in the banking system. The provisions of the SARFAESI 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 objective of the lesson is to familiarize the students with:

- The legal framework provided for law regulating securitization and reconstruction of financial assets
- The legal machinery employers both in public and private sector establishments having requisite training infrastructure
- The legal framework pertaining to debt recovery.

Lesson 10: Winding-Up by Tribunal

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 realise the assets and pay the company's debts expeditiously and fairly in accordance with the law. If any surplus left, it is distributed among the members in accordance with their rights. 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 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 realized, liabilities are paid off and the surplus, if any, is 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.

The objective of the lesson is to facilitate students to acquaint with the:

- Grounds of winding up by Tribunal and its petition
- Functions of company liquidators

- Submission of reports to Tribunal
- Companies (Winding Up) Rules, 2010.

Lesson 11: Insolvency Resolution of Individual and Partnership Firms

The Insolvency and Bankruptcy Code, 2016 (the Code) aims to consolidate and amend laws relating to reorganization and insolvency resolution of corporate persons, partnership forms and individuals in India. The provisions of the Code aim to maximize the value of assets of such persons in order to promote entrepreneurship in the country and also increase the availability of credit in the economy and balance interest of all stakeholders. This lesson envisages how debtor or creditor either on their own or through a Resolution Professional can initiate insolvency resolution process, role of a Resolution Professional and issuance of discharge order by Adjudicating Authority and effect upon the declaration of interim-moratorium and moratorium by adjudicating authority.

The aim of the lesson is to familiarize the students with:

- Application process for insolvency resolution
- Appointment and functions of Resolution Professional
- Repayment Plan
- Meeting of Creditors
- Discharge Order.

Lesson 12: Bankruptcy Order for Individuals and Partnership Firms

Bankruptcy is a legal procedure to give relief for people whose circumstances are unlikely to change and who have no hope of paying off their debts within a reasonable time. The term bankruptcy applies only to individuals and not to the companies or other legal entities. An individual may be made bankrupt only by order passed by Adjudicating Authority based on bankruptcy petition. Either creditor(s) or debtor may make application for bankruptcy. The Adjudicating Authority for dealing with insolvency and bankruptcy of individual and partnership firm is Debt Recovery Tribal and Appellate Authority for the same is Debt Recovery Appellate Tribunal.

The purpose of the lesson is to acclimatize the students with:

- Application process for bankruptcy
- Appointment and functions of bankruptcy trustee
- Administration & distribution of estate of bankrupt
- Discharge Order
- Modification of bankruptcy order.

Lesson 13: Bankruptcy for Individuals and Partnership Firms

A sound bankruptcy and insolvency framework requires the existence of an impartial, efficient and expeditious administration. This is more likely to be possible for individual insolvency when administrative proceedings are placed outside the court of law. As with legal entities, what is visualised for individuals is to enable a negotiated settlement between creditors and debtor without active involvement of the court. The principle is to allow greater flexibility in the repayment plans, and a time to execute the plans, that can be acceptable to both parties. If creditors and debtors can settle on such a plan out of court, what matters for the system is that there is a record of this settlement and that it can affect the premium of future credit transactions. Economies across the world are increasingly placing administrative proceedings outside of the courts. This seems to be a natural way forward for India as well.

The objective of the lesson is to familiarize the students with:

- Functions & powers of bankruptcy trustee
- Estate of bankrupt and restrictions on disposition
- Distribution of property
- Priority payment of debts.

Lesson 14: Fresh Start Process

The Insolvency and Bankruptcy Code, 2016 ("Code") is a consolidated statute which deals with insolvency and bankruptcy of corporate, limited liability partnerships (LLP), individuals and partnership firms. The Code is a one shot solution which provides for dealing with insolvency or bankruptcy of various organizational structures under one roof. The fresh start process is enshrined under Chapter II of Part III of the Code. The fresh start process is an opportunity to a debtor who is unable to pay his debts to clear off his debts in a time-bound manner on fulfilling the prescribed conditions for the fresh start of his qualifying debts. The intent of fresh start process is to provide debtors with comparatively small debts, a chance to discharge off their debts and restart afresh without any liability. The fresh start process is an alternative to the insolvency and bankruptcy processes. To prevent and curb the abuse of this debtor centric process, the Code hat aligned certain restrictions on the applicability and validity of fresh start process.

The purpose of the lesson is to familiarize the students with:

- Application process of fresh start order
- Appointment of Resolution Professional in fresh start process
- Functions of Resolution Professional in fresh start process
- Discharge Order.

Lesson 15:Professional and Ethical Practices for Insolvency Practitioners

The term 'ethics is derived from the Greek word 'ethos' which refers to character, guiding beliefs, standards and ideals that pervade a group, a community or people. The Oxford dictionary states 'ethics' as the 'moral principle that governs a person's behavior or how an activity is conducted'. Ethics refers to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. An Insolvency Professional (IP) plays a very important role under the Insolvency and Bankruptcy Code, 2016. He is a significant actor in the corporate insolvency resolution process. He acts as an "Interim Resolution Professional (IRP)" and "Resolution Professional (RP)" in the corporate insolvency resolution process (specified in Part II of the Code which deals with the Professional (RP) in the corporate insolvency resolution process (specified in Part II of the Code which deals with corporate persons) as well as a "resolution professional under 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.

The objective of the lessons is to familiarize the students with:

- Registration process and obligations of Insolvency Professionals
- Code of Conduct of Insolvency Professionals
- Code of Ethics of Insolvency Professionals
- IBBI Regulations & Circulars on Insolvency Professionals.

Lesson 16: Group Insolvency

Companies in a corporate group are identified as separate legal entities under law. However, the prevalence of corporate groups has thrown up special challenges requiring modifications to this principle of treating companies as completely separate entities. However, courts in India also pierce the corporate veil to hold the parent company liable for subsidiary companies. With the introduction at the Insolvency and Bankruptcy Code, 2016 ('Code'), India moved to create a law that inter alia consolidates the fragmented laws relating to reorganization, insolvency resolution and liquidation relating to corporate persons. While the Code provides detailed provisions to deal with the insolvency of each corporate debtor separately, it lacks a dedicated framework to deal with coordination of insolvency proceedings of different group companies. Thus, the insolvency of different companies belonging to the same group is dealt with through separate insolvency proceedings for each company.

The objective of the lesson is to familiarize the students with:

- The legal framework provided for regulating group insolvency practices in India.
- Advantages and Challenges faced under Group Insolvency
- The legal machinery for Group Insolvency across different Countries
- The legal framework under IBC Code relating to group insolvencies.

Lesson 17: Cross Border Insolvency

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. 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 as 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 adjective of the lesson is to facilitate students to acquaint with:

- Objectives of effective insolvency law
- UNCITRAL guide on insolvency law
- Model law on cross border insolvency
- World Bank principles
- Insolvency Law Committees Recommendations
- Cross Border Insolvencies in UK, UAE US, Singapore, Canada.

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PROFESSIONAL AND ETHICAL PRACTICES FOR INSOLVENCY PRACTITIONERS

Introduction to Insolvency and Bankruptcy Code

Lesson 1

KEY CONCEPTS

■ Insolvency ■ Bankruptcy ■ Liquidation ■ Insolvency and Bankruptcy Board of India ■ Insolvency Professionals ■ Insolvency Professionals Agencies ■ Adjudicating Authority ■ Information utility ■ Corporate Debtor ■ Financial Creditor

Learning Objectives

To understand:

- Historical background of Insolvency Resolution
- Committees on Bankruptcy Reform
- Salient Features of I&B Code
- Pillars of I&B Code

Lesson Outline

- Introduction
- Concept of insolvency and bankruptcy
- Insolvency framework in other countries
- Historical developments in insolvency laws in India
- Need of the Code
- Scheme of the Code
- Pillars under IBC
- Key definitions and concepts
- Case Laws
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

REGULATORY FRAMEWORK

- Insolvency and Bankruptcy Code, 2016
- IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- IBBI (Liquidation Process) Regulations, 2016
- IBBI (Voluntary Liquidation Process) Regulations, 2017
- IBBI (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 in ability 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 in sufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a

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.

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 as sets 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 payoff 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.

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(I705), 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 is 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. They 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 presentative 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.

S.No.	Year	Committee/ Commission	Recommendations/Outcome
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 pruposes 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:

   - 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.

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 facilitation 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 atleast 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 inducting 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 facilitation 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.

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-operatability 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 Contact (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 soul 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. (*Innoventive 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 authorisation 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 Kamlapat 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.

"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 proces 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 may be [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 a 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 (4) 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 prepackge insolvency resolution procers, 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 ROUND-UP

- The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.
- The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts.
- Sections 3,5 and 79 of the Insolvency and Bankruptcy Code, 2016 define important terms used in the Code.
- The National Company Law Tribunal (NCLT) shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal (NCLAT).
- The Debt Recovery Tribunal (DRT) shall be the Adjudicating Authority with jurisdiction over individuals and partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal (DRAT).
- The Code establishes an Insolvency Regulator (The Insolvency and Bankruptcy Board of India) to exercise regulatory oversight over,
  - Insolvency Professionals;
  - Insolvency Professional Agencies; and
  - Information Utilities.
- An insolvency resolution process can be initiated by either a creditor, or by the debtor, upon an event of default.
- 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.
- 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.
- 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.
- The Code proposes to regulate insolvency professionals and insolvency professional agencies. Under Regulator's oversight, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals.
- The Code proposes for Information Utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies. An individual insolvency data base is also proposed to be setup with the goal of providing information on insolvency status of individuals.

- The Code proposes a swift process and timeline of 180 days for dealing with applications for corporate insolvency resolution. This can be extended for 90 days by the Adjudicating Authority as only one time extension. However, the process shall mandatorily be completed within a period of three hundred and hirty days from the insolvency commencement date.

GLOSSARY

Insolvency and Bankruptcy Board of India (IBBI) : The Insolvency and Bankruptcy Board of India is a unique regulator which regulates a profession as well as processes under the Code. Its role includes overseeing 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.

Insolvency Professionals (IPs) : 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.

Insolvency Professional Agency : 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.

Adjudicating Authority : Adjudicating Authority for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

Information Utility : An information utility as a person who is registered with the Board as an information utility under section 210. The Information Utility collect, collate, authenticate and disseminate financial information.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation.)

1. Briefly explain the meaning of terms 'insolvency' and 'bankruptcy'. Discuss historical developments of insolvency law in India.
2. Discuss the insolvency framework in the United Kingdom and the United States of America.
3. Mentions the reasons that led to the enactment of the Insolvency and Bankruptcy Code, 2016. State the objectives of the Code.
4. What are the salient features of the Insolvency and Bankruptcy Code, 2016?
5. Discuss the institutional framework envisaged under the Insolvency and Bankruptcy Code, 2016 to achieve its objectives.
6. Write a note on the Insolvency and Bankruptcy Board of India (IBBI).
7. Discuss the jurisdiction of the Adjudicating Authorities under the Insolvency and Bankruptcy Board of India (IBBI).
8. Briefly mention the functions and obligations of the Insolvency professionals under the Insolvency and Bankruptcy Board of India (IBBI).
9. What is an information utility (IU) under the Insolvency and Bankruptcy Board of India (IBBI)? State its obligations.
10. Discuss with the help of a case law the overriding provisions of the Code with respect to other laws.

LIST OF FURTHER READINGS
● Insolvency and Bankruptcy Code, 2016 (Bare Act)

OTHER REFERENCES (Including Websites / Video Links)
● https://ibbi.gov.in

Corporate Insolvency Resolution Process

Lesson 2

KEY CONCEPTS

■ Financial Creditor ■ Operational Creditor ■ Corporate Debtor ■ Default ■ Corporate Applicant ■ Moratorium ■ Interim Resolution Professional ■ Resolution Professional ■ Interim Finance ■ Claim ■ Related Party ■ Voting share ■ Insolvency resolution process costs ■ Resolution Applicant

Learning Objectives

To understand:

- Moratorium and public announcement
- Appointment and functions of IRP
- Duties of RP
- Preparation of Information Memorandum & Resolution Plan
- Voting and approval by the Committee

Lesson Outline

- Introduction
- Persons who may initiate the process
- Persons not entitled to make application
- Moratorium and public announcement
- Appointment, tenure and functions of Interim Resolution Professional
- Duties of Resolution Professional
- Corporate Insolvency Resolution Process
- Committee of Creditors
- Meetings of Committee of Creditors
- Replacement of Resolution Professional by Committee of Creditors
- Preparation of Information Memorandum
- Approval of Committee of Creditors for certain actions
- Case Laws
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

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.

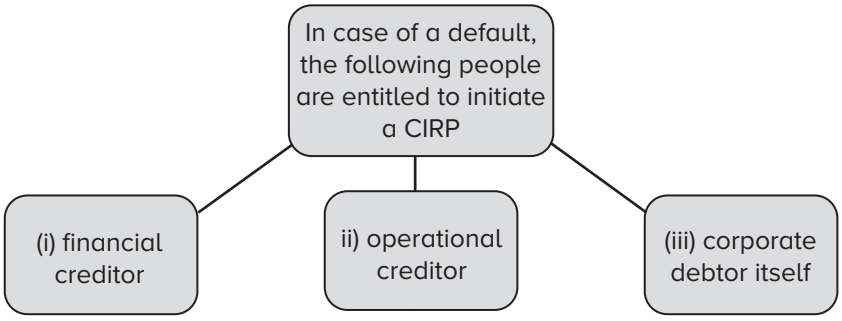
The expression "corporate insolvency resolution process" is not defined in the Insolvency and Bankruptcy Code, 2018. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 defines the expression "corporate insolvency resolution process". According to Rule 3(1)(b), "corporate insolvency resolution process" means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code.

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.

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.

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.



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.

Thus, a "financial creditor" means any person to whom a financial debt is owed and an "operational creditor" means a person to whom an operational debt is owed and both these expressions also include persons to whom such debts have been legally assigned or transferred.

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.

According to section 5(8) of the Code, a "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. According to section 5(8), **a financial debt includes –**

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised 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 non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(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-clause (a) to (h) of this clause.

The definition of "financial debt" in section 5(8) of the Code was amended *vide* **the insolvency and Bankruptcy code (Second Amendment) Act, 2018.** The (Second Amendment) Act of 2018 added an explanation in sub clause (f) of section 5(8). The Explanation clarifies 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. Thus, an **allottee under a real estate project** (a buyer of an under-construction residential or commercial property) will now be considered as a financial creditor, as the amount raised from allottees for financing a real estate project has the commercial effect of a borrowing.

The explanation further clarifies that 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.

The Hon'ble Supreme Court of India has upheld the above stated legal position in the matter of ***Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors. dated 09.08.2019***.

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 Codeadopts 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. 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 debtor 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 fi an application for initiating corporate insolvency resolution process against a corporate debtor before the National Company Law Tribunal when a default has occurred.

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.

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 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 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.

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.

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 anorder 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 into 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.

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.

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 against 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)]

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY CORPORATE APPLICANT

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–

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.

(a) the information relating to its books of account and such other documents for such period as may be specified;

(b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and

(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.

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 authorisation 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.

Sub-section (3) of section 10 of the Code was amended by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.** The (Second Amendment) Act, 2018 provided for the requirement of special resolution passed by the shareholders of the corporate debtor or resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, for initiation of corporate insolvency resolution process by corporate applicant. The **(Second Amendment) Act, 2018** has also amended sub-section (4) to provide that the presence or absence of pending disciplinary proceedings against the proposed resolution professional shall be a ground for acceptance or rejection of application for corporate insolvency resolution process filed by the corporate applicant.

Originally sub-section (3) of section 10 read as follows:

"(3). the corporate applicant shall, along with the application furnished the information relating to –

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional."

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.

SUSPENSION OF INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 10A was inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 which came into effect from 05th June, 2020 in light of COVID-19 pandemic that has impacted business, financial markets and economy all over the world, including India, and created uncertainty and stress for business for reasons beyond their control. Section 10A reads as follows:

"Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for

a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

The section also states that "no application shall be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period" which means that no financial creditor, operational creditor or corporate applicant can file an insolvency application for the defaults occurring between 25th March, 2020 and the next six months or one year.

The aforesaid section covers the default of a corporate debtor which arises after the 25th March, 2020 emerging due to the impact of COVID 19 and shall remain suspended for six months or upto a period of one year. However, the defaults prior to this date are enforceable under the Code.

This was a necessary measure considering the national lockdown in force since 25th March, 2020 to combat COVID-19 and also the difficulty in finding adequate number of resolution applicants to rescue the corporate person who may default in discharge of their debt obligation.

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.

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.

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.

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."

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.

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.

The **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** has amended sub-section (2) of section 12 of the Code to recalibrate voting threshold from seventy-five per cent to sixty-six per cent for extension of corporate insolvency resolution process period by committee of creditors.

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 prescribe 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 basis 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.

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.

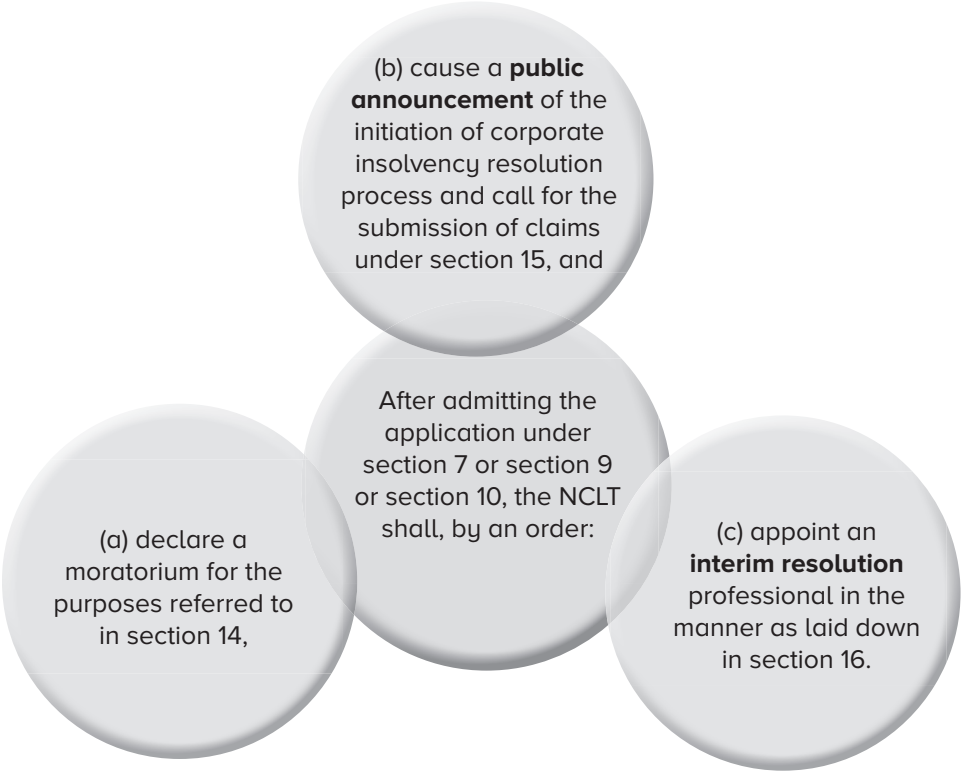
Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

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.

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.

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.

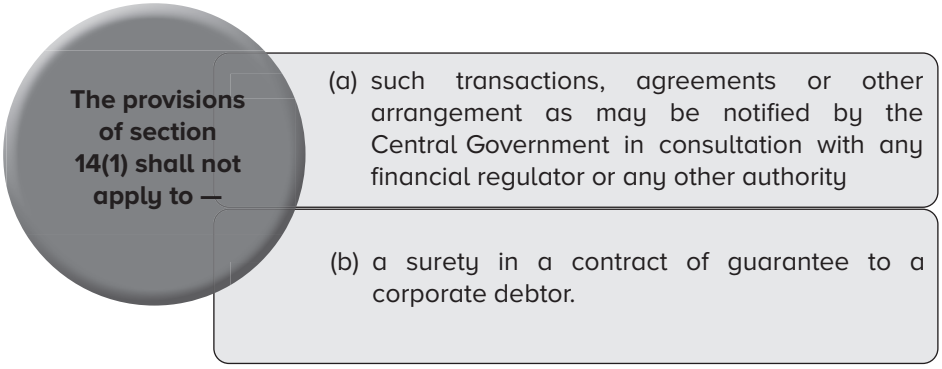
The explanation inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ensures that the corporate debtor retains its going concern status by protecting the corporate debtor from suspension and/ or termination of its licenses/ permits/ concession owing to initiation on insolvency 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 debtor 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)]

Thus, the moratorium will continue to be in effect till the completion of the corporate insolvency resolution process or

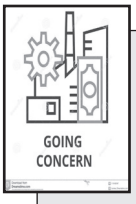
"Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be [Section 5(12)]

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.

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 claims, 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 date of the admission of the application under sections 7, 9 or section 10, as the case may be.

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. [Prior the amendment vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, it read "within fourteen days from 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 the insolvency 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

Section 16(5) originally provides that the term of the interim resolution professional shall not exceed thirty days from date of his appointment. But this sub-section was amended by **the insolvency and Bankruptcy Code (Second Amendment) Act, 2018.** Now 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 is 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.

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.

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.

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; and

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

Manage operations of corporate debtor as a going concern – 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. [Section 20(1)]

"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].

Authority of Interim Resolution Professional – In order 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, the interim resolution Professional shall have the authority to undertake certain actions prescribed under the Code.

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.

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 Interim 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 percent 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.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 amended section 22 of the Code to provide for reduced voting threshold of sixty-six percent in place of seventy-five percent for obtaining the approval of the committee of creditors for appointment of resolution professional. The Second Amendment Act of 2018 has also amended sub-section (3) so as to require a written consent from the Interim Resolution Professional in specified form before his appointment.

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, 2013 (18 of 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 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, 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, file application for avoidance of transactions 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".

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

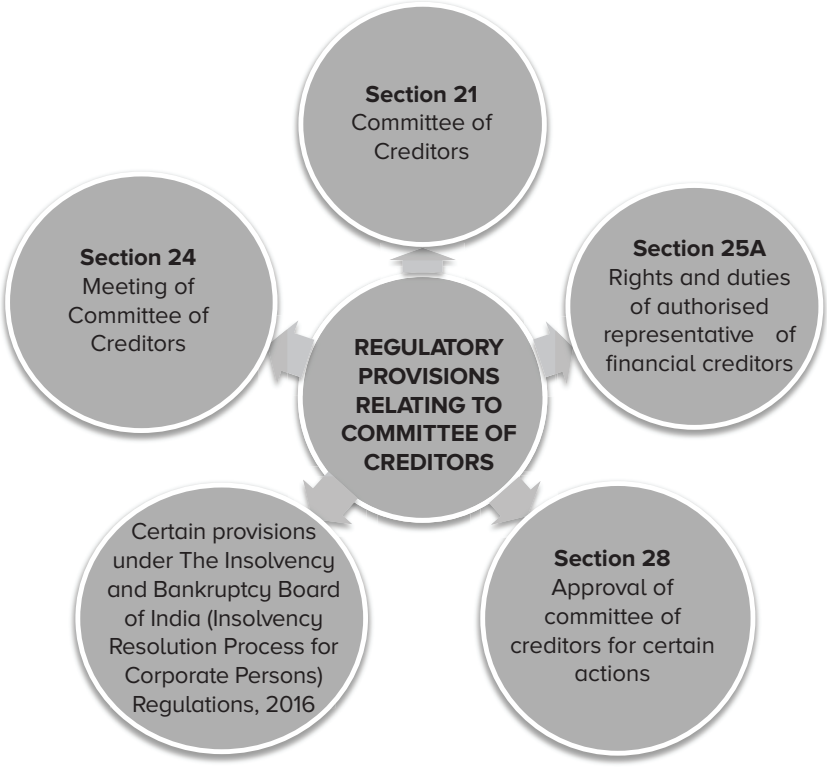
The Supreme Court ruled in ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.*** that the adjudicating authority cannot challenge the CoC's commercial judgement on the basis of merits. According to the limited court review that is available, the CD must continue operating 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 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 per cent. 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 –

(c) a right to payment, whether or not such right is educed to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(d) 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 homebuyers 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 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.

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

Whether the relatedness of the related party could merely have existed in the past or whether they must continue in praesenti 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 thereunder. 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.

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.

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.

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 arbitratory nor violative of Article 14 of Constitution of India;

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.

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) 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.

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 authorised 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 or 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 and shall apply to the Adjudicating Authority for appointment of the authorizsed representatives within two days of the verification of claims. 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.

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:

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	15,000
101-1000	20,000
More than 1000	25,000

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.

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. [Section 24(1)]

2. All meetings of the committee of creditors shall be conducted by the resolution professional. [Section 24(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 aggregate dues is not less than **ten percent** of the debt [Section 24(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. [Section 24(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 the resolution 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. [Section 24(5)]

6. Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor. [Section 24(6)]

7. The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board. [Section 24(7)]

8. The meetings of the committee of creditors shall be conducted in such manner as may be specified. [Section 24(8)]

Quorum at the meeting of the committee of creditors

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

1. 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.

2. 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.

3. 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.

Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a resolution professional may convene a meeting of the committee as and when he considers necessary, and shall convene a meeting if a request to that effect is made by members of the committee representing thirty three per cent of the voting rights.

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.

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)

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.

As per Regulation 23 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, 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.

As per Regulation 24 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall act as the chairperson of the meeting of the committee of creditor. He/She 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. The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within 48 hours of the said meeting.

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.

1. 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)].

2. 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. [Section 25A(2)].

3. 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:

   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)].

3A. 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 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.

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.

Sub-section (2) of section 27 was substituted by **the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** for enabling the committee of creditors to replace the existing resolution professional with another resolution professional by a vote of **sixty-six percent** of voting share instead of **seventy-five percent**, subject to a written consent from the latter.

Before its substitution, the sub-section (2), stood as follows:

"(2) The committee of creditors may, at a meeting, by a vote of seventy-five per cent of voting shares, propose to replace the resolution professional appointed under section 22 with another resolution professional."

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.

"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)]

Sub-section (25) of section (5) was substituted by **the Insolvency and Bankruptcy Code (Amendment) Act, 2018 (Act No 8 of 2018).** Sub-section (25), before its substitution read as follows:

"(25) "resolution applicant" means any person who submits a resolution plan to the resolution professional".

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.

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

1. Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty- fourth day from the insolvency commencement date, whichever is earlier.

2. The information memorandum shall contain the following details of the corporate debtor-

(a) assets and 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, 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;

(l) other information, which the resolution professional deems relevant to the committee.

3. 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.

4. 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.

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.

Section 28(1) provides that notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors:

- 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 Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 had amended section 28 of the Code to reduce the threshold for voting from 75% to 66% for approval of committee of creditors in respect certain actions provided in sub-section (1) of section 28.

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.

VOTING BY THE COMMITTEE

Regulation 25 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 covers the provisions of voting by the committee. The said regulation provides the following in regard to voting by the committee:

The actions listed in section 28(1) shall be considered in meetings of the committee. Any action other than those listed in section 28(1) requiring approval of the committee may be considered in meetings of the committee. 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.

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.

The resolution professional shall:

- 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
- 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 for at least twenty-four hours from the circulation of the minutes.

The authorised representative shall circulate the minutes of the meeting received by the resolution professional 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.

Regulation 25A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 inserted by way of Notification No. IBBI/2019-20/GN/REG052 provides for Voting by Authorised Representative. It implied that 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 subsection (3) or sub-section (3A) of section 25A, as the case may be.

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.

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.
- 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.
- 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 25A 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 maybe 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 provisional list to:

  a) every prospective resolution applicant in the provisional list; and

  b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.

- 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.
- The request for resolution plans shall allow prospective resolution applicants a minimum of 30 days to submit the resolution plan(s).
- The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.
- 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.
- 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.
- 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.
- The resolution professional may with the approval of the committee, may extend the timeline for submission of resolution plans.
- If the resolution professional, does not receive a resolution plan in response to the request under this regulation, he may, with the approval of the committee, issue request for resolution plan for sale of one or more of assets of the corporate debtor.
- 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.

"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)

C. Strategy for marketing of assets of the corporate debtor

Regulation 36C inserted by way of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022 provides as follows:

The resolution professional shall prepare a strategy for marketing of the assets of the corporate debtor in consultation with the committee of creditors where the total assets as per the last available financial statements exceeds INR 100 Cr 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

The above amendment to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was introduced with an objective to maximise the value of assets of the corporate debtor undergoing corporate insolvency resolution process. Value of assets of the corporate debtor can only be maximised when there are multiple resolution plans submitted by the prospective resolution applicants and a price discovery takes place through competitive bidding among such prospective resolution

applicants. To increase interest and promote participation of large number of propspective resolution applicant, the availability of the asset in the market needs to be made known to a larger audience and specifically targeted outreach to prospective resolution applicants.

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 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the mandatory content of the resolution plan shall be as follows:

- The amount payable under a resolution plan to operational and financial creditor of the corporate debtor.
- 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.

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.

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:

- Is an undischarged insolvent;
- Is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- 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 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. However, such a 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. Also provisions of this clause shall not apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor;
- Has been convicted for any offence punishable with imprisonment for two years or more under any Act specified under the Twelfth Schedule or for seven years or more under any law for the time being in force. 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;
- Such a person is disqualified to act as a director under the Companies Act, 2013;
- Such a person is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- 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;
- 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;
- Such person is subject to any disability corresponding to the above-mentioned clauses under any law in a jurisdiction outside India; or
- Has a connected person not eligible corresponding to the above-mentioned clauses.

"Connected Person" means:

(a) any person who is the promoter or in the management or control of the resolution applicant; or

(b) 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

(c) the holding company, subsidiary company, associate company or related party of a person referred above.

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 crystalized, 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 whereby 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 facet of the liquidation process. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor 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.

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. Thereby, the Committee of Creditors is also endowed with the mammoth responsibility of evaluating resolution plans and thereafter 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.

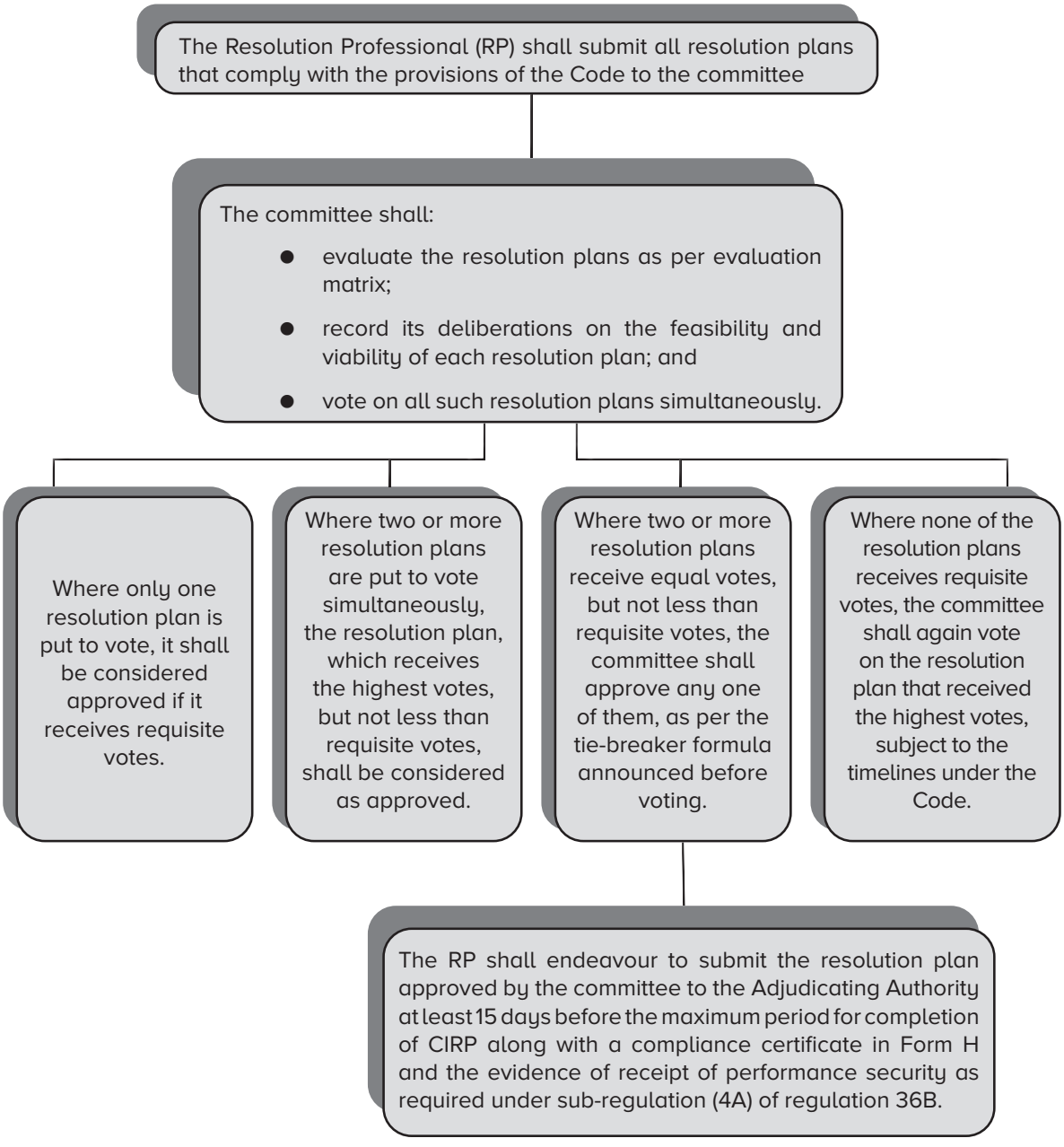
The resolution professional may if envisaged in the request for resolution plan, allow modification of the resolution plan but not more than once or use a challenge mechanism to enable resolution applicants to improve their plans.

The committee shall not consider any resolution plan in the following scenarios:

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.



The resolution professional shall send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

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 timelines under IBC.Financial Creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed resolution plan.

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.

CASE LAWS

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 *Innoventive 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. & ans vs. 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 Kamlapat 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 refiling 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.

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 K K 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 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 stands 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.

LESSON ROUND-UP

- 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.

- 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.
- 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. [Section 5(7)]
- 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. [Section 5(20)]
- 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(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.
- Section 8 the Insolvency and Bankruptcy Code, 2016 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor.
- Section 10 of the Insolvency and Bankruptcy Code, 2016 provides for the initiation of corporate insolvency resolution process by the corporate debtor itself.
- 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. it can be further extended once by a period not exceeding ninety days by NCLT. However, the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date.
- Section 12A provides that the Adjudicating Authority may allow the withdrawal of application admitted under sections 7, 9 or 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.
- Section 21 and 24 of the Insolvency and Bankruptcy Code, 2016 has provisions relating to the committee of creditors (CoC). Section 21 deals with the constitution of CoC while section 24 prescribes the modalities for the meeting of the CoC.
- 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 share.
- 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 committee of creditors.
- Section 21(2) provides that the committee of creditors shall comprise all financial creditors of the corporate debtor.
- 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.
- Section 21(4) provides that where any person is a financial creditor as well as an operational creditor, then such person shall be considered a financial creditor to the extent of the financial debt owed by the corporate debtor.
- 'Voting share' according to section 5(28), 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.
- The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has added sub-sections 6A and 6B to section 21 of the Code. Sub-section 6A provides 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. Sub-section 6B provides for remuneration payable to such authorised representative.

- 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.
- The members of the committee of creditors may meet in person or by such other electronic means as may be specified. [Section 24(1)]
- All meetings of the committee of creditors shall be conducted by the resolution professional. [Section 24(2)]
- 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. 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.

TEST YOURSELF

(These are meant for recapitulation only, Answer to these questions are not to be submitted for evaluation)

1. What is financial debt? Whether an application for corporate insolvency resolution can be filed by financial creditors jointly?
2. Whether the time period of 7 days given to a Financial Creditor/Operational Creditor/Corporate applicant to rectify defects in an application by the adjudicating authority is mandatory or directory? Discuss with the help of a case law.
3. Discuss whether adjudicating authority is required to look into the matter whether CoC approved application under Section 12A with majority voting share of ninety percent?
4. What do you understand by 'Corporate applicant'? Discuss the insolvency resolution process by a corporate applicant under the Insolvency and Bankruptcy Code, 2016.
5. Examine whether the time period of 14 days provided to adjudicating authority under the Code either to admit or reject an application is mandatory or directory?
6. Whether an application under section 7, 9 or 10 of the Insolvency and Bankruptcy Code, 2016 which has been admitted by NCLT, be withdrawn on the basis of compromise between the parties?
7. Mention the modalities for conducting meeting of Committee of Creditors under the Insolvency and Bankruptcy Code, 2016.
8. Explain in brief provisions relating to constitution of 'Committee with only operational creditors' where either the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor.
9. Whether the NCLT is bound by the decision of Committee of Creditors to grant extension of 90 days period for completion of CIRP under section 12(2) of the Code?
10. Discuss whether a demand notice under Section 8 of the Code to Corporate Debtor can be issued by a Lawyer/Chartered Accountant/Company Secretary, before filing an application under Section 9 of the Code.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made therein.
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016.

OTHER REFERENCES (Including Websites / Video Links)
● https://ibbi.gov.in/en/legal-framework/updated ● https://ibbi.gov.in/uploads/publication/76ee3de97a1b8b903319b7c013d8c877.pdf ● https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399cfcda795de38a23.pdf

Resolution Strategies

Lesson 3

KEY CONCEPTS

■ Corporate Restructuring ■ External Restructuring ■ Internal Restructuring ■ Debt Restructuring ■ Equity Restructuring ■ Slump sale

Learning Objectives

To understand:

- Concept of Debt Restructuring
- Concept of Equity Restructuring
- Acquisition in liquidation

Lesson Outline

- Introduction
- Debt Restructuring
- Equity Restructuring
- Acquisition in liquidation - sale of assets as a going concern
- Case laws
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

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-organisation 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 capitalby 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.

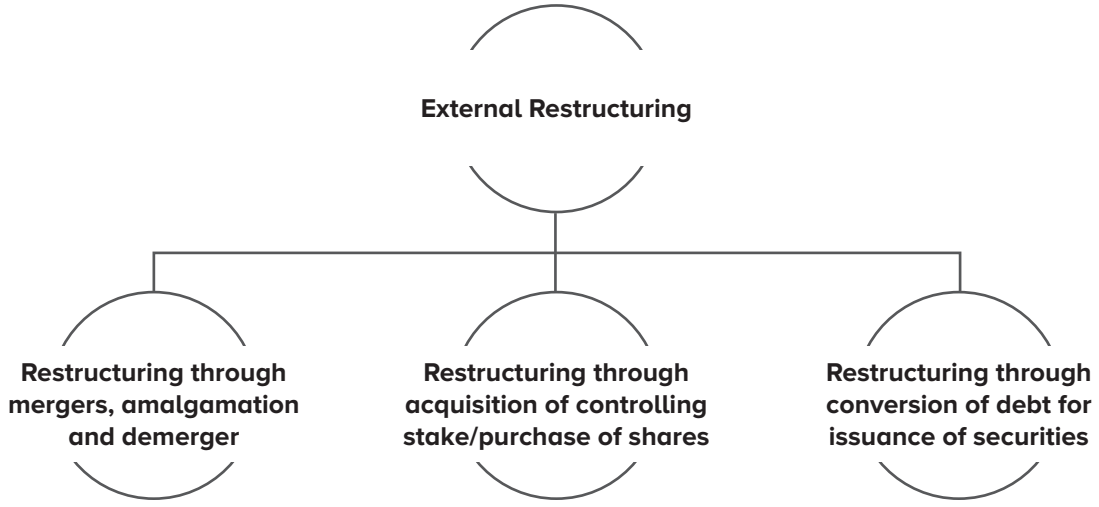
Corporate restructuring may be broadly categorized as follows:

Internal restructuring **External restructuring**

These categories are briefly explained below.

1. External restructuring

It consist 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.

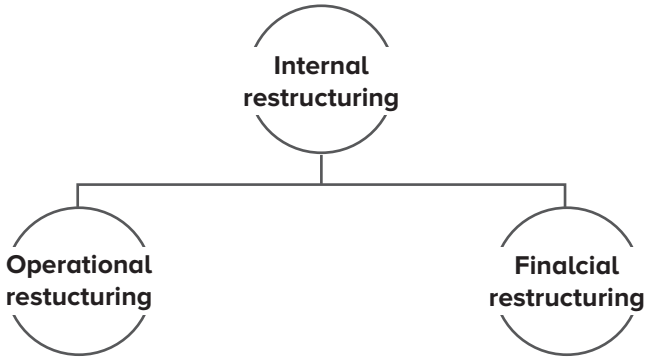
The same kind of restructuring was used in acquisition of Bhushan Steel Limited (after acquisition by Tata Group, it is named as Tata Steel BSl Limited, ("TBSL") by resolution applicant Bamnipal Steel Limited (subsidiary of Tata Steel limited). Pursuant to the Resolution Plan, Bamnipal Steel Limited 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 analyse 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.

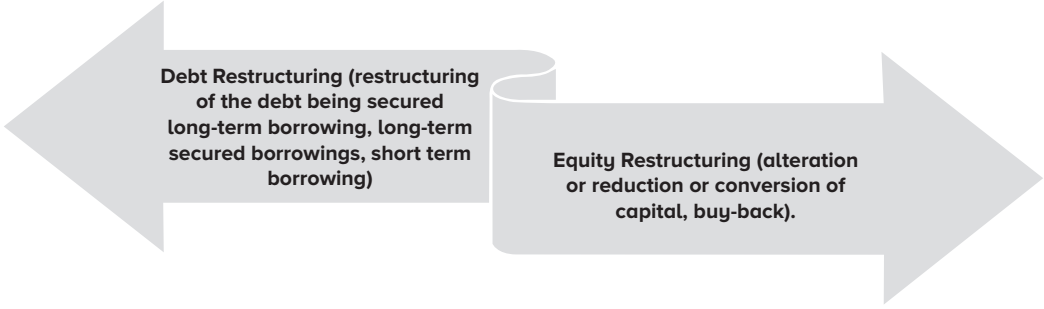
(ii) Financial restructuring

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 competencie

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 whiles 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 harmonise 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 crore by Bamnipal 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 crore in cash to acquire Bhushan Steel. It would pay another Rs.1,200 crore 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 SEBI TAKEOVER 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 Iispat & 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 crore, 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 crore. The NCLAT observed that the company has allotted Rs.1,200 crore for them and L&T plea for a higher priority could not be accepted.

Moreover, it also declined the plea of the promoters 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 crore.

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.

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.

4. If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 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.

Can Liquidator sell the corporate debtor as going concern even after 90 day period prescribed under the Code?

As per Regulation 32A(4), if the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 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.

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

(c) any professional appointed by him.

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.***

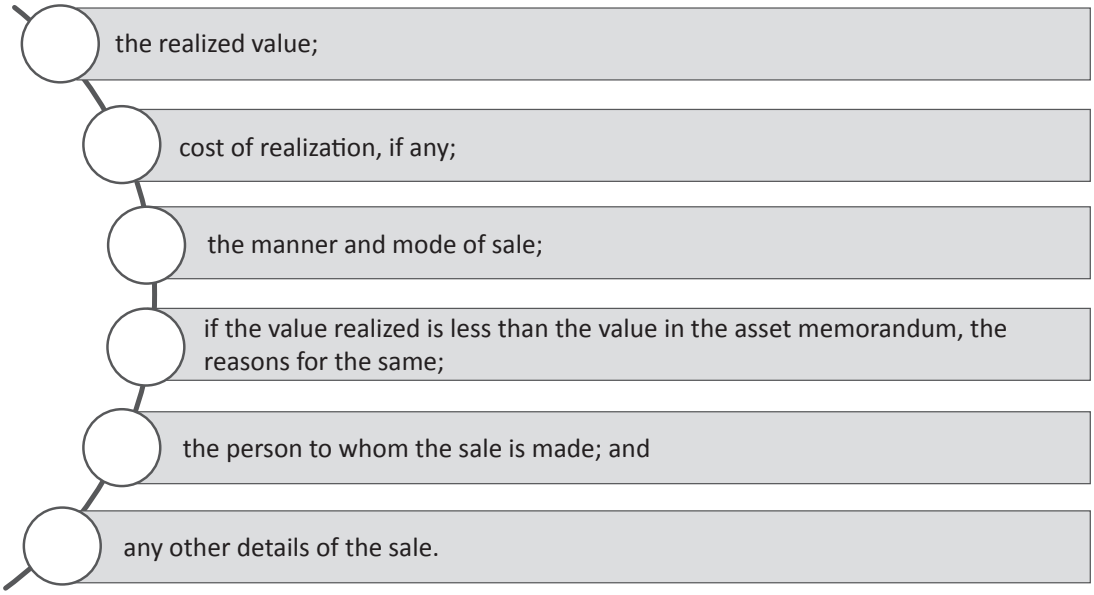
It was stated that the proper interpretation on clauses (a) and(b) of the regulation 33 of Liquidation Process Regulations would be that a liquidator is entitled to sell the assets without requirement of prior permission after reaching the conclusion that the assets are perishable and it is likely to 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.

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.

CONTENTS OF ASSET REPORT

As per Regulation 36 of the IBBI (Liquidation Process) Regulations, 2016, On sale of an asset, the liquidator shall prepare an asset sale report in respect of said asset, to be enclosed with the Progress Reports, containing –



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 ROUND-UP

- Corporate restructuring may be broadly categorized as external restructuring and internal restructuring. External restructuring consists of mergers, amalgamation, acquisition of controlling stake, conversion of debt into equity and internal restructuring consists of operational and financial restructuring.
- The two components of financial restructuring are debt restructuring (restructuring of the secured long-term borrowing, long-term unsecured borrowings, short-term borrowing) and equity restructuring (alteration or reduction of capital, buy-back).
- Debt restructuring is the process of reorganizing the whole debt capital of the company in negotiation with bankers, creditors, vendors. Debt restructuring involves a reduction of debt and an extension of payment terms or change in terms and conditions.
- Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 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.
- Equity restructuring involves reorganization of equity capital, which includes alteration of share capital, reduction of share capital and buy-back of shares.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. Discuss the resolution strategies available for insolvency resolution of the corporate debtor under the Insolvency and Bankruptcy Code, 2016.
2. Mention the advantages and disadvantages of debt restructuring and equity restructuring.
3. Mention the measures that a resolution plan shall provide for insolvency resolution of the corporate debtor for maximization of value of its assets under Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/en/publication/study-materials
- https://www.mca.gov.in/content/mca/global/en/home.html
- https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399cfcda795de38a23.pdf

Fast Track Corporate Insolvency Resolution Process

Lesson 4

KEY CONCEPTS

■ Fast Track Process Period ■ Fast Track Process Costs ■ Applicant ■ Committee ■ Dissenting Financial Creditor ■ Total Debt ■ Evaluation Matrix ■ Participant

Learning Objectives

To understand:

- Concept of Fast Track Corporate Insolvency Resolution Process
- Time period for completion
- Initiation of the process
- Conduct and conclusion of the process

Lesson Outline

REGULATORY FRAMEWORK

- Section 55 to 58 of the Insolvency and Bankruptcy Code, 2016
- Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

INTRODUCTION

Corporate failure may be due to business or financial failure. Business failure is break-down of business model and inability to generate enough revenues. Financial failure is due to mismatch between payments and receivables of an enterprise. A sound bankruptcy process helps the creditors and debtors to come to a platform that brings remedy for business or financial failure. It is not necessary that the defaulting companies go for liquidation. There may be situations in which a viable mechanism can be found through which the companies may be protected as a going concern.

The Insolvency and Bankruptcy Code is a new generation law that provides efficient revival mechanism and also throws challenges in the form of capacity building, harmonisation of various laws, creation of insolvency professionals, development of regulatory platform and so on.

The aim of the Fast Track Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 ('Code') is to conclude the procedure within half of the default time period specified under the Code. The person or entity seeking the fast relief will have onus on the process at set-off and that person or entity that sets-off the fast track process must support that the case is fit for the fast track. Therefore, whosoever files the application for fast track process under Chapter IV (Section 55) of the Insolvency and Bankruptcy Code will have to file the application along with the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process.

FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS

According to Section 55 of the Insolvency and Bankruptcy Code, 2016, a corporate insolvency resolution process carried out in accordance with this Chapter IV of Part II of the Code shall be called as fast track corporate insolvency resolution process.

The Ministry of Corporate Affairs vide notification dated 14th June, 2017 notified the provisions of section 55 to section 58 of the Code. Moreover, it notified that an application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors:

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

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

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

Fast Track corporate insolvency resolution process may be made in respect of the following corporate debtors:

- a corporate debtor with assets and income below a level as may be notified by the Central Government; or
- a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or
- such other category of corporate persons as may be notified by the Central Government

As per the notification by the Ministry of Commerce and Industry, an entity shall be considered as a Startup:

(a) if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India; and

(b) up to ten years from the date of its incorporation/ registration;

(c) if its turnover for any of the financial years since incorporation/ registration has not exceeded Rupees 100 crores; and

(d) if it is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'Startup'.

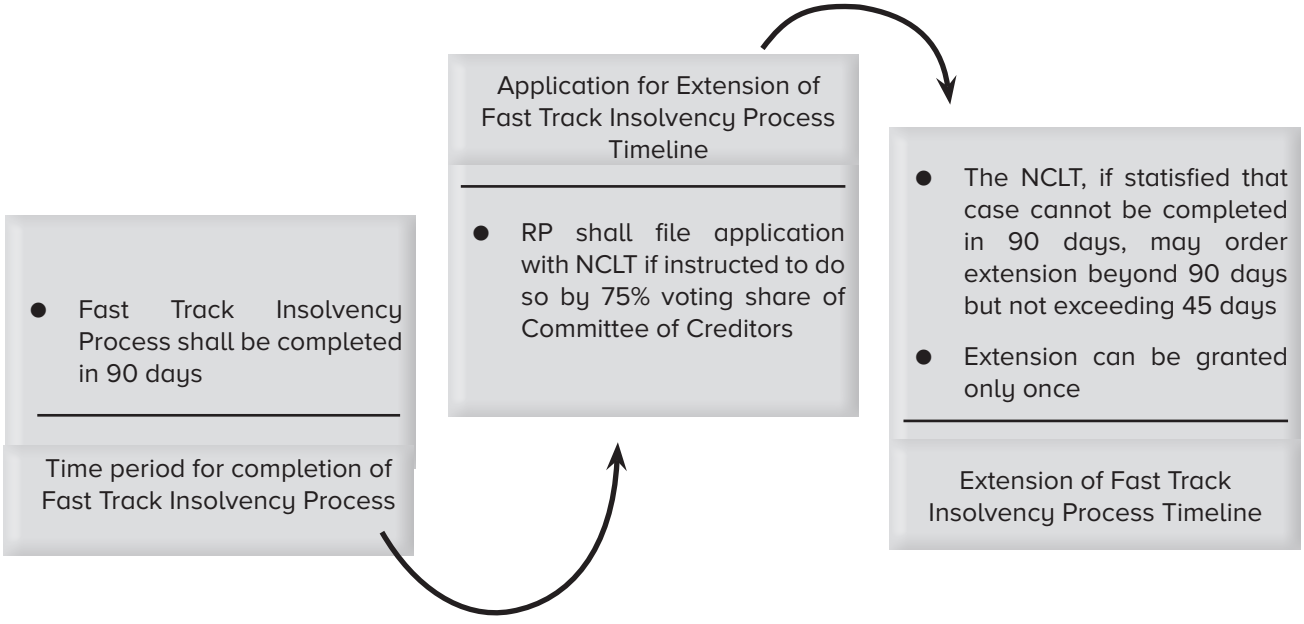
TIME PERIOD FOR COMPLETION OF FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS

A Fast Track Insolvency Process is a speedy way to achieve corporate insolvency in 90 days as compared to the standard 180 day procedure provided under the Code where such faster process is available only in specific cases.

Section 56(2) states that the resolution professional shall file an application to the Adjudicating Authority to extend the period of the fast track corporate insolvency resolution process beyond ninety days if instructed to do so by way of a resolution passed at a meeting of the committee of creditors and supported by a vote of seventy- five per cent of the voting share.

As per Section 56(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 fast track corporate insolvency resolution process cannot be completed within ninety days, it may, by order, extend the duration of such process beyond the said period ninety days by such further period, as it thinks fit, but not exceeding forty-five days.

It may be noted that any extension of the fast track corporate insolvency resolution process under this section shall not be granted more than once.



Manner of initiating fast track corporate insolvency resolution process

As per Section 57 of the Code, an application for fast track corporate insolvency resolution process may be filed by a creditor or corporate debtor as the case may be, along with-

- the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board; and
- such other information as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process. Manner of initiating fast track corporate insolvencyresolution process.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (FAST TRACK INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2017

Important Definitions

"Applicant" means the person filing an application under Chapter IV of Part II of the Code.

"Code" means the insolvency and Bankruptcy Code, 2016.

"Code of Conduct" means the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

"Committee" means a committee of creditors established under section 21.

"Dissenting Financial Creditor" means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee.

"Electronic Form" shall have the meaning assigned to it in the Information Technology Act, 2000.

"Electronic Means" means an authorized and secured computer programme which is capable of producing confirmation of sending communication to the participant entitled to receive such communication at the last electronic mail address provided by such participant and keeping record of such communication.

The process for conducting a corporate insolvency resolution process under Chapter II of the Code and the provisions relating to offences and penalties under Chapter VII of Part II of the Code also apply to fast track corporate insolvency resolution process as the context may require.

"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.

"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.

"Fast Track Process" means the fast track insolvency resolution process for corporate persons under Chapter IV of Part II of the Code.

"Fast Track Process Costs" means the costs in Regulation 30.

"Fast Track Process Period" means the period of ninety days beginning from the fast track recommencement date and ending on the ninetieth day.

"Identification Number" means the Limited Liability Partnership Identification Number under the Limited liability Partnership act, 2008, or the Corporate Identity Number under the Companies Act, 2013, as the case may be.

"Fast Track Commencement Date" means the date of admission of an application by the adjudicating authority for initiating the fast track process under Chapter IV of Part II of the Code.

"Insolvency Professional Entity" means an entity recognised as such under the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

"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.

"Participant" means a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting.

"Registered Valuer" means a person registered as such in accordance with the Companies Act, 2013 and rules made thereunder.

"Section" means section of the Code.

"Video Conferencing or other audio and visual means" means such audio and visual facility which enables the participants in a meeting to communicate concurrently with one another and to participate effectively in the meeting.

Eligibility for Resolution Professional (Regulation 3)

1. An insolvency professional shall be eligible to be appointed as a resolution professional for a fast track 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.
2. An insolvency professional shall not be eligible to be appointed as a resolution professional if he, or the insolvency professional entity of which he is a partner or director, is under a restraint order of the Board.
3. An insolvency professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.
4. An insolvency professional shall not continue as a resolution professional if the insolvency professional entity of which he is a director or a partner, or any other partner or director of such insolvency professional entity represents any other stakeholders in the same fast track process.

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, 2013 (18 of 2013), where the corporate debtor is a company;

(b) is not a related party of the corporate debtor; or

(c) has not been an employee or proprietor or a partner:

1. of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor; or
2. of a legal or a consulting firm, which has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm, at any time in the preceding three years.

Extortionate Credit Transaction (Regulation 5)

A transaction shall be considered an extortionate credit transaction under section 50(2) where the terms:

a) require the corporate debtor to make exorbitant payments in respect of the credit provided; or

b) are unconscionable under the principles of law relating to contracts.

Public Announcement (Regulation 6)

1. An insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional.

   Explanation: 'immediately' means not later than three days from the date of his appointment.

2. The public announcement referred to in sub-regulation (1) shall –

   (a) be in Form A;

   (b) (i) 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 debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations;

   (ii) be hosted on the website, if any, of the corporate debtor; and

   (iii) be hosted on the website, if any, designated by the Board for the purpose.

   (c) provide the last date for submission of proofs of claim, which shall be ten days from the date of appointment of the interim resolution professional.

3. The applicant shall bear the expenses of the public announcement which may be reimbursed by the committee to the extent it ratifies them.

   Explanation - The expenses on the public announcement shall not form part of fast track process costs.

Access to books (Regulation 4)

The interim resolution professional 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 record the ownership of assets;

(e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and

(f) contractual counter parties of the corporate debtor.

Claims by Operational Creditors (Regulation 7)

1. An operational creditor, other than workman or employee of the corporate debtor, shall submit proof of his claim to the interim resolution professional in person, by post or by electronic means in Form B.

   Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

2. The existence of debt due to the operational creditor under this regulation may be proved on the basis of-

   (a) the records available with an information utility, if any; or

   (b) other relevant documents, including -

   - a contract for the supply of goods and services with corporate debtor;
   - an invoice demanding payment for the goods and services supplied to the corporate debtor;

- an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or
- financial accounts.

Claims by Financial Creditors (Regulation 8)

1. A financial creditor shall submit proof of claim to the interim resolution professional in electronic form in Form C:

   Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

2. The existence of debt due to the financial creditor may be proved on the basis of –

   (a) the records available with an information utility, if any; or

   (b) other relevant documents, including -

   - a financial contract supported by financial statements as evidence of the debt;
   - a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
   - financial statements showing that the debt has not been repaid; or
   - an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

Claims by Workmen and Employees (Regulation 9)

1. A workman or an employee of the corporate debtor shall submit proof of claim to the interim resolution professional in person, by post or by electronic means in Form D:

   Provided that such person may submit supplementary documents or clarification in support of the claim, on his own or if required by the interim resolution professional, before the constitution of the committee.

2. Where there are dues to numerous workmen or employees of the corporate debtor, an authorised representative may submit one proof of claim for all such dues on their behalf in Form E.

3. The existence of dues to workmen or employees may be proved by them, individually or collectively on the basis of -

   (a) the records available with an information utility, if any; or

   (b) other relevant documents, including -

   - a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
   - evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or
   - an order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any.

Claims by Other Creditors (Regulation 9A)

1. A person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit proof of its claim to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.

2. The existence of the claim of the creditor referred to in sub-section (1) may be proved on the basis of –

(a) the records available with an information utility, if any; or

(b) other relevant documents, including -

- a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
- evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or
- an order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any.

Submission of Proof of Claims (Regulation 12)

1. Subject to sub-regulation (2), a creditor shall submit proof of his claim on or before the last date mentioned in the public announcement.
2. A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit proof of such claim to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.
3. Where the creditor in sub-regulation (2) is a financial creditor, it shall be included in the committee from the date of admission of such claim:

   Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

SUBSTANTIATION (REGULATION 10) OF CLAIMS:

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

COST OF PROOF PROVING THE DEBT: (REGULATION 11)

A creditor shall bear the cost of proving the debt due to such creditor.

Verification of Claims (Regulation 13)

1. The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the fast track commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

   The list of creditors 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;
   - filed with the Adjudicating Authority; and
   - presented at the first meeting of the committee.

Determination of Amount of Claim (Regulation 14)

1. Where the amount claimed by a creditor is not precise or cannot be determined due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

2. The interim resolution professional or the resolution professional, as the case may be, shall revise the amount of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he receives additional information warranting such revision.

DEBT IN FOREIGN CURRENCY (REGULATION 15)

The claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the fast track commencement date.

Explanation - "official exchange rate" means the reference rate published by the Reserve Bank of India or derived from such reference rates.

Committee with Only Operational Creditors (Regulation 16)

1. Where the corporate debtor has no financial debt or 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 following members: -
   a) eighteen largest operational creditors by value:

      Provided that 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. Every 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.

'Total debt' means 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.

Filings by the Interim Resolution Professional (Regulation 17)

1. The interim resolution professional shall file a report certifying the constitution of the committee to the adjudicating authority on or before the expiry of twenty-one days from the date of his appointment.
2. Based on records of the corporate debtor and claims, if the interim resolution professional is of the opinion that the fast track process is not applicable to the corporate debtor as per notifications under section 55(2), he shall file an application to the Adjudicating Authority along with the report in sub-regulation (1), to pass an order converting the fast track process to corporate insolvency resolution process under Chapter II of Part II of the Code.
3. If the adjudicating authority passes an order converting fast track to corporate insolvency resolution process on an application under sub-regulation (2), the process shall be carried on in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
4. The interim resolution professional shall convene the first meeting of the committee within seven days of filing the report(s) under this Regulation.

MEETINGS OF THE COMMITTEE (REGULATION 18)

A resolution professional may convene a meeting of the committee as and when he considers necessary, and shall convene a meeting if a request to that effect is made by members of the committee representing thirty-three per cent of the voting rights.

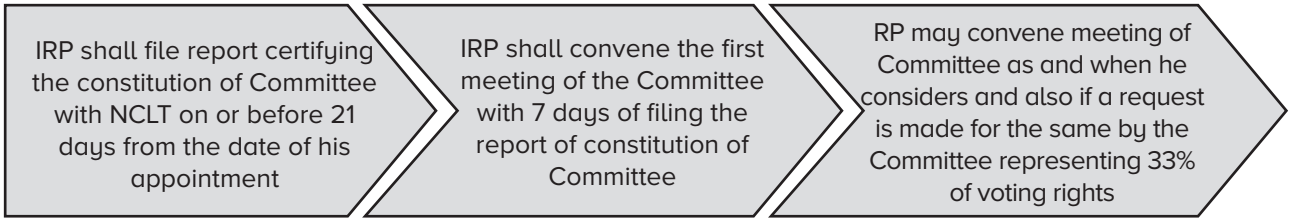


Fig. Constitution of Committee of Creditors

Service of Notice by Electronic Means (Regulation 20)

1. A notice by electronic means may be sent to the participants through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
2. The subject line in e-mail shall state the name of the corporate debtor, the place, if any, the time and the date on which the meeting is scheduled.
3. If notice is sent in the form of a non-editable attachment to an e-mail, such attachment shall be in the Portable document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
4. When notice or notifications of availability of notice are sent by an e-mail, the resolution professional shall ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained as ''proof of sending''.

Timeline and mode of notice

A meeting of the committee shall be called by giving not less than seven days' notice in writing to every creditor, delivered at the address he has provided to the resolution professional and such notice may be served by hand delivery, or by registered post but in any event, be served on every participant by electronic means.

The committee may reduce the notice period from seven days to such other period of not less than twenty four hours, as it deems fit.

5. The obligation of the resolution professional shall be satisfied when he transmits the e-mail and he shall not be held responsible for a failure in transmission beyond its control.
6. The notice made available on the electronic link or uniform resource locator shall be readable, and the recipient should be able to obtain and retain copies and the resolution professional shall give the complete uniform resource locator or address of the website and full details of how to access the document or information.
7. If a creditor, other than a member of the committee, fails to provide or update the relevant e-mail address to the resolution professional, the non-receipt of such notice by such participant of any meeting shall not invalidate the decisions taken at such meeting.

Contents of the Notice for Meeting (Regulation 21)

1. 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 such means.

2. The notice of the meeting shall provide that a creditor may attend and vote in the meeting either in person or through an authorised representative:

   Provided that such creditor 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.

3. The notice of the meeting shall contain an agenda of the meeting with the following-

   (i) a list of the matters to be discussed at the meeting;

   (ii) a list of the issues to be voted upon at the meeting; and

   (iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

4. The notice of the meeting shall-

   (a) state the process and the manner for voting and the time schedule, including the time period during which the votes may be cast;

   (b) provide the login ID and the details of a facility for generating password and for keeping security and casting of an electronic vote in a secure manner; and

   (c) provide contact details of the person who will address the queries connected with the voting.

Quorum at the Meeting (Regulation 22)

1. 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.

2. 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.

3. 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)

1. 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.

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

3. The resolution professional shall take due and reasonable care-

   (a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

   (b) 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;

   (c) to record proceedings and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;

(e) 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

(f) 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:

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.

4. 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 Meeting (Regulation 24)

1. The resolution professional shall act as the Chairperson of the meeting of the committee.
2. 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.

3. 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.
4. The resolution professional shall ensure that the required quorum is present throughout the meeting.
5. 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.
6. 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.
7. 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 by the Committee (Regulation 25)

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) may be considered in meetings of the committee.
3. The resolution professional may, at the meeting, take a vote of the members of the committee who are participating in the meeting on any item listed for voting after discussion on the same.
4. The resolution professional shall –
   a) circulate the minutes of the meeting by electronic means to all members of the committee within forty-eight hours of the conclusion of the meeting; and
   b) seek a vote on the matters listed for voting in the meeting from the members of the committee who did not participate in the meeting or did not vote at the meeting, if any, by electronic means or electronic voting system, where the voting shall be kept open for twenty-four hours from the circulation of the minutes.

Explanation- For the purposes of these Regulations –

(a) the expressions ''voting by electronic means'' and its grammatical variant 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.

5. At the end of the voting period, the electronic voting portal shall forthwith be blocked.
6. Once a vote on a resolution is cast by a member of the committee, such member shall not be allowed to change it subsequently.
7. The resolution professional shall within twenty four hours of the conclusion of the voting, or forty eight hours of the conclusion of the meeting if no electronic vote is required to be sought under this regulation, circulate by electronic means the decision of the committee on agenda items along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

Appointment of Registered Valuer (Regulation 26)

The resolution professional shall within seven days of his appointment, appoint one registered valuer to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 34:

Provided that the following persons shall not be appointed as registered valuers, 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 five years preceding the insolvency commencement date; or
d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

Transfer of Debt Due to Creditors (Regulation 27)

1. In the event a creditor assigns or transfers the debt due to such creditor to any other person during the fast track process period, both parties shall provide the interim resolution professional or the resolution professional, as the case may be, the terms of such assignment or transfer and the identity of the assignee or transferee.

2. The resolution professional shall notify each creditor and the adjudicating authority of any resultant change in the committee within two days of such change.

Sale of Assets Outside the Ordinary Course of Business (Regulation 28)

1. The resolution professional may sell unencumbered asset(s) of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case.

   Provided that the book value of all assets sold during fast track process period in aggregate under this sub-regulation shall not exceed ten percent of the total claims admitted by the interim resolution professional.

2. A sale of assets under this regulation shall require the approval of the committee.

3. A bona fide purchaser of assets sold under this Regulation shall have a free and marketable title to such assets notwithstanding the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature.

Assistance of Local District Administration (Regulation 29)

The interim resolution professional or the resolution professional, as the case may be, may make an application to the adjudicating authority for an order seeking the assistance of the local district administration in discharging his duties under the Code or these regulations.

Fast Track Process Costs

Regulation 30

(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 process;

(e) amounts due to suppliers of essential goods and services under Regulation 31;

(f) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(g) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 32;

(h) expenses incurred on or by the resolution professional fixed under Regulation 33; and

(i) other costs directly relating to the fast track process and approved by the committee.

Costs of The Interim Resolution Professional (Regulation 32)

1. The applicant shall fix the expenses to be incurred on or by the interim resolution professional.
2. The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub- regulation (1).
3. The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.
4. The amount of expenses ratified by the committee shall be treated as fast track process costs.

Resolution Professional Costs (Regulation 33)

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute fast track process costs.

Explanation- For the purposes of Regulation 32 & 33, "expenses" means the fee to be paid to the interim resolution professional/ resolution professional and other expenses, including the cost of engaging professional advisors, to be incurred by the interim resolution professional.

What are essential services under regulation 31?

The essential goods and services referred to in Section 14(2) shall mean-

(a) electricity;

(b) water;

(c) telecommunication services; and

(d) information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration: Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Fair Value and Liquidation Value (Regulation 34)

1. The registered valuer appointed under regulation 26 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.
2. After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub- section (2) of the section 29.
3. The resolution professional and registered valuer shall maintain the confidentiality of the fair value and the liquidation value.

Information Memorandum (Regulation 35)

1. Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to-

   a) each member of the committee within two weeks of his appointment as resolution professional; and

   b) each prospective resolution applicant latest by the date of invitation of resolution plan under clause (h) of sub-section (2) of section 25 of the Code.

2. The information memorandum shall contain the following details of the corporate debtor-

a) Assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values;

b) the latest annual financial statements;

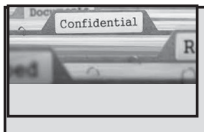
c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

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;

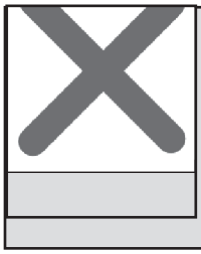
f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

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;

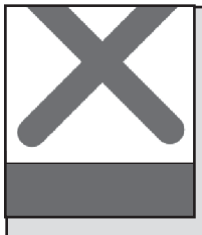


h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

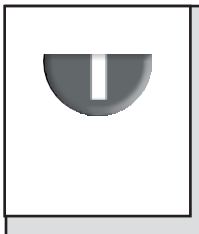
i) the number of workers and employees and liabilities of the corporate debtor towards them;



j) [Omitted by Notification No. IBBI/ 2017-18/GN/REG23, dated 31st December, 2017 (w.e.f. 01.01.2018). Prior to its omission, it stood as "(j) the liquidation value]



k) [Omitted by Notification No. IBBI/ 2017-18/GN/REG23, dated 31st December, 2017 (w.e.f. 01.01.2018). Prior to its omission, it stood as "(k) the liquidation value due to operational creditors; and"]



l) other information, which the resolution professional deems relevant to the committee.

3. 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.

4. The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee or a prospective resolution applicant 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.

Invitation of Resolution Plans (Regulation 35A)

1. The resolution professional shall issue an invitation, including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least fifteen days before the last date of submission of resolution plans.

2. Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least eight days before the last date for submission of resolution plans.

3. The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2) as the case may be.

4. The timelines specified under this regulation shall not apply to an ongoing fast track corporate insolvency resolution process

   (a) Where a period of less than twenty-two days is left for submission of resolution plans under sub-regulation (1);

   (b) Where a period of less than eleven days is left for submission of resolution plans under sub-regulation (2).

5. The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule:

   (a) on the website, if any, of the corporate debtor; and

   (b) on the website, if any, designated by the Board for the purpose.

The said Regulation was inserted by by Notification No. IBBI/2017-18/ GN/REG025, dated 7th February, 2018.

Resolution Plan (Regulation 36)

1. 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 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;

c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

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; and

l) obtaining necessary approvals from the Central and State Governments and other authorities.

Mandatory Contents of The Resolution Plan (Regulation 37)

1. A resolution plan shall identify specific sources of funds that will be used to pay the -

   (a) fast track process costs and provide that the fast track process costs will be paid in priority to any other creditor;

   (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the adjudicating authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

1A. A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor. [Inserted by Notification No. IBBI/2017-18/GN/REG017, dated 5th October, 2017]

2. A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

3. A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.

For the purposes of this sub-regulation, 'details' shall include the following in respect of the resolution applicant and other connected persons, namely:-

(a) identity;

(b) conviction for any offence, if any, during the preceding five years;

(c) criminal proceedings pending, if any;

d) disqualification, if any, under Companies Act, 2013, to act as a director;

e) identification as a willful defaulter, if any, by any bank or financial institution or consortium thereof in accordance with the guidelines of the Reserve Bank of India;

f) debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India; and

g) transactions, if any, with the corporate debtor in the preceding two years.

The expression **'connected persons'** means-

(a) persons who are promoters or in the management or control of the resolution applicant;

(b) persons who will be promoters or in management or control of the business of the corporate debtor during the implementation of the resolution plan ;

(c) holding company, subsidiary company, associate company and related party of the persons referred to in items (a) and (b).

Approval of Resolution Plan (Regulation 38)

1. A resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and these regulations to the resolution professional within the time given in the invitation made under clause (h) of sub- section (2) of section 25.

2. The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:-

(a) preferential transactions under section 43;

What is extortionate credit transaction?

A transaction shall be considered an extortionate credit transaction under section 50(2) where the terms:

(a) require the corporate debtor to make exorbitant payments in respect of the credit provided; or

(b) are unconscionable under the principles of law relating to contracts.

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.

3. The committee may approve any resolution plan with such modifications as it deems fit.

3A. The committee shall, while approving the resolution plan under sub-section (4) of section 30, specify the amounts payable from resources under the resolution plan for the purposes under sub-regulation(1) of regulation 37. [Inserted vide Notification No. IBBI/2017-18/ GN/REG025, dated 07th February, 2018]

4. The resolution professional shall submit the resolution plan approved by the committee to the Adjudicating Authority, at least fifteen days before the expiry of the maximum period permitted under section 56 for the completion of the fast track corporate insolvency resolution process, with the certification that –

(a)	the contents of the resolution plan meet all the requirements of the Code and the Regulations; and
(b)	the resolution plan has been approved by the committee:

Provided that the timeline specified in this sub-regulation shall not apply to an ongoing fast track corporate insolvency resolution process which has completed 50th day from its commencement date.

5. 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.

6. 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.

7. 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 fast track commencement date.

8. 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.

Extension of the Fast Track Process Period (Regulation 39)

1. The committee is of the opinion that the fast track process cannot be completed within the stipulated 90 days, it may instruct the resolution professional to make an application to the adjudicating authority under section 56 to extend the fast track 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.

CASE LAW

In the matter of ***Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr.*** (Company Appeal (AT) (Insolvency) No. 560 of 2018) dated: 03.01.2019 appeal was filed before the National Company Law Appellate Tribunal (NCLAT) against the order dated 25th July, 2018 passed by the National Company Law Tribunal Mumbai Bench, Mumbai.

NCLT extended the period of resolution process in exercise of power conferred under Section 55 of the Code treating the matter as 'Fast Track CIRP' also determining the 'CIRP fee' and the 'cost' incurred and payable to Appellant.

NCLAT noted that Corporate Debtor does not fall under any of the category of clauses (a), (b) or (c) of sub-section (2) of Section 55 of the Code as it neither has its assets and income below a level nor having class of creditors or amount of debt as notified by the Central Government.

In the present case, the application was not filed under Section 55 but filed under Section 9 of the Code. It is clear that the 'Fast Track Corporate Insolvency Resolution Process' is different from 'Corporate Insolvency Resolution Process' against such Corporate Debtors(s) as may be notified by the Central Government in terms of clauses (a), (b) & (c) of Section 55(2).

It was held that the NCLT had no jurisdiction to proceed with the 'Corporate Insolvency Resolution Process' beyond the period of 270 days and it cannot exercise its power under sub-section (2) of Section 55 of the Code, which was not applicable, and therefore the Adjudicating Authority has no power to convert the 'Corporate Insolvency Resolution Process' into a 'Fast Track Corporate Insolvency Resolution Process' under Section 55 of the Code.

LESSON ROUND-UP

- Sections 55 to 58 of the Code contain provisions relating to Fast Track Corporate Insolvency Resolution Process.
- A corporate insolvency resolution process carried out in accordance with Chapter IV of Part II of the Code shall be called as fast track corporate insolvency resolution process. [Section 55]
- Section 56(1) provides that subject to the provisions of sub-section (3), the fast track corporate insolvency resolution process shall be completed within a period of ninety days from the insolvency commencement date.
- The Adjudicating Authority may extend the duration of such process beyond the said period of ninety days by such further period, as it thinks fit, but not exceeding forty-five days.
- According to Section 57 of the Code, an application for fast track corporate insolvency resolution process may be filed by a creditor or corporate debtor as the case may be.
- Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 contains the procedure for fast track corporate insolvency resolution process.
- Regulation 3 of the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 provides for eligibility for Resolution Professional.
- Provision relating to claims by operational creditor, financial creditor, workmen and employees are contained in Regulations 7, 8 and 9 respectively.
- As per Regulation 17, the interim resolution professional shall file a report certifying the constitution of the committee to the Adjudicating Authority on or before the expiry of twenty-one days from the date of his appointment.
- As per Regulation 26, the resolution professional shall within seven days of his appointment, appoint one registered valuer to determine the fair value and the liquidation value of the corporate debtor in accordance with Regulation 34.
- Regulation 37 contains the mandatory contents of the Resolution Plan and Regulation 38 relating to approval of Resolution Plan.
- Regulation 39 contains the provisions relating to the extension of the Fast Track Process Period.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. What is the rationale behind the introduction of Fast Track process for insolvency resolution of corporate persons?
2. How is fast track process different from the corporate insolvency resolution process under Chapter II of Part II of the Code?
3. Whether the Adjudicating Authority has power, in a corporate insolvency resolution process (CIRP), to convert the CIRP into fast track process? Explain with the help of a case law.
4. What measures shall a Resolution Plan provide for insolvency resolution of the corporate debtor for maximization of value of its assets?
5. Discuss the provisions relating to the approval of Resolution Plan under the IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399cfcda795de38a23.pdf

Liquidation of Corporate Person

Lesson 5

KEY CONCEPTS

■ Liquidator ■ Liquidation Cost ■ Liquidation Commencement Date ■ Financial Sector Regulator ■ Claims ■ New Value ■ Security Interest

Learning Objectives

To understand:

- Initiation of Liquidation
- Appointment and Role of Liquidator
- Liquidation Estate
- Distribution of assets in Liquidation
- Dissolution of Corporate Debtor

Lesson Outline

- Introduction
- Initiation of Liquidation
- Appointment of Liquidator and Fee to be paid
- Powers and Duties of Liquidator
- Liquidation Estate
- Powers of Liquidator to Access Information
- Consolidation of claims
- Distribution of assets
- Dissolution of Corporate Debtor
- Case Laws
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

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.

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...."

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').

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).

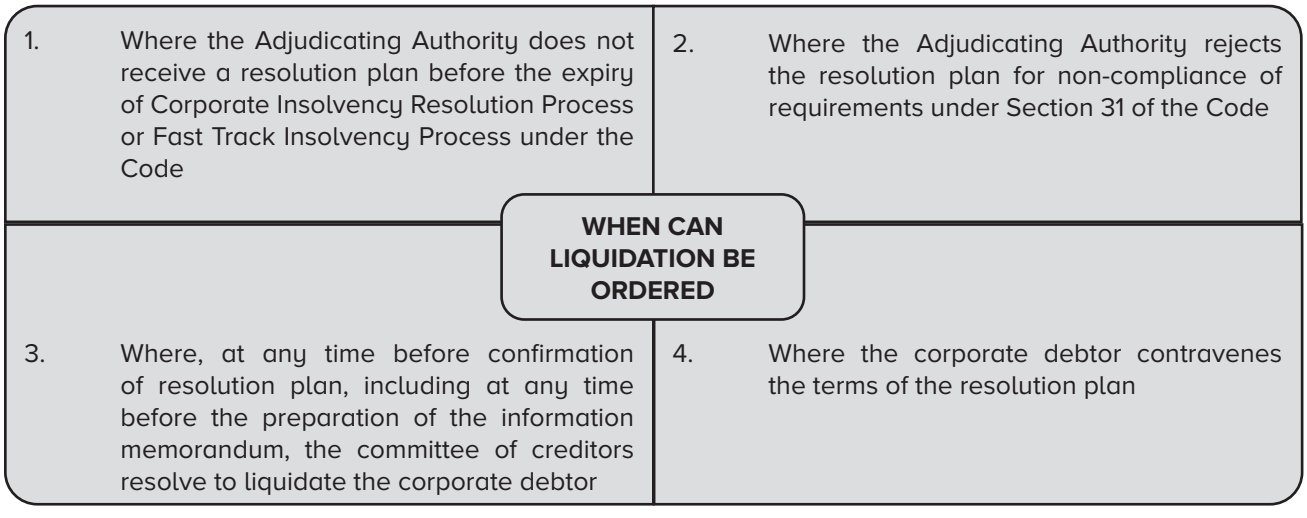
4. On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

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 – 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)]

In the matter of ***Vedikat Nut Crafts Pvt. Ltd.***, after perusing records, the Adjudicating Authority could not see any reason for not inviting resolution plan despite the fact that even a period of one month as balance period of 180 days was still available. NCLT observed that there was no reason for the Committee of Creditors to jump to the conclusion of seeking liquidation of the company without seeking extension of time of 90 days, without inviting expression of interest by the prospective resolution plan applicant as it falls foul of legal provisions and fair play. It presents a telltale story of the irregularity committed by the Committee of Creditors. To say the least such a decision is arbitrary and should not be sustained.

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)]

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.

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)]

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

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.

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)]

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 Adjudicatory 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:

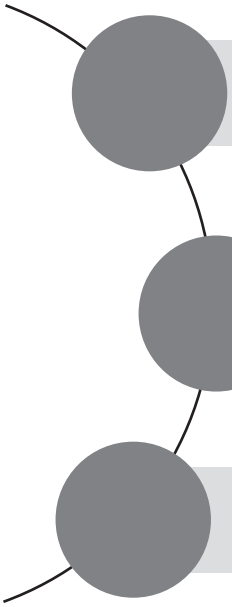
- eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013;
- not a related party of the corporate debtor; or
- has not been an employee or proprietor or a partner in the last three financial years:
  - (i) of a firm of auditors 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 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.

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.

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 realisable 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.

> 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.

(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) 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:

(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 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.

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.

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:

- Person who is or has been an officer, auditor, employee, promoter or partner of the corporate debtor;
- Person who was the interim resolution professional, resolution professional or the previous liquidator of the corporate debtor; or

- 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 honourably 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.

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 he 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.

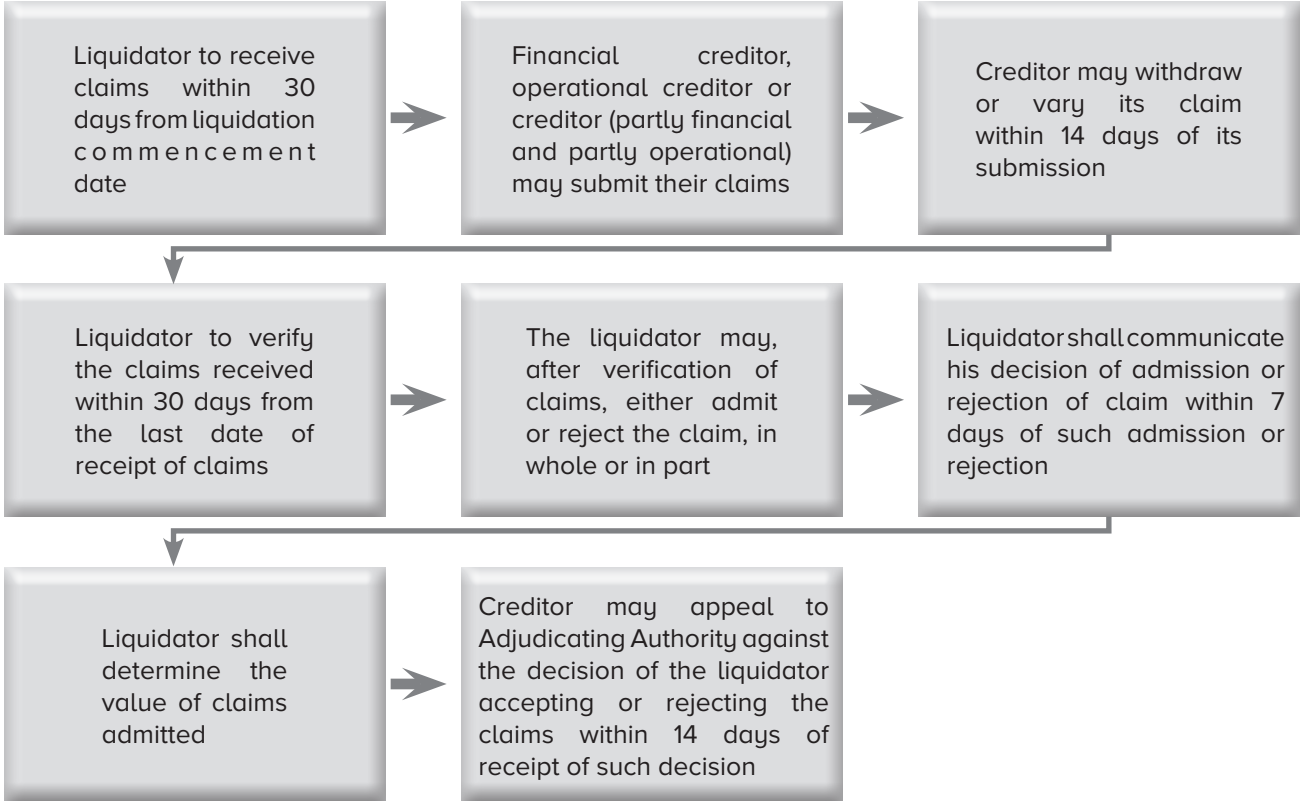


Fig.: Process of receipt, verification and collation of claims under the liquidation process

STAKEHOLDERS CONSULTATION COMMITTEE

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.

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.

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.

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;

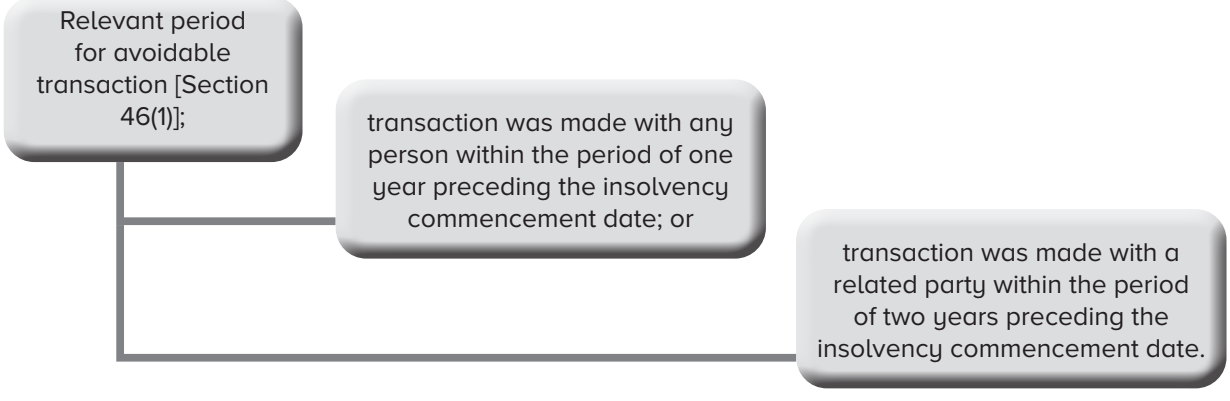
(b) is a related party, it shall be presumed that the interest was acquired, or the benefit was received otherwise than in good faith unless the contrary is shown. [Explanation I to section 44]

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.

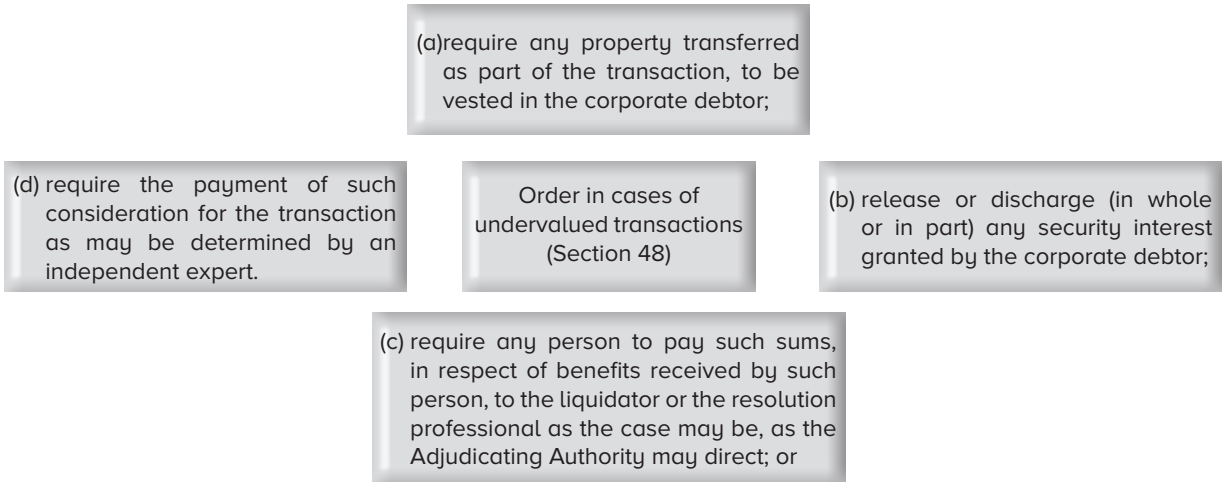
Order by Adjudicating Authority – Sub-section (2) further lays down that where, the Adjudicating Authority, after examination of the application made under sub-section (1), is satisfied that –

- 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 provison 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.

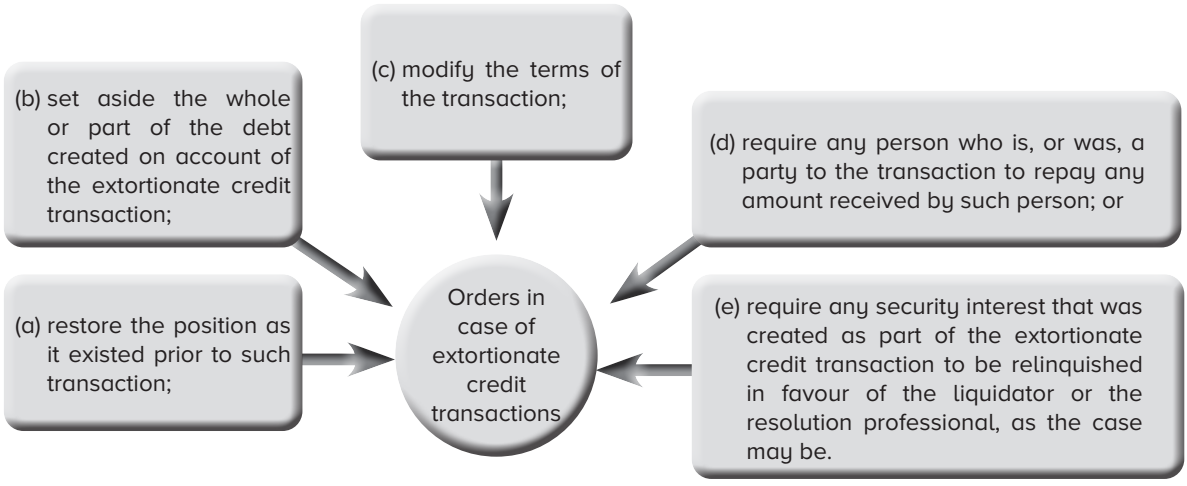
As per Regulation 11 of the Liquidation Regulations, a transaction shall be considered as an extortionate credit transaction where the terms:

(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 transactions 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 decides 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 the liquidation proceedings may -

(a) estate a d receive roceeds from the sale of assets by the iq idator i the ma er s ecified i sectio 53; or relinquish its security interest to the liquidation;

(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)]

Realisation 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 realise their security interests in the manner provided in section 52, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

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 realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in 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 to 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 creditors 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.

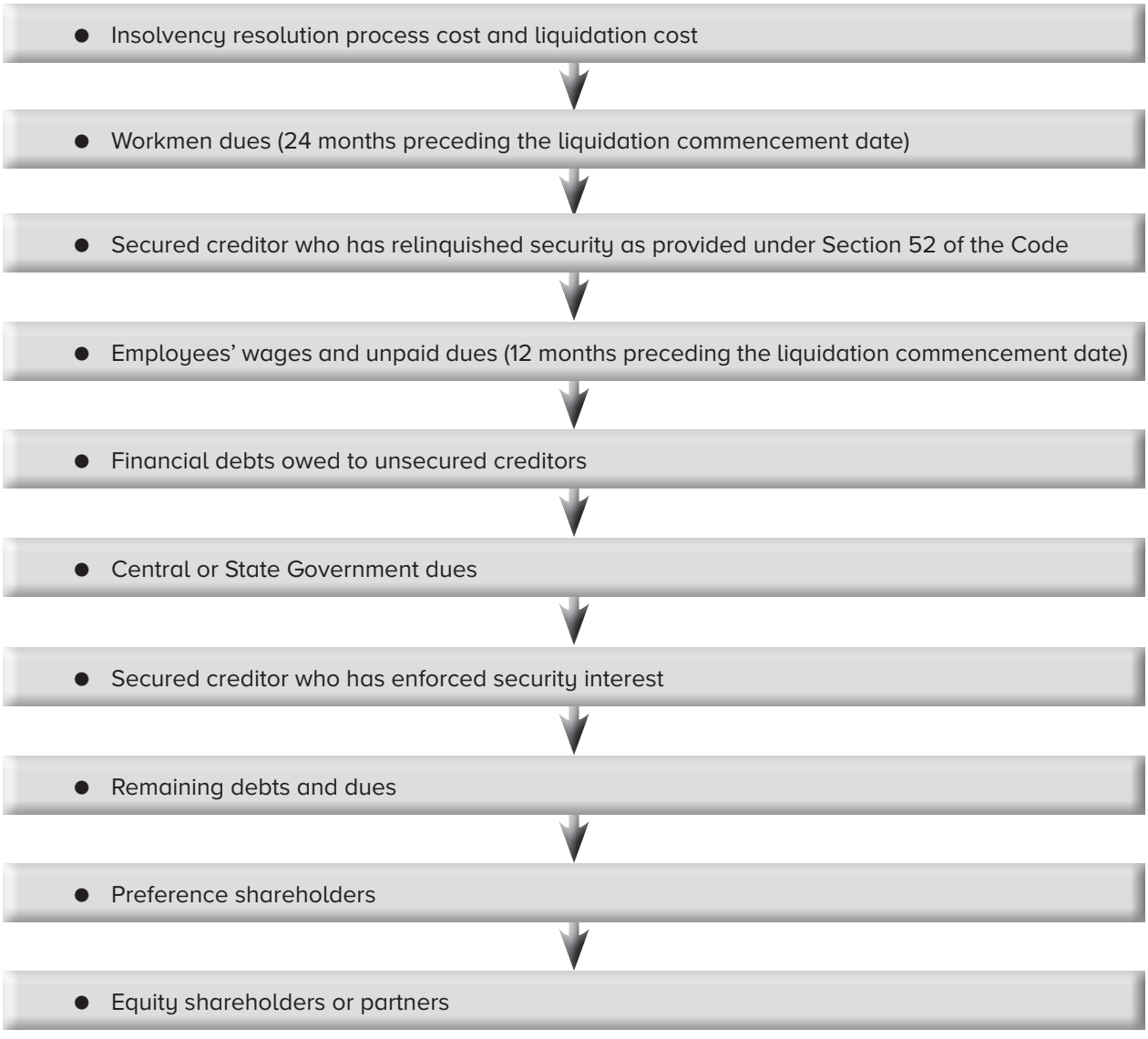


Fig.: Order of distribution of assets/ Waterfall Mechanism under the Code

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.

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 compiled 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.

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.

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.

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.

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.

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 lP, 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 lP) 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 ROUND-UP

- Liquidation provisions in Chapter III of Part II of the Code came into effect if the attempts to resolve corporate insolvency under Chapter II of the Code fail. Section 33 of the Code lists out the triggers for initiating the liquidation process for corporate persons.
- Section 34 of the Code provides for the appointment of liquidator and the fees to be paid to him. '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.
- 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.
- Section 35 provides a non-exhaustive list of powers and duties of the liquidator to ensure orderly completion of the liquidation proceedings.
- 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.
- 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.
- 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.
- 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.
- Section 53 deals with distribution of assets in liquidation. The Insolvency and Bankruptcy Code, 2016 makes significant changes in the priority of claims for distribution of liquidation proceeds.
- '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.
- '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 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.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. Discuss the grounds for the initiation of Liquidation process for corporate persons by the Adjudicating Authority.
2. Mention the powers and duties of Liquidator under section 35 of the Insolvency and Bankruptcy Code, 2016.
3. Write a note on Liquidation Estate.
4. What orders can be passed by the Adjudicating Authority for the avoidance of a preferential transaction?
5. What is the order of priority in distribution of proceeds from the sale of the assets during liquidation?

LIST OF FURTHER READINGS

- The Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/
- https://www.indiacode.nic.in/handle/123456789/2154?sam_handle=123456789/1362
- https://ibbi.gov.in/uploads/legalframwork/b37ac2f0201e2e3c41cfa3d989f58f4d.pdf

Voluntary Liquidation of Companies

Lesson 6

KEY CONCEPTS

■ Liquidator ■ Liquidation Commencement Date ■ Independent person ■ Assets in relation to sale of assets

Learning Objectives

To understand:

- Concept of Voluntary Liquidation
- Initiation of Voluntary Liquidation
- Powers & duties of Liquidator in Voluntary Liquidation
- Effect of Voluntary Liquidation

Lesson Outline

- Introduction
- Voluntary Liquidation for Corporate Persons
- Broad steps involved in the voluntary liquidation
- IBBI (Voluntary Liquidation Process) Regulations, 2017
- Proceeds of Liquidation and distribution of proceeds
- Flowchart of Voluntary Liquidation Process
- Case Law
- Annexure 1
- Annexure 2
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links

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:

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-

> 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.

section (1) shall meet such conditions and procedural requirements as may be specified by the Insolvency and Bankruptcy Board of India.

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:

The proviso appended to sub-section (3) of section 59 lays down that if 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.

(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

The proviso appended to sub-section (3) of section 59 days down that if the company owes any debt to any person creditors representing two third in value of the debt of the company shall approve the resolution passed sub-class (c) within seven days of such resolution.

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.

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)]

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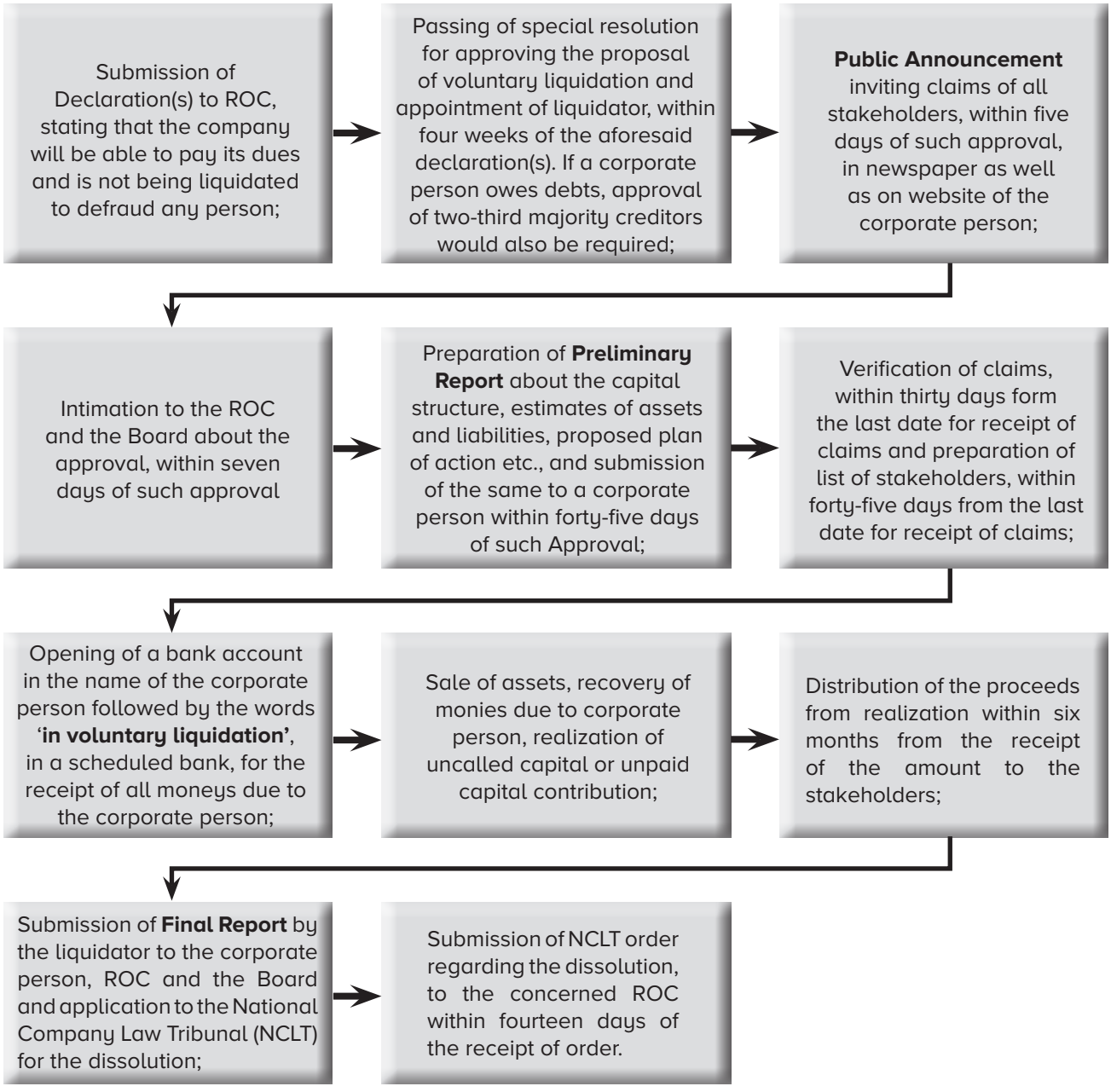
Copy of Order – A copy of an order under sub-section (8) shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered. [Section 59(9)]

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-

   (i) 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

   (ii) the corporate person is not being liquidated to defraud any person;

   (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;

   (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).

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; or

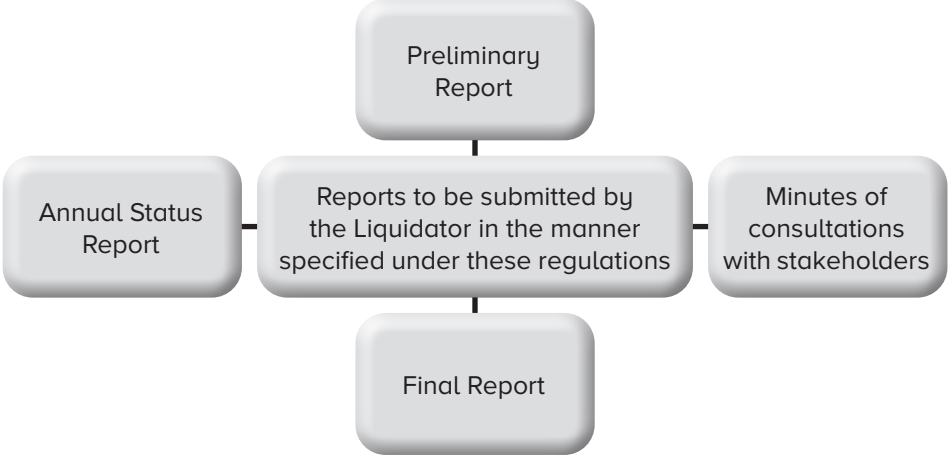
(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, at any time in the last three years.

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

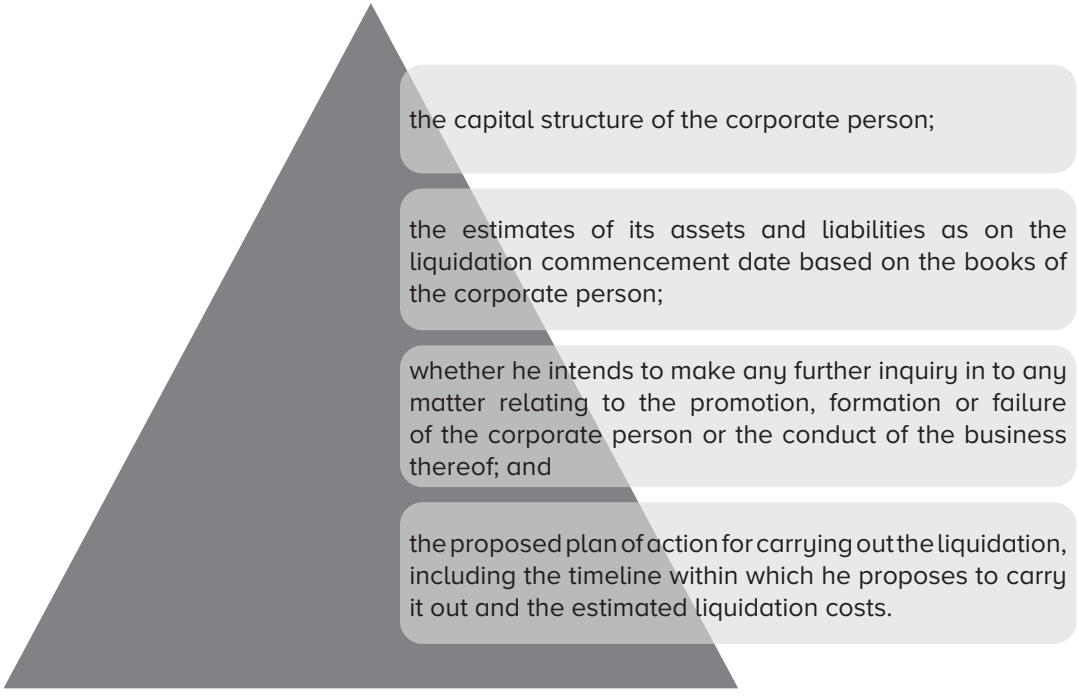


The liquidator shall prepare and submit Preliminary Report, Annual Status Report, minutes of consultations with stakeholders; and Final Report. The liquidator shall also make such reports and minutes available to a stakeholder in either electronic or physical form, on receipt of –

- an application in writing;
- cost of making such reports available to it; and
- an undertaking from the stakeholder that it shall maintain confidentiality of such reports and shall not use these to cause an undue gain or undue loss to itself or any other person.

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.

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.

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.

Verification of claims

As per Regulation 29 of the VL Regulations:

1. 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.
2. 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.

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.

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 six months 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.

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 twelve months, the liquidator shall-
   (a) hold a meeting of the contributories of the corporate person within fifteen days from the end of the twelve months from the liquidation commencement date, and at the end every succeeding twelve months till dissolution of the corporate person; and

(b) shall present an Annual 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.

3. The Annual Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

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.

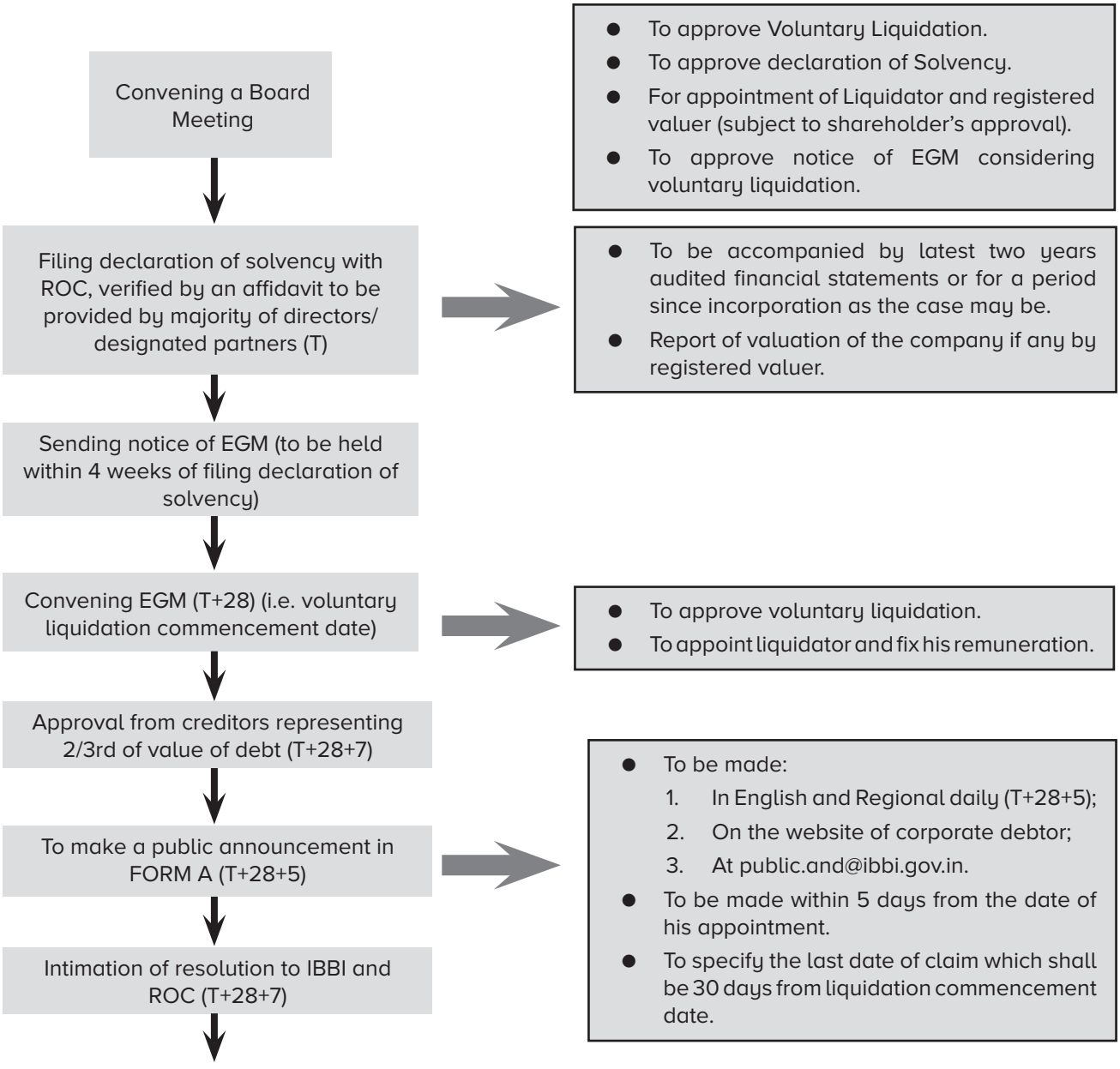
c. a sale statement in respect of all assets containing details with respect to their realized value, cost of realization, the manner and mode of sale, an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets etc.

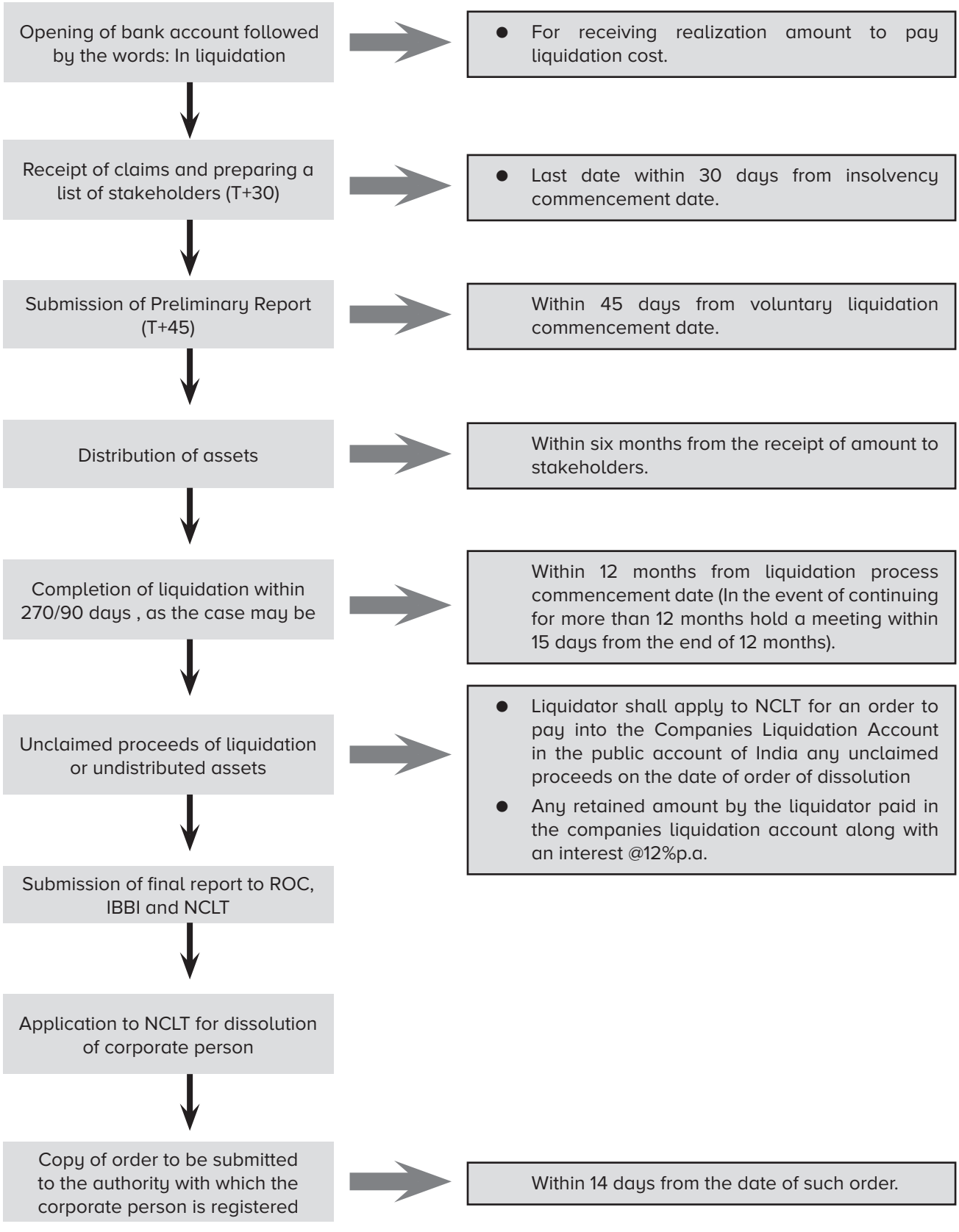
The liquidator shall send the Final Report to the Registrar and the Board. The liquidator shall also submit the Final Report along with Compliance Certificate in Form-H of VL Regulations along with the application under sub-section (7) of section 59 to the Adjudicating Authority.

Preservation of records

The liquidator must keep copies of all the documents needed to provide a thorough account of the voluntary liquidation procedure, according to Regulation 41 of the VL Regulations. The liquidator shall preserve electronic copy of all records (physical and electronic) for a minimum period of eight years; and 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.

FLOWCHART – VOLUNTARY LIQUIDATION PROCESS




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 insolvency commencement date.
Submission of Preliminary Report (T+45)
Within 45 days from voluntary liquidation commencement date.
Distribution of assets
Within six months from the receipt of amount to stakeholders.
Completion of liquidation within 270/90 days , as the case may be
Within 12 months from liquidation process commencement date (In the event of continuing for more than 12 months hold a meeting within 15 days from the end of 12 months).
Unclaimed proceeds of liquidation or undistributed assets
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.
Submission of final report to ROC, IBBI and NCLT
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.

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 atleast 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. XYZwas 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 auditors 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 with 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 voluntary 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.

LESSON ROUND-UP

- As per section 59, 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.
- The Insolvency and Bankruptcy Board of India has made the IBBI (Voluntary Liquidation Process) Regulations, 2017 to regulate the voluntary liquidation of corporate persons.
- 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.
- It is required to submit a declaration to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person.
- Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator, within four weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required.
- Public announcement is issued inviting claims of all stakeholders, within five days of such approval, in newspaper as well as on website of the corporate person.
- 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.
- 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.
- 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.
- The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders.
- The liquidator shall endeavor to complete the liquidation process of the corporate person within the prescribed timelines from the liquidation commencement date.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. What is Voluntary Liquidation under the Insolvency and Bankruptcy Code, 2016?
2. What are the onditions for voluntary liquidation proceedings of corporate person registered as company?
3. Mention the conditions a corporate person registered as a company shall meet for initiation of Voluntary Liquidation proceedings.
4. Write in brief the steps involved in Voluntary Liquidation process.
5. Discuss the differences between the procedure to be followed for voluntary liquidation proceedings and the procedure to be followed for liquidation under Chapter III of the Code.
6. Write a note on the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.

LIST OF FURTHER READINGS

- The Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Insolvency and Bankruptcy Board of India (Voluntary Liquidation) Regulations, 2017.
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016.

OTHER REFERENCES (Including Websites/Video Links)

- https://ibbi.gov.in/
- https://www.indiacode.nic.in/handle/123456789/2154?sam_handle=123456789/13
- https://ibbi.gov.in/IBBI%20(Voluntary%20Liquidation)%20Regulations%202017.pdfTADAV

Adjudication and Appeals for Corporate Persons

Lesson 7

KEY CONCEPTS

■ Adjudicating Authority ■ Corporate Person ■ Asset Reconstruction Companies ■ Assignee ■ Corporate Insolvency Resolution Process ■ Credit Information Company ■ Financial Contract ■ Identification Number

Learning Objectives

To understand:

- Adjudicating Authority for corporate persons
- Appeals and Appellate Authority
- NCLT benches
- Fraudulent and malicious proceedings

Lesson Outline

- Introduction
- Adjudicating authority for corporate persons
- Appeals and appellate authority
- Appeal to the Supreme Court
- NCLT benches and their jurisdiction
- Fraudulent or malicious proceedings
- Case Laws
- Fraudulent Trading or Wrongful Trading
- Proceeding under Section 66
- Fraudulent Management of Corporate Debtor during Pre-Packed Insolvency Resolution Process
- The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/Video Links)

REGULATORY FRAMEWORK

- Section 408 of Companies Act, 2013
- Section 60 to 67A of the Insolvency and Bankruptcy Code, 2016
- The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

INTRODUCTION

Understanding of Adjudicating Authority and its jurisdiction enables an applicant to file the application in right forum. Time is the essence of the Insolvency and Bankruptcy Code, 2016 ('Code') and to ensure effective and successful implementation of the Code; adherence to the timelines prescribed under the Code is of utmost importance. Adjudicating authority is one of the key institutional pillars and backbone of the insolvency ecosystem of India.

Adjudicating authority plays a two-fold role while functioning under the Code. One role is administrative in nature and other is judicial in nature. By administrative, it means that adjudicating authority has to ascertain whether a particular case is complete in terms of Section 7/9/10 of the Insolvency and Bankruptcy Code, 2016 (as the case may be) or it suffers from some defect. Whereas by judicial, it means to decide whether to admit corporate insolvency resolution process or liquidation of a corporate debtor or not.

This lesson enables a reader to understand:

- Adjudicating Authority for dealing with corporate insolvency resolution process and corporate liquidation.
- Appellate Authority under the Code and timeline to prefer appeal.
- NCLT Benches across India and their jurisdiction.
- Applicability of Limitation Act, 1963 for proceedings undergoing the Code.
- Penalty provisions for initiating fraudulent or malicious proceedings under the Code.
- Penalty provisions where corporate debtor is involved in fraudulent or wrongful trading.

To ensure better understanding of readers about the Insolvency and Bankruptcy Code, 2016 and its applicability; reference to case laws have also been made.

ADJUDICATING AUTHORITY FOR CORPORATE PERSONS

Section 60 of the Insolvency and Bankruptcy Code, 2016 deals with Adjudicating Authority (AA) in relation to insolvency resolution and liquidation for corporate persons. Corporate person includes corporate debtors and personal guarantors. AA in relation to corporate person is National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of a corporate person is located.

In the case of *M/s. Fortune Plastech v/s. M/s. Avni Energy Solutions Private Limited,* the matter was filed before NCLT, Bengaluru Bench, under Section 9 of the Insolvency and Bankruptcy Code, 2016 dealing with the initiation of corporate insolvency process by Operational Creditor. The application was dismissed by NCLT on the grounds that the petition was filed by the Petitioner with the wrong Bench. Since the Respondent Company is registered in Andhra Pradesh, so as per the jurisdiction, the case is to be filed at NCLT, Hyderabad Bench rather than NCLT, Bengaluru Bench. Therefore, learned counsel of the Petitioner withdrew the petition with the liberty to file the same before NCLT, Hyderabad Bench.

In *E S Krishnamurthy & Ors. Vs. M/s Bharath Hi Tech Builders Pvt. Ltd*., the Supreme Court was asked to decide on whether the Adjudicating Authority could dismiss the petition under Section 7 because the corporate debtor had started the process of settling with the financial creditors while handling an application under the Code without considering its merits. Whether the NCLT and NCLAT were right in their approach to reject the appellants' Section

7 petition at the "pre-admission stage" and order them to reach a settlement with the Respondent within three months.

In the said matter, Supreme Court held that the Adjudicating Authority must either admit the CIRP application or it must reject the same. The Code does not provide for the Adjudicating Authority to undertake any other action, but for the two choices available. Also, the Adjudicating Authority is empowered only to verify whether a default has occurred or not. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5) of the Code. The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute.

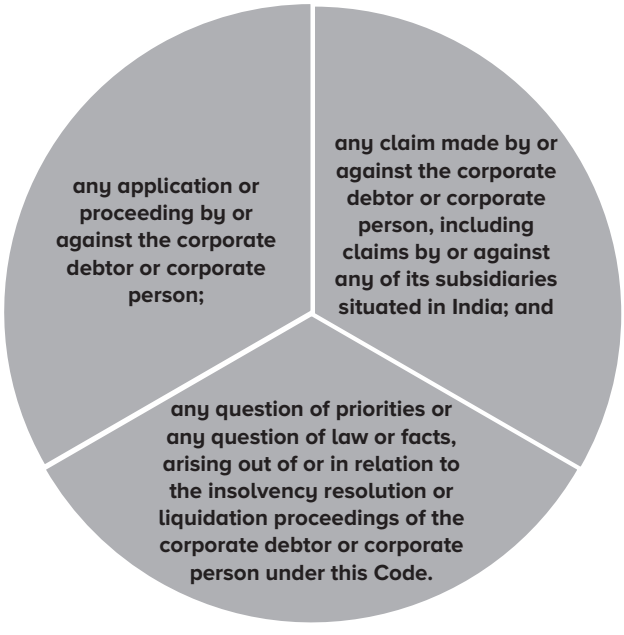
Notwithstanding anything to the contrary contained in the Insolvency and Bankruptcy Code, 2016, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to insolvency resolution process or liquidation or bankruptcy of a corporate guarantor or personal guarantor of such corporate debtor (*as the case may be*) shall be filed before the NCLT.

In the case of *State Bank of India v/s. D.S Rajendra Kumar*, it is observed that if corporate insolvency resolution process of corporate debtor has been initiated before NCLT, then insolvency resolution process of personal guarantor of the corporate debtor can be initiated before same NCLT Bench instead of Debt Recovery Tribunal ("DRT").Further, it was also held in this case that order of moratorium is applicable only to the proceedings against corporate debtor and the personal guarantor but not applicable for filing application for initiating corporate insolvency resolution process against the guarantor or personal guarantor (NCLAT order dated 18th April, 2018)

However, corporate insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor (*as the case may be*) pending in any court or tribunal shall be transferred to the AA dealing with corporate insolvency resolution process or liquidation proceeding of such corporate debtor.

In the case of *Sanjeev Shriya v/s. State Bank of India*, Allahabad High Court held that two parallel proceeding against the corporate debtor and the personal guarantor cannot go simultaneously in two different jurisdictions. (Allahabad High Court order dated 6th September, 2017)

Not with standing anything to the contrary contained in any other law for the time being in force, NCLT shall have jurisdiction to entertain or dispose of:



AA has jurisdiction to entertain or dispose of an application or proceeding by or against the corporate debtor or corporate person including any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India.

Supreme Court in the matter of *Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain, RP, SK Wheels Pvt. Ltd* held that the residuary jurisdiction of the NCLT under Section 60(5)(c) of the Code cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor. In any case, the NCLT and NCLAT's action cannot be viewed as a rewriting of the parties' agreement. The NCLT and NCLAT have the authority to take action if a third party's action threatens to topple the CIRP. They are entrusted with the duty of protecting the Corporate Debtor's existence.

Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been passed, the period during which such moratorium is in place shall be excluded.

In the matter of *New Delhi Municipal Council Vs. Minosha India Ltd*., in May 2018, NCLT, Mumbai Bench admitted an application under Section 10 of the Code and declared the moratorium. In November 2019, resolution plan in respect of the corporate debtor was approved by the NCLT. In November 2020, the Respondent filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 and accordingly, the High Court of Delhi allowed the application and appointed an Arbitrator.

The impact of Section 60(6) of the Code and whether the aforementioned provision gives rise to a new lease of life to a proceeding at the instance of the corporate debtor on the basis of a moratorium that was in place are the questions that need to be answered in this appeal. It also needs to be determined whether the corporate debtor can use the aforementioned provision to bring the application in this case that was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996.

In the aforementioned case, the Supreme Court ruled that Section 60(6) of the IBC does allow for the exclusion of the entire time the corporate debtor's moratorium was in effect from any action that is intended to be brought against it. Under the IBC, by virtue of the order admitting the CIRP application and imposing moratorium, proceedings as are contemplated in Section 14 would be tabooed. This also does not include an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 by the corporate debtor. Additionally, there is no explicit exclusion of the Court's jurisdiction or authority to hear any such case brought by the corporate debtor.

Who shall be the Adjudicating Authority for a corporate person?

In case of a corporate person including corporate debtors and personal guarantors the Adjudicating Authority shall be National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of the corporate person is situated, as per section 60 (1) of the Code. Further as per section 60 (2), the Code provides that without any prejudice to section 60 (1), where the corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, of such corporate debtor shall be filed before such National Company Law Tribunal (NCLT).

In addition to the above, section 60 (3) provides that an insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation processing of such corporate debtor

What are the jurisdictional powers of Adjudicating Authority?

As per Section 60 of the Code, the Adjudicating Authority i.e., National Company Law Tribunal shall have jurisdiction to entertain or dispose of the following:-

(a) any application or proceeding by or against the Corporate Debtor / 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.

(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.

APPEALS AND APPELLATE AUTHORITY

Section 61 of the Insolvency and Bankruptcy Code, 2016 provides that notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the AA in the context of corporate insolvency resolution process or liquidation of corporate person may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT).

Every appeal before NCLAT shall be filed within thirty days (30 days) from the date of receipt of such order. However, NCLAT may allow one time extension of fifteen days (15 days) to file an appeal after the expiry of 30 days if it is satisfied that there was sufficient cause for not filing the appeal within first 30 days.

An appeal against an order approving a resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016 may be filed on the following grounds:

- The approved resolution plan is in contravention of the provisions of any law for the time being in force;
- There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- The insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
- 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 Insolvency and Bankruptcy Board of India ("Board");
- The resolution plan does not comply with any other criteria specified by the Board.

An appeal against a liquidation order passed under Section 33 of the Insolvency and Bankruptcy Code, 2016 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

In the case of *Steel Konnect (India) Private Limited v/s. Hero Fincorp Ltd*., initially Courts were of view that once an insolvency application is admitted, the Code does not permit erstwhile company directors to maintain an appeal on behalf of the corporate debtor and only the Interim Resolution Professional ("IRP") can maintain an appeal on behalf of the company.

> Further, it was observed the power of the IRP as provided under the Code does not include the power to initiate proceedings on behalf of the Corporate debtor. The aforesaid issue was raised in *Steel Konnect (India) Pvt Ltd v. M/s Hero Fincorp Ltd*, where it was held that upon admission of application under the Insolvency and Bankruptcy Code, 2016 and commencement of corporate insolvency resolution process, for preferring an appeal before NCLAT; the corporate debtor can appear through its Board of Directors or its officer or its authorized representative.

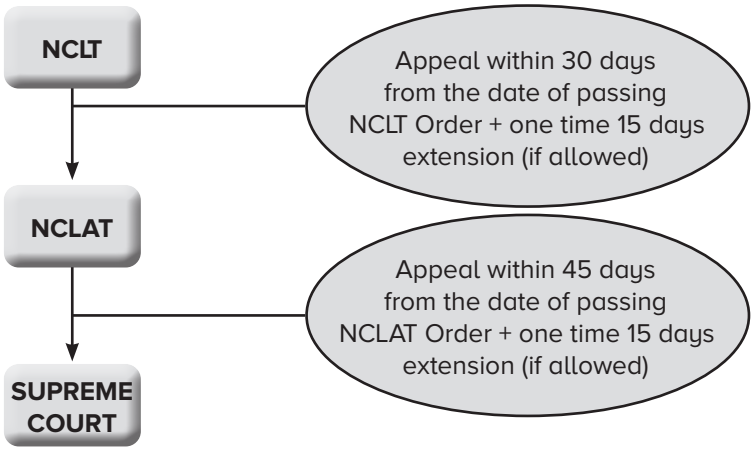
If corporate debtor is represented before AA during appeal through its Board of directors, no objection can be raised in this regard as initiation of corporate insolvency resolution process only suspends functioning of Board of directors in that corporate debtor not the Board of directors as a whole. Also, the directors continue to be in their position and are still present in the records maintained by the Registrar of Companies and are just put in temporary suspension for 180/270 days till continuation of the insolvency resolution process. (NCLAT order dated 29th August, 2017)

In the case of *Uttam Galva Steels Limited v/s. Union of India*, Bombay High Court provided interim protection to the petitioners to withdraw the petition with the liberty to petitioners to prefer appeal under Section 61 of the Code. Bombay High Court also stated that since Interim Resolution Professional has not been appointed in the said case and keeping in view the consequences of appointment of Interim Resolution Professional, Bombay High Court in the interest of justice directed not to appoint Interim Resolution Professional from next two weeks from the date of this order thereby allowing time to the petitioner to prefer an appeal. Order also provided that interim protection provided by the Court shall not be considered as expression of view of the Bombay High Court by the appellate authority while deciding the appeal. (Bombay High Court order dated 20th April, 2017)

APPEAL TO SUPREME COURT

Section 62 of the Insolvency and Bankruptcy Code, 2016 provides that, any person aggrieved by the order of NCLAT may prefer an appeal to the Supreme Court (SC) on a question of law arising out of such order.

Every appeal before SC shall be filed within forty five (45 days) from the date of receipt of such order. However SC may allow **one time extension of fifteen days** (15 days) to file an appeal after the expiry of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within first 45 days.



NCLT BENCHES & THEIR JURISDICTION

In the first phase the Ministry of Corporate Affairs had set-up eleven Benches, one Principal Bench at New Delhi and one each regional Benches at New Delhi, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Jaipur, Kolkata and Mumbai, and later added Cuttack, Kochi, Indore, and Amravati taking total number to fifteen Benches:

S.No.	Name of Bench	Location	Territorial Jurisdiction of the Bench
1	a) National Company Law Tribunal, Principal Bench. b) National Company Law Tribunal, New Delhi Bench.	New Delhi	1. Union territory of Delhi.
2	National Company Law Tribunal, Ahmedabad Bench.	Ahmedabad	1. State of Gujarat. 2. Union territory of Dadra and Nagar Haveli. 3. Union territory of Daman and Diu.
3	National Company Law Tribunal, Allahabad Bench.	Allahabad	1. State of Uttar Pradesh. 2. State of Uttarakhand.

S.No.	Name of Bench	Location	Territorial Jurisdiction of the Bench
4	National Company Law Tribunal, Bengaluru Bench.	Bengaluru	1. State of Karnataka.
5	National Company Law Tribunal, Chandigarh Bench.	Chandigarh	1. State of Himachal Pradesh. 2. State of Jammu and Kashmir. 3. State of Punjab. 4. Union territory of Chandigarh. 5. State of Haryana.
6	National Company Law Tribunal, Chennai Bench.	Chennai	1. State of Tamil Nadu. 2. Union territory of Puducherry.
7	National Company Law Tribunal, Cuttack Bench.	Cuttack	1. State of Chhattisgarh. 2. State of Odisha.
8	National Company Law Tribunal, Guwahati Bench.	Guwahati	1. State of Arunachal Pradesh. 2. State of Assam. 3. State of Manipur. 4. State of Mizoram. 5. State of Meghalaya. 6. State of Nagaland. 7. State of Sikkim. 8. State of Tripura.
9	National Company Law Tribunal, Hyderabad Bench.	Hyderabad	1. State of Telangana.
10	National Company Law Tribunal, Jaipur Bench.	Jaipur	1. State of Rajasthan.
11	National Company Law Tribunal, Kolkata Bench.	Kolkata	1. State of Bihar. 2. State of Jharkhand. 3. State of West Bengal. 4. Union territory of Andaman and Nicobar Islands.
12	National Company Law Tribunal, Mumbai Bench.	Mumbai	1. State of Goa. 2. State of Maharashtra.
13	National Company Law Tribunal, Kochi Bench.	Kochi	1. State of Kerala. 2. Union territory of Lakshadweep.
14	National Company Law Tribunal, Indore Bench.	Indore	1. State of Madhya Pradesh.
15	National Company Law Tribunal, Amravati Bench.	Amravati	1. State of Andhra Pradesh.

In case of ***Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019]*** SC order dt. 08.03.2021, Court held that-

i. NCLT/NCLAT can exercise jurisdiction under section 60(5)(c) of the Code to stay termination of contracts solely on account of CIRP being initiated against the CD.

ii. NCLT has the jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the CD; however, in doing so, the NCLT and NCLAT must ensure that they do not usurp the legitimate jurisdiction of other courts and tribunals.

iii. RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes out of the insolvency, the RP must approach the competent authority.

iv. NCLT cannot do what the Code consciously did not provide it the power to do.

v. The jurisdiction of the NCLT cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the CD.

vi. It cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause, if such termination will not have the effect of making certain the death of the CD.

vii. NCLT to be cautious in setting aside valid contractual terminations which would merely dilute the value of the CD, and not push it to its corporate death.

Note: With effect from 1st June,2016 NCLAT was established under Section 410 of the Companies Act, 2013 to consider appeals against NCLT orders. With effect from 1st December 2016, NCLAT is also the Appellate Tribunal for hearing appeals against the decisions made by NCLT(s) under Section 61 of the Code. For challenges against decisions made by the Insolvency and Bankruptcy Board of India under Section 202 and 211 of the IBC, NCLAT serves as the appellate tribunal. The Principal Bench in New Delhi and the Chennai Bench are the two NCLAT tribunals that are currently in operation.

Section 64 of the insolvency and Bankruptcy Code, 2016 provides that where an application is not disposed of or order is not passed within the timelines specified under the Code, then NCLT/NCLAT (as the case may be), shall record the reasons for not doing so within the period so specified and the President of NCLT or Chairperson of NCLAT, as the case may be after taking into account the reasons so recorded, extend the period specified in the Insolvency and Bankruptcy Code, 2016 but not exceeding ten days.

No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the NCLT/NCLAT under this Code.

CIVIL COURT NOT TO HAVE JURISDICTION

Section 63 of the Insolvency and Bankruptcy Code, 2016 provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT/NCLAT has jurisdiction under this Code.

FRAUDULENT OR MALICIOUS INITIATION OF PROCEEDINGS

Section 65 of the Insolvency and Bankruptcy Code, 2016 provides that if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, AA may impose upon a such person ***a penalty which shall not be less than One Lakh Rupees, but may extend to One Crore Rupees***.

Whereas, if any person initiates voluntary liquidation proceedings with the intent to defraud any person, AA may impose upon such person ***a penalty which shall not be less than One Lakh Rupees, but may extend to One Crore Rupees***.

In ***M/s. Unigreen Global Private limited v. Punjab National Bank and others*** , Corporate debtor filed an application under section 10 of the Code for initiation of CIRP on the ground that it had failed to pay debt due to financial creditors and other creditors. Bank alleged suppression of facts on the ground that the corporate debtor had not disclosed full facts and had not furnished full particulars in relation to assets mortgaged or securities furnished to the financial creditors. Therefore, Adjudicating Authority rejected the application and imposed penalty on the corporate debtor. Corporate debtor filed an appeal with NCLAT against the order.

NCLAT held that Section 10 of the Code does not empower the adjudicating authority to go beyond the records as prescribed under Section 10 and the information as required to be submitted by a corporate debtor in Form 6 of the NCLT Rules, 2016 subject to ineligibility, if any, as prescribed under Section 11 of the Code. Section 11 of the Code prescribes conditions which make an applicant ineligible/disqualified to make an application under the Code to initiate corporate insolvency resolution process. as per the judgment of NCLAT an applicant does not require to disclose or plead any fact which is unrelated or beyond the requirements of the Code or forms prescribed under the NCLT Rules, 2016 and thus non-disclosure of such facts cannot be termed as suppression of facts by a corporate debtor.

In case of ***Monotrone Leasing Pvt. Ltd. Vs. PM Cold Storage Pvt. Ltd. [CA (AT) (Ins.) No. 99 of 2020],*** NCLAT order dt. 16.07.2020, it was held that though section 65 provides for penal action against initiating CIRP with a fraudulent or malicious intent, the same cannot be construed to mean that if an application is filed under section 7, 9 or 10 of the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the AA on the ground that the intent of the applicant was not resolution.

In ***Amit Katyal Vs. Meera Ahuja & Ors. [CA (AT) (Ins.) No. 1380 of 2019]*** NCLAT order dt. 09.11.2020 it wasz stated that

i. In case an allottee does not want to go ahead with its obligation to take possession of the flat, but wants to get back the monies already paid, by way of coercive measure, the use of section 65 is justified, as one allottee is misusing his position to stall the entire project. But it does not mean that an application satisfying the requirements of section 7 or 9 could be dismissed arbitrarily under the guise of section 65.

ii. The Code provides stringent action under section 65 against the person who initiates proceeding fraudulently or with malicious intent, for the purpose other than the resolution of insolvency or liquidation.

FRAUDULENT TRADING OR WRONGFUL TRADING

Section 66 of the Insolvency and Bankruptcy Code, 2016 provides that if during corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, then AA may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

On an application made by a resolution professional during the corporate insolvency resolution process, the adjudicating authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if:

(a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

Explanation – For the purposes of this Section a director or partner of the corporate debtor (as the case may be) shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A. [Inserted vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020]

PROCEEDING UNDER SECTION 66

Section 67 of the Insolvency and Bankruptcy Code, 2016 provides that where the Adjudicating Authority passes an order under sub-section (1) or subsection (2) of section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order, and in particular, the Adjudicating Authority may:

(a) provide for the liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and	(b) from time to time, make such further directions as may be necessary for enforcing any charge imposed under this section.

Explanation – For the purposes of this section, "assignee" includes a person to whom or in whose favour, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the declaration has been made.

Also, where the Adjudicating Authority has passed an order under sub-section (1) or (2) of section 66, as the case may be, in relation to a person who is a creditor of the corporate debtor, it may, by an order, direct that the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the corporate debtor.

What action can be taken for fraudulent trading or wrongful trading?

As per Section 66 of the Code, If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

In case of, ***Axis Bank Ltd. vs. Anuj Jain [CA (AT) (Ins.) No. 243 of 2018 and Ors.]*** NCLAT order dt. 01.08.2019, the AA had allowed the application under sections 66, 43 and 45 of the Code and ordered that the mortgaged properties be vested with the CD. On appeal, the NCLAT noted that the mortgages were made in favour of the banks and financial institutions by the CD in the ordinary course of business. Further, in absence of any contrary evidence to show that they were made to defraud the creditors of the CD or for any fraudulent purpose, it set aside the order of the AA.

FRAUDULENT MANAGEMENT OF CORPORATE DEBTOR DURING PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

Section 67A of the Insolvency and Bankruptcy Code, 2016 inserted by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 provides that when an officer of the corporate debtor manages its affairs with the intent to defraud the corporate debtor's creditors or for any other fraudulent purpose on or after the pre-packaged insolvency commencement date, AA may upon application by the resolution professional, pass an order imposing upon any such officer a penalty that shall not be less than one lakh rupees but may extend to one crore rupees.

THE INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016

These rules were made by Central Government 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 to be effective from 1st December 2016. These Rules shall apply to matters relating to the corporate insolvency resolution process. Some of the provisions of the said rules are discussed below:

Definitions

In these Rules, unless the context otherwise requires,

(a) "Corporate insolvency resolution process" means the insolvency resolution process for corporate persons under Chapter II of Part II of the Code;

(b) "Credit Information Company" shall have the meaning as assigned to it under the Credit information Companies (Regulation) Act, 2005;

(c) "financial contract" means a contract between a corporate debtor and a financial creditor setting out the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment;

(d) "Identification number" means the limited liability partnership identification number or the corporate identity number, as the case may be, of the corporate person.

Application by financial creditor (Rule 4)

1. A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

2. Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

3. The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

4. In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

In the matter of ***Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy and Anr.***, Supreme Court held that since a Financial Creditor is required to apply under Section 7 of the Code in Form 1, the Financial Creditor can only fill in particulars as specified in the various columns of the Form. There is no scope for elaborate pleadings. An application to the Adjudicating Authority under Section 7 of the Code in the prescribed form, cannot therefore, be compared with the plaint in a suit.

Supreme Court also held that an application under Section 7 of the Code would not be barred by limitation on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as Non-Performing Asset, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

What are the forms to be used for Application to be filed before National Company Law Tribunal (NCLT) by Financial Creditor, Operational Creditor and Financial Debtor?

The form in which the application is to be preferred is provided in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as follows:

- Financial Creditor – Form 1
- Operational Creditor – Form 5
- Corporate Applicant – Form 6

What is the process for making an application by financial creditor?

As per Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, a financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority. In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

Demand notice by operational creditor (Rule 5)

1. An operational creditor shall deliver to the corporate debtor, the following documents, namely.-
   a. a demand notice in Form 3; or
   b. a copy of an invoice attached with a notice in Form 4.
2. The demand notice or the copy of the invoice demanding payment referred to in sub- section (2) of section 8 of the Code, may be delivered to the corporate debtor,
   a. at the registered office by hand, registered post or speed post with acknowledgement due; or
   b. by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.
3. A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

What is meant by a Demand Notice? Can a Demand Notice by an operational creditor be issued in any form?

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. No, the Demand Notice has to be issued in Form No. 3 or a copy of an invoice attached with a notice in Form 4 as provided in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Application by operational creditor (Rule 6)

1. An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

2. The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

In ***JK Jute Mill Mazdoor Morcha vs. Juggilal Kamlapat Jute Mills Company Ltd. & Ors. [Civil Appeal No. 20978 of 2017] SC order dt. 30.04.2019*** it was held that the trade union collectively represents its members who are workers, to whom dues may be owed by the employer, which are debts owed for services rendered by each individual workman. If each workman files a separate cause of action, the fact that a joint petition could be filed under rule 6 of AA Rules would be ignored.

What is the process for making an application by Operational creditor?

An operational creditor shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority

Application by corporate applicant (Rule 7)

1. A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
2. The applicant under sub-rule(1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

What is the process for making an application by corporate applicant?

A corporate applicant shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, accompanied with documents and records required therein and as specified in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Withdrawal of application (Rule 8)

The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.

In case of***, Lokhandwala Kataria Construction Pvt. Ltd. vs. Nisus Finance and Investment Managers LLP [Civil Appeal no. 9279 of 2017] SC order dt. 24.07.2017*** In the appeal before SC, a question as to whether, in view of rule 8 of the AA Rules, the NCLAT could utilise the inherent power under rule 11 of the National Company Law Appellate Tribunal Rules, 2016, to allow compromise before it by the parties after admission of the matter. The SC upheld the views of NCLAT that after admission, inherent power could not be utilised. However, by using its power under Article 142 of the Constitution, allowed the consent terms.

Interim resolution professional (Rule 9)

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. (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.

Filing of application and application fee (Rule 10)

1. Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under subsection (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.

The Government amended the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on 14th March, 2019 to modify the forms to enable application for initiation of fast track CIRP and to require submission of details of the Corporate Debtor relevant for determination if fast track is available for its resolution.

LESSON ROUND-UP

- Sections 60 to 67 of the Code contain provisions relating to Adjudicating Authority for Corporate Persons.
- Adjudicating Authority (AA) in relation to insolvency resolution and liquidation of corporate person is National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of a corporate person is located.
- AA has jurisdiction to entertain or dispose of an application or proceeding by or against the corporate debtor or corporate person including any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India.
- Section 61 provides that any person aggrieved by the order of the AA in the context of corporate insolvency resolution process or liquidation of corporate person may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT).
- Every appeal before NCLAT shall be filed within thirty days (30 days) from the date of receipt of such order. NCLAT may allow one time extension of fifteen days (15 days) to file an appeal after the expiry of 30 days if it is satisfied that there was sufficient cause for not filing the appeal within first 30 days.
- Section 61(3) mentions the grounds on which an appeal against an order approving a resolution plan under section 31 may be filed.

- Section 61(4) provides that an appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.
- Section 62 provides that, any person aggrieved by the order of NCLAT may prefer an appeal, within forty five days, from the date of receipt of such order to the Supreme Court on a question of law arising out of such order.
- SC may allow one time extension of fifteen days to file an appeal after the expiry of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within first 45 days.
- Section 63 provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT/NCLAT has jurisdiction under this Code.
- Section 65 provides that if any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent, AA may impose upon such person a penalty which shall not be less than One lakh rupees, but may extend to One Crore rupees.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. Mention the provisions relating to making an Application to the Adjudicating Authority under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. Discuss whether it is open to the Appellate Tribunal to pass an order of settlement even though the promoter agrees to pay all the dues.
3. Mention the grounds on which an appeal against an order of NCLT approving a resolution plan under section 31 of the Code may be filed with the NCLAT.
4. Examine whether Adjudicating Authority is empowered to decide the resolution fee payable to the Resolution Professional.
5. Write a short note on-
   - Appeals and appellate tribunal
   - Jurisdiction of NCLT
   - Fraudulent or malicious initiation of proceedings
   - Fraudulent trading or wrongful trading.

LIST OF FURTHER READINGS

- The Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016.

OTHER REFERENCES (Including Websites/Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399cfcda795de38a23.pdf
- https://www.mca.gov.in/content/mca/global/en/home.html

Pre-Packaged Insolvency Resolution Process

Lesson 8

KEY CONCEPTS

■ Pre-packaged insolvency commencement date ■ Pre-packaged insolvency resolution process costs ■ Pre-packaged insolvency resolution process period ■ Applicant ■ Resolution Professional ■ Preliminary Information Memorandum ■ Committee ■ Participant ■ Resolution applicant

Learning Objectives

To understand:

- Concept of Pre-packaged Insolvency Resolution Process (PPIRP)
- Time period for completion of PPIRP
- Initiation of the process
- Duties and powers of Resolution Professionalt
- Conduct and conclusion of the process

Lesson Outline

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

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, which the President of India promulgated on April 4, 2021, aims to provide corporate persons classified as micro, small and medium enterprises (MSMEs) under the Insolvency and Bankruptcy Code, 2016 (the "Code") with an effective alternative insolvency resolution framework to ensure quicker, more cost-effective and value-maximizing outcomes for all stakeholders in a way that is least disruptive to the ongoing business.

The initiative is based on a trust model and the amendments honour the honest MSME owners by trying to ensure that the resolution happens, and the company remains with them. Pre-Packaged Insolvency Resolution Process for MSMEs under the Code is anticipated to reduce the suffering experienced by MSMEs as a result of the pandemic's effects and the distinctive character of their businesses, appropriately recognising their significance in the economy.

For corporate individuals classified as MSMEs, it offers an effective alternative insolvency resolution framework for prompt, effective, and cost-effective resolution of distress, ensuring a positive signal to the debt market, employment preservation, ease of doing business, and preservation of enterprise capital. Other anticipated effects and advantages of the amendment includes lesser burden on judicial bandwidth, guaranteed business continuity for corporate debtors ("CD"), reduced process costs & maximum asset realisation for financial

creditors ("FC"), and assurance of ongoing business relations with CD as well as rights protection for operational creditors ("OC").

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	1 crore	5 crores	✓
Small Enterprise	10 crores	50 crores	✓
Medium Enterprise	50 crores	250 crores	✓

(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--

(a) 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;

(b) it is not undergoing a corporate insolvency resolution process;

(c) no order requiring it to be liquidated is passed under section 33;

(d) it is eligible to submit a resolution plan under section 29A;

(e) the financial creditors of the corporate debtor, not being its related parties, representing such number and such manner

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.

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;

(f) 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 -

(i) that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

(ii) that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and

(iii) the name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e).

(g) 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.

(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 -

(a) the declaration referred to inclause (f) of sub-section (2);

(b) the special resolution or resolution referred to in clause (g) of sub section (2);

(c) a base resolution plan which conforms to the requirements referred to in section 54k, and such other conditions as may be specified; and

(d) such other information and documents as may be specified.

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-

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 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.

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.

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.

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.

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.

(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.

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.

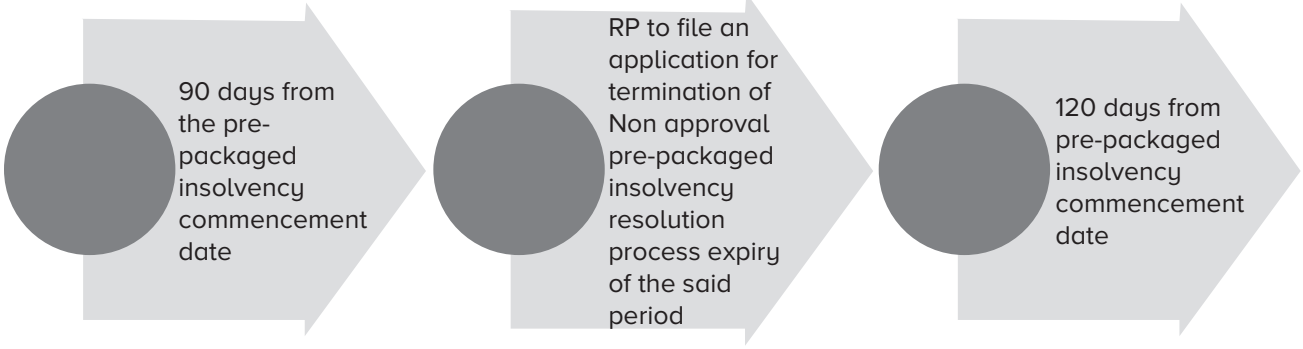


Fig. Timeline of pre-packaged insolvency resolution process

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.

Timeline for public announcement:

The RP shall make a public announcement within two days of the commencement of the process.

(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.

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)

(1) 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.

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.

(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 personshall 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.

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-

(a) the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor, subject to such conditions as may be specified;

b) the Board of Directors or the partners, as the case may be, of the corporate debtor, shall make every eneavour to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern; and

(c) the promoters, members, peronnel and partners, as the case may be, of the corporate debtor, shall exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of this chapter and such other conditions and restrictions as may be prescribed.

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

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.

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.

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.

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.

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.

(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.

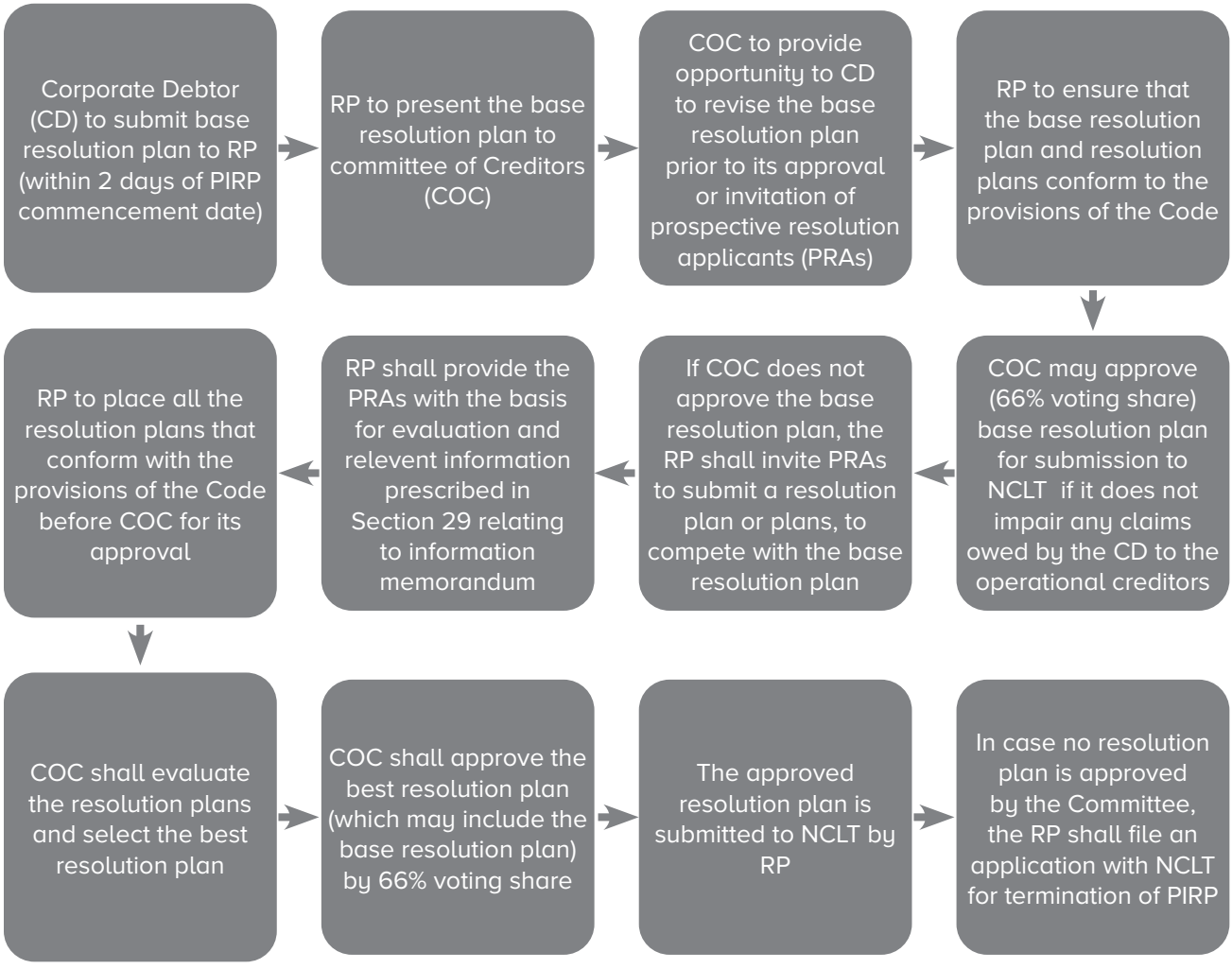


Fig: Consideration and approval of Resolution Plan

Approval of resolution plan by Committee of Creditors

- 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 com mittee 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, -

What happens when the Adjudicating Authority has passed an order for termination of pre-packaged insolvency resolution process pursuant to the decision of COC?

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.

(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).

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)

(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.

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 under subsection (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	(d) for the purposes of sections 43, 46 and 50, references to “insolvency commencement date” shall mean “pre-packaged insolvency	(e) in computing the relevant time or the period for avoidable transactions, the time period for the duration of the prepackaged

		section 67 A, if any, shall continue during the corporate insolvency resolution process;	commencement date"; and	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."

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 controlc	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 ROUND-UP

- Sections 54A to 54P of the Code contain provisions relating to Pre-packaged Insolvency Resolution Process.
- 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. The minimum amount of default for initiating pre-packaged insolvency resolution process is Rs. 10 lakhs.
- Pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.
- The resolution professional shall submit the resolution plan, as approved by the committee of creditors to the Adjudicating Authority within a period of ninety days from the pre-packaged insolvency commencement date.

- A application for pre-packaged insolvency resolution process may be filed by a corporate applicant.
- Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 contains the procedure for pre-packaged insolvency resolution process.
- The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolution professional a list of claims and a preliminary information memorandum.
- During the pre-packaged insolvency resolution process period, the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor.
- 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. As per Section 54I(2),the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- 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, resolve to vest the management of the corporate debtor with the resolution professional.
- The corporate debtor shall submit the base resolution plan to the resolution professional within two days of the pre-packaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.
- The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select a resolution plan from amongst them. The resolution plan approved by the committee of creditors is submitted to the Adjudicating Authority by the Resolution Professional.
- 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.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation).

1. What is the rationale behind the introduction of pre-packaged insolvency resolution process?
2. How is pre-packaged insolvency resolution process different from the corporate insolvency resolution process under Chapter II of Part II of the Code?
3. State the powers and duties of Resolution Professional in relation to pre-packaged insolvency resolution process.
4. What is the role of the Committee of Creditors in pre-packaged insolvency resolution process?
5. Discuss the provisions relating to the approval of resolution plan in relation to pre-packaged insolvency resolution process.
6. Explain the provisions pertaining to termination of pre-packaged insolvency resolution process.
7. Enumerate the benefits of pre-pack insolvency resolution process.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made therein.
- Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021.
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016

OTHER REFERENCES (Including Websites / Video Links)
• https://ibbi.gov.in//uploads/legalframwork/2022-04-28-1817 af0143991dbbd963f47def187e86517f.pdf • https://ibbi.gov.in//uploads/legalframwork/2021-04-10-1823 0dd40b82af7a770d5e89c0d9e37bdb45.pdf • https://www.ibbi.gov.in/uploads/whatsnew/a650764a464bc6 • https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399c

Debt Recovery & Securitization

Lesson 9

KEY CONCEPTS

■ Securitisation ■ Asset Reconstruction Company ■ Financial assets ■ Financial Lease ■ Borrower ■ Security Interest ■ Stressed Assets ■ Non-performing asset ■ Financial Institutions ■ Debt Recovery Tribunal

Learning Objectives

To understand:

- The legal frame work provided for law regulating securitisation and reconstruction of financial assets.
- Assset Reconstruction Company
- The important definitions and concepts.
- To familiarize the students with the legal frame work pertaining to debt recovery.

Lesson Outline

- Introduction
- SARFAESI Act, 2002
- Asset Reconstruction Companies
- Measures for asset reconstruction
- Enforcement of security interest by creditors
- Security Interest (Enforcement) Rules, 2002
- Debt Recovery
- Debt Recovery Tribunals (DRT)
- Application to the DRT
- Modes of Recovery
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

REGULATORY FRAMEWORK

- Securitisation 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. Securitisation is a way of unlocking these blocked funds.

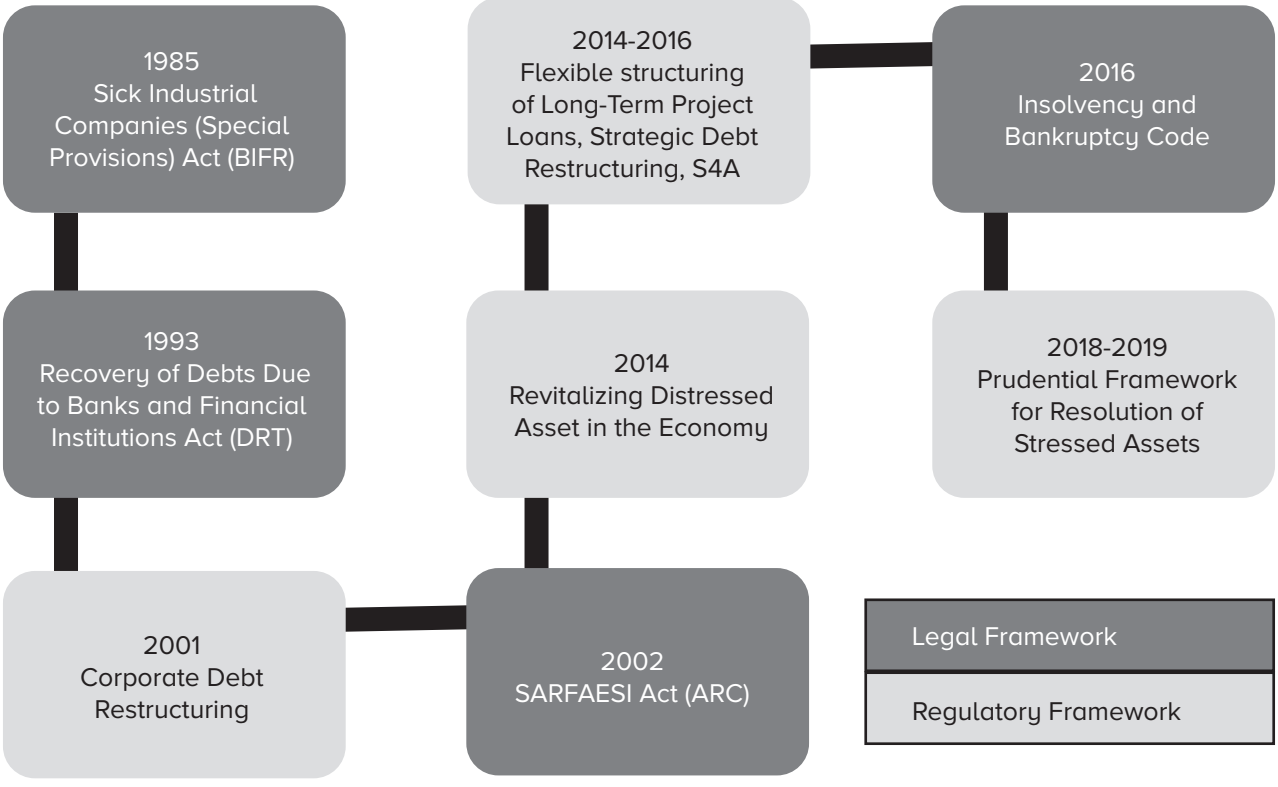
The process leads to the creation of financial instruments that represent ownership interest in, or are secured by a segregated income producing asset or pool of assets. The pool of assets collateralises securities. These assets are generally secured by personal or real property (e.g. automobiles, real estate, or equipment loans), but in some cases are unsecured (e.g. credit card debt, consumer loans).

EVOLUTION OF REGULATORY FRAMEWORKS FOR HANDLING OF STRESSED ASSETS

A sound banking system is an essential requirement for maintaining financial stability in any country. One of the parameters of soundness is the level of non-performing assets (NPAs) in the banking system. In this context, it is common knowledge that the Indian banking system has often been saddled with high levels of NPAs which has been affecting the profitability and eventually the capital position of banks, especially the public sector banks (PSBs). This has been one of the factors which has led to some level of risk aversion among the banks and thereby deceleration of credit growth in the country in the recent years.

In view of its importance for the health of the banking system, management of NPAs has been attracting attention from the RBI and the Government for quite some time now. The first such significant legal framework to manage the stress in the banking system was the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). It was enacted for timely detection of sickness in industrial units and to undertake speedy action to resolve the insolvency of sick units through a Board of experts, namely the Board for Industrial and Financial Reconstruction (BIFR). SICA failed to meet its objective due to delays caused by legal suits and lack of timely decisions by the stakeholders and, therefore, was finally repealed in the year 2003. Related provisions of this Act were added in the Companies Act, 2013 and the National Company Law Tribunal (NCLT) took over the functions of BIFR. Insolvency resolution frameworks as a tool for handling stressed assets culminated into the Insolvency and Bankruptcy Code, 2016 (IBC). IBC was enacted as a single code to consolidate the existing frameworks for insolvency and bankruptcy and has emerged as a significant tool for recovery.

Other noteworthy legislations which aimed to facilitate recovery of debt for banks and Financial Institutions include the Recovery of Debt due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The former Act attempts to provide speedy recovery through tribunals, namely, Debt Recovery Tribunals (DRTs) whereas the latter allows secured creditors to enforce their security interest without the intervention of the courts. The Act also led to creation of asset reconstruction companies (ARCs) as a permanent institutional arrangement to handle the stressed financial assets of banks and other financial institutions.



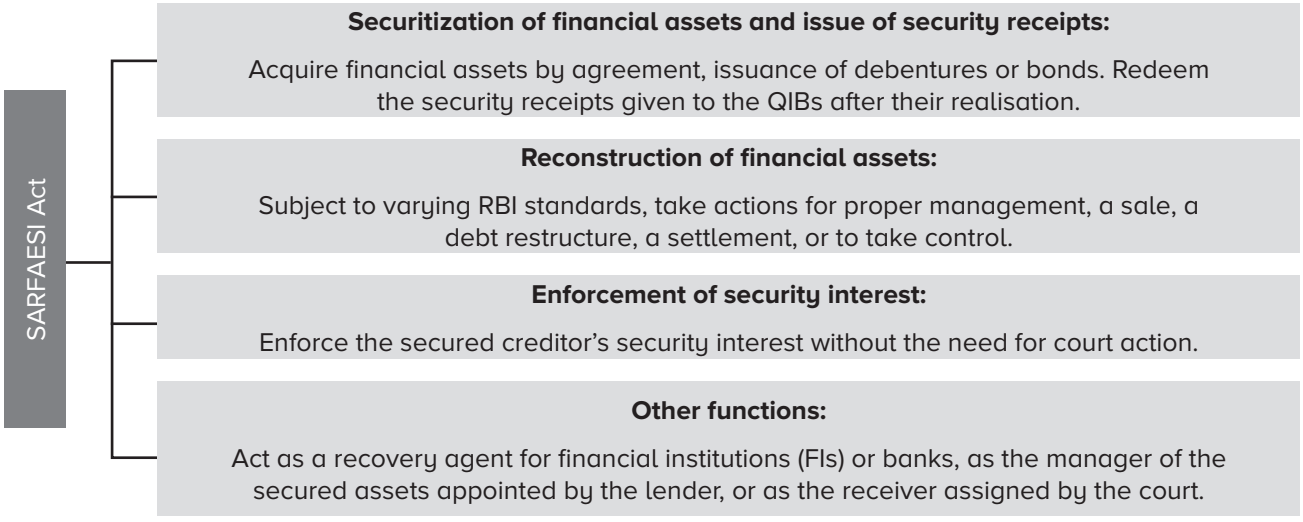
Source: Report of the Committee to Review the Working of Asset Reconstruction Companies, September 2021.

REGULATION OF SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS OF BANKS AND FINANCIAL INSTITUTIONS

Introduction

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation 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 “Securitisation” and the same can be traded in the market like bonds and shares.



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 lw 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:*

(a) 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 DebtAct') for doing so;

(b) no provision had been made to take into account lenders liability;

(c) that the mechanism for recovery under Section 13 does not provide for an adjudicatory forum of inter se disputes between lender and borrower; and

(d) 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 section17 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 maybe 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)]

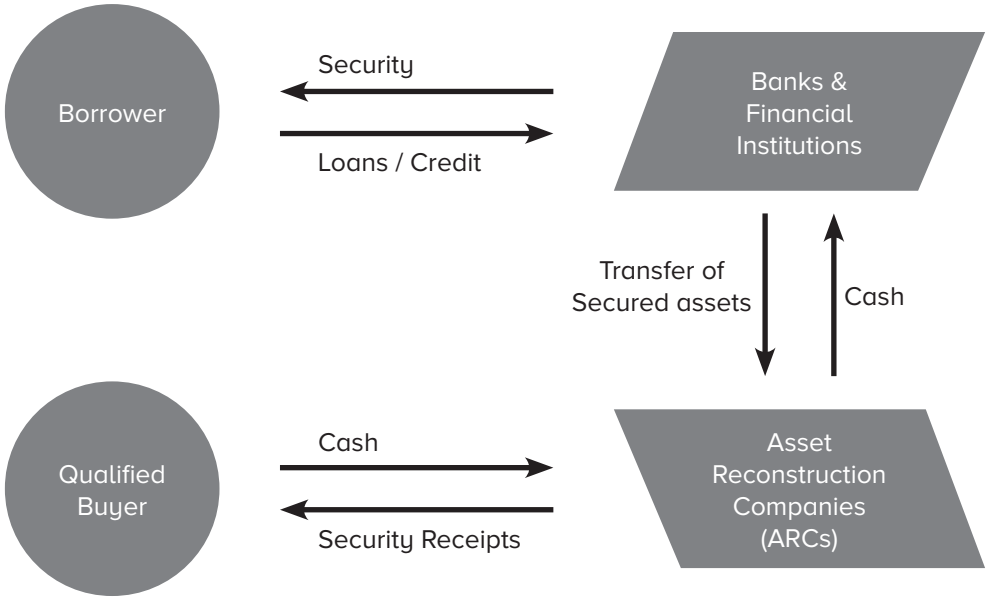
Asset Reconstruction Company

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.

Process under SARFAESI Act



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 securitisation or asset reconstruction without—

a. obtaining a certificate of registration granted under this section; and

b. 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:—

i. that the asset reconstruction company has not incurred losses in any of the three preceding financial years;

ii. 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 maybe 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.

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.

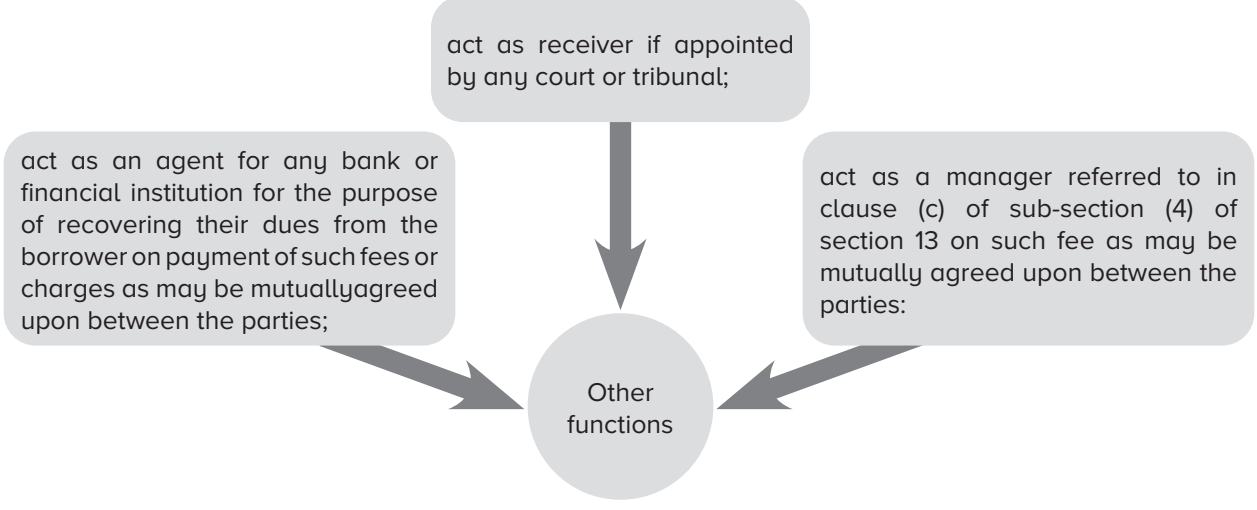
The asset reconstruction company shall take measures under sub-section (1) in accordance with policies and directions of the Reserve Bank determined under sub-section (2).

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 specifies 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.

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.

Validation of fees levied

Any fee levied and collected for preferring, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, shall be deemed always to have been levied and collected in accordance with law as if the amendments made to sections 17 and 18 of this Act by sections 10 and 12 of the said Act were in force at all material times.

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.

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.

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

a) 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

b) 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

c) 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

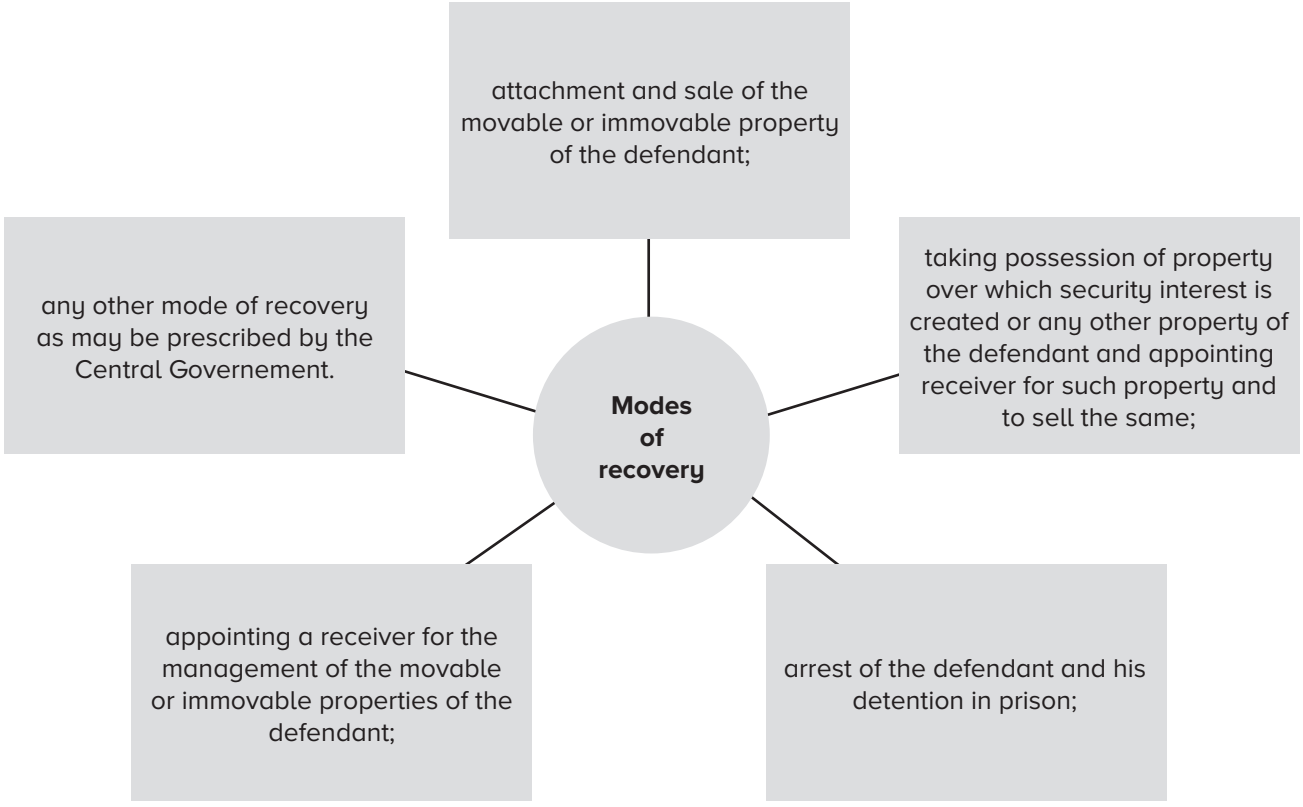
Section 23 states that, a bank or a financial institution making an application to a Tribunal or an appeal to an Appellate Tribunal may authorise one or more legal practitioners or any of its officers to act as Presenting Officers and every person so authorised by it may present its case before the Tribunal 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 deed fit.

Power of Tribunal to issue certificate of recovery in case of decree or order

Section 31A 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 Chandramoulishvar Spg. Mills (P) Ltd.***, the NCLATwhile 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 Moulishvar 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 SARFAESIAct, 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.

LESSON ROUND-UP

- Securitisation is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors.
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is enacted with a view to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.
- 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.
- 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. Section 3 of SARFAESI Act deals with the Registration of Asset Reconstruction Companies.
- 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.
- Any borrower or any other person aggrieved by the action of the secured creditors can file an appeal to the concerned Debt Recovery Tribunal (DRT).
- Any person aggrieved by the order of DRT, may prefer an appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of Debt Recovery Tribunal.
- Section 31 of the Act contains provisions relating to non-applicability of the Act in certain cases. Section 34 provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act.
- Any person who contravenes the provisions of this Act or of any rules made thereunder shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

- Limitation Act, 1963 is applicable to the claims made under this Act. Section 35 provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

TEST YOURSELF

(*These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation*).

1. What is securitization? Mention the reasons behind the enactment of the SARFAESI Act, 2002?
2. Write a note on Asset Reconstruction Companies citing the measures it can take under section 9 of the SARFAESI Act, 2002.
3. What are the provisions relating to assistance of Chief Metropolitan magistrate or District magistrate for taking possession of a securest asset?
4. Mention provisions relating to 'demand notice' under rule 3 of Security Interest (Enforcement) Rules, 2002.
5. Explain the 'Right to lodge a caveat' under SARFAESI Act, 2002.
6. State the salient features of the Recovery of Debts and Bankruptcy Act, 1993.
7. Explain in brief the procedure for making application to the Tribunal under section 19 of the Recovery of Debts and Bankruptcy Act, 1993.
8. Write a note on the powers of the Tribunal and Appellate Tribunal under the Recovery of Debts and Bankruptcy Act, 1993.

LIST OF FURTHER READINGS

- Bare Act - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, (SARFAESI) 2002 and Recovery of Debts Due to Banks and Financial Institutions Act, 1993 rules and regulations made thereunder.
- Report of the Committee to Review the Working of Asset Reconstruction Companies, September 2021.

OTHER REFERENCES (Including Websites / Video Links)

- https://rbi.org.in/home.aspx
- https://m.rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=1188

Winding-Up by Tribunal

Lesson 10

KEY CONCEPTS

■ Winding up ■ Company Liquidator ■ Dissolution ■ Fraudulent preference

Learning Objectives

To understand:

- Grounds of winding up by Tribunal and its petition
- Functions of company liquidators
- Submission of reports to Tribunal
- Companies (Winding-Up) Rules, 2020

Lesson Outline

- Introduction
- Important changes brought about by IBC
- Winding up by tribunal - Grounds
- Petition for the winding-up
- Powers of the Tribunal
- Directions for filing statement of affairs
- Company liquidators and their appointments
- Removal and replacement of liquidators
- Submission of the reports by the Company liquidator
- Advisory Committee
- Submission of periodical reports to the tribunal
- Powers and duties of the company liquidator
- Audit of Company liquidator's accounts
- Overriding Preferential Payments
- Fraudulent preferences
- Companies (Winding-Up) Rules, 2020
- Case Laws
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites/ Video Links)

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.

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.

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 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:

"Winding up" means winding up under the Companies Act, 2013 or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable"[Section 2(94A)]

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.

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.

Section 271 of Companies Act, 2013 (before substitution by IBC)

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 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;

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

Section 271 of Companies Act, 2013 (after substitution by IBC)

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)]

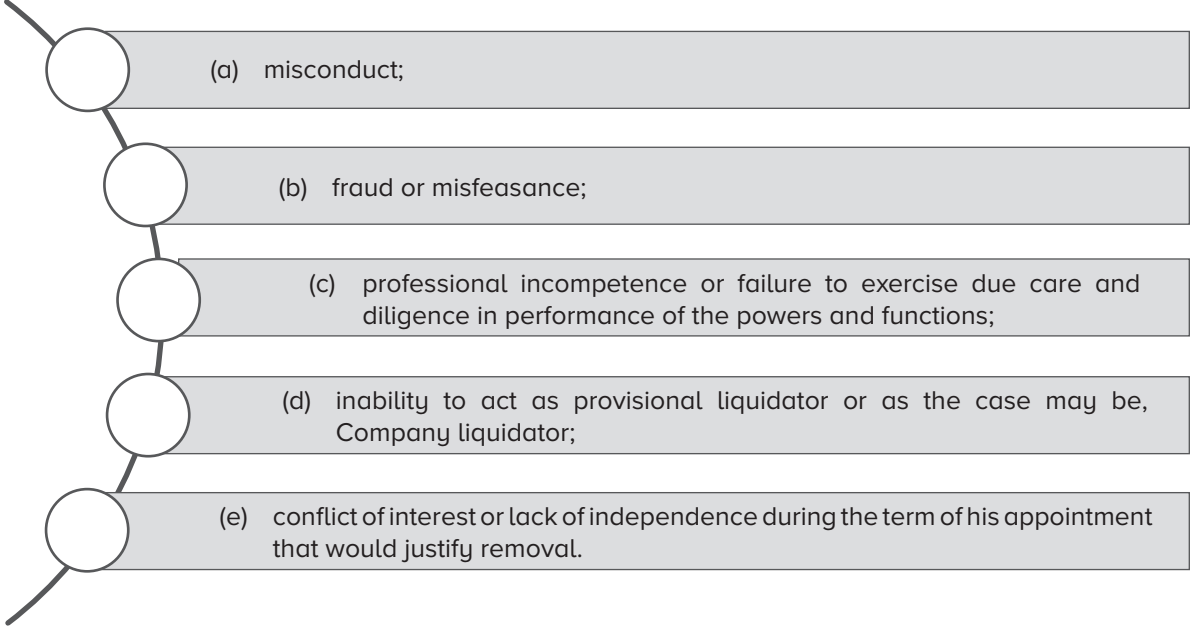
On appointment as provisional liquidator or Company liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment. [Section 275(6)]

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)]

"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)]

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:



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.

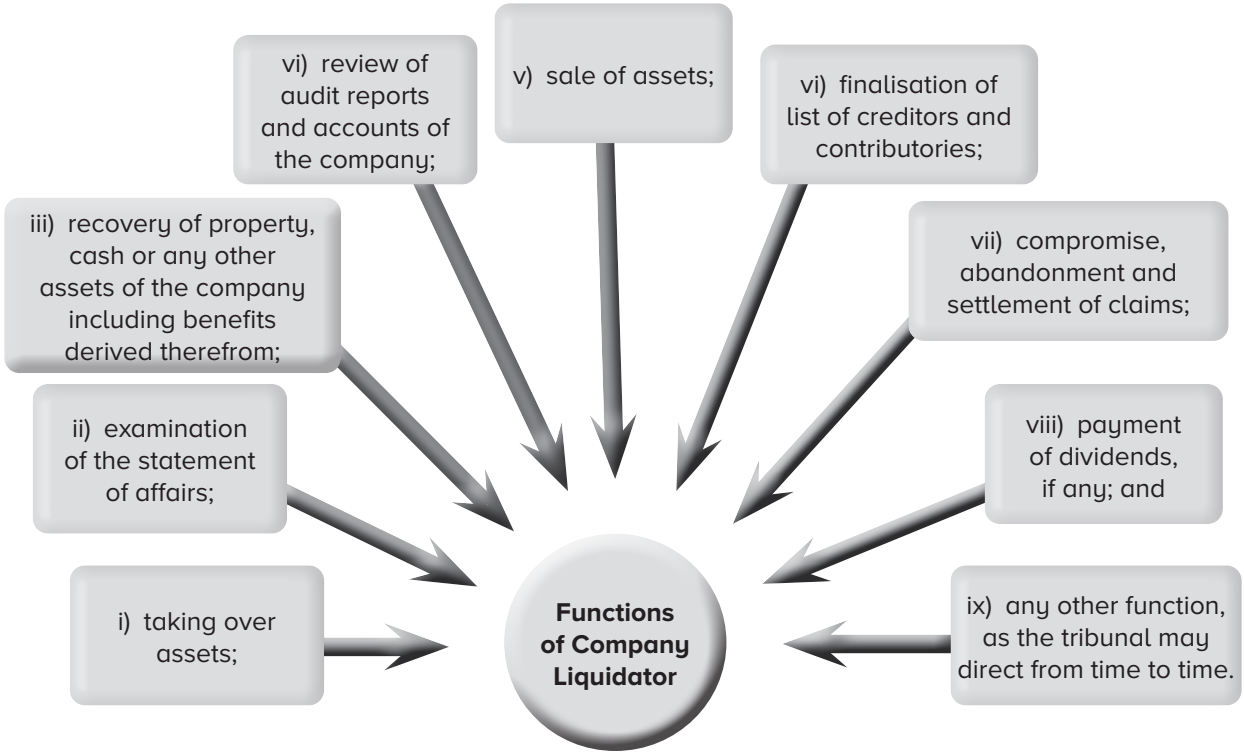
The Registrar on receipt of the copy of order of appointment of provisional liquidator or winding up order shall make an endorsement to that effect in his records relating to the company and notify in the Official Gazette that such an order has been made and in the case of a listed company, the registrar 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.

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)]

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 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)]

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)]

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)]

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)]

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)]

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 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)]

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)]

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]

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).

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.

> 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, there by reducing the burden on NCLT and greatly shortening the overall winding-up timelines.

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 ROUND-UP

- Companies Act, 2013 contains provisions relating to winding-up of companies. However, IBC has made substantial changes in these provisions.
- The main purpose of winding-up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law.
- Winding-up means winding-up under Companies Act, 2013 or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.
- The Companies Act, 2013 shall continue to govern winding-up of companies on various other grounds excluding inability to pay debts, which shall be dealt under the insolvency and Bankruptcy Code, 2016.
- 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 related to winding up of the company.
- Section 271 of the Companies Act, 2013 contains circumstances under which a company may be wound-up by the Tribunal (NCLT).
- Section 271 mentions about who can file petition for winding-up. Section 275 contains provisions relating to the appointment of liquidator.
- Section 281 provides the particulars that a report submitted by liquidator shall contain. Section 287 contains provisions relating to the Advisory Committee.
- Section 290 provides for the powers and duties of the Company liquidator.
- Companies Act, 2013 has only provisions relating to winding-up of solvent companies through the NCLT, and winding-up of unregistered companies.
- The Companies (Winding-up) Rules, 2020 under the Companies Act, 2013 have been notified by the Ministry of Corporate Affairs on 24th January 2020. These Rules have come into force from 1st April, 2020.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. What are the important changes brought about by the Insolvency and Bankruptcy Code, 2016 in the provisions relating to winding-up under the Companies Act, 2013?
2. Discuss with the help of a decided case law whether a profit making company can be wound-up for just and equitable reasons.
3. Explain the constitution and role of the Advisory Committee in the winding-up process.
4. Discuss the powers and duties of Company liquidator under section 290 of the Companies Act, 2013.

5. Examine whether a secured creditor is entitled to file a winding-up petition after having obtained a decree from the Debt Recovery Tribunal.
6. Workmen can be heard but they cannot file petition for winding-up of a company. Discuss.
7. Discuss the provisions of Companies (Winding up) Rules, 2020.

LIST OF FURTHER READINGS

- Bare Act- Insolvency and Bankruptcy Code, 2016
- Bare Act - Companies Act, 2013
- Companies (Winding Up) Rules, 2020

OTHER REFERENCES (Including Websites/Video Links)

- https://ibbi.gov.in/en
- https://www.mca.gov.in/content/mca/global/en/home.html

Insolvency Resolution of Individual and Partnership Firms

Lesson 11

KEY CONCEPTS

■ Excluded Debt ■ Interim Moratorium ■ Resolution ■ Professional ■ Repayment Plan

Learning Objectives

To understand:

- Application process for insolvency resolution
- Appointment and functions of Resolution Professional
- Repayment Plan
- Meeting of Creditors
- Discharge Order

Lesson Outline

REGULATORY FRAMEWORK

➤ Section 94 to 120 of Insolvency and Bankruptcy Code, 2016

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (the Code) aims to consolidate and amend laws relating to re organization and insolvency resolution of corporate persons, partnership firms and individuals in India. The provisions of the Code aim to maximize the value of assets of such persons in order to promote entrepreneurship in the country and also increase the availability of credit in the economy and balance interest of all stakeholders.

Sections 94 to 120 in Chapter III of Part III of the Insolvency and Bankruptcy Code, 2016 deal with insolvency resolution process for individuals and Partnership Firms.

This lesson envisages how debtor or creditor either on their own or through Resolution Professional can initiate insolvency resolution process, role of a Resolution Professional and issuance of discharge order by Adjudicating Authority and effect upon the declaration of interim moratorium and moratorium by adjudicating authority. The adjudicating authority for dealing with insolvency and bankruptcy of individual and partnership firms is Debt Recovery Tribunal and Appellate Authority for the same is Debt Recovery. Appellate Tribunal. However, where a corporate insolvency resolution process or liquidation proceeding of corporate debtor is pending before National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

Application by debtor to initiate Insolvency Resolution Process

Section 94 of the Code provides that the debtor who commits a default may apply to the adjudicating authority for initiating the insolvency resolution process by submitting an application with such fee and in such form as may be prescribed, either personally or through a Resolution Professional. Where the debtor is a partner of a firm, such debtor shall not apply to the Adjudicating Authority for initiating the insolvency resolution process in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

Application for initiating the insolvency resolution process shall be submitted only in respect of debts which are not excluded debts.

Excluded debt means:

- liability to pay fine imposed by a court or Tribunal;
- liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- liability to pay maintenance to any person under any law for the time being in force;
- liability in relation to a student loan; and
- any other debt as may be prescribed.

Under this Section a debtor can make application for initiating the insolvency resolution process only if he is not:

(a) an undischarged bankrupt;

(b) undergoing a fresh start process;

(c) undergoing an insolvency resolution process; or

(d) undergoing a bankruptcy process.

A debtor shall not be eligible to apply for insolvency resolution process if an application regarding insolvency resolution process has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this Section.

APPLICATION BY CREDITOR TO INITIATE INSOLVENCY RESOLUTION PROCESS

Section 95 of the Code provides that a creditor may apply to the Adjudicating Authority for initiating the insolvency resolution process by submitting an application with such fee and in such form as may be prescribed, either by himself or jointly with other creditors or through a Resolution Professional. A creditor may apply under this Section in relation to any partnership debt owed to him for initiating an insolvency resolution process against any one or more partners of the firm or the firm.

Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such adjudicating authority may give such directions for consolidating the proceedings under the applications as it thinks just.

An application under Section 95 shall be accompanied with such details and documents as may be specified by the Board relating to:		
a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;	b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and	c) relevant evidence of such default or non-repayment of debt.

The creditor shall also provide a copy of the application made under this Section to the debtor.

INTERIM MORATORIUM

Section 96 of the Code provides that when an application for initiating the insolvency resolution process is filed under Section 94 or Section 95 of the Code, then an ***interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application.***

Where the application for initiating the insolvency resolution process has been made in relation to a firm, the interim moratorium shall operate against all the partners of the firm as on the date of the application. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

During the interim moratorium period any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

APPOINTMENT OF RESOLUTION PROFESSIONAL

Section 97 of the Code provides that if an application under Section 94 or 95 is filed through a Resolution Professional, the Adjudicating Authority shall direct the Insolvency and Bankruptcy Board of India within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against the resolution Professional. The Insolvency and Bankruptcy Board of India shall within seven days from the date of receipt of directions from Adjudicating Authority; communicate to the Adjudicating Authority in writing either ***confirming the appointment of the Resolution Professional or rejecting the appointment of the Resolution Professional and nominating another Resolution Professional for the insolvency resolution process.***

Where an application for initiating the insolvency resolution process under Section 94 or 95 of the Code, is filed by the debtor or the creditor himself (as the case may be) and not through the Resolution Professional, the Adjudicating Authority shall direct the Insolvency and Bankruptcy Board of India within seven days of the filing of such application, to nominate a Resolution Professional for the insolvency resolution process.

The Insolvency and Bankruptcy Board of India shall nominate a Resolution Professional within ten days of receiving the direction from the adjudicating authority. The Adjudicating Authority shall by an order appoint the

resolution Professional recommended or as nominated by the Insolvency and Bankruptcy Board of India. The Resolution Professional appointed by the Adjudicating Authority shall be provided a copy of the application for insolvency resolution process.

REPLACEMENT OF RESOLUTION PROFESSIONAL

Section 98 of the Code provides that where the debtor or the creditor is of the opinion that the Resolution Professional appointed under Section 97 of the Code, is required to be replaced, the debtor or creditor (as the case may be) may apply to the adjudicating authority for the replacement of such Resolution Professional.

The Adjudicating Authority shall within seven days from the date of receipt of the application with regard to the replacement of Resolution Professional shall make a reference to the Insolvency and Bankruptcy Board of India for replacement of the Resolution Professional. The Insolvency and Bankruptcy Board of India shall within ten days from the date of receipt of the reference from the Adjudicating Authority, shall recommend the name of the Resolution Professional to the adjudicating authority against whom no disciplinary proceedings are pending.

Without prejudice to the provisions contained in this Section, the creditors may apply to the Adjudicating Authority for replacement of the Resolution Professional where it has been decided in the meeting of the creditors to replace the Resolution Professional with a new Resolution Professional for implementation of the repayment plan.

Where the Adjudicating Authority admits an application with regard to the replacement of the Resolution Professional, it shall direct the Insolvency and Bankruptcy Board of India to confirm that there are no disciplinary proceedings pending against the proposed resolution Professional. The Insolvency and Bankruptcy Board of India shall send a communication within ten days from the date of receipt of the direction from Adjudicating Authority either confirming the appointment of the nominated Resolution Professional or rejecting the appointment of the nominated Resolution Professional and recommend a new Resolution Professional.

On the basis of the communication of the Insolvency and Bankruptcy Board of India, the Adjudicating Authority shall pass an order appointing a new Resolution Professional and the Adjudicating Authority may give directions to the replaced Resolution Professional to share all information with the new Resolution Professional in respect of the insolvency resolution process and also to co-operate with the new Resolution Professional in such matters as may be required.

SUBMISSION OF REPORT BY RESOLUTION PROFESSIONAL

Section 99 of the Code provides that the Resolution Professional shall examine the application under Section 94or Section 95 (as the case may be) within ten days from the date of the appointment and submit a report to the adjudicating authority recommending for approval or rejection of the application with regard to the initiation of insolvency resolution process.

Where the application has been filed under Section 95, the Resolution Professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing:

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

For the purposes of examining the application with regard to the initiation of insolvency resolution process, the Resolution Professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who in the opinion of the Resolution Professional may provide such information.

The person from whom such information or explanation is sought shall furnish such information or explanation within seven days from the date of receipt of the request from Resolution Professional. The Resolution

Professional shall examine the application and ascertain that:

(a) The application satisfies the requirements prescribed under Section 94 or 95 and

(b) The applicant has provided information and given explanation sought by the Resolution Professional.

After examination of the application, Resolution Professional may recommend the acceptance or rejection of the application in his report. Where the Resolution Professional finds that the debtor is eligible for a fresh start process (Section 81 to 93 of the Code), the Resolution Professional shall submit a report recommending that the application by the debtor under Section 94 of the Code, be treated as an application under Section 81 of the Code, by the Adjudicating Authority.

The Resolution Professional shall record the reasons for recommending the acceptance or rejection of the application in the report and shall give a copy of the report to the debtor or the creditor (as the case may be).

ADMISSION OR REJECTION OF THE APPLICATION

Section 100 of the Code provides that the Adjudicating Authority shall within fourteen days from the date of submission of the report by Resolution Professional under Section 99 of the Code; pass an order either admitting or rejecting the application under Section 94 or Section 95 as the case may be.

Where the Adjudicating Authority admits an application for initiation of the insolvency resolution process on the request of the Resolution Professional then Adjudicating Authority shall issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan. The Adjudicating Authority shall provide a copy of the order passed along with the report of the Resolution Professional and the application referred under Section 94 or Section 95 of the Insolvency and Bankruptcy Code, 2016 (as the case may be), to the creditors within seven days from the date of passing the said order.

If the application referred under Section 94 or Section 95 of the Insolvency and Bankruptcy Code, 2016 (as the case may be), is rejected by the Adjudicating Authority on the basis of report submitted by the Resolution Professional or that the application was made with the intention to defraud his creditors or the Resolution Professional, the order passed by Adjudicating Authority shall record that the creditor is entitled to file for the Bankruptcy Order under Section 121 to 148 of the Code.

MORATORIUM

Section 101 of the Code provides that when the application for initiating insolvency resolution process is admitted under Section 100 of the Code; a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114 of the Code, whichever is earlier.

During the moratorium period:

a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

c) the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein.

Where an order admitting the application for initiating insolvency resolution process under Section 96 of the Code has been made in relation to a firm, the moratorium shall operate against all the partners of the firm. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

PUBLIC NOTICE AND CLAIMS FROM CREDITORS

Section 102 of the Code provides that the adjudicating authority shall issue a public notice within seven days of passing the order under Section 100 of the Code, for inviting claims from all creditors within twenty one days from the date of issue of notice.

The notice issued by Adjudicating Authority for inviting claims from the creditors shall include:

(a) details of the order admitting the application;

(b) particulars of the Resolution Professional with whom the claims are to be registered; and

(c) the last date for submission of claims.

The notice issued by adjudicating authority for inviting claims:

- shall be published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;
- shall be affixed in the premises of the Adjudicating Authority and;
- should be placed on the website of the Adjudicating Authority.

Registering of claims by creditors

Section 103 of the Code provides that the creditors shall register claims with the Resolution Professional by sending details of the claims by way of electronic communications or through courier, speed post or registered letter. The creditor shall also provide to the Resolution Professional, personal information and such particulars as may be prescribed.

PREPARATION OF LIST OF CREDITORS

Section 104 of the Code provides that the Resolution Professional shall within thirty days from date of issue of public notice prepare a list of creditors on the basis of the:

(a) information disclosed in the application filed under Section 94 or 95 of the Code as the case may be;

(b) claims received by the Resolution Professional under Section 102 of the Code.

REPAYMENT PLAN

Section 105 of the Code provides that the debtor shall in consultation with the Resolution Professional prepare a repayment plan containing a proposal to the creditors for restructuring of the debts or affairs of the concerned debtor.

The repayment plan may authorize or require the Resolution Professional to:

(a) carry on the debtor's business or trade on his behalf or in his name; or

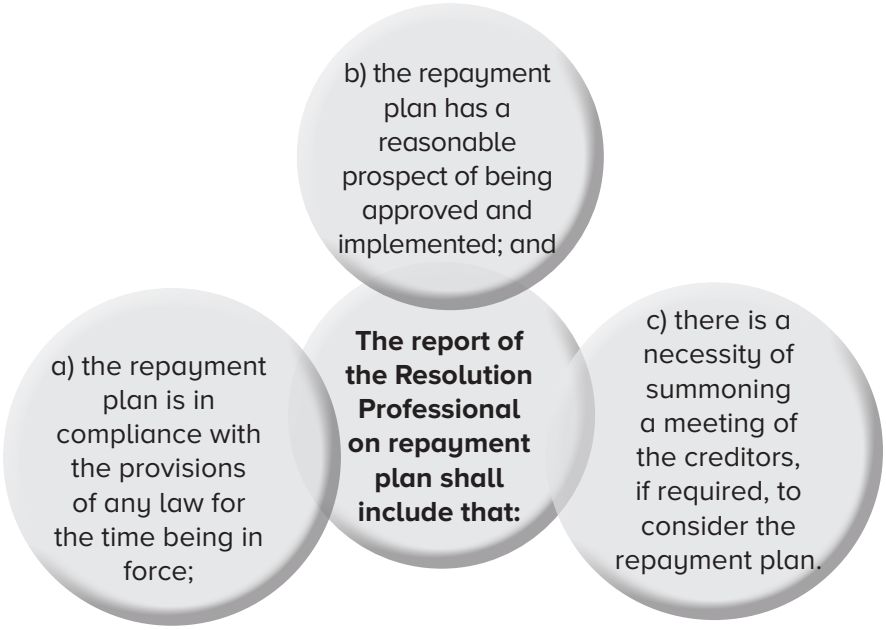
(b) realize the assets of the debtor; or

(c) administer or dispose of any funds of the debtor.

The repayment plan shall include the justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan; provision for payment of fee to the Resolution Professional and such other matters as may be specified.

REPORT OF RESOLUTION PROFESSIONAL ON REPAYMENT PLAN

Section 106 of the Code provides that the Resolution Professional shall submit the repayment plan along with the report on such plan to the Adjudicating Authority within a period of twenty one days from the last date of submission of claims under Section 102 of the Code.



Provided that where the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, reasons for the same shall be provided.

The report of the Resolution Professional on repayment plan shall also specify the date, time and place where the meeting should be held if in the opinion of Resolution Professional meeting of the creditors should be summoned. The date on which the meeting is to be held shall be not less than fourteen days and not more than twenty-eight days from the date of submission of report by the Resolution Professional and Resolution Professional shall consider the convenience of creditors in fixing the date and venue of the meeting of the creditors.

SUMMONING OF MEETING OF CREDITORS

Section 107 of the Code provides that the Resolution Professional shall issue a notice calling the meeting of the creditors at least fourteen days before the date fixed for such meeting. The Resolution Professional shall send the notice of the meeting to the list of creditors prepared under Section 104 of the Code.

The notice shall state the address of the Adjudicating Authority to which the repayment plan and report of the Resolution Professional on the repayment plan has been submitted and shall be accompanied by:

CONDUCT OF MEETING OF CREDITORS

Section 108 provides that in the meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan. The Resolution Professional shall ensure that if modifications are suggested by the creditors, consent of the debtor shall be obtained for each modification. The Resolution Professional may for a sufficient cause adjourn the meeting of the creditors for a period of not more than seven days at a time.

(a) copy of the repayment plan;

(b) copy of the statement of affairs of the debtor;

(c) copy of the said report of the Resolution Professional; and

(d) forms for proxy voting.

The proxy voting, including electronic proxy voting shall take place in such manner and form as may be specified.

VOTING RIGHTS IN MEETING OF CREDITORS

Section 109 of the Code provides that a creditor shall be entitled to vote at every meeting of the creditors in respect of the repayment plan in accordance with voting share assigned to him. The Resolution Professional shall determine voting share to be assigned to each creditor in the manners specified by the Insolvency and Bankruptcy Board of India.

A creditor shall not be entitled to vote in respect of a debt for an unliquidated amount. A creditor shall not be entitled to vote in a meeting of the creditors if the name of creditor is not mentioned in the list of creditors prepared under Section 104 of the Code, or creditor is an associate of the debtor.

RIGHTS OF SECURED CREDITORS IN RELATION TO REPAYMENT PLAN

Section 110 of the Code provides that the secured creditors shall be entitled to participate and vote in the meetings of the creditors. A secured creditor participating in the meetings of the creditors and voting in relation to the repayment plan shall forfeit his right to enforce the security during the period of the repayment plan in accordance with the terms of the repayment plan. "Period of the repayment plan" means the period from the date of the order of Adjudicating Authority approving resolution plan till the date on which the notice is given by the resolution professional on completion of resolution plan or premature end of resolution plan, as the case may be. Where a secured creditor does not forfeit his right to enforce security, such secured creditor shall submit an affidavit to the resolution professional at the meeting of the creditors stating:

(a) that the right to vote exercised by the secured creditor is only in respect of the unsecured part of the debt; and

(b) the estimated value of the unsecured part of the debt.

In case a secured creditor participates in the voting on the repayment plan by submitting an affidavit, the secured and unsecured parts of the debt shall be treated as separate debts.

The concurrence of the secured creditor shall be obtained if the creditor does not participate in the voting on repayment plan but provision of the repayment plan affects his right to enforce security.

APPROVAL OF REPAYMENT PLAN BY CREDITORS

Section 111 of the Insolvency and Bankruptcy Code, 2016 provides that the repayment plan or any modification to the repayment plan shall be approved by a majority of more than three-fourth in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors.

Report of meeting of creditors on repayment plan

Section 112 of the Code provides that the Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan which shall contain:			
a) whether the repayment plan was approved or rejected and if approved, the list the modifications, if any;	b) the resolutions which were proposed at the meeting and the decision on such resolutions;	c) list of the creditors who were present or represented at the meeting and the voting records of each creditor for all meetings of the creditors; and	d) such other information as the resolution Professional thinks appropriate to make known to the Adjudicating Authority.

Notice of decisions taken at meeting of creditors

Section 113 of the Code provides that the Resolution Professional shall provide a copy of the report of the meeting of creditors prepared under Section 99 of the Code, to the debtor, creditor (including those who were not present at the meeting) and to the Adjudicating Authority.

ORDER OF ADJUDICATING AUTHORITY ON REPAYMENT PLAN

Section 114 of the Code provides that the Adjudicating Authority shall by an order approve or reject the repayment plan on the basis of the report of the meeting of the creditors submitted by the Resolution Professional under Section 112 of the Code.

Provided that where a meeting of creditors is not summoned, the Adjudicating Authority shall pass an order on the basis of the report prepared by the Resolution Professional under Section 106 of the Code.

The order of the Adjudicating Authority approving the repayment plan may also provide for directions for implementing the repayment plan and where the Adjudicating Authority is of the opinion that the repayment plan requires modification, it may direct the Resolution Professional to re-convene a meeting of the creditors for reconsidering the repayment plan.

AUTHORITY ON REPAYMENT PLAN

Section 115 of the Code provides that where the Adjudicating Authority has approved the repayment plan under Section 114 of the Insolvency and Bankruptcy Code, 2016, the repayment plan shall take effect as if proposed by the debtor in the meeting; and shall be binding on creditors mentioned in the repayment plan and on the debtor.

Where the Adjudicating Authority rejects the repayment plan under Section 114 of the Code, the debtor and the creditors shall be entitled to file an application for bankruptcy under Section 121 to 148 of the of the Code.

Implementation and supervision of repayment plan

Section 116 of the Code provides that the Resolution Professional appointed under Section 97 or Section 98 of the Code, shall supervise the implementation of the repayment plan. The resolution professional may apply to the adjudicating authority for directions, if necessary, in relation to any particular matter arising under the repayment plan and the Adjudicating Authority may issue directions as may be necessary in this regard.

A copy of the order passed by the Adjudicating Authority shall be provided to the Insolvency and Bankruptcy Board of India for the purpose of recording an entry in the register referred under Section 196 of the Code.

COMPLETION OF REPAYMENT PLAN

Section 117 of the Code provides that the Resolution Professional shall within fourteen days from the date of the completion of the repayment plan, forward to the persons who are bound by the repayment plan under Section 115 of the Code and the Adjudicating Authority, the following documents:

(a) notice that the repayment plan has been fully implemented; and

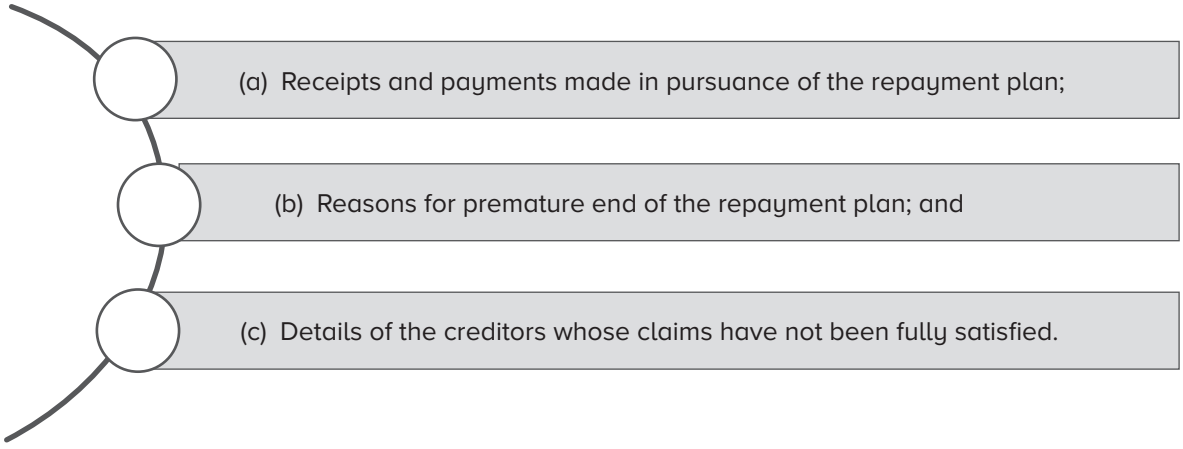
(b) a copy of a report by the resolution professional summarising all receipts and payments made in pursuance of the repayment plan and extent of the implementation of such plan as compared with the repayment plan approved by the meeting of the creditors.

The Resolution Professional may apply to the adjudicating authority to extend the time period for furnishing such documents for the period not exceeding seven days.

REPAYMENT PLAN COMING TO END PREMATURELY

Section 118 of the Insolvency and Bankruptcy Code, 2016 provides that the repayment plan shall be deemed to have come to an end prematurely if it has not been fully implemented in respect of all persons bound by it within the period as mentioned in the repayment plan.

Where a repayment plan comes to an end prematurely, the Resolution Professional shall submit a report to the adjudicating authority which shall state the following:



The Adjudicating Authority shall pass an order on the basis of the report submitted by the Resolution Professional that the repayment plan has not been completely implemented. The debtor or the creditor, whose claims under repayment plan have not been fully satisfied shall be entitled to apply for a bankruptcy order. The Adjudicating Authority shall forward to the persons bound by the repayment plan under Section 115 of the Code, a copy of the report submitted by the Resolution Professional to it under this Section and the order passed by it under this Section.

The Adjudicating Authority shall forward a copy of the order passed under this Section to the Insolvency and Bankruptcy Board of India, for the purpose of recording entries in the register referred to in Section 196 of the Code.

DISCHARGE ORDER

Section 119 of the Code provides that on the basis of the repayment plan, the Resolution Professional shall apply to the Adjudicating Authority for a discharge order in relation to the debts mentioned in the repayment plan and the Adjudicating Authority may pass such discharge order.

The repayment plan may provide for early discharge or for discharge on complete implementation of the repayment plan.

The discharge order shall be forwarded to the Insolvency and Bankruptcy Board of India, for the purpose of recording entries in the register referred to in Section 196 of the Code. The discharge order under shall not discharge any other person from any liability in respect of his debt.

RECENT DEVELOPMENTS

Part III of the Code which applies to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms envisages insolvency resolution of three categories of individuals, namely, personal guarantors to corporate debtors (CDs), partnership firms and proprietorship firms, and other individuals. Each category is unique and needs a separate dispensation for resolution of its insolvency. An appropriate phasing and sequencing of implementation of individual insolvency is essential, in sync with the legislative intention.

Standard of conduct

Section 120 of the Code provides that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the Code.

In the first phase, the provisions of the Code dealing with insolvency and bankruptcy of personal guarantors to corporates have been implemented. This is to complement the corporate insolvency regime and put personal guarantors and corporate guarantors on a level playing field. The provisions of the Code dealing with insolvency of partnership and proprietorship firms may be implemented in the second phase. In the third phase, the provisions of the Code dealing with insolvency of other individuals may be implemented. This would enable learnings from earlier phases for design of the dispensation for subsequent phases and to have all stakeholders on board for the efficient implementation of Part III of the Code.

LESSON ROUND-UP

- The Insolvency and Bankruptcy Code, 2016 aims to consolidate laws relating to liquidation and insolvency of corporate persons, partnership firms and individuals in India.
- Sections 94 to 120 in Chapter III of Part III of the Insolvency and Bankruptcy Code, 2016 deals with insolvency resolution process for individuals and Partnership Firms. Under Chapter III of Part III of the Code, both debtor as well as the creditor can initiate the insolvency resolution process.
- Section 94 of the Insolvency and Bankruptcy Code, 2016 lays down the eligibility criteria for filing of an application for insolvency resolution by a debtor who has committed a default. An application under section 94 of the Code may be filed by the debtor personally, or through a resolution professional.
- Section 95 of the Code provides for an insolvency resolution process application by a creditor(s). In relation to a partnership debt owed to the creditor, the creditor may file an application against the firm or one or more of the partners, provided that separate applications made against partners of the same firm shall be consolidated and heard together.
- Section 96 provides for interim moratorium which shall commence on the date of the application initiating the insolvency resolution and shall cease to have effect on the date of admission of such application.
- Section 97 of the Code provides for the appointment of Resolution Professional. An application for insolvency resolution process may be made by the debtor either personally or through a Resolution Professional.
- Section 98 provides for the grounds and the manner in which a Resolution Professional can be replaced with another Resolution Professional in an insolvency resolution process initiated under section 94 or section 95 of the Code.
- Section 99 of the Code provides the manner in which the Resolution Professional should make a report either recommending acceptance or rejection of the application for Insolvency Resolution process.
- Section 100 requires the Adjudicating Authority to pass an order either accepting or rejecting the application for insolvency resolution process within the prescribed time frame of 14 days from the date of submission of the report under section 99.
- Section 101 provides that an order Admitting an application for Insolvency Resolution has the effect of a fresh moratorium from the date of such admission for a period of one hundred and eighty days, or up to the date on which an order approving the repayment plan is passed by the adjudicating authority under section 114, whichever is earlier.
- Section 102 provides for the issuance of a public notice by the Adjudicating Authority inviting claims from the creditors of the debtor. Section 104 provides for the preparation of list of creditors by the resolution professional. Such a list is required for the purposes of organizing meetings of creditors and for matters relating to the repayment plan.
- Section 105 of the Code provides for the preparation of a repayment plan by the debtor in consultation with the resolution professional. Section 106 of the Code provides for the preparation of a report by the resolution professional on the repayment plan. Such report is to be submitted to the Adjudicating Authority along with the repayment plan.
- Section 108 provides for the conduct of meeting of creditors by the Resolution Professional. In the meeting, the creditors may decide to approve, modify or reject the repayment plan.
- Section 109 provides for voting rights and determination of voting share in meeting of creditors. The weightage of the vote shall depend on the value of the debt on the date of admission of the application for insolvency resolution process under section 100.

- Section 113 mandates the Resolution Professional to provide a copy of the report of the meeting of creditors prepared under section 99. Section 114 provides for an order by the Adjudicating Authority approving or rejecting the repayment plan.
- Section 115 provides that a repayment plan approved by the adjudicating authority under section 114 is binding on all the creditors mentioned in the repayment plan as well as the debtor and take effect as if proposed by the debtor in the meeting.
- Section 116 requires the Resolution Professional appointed under section 97 or under section 98 to supervise the implementation of the approved repayment plan. Section 117 provides for the sharing of certain documents by the resolution professional after completion of the repayment plan.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions is not to be submitted for evaluation)

1. How is insolvency resolution for individual and partnership firms different from corporate insolvency? Discuss.
2. Discuss in brief the provisions under the Insolvency and Bankruptcy Code, 2016 relating to insolvency resolution of individual and partnership firms.
3. Individual insolvency framework under the Code facilitates an individual to get in and get out of business, undeterred by honest business failure, and thereby promotes entrepreneurship. Elaborate.
4. Mention the provisions under section 95 of the Insolvency and Bankruptcy Code, 2016 relating to filing of an application by creditor for insolvency resolution.
5. Discuss in brief the procedure for appointment of Resolution Professional under Chapter III of Part III of the Insolvency and Bankruptcy Code, 2016 that deal with insolvency resolution process for individuals and Partnership Firms.
6. What challenges you foresee in implementation of the provisions of the Insolvency and Bankruptcy Code relating to insolvency resolution and bankruptcy of individuals and partnership firms?

LIST OF FURTHER READINGS

- Bare Act- Insolvency and Bankruptcy Code, 2016
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/en/legal-framework

Bankruptcy Order for Individuals and Partnership Firms

Lesson 12

KEY CONCEPTS

■ Bankruptcy Trustee ■ Interim moratorium ■ Discharge Order ■ Estate ■ Public servant

Learning Objectives

To understand:

- Application process for bankruptcy
- Appointment and functions of bankruptcy trustee
- Administration & distribution of estate of bankrupt
- Discharge Order
- Modification of bankruptcy order

Lesson Outline

REGULATORY FRAMEWORK

- Section 121 to Section 148 of Insolvency and Bankruptcy Code, 2016

INTRODUCTION

Bankruptcy is a legal procedure to give relief for people whose circumstances are unlikely to change and who have no hope of paying off their debts within a reasonable time. The term bankruptcy applies only to individuals and not to the companies or other legal entities. An individual may be made bankrupt only by order passed by Adjudicating Authority based on bankruptcy petition. Either creditor(s) or debtor may make application for bankruptcy.

Application for Bankruptcy

Section 121 of the Code provides that an application for bankruptcy of a debtor may be made by a creditor individually or jointly with other creditors or by a debtor to the adjudicating authority in such format and with such fees as may be prescribed where an order has been passed by an Adjudicating Authority under Section 100(4) or Section 115 (2) or 118(3) of the Code.

An application for bankruptcy shall be filed within a period of three months from the date of the order passed by the Adjudicating Authority. Also, where the debtor is a firm, the application may be filed by any of its partners.

Chapter IV of Part III of the Insolvency and Bankruptcy Code, 2016 (the Code) deals with the provisions of bankruptcy order for individuals and partnership firms. This Chapter explains how, and under what circumstances, a debtor or creditor can apply for the bankruptcy order.

The Adjudicating Authority for dealing with insolvency and bankruptcy of individual and partnership firm is Debt Recovery Tribunal and Appellate Authority for the same is Debt Recovery Appellate Tribunal.

APPLICATION BY DEBTOR

Section 122 of the Code provides that an application for bankruptcy of a debtor shall be accompanied by:

(a) the records of insolvency resolution process undertaken under Chapter III of Part III;

(b) the statement of affairs of the debtor in such form and manner as may be prescribed, on the date of the application for bankruptcy; and

(c) a copy of the order passed by the Adjudicating Authority under Chapter III of Part III permitting the debtor to apply for bankruptcy.

The debtor may propose an insolvency professional as the bankruptcy trustee in the application for bankruptcy. An application for bankruptcy by the debtor shall not be withdrawn without the leave of the Adjudicating Authority.

APPLICATION BY CREDITOR

Section 123 of the Insolvency and Bankruptcy Code, 2016 provides that an application for bankruptcy by a creditor shall be accompanied by:

(a) the records of insolvency resolution process undertaken under Chapter III of the Insolvency and Bankruptcy Code, 2016;

(b) a copy of the order passed by the Adjudicating Authority under Chapter III of the Insolvency and Bankruptcy Code, 2016 permitting the creditor to apply for bankruptcy;

(c) details of the debts owed by the debtor to the creditor as on the date of the application for bankruptcy; and

(d) such other information as may be prescribed.

An application made in respect of a debt which is secured shall be accompanied with:

a) a statement by the creditor having the right to enforce the security that creditor shall in the event of a bankruptcy order being made, give up his security for the benefit of all the creditors of the bankrupt; or	b) a statement by the creditor stating that the application for bankruptcy is only in respect of the unsecured part of the debt and an estimated value of the unsecured part of the debt.

If a secured creditor makes an application for bankruptcy and submits a statement, the secured and unsecured parts of the debt shall be treated as separate debts. The creditor may propose an insolvency professional as the bankruptcy trustee in the application for bankruptcy.

An application for bankruptcy in case of a deceased debtor, may be filed against his legal representatives. The application for bankruptcy shall be in such form and manner and accompanied by such fee as may be prescribed. An application for bankruptcy by the creditor shall not be withdrawn without the permission of the Adjudicating Authority.

EFFECT OF APPLICATION

Section 124 of the Code provides that when an application for bankruptcy is filed under Section 122 or Section 123 of the Code, then:	
(a) interim-moratorium shall commence on the date of the making of the application on all actions against the properties of the debtor in respect of his debts and such moratorium shall cease to have effect on the bankruptcy commencement date; and	(b) during the interim-moratorium period any pending legal action or legal proceeding against any property of the debtor in respect of any of his debts shall be deemed to have been stayed and the creditors of the debtor shall not be entitled to initiate any legal action or legal proceedings against any property of the debtor in respect of any of his debts.

Where the application has been made in relation to a firm, the interim moratorium shall operate against all the partners of the firm as on the date of the making of the application. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

APPOINTMENT OF INSOLVENCY PROFESSIONAL AS BANKRUPTCY TRUSTEE

Section 125 of the Code provides that if an insolvency professional is proposed as the bankruptcy trustee in the application for bankruptcy under Section 122 or Section 123 of the Code, the Adjudicating Authority shall direct the Insolvency and Bankruptcy Board of India within seven days of receiving the application for bankruptcy to confirm that there are no disciplinary proceedings against such professional. The Insolvency and Bankruptcy Board of India shall within ten days from the date of the receipt of the direction shall in writing either confirm the appointment of the proposed insolvency professional as the bankruptcy trustee for the bankruptcy process; or reject the appointment of the proposed insolvency professional as the bankruptcy trustee and nominate another bankruptcy trustee for the bankruptcy process.

Where a bankruptcy trustee is not proposed by the debtor or creditor under Section 122 or Section 123, the Adjudicating Authority shall direct the Insolvency and Bankruptcy Board of India within seven days of receiving the application to nominate a bankruptcy trustee for the bankruptcy process. The Insolvency and Bankruptcy Board of India shall nominate a bankruptcy trustee within ten days of receiving the direction from the Adjudicating Authority. The bankruptcy trustee confirmed or nominated

Validity of bankruptcy order

Section 127 of the Code provides that the bankruptcy order passed by the Adjudicating Authority under Section 126 of the Code, shall continue to have effect till the debtor is discharged under Section 138 of the Code.

under this Section shall be appointed as the bankruptcy trustee by the Adjudicating Authority in the bankruptcy order under Section 126 of the Insolvency and Bankruptcy Code, 2016.

EFFECT OF BANKRUPTCY ORDER

Section 128 of the Code provides that on passing of the bankruptcy order under Section 126 of the Code:

(a) the estate of the bankrupt shall vest in the bankruptcy trustee as provided under Section 154 of the Code;

(b) the estate of the bankrupt shall be divided among his creditors;

(c) a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not:

(i) initiate any action against the property of the bankrupt in respect of such debt; or

(ii) commence any suit or other legal proceedings except with the leave of the adjudicating authority and on such terms as the adjudicating authority may impose.

Subject to the provisions of Section 123 of the Code, the bankruptcy order shall not affect the right of any secured creditor to realize or otherwise deal with his security interest in the same manner as he would have been entitled if the bankruptcy order had not been passed:

Provided that no secured creditor shall be entitled to any interest in respect of his debt after the bankruptcy commencement date if he does not take any action to realise his security within thirty days from the said date. Where a bankruptcy order under Section 126 of the Code has been passed against a firm, the order shall operate as if it were a bankruptcy order made against each of the individuals who, on the date of the order, is a partner in the firm. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Bankruptcy Order

Section 126 of the Code provides that the Adjudicating Authority shall pass a bankruptcy order within fourteen days of receiving the confirmation or nomination of the bankruptcy trustee under Section 125 of the Code. The adjudicating authority shall provide to the bankrupt, creditors and the bankruptcy trustee within seven days of the passing of the bankruptcy order, namely a copy of the application for bankruptcy and a copy of the bankruptcy order.

STATEMENT OF FINANCIAL POSITION

Section 129 of the Code provides that where a bankruptcy order is passed on the application for bankruptcy by a creditor under Section 123 of the Code, the bankrupt shall submit his statement of financial position to the bankruptcy trustee within seven days from the bankruptcy commencement date. The statement of financial position shall be submitted in such form and manner as may be prescribed.

Where the bankrupt is a firm, its partners on the date of the order shall submit a joint statement of financial position of the firm, and each partner of the firm shall submit a statement of his financial position. The bankruptcy trustee may require the bankrupt or any other person to submit in writing further information explaining or modifying any matter contained in the statement of financial position.

PUBLIC NOTICE INVITING CLAIMS FROM CREDITORS

Section 130 of the Code provides that the adjudicating authority shall:

(a) send notices within ten days of the bankruptcy commencement date to the creditors mentioned

Registration of claims

Section 131 of the Code provides that the creditors shall register claims with the bankruptcy trustee within seven days of the publication of the public notice, by sending details of the claims to the bankruptcy trustee in such manner as may be prescribed. The creditor in addition to the details of his claims shall provide such other information and in such manner as may be prescribed.

in the statement of affairs submitted by the bankrupt under Section 129 of the Code; or the application for bankruptcy submitted by the bankrupt under Section 122 of the Code.

(b) issue a public notice inviting claims from creditors.

Preparation of list of creditors

Section 132 of the Code provides that the bankruptcy trustee shall within fourteen days from the bankruptcy commencement date prepare a list of creditors of the bankrupt on the basis of the information disclosed by the bankrupt in the application for bankruptcy filed by the bankrupt under Section 118 of the Code and the statement of affairs filed under Section 125 of the Code, and claims received by the bankruptcy trustee under sub- section (2) of Section 130 of the Code.

The public notice shall include the last date up to which the claims shall be submitted and such others matters and details as may be prescribed and shall be published in leading newspapers, one in english and another in vernacular having sufficient circulation where the bankrupt resides; affixed on the premises of the Adjudicating Authority; and placed on the website of the Adjudicating Authority. The notice to the creditors shall include such matters and details as may be prescribed.

SUMMONING OF MEETING OF CREDITORS

Section 133 of the Code provides that the bankruptcy trustee shall within twenty-one days from the bankruptcy commencement date, issue a notice for calling a meeting of the creditors, to every creditor of the bankrupt as mentioned in the list prepared under Section 132 of the Code.

The notices shall –

(a) state the date of the meeting of the creditors, which shall not be later than twenty-one days from the bankruptcy commencement date;

(b) be accompanied with forms of proxy voting;

(c) specify the form and manner in which the proxy voting may take place.

The proxy voting including electronic proxy voting shall take place in such manner and form as may be specified.

CONDUCT OF MEETING OF CREDITORS

Section 134 of the Code provides that the bankruptcy trustee shall be the convener of the meeting of the creditors summoned under Section 133 of the Code. The bankruptcy trustee shall decide the quorum for the meeting of the creditors, and conduct the meeting only if the quorum is present.

The following business shall be conducted in the meeting of the creditors in which regard a resolution may be passed, namely:

- the establishment of a committee of creditors;
- any other business that the bankruptcy trustee thinks fit to be transacted.

Which creditors are not entitled to vote under Section 135 of the Code?

The following creditors shall not be entitled to vote under this Section, namely:

(a) creditors who are not mentioned in the list of creditors under Section 132 of the Code, and those who have not been given a notice by the bankruptcy trustee;

(b) creditors who are associates of the bankrupt.

The bankruptcy trustee shall cause the minutes of the meeting of the creditors to be recorded, signed and retained as a part of the records of the bankruptcy process. The bankruptcy trustee shall not adjourn the meeting of the creditors for any purpose for more than seven days at a time.

VOTING RIGHTS OF CREDITORS

Section 135 of the Code provides that every creditor mentioned in the list under Section 132 of the Code, or his proxy shall be entitled to vote in respect of the resolutions in the meeting of the creditors in accordance with the voting share assigned to him. The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Insolvency and Bankruptcy Board of India. A creditor shall not be entitled to vote in respect of a debt for an unliquidated amount.

ADMINISTRATION AND DISTRIBUTION OF ESTATE OF BANKRUPT

Section 136 of the Code provides that the bankruptcy trustee shall conduct the administration and distribution of the estate of the bankrupt in accordance with the provisions of Chapter V (Voluntary liquidation) of the Code.

COMPLETION OF ADMINISTRATION

Section 137 of the Code provides that the bankruptcy trustee shall convene a meeting of the committee of creditors on completion of the administration and distribution of the estate of the bankrupt in accordance with the provisions of Chapter V (dealing with Voluntary liquidation) of the Code.

The bankruptcy trustee shall provide the committee of creditors with a report of the administration of the estate of the bankrupt in the meeting of the said committee. The committee of creditors shall approve the report submitted by the bankruptcy trustee within seven days of the receipt of the report and determine whether the bankruptcy trustee should be released under Section 148 of the Code.

The bankruptcy trustee shall retain sufficient sums from the estate of the bankrupt to meet the expenses of convening and conducting the meeting required under this Section during the administration of the estate.

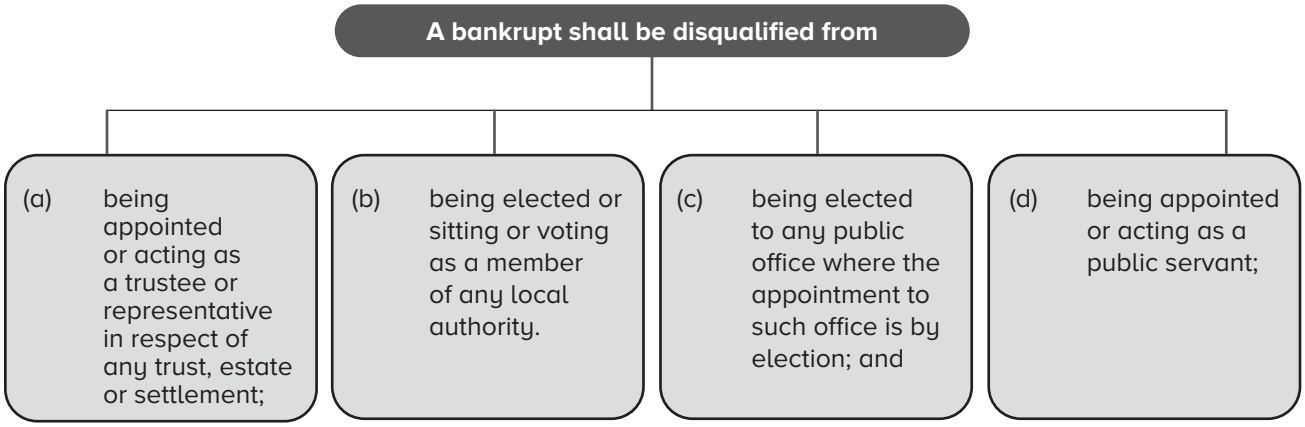
DISCHARGE ORDER

Section 138 of the Code provides that the bankruptcy trustee shall apply to the Adjudicating Authority for a discharge order on the expiry of one year from the bankruptcy commencement date or within seven days of the approval of the committee of creditors of the completion of administration of the estates of the bankrupt under Section 137 of the Code. The Adjudicating Authority shall pass a discharge order on an application by the bankruptcy trustee. A copy of the discharge order shall be provided to the Insolvency and Bankruptcy Board of India, for the purpose of recording an entry in the register referred to in Section 196 of the Code.

EFFECT OF DISCHARGE			
Section 139 of the Code provides that the discharge order under Section 138 of the Code shall release the bankrupt from all the bankruptcy debts. Provided that a discharge shall not:			
(a) affect the functions of the bankruptcy trustee; or	(b) affect the operation of the provisions of Chapter IV and V of Part III of the Code;	c) release the bankrupt from any debt incurred by means of fraud or breach of trust to which he was a party; or	(d) discharge the bankrupt from any excluded debt.

DISQUALIFICATION OF BANKRUPT

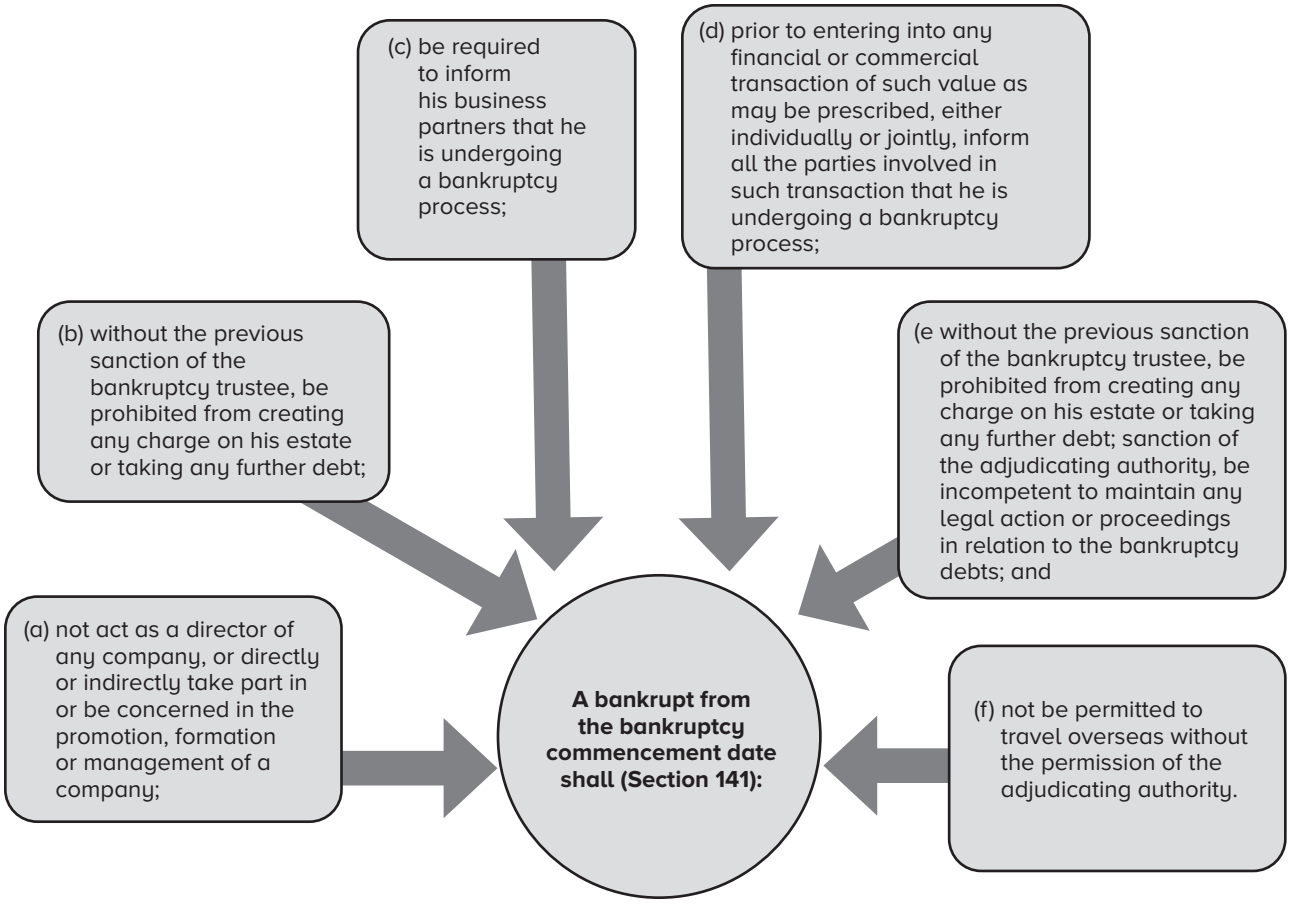
Section 140 of the Code provides that in addition to any disqualification under any other law for the time being in force, a bankrupt shall be disqualified from:



Any disqualification to which a bankrupt may be subject under this Section shall cease to have effect, if the bankruptcy order against him is modified or recalled under Section 142 of the Code, or he is discharged under Section 138 of the Code.

For the purposes of said disqualification, the term "public servant" shall have the same meaning as assigned to it under Section 21 of the Indian Penal Code, 1860 .

RESTRICTIONS ON BANKRUPT



Any restriction to which a bankrupt may be subject under this Section shall cease to have effect if the bankruptcy order against him is modified or recalled under Section 142 of the Code or he is discharged under Section 138 of the Code.

MODIFICATION OR RECALL OF BANKRUPTCY ORDER

Section 142 of the Code provides that the Adjudicating Authority may on an application or *suo motu*, modify or recall a bankruptcy order, whether or not the bankrupt is discharged, if it appears to the adjudicating authority that:

(a) there exists an error apparent on the face of such order; or

b) both the bankruptcy debts and the expenses of the bankruptcy have, after the making of the bankruptcy order, either been paid for or secured to the satisfaction of the Adjudicating Authority.

Where the Adjudicating Authority modifies or recalls the bankruptcy order under this Section, any sale or other disposition of property, payment made or other things duly done by the bankruptcy trustee shall be valid except that the property of the bankrupt shall vest in such person as the Adjudicating Authority may appoint or, in default of any such appointment, revert to the bankrupt on such terms as the Adjudicating Authority may direct. A copy of the order passed by the Adjudicating Authority under this Section shall be provided to the Insolvency and Bankruptcy Board of India, for the purpose of recording an entry in the register referred to in Section 191of the Code. The modification or recall of the order by the Adjudicating Authority shall be binding on all creditors so far as it relates to any debts due to them which form a part of the bankruptcy.

Standard of conduct

Section 143 of the Code provides that the bankruptcy trustee shall perform his functions and duties in compliance with the code of conduct provided under Section 208 of the Code.

REPLACEMENT OF BANKRUPTCY TRUSTEE

Section 145 of the Code provides that where Committee of creditors is of the opinion that at any time during the bankruptcy process, a bankruptcy trustee appointed under Section 125 of the Code, is required to be replaced, it may replace him with another bankruptcy trustee in the manner provided under this Section. The Committee of creditors may, at a meeting, by a vote of 75% of voting share propose to replace the bankruptcy trustee appointed under Section 125 of the Code, with another bankruptcy trustee.

The Committee of creditors may apply to the Adjudicating Authority for the replacement of bankruptcy trustee. The Adjudicating Authority shall within seven days of the receipt of the application direct the Insolvency and Bankruptcy Board of India to recommend for replacement of bankruptcy trustee. The Insolvency and Bankruptcy Board of India shall within ten days of the direction of the Adjudicating Authority recommend a bankruptcy trustee for replacement against whom no disciplinary proceedings are pending.

The Adjudicating Authority shall by an order appoint the bankruptcy trustee as recommended by the Insolvency and Bankruptcy Board of India within fourteen days of receiving such recommendation. The earlier bankruptcy trustee shall deliver possession of the estate of the bankrupt to the bankruptcy trustee appointed on the date of his appointment.

Fees of bankruptcy trustee

Section 144 of the Code provides that a bankruptcy trustee appointed for conducting the bankruptcy process shall charge such fees as may be specified in proportion to the value of the estate of the bankrupt. The fees for the conduct of the bankruptcy process shall be paid to the bankruptcy trustee from the distribution of the estate of the bankrupt in the manner provided in Section 178 of the Code.

The Adjudicating Authority may give directions to the earlier bankruptcy trustee:

(a) to share all information with the new bankruptcy trustee in respect of the bankruptcy process; and

(b) to co-operate with the new bankruptcy trustee in such matters as may be required.

The earlier bankruptcy trustee replaced under this Section shall be released in accordance with the provisions of Section 148 of the Code. The bankruptcy trustee appointed under this Section shall give a notice of his appointment to the bankrupt within seven days of his appointment.

RESIGNATION BY BANKRUPTCY TRUSTEE

Section 146 of the Code provides that a bankruptcy trustee may resign if he intends to cease practicing as an insolvency professional or there is conflict of interest or change of personal circumstances which preclude the further discharge of his duties as a bankruptcy trustee.

The Adjudicating Authority shall within seven days of the acceptance of the resignation of the bankruptcy trustee, direct the Insolvency and Bankruptcy Board of India for his replacement. The Insolvency and Bankruptcy Board of India shall within ten days of the direction of the Adjudicating Authority recommend another bankruptcy trustee as a replacement. The Adjudicating Authority shall appoint the bankruptcy trustee recommended by the Insolvency and Bankruptcy Board of India within fourteen days of receiving the recommendation.

The replaced bankruptcy trustee shall deliver possession of the estate of the bankrupt to the bankruptcy trustee appointed on the date of his appointment. The Adjudicating Authority may give directions to the bankruptcy trustee who has resigned to share all information with the new bankruptcy trustee in respect of the bankruptcy process and to co-operate with the new bankruptcy trustee in such matters as may be required. The bankruptcy trustee appointed under this Section shall give a notice of his appointment to the committee of creditors and the bankrupt within seven days of his appointment. The bankruptcy trustee replaced under this Section shall be released in accordance with the provisions of Section 148 of the Code.

VACANCY IN THE OFFICE OF BANKRUPTCY TRUSTEE

Section 147 of the Code provides that if a vacancy occurs in the office of the bankruptcy trustee for any reason other than his replacement or resignation, the vacancy shall be filled in accordance with the provisions of that Section. In the event of the occurrence of vacancy, the Adjudicating Authority shall direct the Insolvency and Bankruptcy Board of India for replacement of a bankruptcy trustee. The Insolvency and Bankruptcy Board of India shall within ten days of the direction of the Adjudicating Authority recommend a bankruptcy trustee as a replacement.

The Adjudicating Authority shall appoint the bankruptcy trustee recommended by the Insolvency and Bankruptcy Board of India within fourteen days of receiving the recommendation. The earlier bankruptcy trustee shall deliver possession of the estate of the bankrupt to the bankruptcy trustee appointed, on the date of his appointment. The Adjudicating Authority may give directions to the bankruptcy trustee who has vacated the office to share all information with the new bankruptcy trustee in respect of the bankruptcy and to co-operate with the new bankruptcy trustee in such matters as may be required. The bankruptcy trustee appointed shall give a notice of his appointment to the committee of creditors and the bankrupt within seven days of his appointment. The earlier bankruptcy trustee replaced under this Section shall be released in accordance with the provisions of Section 148 of the Code.

Provided that this Section 147 shall not apply if the vacancy has occurred due to temporary illness or temporary leave of the bankruptcy trustee.

RELEASE OF BANKRUPTCY TRUSTEE

Section 148 of the Code provides that a bankruptcy trustee shall be released from his office with effect from the date on which the Adjudicating Authority passes an order appointing a new bankruptcy trustee in the event of replacement, resignation or occurrence of vacancy under Sections 145, 146 or 147 of the Code as the case may be.

The bankruptcy trustee who has been so released shall share all information with the new bankruptcy trustee in respect of the bankruptcy process and co-operate with the new bankruptcy trustee in such matters as may be required. A bankruptcy trustee who has completed the administration of the bankruptcy process shall be released of his duties with effect from the date on which the committee of creditors approves the report of the bankruptcy trustee under Section 137 of the Code.

LESSON ROUND-UP

- Chapter IV of Part III of the Insolvency and Bankruptcy Code, 2016 deals with the provisions of bankruptcy order for individuals and partnership firms. This Chapter explains how a debtor or creditor can apply for the bankruptcy order and under what circumstances.
- Section 121 of the Insolvency and Bankruptcy Code, 2016 provides that an application for bankruptcy of a debtor may be made by a creditor individually or jointly with other creditors or by a debtor to the Adjudicating Authority.
- An application for bankruptcy shall be filed within a period of three months from the date of the order passed by the Adjudicating Authority. Also where the debtor is a firm, the application may be filed by any of its partners.
- Sections 122 and 123 of the Insolvency and Bankruptcy Code, 2016 provides the documents to be accompanied with an application for bankruptcy of a debtor and creditor respectively.
- The debtor may propose an Insolvency professional as the bankruptcy trustee in the application for bankruptcy. An application for bankruptcy by the debtor shall not be withdrawn without the leave of the adjudicating authority.
- Section 126 of the Insolvency and Bankruptcy Code, 2016 provides that the Adjudicating Authority shall pass a bankruptcy order within fourteen days of receiving the confirmation or nomination of the bankruptcy trustee under Section 125 of the Insolvency and Bankruptcy Code, 2016.
- Section 128 of the Insolvency and Bankruptcy Code, 2016 provides for the effect of bankruptcy order under Section 126 of the Insolvency and Bankruptcy Code, 2016.
- Section 130 of the Insolvency and Bankruptcy Code, 2016 provides for Public Notice inviting claims from creditors.
- Section 132 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall within fourteen days from the bankruptcy commencement date prepare a list of creditors of the bankrupt.
- Section 133 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall within twenty-one days from the bankruptcy commencement date, issue a notice for calling a meeting of the creditors.
- Section 134 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall be the convener of the meeting of the creditors. The bankruptcy trustee shall decide the quorum for the meeting of the creditors, and conduct the meeting only if the quorum is present.
- Section 136 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall conduct the administration and distribution of the estate of the bankrupt in accordance with the provisions of Chapter V.
- Section 137 of the Insolvency and Bankruptcy Code, 2016 provides that the bankruptcy trustee shall convene a meeting of the committee of creditors on completion of the administration and distribution of the estate of the bankrupt in accordance with the provisions of Chapter V.
- Section 139 of the Insolvency and Bankruptcy Code, 2016 provides that the discharge order under Section 138 of the Insolvency and Bankruptcy Code, 2016 shall release the bankrupt from all the bankruptcy debts.

- Section 142 of the Insolvency and Bankruptcy Code, 2016 provides that the Adjudicating Authority may on an application or *suo motu*, modify or recall a bankruptcy order, whether or not the bankrupt is discharged.
- The Committee of creditors may, at a meeting, by a vote of 75% of voting share propose to replace the bankruptcy trustee appointed under Section 125.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the provisions relating to bankruptcy of a debtor under the Insolvency and Bankruptcy Code, 2016.
2. What is the process for making an application for bankruptcy by a creditor?
3. Who is a 'bankruptcy trustee'? Discuss the provisions relating to his appointment.
4. Mention the effect of bankruptcy order passed by the Adjudicating Authority under section 126 of the Code.
5. State the restrictions imposed on the bankrupt under section 141 of the Code from the bankruptcy commencement date.

LIST OF FURTHER READINGS

- Bare Act- Insolvency and Bankruptcy Code, 2016
- Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/en/legal-framework

Bankruptcy for Individuals and Partnership Firms

Lesson 13

KEY CONCEPTS

■ Bankruptcy Trustee ■ Estate ■ Property ■ After-acquired property ■ Onerous property ■ Undervalued transaction ■ Preference transaction ■ Extortionate credit transaction

Learning Objectives

To understand:

- Functions & powers of bankruptcy trustee
- Estate of bankrupt and restrictions on disposition
- Distribution of property
- Priority of payment of debts

Lesson Outline

REGULATORY FRAMEWORK

- Section 149 to 178 of the Insolvency and Bankruptcy Code, 2016

INTRODUCTION

In 2016, Parliament enacted the Insolvency and Bankruptcy Code. The law aims to consolidate the laws relating to insolvency of companies and limited liability entities (including limited liability partnerships and other entities with limited liability), unlimited liability partnerships and individuals, presently contained in a number of legislations, into a single legislation. Chapter V of Part III (hereinafter referred to as Chapter or this Chapter) deals with administration and distribution of estate of bankrupt.

This lesson covers the aspects relating to the administration and distribution of the estate of the bankrupt. According to the report of the Bankruptcy law reforms Committee, Volume I rational and design (November 2015) - A sound bankruptcy and insolvency framework requires the existence of an impartial, efficient and expeditious administration. This is more likely to be possible for individual insolvency when administrative proceedings are placed outside the court of law. As with legal entities, what is visualised for individuals is to enable a negotiated settlement between creditors and debtor without active involvement of the court. The principle is to allow greater flexibility in the repayment plans, and a time to execute the plans, that can be acceptable to both parties. If creditors and debtors can settle on such a plan out of court, what matters for the system is that there is a record of this settlement and that it can affect the premium of future credit transactions. Economies across the world are increasingly placing administrative proceedings outside of the courts. This seems to be a natural way forward for India as well.

Before enactment of Insolvency and Bankruptcy Code, 2016, personal insolvency was primarily governed under two acts in India: the Presidency Towns Insolvency Act, 1909 (for the erstwhile Presidency towns, i.e. Kolkata, Mumbai and Chennai) and the Provincial Insolvency Act, 1920 (for the rest of India). Though these are central laws, it should be noted that both these Acts have a number of state specific amendments. The substantive provisions under the two acts are largely similar. There has not been any substantial changes to this regime over the years and it has proved to be largely ineffective in practice.

FUNCTIONS OF BANKRUPTCY TRUSTEE

According to Section 149 of the Insolvency and Bankruptcy Code, 2016 ('the Code'), the bankruptcy trustee shall perform the following functions in accordance with the provisions of this Chapter

(a) investigate the affairs of the bankrupt;

(b) realise the estate of the bankrupt; and

(c) distribute the estate of the bankrupt.

It may be noted that "bankruptcy trustee" means the insolvency professional appointed as a trustee for the estate of the bankrupt under Section 125 or Section 145 of the Code.

DUTIES OF BANKRUPT TOWARDS BANKRUPTCY TRUSTEE

Section 150 of the Code provides that the bankrupt shall assist the bankruptcy trustee in carrying out his functions by –

a) giving to the bankruptcy trustee the information of his affairs;

b) attending on the bankruptcy trustee at such times as may be required;

c) giving notice to the bankruptcy trustee of any of the following events which have occurred after the bankruptcy commencement date, -
   i) acquisition of any property by the bankrupt;
   ii) devolution of any property upon the bankrupt;
   iii) increase in the income of the bankrupt.

d) doing all other things as may be prescribed.

The bankrupt shall give notice of the increase in income or acquisition or devolution of property within seven days of such increase, acquisition or devolution. The bankrupt shall continue to discharge his above duties except duty under Clause (c) above even after passing of discharge order under Section 138.

RIGHTS OF BANKRUPTCY TRUSTEE

As per Section 151 of the Code, the bankruptcy trustee may, by his official name:

(a) hold property of every description;

b) make contracts;

c) sue and be sued;

d) enter into engagements in respect of the estate of the bankrupt;

e) employ persons to assist him;

f) execute any power of attorney, deed or other instrument; and

g) do any other act which is necessary or expedient for the purposes of or in connection with the exercise of his rights.

GENERAL POWERS OF BANKRUPTCY TRUSTEE

According to Section 152 of the Code, the bankruptcy trustee may while discharging his functions under this Chapter:

(a) sell any part of the estate of the bankrupt;

(b) give receipts for any money received by him;

(c) prove, rank, claim and draw a dividend in respect of such debts due to the bankrupt as are comprised in his estate;

(d) where any property comprised in the estate of the bankrupt is held by any person by way of pledge or hypothecation, exercise the right of redemption in respect of any such property subject to the relevant contract by giving notice to the said person;

(e) where any part of the estate of the bankrupt consists of securities in a company or any other property which is transferable in the books of a person, exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt; and

(f) deal with any property comprised in the estate of the bankrupt to which the bankrupt is beneficially entitled in the same manner as he might have dealt with it.

APPROVAL OF CREDITORS FOR CERTAIN ACTS

Section 153 of the Code provides that the bankruptcy trustee for the purposes of this Chapter may after procuring the approval of the committee of creditors, -

(a) carry on any business of the bankrupt as far as may benecessary for winding it up beneficially;

(b) bring, institute or defend any legal action or proceedings relating to the property comprised in the estate of the bankrupt;

(c) accept as consideration for the sale of any property a sum of money due at a future time subject to certain stipulations such as security;

(d) mortgage or pledge any property for the purpose of raising money for the payment of the debts of the bankrupt;

(e) where any right, option or other power forms part of the estate of the bankrupt, make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of such right, option or power;

(f) refer to arbitration or compromise on such terms as may be agreed, any debts subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt;

(g) make compromise or other arrangement as may be considered expedient, with the creditors;

(h) make compromise or other arrangement as he may deem expedient with respect to any claim arising out of or incidental to the bankrupt's estate;

(i) appoint the bankrupt to -

(A) supervise the management of the estate of the bankrupt or any part of it;

(B) carry on his business for the benefit of his creditors;

(C) assist the bankruptcy trustee in administering the estate of the bankrupt.

Vesting of estate of bankrupt in Bankruptcy Trustee

Section 154 of the Code states that the estate of the bankrupt shall vest in the bankruptcy trustee immediately from the date of his appointment. The vesting shall take effect without any conveyance, assignment or transfer.

ESTATE OF BANKRUPT

According to Section 155 (1) of the Code, the estate of the bankrupt shall include, –

(a) all property belonging to or vested in the bankrupt at the bankruptcy commencement date;

(b) the capacity to exercise and to initiate proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the bankruptcy commencement date or before the date of the discharge order passed under section 138; and

(c) all property which by virtue of any of the provisions of this Chapter is comprised in the estate.

Further as per Section 155(1) of the Code the estate of the bankrupt shall not include –

(a) excluded assets;

(b) property held by the bankrupt on trust for any other person;

(c) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund; and

(d) such assets as may be notified by the Central Government in consultation with any financial sector regulator.

Delivery of property and documents to Bankruptcy Trustee

Section 156 of the Code provides that, the bankrupt, his banker or agent or any other person having possession of any property, books, papers or other records which bankruptcy trustee is required to take possession for the purposes of the bankruptcy process shall deliver the said property and documents to the bankruptcy trustee.

Acquisition of control by Bankruptcy Trustee

According to Section 157 of the Code, the bankruptcy trustee shall take possession and control of all property, books, papers and other records relating to the estate of the bankrupt or affairs of the bankrupt which belong to him or are in his possession or under his control.

Where any part of the estate of the bankrupt consists of things in actionable claims, they shall be deemed to have been assigned to the bankruptcy trustee without any notice of the assignment.

RESTRICTIONS ON DISPOSITION OF PROPERTY

Section 158(1) of the Code provides that any disposition of property made by the debtor, during the period between the date of filing of the application for bankruptcy and the bankruptcy commencement date shall be void.

Further, Section 158(2) of the Code provides that any disposition of property made under sub-section (1) shall not give rise to any right against any person, in respect of such property, even if he has received such property before the bankruptcy commencement date in –

- good faith;
- for value; and
- without notice of the filing of the application for bankruptcy.

It may be noted that the term "property" means all the property of the debtor, whether or not it is comprised in the estate of the bankrupt, but shall not include property held by the debtor in trust for any other person.

AFTER-ACQUIRED PROPERTY OF BANKRUPT (SECTION 159)

Section 159 of the Code provides that the bankruptcy trustee shall be entitled to claim for the estate of the bankrupt, any after-acquired property by giving a notice to the bankrupt. A notice shall not be served in respect of excluded assets or any property which is acquired by or devolves upon the bankrupt after a discharge order is passed undersection 138. The notice shall be given within fifteen days from the day on which the acquisition or devolution of the after-acquired property comes to the knowledge of the bankruptcy trustee. Section 159 further provides that anything which comes to the knowledge of the bankruptcy trustee shall be deemed to have come to the knowledge of the successor of the bankruptcy trustee at the same time; and anything which comes to the knowledge of a person before he is appointed as a bankruptcy trustee shall be deemed to have come to his knowledge on the date of his appointment as bankruptcy trustee.

"After-acquired property" means any property which has been acquired by or has devolved upon the bankrupt after the bankruptcy commencement date.

The bankruptcy trustee shall not be entitled, by virtue of section 159, to claim from any person who has acquired any right over after-acquired property, in good faith, for value and without notice of the bankruptcy.

A notice may be served after the expiry of the period fifteen days only with the approval of the Adjudicating Authority.

ONEROUS PROPERTY OF BANKRUPT

Section 160 of the Code provides that the bankruptcy trustee may, by giving notice to the bankrupt or any person interested in the onerous property, disclaim any onerous property which forms a part of the estate of the bankrupt.

The bankruptcy trustee may give the notice under notwithstanding that he has taken possession of the onerous property, endeavored to sell it or has exercised rights of ownership in relation to it.

Said notice of disclaimer shall –

(a) determine, as from the date of such notice, the rights, interests and liabilities of the bankrupt in respect of the onerous property disclaimed;

(b) discharge the bankruptcy trustee from all personal liability in respect of the onerous property as from the date of appointment of the bankruptcy trustee.

The term "onerous property" means -

(i) any unprofitable contract; and

(ii) any other property comprised in the estate of the bankrupt which is unsaleable or not readily saleable, or is such that it may give rise to a claim.

Further the said notice of disclaimer shall not be given in respect of the property which has been claimed for the estate of the bankrupt under section 155 without the permission of the committee of creditors.

And the notice of disclaimer shall not affect the rights or liabilities of any other person, and any person who sustains a loss or damage in consequence of the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the loss or damage.

NOTICE TO DISCLAIM ONEROUS PROPERTY

As per Section 161(1) of the Code, no notice of disclaimer under section 160 shall be necessary if –

a) a person interested in the onerous property has applied in writing to the bankruptcy trustee or his predecessor requiring him to decide whether the onerous property should be disclaimed or not;

and

b) a decision under clause (a) has not been taken by the bankruptcy trustee within seven days of receipt of the notice.

As per section 61(2) of the code, any onerous property which connot be disclaimed under sub-section (1) shall be deemed to be part the estate of the baukrupt.

An onerous property is said to be disclaimed where notice in relation to that property has been given by the bankruptcy trustee under section 160.

DISCLAIMER OF LEASEHOLDS

According to Section 162 of the Code, the bankruptcy trustee shall not be entitled to disclaim any leasehold interest, unless a notice of disclaimer has been served on every interested person and –

(a) no application objecting to the disclaimer by the interested person, has been filed with respect to the leasehold interest, within fourteen days of the date on which notice was served; and

(b) where the application objecting to the disclaimer has been filed by the interested person, the Adjudicating Authority has directed under section 163 that the disclaimer shall take effect.

What happens when an onerous property cannot be disclaimed?

As per Section 161(2) of the Code, any onerous property which cannot be disclaimed under sub-section (1) shall be deemed to be part of the estate of the bankrupt.

Where the Adjudicating Authority gives a direction above, it may also make order with respect to fixtures, improvements by tenant and other matters arising out of the lease as it may think fit.

CHALLENGE AGAINST DISCLAIMED PROPERTY

As per Section 163(1) of the Code, an application challenging the disclaimer may be made by the following persons under that section to the adjudicating authority –

(a) any person who claims an interest in the disclaimed property; or

(b) any person who is under any liability in respect of the disclaimed property; or

(c) where the disclaimed property is a dwelling house, any person who on the date of application for bankruptcy was in occupation of or entitled to occupy that dwelling house.

Section 163(2) of the Code provides that the adjudicating authority may on an application under sub-section (1) make an order for the vesting of the disclaimed property in, or for its delivery to any of the persons mentioned in sub-section(1).

The Adjudicating Authority shall not make an order in favour of a person who has made an application under clause (b) of sub-section (1) except where it appears to the adjudicating authority that it would be just to do so for the purpose of compensating the person.

The effect of an order under this section shall be taken into account while assessing loss or damage sustained by any person in consequence of the disclaimer under sub-section (5) of section 160.

An order vesting property in any person need not be completed by any consequence, assignment or transfer.

UNDERVALUED TRANSACTIONS

As per Section 164(1) of the Code, the bankruptcy trustee may apply to the adjudicating authority for an order under that section in respect of an undervalued transaction between a bankrupt and any person.

As per Section 164(2) of the Code, the undervalued transaction should have –

(a) been entered into during the period of two years ending on the filing of the application for bankruptcy; and

(b) caused bankruptcy process to be triggered.

As per Section 164(3) of the Code, a transaction between a bankrupt and his associate entered into during the period of two years preceding the date of making of the application for bankruptcy shall be deemed to be an undervalued transaction under this section.

Section 164(4) of the Code provides that on the application of the bankruptcy trustee, the adjudicating authority may –

(a) pass an order declaring an undervalued transaction void;

(b) pass an order requiring any property transferred as a part of an undervalued transaction to be vested with the bankruptcy trustee as a part of the estate of the bankrupt; and

(c) pass any other order it thinks fit for restoring the position to what it would have been if the bankrupt had not entered into the undervalued transaction.

What constitutes undervalued transaction?

As per Section 164(6) a bankrupt enters into an undervalued transaction with any person if -

(a) he makes a gift to that person;

(b) no consideration has been received by that person from the bankrupt;

(c) it is in consideration of marriage; or

(d) it is for a consideration, the value of which in money or money's worth is significantly less than the value in money or money's worth of the consideration provided by the bankrupt.

Note: Undervalued transactions are basically the transactions where either there is no consideration received by the bankrupt or the consideration received is much lesser than the market value.

As per Section 164(5) the order under Section 164(4)(a) shall notbe passed if it is proved by the bankrupt that the transaction was undertaken in the ordinary course of business of the bankrupt:

However, the provisions of Section 164(5) shall not be applicable to undervalued transaction entered into between a bankrupt and his associate under Section 164(3).

PREFERENCE TRANSACTIONS (SECTION 165)

1. The bankruptcy trustee may apply to the Adjudicating Authority for an order under this section if a bankrupt has given a preference to any person.
2. The transaction giving preference to an associate of the bankrupt under sub-section (1) should have been entered into by the bankrupt with the associate during the period of two years ending on the date of the application for bankruptcy.
3. Any transaction giving preference not covered under sub-section (2) should have been entered into by the bankrupt during the period of six months ending on the date of the application for bankruptcy.
4. The transaction giving preference under sub-section (2) or under sub-section (3) should have caused the bankruptcy process to be triggered.
5. On the application of the bankruptcy trustee under sub-section (1), the adjudicating authority may –
   (a) pass an order declaring a transaction giving preference void;
   (b) pass an order requiring any property transferred in respect of a transaction giving preference to be vested with the bankruptcy trustee as a part of the estate of the bankrupt; and
   (c) pass any other order it thinks fit for restoring the position to what it would have been if the bankrupt had not entered into the transaction giving preference.
6. The adjudicating authority shall not pass an order under sub-section (5) unless the bankrupt was influenced in his decision of giving preference to a person by a desire to produce in relation to that person an effect under clause (b) of sub-section (8).
7. For the purpose of sub-section (6), if the person is an associate of the bankrupt, (otherwise than by reason only of being his employee), at the time when the preference was given, it shall be presumed that the bankrupt was influenced in his decision under that sub- section.

EFFECT OF ORDER (SECTION 166)

1. Subject to the provision of sub-section (2), an order passed by the adjudicating authority under section 164 or section 165 shall not, -
   (a) give rise to a right against a person interested in the property which was acquired in an undervalued transaction or a transaction giving preference, whether or not he is the person with whom the bankrupt entered into such transaction; and
   (b) require any person to pay a sum to the bankruptcy trustee in respect of the benefit received from the undervalued transaction or a transaction giving preference, whether or not he is the person with whom the bankrupt entered into such transaction.
2. The provision of sub-section (1) shall apply only if the interest was acquired or the benefit was received –
   a) in good faith;
   b) for value;
   c) without notice that the bankrupt entered into the transaction at an under-value or for giving preference;
   d) without notice that the bankrupt has filed an application for bankruptcy or a bankruptcy order has been passed; and
   e) by any person who at the time of acquiring the interest or receiving the benefit was notan associate of the bankrupt.

3. Any sum required to be paid to the bankruptcy trustee under sub-section (1) shall be included in the estate ofthe bankrupt.

EXTORTIONATE CREDIT TRANSACTIONS (SECTION 167)

1. Subject to sub-section (6), on an application by the bankruptcy trustee, the adjudicating authority may make an order under this section in respect of extortionate credit transactions to which the bankrupt is or has been a party.
2. The transactions under sub-section (1) should have been entered into by the bankrupt during the period of two years ending on the bankruptcy commencement date.
3. An order of the adjudicating authority may -
   (a) set aside the whole or part of any debt created by the transaction;
   (b) vary the terms of the transaction or vary the terms on which any security for the purposes of thetransaction is held;
   (c) require any person who has been paid by the bankrupt under any transaction, to pay a sum to the bankruptcy trustee;
   (d) require any person to surrender to the bankruptcy trustee any property of the bankrupt held as security for the purposes of the transaction.
4. Any sum paid or any property surrendered to the bankruptcy trustee shall be included in the estate of thebankrupt.
5. Any debt extended by a person regulated for the provision of financial services in compliance with the law inforce in relation to such debt, shall not be considered as an extortionate credit transaction under this section.

OBLIGATIONS UNDER CONTRACTS (SECTION 168)

1. This section shall apply where a contract has been entered into by the bankrupt with a person before the bankruptcy commencement date.
2. Any party to a contract, other than the bankrupt under sub-section (1), may apply to the adjudicating authority for –
   (a) an order discharging the obligations of the applicant or the bankrupt under the contract; and
   (b) payment of damages by the party or the bankrupt, for non-performance of the contract or otherwise.
3. Any damages payable by the bankrupt by virtue of an order under clause (b) of sub- section (2) shall beprovable as bankruptcy debt.
4. When a bankrupt is a party to the contract under this section jointly with another person, that person may sue or be sued in respect of the contract without joinder of the bankrupt.

ADMINISTRATION OF ESTATE OF DECEASED BANKRUPT

According to Section 170(1) of the Code, all the provisions of Chapter V relating to the administration and distribution of the estate of the bankrupt shall, so far as the same are applicable, apply to the administration of the estate of a deceased bankrupt.

Section 170(2) provides that while administering the estate of a deceased bankrupt, the bankruptcy trustee shall have regard to the claims by the legal representative of the deceased bankrupt to payment of the proper funeral and testamentary expenses incurred by them.

Section 170(3) provides that the claims under sub-section (2) shall rank equally to the secured creditors in the priority provided under section 178.

If, on the administration of the estate of a deceased bankrupt, any surplus remains in the hands of the bankruptcy trustee after payment in full of all the debts due from the deceased bankrupt, together with the costs of the administration and interest as provided under section 178, such surplus shall be paid to the legal representatives of the estate of the deceased bankrupt or dealt with in such manner as may be prescribed.

What happens to the proceedings on death of the bankrupt?

Since bankruptcy proceedings are civil in nature, these proceedings survive the demise of bankrupt. As per Section 169 of the Code, if a bankrupt dies, the bankruptcy proceedings shall, continue as if he were alive.

PROOF OF DEBT

As per Section 171 of the Code the bankruptcy trustee shall give notice to each of the creditors to submit proof of debt within fourteen days of preparing the list of creditors under section 132.

The proof of debt shall –

(a) require the creditor to give full particulars of debt, including the date on which the debt was contracted and the value at which that person assesses it;

(b) require the creditor to give full particulars of the security, including the date on which the security was given and the value at which that person assesses it;

(c) be in such form and manner as may be prescribed.

In case the creditor is a decree holder against the bankrupt, a copy of the decree shall be a valid proof of debt.

Where a debt bears interest, that interest shall be provable as part of the debt except in so far as it is owed in respect of any period after the bankruptcy commencement date.

The bankruptcy trustee shall estimate the value of any bankruptcy debt which does not have a specific value. The value assigned by the bankruptcy trustee shall be the amount provable by the concerned creditor.

A creditor may prove for a debt where payment would have become due at a date later than the bankruptcy commencement date as if it were owed presently and may receive dividends in a manner as may be prescribed.

Where the bankruptcy trustee serves a notice and the person on whom the notice is served does not file a proof of security within thirty days after the date of service of the notice, the bankruptcy trustee may, with leave of the adjudicating authority, sell or dispose of any property that was subject to the security, free of that security.

MUTUAL CREDIT AND SET-OFF

Section 173 states that where before the bankruptcy commencement date, there have been mutual dealings between the bankrupt and any creditor, the bankruptcy trustee shall -

- take an account of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other; and
- only the balance shall be provable as a bankruptcy debt or as the amount payable to the bankruptcy trustee as part of the estate of the bankrupt.

Sums due from the bankrupt to another party shall not be included in the account taken by the bankruptcy trustee above, if that other party had notice at the time they became due that an application for bankruptcy relating to the bankrupt was pending.

Proof of debt by secured creditors

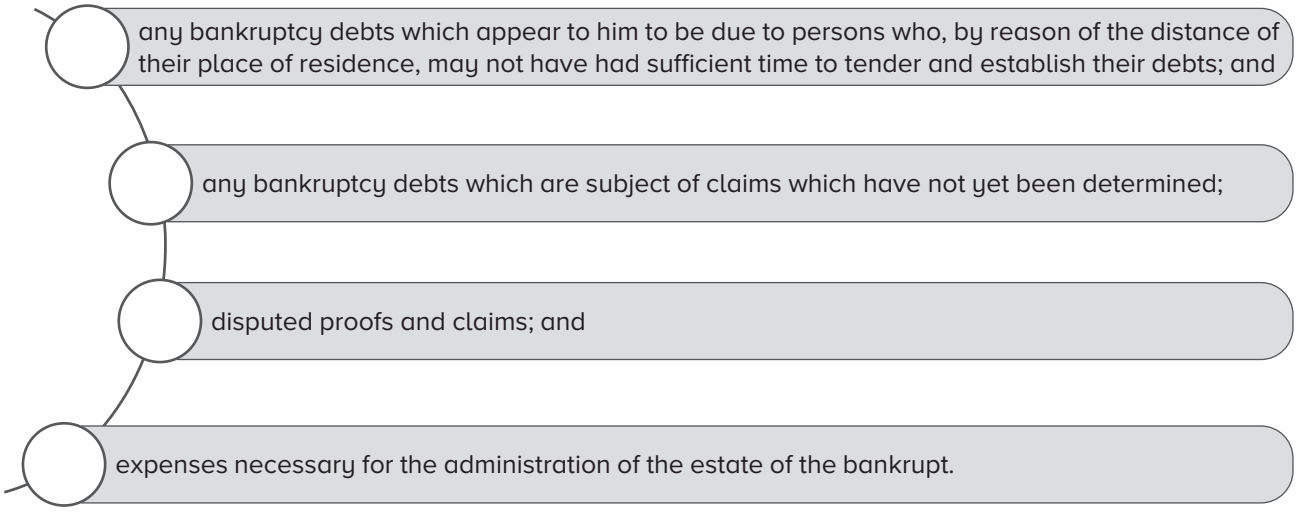
Section 172 of the Code provides that where a secured creditor realises his security, he may produce proof of the balance due to him. Where a secured creditor surrenders his security to the bankruptcy trustee for the general benefit of the creditors, he may produce proof of his whole claim.

DISTRIBUTION OF INTERIM DIVIDEND

According to Section 174 of the Code, whenever the bankruptcy trustee has sufficient funds in his hand, he may declare and distribute interim dividend among the creditors in respect of the bankruptcy debts which they have respectively proved.

Where the bankruptcy trustee has declared any interim dividend, he shall give notice of such dividend and the manner in which it is proposed to be distributed.

In the calculation and distribution of the interim dividend, the bankruptcy trustee shall make provision for –



DISTRIBUTION OF PROPERTY

According to Section 175(1) of the Code, the bankruptcy trustee may, with the approval of the committee of creditors, divide in its existing form amongst the creditors, according to its estimated value, any property in its existing formwhich from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

Section 175(2) provides that an approval under sub-section (1) shall be sought by the bankruptcy trustee for each transaction, and a person dealing with the bankruptcy trustee in good faith and for value shall not be required to enquire whether any approval required under sub-section (1) has been given.

Section 175(3) provides that where the bankruptcy trustee has done anything without the approval of the committee of creditors, the committee may, for the purpose of enabling him to meet his expenses out of the estate of the bankrupt, ratify the act of the bankruptcy trustee.

Section 175(4) states that the committee of the creditors shall not ratify the act of the bankruptcy trustee under Section 175(3) unless it is satisfied that the bankruptcy trustee acted in a case of urgency and has sought its ratification without undue delay.

FINAL DIVIDEND (SECTION 176)

1. Where the bankruptcy trustee has realised the entire estate of the bankrupt or so much of it as could berealised in the opinion of the bankruptcy trustee, he shall give notice -

   (a) of his intention to declare a final dividend; or

   (b) that no dividend or further dividend shall be declared.

2. The notice under sub-section (1) shall contain such particulars as may be prescribed and shall require all claims against the estate of the bankrupt to be established by a final date specified in the notice.

3. The Adjudicating Authority may, on the application of any person interested in the administration of the estate of the bankrupt, postpone the final date referred to in sub-section (2).

4. After the final date referred to in sub-section (2), the bankruptcy trustee shall –

a) defray any outstanding expenses of the bankruptcy out of the estate of the bankrupt;and

b) if he intends to declare a final dividend, declare and distribute that dividend among the creditors who have proved their debts, without regard to the claims of any other persons.

5. If a surplus remains after payment in full with interest to all the creditors of the bankrupt and the payment ofthe expenses of the bankruptcy, the bankrupt shall be entitled to the surplus.

6. Where a bankruptcy order has been passed in respect of one partner in a firm, a creditor to whom the bankrupt is indebted jointly with the other partners in the firm or any of them shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

CLAIMS OF CREDITORS (SECTION 177)

1. A creditor who has not proved his debt before the declaration of any dividend is not entitled to disturb, by reason that he has not participated in it, the distribution of that dividend or any other dividend declared beforehis debt was proved, but –

a) when he has proved the debt, he shall be entitled to be paid any dividend or dividends which he has failed to receive, out of any money for the time being available for the payment of any further dividend; and

b) any dividend or dividends payable to him shall be paid before that money is applied to the payment of any such further dividend.

2. No action shall lie against the bankruptcy trustee for a dividend, but if the bankruptcy trustee refuses to pay a dividend payable under sub-section (1), the adjudicating authority may order him to –

(a) pay the dividend; and

(b) pay, out of his own money -

(i) interest on the dividend; and

(ii) the costs of the proceedings in which the order to pay has been made.

PRIORITY OF PAYMENT OF DEBTS (SECTION 178)

1. Notwithstanding anything to the contrary contained in any law enacted by the Parliament or the State Legislature for the time being in force, in the distribution of the final dividend, the following debts shall be paid in priority to all other debts —

(a) firstly, the costs and expenses incurred by the bankruptcy trustee for the bankruptcy process in full;

(b) secondly, -

(i) the workmen's dues for the period of twenty-four months preceding the bankruptcy commencement date; and

(ii) debts owed to secured creditors;

(c) thirdly, wages and any unpaid dues owed to employees, other than workmen, of the bankrupt for the period of twelve months preceding the bankruptcy commencement date;

(d) fourthly, any amount due to the Central Government and the State Government including the amount to be received on account of Consolidated Fund of india and the Consolidated Fund

of a State, if any, in respect of the whole or any part of the period of two years preceding the bankruptcy commencement date;

(e) lastly, all other debts and dues owed by the bankrupt including unsecured debts.

2. The debts in each class specified in sub-section (1) shall rank in the order mentioned in that sub-section but debts of the same class shall rank equally amongst themselves, and shall be paid in full, unless the estate of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

3. Where any creditor has given any indemnity or has made any payment of moneys by virtue of which any asset of the bankrupt has been recovered, protected or preserved, the adjudicating authority may make such order as it thinks just with respect to the distribution of such asset with a view to giving that creditor an advantage over other creditors in consideration of the risks taken by him in so doing.

4. Unsecured creditors shall rank equally amongst themselves unless contractually agreed to the contrary by such creditors.

5. Any surplus remaining after the payment of the debts under sub-section (1) shall be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the bankruptcy commencement date.

6. Interest payments under sub-section (5) shall rank equally irrespective of the nature of the debt.

7. In the case of partners, the partnership property shall be applicable in the first instance in payment of the partnership debts and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

8. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be dealt with as part of the respective separate property in proportion to the rights and interests of each partner in the partnership property.

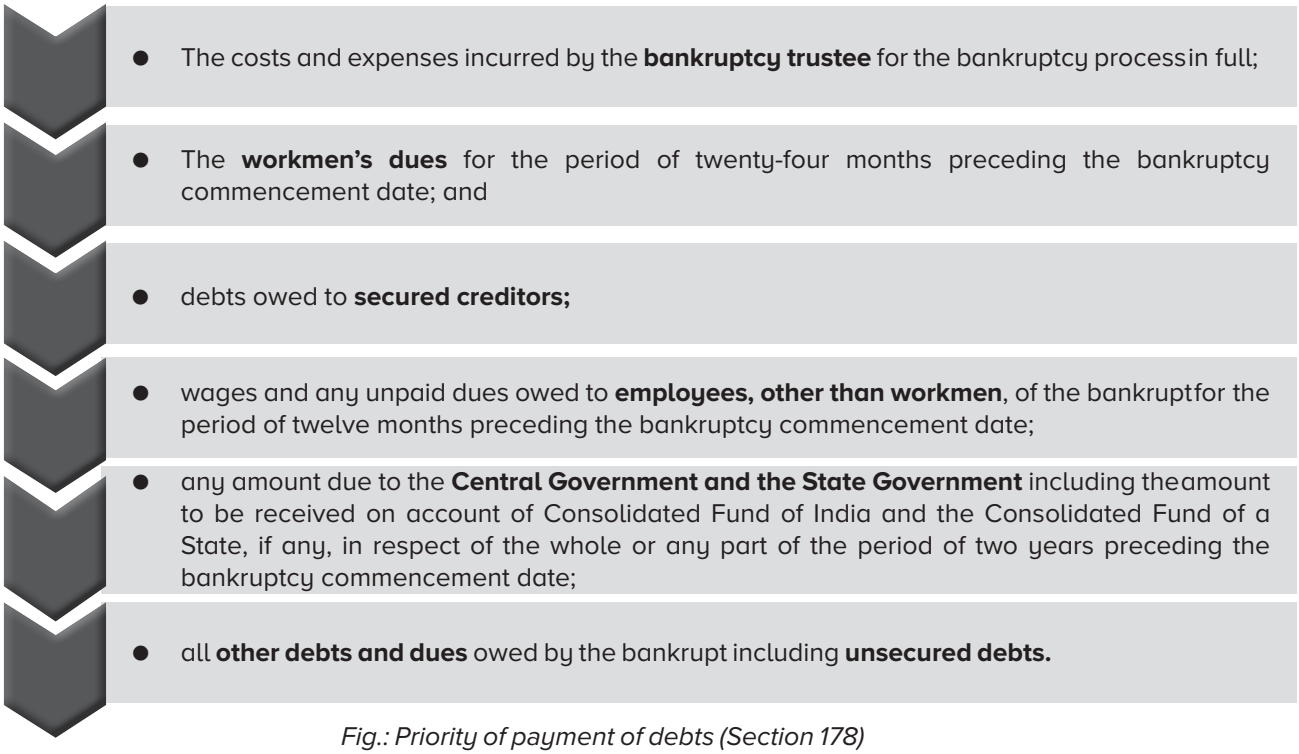


Fig.: Priority of payment of debts (Section 178)

ADJUDICATING AUTHORITY FOR INDIVIDUALS AND PARTNERSHIP FIRMS

Section 179 of the Code, states 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 overthe 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.

The Debt Recovery Tribunal shall, notwithstanding anything contained in any other law for the time being in force,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.

Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a debtor for which an order of moratorium has been made under Part III, the period during which such moratorium is in place shall be excluded.

CIVIL COURT NOT TO HAVE JURISDICTION

According to Section 180 of the Code, 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 Tribunalhas jurisdiction under this Code.

No injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal by or under this Code.

APPEAL TO DEBT RECOVERY APPELLATE TRIBUNAL

As per Section 181 of the Code, an appeal from an order of the Debt Recovery Tribunal under the Code shall be filed within thirty days before the Debt Recovery Appellate Tribunal.

The Debt Recovery Appellate Tribunal may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within thirty days, allow the appeal to be filed within a further period not exceeding fifteen days.

APPEAL TO SUPREME COURT

Section 182 of the Insolvency and Bankruptcy Code, 2016 provides that an appeal from an order of the Debt Recovery Appellate Tribunal on a question of law under this Code shall be filed within forty-five days before the Supreme Court.

The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal with in forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days.

LESSON ROUND-UP

- Section 149 of the Insolvency and Bankruptcy Code, 2016 outlines the functions of bankruptcy trustee.
- Section 151 and 152 of the Code contains provisions relating to rights and General Powers of the Bankruptcy trustee respectively.
- Section 153 of the Code provides for acts which can be undertaken by bankruptcy trustee after approval of the Committee of Creditors.
- Section 155 of the Code contains provisions relating to the estate of the Bankrupt.
- Any disposition of property made by the debtor, during the period between the date of filing of the application for bankruptcy and the bankruptcy commencement date shall be void.
- Onerous property means any unprofitable contract; and any other property comprised in the estate of the bankrupt which is unsaleable or not readily saleable, or is such that it may give rise to a claim.
- As per Section 164(1) of the Code, the bankruptcy trustee may apply to the Adjudicating Authority for an order under this section in respect of an undervalued transaction between a bankrupt and any person.
- Section 167 contains provisions relating to extortionate credit transactions to which the bankrupt is or has been a party.
- Section 168 provides for Obligations under contracts that has been entered into by the bankrupt with a person before the bankruptcy commencement date.
- Section 169 contains that if a bankrupt dies, the bankruptcy proceedings shall, continue as if he were alive.
- Section 171 states that the bankruptcy trustee shall give notice to each of the creditors to submit proof of debt within fourteen days of preparing the list of creditors.
- Whenever the bankruptcy trustee has sufficient funds in his hand, he may declare and distribute interim dividend among the creditors in respect of the bankruptcy debts which they have respectively proved.
- Section 178 provides for the priority of payment of debts.
- Section 179 provides that Adjudicating Authority for individuals and partnership 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.
- An appeal from an order of the Debt Recovery Tribunal under this Code shall be filed within thirty days before the debt recovery appellate tribunal.
- 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.
- An appeal from an order of the Debt Recovery Appellate Tribunal on a question of law under this Code shall be filed within forty-five days before the Supreme Court.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Mention in brief the duties of the Bankruptcy Trustee.
2. Discuss in brief the general powers of the Bankruptcy Trustee.
3. Write a short note on the 'estate of bankrupt'.
4. What do you understand by onerous property of the bankrupt? Explain.
5. Mention the priority of payments of debt under Section 178 of the Insolvency and Bankruptcy Code, 2016.

LIST OF FURTHER READINGS
● Bare Act- Insolvency and Bankruptcy Code, 2016 ● Frequently Asked Questions (FAQs) on Insolvency and Bankruptcy Code, 2016

OTHER REFERENCES (Including Websites / Video Links)
● https://ibbi.gov.in/en ● https://ibbi.gov.in/en/legal-framework

Fresh Start Process

Lesson 14

KEY CONCEPTS

■ Fresh Start ■ Qualifying Debt ■ Excluded Debt ■Resolution Professional ■ Interim-Moratorium ■ Discharge Order

Learning Objectives

To understand:

- Application process of fresh start order
- Appointment of Resolution Professional in fresh start process
- Functions of Resolution Professional in fresh start process
- Discharge order

Lesson Outline

- Introduction
- Eligibility for making application
- Application for Fresh Start Order
- Appointment of Resolution Professional
- Examination of application by Resolution Professional
- Admission or rejection of application
- Objections by creditor and their examination
- Application against decision of Resolution Professional
- Replacement of Resolution Professional
- Discharge Order
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

REGULATORY FRAMEWORK

- Section 80 to 93 of the Insolvency and Bankruptcy Code, 2016

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ("Code") is a consolidated statute which deals with insolvency and bankruptcy of corporate, limited liability partnerships (LLPs), individuals and partnership firms. The Code is a one shot solution which provides for dealing with insolvency or bankruptcy of various organizational structures under one roof.

This Lesson enables readers to comprehend the provisions specified under the Code for initiating fresh start process by a debtor subject to fulfillment of certain criteria. Since the provisions of fresh start process have not been notified under the Code therefore no statutory regulations providing the form and manner for initiating fresh start process have been introduced yet by the Insolvency and Bankruptcy Board of India ("Board").

The fresh start process is enshrined under Chapter II of Part III of the Code. The fresh start process is an opportunity to a debtor who is unable to pay his debts to clear off his debts in a time-bound manner on fulfilling the prescribed conditions for the fresh start of his qualifying debts.

The intent of fresh start process is to provide debtors with comparatively small debts, a chance to discharge off their debts and restart afresh without any liability. The fresh start process is an alternative to the insolvency and bankruptcy processes. To prevent and curb the abuse of this debtor centric process, the Code has aligned certain restrictions on the applicability and validity of fresh start process.

WHO CAN MAKE AN APPLICATION FOR FRESH START PROCESS?

Section 80 of the Insolvency and Bankruptcy Code, 2016 provides that a debtor who is unable to pay his debt and fulfils the below mentioned conditions shall be entitled to make an application for a fresh start process for discharge of his qualifying debt.

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 but does not include:

An excluded debt	**a debt to the extent it is secured**	**any debt which has been incurred three months prior to the date of the application for fresh start process**

Excluded debt means:

- liability to pay fine imposed by a Court or Tribunal;
- liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- liability to pay maintenance to any person under any law for the time being in force;

- liability in relation to a student loan;

- any other debt as may be prescribed.

Conditions to be fulfilled for applying for fresh start process:

A debtor may either personally or through a Resolution Professional may apply for fresh start process if he fulfills the following conditions:						
(a) The gross annual income of the debtor does not exceed sixty thousand rupees;	(b) The aggregate value of the assets of the debtor does not exceed twenty thousand rupees;	(c) The aggregate value of the qualifying debts does not exceed thirty -five thousand rupees;	(d) He is not an undischarged bankrupt;	(e) He does not own a dwelling unit, irrespective of whether it is encumbered or not;	(f) A fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and	(g) No previous fresh start order under these provisions has been made in relation to him in the preceding twelve months of the date of the application for fresh start.

FILING OF APPLICATIONS FOR FRESH START PROCESS AND ITS EFFECT THEREOF

Sub-section 4 of Section 81 of the Insolvency and Bankruptcy Code, 2016 provides that an application filed for fresh start process shall be in such form and manner and accompanied by such fee as may be prescribed by the regulations after their enforcement and shall contain the following information supported by an affidavit namely:

(a) list of all debts owed by the debtor as on the date of the said application along with details relating to the amount of each debt, interest payable thereon and the names of the creditors to whom each debt is owed;

(b) the interest payable on the debts and the rate thereof stipulated in the contract;

(c) list of security held in respect of any of the debts;

(d) the financial information of the debtor and his immediate family for up to two years prior to the date of the application;

(e) the particulars of the debtor's personal details, as may be prescribed;

(f) the reasons for making the application;

(g) the particulars of any legal proceedings which, to the debtor's knowledge has been commenced against him; and

(h) The confirmation that no previous fresh start order under the provisions of the Code has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application.

When an application is filed under Section 80 by a debtor, an interim-moratorium shall commence on the date of filing of said application in relation to all the debts and shall cease to have effect on the date of admission or rejection of such application, as the case may be. During the interim-moratorium period if any legal action or legal proceeding is pending in respect of any of debts of the debtor then the same shall be deemed to have been stayed and no creditor shall initiate any legal action or proceedings in respect of such debt.

APPOINTMENT OF RESOLUTION PROFESSIONAL

Section 82 of the Insolvency and Bankruptcy Code, 2016 provides that where an application under Section 80 is filed by the debtor through a Resolution Professional, the Adjudicating Authority shall direct the Board within seven days of the date of receipt of the application and shall seek confirmation from the Board that there are no disciplinary proceedings against the Resolution Professional who has submitted such application.

The Board shall communicate to the adjudicating authority in writing either:

- Confirming the appointment of the Resolution Professional who filed an application; or
- Rejecting the appointment of the Resolution Professional who filed an application and nominating a Resolution Professional suitable for the fresh start process.

Where an application under section 80 is filed by the debtor himself and not through the Resolution Professional, the adjudicating authority shall direct the Board within seven days of the date of the receipt of an application to nominate a Resolution Professional for the fresh start process. The Board shall nominate a Resolution Professional within ten days of receiving the direction issued by the adjudicating authority. The adjudicating authority shall by order appoint the Resolution Professional recommended or nominated by the Board.

EXAMINATION OF APPLICATION BY RESOLUTION PROFESSIONAL

Section 83 of the Insolvency and Bankruptcy Code, 2016 provides that the Resolution Professional shall examine the application made under Section 80 within ten days of his appointment and submit a report to the adjudicating authority, either recommending acceptance or rejection of the application.

The report by the Resolution Professional shall contain the details of the amounts mentioned in the application which in the opinion of the Resolution Professional are–

- qualifying debts; and
- liabilities eligible for discharge under sub-section (3) of Section 92.

The Resolution Professional may call for such further information or explanation in connection with the application as may be required from the debtor or any other person who, in the opinion of the Resolution Professional, may provide such information. The debtor or any other person, as the case may be, shall furnish such information or explanation within seven days of receipt of the request for additional information or explanation.

The Resolution Professional shall presume that the debtor is unable to pay his debts at the date of the application, if in his opinion:

- the information supplied in the application indicates that the debtor is unable to pay his debts and he has no reason to believe that the information supplied is incorrect or incomplete; and
- there is no change in the financial circumstances of the debtor since the date of the application enabling the debtor to pay his debts.

The Resolution Professional shall reject the application in the following cases:

a) The debtor does not satisfy the conditions specified under Section 80; or

b) the debts disclosed in the application by the debtor are not qualifying debts; or

c) the debtor has deliberately made a false representation or omission in the application or with respect to the documents or information submitted.

The Resolution Professional shall record the reasons for recommending the acceptance or rejection of the application in the report to the adjudicating authority and shall give a copy of the report to the debtor.

ADMISSION OR REJECTION OF APPLICATION BY ADJUDICATING AUTHORITY AND ITS EFFECT THEREOF

Section 84 of the Insolvency and Bankruptcy Code, 2016 provides that the Adjudicating Authority may within fourteen days from the date of submission of the report by the Resolution Professional pass an order either admitting or rejecting the application made under sub-section (1) of Section 81. In case the application has been accepted by the Adjudicating Authority, then the order shall state the amount which has been accepted as qualifying debts by the Resolution Professional and other amounts eligible for discharge under Section 92 for the purposes of the fresh start order.

A copy of the order passed by the Adjudicating Authority along with a copy of the application shall be provided to the creditors mentioned in the application within two days of the passing of the order.

Section 85 of the Insolvency and Bankruptcy Code, 2016 provides that on the date of admission of the application, the moratorium period shall commence in respect of all the debts of the debtor. During the moratorium period, any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed and pursuant to the provisions of Section 86, the creditors shall not initiate any legal action or proceedings in respect of any debt. The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission, unless the order admitting the application is revoked under sub-section (2) of section 91.

During the moratorium period, the debtor shall:

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

- not dispose of or alienate any of his assets;

- inform his business partners that he is undergoing a fresh start process;

- be required to inform prior to entering into any financial or commercial transaction of such value as may be notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process;

- disclose the name under which he enters into business transactions, if it is different from the name in the application admitted under Section 84; and

- not travel outside India except with the permission of the Adjudicating Authority.

OBJECTIONS BY CREDITOR AND THEIR EXAMINATION BY RESOLUTION PROFESSIONAL

Section 86 of the Insolvency and Bankruptcy Code, 2016 provides that any creditor mentioned in the order of the Adjudicating Authority under Section 84 to whom a qualifying debt is owed, may within a period of ten days from the date of receipt of the order under Section 84, object only on the following grounds, namely:

- inclusion of a debt as a qualifying debt; or
- incorrectness of the details of the qualifying debt specified in the order under Section 84.

A creditor may file an objection by way of an application to the Resolution Professional. The application shall be supported by such information and documents as may be prescribed. The Resolution Professional shall consider every objection made under this Section. The Resolution Professional shall examine the objections and either accept or reject the objections within ten days of the date of the application. The Resolution Professional may examine on any matter that appears to him to be relevant to the making of a final list of qualifying debts for the purposes of Section 92.

On the basis of the examination, the Resolution Professional shall:

a) prepare an amended list of qualifying debts for the purpose of the discharge order;

b) make an application to the adjudicating authority for directions under section 90; or

c) take any other steps in relation to the debtor.

APPLICATION AGAINST DECISION OF RESOLUTION PROFESSIONAL

Section 87 of the Insolvency and Bankruptcy Code, 2016 provides that the debtor or the creditor, who is aggrieved by the action taken by the Resolution Professional under Section 86, may within ten days of such decision, make an application to the Adjudicating Authority challenging such action on any of the following grounds, namely:

a) that the Resolution Professional has not given an opportunity to the debtor or the creditor to make a representation; or

b) that the Resolution Professional colluded with the other party in arriving at the decision; or

c) that the Resolution Professional has not complied with the requirements of Section 86.

The Adjudicating Authority shall decide the application referred within fourteen days of such application and make an order as it deems fit. Where the application has been allowed by the Adjudicating Authority, it shall forward its order to the Board and the Board may take such action as may be required against the Resolution Professional.

General duties of Debtor

Section 88 of the Insolvency and Bankruptcy Code, 2016 prescribes the duties of the debtor during fresh start process which is as follows:

a) To make available to the Resolution Professional all information relating to his affairs, attend meetings and comply with the requests of the Resolution Professional in relation to the fresh start process.

b) to inform the Resolution Professional as soon as reasonably possible of any material error or omission in relation to the information or document supplied to the Resolution Professional or any change in financial circumstances after the date of application, where such change has an impact on the fresh start process.

REPLACEMENT OF RESOLUTION PROFESSIONAL

Section 89 of the Insolvency and Bankruptcy Code, 2016 prescribes that where the debtor or the creditor is of the opinion that the Resolution Professional appointed under section 82 is required to be replaced, they may apply to the Adjudicating Authority for the replacement of such Resolution Professional. the Adjudicating Authority shall within seven days of the receipt of the application make a reference to the Board for replacement of the resolution Professional. the Board shall within ten days of the receipt of a reference from the Adjudicating Authority under recommend the name of insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending and then consequently Adjudicating Authority shall appoint another Resolution Professional for the purposes of the fresh start process on the basis of the recommendation by the Board. theAdjudicating Authority may give directions to the replaced Resolution Professional to share all information with the new Resolution Professional in respect of the fresh start process; and to co-operate with the new Resolution Professional in such matters as may be required.

Directions for compliances of restrictions

Section 90 of the Insolvency and Bankruptcy Code, 2016 provides that Resolution Professional may apply to the Adjudicating Authority for any of the following directions, namely:

a) Compliance of any restrictions referred to in sub-section (3) of Section 85 in case of non-compliance by the debtor; or

b) Compliance of the duties of the debtor referred to in section 88, in case on non-compliance by the debtor.

The Resolution Professional may apply to the Adjudicating Authority for directions in relation to any other matter under these provisions for which no specific provisions have been made.

REVOCATION OF ORDER ADMITTING APPLICATION

Section 91 of the Insolvency and Bankruptcy Code, 2016 provides that the Resolution Professional may submit an application to the Adjudicating Authority seeking revocation of its order made under Section 84 on the following grounds, namely:

a) if due to any change in the financial circumstances of the debtor, the debtor is ineligible for a fresh start process; or

b) non-compliance by the debtor of the restrictions imposed under sub-section (3) of section 85; or

c) if the debtor has acted in a mala fide manner and has wilfully failed to comply with the provisions of this Chapter.

The Adjudicating Authority shall within fourteen days of the receipt of the application, may by order admit or reject the application. On passing of the order admitting the application, the moratorium and the fresh start process shall cease to have effect. A copy of the order passed by the Adjudicating Authority under this Section shall be provided to the Board for the purpose of recording an entry in the register referred to in Section 196.

DISCHARGE ORDER

Section 92 of the Insolvency and Bankruptcy Code, 2016 provides that the Resolution Professional shall prepare a final list of qualifying debts and submit such list to the Adjudicating Authority at least seven days before the moratorium period comes to an end. The Adjudicating Authority shall pass a discharge order at the end of the moratorium period for discharge of the debtor from the qualifying debts.

The Adjudicating Authority shall discharge the debtor from the following liabilities, namely:

(a) penalties in respect of the qualifying debts from the date of application till the date of the discharge order;

(b) interest including penal interest in respect of the qualifying debts from the date of application till the date of the discharge order; and

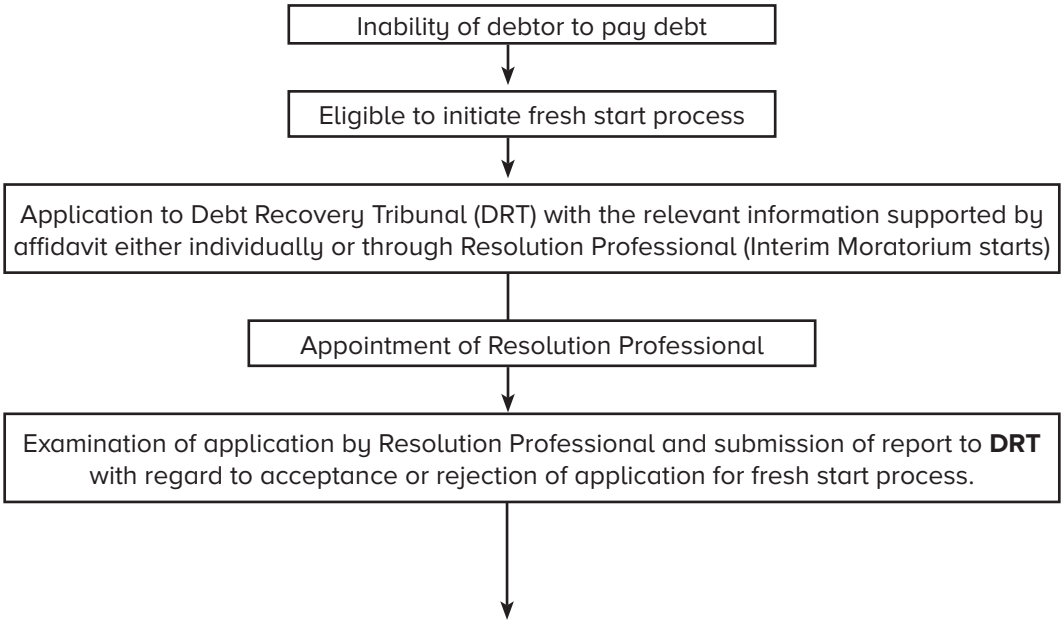
(c) any other sums owed under any contract in respect of the qualifying debts from the date of application till the date of the discharge order.

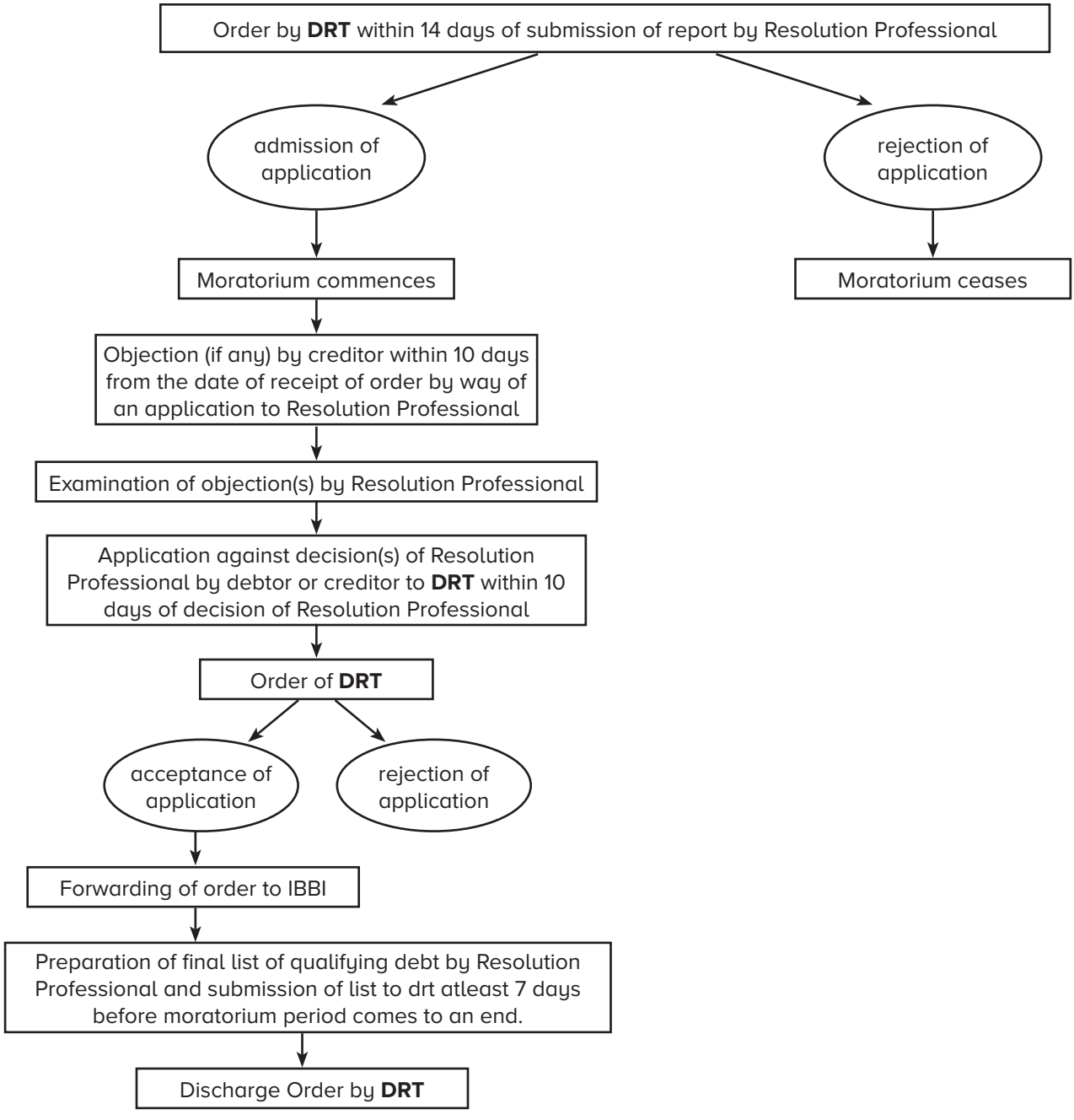
The discharge order shall be forwarded to the Board for the purpose of recording an entry in the register referred to in section 196. A discharge order shall not discharge any other person apart from the debtor from any liability in respect of the qualifying debts.

STANDARD OF CONDUCT

Section 93 of the Insolvency and Bankruptcy Code, 2016 provides that the Resolution Professional shall perform his functions and duties in compliance with the code of conduct provided under Section 208.

FRESH START PROCESS





LESSON ROUND-UP

- Sections 80 to 93 in Chapter II of Part III of the Insolvency and Bankruptcy Code, 2016 make provisions relating to fresh start process. The fresh start process has been conceptualized for persons who owe relatively less amount of money and have little or no income or assets to repay their debts.
- The outcome of an application for fresh start is a discharge from the qualifying debts and the debtor shall not be required to pay the amount comprising of the qualifying debts for which a discharge order is made under section 92 of the Code.

- Thus excluded debts, secured debts and debts incurred three months prior to the date of the application for fresh start process are outside the purview of fresh start process. Section 80 lays down the eligibility criteria for making an application for a fresh start process.
- Section 81 provides for the imposition of an interim moratorium. The moratorium provisions shall have effect from the date of filing of such application up to the date on which such application is admitted or rejected by the adjudicating authority.
- Section 82 of the Code provides for the appointment of Resolution Professional. An application for fresh start may be made by the debtor either personally or through a Resolution Professional.
- Section 83 prescribes the manner in which the Resolution Professional should make a report either recommending acceptance or rejection of the application for fresh start. Section 84 provides for the acceptance or rejection of the application for fresh start by the adjudicating authority.
- Section 85 provides that an order admitting an application for fresh start has the effect of a fresh moratorium from the date of such admission for a period of one hundred and eighty days, or up to the date on which the order admitting such application is revoked under section 91, as the case may be. On the passing of such order, irrespective of the acceptance or rejection of the application, the interim moratorium under section 81 comes to an end.
- Section 86 gives the creditors a right to object to the inclusion of their debt as a qualifying debt for discharge or object to any material inconsistency in the details of such debt, by filing an application to the Resolution Professional.
- Section 87 lists out the grounds on which an aggrieved creditor or debtor may make an application to the adjudicating authority challenging the action of the Resolution Professional taken under Section 86. Section 89 provides for the grounds and the manner in which a Resolution Professional can be replaced with another Resolution Professional in a fresh start process.
- Section 91 sets out the grounds on which the Resolution Professional may submit an application to the Adjudicating Authority seeking revocation of its order made under section 84. The object of section 91 is to provide for rescinding the fresh start process where due to any change in the financial circumstances of the debtor, the debtor becomes ineligible for a fresh start process or the debtor acts in violation of certain provisions of the Code.
- Section 92 provides for the passing of a discharge order by the Adjudicating Authority at the end of the moratorium period for discharge of the debtor from the qualifying debts.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation)

1. What is 'Fresh Start Process' under the Insolvency and Bankruptcy Code, 2016? State the eligibility for making an application for Fresh Start Process.
2. Mention the information an application for Fresh Start shall contain under section 81 of the Insolvency and Bankruptcy Code, 2016.
3. Describe the manner in which the Resolution Professional should make a report either recommending acceptance or rejection of the application for fresh start under section 83 of the Code.
4. What is the effect of admission of an application for Fresh Start under section 85 of the Code?
5. How can a creditor object to the inclusion of their debt as a qualifying debt for discharge or object to any material inconsistency in the details of such debt in an order for Fresh Start?
6. Write a note on 'Discharge Order' under section 92 of the Insolvency and Bankruptcy Code, 2016.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made thereunder
- Frequently Asked Questions on The Insolvency and Bankruptcy Code, 2016 (Revised January 2022 Edition), IBBI

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://ibbi.gov.in/uploads/resources/d6acbb36bddb5c66f473529bf08b4aa0.pdf
- https://ibbi.gov.in/uploads/publication/6adaf64e3d3221399cfcda795de38a23.pdf

Professional and Ethical Practices for Insolvency Practitioners

Lesson 15

KEY CONCEPTS

■ Insolvency Professional ■ Interim Resolution Professional ■ Resolution Professional ■ Committee of Creditors ■ Code of Conduct

Learning Objectives

To Understand

- Appointment of Interim Resolution Professional
- Appointment of Resolution Professional
- Resolution Professional
- Management of Affairs of Corporate Debtor
- Meeting of Committee of Creditors
- Duties of Resolution Professional

Lesson Outline

- Introduction
- Provisions of the Insolvency and Bankruptcy Code, 2016 relating to Resolution Professional & Interim Resolution Professional
- Role of Insolvency Profession as an Authorised Representative under the Code
- The IBBI (Insolvency Professionals) Regulations, 2016
- Public Announcement
- Code of Conduct of Insolvency Professional
- Duties and Powers of Interim Resolution Professional/ Resolution Professional
- Professional fee
- Case Laws
- Lesson Round-Up
- Test Yourself
- References

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.

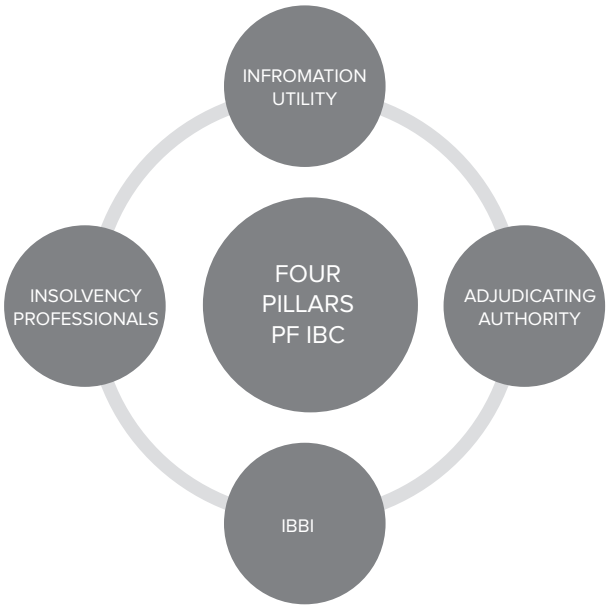
In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management 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

- The Insovlency and Bankruptcy Code,2016
- The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- The IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016
- The IBBI (Insolvency Professionals) Regulations, 2016
- The IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017
- The IBBI (Inspection and Investigation) Regulations, 2017

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.

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.

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.

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.

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 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.

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: S*ubject 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 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.

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 renderinng services as an Insolvency Professional.

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.

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, asthe 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 canned 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 malafide 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

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.

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."

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."

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 ROUND-UP

- The significance of role of Insolvency Professional has been summed up in the BLRC Report, Volume 1-Rationale for the Code.
- Regulatory framework for Insolvency Professionals is governed by(i) the IBC,2016 (ii) the IBBI(CIRP) Regulations,2016 (iii)the IBBI (IP) Regulations,2016 (iv) the IBBI (Model Bye- Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (v) The IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017 (vi)The IBBI (Inspection and Investigation) Regulations, 2017.
- 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.
- 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.
- 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.
- 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.
- The name of the insolvency professional proposed to be appointed as IRP is mandatory in case application to initiate CIRP is filed by financial creditor and corporate applicant while the same is optional for operational creditor. AA appoints the proposed insolvency professional as IRP only if Board confirms that there are no disciplinary proceedings pending against that insolvency professional.
- The management of CD is vested in IRP from the date of his appointment and then in RP.
- Duties and powers of the IRP and RP are well defined in the regulatory framework governing Insolvency Professional as stated above. It includes duty to constitute CoC, conduct meetings of the CoC, run CD as a going concern etc.
- The regulatory framework of IP also cast obligation on personnel of CD and creditors to extend full co-operation and give all requisite information to IRP/RP to facilitate him to conduct CIRP.
- CoC is vested with power to appoint same IRP as RP in its first meeting or to replace IRP with another RP as well as to replace RP during the tenure of CIRP.
- First Schedule of the IBBI (IP) Regulations, 2016 lays down Code of Conduct for Insolvency Professionals.

TEST YOURSELF

1. What is the eligibility criterion for an individual to become Insolvency Professional?
2. Who is liable to pay fee to IRP in case of non-cooperation by creditors as well as Operational creditor (applicant on whose application CIRP was initiated) leading to failure to constitute Committee of Creditors and thereby leading to application u/s 60 by IRP for termination of CIRP, seeking his discharge from duties as IRP and reimbursement of costs for duties performed? Decide with reference to case.
3. State the role of Disciplinary Committee constituted by IBBI under the Code?
4. State the provision of surrender of authorization for assignment by an Insolvency Professional?
5. Discuss the duties of Resolution Professional under the IBC.

REFERENCES

- IBBI Handbook on IP
- IBBI 2019 Handbook
- IBBI Newsletter Jan-March 2023
- ICSIIIP Journal Feb 2023

Group Insolvency

Lesson 16

KEY CONCEPTS

■ Group Insolvency ■ Procedural coordination ■ Partial Consolidation ■ Substantive consolidation ■ Pooling of assets ■ Equity ■ Insolvency Proceedings ■ Corporate Insolvency Resolution Processes ■ Adjudicating Authority

Learning Objectives

To understand:

- The legal frame work provided for regulating group insolvency practices in India.
- Advantages and Challenges faced under Group Insolvency.
- The legal machinery for Group Insolvency across different Countries.
- The important definitions and concepts.
- To familiarize the students with the legal frame work under IBC Code relating to group insolvencies.

Lesson Outline

INTRODUCTION

Companies in a corporate group are identified as separate legal entities under law. However, the prevalence of corporate groups has thrown up special challenges requiring modifications to this principle of treating companies as completely separate entities. However, courts in India also pierce the corporate veil to hold the parent company liable for subsidiary companies. The Supreme Court in *LIC v. Escorts, AIR 1986 SC 1370*, (Para 321) held that "*generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.*"

In *Delhi Development Authority v. Skiper Construction*, *AIR 1996 SC 2005* the defendant company sought to defraud *bona fide* purchasers of property by establishing several corporate entities. Finding that the entities were cloaks behind which the members of the same family sought to defraud purchasers, the court pierced the corporate veil and held the family members liable. It observed "*...[when] the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.*"

The separate legal personality of group companies is disregarded in many cases.

In this context, when a company/few companies belonging to a group is undergoing corporate insolvency resolution process, the co-ordination of insolvency of different companies in a group are dealt globally through prescribed regulatory framework resulting in reduction of cost and maximisation of value.

With the introduction of the Insolvency and Bankruptcy Code, 2016 ('Code'), India moved to create a law that *inter alia* consolidates the fragmented laws relating to reorganization, insolvency resolution and liquidation relating to corporate persons. While the Code provides detailed provisions to deal with the insolvency of each corporate debtor separately, it lacks a dedicated framework to deal with coordination of insolvency proceedings of different group companies.

Thus, the insolvency of different companies belonging to the same group is dealt with through separate insolvency proceedings for each company. However, in the insolvency resolution of debtor companies including companies of *Videocon, Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee, Aircel* special issues arising from their interconnections with other group companies have come up, and a need has been felt to examine the desirability and design of a framework dealing with issues arising in the insolvency of group companies.

Example of a group of companies that is viewed as a single economic entity-

B is a company engaged in the execution of construction contracts involving engineering, procurement and construction projects. It is the holding company of several subsidiary companies by way of direct and indirect investments. B holds more than 90% shareholding in all the subsidiary companies. B along with several of its subsidiary companies have defaulted in their respective loans and CIRPs have been initiated for the same.

Source: Report of the IBBI Working Group on Group Insolvency

The Code largely deals with the insolvency of each company through separate proceedings for each company but has some provisions that recognise its interest in group companies.

For instance:

- Sections 60(2) and 60(3) of the Code provide that the insolvency proceedings of a debtor company and its guarantor would be dealt with by the same Adjudicating Authority. This may also enable linking of proceedings in those cases where the debtor and guarantor are part of the same group of companies.
- Sections 18(f) and 36 of the Code give control of the shares of the subsidiary to the resolution professional and liquidator of the parent company. The control rights given to the shareholders of a solvent company

may be used by the resolution professional or liquidator to obtain information from solvent group entities easily. Further, a resolution plan of a parent company would deal with the assets of the company, which would include its shares in subsidiary companies. A successful resolution applicant could also receive the control of these securities (based on the specifics of the resolution plan).

- Some provisions in the Code target perverse behavior in group structures. The Code defines related party in relation to corporate debtors to inter alia include holding subsidiary companies, companies in which directors or managers have shareholding, companies controlling each other by virtue of contracts, companies with whom there may be de facto association in the form of participation in policy making process, interchange of employees, etc. Longer time-limits are prescribed for the application of avoidance provisions in case of transactions with related persons, and prohibitions in sections 29A and 21 target the ability of related parties to submit a plan for the resolution of the company or vote as part of the CoC. Even transactions with related parties during the insolvency resolution period require approval of the CoC by virtue of section 28.

CONCEPT

How the term 'Group" is defined?

UNCITRAL Model Law On Enterprise Group Insolvency (UNEGI)- Definitions

"Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;

"Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

"Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

The definition of "enterprise group" refers both to "control" and "significant ownership". While the UNEGI defines the term "control", it leaves it to enacting States to consider defining the term "significant ownership" according to domestic requirements, to avoid possible uncertainties and litigation.

UNCITRAL Legislative Guide on Insolvency Law

The glossary to Part III of the UNCITRAL Legislative Guide on Insolvency Law on 'Treatment of enterprise groups in insolvency' ("UNCITRAL Guide") defines an enterprise group as "two or more enterprises that are interconnected by control or significant ownership", with control being "the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise"

Recommendation of Cross Border Insolvency Rules/Regulations Committee on the Definition of Group (CBIRC)

In the group insolvency framework under the Code, a broad and inclusive definition of 'group' should be provided so as to include a large number of corporate debtors within the ambit of the framework. The definition of 'group' may be based on the criteria of control and significant ownership. This definition should be applicable to all entities that fall within the definition of a 'corporate debtor' under the Code, i.e., companies and limited liability partnerships. The group insolvency framework may not apply to financial service providers notified under Section 227 of the Code.

Recommendations on the Definition of Group

"group" means two or more corporate debtors that are interconnected by control or significant ownership;

"control" includes the right to appoint majority of the directors or other key managerial personnel entitled to manage the affairs of the body corporate or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding, management rights, ownership interest, shareholders agreements, voting agreements, articles of association, limited liability partnership agreements or in any other manner;

"significant ownership" includes the right to exercise twenty-six per cent or more voting rights;

Overview of the Definition of a Group Prescribed by the UNCITRAL Legislative Guide, MLEGI and the Working Group

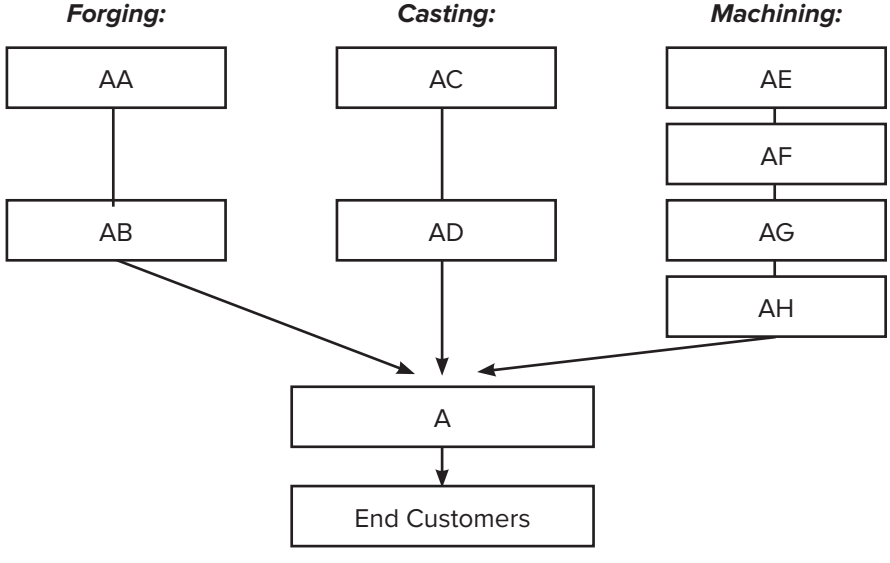
MLEGI	UNCITRAL Legislative Guide	Working Group
Applies to 'enterprise groups', which includes a broad set of organisations and not just corporations.	Applies to 'enterprise groups', which includes a broad set of organisations and not just corporations.	Applies to 'corporate groups', which only includes corporate debtors under the Code.
Enterprise group means two or more enterprises that are interconnected by control or significant ownership. Control is the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.	Enterprise group means two or more enterprises that are interconnected by control or significant ownership. Control is the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise.	Corporate group includes holding, subsidiary and associate companies as defined in the Companies Act, 2013. The Adjudicating Authority may include other companies under this definition if they "are so intrinsically linked as to form part of a 'group' in commercial understanding ... as long as it can be demonstrated that this will result in maximisation of value of the insolvent company without destroying the value of the company being included, so that there is overall value maximization."

Source: Report of CBIRC-II on Group Insolvency

Example of a group of companies with significant interdependence

The group companies of A are engaged in different stages of the supply chain in the automotive sector and non--automotive sector. For example, AA and AB are engaged in forging, AC and AD are involved in casting, AE, AF, AG, and AH are involved in machining, while A is engaged in machining and production of the final products which are shipped to the end-customers.

Significantly, while more than 10% of the total sales of the A Ltd. group are made to the entities which are part of the same group, an overwhelming percentage of the total raw materials purchased by the group are made from within the group. Further, the raw



Source: Report of the IBBI Working Group on Group Insolvency

materials and essential components required for making the end products sold by A are procured from within the group as per the directions of the end-customer and the same cannot be sourced from other suppliers in a short period of time as they are based on the customized products ordered by the end-customers.

HOW GROUP INSOLVENCY IS DEALT IN DIFFERENT COUNTRIES?

Globally, Group Insolvencies are either dealt by way of Procedural Co-ordination or Substantive Consolidation.

"Procedural coordination" refers to coordination of the administrations of two or more insolvency proceedings in respect of enterprise group members. The European Union (EU) and Germany have recently amended their insolvency legislation to provide for treatment of group insolvencies through Group Coordination. It includes aspects such as procedure for co-ordination amongst Court, appointment of common Court, appointment of common administrators, co-ordination amongst administrators, group communication process, appointment of coordinator, his independence and so on.

"Substantive consolidation" is the treatment of the assets and liabilities of two or more enterprise group members as if they were a single insolvency estate. Countries like Australia have provisions as part of their Insolvency Legislations for Substantive Consolidation in way of "pooling" of assets of the Group Companies.

Some countries like the United States have handled various insolvencies by Substantive Consolidation even in the absence of any specific provisions for the same. Worldwide, substantive consolidation is triggered as an exceptional tool in situations such as assets and liabilities of entities are inseparable, creditors perception as a group rather than a single entity, administrative benefits of consolidation, unity of ownership etc.. In a number of significant insolvencies like WorldCom and Nortel, the U.S. and Canadian Courts have used a blend and variations of both these methodologies, by means of Partial Consolidation.

Broadly speaking, "Group Insolvencies" are dealt either through some defined legislative framework or through the judicial precedents, *i.e.,* the judicial dicta/judgments of Courts of law. The following procedures have been prescribed in regard to "Group Insolvency":

1. Substantive Consolidation;
2. Partial Consolidation;
3. Procedural Co-ordination.

UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY

The purpose of this Law is to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in those cases;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

LEGAL FRAMEWORK FOR GROUP INSOLVENCY: A CROSS-COUNTRY COMPARISON*

Serial Number	Country	Particulars
1	USA	● The Courts, generally, find authority for the remedy in the broad powers of "*Equity*" conferred under section 105(a) of the Bankruptcy Code, which authorizes the Court to "*issue any order, process, or judgment that is necessary or appropriate to carry out the provisions*" of the Bankruptcy Code. ● US Bankruptcy Courts developed the *Factor Test* or the *Checklist Approach* for the application of Substantive Consolidation.
2	Austria	● There is no concept of "*Group Insolvency*" under the Austrian Insolvency Law; each legal entity is to be assessed individually. The EU Insolvency Regulations and Rules on cooperation within Group Insolvencies have been included in the Insolvency Code. ● There is a completely new detailed legal framework on the cooperation and coordination of cross-border insolvency proceedings over the estate of members of a Group of Companies.
3	Australia	● The Principal legislation governing insolvency in Australia is the Corporations Act, 2001. Under section 588V of the Corporations Act, 2001, a holding company may, in certain circumstances, be held liable for the insolvent trading of its subsidiary. ● There is no formal legal mechanism for initiating proceedings on a Group basis. Once insolvency proceedings have been commenced in respect of individual group companies, "pooling" of those proceedings may be available in certain circumstances. ● Australian Courts sanction the use of pooling arrangements for Groups in administration proposing to carry out a pooled DOCA (Deed of Company Arrangement).
4	Canada	● The legislations that deal with "*Insolvency*" are Bankruptcy and Insolvency Act (BIA) and The Companies' Creditors Arrangement Act (CCAA). ● As per the CCAA, the Court will allow a consolidated plan of compromise and arrangement to be filed for two or more related companies in appropriate circumstances. ● Case-law development led to three factor approach to decide whether consolidation would be the appropriate solution or not. The Court will consider whether consolidation is fair and reasonable based on the facts and circumstances of each case.
5	Brazil	● The current Brazilian legislation on Corporate Insolvency Law is the Federal Law 11,101. It covers three types of court proceedings: judicial reorganisation, expedited reorganisation and bankruptcy liquidation. ● An analysis of requests for Substantive Consolidation filed before the Brazilian Courts reveals that, in majority of cases, such requests are based on the companies being part of the same economic group; the existence of a common management of the companies; and the existence of cross-guarantees among the requesting companies.

* www.ibbi.gov.in

Serial Number	Country	Particulars
6	European Union	● Regulation (EU) 2015/848 of the European Parliament and of the Council on the subject of "*Insolvency Proceedings*" is the legislation governing Group Insolvency. Chapter V of the Regulations (Article 56 to Article 77) talks about Insolvency Proceedings of Members of Group Companies. ● The Regulations provide for a detailed framework of Group Procedural Co-ordination. ● The European Courts have ruled that the European Insolvency Regulation can be interpreted, under certain conditions, to allow for insolvency proceedings of a member state to cross borders (to a certain extent) and include another company from another member state.
7	Netherlands	● The Dutch Bankruptcy law recognizes the *Legal Entity* principle of a corporate, and thus requires that the assets of a legal entity are to be disposed of for the benefit of its own creditors only. If a Group (of companies) files for insolvency, each member company shall be addressed as a separate case. ● The Dutch Supreme Court has held that, in cases wherein separate administration of the estates of separate entities (insolvent) is onerous, there can be a joint administration of such estates. The European Insolvency Regulation obligates the Dutch Courts to automatically recognize insolvency proceedings opened elsewhere in the EU.
8	Germany	● The German Legislator had on 9th March 2017 introduced the concept of Group Insolvency into the German Insolvency law. German Insolvency law allows insolvency proceedings to be initiated in respect of companies within a Corporate Group at a single German Insolvency Court and/or to be administered by a single Insolvency Administrator. ● The Regulations have provided for some key innovations, *viz.*, (i) a Group venue; (ii) the option to appoint the same person as (Group) Insolvency Administrator/receiver; and (iii) Group Coordination proceedings.
9	China	● The governing legislation is The Enterprise Bankruptcy Law of the People's Republic of China (Effective from 1st June, 2006). ● The minutes of National Court Work Conference on Bankruptcy Trials in Shenzhen, Guangdong Province have become guidelines on the subject of substantive consolidation and the rarity with which it should be used in China. ● There are no circumstances in which a parent or affiliated Corporation assumes the responsibility for the liabilities of subsidiaries or affiliates. In practice, however, the parent Corporation should bear the responsibility for its subsidiary, if such a subsidiary is not an independent entity, or it has conducted an abnormal transaction. ● Combining of bankruptcy procedures of the parent company and its subsidiaries is permitted in general practice. Under such circumstances, the assets and liabilities belonging to the companies may be pooled for the purpose of distribution of their assets.

Serial Number	Country	Particulars
10	UK	● Every member of a Group is treated as a distinct legal person as far as its assets and liabilities are concerned. ● There is a common practice, however, to appoint the same administrator or liquidator with respect to multiple companies within a Group which amounts to elements of procedural coordination. ● As each Group Company has a distinct legal personality, there is no requirement/obligation on a company's affiliate to proceed under the same type or location of insolvency proceeding as other Group members.

EXCERPTS FROM REPORTS ON GROUP INSOLVENCY

Report of the Working Group on Group Insolvency (IBBI Working Group Constituted in January 2019, Submitted its Report on September 23, 2019)

Broad Recommendations

(1) The law may envisage a framework to facilitate insolvency resolution and liquidation of companies belonging to a group. The framework may be enabling, and may be voluntarily used by relevant stakeholders of the company. Only provisions relating to communication, cooperation and information sharing may be mandatory for insolvency professionals, Adjudicating Authorities and committees of creditors ("CoCs") of the companies which belong to a group and have been admitted into CIRP.

(2) The law may enable phased implementation of the framework. The first phase may facilitate the introduction of procedural co-ordination of only domestic companies in groups and rules against perverse behaviour. Cross-border group insolvency and substantive consolidation could be considered at a later stage, depending on the experience of implementing the earlier phases of the framework, and the felt need at the relevant time.

(3) For the purposes of this framework, a 'corporate group' may include holding, subsidiary and associate companies, as defined under the Companies Act, 2013. However, an application may be made to the Adjudicating Authority to include companies that are so intrinsically linked as to form part of a 'group' in commercial understanding, but are not covered by the definition of corporate group above, as well. Procedural coordination mechanisms under this framework may be applicable only to those group companies which have defaulted, and which are covered by the Code for the purpose of insolvency resolution or liquidation. However, rules against perverse behaviour may be applicable to all group companies, regardless of their solvency.

(4) The framework may provide for procedural coordination in the first phase as under:

a. The framework may have the following elements of procedural co-ordination:

i. Joint application

ii. Communication, cooperation and information sharing

iii. Single insolvency professional and single Adjudicating Authority

iv. Creation of a group creditors' committee, and

v. Group coordination proceedings.

b. A joint application may be made against all corporate debtors who have committed a default and who form part of a group. Other procedural coordination mechanisms (listed above) may be made available to those companies who form part of a group, and have been admitted into CIRP.

c. While all other elements of procedural co-ordination may be voluntary, cooperation, communication and information sharing among insolvency professionals, CoC and Adjudicating Authorities may be mandatory for companies that have been admitted into CIRP.

In addition to cooperation, communication and information sharing, other elements of procedural coordination may be enabled as under:

- **Joint Application for the insolvency resolution:** The law may enable a single application to be filed to commence the insolvency resolution processes of multiple companies in a group, before any Adjudicating Authority that has jurisdiction over any one of the companies.
- **Single insolvency professional and single Adjudicating Authority:** The law may enable and encourage appointment of a single insolvency professional and designation of a single Adjudicating Authority for resolution of multiple companies admitted into CIRP, except where there are issues such as conflict of interest, lack of sufficient resources (in case of insolvency professionals) or where stakeholders would get adversely affected (in case of Adjudicating Authorities) etc.
- **Group creditors' committee:** The law may, at the option of the CoCs of participating companies, enable the creation of a group creditors' committee to support individual CoCs, and not supplant them.
- **Group coordination proceedings:** The law may enable group co-ordination proceedings, at the option of the CoCs of the companies under CIRP. Group coordination proceedings may be governed by a Framework Agreement among the CoCs of the participating CDs. It may entail appointment of a "group coordinator" who would propose a strategy for the synchronised resolution of insolvency of the group companies. This strategy could propose invitation of a common expression of interest, resolution plan, etc. At this stage, a company may opt out of group coordination proceedings by a vote of the majority of its CoC. Once group coordination proceedings are initiated, one Adjudicating Authority (chosen as per the Framework Agreement) would have jurisdiction over the insolvency proceedings of each of the companies and the group coordination proceedings. Further, these companies may be allowed to seek an extension of the CIRP period by another ninety days to account for the additional time these proceedings may take to enable the value maximising resolution.

d. Procedural coordination may be allowed at any stage of the insolvency resolution or liquidation process for companies.

e. Procedural co-ordination at the resolution process stage may not necessarily continue to the stage of liquidation process. Such coordination at liquidation stage may be allowed on a fresh application for the same. A single insolvency professional may be appointed, a single Adjudicating Authority may be designated and group coordination proceedings may be commenced even at the liquidation stage.

(5) The framework may have certain rules against perverse behaviour. While the provisions enabling the avoidance of certain transactions and imposition of liability for wrongful and fraudulent trading may broadly be sufficient to capture intra-group transactions that are value destructive, the framework may permit the Adjudicating Authority to subordinate the claims of other companies in a group in exceptional circumstances of fraud, etc.

ADVANTAGES AND CHALLENGES OF GROUP INSOLVENCY

Advantages

- **Promotion of information symmetry:** If insolvency law enables the exchange of information between the stakeholders of different companies, it may enable better assessment of viability and increase the chances of resolution. This exchange of information may also reduce information asymmetry amongst stakeholders.

- **Reduction in costs of insolvency proceedings:** Where the insolvency of different group companies is dealt with entirely in isolation, there is a likelihood of unnecessary duplication of work if different Benches of Adjudicating Authority, insolvency professionals and creditors individually appreciate and consider the same or similar facts in order to piece together a complete picture. The resultant delay and clogging up of judicial infrastructure may have long-term negative consequences. Further in some cases groups are so interlinked, that it would be costly to disentangle their inter-linkages. The creation of a group insolvency framework may reduce these costs.

- **Maximization of value:** An insolvency framework that recognises special issues relating to group companies is likely to increase the efficiency of processes and maximize value in two ways, one, by reducing information asymmetry and costs of administering insolvencies, and second, by enabling the resolution or liquidation of intrinsically linked assets together, thereby maximising synergies and not forcing a value destructive separation.

- **Reduction in costs of capital**: To the extent an insolvency framework respects the expectations of stakeholders, it is likely to *ex-ante* reduce the cost of capital for the group since stakeholders would not have to adjust for a change in their position purely due to the initiation of insolvency proceedings. Further, to the extent that insolvency law effectively targets transactions between group companies that unfairly transfer value from one entity to another, it is likely to reduce monitoring costs for stakeholders, and further bring down the cost of capital.

- **Increasing certainty for stakeholders and saving judicial time:** Where the insolvency framework clearly lays down rules to facilitate the insolvency resolution and liquidation of companies in a group, stakeholders have certainty on the manner in which they may be applied and also saves judicial time.

  For example, nearly 100% of all the members of the CoCs are common for all the four corporate debtors. While separate proceedings were opened for these corporate debtors, all of them were being heard by the same NCLT bench and were initiated by the same financial creditor. The same insolvency professional was appointed as the resolution professional for all four companies. Joint meetings of the CoCs were conducted for all the corporate debtors. This saved time and reduced the costs involved and resulted in swifter and more cost-efficient decision making at the meetings of the CoC. The time and costs could have been reduced further if procedural coordination mechanisms such as a joint application process and a common public announcement (as discussed) were also permitted in the law.

Challenges

- **Potential for costs of capital to increase**: If the basic principle of asset partitioning is disregarded without justification, in those cases where the companies themselves are run distinctly without regard to each other's businesses and activities, creditors and the stakeholders of one company will have to monitor the activities of the entire group. The value of lending to one company will have to be balanced against the cost of having to monitor all the companies in the group. This may disincentivise lenders sufficiently and they may not be willing to extend credit to companies within a group. This may be of special concern where group companies are incorporated precisely because there is a need for a separate legal entity whose assets are partitioned (e.g. in the case of special purpose vehicles("SPVs")), with limited inter-linkages between them. If a majority of the groups are structured

in this manner, and the law disregards the separate legal personality of companies in such groups without justification, it may increase the cost of doing business.

- **Potential for expenses of the framework to reduce recovery**: A framework dealing with the insolvency of group companies may itself require certain expenses to be incurred. For instance, if another professional is hired to assist in the creation of a group strategy for the resolution of insolvency group companies, it may require expenses for such a professional to be incurred. If the framework imposes expensive requirements that are not offset by reduction of costs for stakeholders, it may reduce recoveries for stakeholders.
- **Potential for unfair capture of value by some stakeholders:** Some stakeholders consulted by the WG suggested that if the framework for group insolvency deviates from the principle of asset partitioning unjustifiably, it may result in dominant lenders lowering their credit and monitoring standards and capturing value in group entities where the primary monitoring burden has been carried by other stakeholders

REPORT OF CROSS BORDER INSOLVENCY RULES/REGULATIONS COMMITTEE (CBIRC) ON GROUP INSOLVENCY (DECEMBER 2021)

Summary of Recommendations

i. A group insolvency framework that is voluntary, flexible and enabling in nature should be provided under the Code. Such a framework may be introduced in phases. In the first phase, only provisions governing domestic group insolvency may be enacted.

ii. The UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI) may not be adopted in India at present, and its adoption may be considered after enactment of single entity cross border insolvency laws and based on learnings from its implementation.

iii. Jurisprudence on substantive consolidation, i.e., pooling of assets and liabilities of an insolvent group, is already developing under the Code through case law. This is a remedy resorted to in exceptional circumstances and provisions governing substantive consolidation may not be provided in the Code at present. The need for such provisions may be contemplated at a later stage, on the basis of practice and jurisprudence evolved in this regard.

iv. In the group insolvency framework under the Code, a broad and inclusive definition of 'group' should be provided so as to include a large number of corporate debtors within the ambit of the framework. The definition of 'group' may be based on the criteria of control and significant ownership. This definition should be applicable to all entities that fall within the definition of a 'corporate debtor' under the Code, i.e., companies and limited liability partnerships. The group insolvency framework may not apply to financial service providers notified under Section 227 of the Code.

v. The group insolvency framework under the Code should only apply to corporate debtors in respect of whom a corporate insolvency resolution process or liquidation process is ongoing. The law shall not apply to solvent members of the group.

vi. A list of procedural coordination mechanisms should be available under the group insolvency framework. These are discussed below.

vii. Filing of joint applications for initiation of corporate insolvency resolution proceedings against multiple corporate debtors belonging to the same group may be permitted. Such applications may be filed with an Adjudicating Authority that has territorial jurisdiction over any one of the corporate debtors in respect of whom such joint application is being filed. Although filing jointly may be permitted, the application form for each corporate debtor should be separate.

viii. All proceedings related to corporate debtors belonging to a group may take place under the same Adjudicating Authority. To give this effect, all pending applications and proceedings under the Code in respect of a group member may be transferred to the NCLT that is the first to admit an application

for triggering an insolvency resolution process in respect of any corporate debtor belonging to the group. All new applications in respect of any group member should also be filed in such NCLT.

ix. A common insolvency professional may be appointed as the resolution professional or liquidator of corporate debtors that belong to the same group. An insolvency professional should refuse taking such appointment if she believes that there are conflicts of interest which may affect her functions. She may approach the Adjudicating Authority for suitable directions if conflicts arise after her appointment.

x. A group CoC may be formed with adequate representation from CoCs of all group members (outside group coordination proceedings in points xi-xviii). This may be at discretion of the CoCs and its constitution and formation may be subject to negotiation amongst parties. The group CoC (outside of a group coordination proceeding) may only provide procedural assistance and should not be tasked with taking decisions that affect the substantive rights and obligations of the parties, which right shall continue to be available to the CoCs of the relevant group members.

xi. The CoCs and insolvency professionals appointed in respect of corporate debtors belonging to the same group should mandatorily be required to cooperate, coordinate and share information with each other.

xii. The law should enable group coordination proceedings for corporate debtors belonging to the same group and undergoing a corporate insolvency resolution or liquidation process under the Code. A group coordination proceeding may be opened on application made by two or more CoCs of corporate debtors belonging to a group. If the corporate debtor is in liquidation, the application may be made by the liquidator. Such applications will be made to the Adjudicating Authority. The Adjudicating Authority may open the group coordination proceedings and appoint a group coordinator (as proposed in the application and subject to eligibility criteria). The proceedings will run alongside the separate insolvency or liquidation proceedings of the corporate debtors.

xiii. Participation of a corporate debtor in the group coordination proceeding should be voluntary. The CoCs may have flexibility to opt-in to the group coordination proceedings until 30 days after its opening. Any opt-ins after such time may be permitted with the approval of the participating CoCs and liquidators. For such approval, each CoC would have to vote in favour of such opt in by at least 50% of each of their voting shares. The participating group members may opt out of the group coordination proceedings at any time until a group strategy has been approved by their respective CoC.

xiv. The group coordinator shall constitute a group CoC consisting of suitable representatives from CoCs of all participating group members. The group CoC (in group coordination proceeding) may perform functions delegated to it by separate CoCs. However, the power to approve a resolution plan shall not be permitted to be delegated to the group CoC.

xv. The group coordinator will conduct the group coordination proceedings and develop a group strategy. A group strategy may provide various combinations of measures that synchronise the insolvency resolution or liquidation proceedings of the participating corporate debtors. Such measures may be different for different companies included in the strategy. The group coordinator will also assist the resolution professionals, liquidators and CoCs of the corporate debtors so as to enable effective coordination amongst them.

xvi. A group strategy should require the approval of all participating CoCs by 66% of each of their voting shares respectively. Where a corporate debtor participating in a group coordination proceeding is undergoing liquidation, the liquidator should decide whether to approve the group strategy for the corporate debtor it represents. Once approved, the group strategy shall be filed with the Adjudicating Authority and shall be binding on all parties to the group strategy.

xvii. A group coordination proceeding shall terminate if the group coordinator applies for a termination order, which may be on the grounds that – (a) the group strategy has been approved and fully

implemented; (b) the CoCs and liquidators have approved such termination by requisite majority; (c) the CoCs and liquidators have failed to approve a group strategy and the group coordinator is of the opinion that it is not feasible for participating group members to agree on a group strategy.

xviii. The costs of conducting group coordination proceedings should form part of the insolvency resolution or liquidation process costs of the participating group members. Further, where group coordination proceedings are opened, an additional 90 days may be added to the time period for completion of the insolvency resolution process for the participating corporate debtors.

xix. Specific provisions to deal with perverse behaviour may not be required as provisions dealing with avoidance actions and fraudulent or wrongful trading under the Code may be sufficient. Detailed provisions targeting perverse behaviour in group insolvency scenarios should be legislated based on practice developed under the Code in due course.

xx. Effective capacity building measures and increase in use of technology during implementation will bolster the efficiency of the group insolvency framework.

CASE LAWS

State Bank of India & Anr. v. Videocon Industries Ltd. & Ors

In State Bank of India & Anr. v. Videocon Industries Ltd. & Ors., the insolvency proceedings of 13 out of 15 companies belonging to the same group were ordered to be consolidated based on the following set of factors: -

(i) common control;

(ii) common directors;

(iii) common assets;

(iv) common liabilities;

(v) inter-dependence of the companies;

(vi) interlacing of finance;

(vii) pooling of resources;

(viii) co-existence for survival;

(ix) intricate links between companies;

(x) intertwined accounts;

(xi) inter-looping of debts;

(xii) singleness of economic of units;

(xiii) common financial creditors.

Due to the lacuna in the Code, the Adjudicating Authority relied on jurisprudence in jurisdictions like the US and UK. A resolution plan has been approved for these companies by the National Company Law Tribunal (Mumbai) ("NCLT") vide a recent order dated 8 June 2021.

Venugopal Dhoot v. State Bank of India & Ors.CA- 1022(PB)/2018- decision dated 24.10.2018

In *Venugopal Dhoot v. State Bank of India & Ors.* multiple companies of the Videocon group were being put through insolvency resolution processes. In this case, parties sought that all matters pertaining to the insolvency resolution of different Videocon companies be dealt with by the same NCLT and that there be consolidation of separate proceedings of multiple Videocon companies to treat "*the corporate insolvency resolution process*

as one in respect of all of these companies". The Principal Bench of the NCLT ordered that all the matters regarding the insolvency resolution processes of these different companies be dealt with by the same bench of the NCLT for the purpose of "*avoiding conflicting orders and facilitating the hearing*" of these matters. The bench also observed that the relevant NCLT would be empowered to decide whether different proceedings may be consolidated.

Chitra Sharma v. Union of India, W.P. (Civil) No(s).744/2017- decision dated 11.09.2017

In *Chitra Sharma v. Union of India,* where insolvency proceedings had been initiated against Jaypee Infratech Ltd., but homebuyers had entered into contracts with both Jaypee Infratech Ltd. and its parent company Jai Prakash Associates Ltd., the Supreme Court ordered that the parent company which was not subject to the insolvency proceedings deposit a sum of INR two thousand crores before the court.

Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors, Company Appeal (AT) (Insolvency) No. 377 of 2019]

In *Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt. Ltd. & Ors.,* 20 the Appellate Authority held that "group insolvency proceedings were required to be initiated" against five companies that had been working as a joint consortium to develop a residential plotted colony. To enable successful development of this colony, the Appellate Authority ordered that "simultaneous 'Corporate Insolvency Resolution Processes' should continue against them under the guidance of same 'Resolution Professional'" who should run the processes so that they are "completed in one go by initiating a consolidated 'Resolution Plan(s)' for total development".

Bikram Chatterji v. Union of India WRIT PETITION (CIVIL) NO. 940 OF 2017 decided on 7.11.2022

In *Bikram Chatterji v. Union of India*, homebuyers in projects developed by different companies of the Amrapali group filed a Writ Petition before the Supreme Court in order to protect their interests in the wake of the insolvency of different Amrapali group companies. The Supreme Court in these proceedings dealt with the group as a whole. Given the nature of the transactions between the group companies, the Court also ordered that the properties of all forty group companies in the Amrapali group be attached and the bank accounts of all companies and their directors be frozen.

LESSON ROUND-UP

- When a company/few companies belonging to a group is undergoing corporate insolvency resolution process, the co-ordination of insolvency of different companies in a group are dealt globally through prescribed regulatory framework resulting in reduction of cost and maximisation of value.
- With the introduction of the Insolvency and Bankruptcy Code, 2016 ('Code'), India moved to create a law that inter alia consolidates the fragmented laws relating to reorganization, insolvency resolution and liquidation relating to corporate persons.
- The Code largely deals with the insolvency of each company through separate proceedings for each company but has some provisions that recognise its interest in group companies.
- Sections 60(2) and 60(3) of the Code provide that the insolvency proceedings of a debtor company and its guarantor would be dealt with by the same Adjudicating Authority. This may also enable linking of proceedings in those cases where the debtor and guarantor are part of the same group of companies.
- Few advantages of group insolvency are- Promotion of information symmetry; Reduction in costs of insolvency proceedings; Maximization of value; Reduction in costs of capital; Increasing certainty for stakeholders and saving judicial time.
- Challenges faced while going for group insolvency are- Potential for costs of capital to increase; Potential for expenses of the framework to reduce recovery; Potential for unfair capture of value by some stakeholders.

- Procedural coordination refers to coordination of the administrations of two or more insolvency proceedings in respect of enterprise group members.
- Substantive consolidation is the treatment of the assets and liabilities of two or more enterprise group members as if they were a single insolvency estate.
- The definition of "enterprise group" refers both to "control" and "significant ownership". While the UNEGI defines the term "control", it leaves it to enacting States to consider defining the term "significant ownership" according to domestic requirements, to avoid possible uncertainties and litigation.
- A group insolvency framework that is voluntary, flexible and enabling in nature should be provided under the Code. Such a framework may be introduced in phases. In the first phase, only provisions governing domestic group insolvency may be enacted.

TEST YOURSELF

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain the concept of group insolvency with the help of some case laws.
2. Enumerate the provisions contained in IBC pertaining to group insolvency.
3. What are the advantages and disadvantages while considering group insolvency?
4. How group insolvency is dealt in different countries across globe?
5. Elaborate on UNCITRAL Model Law.
6. Write a short note on group insolvencies in-
   - US
   - UK
   - Canada
   - Singapore
   - European Union
   - Germany.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- Report of the Working Group on Group Insolvency, 2019.
- Report of CBIRC-II on Group Insolvency, December 2021.

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://icsiiip.in/panel/assets/images/knowledge_capsules/163315929432451BC_Knowledge_Capsule_14.pdf
- https://ibbi.gov.in/uploads/resources/9ff4f639c0d2a29ea188fd0cba332273.pdf
- https://ibbi.gov.in/uploads/resources/eab27488d871106920be49844c1a78fe.pdf

Cross Border Insolvency

Lesson 17

KEY CONCEPTS

■ UNCITRAL ■ Foreign proceeding ■ Foreign representative ■ Establishment ■ State ■ Reorganization

Learning Objectives

To understand:

- Objectives of effective insolvency law
- UNCITRAL guide on insolvency law
- Model law on cross border insolvency
- World Bank principles
- Insolvency Law Committee Recommendations
- Cross Border Insolvencies in UK, UAE, US, Singapore, Canada

Lesson Outline

- Introduction
- Key objectives of effective and efficient insolvency law
- UNCITRAL
- UNCITRAL Legislative guide on insolvency law
- UNCITRAL Model law on Cross Border insolvency
- Purpose of Model law
- World Bank Principles – effective insolvency and creditor rights
- US Bankruptcy Code
- Enabling provisions for cross border transactions under IBC
- Insolvency Law Committee (ILC)
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Including Websites / Video Links)

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.

> 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.

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.

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:

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

Examples of Non-Legislative texts:

- UNCITRAL Arbitration Rules
- UNCITRAL Conciliation Rules
- UNCITRAL Notes on Organizing Arbitral Proceedings

- UNCITRAL Model Law on International Credit Transfers
- UNCITRAL Model Law on Electronic Commerce
- 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.

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.

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 insolvenc y, 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.

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 reflect 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 analysing 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 practioners; and	(d) coordination between two or more concurrent insolvency proceedingsin 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;

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]

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.

General Provisions

Scope of Application (Article 1)

The model Law 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.

According to article 1 of the Model law, it applies where:

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

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.

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.

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;

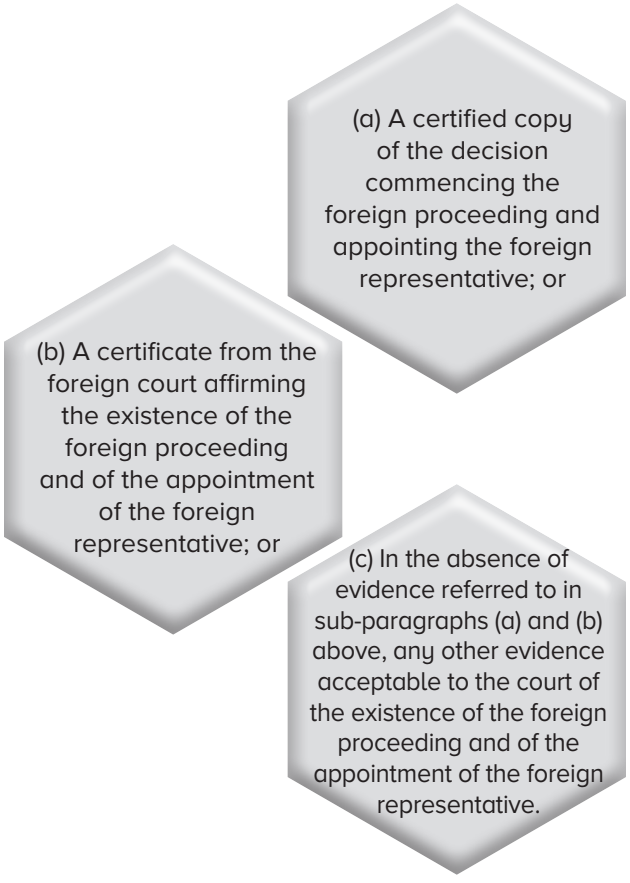
(b) Indicate whether secured creditors need to file their secured claims; and

(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:



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:

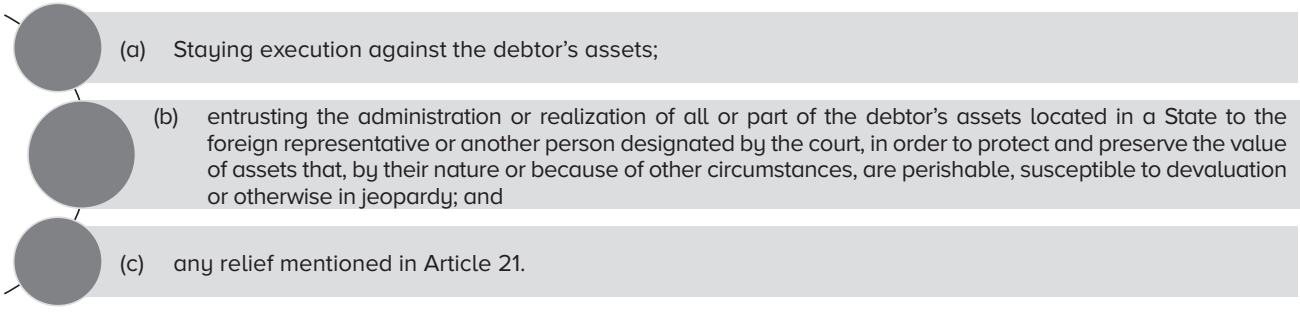
(a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and	(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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:



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 orliabilities;	(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 insolvenices.

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

Intervention by a foreign representative in proceedings (Article 24)

Upon recognition of a foreign proceeding, in the foreign representative may, provided the requirements of the law of the State are met, intervene in any proceedings in they 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 conteplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

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.

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:

- (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 debtorhas 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, reschedulings, 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;

(vi) 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

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)

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.

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-Broder 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

(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or

(b) 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

(a) the appointment of a person to act at the direction of the court;

(b) the communication of information by any means considered appropriate by the court;

(c) the coordination of the administration and supervision of the debtor's assets and affairs;

(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(e) 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 empower 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

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.

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.

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 interfered 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 Ddutch 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'.

LESSON ROUND-UP

- 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.
- Cross-border insolvency regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country.
- A company is said to be insolvent when its liabilities exceed its assets which results in its inability to pay off the debts. Cross border insolvency issues arise when a non-resident is either a debtor or contributory or creditor.
- Since national insolvency laws have by and large not kept pace with the trend, they are often ill equipped to deal with cases of cross border nature. It hampers the rescue of financially troubled business.
- The United Nations Commission on International Trade Law (UNCITRAL) prepares international legislative texts for use by States in modernizing commercial law and non-legislative texts for use by commercial parties in negotiating transactions.
- The Legislative Guide on Insolvency Law was prepared by UNCITRAL on insolvency law, specifically corporate insolvency, to foster and encourage the adoption of effective national corporate insolvency regimes in 2004.
- The legislative Guide on insolvency law is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.
- 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.
- The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases, i.e., access, recognition, relief (assistance) and cooperation.

- In the United States of America, all bankruptcy cases are handled in federal courts under rules outlined in the Bankruptcy Code, a federal law. The Bankruptcy Code was enacted in 1978 and is codified as title 11 of the United States Code.
- Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 make provisions to deal with ases involving cross border insolvency.
- Section 234 of the Code empowers the central government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency.
- The Insolvency Law Committee (ILC) on cross border insolvency set-up by Government for a robust cross-border insolvency law in India has submitted its recommendations.
- 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 has proposed a draft 'Part Z' in the Insolvency and Bankruptcy Code, 2016 relating to cross-border insolvency.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation).

1. Companies through their multi-layered structures, move cash and other assets to other jurisdictions, which creates hurdle in regulating cross-border insolvency and financial distress. Discuss.
2. Why is UNCITRAL Model law on Cross Border insolvency a preferred legislation worldwide in dealing with cross-border insolvency?
3. Mention the salient provisions of the UNCITRAL Legislative Guide on insolvency laws.
4. Discuss whether the Insolvency and Bankruptcy Code, 2016 provides a robust mechanism to deal with cross border insolvency?
5. The recent recommendations of the Insolvency Law Committee (ILC) on cross-border insolvency are in line with the provisions set-out in the UNCITRAL Model law on cross-border insolvency. Discuss.
6. What do you understand by Centre of Main Interest (COMI) under UNCITRAL Model law? Ascertaining the COMI will be critical to the working of the cross border insolvency law in India. Discuss.
7. Elaborate on various cross border insolvency models followed around the globe.

LIST OF FURTHER READINGS

- Insolvency and Bankruptcy Code, 2016 and rules made thereunder.
- UNCITRAL Model Law.
- Report on the Rules and Regulations for Cross-Border Insolvency Resolution, June 2020.

OTHER REFERENCES (Including Websites / Video Links)

- https://ibbi.gov.in/en
- https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency
- https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf
- https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/

WARNING

Regulation 27 of the Company Secretaries Regulations, 1982

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo-moto or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as a student, or debar him from re-registration as a student, or take such action as may be deemed fit.

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PROFESSIONAL PROGRAMME
INSOLVENCY AND BANKRUPTCY - LAW & PRACTICE
GROUP 2 • ELECTIVE PAPER 7.5

(This test paper is for practice and self-study only and not to be sent to the Institute)

Time Allowed: 3 Hours *Maximum Marks: 100*

All questions are compulsory.

Marks for each question is indicated alongside of the question.

Read the following case study and answer the questions given at the end:

Question No. 1

ABD Bank filed an application for initiating Corporate Insolvency Resolution Process (CIRP) against one of its borrower company M/s Sunrays Pvt. Ltd., in the National Company Law Tribunal (NCLT). The NCLT allowed the application and passed order for commencement of CIRP. Mr. K has been appointed as Interim Resolution Professional (IRP) and moratorium was declared.

The Committee of Creditor (CoC) was constituted and Mr. K was appointed as Resolution Professional by CoC. Meetings of the CoC was convened from time to time and expression of interest for Resolution Plan was invited from various parties via public notice. However, no Resolution Plan was received during the currency of 180 days period. Hence, NCLT on the recommendation of RP extended the initial time period from 180 days to 270 days. Since, no one had shown the expression of interest even during the extended period of 270 days, the CoC appointed another Resolution Professional (RP) after the expiry of 270 days.

When the matter of resolution could not be completed within the extended time. NCLT, extended the period of CIRP by further period of 90 days after the expiry of 270 days by exercising the power conferred under Section 55 of Insolvency and Bankruptcy Code, 2016 by treating the matter as 'Fast Track Corporate Insolvency Resolution Process' and also determined the 'Corporate Insolvency Resolution Process fee' and the 'Cost' incurred and payable to the Resolution Professional. Aggrieved from the said order of the NCLT, the Resolution Professional preferred appeals against the order of the NCLT.

Questions

1. Whether Section 55 of the Insolvency and Bankruptcy Code, 2016 gives the NCLT the authority to reclassify the CIRP as a "Fast Track Insolvency Resolution Process"? Explain.
2. Does the Committee of Creditors have the authority to appoint a new Resolution Professional after the 270-day period has passed? What are the implications of the same?
3. Does the NCLT have the authority to determine the resolution costs, including the price to be paid to the Resolution Professional? Give reasons to support your answer.
4. How does the Corporate Insolvency Resolution Process under Chapter II of Part II of the Insolvency and Bankruptcy Code, 2016 differ from the fast track procedure?

(*5 marks each*)

Question No. 2

Star Light Ltd. was granted credit facility of Rs. 100 lakh under consortium arrangements. Under the consortium, there were 5 five banks, and credit facility provided by the respective banks were as under:

Credit Factory Bank Ltd. - Rs. 45 lakh

We Bank Ltd. - Rs. 20 lakh

XYZ Bank Ltd. - Rs.15 lakh

ABC Bank Ltd. - Rs.10 lakh and

Trust Bank Ltd - Rs.10 lakh

Among these the Credit Factory Bank Ltd. was the leader.

Star Light Ltd. was engaged in the business of manufacturing and trading of Gym exercise machines. However, due to poor demand of the products, the company could not sell out the machines and as a result the account of the company with respective banks were classified as Non-performing Advances (NPAs).

Apart from credit facility from the above banks, the company was also having outstanding dues of the creditor, which the company was not able to pay-off. The total amount outstanding of such operational creditors amounted Rs. 30 lakh. The company has also not paid the salary to its employees and workers for the last 6 months and the total dues amounted to Rs. 10 lakh.

The leader of the consortium filed Corporate Insolvency Resolution Process (CIRP) with the Adjudicating Authority (AA) and proposed the name of Abhinav Mishra, as Interim Resolution Professional (IRP). The AA accepted the application and appointed Abhinav Mishra as IRP and put moratorium. The IRP constituted the Committee of Creditors (CoC) and first meeting of the CoC was called upon.

The operational creditors objected about the constitution of the committee and asked the IRP to include operational creditors also in the CoC, which the IRP denied. The CoC observed that IRP is not discharging his functions properly and was reluctant in calling the expression of interest from Resolution Applicant(s), so they proposed for the change of the existing IRP and appointment of the new Resolution Professional (RP) named as Shyam Sharma.

The RP called the expression of interest from the eligible applicants and each proposal was placed before the CoC, but no consensus had arrived at. The initial period of 180 days was about to elapse so the CoC through the RP sought extension which the Adjudicating Authority for further 90 days. The RP again called the expression of interest from other Resolution Applicants, but it was also not agreed upon by the CoC and after lapse of total 270 days, the Adjudicating Authority ordered for its liquidation and the present RP was appointed as Liquidator. The Liquidator sold off the assets of the Company and realised only Rs. 150 lakh, whereas the outstanding dues of the various stakeholders remained as under.

Dues of	**Amount in Lakhs**
Fee payable as Resolution Professional	10
Fee payable as Liquidator	10
Dues of the banks with interest	90
Outstanding from Operational Creditors	30
Dues of Govts.	15
Workmen's dues	20
Employee's salary	10
Equity shareholders	15
Total	**200**

Questions

1. Mention the provisions Insolvency and Bankruptcy Code, 2016 that govern the creation of the Committee of Creditors (CoC). The Operational Creditors were not a part of the IRP in the present instance. Whether the IRP's action was appropriate?

2. In this case, since the funding was made accessible through a consortium agreement, how will the voting of shares be decided upon at the CoC meeting?

3. What do "Resolution Plan" and "Resolution Applicant" mean? List the people who are not qualified to be "Resolution Applicant."

4. Describe the pertinent provisions for the liquidator's distribution of assets. How will the liquidator pay off the obligations of the different players in case of priority order?

(*5 marks each*)

Question No. 3

Food Labs Limited ("PFIL") is one of the top FMCG player and listed entity in India. It is a leading manufacturer and marketer of various edible oils, food products and eatables. Its Authorized Capital is Rs. 252.00 crore and Paid-up Capital is Rs. 65.00 crore. PFIL has borrowed from various Banks and Financial institutions in India and its borrowings were around Rs. 12,000 Crore.

Due to unprecedented crash in global prices of the oil seeds coupled with falling revenues in the oil business gave a crippling blow to PFIL. XYZ Bank and BCD Bank filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") for initiating the insolvency resolution process against PFIL (hereinafter called as the Corporate Debtor ("CD")). After hearing both the parties, National Company Law Tribunal ("NCLT") admitted the petition filed. The Financial Creditor proposed the name of Mr. K to act as Interim Resolution Professional ("IRP").

An application was filed before NCLT by one of the creditors who made a claim before the Resolution Professional ("RP") stating that the CD owed to pay USD 10.00 crore, based on the Bills of Exchanges, ordering the CD to pay this creditor for the goods supplied by another party. On making of such claim before the RP, it has been rejected by him saying that it is not a Financial Debt as it is an Operational Debt therefore, it could not be considered as Financial Debt as claimed by applicant therein.

Niraj Joshi, suspended Director of the CD, filed an application before the NCLT under section 60(5) of the Code seeking an order for setting aside the decision taken by the Committee of Creditors ("CoC") disallowing the erstwhile representatives of the Corporate Debtor to participate in the CoC meetings; declare that the CoC meeting is non est; direct the RP to ensure active participation of the applicant in the meetings of CoC; provide all the documents and information to the applicant.

RP filed application in NCLT under section 43(1) of the Code for seeking reversal of the amounts that were debited from the current accounts of the CD maintained with KYC Bank which had been debited by the KYC Bank before the insolvency commencement date and were utilized against the payment of the dues owed by the CD to a Bank in relation to the Letter of Credit issued by them. The RP submits that the payment of the impugned amount lead to preferential treatment towards KYC Bank by the CD as such payment has the effect of putting Respondents (i.e. KYC Bank) in a beneficial position than it would have been in liquidation of the CD in accordance with Section 53 of the Code. It is further stated by the RP that the payments of the impugned amount by the Corporate Debtor were not in the "ordinary course of business" of the CD.

NCLT, vide its order, held that the respondent Bank, which had debited an amount aggregating to Rs. 65.98 crores from the current accounts of the Corporate Debtor is directed to reverse the said amount within 30 days from the date of the said order. Since the resolution plan is already submitted and under examination of the CoC without consideration of this amount, therefore the appropriation of this amount will be decided by the CoC. KYC Bank filed appeal in NCLAT against the order of NCLT.

The main plea taken by the Appellant Bank is that the RP before filing an application under Section 43(1) of the Code formed no independent opinion nor afforded an opportunity to the Appellant to explain about the transactions in question. The RP called for Expression of Interest ("EOI") prospective resolution applicants showed their interest out of which two prospective resolution applicants were rejected as one was disqualified under Section 29A of the Code (being related party) and the other was a financial investor who did not meet the criteria in the EOI evaluation parameters. The applicant reviewed the four Resolution Plans submitted by the Resolution Applicants and found that only the plans submitted by 2 Resolution Applicants (RA1 and RA2) provided for the corporate insolvency resolution of the Corporate Debtor as a whole and on a going concern basis.

The RP filed application under section 30(6) of the Code, seeking order for approval of the resolution plan for the Corporate Debtor submitted by the consortium led by Mr. K (RA2) as approved by the members of Committee of Creditors (CoC). The said resolution plan was approved by a vote share of 96.85%. RP filed application in NCLT for approval of Resolution Plan.

While the said application was pending for consideration before the NCLT, Hon'ble Supreme Court, in *Niraj Joshi vs. Standard Chartered Bank & Ors* pronounced the judgment. Under the Judgment of Hon'ble Supreme Court, the approval of the NCLT to the resolution plan of RA2 was interdicted. In compliance of the abovementioned Hon'ble Supreme Court order, NCLT by its order directed as follows:

"Resolution Professional is directed to comply with the directions of the Hon'ble Supreme Court and submit the report within the stipulated time as provided by the Hon'ble Supreme Court."

Thereafter, NCLT approved the Resolution Plan submitted by RA2 and passed orders and directions on the reliefs and concession sought.

Since in Para 38, NCLT in their order rejected some of the relief sought, RA2 moved to NCLT for modification of order of NCLT. In the application filed, RA2 had sought substitution of Para 38 of the order of NCLT approving the Resolution Plan of RA2 as under:

Existing Para

"38. Any relief sought for in the Resolution Plan, where the contract/agreement/ understanding/ proceedings/ actions/notice etc. is not specifically identified or is for future and contingent liability, is at this moment rejected.

"All claims that were either not filed or not admitted during CIRP in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 shall stand extinguished. Further, claims admitted/ verified by the Resolution Professional shall stand settled and extinguished as per the Resolution Plan."

Resolution Plan approved by NCLT of RA2 leads to a 60% haircut for the lenders. RA2 completed its acquisition of PFIL.

Questions

1. Whether or not the creation of the Joint Lender Forum will affect the filing of this complaint. Briefly, citing the provisions of the IBC, 2016 regarding who may bring a case under the Code.
2. Explain whether Niraj Joshi's position was successful in the current instance. Discuss the function and place of the suspended Board of Directors in the Committee of Creditors in light of the Supreme Court's ruling.
3. Describe the NCLAT's ruling in the aforementioned lawsuit brought by KYC Bank regarding Section 43 transactions. Briefly explain who the application under Section 43 of the IB Code can be filed against and what orders can be made in accordance with that section, referencing any applicable legislation.
4. Whether the Resolution Applicant has the authority to ask for the NCLT's order on the Resolution Plan to be modified. Examine whether NCLT has the authority to alter or amend an order it issued in accordance with the IB Code?

(*5 marks each*)

Question No. 4

Your Car Company (YCC) is a manufacturer of passenger cars. It sells the cars through single brand dealerships across different cities. Because of its inability to compete in the market and continuous losses, YCC has decided to exit the passenger car business and notified its dealers about shutdown of passenger car manufacturing and sales in India.

Tryst Cars Ltd. is a passenger car dealer for YCC in Kanpur with an office cum showroom and having three service centers in Kanpur. Tryst Cars Ltd. has Bank Loan from XYZ Bank (B1) and MNO Bank (B2) for Rs. 10 Crores and Rs. 7 Crores respectively. The promoters cum directors of Tryst Cars Ltd. have also given their Personal Guarantee to the bankers along with mortgage charge on the office premises cum showroom of Tryst Cars

Ltd. Tryst Cards Ltd. failed to repay the amount borrowed from the Banks. The banks have issued notice to Tryst Cars Ltd. On receipt of the notice makes the representation that due to the present market conditions, the company is not able to repay the loan amount to the Banks.

One of the Operational Creditors, M/s Rani Automobiles Private Ltd. having an outstanding payment of Rs. 1 Crore has filed an application to initiate insolvency process under the Insolvency and Bankruptcy Code, 2016. The NCLT has admitted the Insolvency Application and appointed Mr. X, Insolvency Resolution Professional as Interim Resolution Professional.

The NCLT has declared moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016. Subsequently, M/s Rani Automobiles Private Ltd. was informed by the consultant about the Fast Track Insolvency Process. M/s Rani Automobiles Private Limited want to convert the existing Resolution Process to Fast Track Corporate Insolvency Resolution Process.

Tryst Cars Ltd. has contested the application for 'Conversion of the Corporate Insolvency Process' into 'Fast Track Corporate Insolvency Resolution Process'. The promoters and directors have taken a stand that Resolution Process cannot be initiated against them before the NCLT for Corporate Insolvency Resolution Process and it should be filed before Debt Recovery Tribunal.

Questions

1. As requested by M/s Rani Automobiles Ltd., determine whether the NCLT is authorised to transform the "Corporate Insolvency Resolution Process" into a "Fast Track Corporate Insolvency Resolution Process" under the Insolvency and Bankruptcy Code, 2016. Describe using the relevant case law(s).
2. What is the effect of the order of moratorium?
3. What shall be included in the public announcement made by the Adjudicating Authority?
4. Discuss the duties of Interim Resolution Professional.

(*5 marks each*)

Question No. 5

Samy Infrastructure Limited engaged in the construction of roads is in default in repayment of loans due to general slowdown in construction industry. Repeated follow-up by the financial institutions with the Corporate Debtor, 'Samy Infrastructure Ltd.' for submitting its specific plan for repayment of dues did not evoke any response.

One of the financial creditors filed a case against Samy Infrastructure Ltd. before the Debt Recovery Tribunal. Samy Infrastructure Ltd. had issued some cheques to some Operational Creditors. All the cheques issued to creditors were dishonored/returned by the banker due to insufficient funds in the account. Consequently, Operational Creditors issued legal notices to Samy Infrastructure Ltd, with clear intimation that if due amount is not paid within 15 days from the date of receipt of legal notice, criminal complaint shall be filed against Samy Infrastructure Ltd. under the Negotiable Instrument Act, 1881 and criminal complaints were filed. After a joint lenders meeting, all the financial institutions unanimously decided to apply under the provisions of the Insolvency and Bankruptcy Code, 2016 to the National Company Law Tribunal (NCLT) for starting the process of Insolvency Resolution. Their application was admitted by NCLT on 30th June, 2018 and orders were issued for commencement of a moratorium period of 180 days, appointment of an Interim Resolution Professional and issue of public announcement inviting claims from all concerned. The Defendant's employment with the Plaintiff no longer subsists. The Defendant claims to have resigned and the Plaintiff claims to have terminated his services as whole time Director.

After public announcement and the responses thereto, following details were brought out:

Particulars	Rs. in crores
Financial debts due to unsecured creditors	15
Workmen's due for the period of 24 months preceding the liquidation commencement date	25
Debts due to a secured creditor who has relinquished his security	30
Amount due to the Central Government	27
Debts due to a secured creditor after the enforcement of security interest	36

Insolvency Resolution Professional (IRP) approached the promoters, directors and officials of Samy Infrastructure Ltd to provide the necessary information, documents, statutory records, books of accounts to verify the claims filed by creditors. The promoters, directors and officials of Samy Infrastructure Ltd. ignored the request of Resolution Professional.

M/s K&C Associates, Chartered Accountants were the Statutory Auditors of Samy Infrastructure Ltd. They audited the accounts for the financial year end March, 2018 of Samy Infrastructure Ltd. and submitted the Annual Accounts for approval of the Board of Directors.

The Resolution Professional has appointed valuers and has received the valuation reports. The Resolution Professional then started the efforts to get resolution proposals. However during the normal resolution process period of 180 days, no resolution proposal could be finalized. The Committee of Creditors decided that Resolution Professional should get the extension as per the provisions of Insolvency and Bankruptcy Code, 2016.

Questions

1. Under the Insolvency and Bankruptcy Code, 2016, can a Financial Creditor pursue legal action against a Corporate Debtor even while the case is already before the Debt Recovery Tribunal? Analyse the situation using the relevant case law and laws.
2. Is it required to file a request for a 90-day extension of time before the 180-day period has passed? What safety measures should an insolvency professional take when requesting a 90-day extension from NCLT? Analyse the situation using any existing case law that has been decided.
3. Even after the start of the Corporate Insolvency Resolution Process, can criminal actions under Section 138 of the Negotiable Instrument Act, 1881, continue? Analyse the situation using any existing case law that has been decided.
4. Can Insolvency Resolution Professional (IRP) impose sanctions on Corporate Debtor workers in accordance with their employment contracts?

(*5 marks each*)

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