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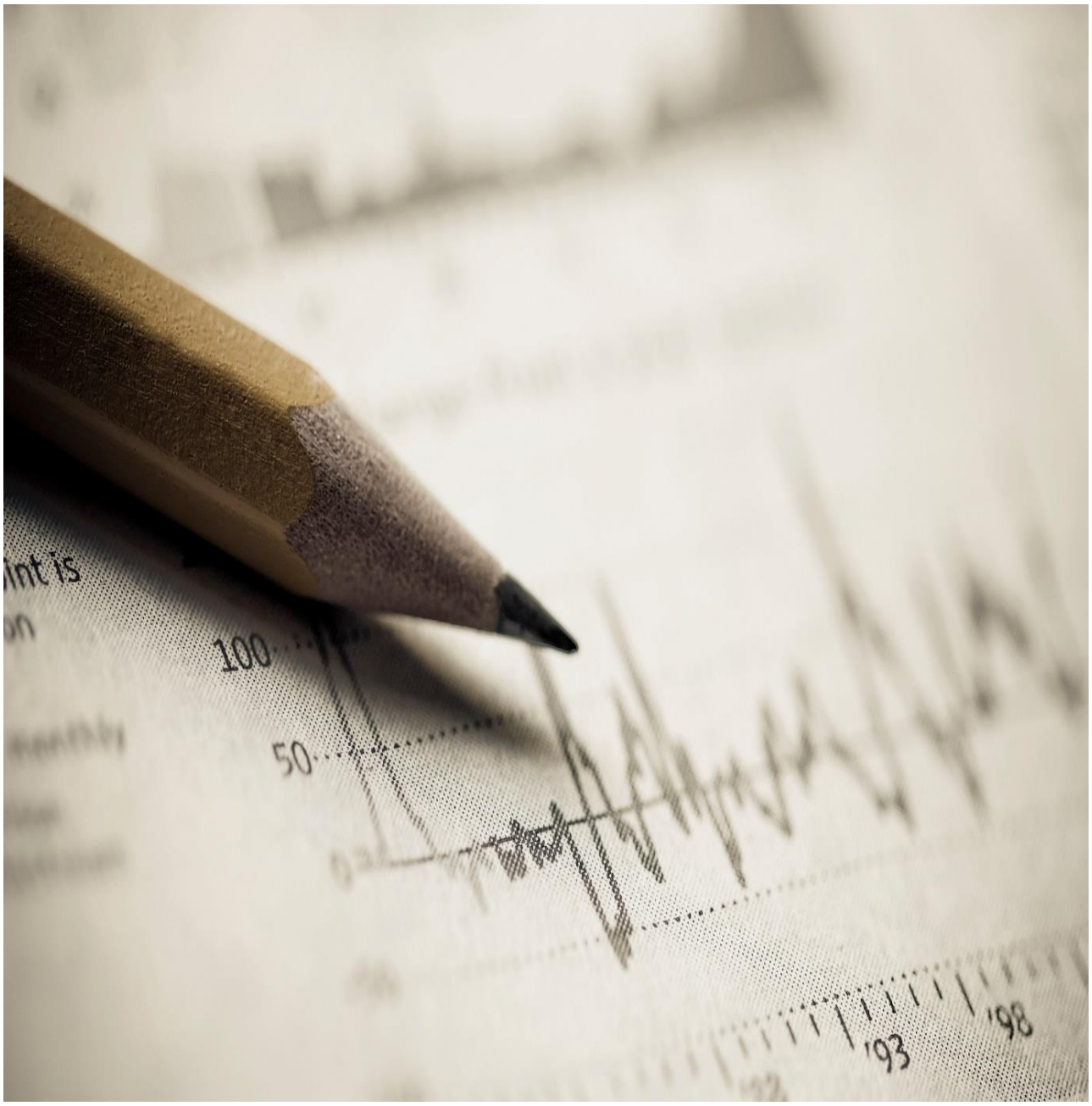
THE INSOLVENCY PROFESSIONAL
YOUR INSIGHT JOURNAL



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICAI) is a Section 8 Company incorporated under the Companies Act -2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enrol and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavour to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

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FROM THE DESK OF CHAIRMAN

Recently a significant ruling furthered the Indian courts' pro-enforcement approach while dealing with the international commercial arbitrations. The Hon'ble Supreme Court of India in the matter of Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors. has recognised and allowed the enforcement of an "award" passed by an Emergency Arbitrator appointed under the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules"). The ruling has assumed a massive significance in strengthening the Indian legal ecosystem and framework for international commercial arbitrations. Not only has this decision been recognised as one of the pioneering decisions granting acknowledgement to the Emergency Arbitrators in jurisdictions but has also proven itself to be a pivot for the parties considering to be governed by the Indian law as the curial law of arbitration.

The decision of the Supreme Court has approved the validity and enforcement of decisions/awards passed by an Emergency Arbitrator, despite the absence of an express statutory recognition to the concept of Emergency Arbitration (or Emergency Arbitrator proceedings) under the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). The Supreme Court has given its recognition and has laid emphasis on parties' autonomy to subject themselves to the rules of the institution providing for an Emergency Arbitrator and held that in view of there being no interdict, either express or implied, against an Emergency Arbitrator, the awards/orders passed by such Emergency Arbitrator shall be covered under the Arbitration Act. Therefore, by filling the legislative void in respect of the legality of Emergency Arbitrations in the Indian scenario, the Supreme Court has taken a progressive step towards cementing India's position as an international hub for resolving commercial disputes and arbitrations.

Though the decision welcomed an incidental question of whether an order passed under Section 17(2) of the Arbitration Act is appealable while enforcing the award of an Emergency Arbitrator, the analysis of enforceability of the decision on the issue of an award delivered by an Emergency Arbitrator under Section 17(1) of the Arbitration Act is definitely a landmark moment in the history of Indian Judicial system. The relevance in the development of law and the opinions on the unsettled issues and the way forward post the Amazon decision are matters which would further landmark moments in the Judicial developments.

In other words we can mention that this ruling is marking order for India to turn into a robust centre of international as well as domestic arbitration which will leave a worldwide impact in terms of dynamics, purpose, contextual interpretations and the existing provisions with respect to the Arbitration Act, thereby the Hon'ble Supreme Court of India has upheld the fundamental principle of party autonomy while at the same time acknowledging the efficiency of arbitral tribunals (including Emergency Arbitrators) to grant urgent interim reliefs in appropriate cases. The Court also observed that a party after participating in the emergency arbitral proceedings, cannot call the arbitral award a nullity on losing the case.

It still remains to be seen if the concept of 'Emergency Arbitrator' can find its place in the Indian legal/commercial ecosystem, though the Hon'ble Supreme Court has opened the doors by upholding the validity and enforceability of such 'Emergency Arbitrators' Award' in India.

Warm Regards,

Dr. Jai Deo Sharma,
Chairman, IPA ICAI

FROM THE DESK OF MANAGING DIRECTOR

The Insolvency and Bankruptcy Code, 2016 (IBC) is one of the highly discussed and acclaimed law in the Parliament, in the Hon'ble Courts of Law, across the country and also amongst the Professionals as well. This law has been evolving over the time, which has resulted into various amendments as well as corresponding amendments in other laws of the country, to serve the overall purpose and intent of the code. All these recent amendments in the Insolvency and Bankruptcy Board place the insolvency professional at the fulcrum of the resolution process.

The legislative intent in this regard is quite evident that the state of affairs should be such that the Corporate Debtor can be revived. Once the CIRP is initiated and an insolvency professional (IP) is appointed, he / she steps in the shoes of the board of directors and management to take charge of the corporate debtor. The code details the various duties of the IP with the objective of preserving the value of the debtor, promote entrepreneurship and give fresh life to the assets, besides maximising its value. This can be achieved when IP in his/her role as IRP/RP puts in his/her best, in line with the provisions of the code, timeliness and expectations of COC, out of him.

The topics covered in the journal are on very relevant and apt topics i.e. **Avoidance Transactions, Group Insolvency and Importance of IP and Valuer to work in tandem & relevance of the subtleties of IBC code to Valuers** which shall benefit the readers immensely with detailed insight of these important subject matters.

The law emphasizes that the responsibilities & duties are performed by an IP with utmost diligence and in a time bound manner. In a recent judgement an IP filed avoidance application after filing of the resolution plan, the AA raised concerns on the conduct of the IP and 'tick in the box' approach towards avoidance transactions. In another case, Hon'ble High Court raised concerns over filing of avoidance application after management handover to the successful RA.

In view of such instances, recent amendments to CIRP regulations are relevant as they aim to ensure discipline, accountability, and transparency in the insolvency process. While the law empowers the IP, it also casts a duty on him/her to timely identify transactions and seek reliefs from the AA. It is pertinent to note that while IPs are expected to exercise their professional appropriate judgment and diligence to undertake the evaluation, they may require assistance of independent experts in examination and quantification of complex transactions. In nutshell, timely identification and reversal of avoidance transactions can result in better recovery to the creditors.

A lot more is yet to be achieved in the field of IBC, on which Govt of India, MCA, IBBI, IPA, IPs and whole eco-system is working untiringly. There is no doubt that with the passage of time, various amendments in offing and noble intent of stakeholders, the effectiveness and efficiency of IBC shall achieve greater heights to fulfil the desired objectives of its creation, in fullest.

AVM Rakesh Kumar Khattri (Retd.)
Managing Director, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

FEBRUARY, 2022	
4th February, 2022	Learning Session on Compliances to be made by IPs under 2016
5th February, 2022	Webinar on Technology Solutions for IPs by Information Utility
11th February, 2022	Executive Development Program (Series-2) Chief Features of CIRP
18th February, 2022	53rd Batch of PREC
18th February, 2022	Workshop on PUFE Transactions
25th February, 2022	Master Class on Personal Guarantors to Corporate Debtors
26th February, 2022	Interactive Meet on CIRP & Liquidation (Timelines & the Challenges)
26th February, 2022	Seminar on the Insolvency & Bankruptcy Code, 2016 & Its Emerging Scenario

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INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA (IPA ICAI)

AVOIDANCE TRANSACTIONS – WAYS RESOLUTION PROFESSIONALS CAN ENHANCE THE VALUE OF A COMPANY UNDER CORPORATE INSOLVENCY RESOLUTION PROCESS

RANGANATHA CHENNA
ADVOCATE, CS, INSOLVENCY PROFESSIONAL

Avoidance transactions are those transactions which are in the nature of preferential, undervalue, extortionate and fraudulent transactions which would affect monetary interests of the stakeholders of the company under CIRP, including the creditors. These transactions are required to be reversed in order to maximise the value of the company under CIRP. In the event the Avoidance Transactions go undetected, the value of company gets irreversibly affected and consequently, creditors of such company may need to contend with large haircuts in repayments. Therefore, timely detection and reversal of Avoidance Transactions play an important role in maximising the value of the company under CIRP.

Preamble

The Insolvency and Bankruptcy Code, 2016 ("**IBC**"), as we all are well aware, provides for the revival of the chronic credit defaulting companies under the Corporate Insolvency Resolution Process ("**CIRP**"), while at the same time repaying the debts to the financial and other creditors (albeit after some haircuts in repayments) from the resolution amounts paid by the eligible resolution applicants who takes over the management and ownership of companies under the CIRP.

The haircuts in repayments that the creditors take may be reduced to a great extent if the Avoidance Transactions are pursued diligently and promptly by the RP.

The company under the CIRP goes for revival at a stage where the company's value would have eroded a great deal and maximising the value of the company is the key to successful completion of the CIRP and achieve the stated objectives of IBC.

The IBC lays down the provisions for avoidance transactions under Sections 43 to 51 and Section 66 ("**Avoidance Transactions**"). These provisions are a few of the most important provisions of the IBC as these provisions enjoin upon the Resolution Professional ("**RP**") a duty to identity and reverse the Avoidance Transactions. The management of the company under CIRP would have used creative ways to undertake Avoidance Transactions so as to mask the real intention of such transactions. It is the duty of IRP/RP to undertake a detailed examination of these transactions, if needed, with the help of transaction/forensic auditor, and place them before the Adjudicating Authority ("**NCLT/AA**") for its approval to reverse these transactions.

Hereunder, I examine the relevant provisions of the Avoidance Transactions briefly and the steps for timely identification of the Avoidance Transactions by IRP/RP based on latest case laws and practices.

Preferential Transactions

Section 43 deals with preferential transactions. As per Section 43 (1), if RP is of the opinion that the corporate debtor has given a preference in transactions, he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in section 44."

As per Section 43(2), a corporate debtor shall be deemed to have given a preference, if:

(a) there is a transfer of property of corporate debtor or an interest therein 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.

As per Section 43 (2), a preference is deemed to have been given by a Corporate Debtor, in case of related party, during the period of 2 years preceding the insolvency commencement date, and in any other cases, during the period of 1 year preceding the insolvency commencement date.

Some concerns have been raised that the CIRP admission process takes some time to complete, therefore, the period from the date of filing of the CIRP application up to the time the CIRP application is admitted takes away precious time and affects the reversal of Avoidance Transactions greatly. Therefore, the IBBI proposes to vary the commencement of lookback period for the Avoidance Transactions.

As per the proposed amendment, the look back period would be 2 years (for related parties) or 1 year (for un-related parties), preceding the date of filing of application of CIRP, unlike the extant legal requirement of calculating lookback period from the date of admission of an application for CIRP.

This proposed amendment contemplates to save precious time that would otherwise be taken for processing the application for admission of application for CIRP.

It may be noted that that the reliefs granted by AA under Section 44 of the IBC are mostly in nature of *status quo ante.* The AA may order, for *status quo ante* by requiring return of

the property which is subject of preferential transaction, or release, or discharge of any security interest created by the CD, or require sums representing benefits under preferential transactions to be paid, or direct that any debt which was paid off as a preference to be placed back as debt due, direct reinstatement of security or charge which has been discharged by giving preference or proving of claims in the CIRP.

Transactions Defrauding Creditors

As per Section 45, a transaction which is undervalued may be avoided with the approval of AA. The AA may declare such transactions to be void or reverse such transaction.

Undervalued transactions are such transactions in nature of gift by CD or where the transaction is for transfer of property at a price much less than the value provided by the CD and such transaction is not in the ordinary course of business.

In fact, an undervalue transaction may be reported by a creditor, member or a partner of a CD to the AA, if the RP misses to report the same (Section 47).

The order of AA may require, any part of property transferred as part of the transaction to be vested in CD, or release or discharge any security interest granted by CD or require any person to return the benefits received by any person or require the payment as may be determined by in independent expert (Section 48).

If the AA is satisfied on the application that a CD has entered into an undervalued transaction in order to keep the assets of the corporate debtor beyond the reach of any person entitled to make a claim against the corporate debtor, the AA will make an order restoring the *status quo ante* and protecting the interests of persons who are victims of such transactions (Section 49).

Extortionate Credit Transactions

If an RP notices any transactions which involves extortionate payments, the same may be avoided by making an application to AA (Section 50).

The AA may order for, restoration of *status quo ante*, or setting aside the whole or part of such transaction, or modifying the terms thereto, or repayment of amounts received under such transaction, or relinquishment of any security interest in favour of RP (Section 51).

In Shinhan Bank vs. Sungil India Private Limited, it was held that payment of interest of 65% on a loan is construed as extortionate transaction. Any payment of interest above the rate prevailing in the market would be in the nature of extortionate transactions.

Fraudulent Trading or Wrongful Trading

If a business is carried on with an intent to defraud creditors or the CD or for any fraudulent purposes, the RP may on identifying such transactions, make an application to AA for directing such persons (director or partner of CD) who undertook any such business to make contributions to the assets of the CD as it may deem fit. On the order of AA, a director or partner who knew or ought to have known that CIRP may commence and despite knowing did not exercise due diligence in minimising the potential loss to the creditors of the CD would need to make contributions (Section 66).

Steps to be taken by RP for enhancing the value of the CD

In most of the instances, the proceedings in connection with the Avoidance Transactions have continued even beyond the CIRP, resulting in erosion of valuation of the company under CIRP. Therefore, the RP would need to be extremely diligent and show utmost urgency in identifying the Avoidance Transactions and make an application to AA for an appropriate order reversing such transactions.
Regulation 35A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Corporate Regulations**") regulates the timelines for identification and making an application to AA for reversing such transactions. The RP is required to comply with Regulation 35A of Corporate Regulations.

The mere compliance of timelines enunciated in Regulation 35A of the Corporate Regulations will go a long way in maximising the value of the company under CIRP, consequently, less haircuts for creditors. However, to meet the timelines stated in Regulation 35A of the Corporate Regulations, the RP would need to focus right from the beginning of his/her appointment on the Avoidance Transactions. The maximisation of the value of the company under CIRP should be the sole object of RP and also the Committee of Creditors ("**CoC**").

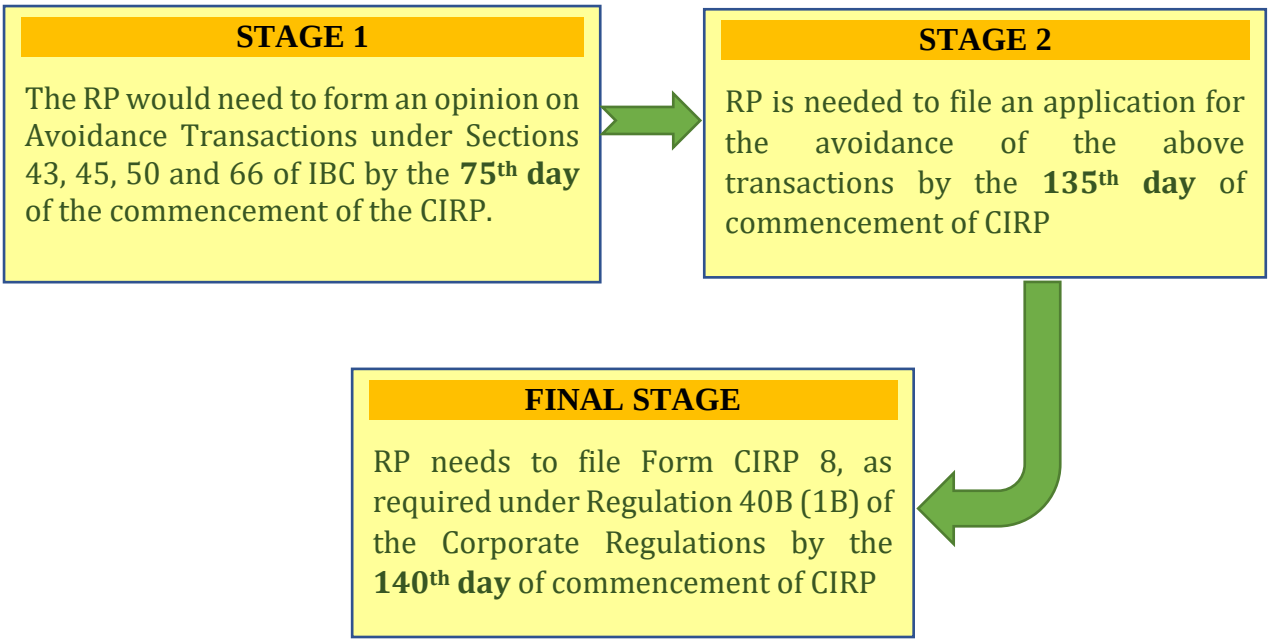
While CoC approval is not required for making an application by RP to AA for reversing Avoidance Transactions, any fee payable to transaction auditor/forensic auditor who would be appointed by the RP to sift through the transactions to discover Avoidance Transactions would require the approval of CoC. In view of the fact that RP is appointed by CoC and s/he functions on the basis of approvals of CoC, it is advisable that both RP and CoC act promptly and proactively.

There have been a few instances of delays in identifying Avoidance Transactions and consequent delay in making necessary applications to AA for the reversal of Avoidance Transactions by RP within the time period prescribed in the IBC. While these instances are a few, RPs should take extra caution and avoid these situations, even inadvertently.

Delays in identifying Avoidance Transactions not only affects the integrity of RP, but also attracts disciplinary proceedings by the IBBI.

Timelines for Identifying and Making an Application to AA for Reversal of Avoidance Transactions

The following are the timelines enunciated in Regulation 35A of the Corporate Regulations:



The introduction of the requirement of filing Form CIRP 8, vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2021 dated 14.07.2021, helped RP's in proactively pursuing avoidance transactions and reporting the same in Form CIRP 8.

Duties of RP in Identifying Avoidance Transactions

There are quite a few important judgments which provide guidance to RP's in identifying and making an application for Avoidance Transactions. The judgment in Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs Axis Bank Limited, etc., (**"Jaypee matter"**) is the most important one in so far as elaborating the duties of RP in relation to identification and application for Avoidance Transactions are concerned.

The Hon'ble Supreme Court of India (the "**SC**") in Jaypee matter, held as follows:

"On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in

essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

The SC judgment in Jaypee matter lays down that the following questions would need to be examined in a given case to check the applicability of Section 43 in a situation where property is transferred or an interest therein:

(i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

(iii). As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?

(iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date, and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?
(v). As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

The SC goes on further to clearly delineate the duties of an RP in relation to identifying transactions under Section 43 of IBC as under:

The SC beautifully illustrates what an RP is ordinarily required to do in terms of the legal fictions created by Section 43, read with Section 25, which enumerates the duties and responsibilities of RP in a CIRP:

1. The first step for the RP would be to undertake sifting through the entire cargo of transactions relating to the properties or interest thereof of the CD backwards from the date of commencement of insolvency and up to preceding two years.

2. The next step would be identifying the persons involved in Avoidance Transactions and categorising them as one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the IBC and another for non-related parties.

3. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party.

4. The above step would lead to bifurcation of the identified transactions into two sub-sets: One concerning related parties and other concerning non-related parties with each sub-set requiring different analysis. The sub-set concerning non-related parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of CIRP.

5. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find:

   (i) as to whether the transaction is of transfer of property or any interest therein of the CD; and
   (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the CD. These steps result in shortlisting of such transactions which are potentially preferential in nature.

6. Thereafter, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the CD. The transactions which are so found would fall squarely within clause (a) of sub-section (2) of Section 43.

7. Further, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets as per Section 53. If the answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exception provided by sub-section (3) of Section 43.

8. Thereafter, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does or does not fall within clauses (a) and (b) of sub-section (3) of Section 43.

9. After the resolution professional has carried out the aforesaid volumetric, as also gravimetric, analysis of the transactions on the defined coordinates, s/he shall be required to apply to the Adjudicating Authority for necessary orders in relation to the transactions that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

Conclusion

The SC judgment in Jaypee matter was given in relation to identification of Avoidance Transactions under Section 43. Same rules/steps may be applied for identification of other Avoidance Transactions.

Considering that an interim RP ("**IRP**") takes over the reins of management of the Company, until RP is appointed by the CoC, it is incumbent on the IRP to carry out a preliminary examination and be ready with the list of would-be Avoidance Transactions and in the event, IRP is not continued as RP, then the IRP may handover his/her findings to the RP.

This process will not only help maintain professional ethics of IRP, it also helps the RP in pursuing these transactions vigorously immediately after his appointment. This process would save a lot of time, consequently, enhance the value of the company. In CIRP process, time lost is value lost, therefore, IBC provides for the completion of CIRP process within 330 days. The Hon'ble SC in *Essar Steel India Ltd. v. Satish Kumar Gupta & Ors* held that only in exceptional circumstances the CIRP process may be allowed to continue beyond maximum threshold CIRP period of 330 days. To take the ground of exceptional circumstances, it needs to be demonstrated that the delay is not due to the actions of litigants, but due to the tardy process undertaken by AA or Appellate Authority.

It may also be noted and acknowledged that RP steps into the shoes of management of the company under CIRP and conducts business, which hitherto would have been done by the chief executive officer/manging director and board of directors, in addition to conducting CIRP. RP's focus on one aspect of the CIRP would derail other aspects of CIRP. Therefore, from practicality perspective, the RP should authorise Transaction/Forensic Auditors to identify Avoidance Transactions, the moment s/he finds any hints of Avoidance Transactions.

If the past conduct of business necessitates appointment of Forensic Auditor, then a Forensic Auditor may be appointed with the approval of CoC at the earliest. In the event Forensic Auditors' appointment is not needed, then a Transaction Auditor may be appointed to dive deep into the transactions which have been red marked as would-be Avoidance Transactions

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GROUP INSOLVENCY FRAMEWORK: NEED OF THE HOUR

DR. S K GUPTA
MANAGING DIRECTOR
ICMAI REGISTERED VALUERS' ORGANIZATION

Presently, the Insolvency and Bankruptcy Code, 2016 (IBC) does not provide for a consolidated mechanism to synchronize insolvency proceedings of corporate debtors procedurally or substantively within the same group. In spite of this, adjudicating authorities under the IBC have passed orders taking into consideration corporate debtors and their interconnections with other group companies such as in cases of Sachet Infrastructure, Videocon, Amtek Auto, Jaypee etc.

Codifying a Framework can have advantages such as reduced cost of proceedings, exchange of information, more certainty for stakeholders and maximization of value.

The Perspective

The recognition of a company's separate juristic personality by the UK's House of Lords in its landmark ruling in *Salomon v. Salomon A Company Ltd* remains the basis for modern corporate law. The ruling in effect drew a *corporate veil* around the legal personality of the company thereby establishing the separate legal identity of a corporate. While India also follows the separate juristic personality of corporates as a general principle, exceptions have been incorporated over the years by way of legislative action and juridical pronouncements. In the context of insolvency law, the corporate veil is typically lifted in instances where a group company could be held liable for the debts of its associate and subsidiary companies, or if a group of companies functioned as a collective.

Market data suggests that a significant percentage of Indian businesses are structured as intrinsically linked group entities that operate as a single economic unit. It comes as no surprise that according to a World Bank Report, India ranked 20th on the related party transaction index out of 190 jurisdictions. It is common business practice for group entities to regularly engage in related party transactions such as inter-corporate loans, cross collateralization and significant influence arrangements. While such structures largely respect the separate legal status of the group companies. Practice suggests such interlinkages in business, operations and management often raise significant challenges when individual group entities become insolvent.

The increased consolidation in India Inc over the last few years has led to numerous instances of situations wherein the group holding company lands into indebtedness and is on the verge

of being insolvent, thereby impacting all its subsidiary companies, or vice-versa, wherein indebtedness of a subsidiary creates risk for the larger group. Such instances are categorized as 'group insolvency', which refers to the process of clubbing together the assets and liabilities of individual companies and undertaking the insolvency proceedings as one substantive consolidation of the holding company, its associates, and its subsidiaries.

With group structures holding prominence in the business scene of India, there has been a need to outline and frame a comprehensive group insolvency framework. There are situations where the stakeholders may expand their interests and the chance of revival of organizations might be higher if organizations in a group are settled and resolved together. However, the Insolvency and Bankruptcy Code, 2016 ('IBC') doesn't conceive a structure to either synchronize indebtedness procedures of various organizations in a group or to resolve their insolvencies together. As of late, the need was acknowledged in the insolvency resolution of some corporate debtors like Videocon, Era Infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel, where uncommon issues emerged from their interconnection with other group organizations. In a portion of these cases, the Adjudicating Authority under the Code just as the Supreme Court, have passed orders to partially enhance such issues.

Group Company Insolvency

A Group Company is a cluster of corporate entities of parent and subsidiary companies in a vertical structure or horizontal structure format that functions as a single economic entity with common control. According to the Reserve Bank of India, Group Company means two or more enterprises which, directly or indirectly, are in position to exercise twenty-six per cent, or more of voting rights in other enterprise or appoint more than fifty per cent, of members of board of directors in the other enterprise. Group companies with financial relations, like interlinked corporate guarantees, loans and advances are more prone to group company insolvency rather than group companies with operational relations. When one of the group companies becomes insolvent, all the other companies financially linked with the insolvent company gets dragged for insolvency proceedings.

Where one entity of a corporate group enters insolvency, these links may make the operations of the entire group difficult. The insolvent entity's insolvency process may itself become affected due to the corporate group's behaviour. Therefore, where there is a default by one or more companies in a corporate group and on the existence of such links, common law prefers the consolidation of all the defaulting group entities' insolvencies. Typically, group insolvencies aim to ensure value maximization, procedural and cost efficiency, and the protection of all stakeholders' interests.

The practitioners of Insolvency Law would have come across situations where the corporate debtor in a CIRP does not have assets for insolvency resolution in a meaningful way, but there would be holding companies or associate or subsidiary companies of the same group who have good assets. But those assets cannot be touched because they belong to a different entity, though that entity is either promoted or controlled by the same or substantially same

promoters. This is because IBC does not have provisions or a mechanism to consolidate the assets and liabilities of group companies or to consolidate CIRPs and work together for insolvency resolution of more than one company belonging to the same group.

Approaches to Group Insolvency

While the approaches to achieving group-focused insolvency resolution or liquidation may be many, there are essentially two major ones – procedural consolidation, and substantive consolidation.

Procedural consolidation is where the proceedings of insolvency of different entities are coordinated, even if before different judicial or adjudicating authorities. This has successfully been done in several major insolvencies involving cross-border entities, such as BCCI, Maxwell.

Substantive consolidation disregards the separation of entities and pools the assets and liabilities of various entities into a common hotchpot. This extreme remedy is rarely used, even though UNCITRAL has been aggressively working on developing the principles for the same. Basically, substantive consolidation is ordered by courts where pooling of assets and liabilities is to larger benefit of different creditors, and generally not prejudicial to any. Mostly, this is done under circumstances similar to those inviting "lifting or piercing the corporate veil", even substantive consolidation is different from veil lifting or piercing.

Mechanics of Group Insolvency

The IBBI Working group on Group Insolvency has recommended that "corporate group" ought to have two essential ingredients as Ownership and Control. In addition to that, the Working group suggests that even organizations which are not covered under the definition however are characteristically connected will form some part of a 'group' in commercial understanding. Here, the principal factor in deciding whether the organization will be incorporated or not will rely on the value addition to be the other organization in the indebtedness without destroying the value of the organization being incorporated. Another critical view is that the framework has been made regarding the organizations; along these lines, other corporate structures like limited liability partnerships or other body corporate have not been incorporated.

IBBI Working Group, among several recommendations, has suggested the implementation of the group insolvency framework in a phased manner.

- **Phase 1**: The first phase should initially be applied only to companies in a domestic group with adoption of procedural coordination mechanisms as a trial mechanism. Procedural coordination mechanisms are rules which coordinate the different insolvency processes of various group companies, without disturbing the division of assets and substantive claims of creditors of each of the group companies. This mechanism lowers costs and reduces the time associated with different insolvency processes. It consists of the following elements:

  - Joint application process for insolvency of multiple companies
  - Communication, cooperation and information sharing between different insolvency professionals, NCLTs and CoCs under IBC
  - Single Adjudicating Authority to administer insolvency proceedings
  - Single insolvency professional for companies in a corporate group
  - Creation of a group creditors' committee
  - Enabling of group coordination proceedings
  - Extension of overall time frame for conclusion of CIRP of group entities to 420 days
- **Phase 2**: The second phase should introduce mechanisms of group insolvency in cross-border group insolvencies and substantial consolidation, depending upon the implementation of first phase of framework. The concept of substantive consolidation seeks to consolidate the assets and liabilities of group companies so that they are considered as a single economic unit for the insolvency process.

The Working group suggests that procedural coordination mechanisms (other than co-operation, coordination and data sharing) ought to on a fundamental level be empowered by law, anyway adaptability ought to be allowed to not decide on or apply these mechanisms in those situations where they don't help expand the value of assets or lower expenses of procedures. Further, working group suggests that insolvency professionals, CoCs (committees of creditors) and Adjudicating Authorities ought to be ordered to coordinate, communicate and share data with one another, since this is probably going to decrease the time taken in procedures, lower costs by de-copying efforts to gather data and promote data balance.

The working group has recommended amending the IBC, the corresponding rules and regulations and other relevant laws to enable its recommendations for the Framework. The key working group recommendations are set out below:

- **Co-operation, communication and Information sharing**: The IPs, each committee of creditors ("CoC") and AAs will have to cooperate, communicate and share information with each other, in case of insolvency of group companies.
- **Joint application process:** A single application to commence CIRP for multiple group companies that have committed defaults can be made. Such a joint application process should be in addition to the mechanism to initiate the CIRP against each group company separately.
- **Designation of a single AA:** A single AA is required to administer the insolvency proceedings of different companies in a group. This will be the AA that first admits an application to commence the CIRP for any company in the group. However, the CoCs of different companies may, by the required majority, choose the AA as per their convenience. If any CoC opts out of the group insolvency process, the AAs must share information, cooperate and communicate with each other.
- **Designation of a single IP:** The AA will have to appoint a single IP in the insolvency proceedings of all companies in the corporate group. Multiple IPs can be appointed if a single IP has potential conflicts of interest or insufficient resources to carry out his duties. The different IPs will have to communicate, cooperate and share information with each other.

- **Formation of a group creditors' committee and signing a framework agreement:** The group creditors' committee will be formed at the discretion of the CoCs of each group company. The composition, constitution, and cost of the group creditors' committee can be decided by an agreement between the CoCs or by a framework agreement.
- **Group coordination proceedings:** Such coordination proceedings should be enabled by a vote of the majority of each CoC and governed by the framework agreement. The parties to the framework agreement can appoint an IP as a group coordinator. The group coordinator will be required to propose the actions to be taken by the group. Each CoC can opt-out of the group coordination proceedings if it does not approve of the strategy of the group coordinator. When group coordination proceedings are opened, all AAs should be intimated of the same and all cases should be transferred to a single AA chosen under the framework agreement.
- **Extension of CIRP timeframe**: The timeframe for proceedings of any company that has opened group co-ordination proceedings may be extended to 420 days (including time taken in litigation) on an application to the AA. (The timeframe presently available for a company to complete CIRP under IBC is 330 days.)
- **Rules against perverse behaviour of group companies:** While the WG pondered over-rules against perverse behaviour from various jurisdictions which could be incorporated in the Framework, the only amendment that the WG has finally recommended is to allow subordination of intra-group debt in exceptional circumstances of fraud, etc. No other rules against perverse behaviour have been recommended on account of provisions regarding preferential and fraudulent transactions already being covered in the present IBC. Further, the subordination of intragroup claims may be allowed in respect of all group companies, regardless of their solvency.

Despite broad proposed structure for Group Insolvency being outlined by the Working Group there remain concerns that need to be addressed:

- Definition of the term 'corporate group' provided by the Working Group for the purpose of this framework so as to include holding, subsidiary and associate companies, is vague and fails to be inclusive
- Inherent ambiguity between jurisdictional issues arising due to the recommendation of a single Adjudicating Authority to mandatorily monitor the group insolvency process and the liberties provided to stakeholders to have different Adjudicating Authorities during the process of transfer of their applications.
- Applicability of cross-border insolvency provisions with relation to group insolvency since the development of provisions related to cross-border insolvency is itself at a nascent stage
- Non-settlement of the application of the principle of extension of liability as far as the Indian jurisprudence related to group insolvency proceedings is concerned
- Lack of consideration of issues relating to provisions for dealing with multiple tax jurisdictions, the concept of group moratorium, the procedure to move out from group insolvency proceedings in case of settlement between creditors and

corporate debtors, the feasibility of insolvency proceedings of a corporate debtor having cross investments and backward or forward linkages with other group entities without consolidation, alignment of management of multiple group companies by single RP, etc.

Nonetheless, the recommendations of the working group, if implemented with caution, will be a definite step towards taking the insolvency reforms forward. The working group report will serve as a guiding principle for the proposed phased implementation of the group insolvency regime for effectively tackling the substantiated issues which have arisen in cases of group insolvency.

Challenges in its way

This new advancement of Group Insolvency accompanies its own set of challenges and issues which should be remembered and kept in mind while it is drafted. Issues must be settled in regard to organizations with a gigantic turnover, which is monetarily independent and self-sufficient in running their organization as a going concern but is being dragged in the insolvency because of the group members. For instance, KAIL was one of the fifteen Videocon group entities which were requested to be consolidated. The court chose to keep it out of the union or consolidation since KAIL was an independent and self-sufficient organization with an immense turnover and was autonomously equipped with keeping up itself as a going concern.

Whenever merged with different entities, KAIL's asset value would have diminished which would have harmed its creditors' enthusiasm and interest leaving them uncertain about their share in the combined asset of the Group. On the off chance that creditors are left insecure, at that point that would reflect in either their eagerness to give credit or their raise in the amount of intrigue or interest. In the case of operational creditors, on the off chance that the assets are consolidated, at that point their chances to hold **10% of the aggregate** due sum diminishes. Henceforth, their opportunity to be a part of Committee of Creditors goes down and on the off chance that operational creditors are overlooked or ignored, at that point, no one would give merchandise and services on credit. There would be a demand for advance payment which would be terrible for the Indian economy.

Conclusion

Individual Insolvency procedures against different organizations of the same group in the different jurisdictions over the world result in an undue delay to the innocent creditors. In such a situation, the union of the subject matter would act in the advantage of creditors and the resolution procedure of such group insolvency would be quick and in an ideal way. The group insolvency system is required to address different developing worries, as was apparent from recent indebtedness cases. However, as the Code develops from the idea of 'entity' to 'enterprise', the stakeholders, including the administrators and the legal executive, will contribute as well as gain from the experience it brings to the table. Further, the usage of the group framework is in a phased manner which will prompt the improvement of law and development of jurisprudence alongside the cases. Along these lines, the input obtained from the execution of the gathering structure will assist the administrators with devising fundamental revisions in the equivalent.

Separately, in light of the Report, modifications to the Prudential Framework for Resolution of Stressed Assets released by the Reserve Bank of India on June 7, 2019, may also be considered in relation to asset restructuring for group entities. For instance, introduction of provisions catering to group structures for governing the synchronization of asset classification norms amongst entities, pre-IBC restructuring and specialized asset classification, will aid in the growth of a symbiotic relationship between the Code and RBI norms. This may serve in expediting the revival of group entities.

In India, however, the Code doesn't accommodate and provide for specific arrangements or provisions identified with group insolvency, the courts, through its capacity of legal translation or judicial interpretation, have acted as the hero to rescue and settle a few cases accordingly. In any case, specific provisions identified with this concept should be incorporated in the code so as to get sureness and consistency in the law. Investors shall accordingly plan their investment; otherwise, pointless deferral or delay in courts and different complexities would make India a less alluring investment destination.

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End-Notes:

- Bankruptcy No. 79-224-A United States Bankruptcy Court E.D. Virginia.
- Edelweiss Asset Reconstruction Company Limited v. Sachet Infrastructure Pvt Ltd, Company Appeal (AT) (Insolvency) No.377 of 2019 (India).
- Insolvency and Bankruptcy Board of India, The report of the Bankruptcy Law Reforms Committee
- State Bank of India v. Videocon Industries Limited & Ors. MANU/NC/2290/2020 (India).
- Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India,
- Reserve Bank of India, A.P. (DIR Series) Circular No.68, RBI/2013-14/356.

IMPORTANCE OF IP AND VALUER TO WORK IN TANDEM AND RELEVANCE OF THE SUBTLETIES OF IBC CODE TO VALUERS IN NCLT ISSUES

P.S. PRAKASA RAO
M.TECH, REGISTERED VALUER

The preamble of IBC code 2016 commences with the main objective of insolvency resolution of corporate persons, individuals, partnership persons, in a time bound mannerfor Maximization of Value of assets of such persons, to promote entrepreneurship and availability of credit, balancing the interest of all stakeholders. Where any corporate debtor has defaulted, CIRP may be initiated by either financial creditor, Operational creditor or the debtor himself. The application so admitted in due course, following the laid down procedures, the adjudicating authority shall appoint an Insolvency professional based on the recommendation of the Board. The IP will assume thetotal responsibility of managing the defaulting enterprise and run it as a going concern.

Introduction

It is often discussed in professional circles that the IP has to encounter uncharitable territories in CIRP, and is reduced to the level of just collating the claims of creditors, and involves in other procedural wrangles, while the committee of creditors is the sole authority in the process of decision making. Noncooperation of the corporate debtor in furnishing the relevant financial or otherwise, information is one of the stumbling blocks inthe resolution process.

In view of the hurdles encountered by the IP, the author advocates in the ensuing paragraphs that a paradigm shift is needed that the Valuer has to acquaint himself with IBCcode and understand the subtleties in the various stages of the CIRP to lend a helping hand to the IP. Understanding the whole gamut of terminology in CIRP will facilitate the valuer and IP with a holistic view instead of piecemeal approach. It is pertinent to mention that the Valuer is appointed in case of Liquidation and not otherwise.

The author explains here briefly the need for a deeper understanding of the code, the standards to be referred for valuation, the approach/methods to evaluate, the roles of IPand valuer.

Why understanding IBC Code is relevant

The code stresses on the maximization of value of assets for the benefit of all the concerned. This concept is aimed at minimizing the losses of the enterprise by

obtaining afair market price in an arms' length transaction for the assets that are brought under resolution and only when it culminates in liquidation.. As the valuer is appointed by the IPat the terminal stages, is not exposed to CIRP. However, the author advocates for the appointment at the initial stages itself.

The valuer is an important link in the whole process of CIRP. The COC (Committee of Creditors) whose approval is final to approve the Resolution Plan may take guidance from the valuation as there are possibilities of undermining the value of enterprise by the corporate debtor. Asset valuation may come in handy to arrive at a rational price which is acceptable to all the stake holders. The figures may provide the true picture of the enterprise value before acceptance by COC or may function as the reserve price for the bids. The IP will stand to gain from the experience and depth of knowledge about the valueof the assets in consideration for liquidation or resolution.

Understanding the Roles and Standards for Valuation

The Resolution professional:

Sections 17 & 18 of Code defined the role and duties of RP in detail while managing the affairs of corporate debtor in CIRP. Section 19 mandates that personnel of the defaulting debtor to extend assistance to RP in managing the affairs. The apprehension of noncooperation by the staff is confirmed by introduction of clause 19(2), implying that the management may not cooperate in CIRP. IP has to resort to making an application to adjudicating authority in such a situation to issue necessary directions. It goes without saying that the IP shall- have a micro level knowledge of the code for remedial measures insuch predicaments.

The Valuer

It is relevant to look into the section 247 of companies act 2013 wherein the appointed registered valuer shall make a) an impartial and fair Valuation b) exercise due diligence c)in accordance with the rules as may be prescribed.

Section 20.30 of Glossary of IVS 2022 defines a "valuer" is an individual, group of individuals or individual within an entity, regardless of whether employed (internal) or engaged (contracted/external), possessing the necessary qualifications, ability and experience to execute a valuation in an objective, unbiased, ethical and competent manner.

The Standards

There is an implicit mention in the IBC code Chapter 10 of Regulations REG004& REG012 (Resolution Process for Corporate Persons& Fast Track Insolvency) that internationally accepted valuation standards (IVS) shall be followed in computation of liquidation value after due physical verification of the assets of the corporate debtor.

It may not be out of context to quote a few relevant definitions (applicable in the presentcontext) from IVS2022 which has come into effect from 31st Jan 2022 and in IBC code.

Section 30.4. of Glossary of IVS defines: The market value of an asset will reflect its highest and best use (HABU) (paras 140.1-140.5). The highest and best use is the use of an asset that maximizes its potential and that is possible, legally permissible and financially feasible.The highest and best use may be for continuation of an asset's existing use or for some alternative use (In Situ or Ex Situ). This is determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid.

Section 20.23 of Glossary of IVS defines. Synergistic Value: The result of a combination of two or more assets or interests where the combined value is more than the sum of the separate values. If the synergies are only available to one specific buyer, then synergistic value will differ from market value, as the synergistic value will reflect particular attributesof an asset that are only of value to a specific purchaser. The added value above the aggregate of the respective interests is often referred to as marriage value.

IVS-Defined liquidation value in section 80.1 of IVS104 as: the amount that would be realized when an asset or group of assets are sold on a piecemeal basis. Liquidation valueshould take into account the costs of getting the assets into saleable condition as well as those of the disposal activity. Liquidation value can be determined under two different premises of value: (a) an orderly transaction with a typical marketing period (see section160), or (b) a forced transaction with a shortened marketing period (see section 170).

In Chapters 10 of REG004 & REG 012 - Resolution plans, Liquidation value is defined as theestimated realizable value of assets of corporate debtor if the corporate debtor were to be liquidated on insolvency/fast track commencement date. A period of 2years /90 days is provided to make an assessment.

The Approach

IVS, while taking the standard approaches of Income, Market & Cost approaches as the accepted methods of valuation, elaborated the definitions& procedural aspects in the following standards for different assets.

IVS104 Bases of Value, IVS 105 Valuation Approaches and Methods, IVS 200 Businesses and Business Interests, IVS 210 Intangible Assets, IVS 220 Non-Financial Liabilities, IVS 30 Inventory, IVS 300 Plant and Equipment, IVS 400 Real Property Interests, IVS 410Development Property, IVS 500 Financial Instruments.

Holistic approach by the Valuer and IP

While the Resolution professional has the total responsibility from the date of his

appointment to call for the necessary documents, step into the shoes of the Board, call forCOC meetings and so on, the Valuer in his own capacity may try to understand the whole scenario of the CIRP in the interests of all the stake holders. However, he is limited by the constraints of his appointment confirmation which is done by the resolution professional.Taking in a positive sense "it takes two for a Tango" may be relevant in this context.

Information Utilities will come in handy for IP and Valuer

The IBBI (Information Utilities) Regulation 2017, IBBI/2016-17/GN/REG009.

Information Utilities (IU) provides core services such as 1) Accepting electronic submission of financial information in such form as may be prescribed2) safe and accuratestoring of financial information3) authentication & verification 4) providing access to the authorized.

Valuers and IP can optimally utilize Information utilities (NSEL) to upload all the documents that of assets, Inventory etc.; and store for a period of 8 years as per the statutefor a nominal fee.

Conclusion/Recommendations

The author attempts to drive home the point that the valuer to be associated with CIRP since its commencement instead of at reaching the stage of liquidation. His understanding of IBC code and CIRP is of paramount importance as the real contribution for the maximization of value comes through proper valuation. Resolution plan can be based on these estimates to arrive at a plausible solution for the valuation of the enterprise.

The time frames left for accurate valuation at the point of liquidation are too narrow to arrive at fair value of the enterprise for **fast-track** process. Association of RV at the initial stages will provide an opportunity to him for correct estimation, as enough time is neededto collate and arrive at a reasonable estimate.

The appointment of RV may be made by The Board or Audit committee as the case may be,independent of Resolution professional and not at his discretion.

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CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

- **Srinivasa Reddy Velagala v. Sravanthi Infratech (P.) Ltd. [2021] 127 taxmann.com 224 /[2021] 165 SCL 454 (NCL-AT)**

Where an EPC Contract between parties out of which default had arisen had not been terminated by either of parties and was still continuing and there was no such clause in contract regarding frustration or termination by efflux of time, application filed under section 9 by operational creditor could not be said to be barred by limitation.

The appellant-corporate debtor had awarded a contract to the respondent-operational creditor for engineering procurement and construction (EPC) project for setting up gas based combined cycle power station and several obligations and conditions for payments were enumerated therein. The corporate debtor failed to make payment as per the schedule. Thus, there being debt due, the operational creditor issued a demand notice under section 8 which was not responded by the corporate debtor. Accordingly, the operational creditor filed an application seeking initiation of corporate insolvency resolution process against the corporate debtor. The Adjudicating Authority admitted said application and initiated corporate insolvency resolution process by appointing Interim Resolution Professional. The appellant challenged said order on ground that application filed under section 9 by the operational creditor was barred by limitation as prescribed under article 137 of the Limitation Act 1963 and contract was frustrated by efflux of time.

Held that, as seen from correspondences between parties and from perusal of clauses/articles as enumerated under EPC contract, said contract had not been terminated by either parties and thus, issue raised with regard to application being barred by limitation could not be accepted. Further, there was no such clause in contract regarding frustration or termination by efflux of time, thus, default had arisen out of EPC Contract, which itself was a continuing contract. Therefore, the Adjudicating Authority had rightly admitted application of the operational creditor which did not require any interference in appeal.

SECTION 10 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY CORPORATE APPLICANT

- **Neesa Infrastructure Ltd. v. State Bank of India, Ahmedabad [2021] 127 taxmann.com 225 /[2021] 165 SCL 578 (NCL-AT)**

Where no special resolution was passed by shareholders of corporate debtor for filing application under section 10 as there was no director on board of company due to dis-qualification under section 164 of Companies Act, 2013, Adjudicating Authority rightly rejected application filed under section 10 for initiation of CIRP.

The appellant, one of promoter of the corporate debtor, had filed an application under section 10. However, it was found that there was no special resolution passed by shareholders of the corporate debtor approving filing of application as there was no director on Board of the company due to disqualification under section 164 of the Companies Act, 2013. The Adjudicating Authority rejected application filed under section 10.

Held that since the appellant filed application with an intention to stall recovery proceedings pending against the corporate debtor, the appellant had not approached the Adjudicating Authority with a bona fide intention and the Adjudicating Authority rightly rejected application of the appellant.

I. SECTION 2 - APPLICATION OF CODE
II. II. SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF:

- **Lalit Kumar Jain v. Union Of India - [2021] 127 taxmann.com 368 (SC)**

(i) *In IBC itself, there is sufficient indication that personal guarantors are to be dealt with differently; Notification No. S.O. 4126 (E), dated 15-11-2019 making provisions of IBC applicable in respect of 'personal guarantors to corporate debtors' as another category of persons is valid.*

Petitioners were associated with different corporate debtor companies as directors, promoters or in some instances, as chairman or managing directors. They furnished personal guarantees to banks and financial institutions. Notification No. S.O. 4126 (E), Dated 15-11-2019 was issued by the Central Government which brought into force sections 2(e), 78, 79, 94-187, 239(2)(g), 239(2)(h) & 239(2)(i), 239(2)(m) to 239(2)(zc), 239(2)(zn) to 239(2)(zs) and 249 in relation to such 'personal guarantors' to 'corporate debtors'.

Held that there is no compulsion in the Code that it should, at same time, be made applicable to all individuals, (including personal guarantors) and there is sufficient indication in the Code by sections 2(e), 5(22), sections 60 and 179 indicating that personal guarantors, though forming part of larger grouping of individuals, are to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through same adjudicatory process and by same forum as such corporate debtors. Further, impugned notification has merely made provisions of the Code applicable in respect of 'personal guarantors to corporate debtors' as another such category of persons to whom the Code has been extended. Thus, impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code and it being issued within power granted by the Parliament, is valid.

(ii) Approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee.

Held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under contract of guarantee. Release or discharge of a principal borrower from debt owed by it to its creditor by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve surety/guarantor of his/her liability which arises out of an independent contract. Approval of resolution plan relating to a corporate debtor does not discharge liabilities of personal guarantors.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

- **Union Bank of India v. Kapil Wadhawan [2021] 127 taxmann.com 394 /[2021] 168 SCL 54 (NCL-AT)**

Order passed by Adjudicating Authority (NCLT) asking lenders of corporate debtor DHFL to consider resolution plan of company's former promoter was to be stayed as matter had proceeded to stage where Resolution Plan had been approved and was before Adjudicating Authority, hence, without deciding same, Adjudicating Authority should not have passed impugned order as had been done.

NCLT by impugned order had directed erstwhile promoter of the corporate debtor (DHFL) to place before Committee of Creditors (CoC) its 2nd settlement proposal which would ensure repayment in full of principal amount due to all creditors of the corporate debtor. Union Bank of India on behalf of CoC of the corporate debtor (DHFL) challenged above order. It was argued that in the I&B Code when Resolution Process is initiated there can be only three contingencies: (i) Resolution Plan is approved, (ii) Orders of Liquidation are passed or (iii) CIRP is disposed of under section 12A. The Adjudicating Authority was aware that settlement proposals did not fall either under category of Resolution Plan but still went on to pass orders as it did in the Impugned Order.

Held that the matter had proceeded to stage where even Resolution Plan had been approved and was before the Adjudicating Authority, hence, reversal could not have been allowed and without deciding same, Adjudicating Authority should not have passed impugned order as had been done. Thus, there were serious issues which were being raised and which need consideration. Therefore, impugned orders were to be stayed.

SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - SUBMISSION OF

- **India Resurgence Arc (P.) Ltd. v. Amit Metaliks Ltd. [2021] 127 taxmann.com 610 /[2021] 167 SCL 223 (SC)**

Amount to be paid to different classes of creditors is essentially commercial wisdom of Committee of Creditors and a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to value of security interest.

Held that amendment to sub-section (4) of section 30 only amplifies considerations for the Committee of Creditors (CoC) while exercising its commercial wisdom so as to take an informed decision in regard to viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and business decision taken in exercise of commercial wisdom of the CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment. What amount is to be paid to different classes or sub-classes of creditors in accordance with provisions of the Code and related Regulations, is essentially commercial wisdom of the Committee of Creditors; and a dissenting secured creditor cannot suggest a higher amount to be paid to it with reference to value of security interest. Limitation on extent of amount receivable by a dissenting financial creditor is innate in section 30(2)(b). It has not been intent of legislature that a security interest available to a dissenting financial creditor over assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce entire of security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond receivable liquidation value proposed for same class of creditors.

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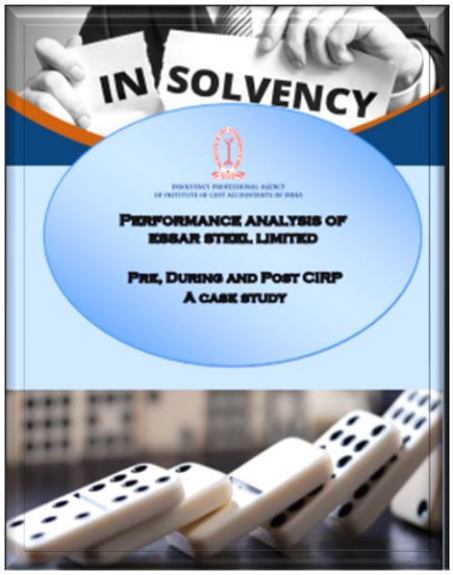
PUBLICATIONS

IBC AU COURANT



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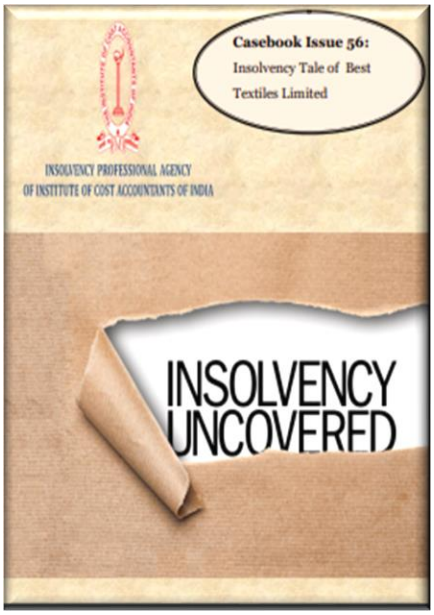

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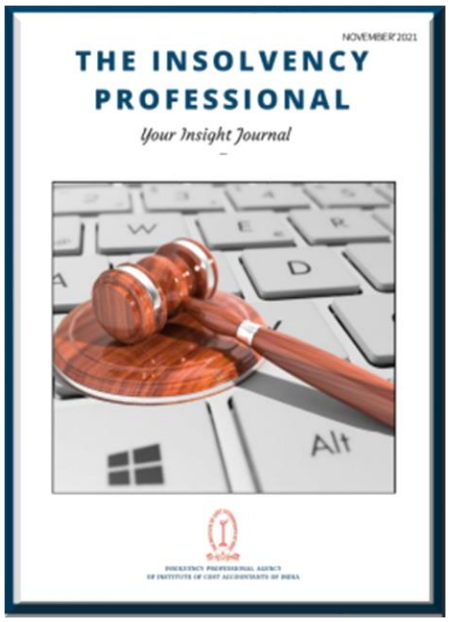

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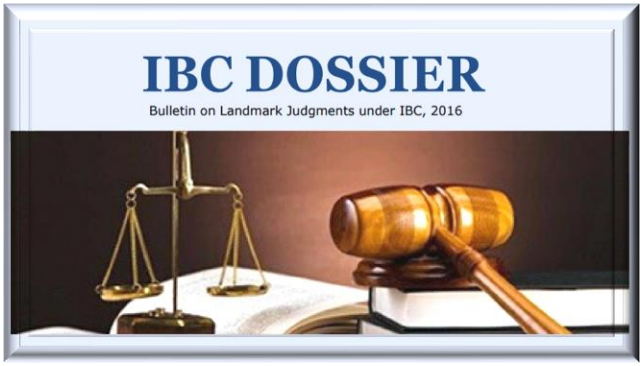

IBC DOSSIER

GALLERY

INTERACTIVE SESSION AT SCOPE CONENVENTION HALL, NEW DELHI

GLORIOUS MOMENT OF WELCOMING MR. RAVI MITAL, CHAIRPERSON, IBBI WITH BOARD OF DIRECTORS OF IPA ICAI

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The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

- ✓ *The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.*
- ✓ *The article should be topical and should discuss a matter of current interest to the professionals/readers.*
- ✓ *It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.*
- ✓ *The length of the article should be 2500-3000 words.*
- ✓ *The article should also have an executive summary of around 100 words.*
- ✓ *The article should contain headings, which should be clear, short, catchy and interesting.*
- ✓ *The authors must provide the list of references, if any at the end of article.*
- ✓ *A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.*
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