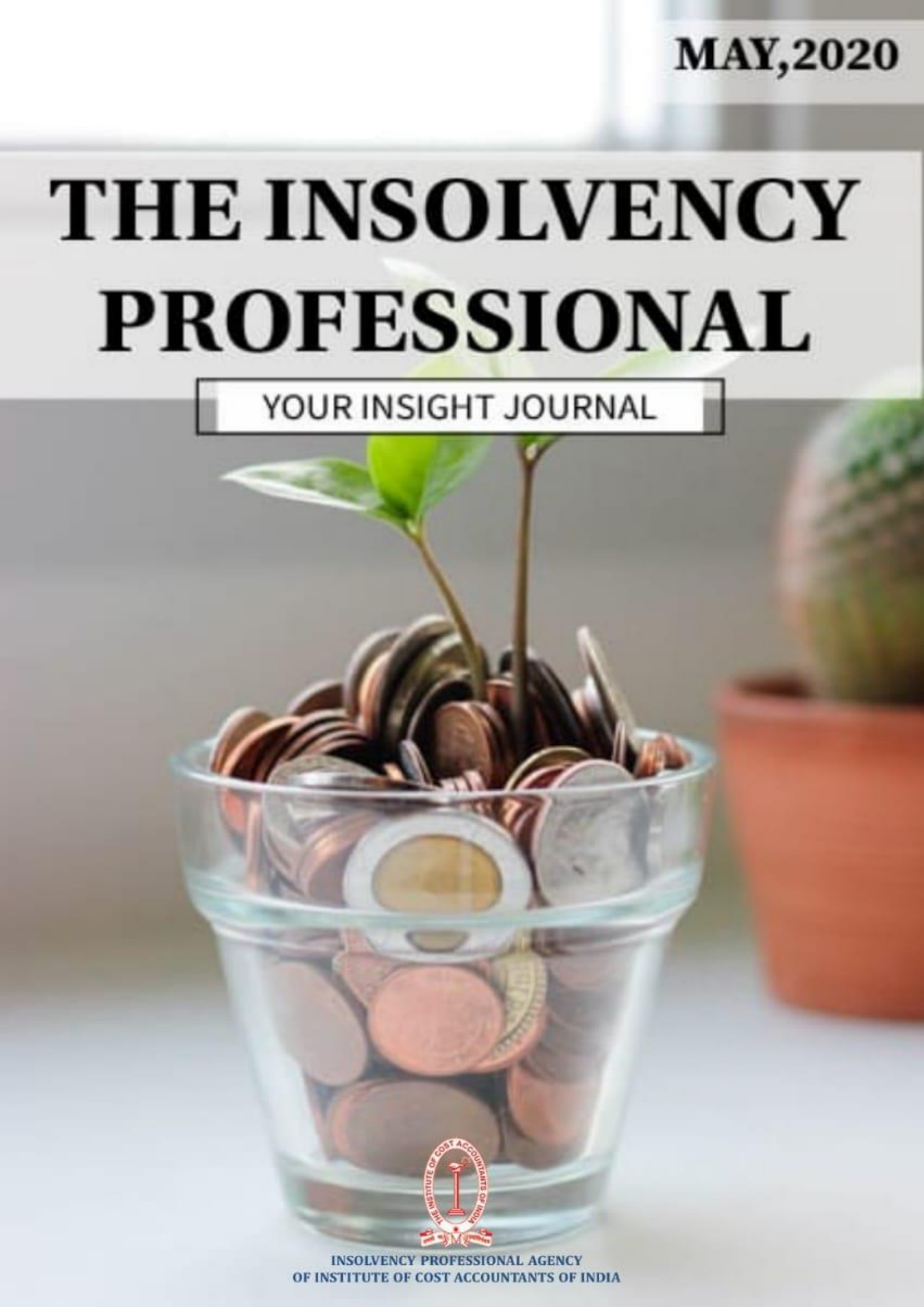
MAY,2020

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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MD & CEO MESSAGE

With an eye on further enhancement of Ease of Doing Business and at a time when a large number of companies have seen their revenues collapse during the last month or so, with forecasts suggesting that demand for goods will remain weak due to Covid-19. The government has announced the proposed suspension of fresh initiation of insolvency proceedings up to one year and exclusion of COVID 19 related debt from the definition of "default" under IBC. The minimum threshold to initiate Insolvency proceedings has been pushed to Rs.1 crore from the current Rs.1 lakh default. Section 240 (A) of the IBC covers the framework of how it is applied on MSMEs. The government has now proposed a special resolution framework for MSMEs to be notified soon.

As uncertainty looms over corporate India in the wake of the Covid-19 outbreak, several Companies under the Bankruptcy Resolution process may see potential buyers pulling out. Buyers have adopted a wait-and-watch approach even in cases where the deals were at the final stages or bids submitted, as the Covid-19 crisis has put a question mark on valuations and viability of businesses. The impact of coronavirus will be highly disruptive for the insolvency industry; even the plans which were either approved or under consideration by the committee of creditors and NCLT may go back to the drawing board. You could also see the bidders thinning for insolvency companies; they might seek a payment moratorium or timeline extension in places they have already submitted bids. The centre of gravity will shift from NCLT based resolution to informal restructuring under RBI sponsored scheme, which too would need an urgent tweak. With the streams of global distressed asset, investors and resolution applicants likely drying and with existing promoters disqualified to bid in view of Section 29A, the banks are likely to prefer resolution outside of NCLT.

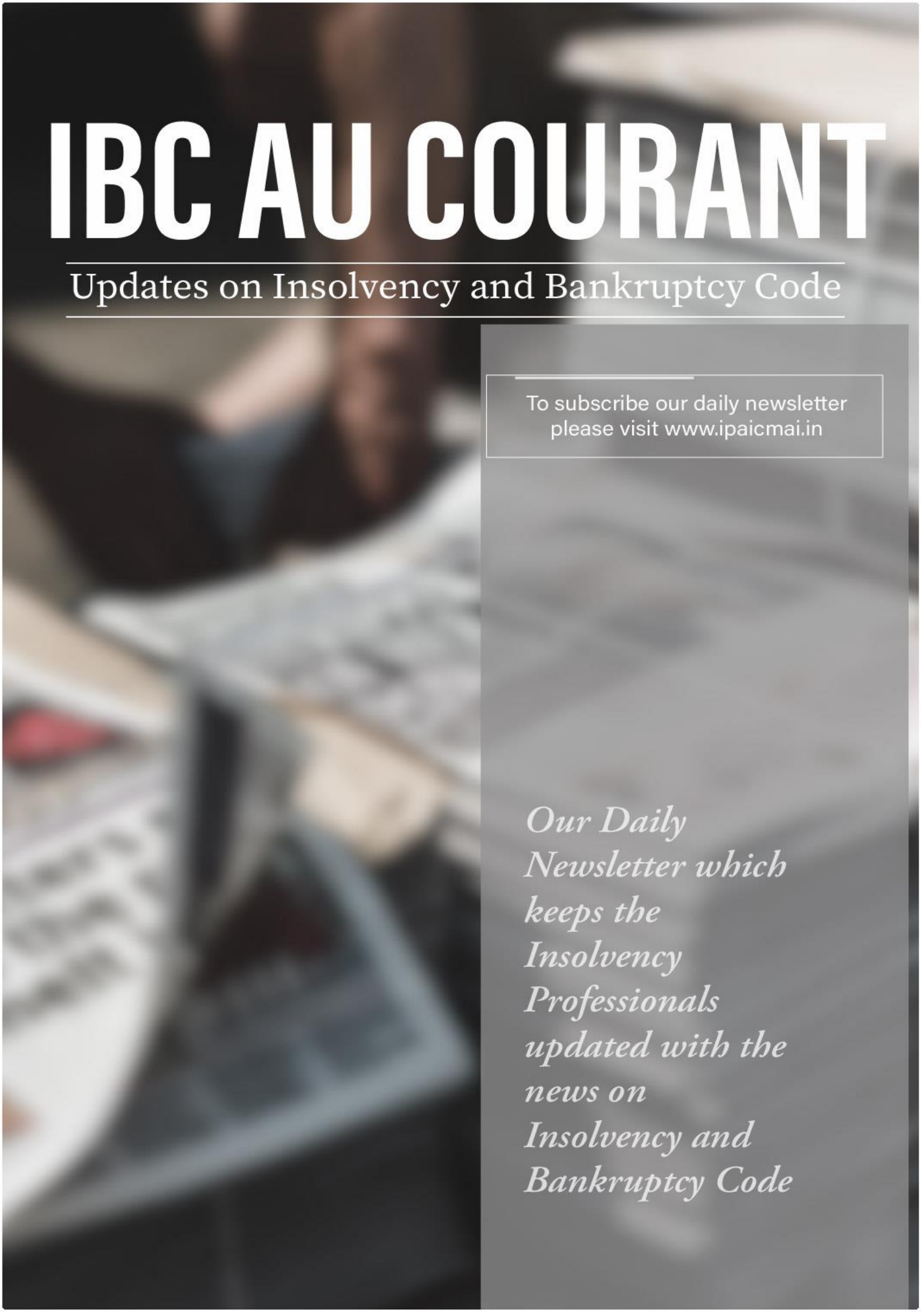
It would be critical to see if the Reserve Bank of India allows corresponding leeway for the lenders, so that they don't need to treat those defaults (or delayed payments) as non-performing assets or even write-off in their books. Else, the lenders will bear the financial burden of this pause by having to account for it in their quarterly provisioning. Further it is to be seen whether the rating agencies pause the rating for those firms during this period or will they trigger downgrade? Ability to borrow further and the pricing of such a debt will depend on the rating.

PROFESSIONAL DEVELOPMENT INITIATIVES

Insolvency Professional Agency of Institute
of Cost Accountants of India

EVENTS CONDUCTED

MAY,2020	
May 1, 2020	Webinar on Role of IP as Administrator under SEBI regulations
May 2, 2020	Webinar on Issues faced by IPs under IBC
May 3, 2020	Webinar on Professional Ethics for Insolvency Professionals
May 5, 2020	Webinar on Critical Issues in Real Estate under IBC
May 6, 2020	Webinar on Role of IP as Administrator under SEBI Regulations
May 11 - 20 May, 2020	30 Hours Online Certificate Course in IBC
May 15, 2020	Webinar on Valuation under IBC- Impact on account of COVID-19 pandemic
May 16, 2020	Webinar on Insolvency and Bankruptcy Law- Comparison of India Vs. UK Model
May 21, 2020	Webinar on Interactive Session on IBC
May 22, 2020	Webinar on Impact of Covid 19 on Insolvency and Bankruptcy Law and Practice in USA
May 27, 2020	Webinar on Leveraging Big Data Analytics/Computer Forensics to detect fraud during Insolvency Proceedings
May 29, 2020	Webinar on Impact of Covid 19 on Insolvency and Restructuring Sectors



IBC AU COURANT

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Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code


ARTICLES
Insolvency Professional Agency of Institute of Cost Accountants of India

IMPACT OF COVID-19 ON ONGOING RESOLUTION PLANS UNDER IBC AND SUBSEQUENT ACTIONS AND PROCESS THEREOF

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Background

COVID-19 and resultant lockdown have caused unprecedented challenges. Businesses are coming to grips with the unfolding crisis, uncertainty around its scope, degree and duration of impact and responding to deal with the crisis by taking short term and long term measures. Many corporates undergoing resolution under Insolvency and Bankruptcy Code, 2016 (IBC) are in different stages of getting resolved. Under the current scenario, resolution applicants (RAs) and lenders are faced with questions relating to its impact on approval and implementation of ongoing resolution plans.

As per IBBI Quarterly Newsletter ended March 31, 2020, from Status of CIRP, out of 3,774 cases admitted into insolvency, resolution plans have been approved in 221 cases and CIRP process is ongoing for 2,170 cases. Total amount of Rs 176,673 crore is realizable by Financial Creditors(FCs) which includes amount received and to be received by FCs as per the resolution plans. Break-up of amount received and to be received under the approved resolution plans is not separately available. However, amount to be received by FCs is expected to be significant as many large cases are yet to be implemented. Banks/lenders to stressed CDs are interested in the payment of amounts as per approved resolution plans so that their Non-Performing Assets can reduce. Further, as most of these accounts are written-off/fully provided for in FCs books, these lenders can re-deploy the realizations and book profit against realizations made.

In this context, this article covers impact of COVID-19 on ongoing resolution plans on Resolution Applicants (RAs), Successful Resolution Applicants (SRAs), Committee of Creditors (CoC), lenders etc. and subsequent actions and process thereof from the standpoint of IBC and other applicable provisions. Exact impact on existing creditors will depend on facts of the specific account, decisions of CoC, its provisions of RFP and resolution plan.

Following three buckets of ongoing resolution plans under IBC are explored below.

1. Resolution Plans approved by AA and under implementation by Successful Resolution Applicant (SRA)

Once a plan is approved by the Adjudicating Authority (AA), the resolution plan is binding on the CD and its employees, members, creditors, guarantors and other stakeholders as per Section 31(1) of IBC. Further, as per Section 33(3) of IBC, where the resolution plan approved by AA is contravened by the concerned Corporate Debtor (CD), any person other than the CD, whose interests are prejudicially affected by such contravention may make an application to AA for the liquidation order and AA may pass a liquidation order if the AA determines that the CD has contravened the provisions of the approved resolution plan. Therefore, in the event of the contravention of the terms of the approved resolution plan, there is likelihood of any aggrieved creditor taking CD concerned to AA for liquidation as per IBC.

Based on approved resolution plan, creditors are also expected to file new debt information as per plan with National e-Governance Services Limited (NeSL), Information Utility (IU) under IBC, in particular, if payment is deferred over a period of time.

In cases, wherein SRA has paid to all earlier creditors of CD in full and has taken control of CD, there would not be contravention of resolution plan. However, there are quite a few resolution plans which have been approved by the AA and are pending for completion as no definite timeline has been given in the plan for its implementation. In certain accounts, agreed plans also stipulate penal/additional interest in case of delay in implementation by SRA while the plan is pending implementation.

In addition, there are a number of resolution plans which have been approved on deferred payment basis and are under implementation as complete amounts have not been paid to creditors. Some of the successful resolution applicants (SRA) have defaulted on their obligations or have defaulted recently post-COVID-19. One such account is Tecpro Systems Limited which had yielded resolution earlier and has now moved to liquidation on account of delays in implementation as mentioned later.

As per IBC, if any approved plan is contravened by CD or by any of its officers or creditors, such CD, officer etc. can be punished under Section 74(3) of IBC. Any creditor who is affected by such delay or default can file application with AA for compliance by concerned CD/SRA. Under the circumstances, SRAs may like to renegotiate or withdraw the plan to overcome above section.

Some of the past instances wherein SRAs have sought to renegotiate/withdraw the resolution plan based on circumstances therein as well as where AA has approved liquidation on account of delays in liquidation and decided on performance bank guarantee are as under:

i) In case of Mandhana Industries Ltd (renamed as GB Global Limited), AA directed SRA - Formation Textiles LLC, a US based company, to hand over the possession to the CoC/RP in its order dated December 5, 2019. Subsequent to the approval of the resolution plan, the SRA had filed application on June 18, 2019 seeking the relief of revising its offer/bid and to reduce the bid amount in line with actual valuation of the CD, appointment of an independent auditor to carry out forensic audit of the CD to accurately determine the accurate valuation and raised questions about the transparency of the insolvency proceedings.

ii) Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors. [Civil Appeal No. 4242/2019 & Ors. Dated 22/01/2020] - The Supreme Court held that the exit route prescribed under section 12A of IBC is not applicable to a SRA and is available only to the applicants initiating CIRP.

iii) Liberty House Group Pte. Ltd. Vs. State Bank of India & Ors. [CA(AT)(Ins) No. 724/2019] - The AA approved resolution plans submitted by Liberty Group in the CIRPs of two CDs, namely, Adhunik Metaliks Limited and Zion Steel Limited. As Liberty Group failed to implement the resolution plans, the AA cancelled the resolution plans and passed orders of liquidation of CDs. While appeal in the matter was pending, the Liberty Group filed an affidavit to allow it to comply with the resolution plans and to set aside the orders of liquidation of both the CDs. Noting that SRA, the Liberty Group, has implemented both the resolution plans, the NCLAT by order set aside liquidation. It directed that the said order be served on IBBI to withdraw complaints, if any, made before the Special Judge against the Liberty Group.

iv) The Committee of Creditors of Metalyst Forging Ltd. through State Bank of India Vs. Deccan Value Investors LP & Ors. [CA(AT)(Ins) No. 1276/2019] - After approval by CoC, a resolution plan was placed for approval of the AA. SRA, however, on demand of performance guarantee, wanted to withdraw the resolution plan. The AA refused to approve the plan and directed the RP/CoC to invite fresh bids. It held that the SRA will not be entitled to refund of the amount of the bid bond guarantee in case fresh bid of the RA is not accepted. The CoC challenged the order of rejection of the resolution plan. SRA also challenged the forfeiture of bid bond guarantee. The NCLAT held that the Code does not confer any power and jurisdiction on the AA to compel specific performance of

a plan by an unwilling resolution applicant. It, however, did not interfere with the CoC's decision of forfeiture of the bid bond furnished by the RA.

v) Tecpro Systems Limited [CA 2683(PB)/2019 in CP No. (IB)197(PB)/2017] - There was inordinate delay in the implementation of the approved resolution plan. The erstwhile members of the CoC approved liquidation of the CD with 99.28% of voting rights. The AA approved liquidation and directed forfeiture of performance guarantee of Rs 5 crore furnished by RA.

It may be observed from above orders that in the past, AA has ordered liquidation on account of failure or inordinate delays in implementation of resolution plan. In such event, forfeiture of performance bank guarantee furnished by RA has also been ordered by AA. In certain circumstances, AA has also allowed withdrawal of resolution plan and CoC to carry out fresh bidding.

In view of COVID-19 situation, it has been notified that all NCLT benches shall remain closed during lockdown. In line with order passed by the Hon'ble Supreme Court, the Hon'ble NCLAT vide order dated March 30, 2019, excluded the lockdown period for the purpose of counting of the period for '*Resolution Process under Section 12 of the Code, 2016, in all cases where 'Corporate Insolvency Resolution Process' has been initiated*. Amendment to IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was also made wherein Regulation 40C was introduced which provided that *period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of the timeline for any activity that could not be completed due to such lockdown, in relation to CIRP process*.

The Reserve Bank of India (RBI) in March 27, 2020 announced that all banks and NBFCs have been permitted to allow a moratorium of 3 months on repayment of term loans outstanding on March 1, 2020.

Since on approval of plan by AA, CIRP period is over, in the event date of implementation of resolution plan falls within lockdown period, there is no extension available to SRA as per above notifications as period of lockdown under COVID-19 is not excluded from beyond CIRP period. In addition, the Code does not provide for extension to CoC beyond CIRP period.
Following issues/questions therefore arise:

i) Whether in the event of SRA seeking deferment of implementation or payments as per approved resolution plan, such proposal of SRA would be dealt by the present lenders or AA (i.e., same authority which had approved the resolution plan).

ii) If lenders make any change in resolution plan' terms unilaterally without informing AA, will such action make resolution plan void and lenders cannot approach AA for enforcing the plan at a subsequent stage.

iii) Can the CoC unilaterally extend the time period of payments or implementation of resolution plan since the same is done by AA.

iv) whether moratorium provided by RBI would be available to loans to be repaid to banks as per plan resolution approved under the IBC.

It is therefore necessary to analyse the inter-play of approval of resolution plan under IBC and the Contract Act, 1872.

As per Section 3(37) of the IBC, "words and expressions used but not defined in this code but defined in the Indian Contracts Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities and 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, it is important to interpret the words and expressions relating to contracts not defined in IBC to have meaning assigned in the Contract Act, 1872.

It may be noted that on approval of resolution plan by AA, resolution plan is construed as and takes shape of statutory contract as its contents are prescribed by statute with its implementation to be done under the umbrella of IBC. Once a plan is approved by AA, there is no supervisory power of AA over the plan as same is provided in the plan as a mandatory content and is restricted to contravention, if any, of the resolution plan.

It is understood that most of the resolution plans approved are unconditional and don't contain force majeure clause (FMC). In case, a resolution plan incorporates FMC, then plan would be governed under Section 32 of the Contract Act, 1872 which covers enforcement of contracts contingent on an event happening. Therefore, language of the FMC in the resolution plan will define the scope of applicability of the principle of force majeure.

Recently, the Ministry of Finance, Department of Expenditure, has also vide its Memorandum dated February 19, 2020 clarified that the disruption of the supply chains due to the spread of corona virus will be covered in the force majeure clause (FMC) and should be considered as a natural calamity and FMC may be invoked in relation to procurement of goods as per the Manual for Procurement of Goods, 2017.

In absence of FMC, one may seek relief under the 'Doctrine of Frustration' wherein there is an impossibility in performance of the transaction based on facts or law to fulfill SRA's performance under the contract due to the occurrence of subsequent events. In so far as a force majeure event occurs de hors (without) the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act, 1872 [Energy Watchdog and Ors. Vs. Central Electricity Regulatory Commission and Ors. (2017)14SCC 80)]. However, it should be understood that loss of commercial viability will not be a factor for frustration of contract. It is important to note that invoking Section 56 shall render agreement this resolution plan void and discharge all parties from their obligations.

The Hon'ble NCLAT in the case of RGG Vyapar Pvt Ltd v. Arun Kumar Gupta held on August 31, 2018 that AA has no jurisdiction to reopen the resolution plan on approval of the plan under Section 31 of IBC.

As various judgments have upheld the primacy and commercial wisdom of CoC/Financial Creditors, AA have limited judicial review on commercial terms of the plan, the sequence of above process of undertaking modification in terms of resolution plan will evolve. In view of above, any modification in terms and conditions of the resolution plan may have to be approved first by CoC and then filed with AA for its approval.

Thus, it would be interesting to see how SRA/CD may approach CoC/AA for any modification/withdrawal of a resolution plan approved by AA under various scenarios mentioned above.

2. Resolution Plans approved by CoC and pending approval of AA

At the time of approval of the resolution plan, CoC has to consider the resolution plan's feasibility and viability as per Section 30(4) of IBC. Once a resolution plan is approved by CoC, RP often issues Letter of Intent (LOI) to SRA on behalf of CoC, subject to further approval by AA.

SRA thereafter provides performance security as provided in terms of Regulation 36B(4A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. As per aforesaid Regulation, such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by AA, fails to implement the plan or contributes to the failure of the implementation of that plan. RP, after CoC approval, submits the resolution plan to AA for its approval. As mentioned earlier, It is understood that most of resolution plan submitted to CoC by RAs are unconditional and don't contain FMC.

Though there seem to be few instances under IBC where a resolution plan has been withdrawn or renegotiated prior to its approval by AA, from the legal standpoint under the Contract Act, 1872 an offer/plan can be withdrawn any time before final acceptance. In Amtek Auto CIRP, a resolution applicant was permitted to withdraw its resolution plan by NCLAT. However, circumstances in aforesaid account cited were different and were largely related to discrepancy in information provided in the Information Memorandum.

3. Resolution Plans submitted by Resolution Applicants and under the consideration of CoC

In the context of the Contract Act, 1872, a resolution plan which is yet to be approved by AA may not be binding on SRA as final acceptance from AA has not been granted.

In view of changes in business environment and disruptions on account of COVID-19, business plan of CD as formulated by SRA are likely to undergo changes and expose SRAs to various uncertainties. In the interim period of pending approval of plan by AA, in the event of material adverse event caused by COVID-19 etc., financial projections may undergo change that may have impact on 'viability and feasibility' and may require higher contribution from SRA for CD's viable operations. In addition, financial institutions which have committed funds to SRA's resolution plan may re-evaluate their funding commitment in view of emerging situation citing material adverse event, however, same would depend on particular clause financing documents.

Both SRA and CoC/RP would be concerned of such material adverse change (MAE) on the successful implementation of the resolution plan and therefore may like to re-assess the resolution plan with respect to its sustainability.

In cases where RA has submitted resolution plan to CoC by RA along with EMD if applicable and is pending for CoC approval, RA would be concerned to assess its own ability to implement the plan as financial position of many RAs have been adversely affected in light of uncertainties caused by COVID-19. These RAs may themselves face liquidity crunch or volume de-growth thereby deteriorating their own operating and financial leverage thereby limiting their own ability to meet commitments made.

RA will also be concerned on the impact on operations due to various factors such as closure of units, supply-chain disruptions etc. and its impact on the viability of CD on account of COVID-19. Stoppage of operations of CD would result in losses of CD. RA will have to assess whether these are interim issues or more systemic long-term issues that require sustained focus and

redressal. Though business operations may be suspended, CD will have to bear fixed costs as payments due to various creditors during CIRP period are treated as CIRP cost. In case of force majeure invoked during CIRP or payments due not made during CIRP by CD or against CD, it will result in number of disputes going up. Accordingly, RA may have to provide higher capital infusion to fund losses as well as to take into account lower margins and volumes of CD due to COVID-19 disruption to ensure that the plan continues to be viable. SRAs assumptions for utilization of assets of CD may undergo change depending on industry/sector of CD.

Higher commitment of amount by SRA may also adversely affect rating of SRAs and lead them to reconsider the plans submitted.

On other hand, CoC's are under obligations to ensure that submitted and approved plan is viable and feasible. It will be difficult as to how will CoC evaluate the same plan's feasibility and viability under the present/changed circumstances and comply with its above obligation so that implementation of the plan is smooth and successful.

As decided by the Hon'ble Supreme Court in its judgement of '*CoC of Essar Steel India Limited v. Satish Kumar Gupta and Ors., Civil Appeal No. 8766-67 of 2019'* , it is ultimately the commercial wisdom of the CoC which determines and approves the best resolution plan considering all aspects including 'feasibility and viability', preserving the business as a going concern, etc. It further held that the Code does not confer any powers on NCLAT and NCLAT to prescribe the contents or manner of implementation of the resolution plan apart from those statutorily mandated in section 30(2) of the Code.

Interestingly, Hon'ble Supreme Court further held CoC's position in above cited case of Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors. [Civil Appeal No. 4242/2019 & Ors. Dated 22/01/2020] that AA had exceeded its jurisdiction in directing matching of liquidation value by Resolution Applicant and wrongly proceeded on equitable perception rather than commercial wisdom.

The impact of delays is already visible with the report that JSW Steel Limited has sought more time from lenders to Bhushan Power and Steel Limited to make payment of Rs 19,700 crore for its acquisition following a steep fall in global steel prices and demand. The resolution plan of Bhushan Power and Steel Limited was approved by NCLAT in February 2020 and has crossed more than 1,000 days since its admission into insolvency under IBC on July 27, 2017.

It is therefore amply evident that primacy of CoC's commercial wisdom has been reiterated by the Apex Court in a number of judgments. In above scenarios of impact of COVID-19 and delays thereof, both RAs/SRAs and CoC will have to constructively engage together and take resolution

process forward to its finality to achieve the overall objective of achieving the best resolution and maximization of value of CD.

BANK GUARANTEES IN THE CONTEXT OF THE INSOLVENCY AND BANKRUPTCY CODE 2016 (IBC)

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Insolvency Professional

The law on Guarantees forms part of the Indian Contract Act 1812 with Section 126 defining Guarantees and then there are other sections that cover the rights and liabilities of the Creditors and Guarantors etc. In the context of IBC, we will restrict ourselves to Guarantees for repayment of loans by a corporate person (Principal Debtor/ Corporate Debtor or CD).

A contract of Guarantee has three elements; the entity that has borrowed the money (the principal debtor), the entity that has provided the funds (the creditor) and the Guarantor.
The contract of guarantees will have the following features (unless specifically modified):

A. Once entered into, the guarantor cannot walk away from his obligations until the expiry date of the guarantee unless there is anything contrary to that effect in the guarantee document.
B. The liability of the guarantor and the borrower is independent and co-extensive.
C. The creditor can independently proceed against the principal borrower and the guarantor
D. Any modification to the guarantee instrument without the consent of the guarantor can release the guarantor of his obligations.
E. The guarantor will have a right of subrogation i.e. once the guarantor has fulfilled his guarantee obligations, he will have a right to claim the amount from the Principal Debtor

In the context of IBC, broadly, three types of Guarantees are at the centre stage:

A. Guarantees issued by Banks upon the request of the CD
B. Corporate Guarantees given by a CD for example, Corporate Guarantee given by a Holding Company for guaranteeing obligations of a subsidiary company.
C. Personal Guarantees of the Promoters/ Directors to Banks etc. for repayment of loans by the CD

Guarantee as a Debt

The IBC defines Debts as Financial Debt and Operational Debt. Operational Debt is the amount due to a supplier for provision of goods and services and includes workers and employees' dues, dues owned to the government and others. Sec 5 of the IBC has an exhaustive list of what constitutes Financial Debt with Guarantees covered under clause 8 subclause (i) which reads as:
Quote "the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub clauses referred to in sub clauses (a) to (h) of this clause. "Unquote.
The treatment of Guarantees under IBC has seen many issues emerge as under:

A. Whether uninvoked Guarantees can be admitted as a debt

The position taken by some RPs was that unless a guarantee has been invoked, it does not become a Debt. The guarantee may lapse and therefore only when the guarantee has been invoked can that be admitted as a Financial Debt and therefore the Bank is to be treated as Financial Creditor only after the guarantee cannot be treated as a Financial Debt guarantee is invoked. Another position taken by an RP, inter alia, was that for a guarantee to be treated as a Financial Debt, the guarantee must have been issued by a financial institution, in terms of IBC, and therefore if a non-banking entity has issued a guarantee then the and the issuing entity cannot be treated as a financial creditor. In many cases though, RPs have admitted uninvoked bank Guarantees as a valid claim.

It is the view of this author that the obligation of the Bank issuing the guarantee is absolute under law. The Bank therefore has a stake in the process and if anytime the guarantee gets invoked then there is no difference between the Banks who have extended loans and a bank that has issued a guarantee on behalf of a Corporate Debtor. The Bank cannot be denied a seat on the Committee of Creditors only because the guarantee has not been invoked. Further subclause 8 (i) of Section 5 of the IBC only provides for Guarantees and there is no distinction made between Invoked and Uninvoked Guarantees.

This matter came to be heard by the Hon'ble NCLAT in the case of Axis Bank vs. Edu Smart Services Private Limited and others in Corporate Debtor Appeal (AT) 304 of 2017. Prior to the filing of the appeal in NCLAT, the Hon'ble Principal Bench of NCLT at New Delhi rejected the claim of Axis Bank stating that as of the date of admission under CIRP, the claim was contingent as the guarantee had not been invoked. It also concurred with the views of the RP in the case that the moratorium under Section 14 does not permit invocation of a guarantee once the Corporate Debtor has been admitted under CIRP. The CoC in this case also claimed that claim for unmatured debt under a guarantee cannot be accepted as the debt has not become due and payable.

The Hon'ble NCLAT differentiated between claim and default. It was held that the claim as defined under Section 3(6) of the IBC means, inter alia, right to payment and for any application for Insolvency to be triggered, default must have take place and default as defined under Section 3(12) of the IBC reads as " default means non payment of debt when debt has become due and payable"

The Appellate Tribunal held that when the Insolvency has been triggered then everyone who has a right to payment can file a claim with the IRP/RP and that the claim has not matured cannot be a ground for rejection of the claim.

The Hon'ble Appellate Tribunal ruled that:

Quote "Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor." Unquote.

Further it was also held that the Guarantee need not be issued only by a financial institution and by implication that Non-Banking entities issuing Corporate Guarantees shall also be treated as a financial creditor.

There would, however, be a practical issue to be addressed at the time of distribution under the approved resolution plan when the Guarantees have not been invoked. In principle, if the guarantee has not been invoked at the time of distribution under an approved resolution plan then the creditor cannot get the benefit of the payment against uninvoked Guarantees.

The following scenarios are most likely:

A. Both, the primary and the claim period under the guarantees have expired.
B. The primary period has expired but the claim period is still valid
C. The primary and the claim period are valid as of the date of the planned distribution under an approved resolution plan.
D. The guarantee has been invoked and payout has been made by the creditor

It is also quite likely that some of the guarantees may have been issued to power companies, utilities supplying water, to customers against tenders awarded in favour of the Corporate Debtor etc. and the continuation of these guarantees would be essential to maintain the CD as a going concern.

The probable treatment for the uninvoked guarantees in the above scenarios would be as under:

1. In Scenario A, since the Creditor has no further liability to honour the guarantee, his claim amount will need to be reduced and such an entity would not be a Creditor if there are no other admitted debts.

2. In Scenario B, from the total share in the distribution under the resolution plan due to the creditor, the amount payable if invocation was to happen will be held back and not distributed till the claim period has expired. If invocation happens then the creditor will receive the portion of the plan distribution against the claim admitted and if there is no invocation then the amount will need to be redistributed to all the creditors unless the approved resolution plan has specifically provided that in the event of non-invocation, the successful resolution applicant ("**Resolution Applicant**") will reduce the total amount that it has agreed to pay against the guarantee claim.

3. In Scenario C, it is possible that the Resolution Applicant will need to carry forward the guarantees and get these renewed or substituted by new guarantees. This is likely where guarantees are issued to Utilities Companies or for contracts under execution and similar purposes. In such a scenario, if these guarantees are being taken over by the Resolution Applicant then the creditor will need to reduce their claim and the distribution pattern would be worked out with the change in the admitted claim. If, however, the guarantees are not being taken over by the Resolution Applicant then the same treatment as in Scenario B will be followed and the payout in relation to the guarantees will happen only after the eventual fate of the Guarantees is known. When we say the guarantees are taken over by the Resolution Applicant, that implies that the Resolution Applicant will either provide margin money to secure the guarantees or replace the guarantees with new guarantees as provided for in the resolution plan.

4. In Scenario D, if the Guarantees have been invoked and payout has happened, the creditor shall receive the payout as agreed under the resolution plan against the admitted claim.
   As the readers might have noticed, that in the cited case, NCLAT did not rule on whether Guarantees can be invoked during the moratorium period under Section 14 of the IBC. Prior to the amendment brought about in the IBC on 6th June 2018 through an amendment in 2018, there have been judgements that have ruled that the Guarantees cannot be invoked during the moratorium period. However, the amendment to the Act inserted sub-section 3 of Section 14 under which in clause (b) it is specified that Quote" The provision of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor" Unquote.
   Accordingly, it appears that post the amendment there is no restriction on a beneficiary of the guarantee to invoke and get paid the guarantee amount during the moratorium period. In the case of Levcon Valves Private Limited vs. Energo Engineering Projects Limited the Hon'ble

NCLAT in its judgement has held that Performance Guarantee issued by Banks can be invoked during the moratorium period. The Hon'ble Supreme Court in the matter of State Bank of India vs. V. Ramakrishnan and Others has also ruled that there is no bar on the invocation of personal Guarantees during the moratorium period under Section 14 of the IBC.

This author holds the view that once the claim for guarantees issued has been admitted and the liability of the guarantor is absolute (as also confirmed by SC in earlier cases that banks cannot withhold and need to honour the guarantee obligations in general) then the beneficiary cannot be stopped from invocation simply because it is not a recovery against the Corporate Debtor but the liability to pay is of creditor and the creditor will receive consideration against the guarantee invoked basis the approved resolution plan or as per the Liquidation Waterfall under Section 53 of the Code in the event the Corporate Debtor was ordered to be liquidated by the Adjudicating Authority.

Obligations of the Guarantor and Corporate Debtor

As discussed earlier, under the Contract Act, the obligations of a Guarantor and Borrower are co- extensive and independent. The main question that has arisen in the past is that if a financial creditor has already commenced Insolvency Proceedings against the Corporate Debtor, can the same creditor also initiate Insolvency Proceedings against the guarantor. Another question conversely is that can the creditor proceed against the guarantor without first moving against the CD (Principal Debtor).

This matter came up for examination by the Hon'ble NCLAT in the case of Vishnu Kumar Aggarwal vs Piramal enterprises. The Hon'ble NCLAT ruled that there is no requirement that the financial creditor must first proceed against the principal borrower and then only against the guarantor. The order ruled that the liability of the guarantor is co-extensive with the borrower and the guarantor is a debtor qua the financial creditor. The Appellate Authority also relied on two Supreme Court judgements in the cases of Bank of Bihar vs Damodar Prasad & Anr and State Bank of India vs Indexport Registered and Ors. Accordingly, a financial creditor can proceed simultaneously against the Corporate Debtor and the Guarantor and also independently against the guarantors without proceeding against the borrower. This position was further affirmed by the Hon'ble Supreme Court in the matter of an appeal filed by Raj Bahadur Shree Ram Private Limited against the decision of the Hon'ble NCLAT in the matter of Ferro Alloys Corporation vs. Rural Electrification Corporation Limited.

As stated earlier in this paper, there is no bar in invoking the personal guarantee when the CD is undergoing CIRP. In the period prior to the notification on Insolvency and Bankruptcy of Personal Guarantors to the Corporate Debtors Regulations in November 2019 , the invocation

proceedings against personal guarantors was dealt with in the Debt Recovery Tribunal (DRT) and even under the IBC, once Part III on Insolvency of Individuals and Partnership Firms is notified, DRT is the designated authority. The Hon'ble NCLAT in its order in the case of State Bank of India vs D.S Rajkumar has ruled that while the Part III is yet to be notified, under Section 60(2) of the IBC, it is open for the financial creditor to initiate Insolvency Resolution Process against corporate and personal guarantors and such proceeding are to be filed with the same NCLT where the Insolvency Resolution Process against the corporate debtor has been filed. However, currently, the rules governing Insolvency and Bankruptcy of personal guarantors to Corporate Debtors specify that NCLT and not DRT will be the forum in such a case. By implication this would mean that all cases against personal guarantors to the CD will need to be transferred to NCLT.

Right of Subrogation

Section 140 of the Contract Act provides that once the guarantor has honoured its obligations under the guarantee, he is vested with the all the rights that the creditor had against the principal debtor. This is also called the Right of Subrogation. Section 133 of the Contract Act also provides for discharge of the surety by variance in the terms of the contract between the principal debtor and the creditor without the consent of the guarantor. Generally, though, in case of loans provided by the financial creditors, sufficient rights are provided to the financial creditor for changes to the loan amount, variation in the loan conditions etc. as a part of the guarantee contract. Each creditor will normally sign an independent contract with the guarantor.

In the past, litigation has taken place as to whether the Resolution Applicant can provide that the guarantors shall not have a right of subrogation against the Corporate Debtor or the Resolution Applicant.

The matter of right of subrogation came for consideration of the Hon'ble NCLAT in the matter of Lalit Mishra and Ors vs Sharon Bio Medicine. In this case, the resolution plan provided that personal Guarantees provided by the existing promoters of the Corporate Debtor shall result in no liability towards the Corporate Debtor or the Resolution Appellants. It was alleged by the appellants that this clause was in contravention to Section 133 and Section 140 of the Contract Act.

The Hon'ble NCLAT ruled that
Quote" However, the aforesaid submissions cannot be accepted, as on approval of the 'Resolution Plan', the claim of the entire stakeholders stand cleared and the 'Personal

Guarantor' thereafter cannot claim that they have been discriminated. All the stakeholders have already been cleared by the 3rd Respondent- 'Successful Resolution Applicant'. It was open to them to say that the personal guarantee will not result into any liability towards the 'Corporate Debtor' or the 'Resolution Applicant'.

9. It was not the intention of the legislature to benefit the 'Personal Guarantors' by excluding exercise of legal remedies available in law by the creditors, to recover legitimate dues by enforcing the personal Guarantees, which are independent contracts. It is a settled position of law that the liabilities of guarantors is co-extensive with the borrower. This Appellate Tribunal held that the resolution under the 'I&B Code' is not a recovery suit. The object of the 'I&B Code' is, inter alia, maximization of the value of the assets of the 'Corporate Debtor', then to balance all the creditors and make availability of credit and for promotion of entrepreneurship of the 'Corporate Debtor'. While considering the 'Resolution Plan', the creditors focus on resolution of the borrower 'Corporate Debtor', in line with the spirit of the 'I&B Code'.

10. The present appeal has been preferred by the promoters, who are responsible for having contributed to the insolvency of the 'Corporate Debtor'. The 'I&B Code' prohibits the promoters from gaining, directly or indirectly, control of the 'Corporate Debtor', or benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. The 'I&B Code' seeks to protect creditors of the 'Corporate Debtor' by preventing promoters from rewarding themselves at the expense of creditors and undermining the insolvency processes. "Unquote

The issue of right of subrogation has also been dealt with by the Supreme Court in the Essar Steel judgement whereby it has been ruled that the right of subrogation to the personal guarantors qua the CD does not remain in IBC cases. Accordingly, this now is the settled law that the guarantors do not have a right to subrogation in IBC cases.

Personal Guarantees when Financial Debt is extinguished / settled qua the Creditors

A resolution plan may provide for that either the entire Financial Debt is fully settled or may provide that the creditors will assign the Financial Debt in favour of the Resolution Applicant. It may also provide that to an extent, the financial creditors will remain as creditors of the CD though this author believes that this is not the general practice and the Resolution Applicant, generally, start with a clean slate. While in the first case, no debt remains in the books of the lenders as well as the Corporate Debtor, in the second case (assignment of the debt) the Resolution Applicant step into the shoes of the financial creditors and the debt remains in the books of the CD. Under both the situations, as far as guarantees are concerned, generally, either these would remain with the financial creditors or assigned to the Resolution Applicant.

There can be a question that if there is no debt outstanding in the books of the financial creditors arising out of an approved resolution plan then can the creditors invoke the personal guarantees for cases where the personal guarantees have not been assigned to the Resolution Applicant. The guarantee is for repayment of the loan by the principal debtor to the creditor but when there is no debt left in the books of the creditor, the argument has been that since the debt has been settled qua the creditors, therefore, the guarantor can argue that it is no longer liable under the contract of guarantee.

There is no specific provision for such a situation under the Contract Act or the IBC but the legal position now seems to be settled post the judgement of the Hon'ble Supreme Court in the case of Essar Steel.

In the Essar matter, the Hon'ble NCLAT ruled that once the debt is satisfied then the creditor cannot proceed against the guarantors. The Hon'ble Tribunal under Para 30 and 31 of the said Judgement stated that

Quote" 30. So far as the Appellant- Mr. Prashant Ruia's right of subrogation under Section 140 of the Contract Act and right to be indemnified under Section 145 of the said Act is concerned, the question of exercising such right does not arise in the present case.

31. The Appellant- Mr. Prashant Ruia has executed a 'Deed of Guarantee' between the lenders and the 'Corporate Debtor'. Such guarantee is with regard to clearance of debt. Once the debt payable by the 'Corporate Debtor' stands cleared in view of the approval of the plan by making payment in favour of the lenders ('Financial Creditors'), the effect of 'Deed of Guarantee' comes to an end as the debt stands paid. The guarantee having become ineffective in view of payment of debt by way of resolution to the original lenders ('Financial Creditors'), the question of right of subrogation of the Appellant's right under Section 140 of the Contract Act and the right to be indemnified under Section 145 of the Contract Act does not arise." Unquote

Again, in Para 221 of the said judgement, the Hon'ble NCLAT has ruled that

Quote "The 'Financial Creditors' in whose favour guarantee were executed as their total claim stands satisfied to the extent of the guarantee, they cannot reagitate such claim from the Principal Borrower" Unquote

The Hon'ble Supreme Court, on an appeal has overturned the NCLAT Judgement on various grounds including the appeal of Mr. Ruia. It, therefore, can be argued that settlement of the loan either by writing back of the debt by the CD or assignment of the debt to the Resolution Applicant will not come in the way of the financial creditors to proceed against the personal guarantors to the CD in the event the personal Guarantees remain with the financial creditors.

Potential Issue going forward

At discussed earlier, the liability of the guarantor is independent and co- extensive with the principal debtor and the creditor can proceed against the principal debtor as well as the guarantor. The Hon'ble NCLAT, in the matter of SEW Infrastructure VS. Mahendra Investment Advisors Private Limited, has held that while there is no bar on filing concurrent applications against the principal debtor and the guarantor but for the same set of claims, once the application has been admitted against the CD then CIRP cannot be started against the Corporate Guarantor.

The potential issues, basis the above judgement, that could arise are as under:

A. In case the application under the Guarantor is admitted first then does it mean that no application can lie against the CD even though the CD is the principal debtor
B. Can it be argued that if there cannot be any proceeding against the Corporate Guarantor in case the application is admitted against the CD then does not the same principle apply to personal guarantors to the Corporate Debtor.

One will have to wait for jurisprudence to emerge, if and when, the above issues are agitated.

Acknowledgement

The purpose of this Article is to provide a broad understanding of the issues that have been raised and settled by the Courts. The readers are advised to consult their attorneys for any issues. I thank Ms. Veena Sivaramakrishnan, Partner, Shardul Amarchand Mangaldas & Co. for providing her insights. The views shared by her are personal and Shardul Amarchand Mangaldas & Co. is not in any way associated with this article.

EODB PARAMETER-RESOLVING INSOLVENCY

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World Bank Group ("WBG") releases its Doing Business Report every year, ranking 190 economies on various parameters with one of the parameters being 'Resolving Insolvency'. In the Doing Business Report of 2020 released in October-2019 ("Report"), India's ranking in Resolving Insolvency improved to 52 from 108 in 2019 owing to the establishment of insolvency regime with enactment of the Insolvency and Bankruptcy Code, 2016 (IBC). To assess the performance of a country with respect to 'Resolving Insolvency,' the World Bank circulates a questionnaire each year to collect responses from practitioners, professionals and other stakeholders of the insolvency and bankruptcy regime. On the basis of the responses received, each country is given a score out of 100 and rankings are arrived at accordingly.

As Insolvency Professional, being one of the stakeholders, this year I participated in this survey and responded to the questionnaire. While responding to the survey I also analysed Report-2020 to understand the ranking process and methodology followed by WBG, in greater detail. I am happy to submit this article giving a comparative analysis of 'resolving insolvency' framework implemented across leading economies of the world, which was covered as part of the Report survey.

Apart from the government's consistency on views relating to regulatory policies, the other two important pillars of providing a secure environment for a business are (i) enforcing contracts and (ii) resolving insolvency. These two pillars are in-fact two sides of the same coin, facilitating credit growth and promoting entrepreneurship. The ultimate objective of an economy which strives to provide such a secure business environment is reallocation of underutilized resources from stressed businesses to more productive channels leading to overall growth.

Efficiency of resolving commercial dispute through enforcement of contracts can be extended to regulatory framework of "Resolving Insolvency" which has an element of underlying contract between a debtor and creditor/s. A range of interests needs to be delicately balanced by this regulatory framework : those of the parties affected by the proceedings including debtor, owner and management of debtor, creditors who may be secured to varying degrees, government authorities, employees, guarantors of debts and suppliers of goods/services. Apart from striking balance between these stakeholders, regulatory framework must also take into consideration its social, political and economic impact. As can be seen from the table below which gives average ease of doing business score of 190 countries for the areas covered in Report, insolvency framework is most challenging reform area to implement. (table 1.1 below)

Which area is easier and which is more difficult to implement?

(Table 1.1 - Source: www.doingbusiness.org)

A few selected countries and their ranking on Resolving Insolvency is as under:

Country	Ranking	Recovery Rate (%)	No of years to resolve insolvency	Process cost as % of estate	Strength of insolvency framework index (out of 0 – 16)
Finland	1	88.0%	0.90	3.5%	14.5
USA	2	81.0%	1.00	10.0%	15.0
Japan	3	92.1%	0.60	4.2%	13.0
UK	14	85.4%	1.00	6.0%	11.0
Singapore	27	88.7%	0.80	4.0%	8.5
Indonesia	38	65.5%	1.10	21.6%	10.5
China	51	36.9%	1.70	22.0%	13.5
India	52	71.6%	1.60	9.0%	7.5
Brazil	77	18.20%	4.00	12.0%	13.0

Source: www.doingbusiness.org

While other aspects of this area are self-explanatory, strength of insolvency framework index ("Index") which is measured out of score between 0 to 16 (16 being the best performance) needs further analysis. This Index has been given 50% weightage by WBG

while ranking countries in this area. Strength of insolvency framework index measures the quality of insolvency laws that govern relations between debtors, creditors and the court. Aspects such as recovery rate, number of years to insolvency and process cost are nothing but outcome of this insolvency framework. This Index has been delved in greater detail in this article.

While evaluating Index, WBG as part of its Report and methodology has covered certain aspects of Resolving Insolvency. These aspects along with their comparative score for a few countries are as per table provided below.

A	Commencement	USA	Japan	UK	India	Score - Remarks
1	Can creditors initiate both liquidation or reorganization proceedings?	1	1	1	0.5	Both - 1, only one - 0.5
2	Can debtors initiate both, liquidation or reorganization proceedings?	1	1	1	0.5	Both - 1, only one - 0.5
3	Standards used for commencement of insolvency: Liquidity Test or Balance Sheet Test or both	1	1	1	1	Any one - 1, Both - 0.5
B	Management of Debtors	USA	Japan	UK	India	Score - Remarks
1	Does the insolvency framework allow the continuation of contracts supplying essential goods and services to the debtor?	1	1	0	0	Yes - 1, No - 0
2	Whether debtor can reject overly burdensome contracts?	1	1	1	1	Yes - 1, No - 0
3	Whether law provides for avoidance of preferential transactions?	1	1	1	1	Yes - 1, No - 0
4	Whether law provides for avoidance of undervalued transactions?	1	1	1	1	Yes - 1, No - 0
5	Does the insolvency framework provide for the possibility of the debtor obtaining credit after commencement of insolvency proceedings?	1	1	1	1	Yes - 1, No - 0
6	Does the insolvency framework assign priority to post-commencement credit?	1	1	1	0.5	Yes - 1, No - 0.5
C	Resolution	USA	Japan	UK	India	Score - Remarks
1	Which creditors vote on the proposed reorganization plan - Only those whose rights are modified or affected by the plan?	1	1	1	0	Yes - 1, No - 0
2	Does the insolvency framework require that dissenting creditors in reorganization receive at least as much as what they would obtain in a liquidation?	1	1	0	0	Yes - 1, No - 0

3	Are the creditors divided into classes for the purposes of voting on the reorganization plan, does each class vote separately and are creditors in the same class treated equally?	1	1	0	0	Yes - 1, No - 0
D	Creditors participation	USA	Japan	UK	India	Score - Remarks
1	Does the insolvency framework require approval by the creditors for selection or appointment of the insolvency representative?	1	0	1	0	Yes - 1, No - 0
2	Does the insolvency framework require approval by the creditors for sale of substantial assets of the debtor?	0	0	0	0	Yes - 1, No - 0
3	Does the insolvency framework provide that a creditor has the right to request information from the insolvency representative?	1	0	0	1	Yes - 1, No - 0
4	Does the insolvency framework provide that a creditor has the right to object to decisions accepting or rejecting other creditors' claims?	1	1	1	0	Yes - 1, No - 0
	Total Score	15	13	11	7.5	

Let's review the above Index framework with specific reference to India and our country score of '7.5'. Since the release of Report in October 2019, there have been subsequent amendments to the Insolvency and Bankruptcy Code, 2016 ("Code"). Further, with development of certain jurisprudence we observe that current position of the score and corresponding Index of India, is slightly different today. It is clear from The Insolvency Law Committee Report, 2020 ("ILCR – 2020 / ILC") that from India's perspective, policy reforms would continue in the direction to improve this score ensuring that policies on resolving insolvency are broadly aligned to leading economies of the world.

For the purpose of this discussion author has ignored Voluntary Liquidation as envisaged under Section 59 of the Code. Author has considered for analysis only those parameters where Indian framework under the Code is different from those of leading economies of the world.

A. **Commencement**: Can creditor / debtor initiate liquidation without following the process of reorganization in insolvency proceedings?

Leading economies of the world allow that debtor/creditor in default, to initiate liquidation or reorganization subject to certain conditions. The background to this is the developed corporate bond market as the natural financing strategy of these countries for large companies.

Framework of initiating liquidation or reorganization in such countries facilitate such credit markets to thrive.

While dealing with aspect, The report of the Bankruptcy Law Reform Committee (BLRC) has commented that to the extent a viable mechanism can be found through which a firm is protected as a going concern, and if done, cost imposed upon society will go down, as liquidation involves destruction of the organization capital of the firm. This view has resultantly come clearly in the objective of the Code as well, giving resolution a required priority and considering liquidation as last resort. Though, Code empowers a committee of creditors supported with 66% voting rights to approve liquidation even before issuance of Information Memorandum, it is still very far from the ultimate objective of developing stable corporate bond market. As we are at initial stage of implementing the Code, I don't see this position to change in near future. Debtor / creditor (in case of default), may not be able to initiate liquidation directly without following the process of resolution in insolvency proceedings, hence India score on this will continue to remain unchanged.

B. **Management of debtors**: (a) Does the insolvency framework allow the continuation of contracts supplying essential goods and services to the debtor?

Section 14 of Code provides that supply of essential goods and services such as electricity, water, telecommunication and information technology services, to corporate debtor shall not be terminated during moratorium period, to the extent these are not direct input to the output produced or supplied by the corporate debtor. Since this clause had limited application and considering its practical relevance, Code has been amended w.e.f. 28th Dec,2019 widening the scope of goods and services under this section to include certain 'critical' goods and services as well. Amended section has now given wide powers to Interim Resolution Professional / Resolution Professional to consider continuance of supply of goods and services that is critical to protect and preserve the value of corporate debtor and manage the operations of corporate debtor as a going concern provided corporate debtor has paid dues arising from such supply during the moratorium period. With this amendment India-score should stand revised at same level as leading economies of the world.

(b) Does insolvency framework assign priority to post-commencement credit?

In UK, any finance provided during administration (i.e. interim finance) along with the dues payable under other post-administration contracts, is provided a priority over the administrator's expenses and remuneration, preferential claims and term of floating charge holders. However, the claims of interim financer do not enjoy priority over the claims of secured

creditors having a fixed charge over the assets of the debtor. The position in USA is quite similar in cases where Bankruptcy Courts provide for interim finance, subject to certain conditions. ILC has commented on current position under the Code that super-priority to interim finance could adversely affect the interest of other claimants which are equally crucial for running the operations of corporate debtor during CIRP. ICL concluded that sufficient protection is already provided to the interest of interim finance provider and no change may be required to give interim finance super-priority i.e. over other insolvency resolution process cost. Author is of the view that evolvement of Code and its success in resolution of stressed assets, will be the key to the determination of demand and supply of interim finance. Hence, the decision of super-priority to interim finance should be left to the commercial wisdom of Committee of Creditors based on the recommendation of Interim Resolution Professional / Resolution Professional.

C. **Resolution**: (a) Which creditors vote on the proposed reorganization plan, only those whose rights are modified or affected by the plan? Are the creditors divided into classes for the purposes of voting on the reorganization plan? Does each class vote separately and are creditors in the same class treated equally?

The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes recommend that "creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings to ensure fairness and integrity". Further, UNCITRAL Guide recommends that an "insolvency law should specify that a creditor or equity holder whose rights are modified or affected by the plan should not be bound to the terms of the plan unless that creditor or equity holder has been the given the opportunity to vote on approval of the plan". In USA, a re-organization plan would not be confirmed by a Bankruptcy Court unless it is accepted by every class of creditors and shareholders whose rights are impaired by it, and certain additional conditions are met.

In India, voting rights of all claimants and water-fall mechanism under section 53 of the Code, have been debated at various forums and even before Apex Court in the matter of Swiss Ribbons and Essar Steel. BLRC Report and ILCR – 2020 have both recognized the importance of conferring voting rights on operational creditors. It has been concluded that at present, operational creditors may not be provided with voting rights considering their number, geographical spread, limited ability to assess and monitor corporate debtor, resultant delays with increased process cost and limitation in their ability to balance rights of all stakeholders. Further, though the class voting (home buyers, deposit holders etc) has been recognized in the Code but only under the category as financial creditor. Author is of the view and is also commented by ILC that in years to come, voting rights of operational creditors as part of committee of creditors will have to be recognized with institutional capacity built under the

Code to facilitate their participation, as their contribution to the 'going concern' status of Corporate Debtor cannot be ignored.

(b) Does the insolvency framework require that dissenting creditors in reorganization receive at least as much as what they would obtain in a liquidation? With the amendment in section 30 (2) insolvency framework in India for dissenting creditors now aligned with global practice.

D. **Creditors Participation**: (a) Does the insolvency framework require approval by the creditors for selection or appointment of the insolvency representative?

Section 16 of the Code provides that the Adjudicating Authority shall appoint an interim resolution professional and 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. Further, Section 22(2) of the Code provides that the committee of creditors may in the first meeting, by a majority vote of not less than 66% of the voting share of financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional with another resolution professional. In essence, framework under Code requires approval of creditors for selection or appointment of insolvency representative to continue beyond first meeting of Committee of Creditors. *Hence, Author is of the view that India Index on this parameter should have been evaluated as "1" and not as "0"*.

(b) Does the insolvency framework require approval by the creditors for sale of substantial assets of the debtor?

Under Regulation 29 of IBBI (Insolvency Process for Corporate Persons) Regulation,2016, the resolution professional may sell only unencumbered assets of the Corporate Debtors, if he is of the opinion that such a sale is necessary for a better realization of value under the facts and circumstances of the case. Section further provides that book value of the total assets sold during resolution process in aggregate under this regulation cannot exceed 10% of the total claim admitted by the Resolution Professional. A sale of assets under this regulation requires approval of the committee by a vote of 66% of voting share of the members. Hence, *Author is of the view that India Index on this parameter should have been evaluated as "1" and not as "0" as sale of substantial assets need approval of Committee of Creditors.*

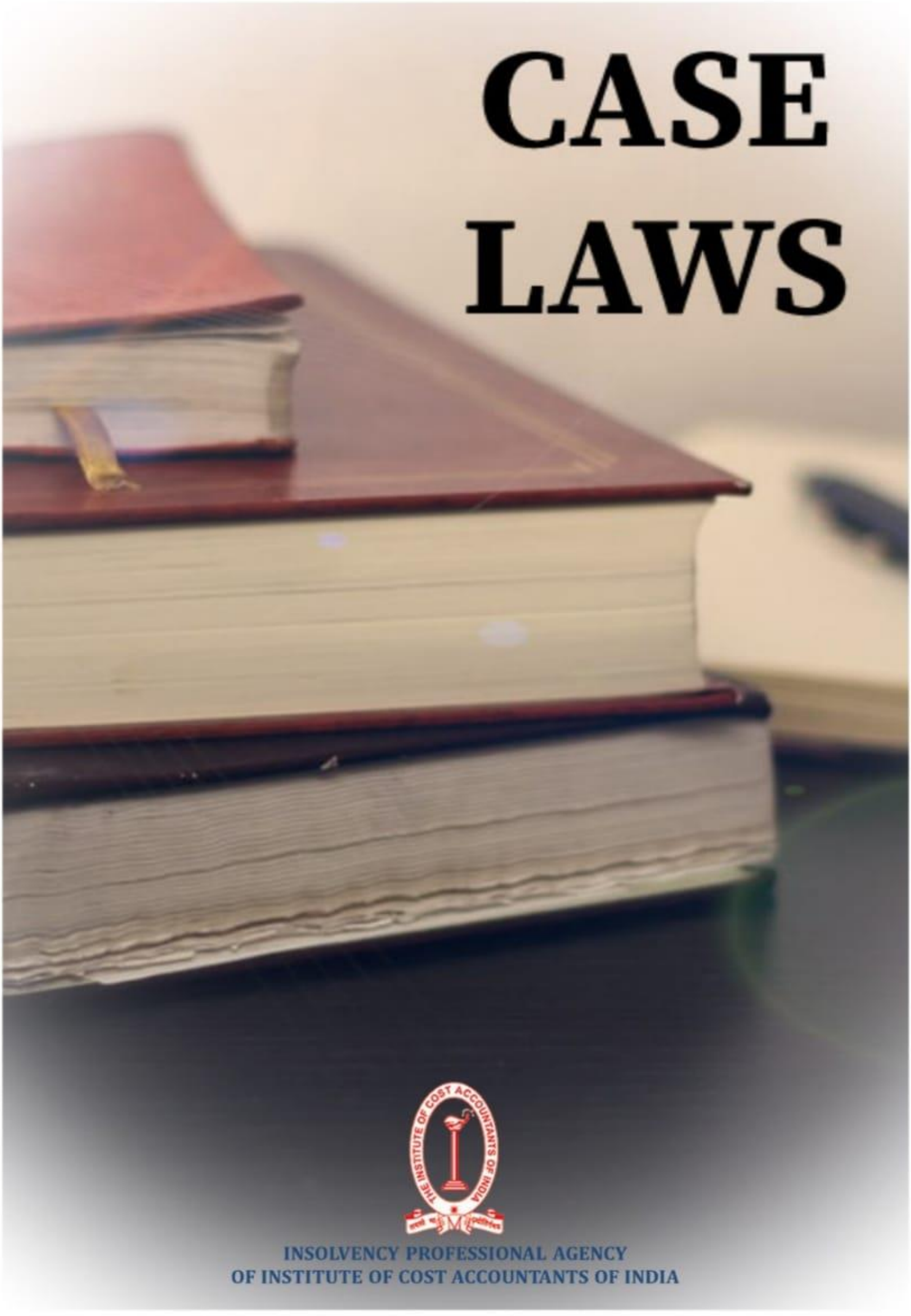
(c) Does the insolvency framework provide that a creditor has the right to object to decisions accepting or rejecting other creditors' claims?

Section 60(5)(b) of the Code provides that Adjudicating Authority has jurisdiction to entertain or dispose of (a) any application or proceedings by or against the Corporate Debtor or Corporate person (b) any claim made by or against the Corporate Debtor.

Further, Section 42 of Code provides that a creditor may appeal to the Adjudicating Authority against the decision of the liquidator rejecting the claims within 14 days of such decision. Though, code does not specifically provide for a creditor objecting to the decision of accepting or rejecting of claim of other creditors, jurisprudence have established that a creditor can object to the decision of Resolution Professional in respect of accepting and rejecting claim of other creditors. *Hence again, Author is of the view that India Index on this parameter should have been evaluated as "1" and not as "0"*.

Conclusion: Apart from a benchmarking the insolvency framework of any country, WBG report lays down path for amendments to framework in times to come and this article in an attempt to disseminate WBG ranking survey process / methodology along with comparative framework of other leading economies of the world on 'resolving insolvency'. Ordinance suspending Section 7,8 and 10 upto one year, which will do away with initiation of corporate insolvency proceedings against corporate defaulters has been announced by Government of India. While we await the fine prints of the Ordinance, suspension may take away sheen and momentum of the Code and resulting impact on "resolving insolvency"

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 3(12) – DEFAULT

- **R. Arumugasamy v. United Bank of India - [2019] 109 taxmann.com 487 (NCL-AT)**

Where corporate debtor was heard and it was found to have failed to pay 'part default' amount of Rs. 9.5 crores, CIRP order of Adjudicating Authority against corporate debtor could not be interfered with.

Before the Appellate Tribunal, Managing Director of the corporate debtor company submitted that the Adjudicating Authority passed CIRP order without taking counter statement of the appellant and also failed to consider that the corporate debtor had made payment.
Held that since the corporate debtor was heard and it was found that it failed to pay 'part default' amount of Rs. 9.5 crores, impugned order of the Adjudicating Authority admitting CIRP application could not be interfered with.

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

- **Peter Johnson John (Employee) v. KEC International Ltd. - [2019] 109 taxmann.com 500/ [2019] 156 SCL 16 (NCL-AT)**

Civil suit filed by operational creditor for realization of decreed amount as per foreign judgment falls within preview of pre-existing dispute placing an embargo on powers of Adjudicating Authority to initiate CIRP at instance of corporate debtor.

The appellant was appointed by the corporate debtor as Assistant Manager for its project in Democratic Republic in Congo. When the corporate debtor failed to make payment of salary, the appellant filed suit in the Labour Court of Congo. The Labour Court of Congo directed the corporate debtor to pay arrears of salary to the appellant. The corporate debtor did not comply with judgment of the Labour Court. Instead it wound up its various operations and projects in Congo. The appellant filed civil suit before the writ court seeking declaration with regard to executability of decree passed by the foreign court in India. Said suit was pending adjudication. Meanwhile, the appellant filed application under section 9.

Held that adjudication indicated by the appellant before the High Court, wherein adjudication was sought in regard to foreign decree, falls within purview of a pre-existing dispute placing an embargo on powers of the Adjudicating Authority to initiate CIRP at instance of a corporate debtor, therefore until such adjudication fructifying in a decree favouring the appellant, claim of the appellant could not be held to have crystallized into a 'Debt payable in law'. Thus, impugned order passed by the Adjudicating Authority rejecting application under section 9 could not be interfered with.

Case Review: Peter Johnson John v. KEC International Ltd. [2019] 109 taxmann.com 499 (NCLT-Mum.), affirmed.

SECTION 65 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR MALICIOUS PROCEEDINGS

- **Ranjit Kapoor v. Asset Reconstruction Company (India) Ltd. - [2019] 109 taxmann.com 502/ [2019] 156 SCL 43 (NCL-AT)**

Validity of Assignment Agreement assigned by Bank to asset reconstruction co. to recover its financial dues from corporate debtor could not be decided by Adjudicating Authority and hence, same could not be a ground to allege malicious intent on part of financial creditor.

Bank assigned and transferred its financial debt/outstanding from the corporate debtor in favour of the respondent-asset reconstruction company vide assignment agreement. The appellant-corporate debtor did not dispute debt due or its default towards same but alleged that said Assignment Agreement related to sale of assets and initiation of CIRP against the appellant was fraudulent.

Held that validity of the Assignment Agreement could not be decided by the Adjudicating Authority hence, same could not be a ground to allege malicious intent on part of financial creditor, accordingly, instant application of the corporate debtor was to be disposed of.

Case Review - Asset Reconstruction Company (India) Ltd. v. White Metals Ltd. [2019] 109 taxmann.com 501 (NCLT - New Delhi) (SB), Appeal withdrawn

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SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **IFCI Ltd. v. Golf Technologies (P.) Ltd. - [2019] 110 taxmann.com 17 / [2019] 215 COMP CASE 377 (NCL-AT)**

Same debt amount could not be claimed in two different resolution process; where default was of more than Rs.12 core, it could not be said that substantial portion of debt was repaid.

The principal borrower availed loan of Rs 150 crores from the financial creditor. Said loan was secured by pledge of shares held by the corporate debtor. The principal borrower failed to repay thus the financial creditor filed application under section 7 to initiate CIRP against the corporate debtor. The Adjudicating Authority rejected said application on ground that the financial creditor invoked and sold 58,50,000 pledged shares and thus, substantial portion of debt was recovered by the financial creditor. It was noted that invocation of pledged shares took place before default was committed by the principal borrower. Further, default was of more than Rs.12 crores, which was a substantial amount to be paid by the corporate debtor.
Held that the Adjudicating Authority wrongly rejected said section 7 application and further since application under section 7 filed against the principal borrower was rejected prior to impugned order passed in case of the corporate debtor, the Adjudicating Authority would first take up matter which was filed against the principal borrower and once it was admitted, other case against the corporate debtor should not have been entertained for same amount as same debt amount could not be claimed in two different resolution process.

SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

- **Aishwarya Structurals v. Matrix Metals Traders (P.) Ltd. - [2019] 110 taxmann.com 19 (NCL-AT)**

Where liquidation order was passed, issue as to whether property was transferred in favour of corporate debtor and, thus, belonging to it, or not would be submitted before liquidator.

Order of liquidation had been passed by the Adjudicating Authority in view of application under section 33(1)(a) filed by the 'Resolution Professional' on instruction of the CoC. The appellant construction company submitted that property in question of which Sale Deed was executed in favour of the corporate debtor was not given effect as cheque given by the corporate debtor could not be encashed. Therefore, in absence of transfer of consideration amount, immovable properties could not be held to be asset of the corporate debtor. The Resolution Professional/Liquidator submitted that two immovable properties in question were transferred by the Registered Sale Deeds. The Registered Sale Deed also included registered Construction Agreements.

Held that since liquidation order was passed and more than 180 days had been passed, in absence of any infirmity, order of liquidation could not be interfered and so far as claim of appellant was concerned, it could move before the Liquidation Forum, and Liquidator would pass appropriate order. Therefore, in absence of any application under section 60 filed by the appellant before the Adjudicating Authority, the Adjudicating Authority could not decide such issue.

Case Review - O. S. Abdullah v. Matrix Metal Traders (P.) Ltd. [2019] 102 taxmann.com 4 (NCLT - Chennai) (SB), affirmed.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **R.S. Cottmark (India) (P.) Ltd. v. Rajvir Industries Ltd. - [2019] 110 taxmann.com 21 (NCL-AT)**

Where corporate debtor rejected consignment of cotton bales supplied and parties along with intermediary initiated reconciliation discussion much prior to issue of demand notice by appellant, existence of pre-existing dispute was proved.

Appellants sold cotton bales to the respondent. The respondent conducted quality control test. Finding supplies inferior, the respondent rejected consignments and informed intermediary as well as appellants. Parties initiated dispute reconciliation discussion and the respondent got issued irrevocable LOC.

Held that since there was an existence of dispute as on date of issuance of demand notice by appellants to respondent; CIRP application could not be admitted.

SECTION 12 - CORPORATE INSOLVENCY RESOLUTION PROCESS - TIME-LIMIT FOR COMPLETION OF

- **First Step Ventures Ltd. v. Frontier Lifeline (P.) Ltd. - [2019] 110 taxmann.com 39 (NCL-AT)/ [2019] 156 SCL 451 (NCL-AT)**

Where resolution applicant did not challenge order whereby 90 days extension of CIRP period was granted from retrospective date and CIRP period of 270 days being completed, Adjudicating Authority had rightly rejected application for exclusion of CIRP period.

CIRP period was extended for 90 days beyond 180 days. The appellant filed resolution plan but, the CoC did not consider said plan due to completion of CIRP period of 270 days. The appellant filed instant application wherein it assailed that the Adjudicating Authority granted 90 days extension but it was given effect from retrospective date thereby in fact 68 days of extension was granted. Thus, 22 days were to be excluded by extending period from prospective date so that the CoC could considered resolution plan of the appellant.
Held that since the appellant vide instant appeal had not challenged order whereby 90 days was granted from retrospective date, thus, there was no need to decide whether such extension was wrong or right and since 270 days were over as per calculation on basis of order of extension, in absence of any other reason, the Adjudicating Authority had rightly rejected application for exclusion of CIRP period.

Case Review - S. Rajagopal RP v. Dy. General Manager [2019] 110 taxmann.com 38 (NCLT - Chennai), affirmed

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SECTION 238A - LIMITATION PERIOD

- **Sagar Sharma v. Phoenix ARC (P.) Ltd. - [2019] 110 taxmann.com 50 (SC)/ [2019] 156 SCL 707 (SC)**

An application was filed under section 7. By the impugned judgment, it was held that the application was not barred by limitation as the 'I&B Code' came into force since 1-12-2016 and,

therefore, the right to apply accrued to Respondent on 1-12-2016. Thus, it was held that the application under section 7 was not barred by limitation.

Held that date of coming into force of the I&B Code does not and cannot form a trigger point of limitation for applications filed under the Code, further article 137 of the Limitation Act will apply to application filed under section 7 and same would be barred by limitation if filed beyond period of three years of default.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **Karan Goel v. Pashupati Jewellers - [2019] 110 taxmann.com 130 (NCL-AT)/ [2019] 156 SCL 653 (NCL-AT)**

Pre-existing dispute cannot be a subject matter of section 7, though it may be relevant under section 9.

The Adjudicating Authority admitted the application under section 7 preferred by the 'financial creditor'. The appellant, promoter of the corporate debtor, preferred an appeal against order dated 20-9-2019 passed by the NCLT. The appellant submitted that loan amount was taken by one B from 'S' and an agreement was executed on 7-4-2017. According to the appellant, the 'Corporate Guarantee and Undertaking' Agreement dated 7-4-2017 as purported, had been given by the corporate debtor and there was actually a fraud played by one of the erstwhile Director, namely - 'N'. The so-called 'Corporate Guarantee and Undertaking' Agreement dated 7-4-2017, in fact, was not reflected in the records of the 'corporate debtor' available with the Registrar of Companies. According to him, in the eyes of law, no 'corporate guarantee' had been given by the corporate debtor and, therefore, application under section 7 was not maintainable.

Held that merely because a suit filed by the applicant was pending, same could not be a ground to reject application under section 7. Pre-existing dispute cannot be a subject matter of section 7, though it may be relevant under section 9, and once the Adjudicating Authority is satisfied on basis of records that debt is payable and there is default, the Adjudicating Authority is required to admit application filed under section 7.

SECTION 238 - OVERRIDING EFFECT OF CODE

- **Duncans Industries Ltd. v. A.J. Agrochem - [2019] 110 taxmann.com 131 (SC)/ [2019] 156 SCL 478 (SC)/ [2019] 217 COMP CASE 320 (SC)**

Provisions of IBC shall have an overriding effect over Tea Act, 1953, hence, before initiation of proceedings under section 7 or section 9 of IBC, consent of Central Government as provided under Tea Act is not required to be obtained.

The respondent was an operational creditor of the appellant. It used to supply pesticides, insecticides, herbicides etc. to the appellant. According to the respondent operational creditor, a sum of Rs.41.56 lakhs was due and payable by the appellant to the respondent. The respondent-initiated proceedings against the appellant before the NCLT under section 9. The appellant opposed the proceedings mainly and solely on the ground that, as provided under section 16G(1)(c) of the Tea Act, once the management of tea unit had been taken over by the Central Government, then the proceedings for winding up or appointment of receiver could not be initiated without the consent of the Central Government and as the prior approval of the Central Government had not been taken, the insolvency proceedings under section 9 would not be maintainable. The NCLT by an order dated 5-10-2018 held that in view of the statutory provisions under section 16G of the Tea Act and as the prior consent of the Central Government had not been obtained, the proceedings under section 9 shall not be maintainable. On further appeal, the NCLAT reversed the order passed by the NCLT and held that the respondent's application under section 9 would be maintainable even without the consent of the Central Government in terms of section 16G of the Tea Act.
Held that as per section 16G of Tea Act, 1953 once management of tea unit has been taken over by Central Government, consent of Central Government would be required before initiation of proceedings of winding up or appointment of receiver. However, provisions of the IBC would have an overriding effect over the Tea Act. Thus, no prior consent of the Central Government before initiation of proceedings under section 7 or section 9 would be required and even without such consent of the Central Government, insolvency proceedings under section 7 or section 9 initiated by the operational creditor shall be maintainable.

Case Review - A.J. Agrochem v. Duncans Industries Ltd. [2019] 106 taxmann.com 414 (para 8) affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

- **Suraksha Asset Reconstruction (P.) Ltd. v. Jindal Steel & Power Ltd. - [2019] 110 taxmann.com 150 (NCL-AT)**

Where Arbitral Award had been passed in favour of respondent, amount disbursed by respondent to corporate debtor under coal purchase agreement became financial debt.

The respondent had advanced a sum under a coal purchase agreement to 'G'. The corporate debtor stood as guarantor for said amount. Dispute arose between 'G' and respondent for non-supply of coke, which culminated into an Arbitration award. The respondent filed application under section 7 against the corporate debtor which had been admitted by the NCLT by impugned order dated 11-3-2019. The appellant, another financial creditor, filed appeal against order of admission of petition u/s 7.
Held that since award was passed in favour of the respondent, amount disbursed by the respondent became financial debt and the appellant being another financial creditor of the corporate debtor could not be said to be an aggrieved person against order of initiation of corporate insolvency resolution process, therefore, appeal against impugned order of admission was to be dismissed.

Case Review - Jindal Steel & Power Ltd. v. Bharat NRE Coke Ltd. [2019] 105 taxmann.com 171/153 SCL 561 (NCLT - Kol.), affirmed.

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

- **Kautilya Industries (P.) Ltd. v. Parasrampuriya Synthetic Ltd. - [2019] 110 taxmann.com 160 (NCL-AT)**

Where High Court passed order of winding up against corporate debtor which was vacated after 97 days and resolution applicant sought exclusion of said 97 days from CIRP period of 270 days, since no order of prohibition was made specifically prohibiting CoC, not to consider resolution plan, exclusion of said period was not to be allowed.

Resolution plan filed by the appellant was rejected by the CoC on ground that CIRP period of 270 days were over. Accordingly, the Tribunal passed, order of liquidation of the corporate debtor. The appellant filed instant application alleging that the Adjudicating Authority failed to notice that there was an interim order passed by the High Court which was vacated after 97

days, therefore, said 97 days was to be excluded for purpose of counting period of 270 days so that revised resolution plan submitted by the appellant could have been re-considered by the CoC. It was observed that the High Court passed an order of winding-up of the corporate debtor and appointed an official liquidator to take over possession of assets but no order of prohibition was made specifically prohibiting CoC not to consider resolution plan.
Held that there being no prohibition on CoC for considering one or other resolution plan, no exclusion of any of period for purpose of counting 270 days, was to be allowed.

Case Review - Asset Reconstruction Company (India) Ltd. v. Parasarampuriya Synthetics Ltd. [2019] 110 taxmann.com 159 (NCLT - Jaipur), affirmed

SECTION 66 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR WRONGFUL TRADING

- **M. Srinivas v. Smt. Ramanathan Bhuvaneshwari - [2019] 110 taxmann.com 162 (NCL-AT)**

Merely because NCLT as adjudicating authority is vested with additional power, power of NCLT under Companies Act, 2013 would not stand extinguished; on satisfaction that business of company was conducted with intent to defraud creditors, members or any other person, NCLT can refer matter to Central Government for investigation into affairs of company.

During the CIRP, the CoC appointed Forensic Auditor to conduct a Forensic Audit and on receipt of the report. The RP filed application under section 66, read with sections 25(2), 69, 70 and other applicable sections inter alia seeking to attach the personal assets of three directors alleging that they were responsible for defrauding the creditors. Same was to be done in order to recover the total dues of Rs. 46.11 crores. By exercising power conferred on the Adjudicating Authority, the order was passed referring the matter to the Central Government for investigation through SFIO (Serious Fraud Investigation Office). The appellant, a majority shareholder of the corporate debtor, contended that Adjudicating Authority was not conferred with power under section 213 of the Companies Act, 2013 in absence of any amendment made in Schedule XI of the Code and, thus, had no jurisdiction to pass order under section 213 of the Companies Act.
Held that merely because the Adjudicating Authority is vested with additional power, its power under Companies Act, 2013 does not stand extinguish. Adjudicating Authority has dual role and power to pass order under section 213 of Companies Act, 2013, read with rule 11 of NCLT Rules, 2016. On satisfaction that there were circumstances suggesting business of company

was conducted with intent to defraud creditors, members or any other person, the Adjudicating Authority had power to refer matter to Central Government for investigation into affairs of the company.

Case Review - Smt. Ramanathan Bhuvaneshwari v. Pratap Kunda [2019] 110 taxmann.com 161 (NCLT - Bangalore) (para 17), affirmed

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

- **Beacon Courier & Cargo India (P.) Ltd. v. Trim India (P.) Ltd. - [2019] 110 taxmann.com 164 (NCL-AT)**

Where number of emails showed that there was a dispute between parties and corporate debtor had already filed recovery suit for excessive charges billed by appellant transporter (operational creditor), no CIRP application was to be entertained.

The appellant-operational creditor, a courier transporter, provided transport services to respondent. The respondent-corporate debtor brought to notice number of e-mails wherein meetings between parties were communicated which showed that there was a dispute between operational creditor and corporate debtor - On allegation of excessive charges billed by appellant, respondent had already filed recovery suit and same was pending adjudication - Appellant filed application to initiate CIRP proceeding - Whether since there was a pre-existing dispute between parties, CIRP application filed under section 9 was rightly dismissed by Adjudicating Authority

Case Review - Beacon Courier & Cargo India (P.) Ltd. v. Trim India (P.) Ltd. [2019] 110 taxmann.com 163 (NCLT - New Delhi) affirmed

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