September,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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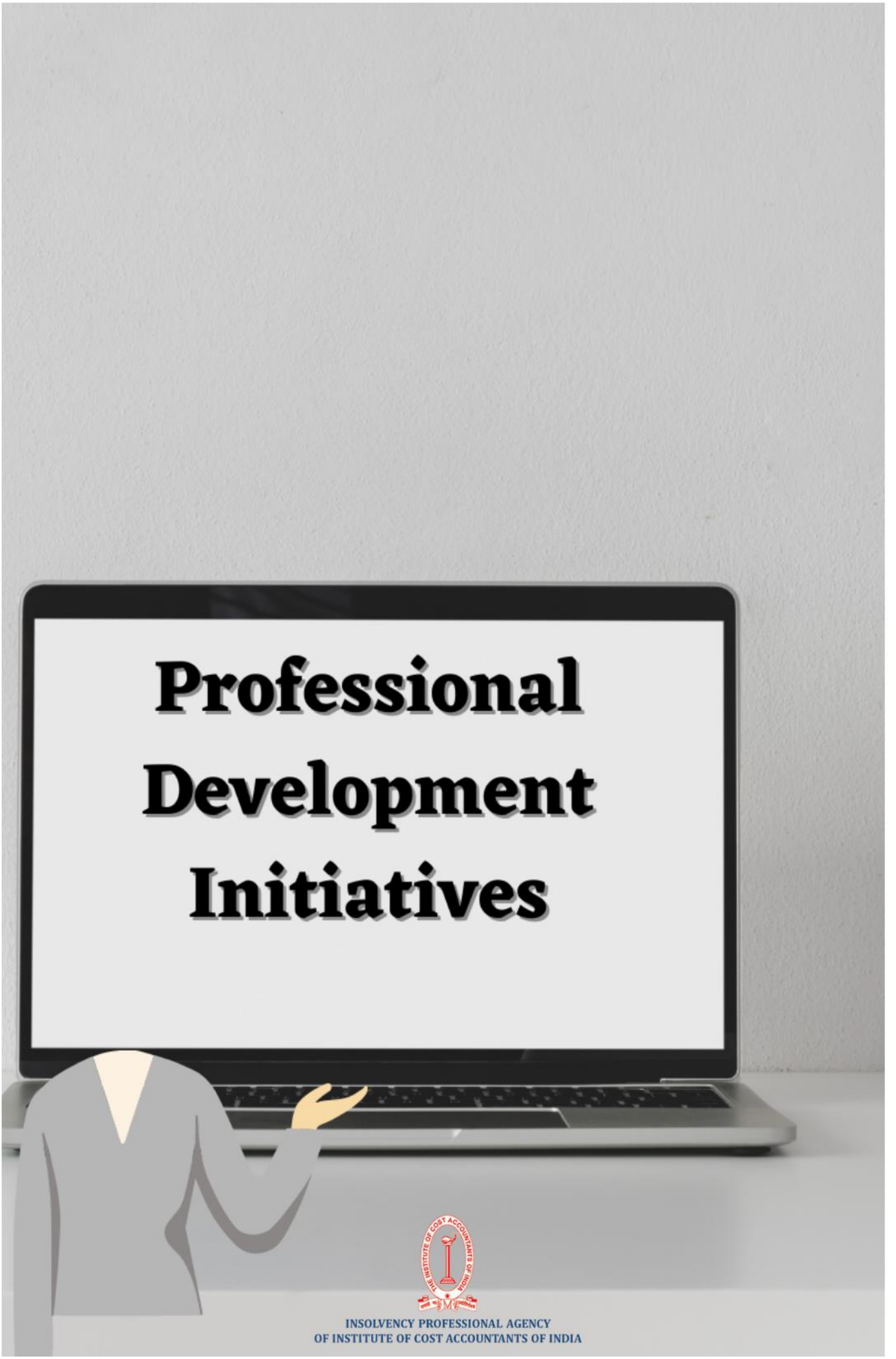
CEO MESSAGE

The Rajya Sabha on September 19 passed the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020. The Bill was tabled by Finance Minister Nirmala Sitharaman amends the Insolvency and Bankruptcy Code 2016. Replying to a debate on the Bill in the House, Finance Minister said the intention of the IBC is to keep companies a "going concern" and not liquidate them.

The number of corporate insolvency resolution processes (CIRPs) admitted by the National Company Law Tribunal (NCLT) dropped by a massive 83% during the April-June quarter on a sequential basis. While 435 cases were admitted in the final quarter of the last fiscal, only 76 cases were admitted during the first quarter of the current fiscal, according to data from the Insolvency and Bankruptcy Board of India (IBBI). The drop was largely due to the ordinance suspending initiation of CIRP from March 25 onward, to protect companies from the impact of the pandemic and ensuing lockdown. It is pertinent to note that the IBC has resulted in thousands of viable companies resolving their debt before completion of the CIRP.

The government is looking to provide a pre-packaged resolution framework for stressed companies under the Insolvency and Bankruptcy Code (IBC). A pre-packaged resolution, where a company prepares a restructuring plan in cooperation with its creditors before initiating insolvency proceedings, reduces the time and costs involved in the process.

The government has asked state run banks to look out for insolvency cases that may also require initiation of individual bankruptcy process before the National Company Law Tribunal against personal guarantors to corporate debtors. This is to ensure banks explore all avenues of realising their loans. Rules empowering creditors to file insolvency applications against personal guarantors came into effect in December.



INSOLVENCY PROFESSIONAL AGENCY
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EVENTS

September,2020	
Date	**Events**
2nd Sep,2020	Online Workshop on Retention of Records
11th-13th Sep,2020	Master Class on Avoidance Transactions
16th Sep,2020	Online workshop on Draft forms for PG to CD
25th-27th Sep,2020	Master Class on Committee of Creditors
28th Sep,2020	Online workshop on Corporate Liquidation Process

IBC AU COURANT

Updates on insolvency and bankruptcy code

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INSOLVENCY PROFESSIONAL AGENCY
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ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
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MUTUAL DEBTS - RIGHT OF SET-OFF & BANKER'S LIEN IN IBC.

- Arvind Mangla

Insolvency Professional, Ex-Banker

Query - Bank (FC) filed the claim for full amount of Bank Guarantee (BG), without adjusting the margin amount (held in the shape of FDR). Thereafter during CIRP the BG was invoked (being performance guarantee) and paid in full by the bank. The bank did not adjust the FDR and thereafter refused to release it. After payment of the BG as above, there is no other BG for which margin was required. The claim for full value of BG has already been made. During the liquidation process, the bank wants to claim the FDR as margin and adjust it against the claim amount of BG.

Issues;

1. Whether the bank (FC) can set-off the amount of FDR with it's claim, after invocation of BG during CIRP.
2. Whether the bank can withhold the FDR, during the CIRP..
3. Whether the bank can adjust (set-off) the amount of FDR in the claim amount during the Liquidation process.
4. Whether the bank can enforce security interest over such FDR under section 52.

1. Whether the bank (FC) can set-off the amount of FDR with it's claim, after invocation of BG during CIRP.

Contractual set off

Parties sometimes agree to a contractual right of set off, for example, when they have an ongoing business relationship; alternatively, they may agree to exclude set-off rights.

What Is a Set-Off Clause?

A set-off clause is a legal clause that gives a lender the authority to seize a debtor's deposits when they default on a loan. A set-off clause can also refer to a settlement of mutual debt between a creditor and a debtor through offsetting transaction claims. This allows creditors to collect a greater amount than they usually could under bankruptcy proceedings.

Key Takeaways

- Set-off clauses are written into legal agreements to protect the lender.
- A set-off clause allows the lender to seize assets belonging to the borrower, such as bank accounts, in the event of a default.
- Set-off clauses are also used by manufacturers and other sellers of goods to protect them from a default by a buyer.

How a Set-Off Clause Works

Set-off clauses give the lender the right of setoff - the legal right to seize funds from the debtor or a guarantor of the debt. They are part of many lending agreements and can be structured in various ways. Lenders may elect to include a set-off clause in the agreement to ensure that, in the event of default, they will receive a greater percentage of the amount that's owed them than they might otherwise. If a debtor is unable to meet an obligation to the bank, the bank can seize the assets detailed in the clause.

Set-off clauses are most commonly used in loan agreements between lenders, such as banks, and their borrowers. They may also be used in other kinds of transactions where one party faces a risk of payment default, such as a contract between a manufacturer and a buyer of its goods.

Examples of Set-Off Clauses

A lending set-off clause is often included in a loan agreement between a borrower and the bank where they hold other assets, such as money in a checking, savings, or money market account, or a certificate of deposit. The borrower agrees to make those assets available to the lender in the case of default. If assets are held at that lender, they can be more easily accessed by the lender to cover a defaulted payment. But a set-off clause may also include rights to assets held at other institutions. While those assets are not as readily accessible to the lender, the set-off clause does give the lender contractual consent to seize them if a borrower defaults.

A set-off clause might also be part of a supplier agreement between the supplier, such as a manufacturer, and a buyer, such as a retailer. This type of clause can be used in place of a letter of credit from a bank and gives the supplier access to deposit accounts or other assets held at the buyer's financial institution if the buyer fails to pay. With a set-off clause, the seller can obtain payment equivalent to the amount that's owed them under the supplier agreement.

Benefits of Set-Off Clauses

Set-off clauses are used for the benefit of the party at risk of a payment default. They give the creditor legal access to a debtor's assets at either the lender's financial institution or another one where the debtor has accounts. Before signing a contract with a set-off clause, borrowers should be aware that it may result in the loss of assets they would have been able to retain through other means of debt settlement, such as bankruptcy.

Right of Set-off (Mutual credits) in IBC.

Though nothing is mentioned in the Code & CIRP Regulations, NCLT Mumbai (01.05.2019) in Bharti Airtel Ltd. vs. Vijaykumar V. Iyer (MA 230/2019 in CP No. 302/IBC/NCLT/MB/MAH/2018) permitted set-off of mutual debts during insolvency proceedings. The question before the Tribunal was, whether the set-off is allowable under Insolvency Proceedings. Tribunal observed as under;

- *"...the Bench is of the view that the applicant is legally entitled under the insolvency code to set off the amount of Rs 112 crore while making a payment of the amount retained out of the total consideration settled as per Spectrum Trading Agreement...this Application deserves to be allowed,"*

However, NCLAT (13.07.2020) in Vijay Kumar V Iyer vs. Bharti Airtel Ltd & Ors [Company Appeal (AT) (Ins) No.530 & 700 of 2019] ruled that set-off of mutual debts are not allowed during insolvency proceedings.

- *# 14. We have also observed that Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The I&B Code, 2016 provides the mechanism of Moratorium during the CIRP till the Resolution Plan is approved or Liquidation order is passed. The I&B Code has a provision to override other laws as enunciated above. Hence, even if there are some such provisions in any other law, the I&B Code 2016 will prevail over that.*

 # 15. Accordingly, we allow the present appeal and set aside the order dated 01.05.2019 passed by NCLT, Mumbai Bench and direct the Respondent No.1 & 2 to pay the amount whatever has been set off by them to the Aircel Entities.

Though, I personally do not agree with the decision of the Appellate Court, based on the detailed arguments mentioned in the order of NCLT dated 01.05.2019, the ruling of the Appellate Court (NCLAT) will prevail, till such time the same is deliberated upon by the Hon'ble SCI.

In the present case, despite the bank having contractual rights of set-off, it can not adjust the amount of FDR in its claim amount of BG, in light of the ruling of NCLAT dated 13.07.2020.

2. Whether the bank (FC) can withhold the FDR, during the CIRP / Liquidation process.

Though, under section 171, 172 &173 of "The Indian Contract Act, 1872, bank can retain the possession of the security (FDR), but under the provisions of section 18(f) read with section 238 of IBC, IRP / RP is required to take control and custody of assets over which the corporate debtor has ownership rights. Thus, the bank cannot withhold the possession of FDR, during the CIRP / Liquidation process.

The Indian Contract Act, 1872

Section 171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers. - Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Section 172. "Pledge" "pawnor", and "pawnee" defined. - The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

Section 173. Pawnee's right of retainer. - The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

I&B Code, 2016

Section 18. Duties of interim resolution professional. -

The interim resolution professional shall perform the following duties, namely: -

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including -

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

Section 238. Provisions of this Code to override other laws. -

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law**.**

Case Law;

"NCLAT" (2019.05.14) in Encore Asset Reconstruction Company Pvt. Ltd vs. Ms. Charu Sandeep Desai & Ors. [Company Appeal (AT) (Insolvency) No. 719 of 2018] held that a secured lender which has taken physical possession of mortgaged property prior to admission of insolvency proceedings must hand over custody of the same to the Interim Resolution Professional ("IRP") as section 18 of the Insolvency and Bankruptcy Code, 2016 ("IBC") will prevail over Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act").

However, IRP/RP is to keep in mind the following provisions of the Code in respect of encumbered property of the CD. In the present case the FDR in question is encumbered property, with the bank having security interest over the same. As such IRP/RP can take possession & custody of the said FDR (encumbered asset of CD) but cannot utilize the same towards IRPC (Insolvency Resolution Process Cost), in terms of regulation 29(1) of Insolvency Resolution Process Regulations.

CIRP Regulations, 2016.

Regulation 29. Sale of assets outside the ordinary course of business.

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

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

3. Whether the bank (FC) can adjust the amount of FDR in the claim amount during the Liquidation process.

In the present case the bank (FC) can set-off the amount of FDR in the claim amount. Here following provisions of the Code & Liquidation Process Regulations comes handy.

Section 36. Liquidation Estate:

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: -

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor

 # Regulation 29. Mutual credits and set-off.
Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party.
Illustration: X owes Rs. 100 to the corporate debtor. The corporate debtor owes Rs. 70 to X. After set off, Rs. 30 is payable by X to the corporate debtor

4. Whether the bank can enforce security interest over such FDR under section 52.
Alternatively, the Bank (FC) can enforce security interest over the FDR, under the provisions of section 52, which has precondition of permission of Liquidator under section 52(3), after verification of the security interest by the Liquidator.

However, the option of enforcement of security interest vs. set-off, during liquidation process has following infirmities;
i). Prior to implementation of The Companies Act,2013, under The Companies Act,1956, the charge of "Banker's Specific Lien" / "Pledge" was not required to be registered, whereas under The Companies Act, 2013, all types of charges are required to be registered. I understand that, in most of the cases, banks have not revised their internal guidelines for getting registered the charge of "Banker's Specific Lien" / "Pledge" of FDR's.

- ***The Companies Act, 1956***

Section 125. *Certain charges to be void against liquidator or creditors unless registered.*
(4) This section applies to the following charges: -
(e) a charge, not being a pledge, on any movable property of the company;

Permission for enforcement of security interest in respect of FDR under lien / pledge will be denied by the liquidator, if the charge of lien / pledge of FDR is not registered with ROC.

ii). Proceeds of enforcement of security interest are subject to sharing as per section 52(8) read with liquidation regulation 21A (2).

iii). Further the priority of distribution, in the liquidation process, of the balance of claim amount (unsecured) of BG unpaid after enforcement of security interest as above, will be lower under section 53(1)(e)(ii).
Thus, claiming set-off of FDR in claim amount under regulation 29 of liquidation process regulations, as per supra above is a better option. The balance of claim amount of BG

(unsecured financial debt) unpaid after set-off, will have higher priority for distribution under liquidation process [section 53(1)(d)(ii)].

Provisions in respect of definition of Charge (security interest) and its registration are as under;

I&B Code, 2016

Section 3(4) **"charge"** means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;

The Companies Act, 2013

Section 2(16) **"charge"** means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;

Section 77**. Duty to register charges**, etc. - (1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.

PERSONAL GUARANTOR- PROCESS AND ISSUES

- Yogesh Kumar Gupta

FCMA FCS IP

The Insolvency and Bankruptcy Code, 2016 ("Code") received the consent from the president on 28.05.2016 and various provisions were notified from time. The Code was divided mainly into three parts i.e. Corporate debtor, personal Guarantor to the Corporate Debtor and partnership/ proprietor firms and other individuals. The law relating to the corporate debtors was made effective from 1st Dec. 2016. However, the 2nd part for the personal guarantors could see the light of the day wef 1st December 2019. In fact, this is allowed only for the personal guarantors to the corporate debtors which have already been admitted into CIRP. The third part pertaining to the partnership/ proprietor firms and other individuals is yet to be notified.

It had been experienced during the last approx. three years life of Code that upon resolving the insolvency of corporate debtor, the liabilities of the corporate ends irrespective of quantum of recovery to the creditor. In most of the cases filed by the financial creditors , the directors have given their personal guarantees and there was no provision under IBC 2016 to take any action against such personal guarantors. In such a scenario, question arises as to how the provisions of insolvency or liquidation of a company under the Insolvency and Bankruptcy Code, 2016 treat the Guarantor.

The concept of guarantee introduced and explained under Section 126 of the Indian Contracts Act, 1882 puts an obligation on a surety to honour the promise of principal debtor by paying the principal debtor's debt obligations, provided to him by a creditor. The presence of three parties in the contract extends the privity of contract to the tripartite agreement. The three parties involved are lender, borrower and the guarantor who forms privity to such contract. Here, it would be beneficial to mention that a guarantor steps into the shoes of the creditor who fails to meet its debt obligations. In fact, the personal guarantees are obtained by the financial creditors from the purview of putting a psychological pressure on the promoters rather than actually from a financial security angle which is quite evident from the past history that the promoters hardly have any assets in their personal name specially at the time of such failure of businesses. In fact, there is no provision under any law which restricts the personal guarantors in disposing of their assets unless their assets are also mortgaged with the lenders.

The Central Government vide notification dated 15th November, 2019, notified the provisions of the Code relating to personal guarantor of corporate debtor with effect from 1st December, 2019. Central Government also notified Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors)

Rules, 2019; the Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

Till the enactment of the above notification, the lenders were required to initiate legal process against the Personal Guarantors under SARFAESI Act, 2020, Presidency Towns Insolvency Act, 1909, Provincial Insolvency Act, 1920 and The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 etc and thereby causing some disconnect in following up the case in two forums i.e. NCLT and DRT. Now, with this notification, the creditors can initiate insolvency process against the personal guarantors of the corporate guarantors where the CIRP has been initiated against the corporate debtor for whom the personal guarantor has given his guarantee to the creditor. The purpose of enactment of above provision for initiating the insolvency resolution process against the personal guarantor of corporate debtor is to target the personal wealth of personal guarantor and enforcing the provision of personal guarantee against him for the value over and above the amount which could not be recovered from the corporate debtor. However, the initiation of the cases against the personal guarantors still have to approach DRT if corporate debtor of such Personal Guarantors is not undergoing CIRP process. Lot of responsibility has been laid on the shoulders of the Insolvency Professional to act as the extended arm of the courts in the insolvency process of a personal guarantor.

Section 5(22) of Code defines Personal Guarantor as "an individual who is the surety in a contract of guarantee to a corporate debtor". Further, Insolvency Resolution process of Personal Guarantor regulated under section 94 to 120 in Chapter III of Part III of the code and Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process f0r Personal Guarantor to Corporate Debtors) Regulations, 2019.

Code provides the following provisions for proceeding with the insolvency resolution process of personal guarantor as follows:

Application for initiation of insolvency proceeding against the Personal Guarantor can be filed either by personal guarantor himself or through resolution professional on his behalf under section 94 or creditor(s) either himself/itself or through resolution professional on the behalf of the creditor under section 95 of the code to Adjudicating Authority. On filing the application an interim moratorium period shall be started under section 96 of the code in relation to all the debtor, pending and future proceeding and will come to end when the application is accepted. The Hon'ble Tribunal shall appoint a resolution professional under section 97 and a copy of above application shall be forwarded to him. The resolution professional shall within ten days of his appointment, examine the application and submit his report to Tribunal recommending for approval or rejection of application.

The tribunal shall within fourteen days of filing the report by resolution professional decide to accept or reject the application and if it decides to accepts then the tribunal shall issue instruction to resolution professional to conduct negotiation between creditor and personal guarantor and arrive a repayment plan after which a moratorium shall be applied from the date of admission till next hundred and eighty days.

The Tribunal shall under section 102 issue a public notice in newspaper for invitation of claim from the creditors and the creditors shall file their claims in Form B within twenty one days of publication after that the resolution professional shall within thirty days of notice prepare the list of creditor on the basis of claims received or information provided by the personal guarantor.

The personal guarantor shall in consultation with resolution professional prepare a repayment plan with justification and reason of the plan. The plan may authorise the resolution professional to:

i. Carry on the debtor's business or trade on his behalf or in his name,
ii. Realise the assets of the debtor, or
iii. Administer or dispose of any funds of the debtor.

The resolution professional shall submit the resolution plan and his report on the resolution plan within twenty one days of last date of filing the claim by creditors.

After submitting the repayment plan with Tribunal the resolution professional shall call the meeting of creditors by issuing a notice which shall inter alia be issued with the repayment plan and his report for the purpose of discussion and approval of the plan and plan shall be approved with three-fourth majority of creditors presenting either by himself or by proxy and voting. The repayment plan can be approved with or without any modification and if any modification is suggested by the creditors that must be assented by the personal guarantor.

The resolution professional shall prepare a report on meeting of creditors about acceptance or rejection of repayment plan by creditors and shall forward the report to tribunal, debtor and creditors including those not presented in the meeting. The tribunal shall pass the order for approval or rejection of repayment plan and implementation of the same. The tribunal may also pass the order for any suggestive modification in the plan if required. If tribunal approves the repayment plan it shall be binding on the debtor as well as creditors and shall be supervised by the resolution professional and if the plan is rejected, then the creditors and debtors shall be entitled for filing the application for Bankruptcy against the Individual Personal Guarantor.

After completion of implementation of resolution plan, the resolution professional shall within fourteen days of completion, inter alia file a report on fully implemented repayment plan to the creditor, debtors and tribunal.

The timelines for the insolvency process for the Individual Guarantors case has been tabulated as under:

S No.	Section / Regulation	Description of Activity	Norm	Latest Timeline
1	Section 94 or 95	Filling of application to initiate Insolvency resolution process and forward the application to FC and CD for whom guarantor is personal guarantor (rule 6)	Date of application	T
2	Section 97(3)	If application filed by debtor or creditor himself- AA to direct Board to nominate IP	Within 7 days of application	T+7
3.	Section 97(4)	Board to nominate IP	Within 10 days of direction from AA	T+17
4	Section 96	Commencement of Interim Moratorium period	from filling of application till admission of application by AA	T
5	Section 97(1)	AA shall direct to Board for evaluation of resolution professional	Within 7 Days of Application	T+7
6	Section 97(2)	Board shall examine and communicate to AA for appointment or rejection of resolution professional	within 7 Days from from direction of AA	T+14
7	Section 97	AA shall appoint resolution professional recommended/examined by board and the RP shall be served with copy of application	Date of appointment	A
8	Rule 9 of (Application to AA for IRP for	Applicant to forward copy of application to RP (if not provided earlier)	within 3 days of appointment of RP	A+3

	PG to CD) rules			
9	Section 99	Resolution professional submit a report to the Adjudicating Authority recommending for approval or rejection of the application also forward copy of report to applicant	within 10 days of appointment of RP	A+10
10	Section 100	AA order for admitting or rejecting the application (commencement of insolvency resolution process???)	Within 14 days from submission of report by RP	A+24
11	section 102	Adjudicating Authority shall issue a public notice	within 7 days of passing the insolvency commencement order	A+31
12	section 102/ Regulation 7	Submission of claims by creditors with RP	within 21 days of public notice	A+52
13	Section 104/ Regulation 7, 9	RP to verify the claims and prepare list of creditors	within 30 days from the date of the Public notice	A+61
14	Section 106	RP submit the repayment plan with his report on such plan to the Adjudicating Authority	within 21days from the last date of submission of claims	A+73
15	Sec 106 to 111 withRegulation 11 to 15	Conduct meeting of creditors	Within 14 days to 28 days of submission of report	A+87 to 101
16	Section 113/ Regulation 19	RP file approved repayment plan with report u/s-106 and 112 with AA	Within 120 days of insolvency commencement	A+144
17	Section-117	RP submit Notice and report of implementation of resolution plan with AA and persons bound by plan	Within 14 days of completion of plan implementation (as mentioned in plan)	

18		failure of implementation of resolution plan by personal guarantor		F
19	Regulation 20	Issue a notice to the guarantor identifying the failure of Implementation of plan on part of Guarantor	within 3 days of knowledge of failure	F+3
		Guarantor will addresses the failure in implementation of the repayment plan	within 15 days of notice issued by RP	F+18
		Resolution professional shall report the failure to creditors	within 7 days of address/Explanation by guarantor	F+25

Points to be noted under provisions of Insolvency proceeding against Personal Guarantor

- For invoking liability of personal guarantor, the creditor need not wait for complete recovery or default from the part of corporate debtor and it can institute the proceeding along with the institution of corporate insolvency proceedings simultaneously.
- The biggest challenge is to track the assets of the Personal Guarantors, getting compete details of the case etc.
- For the cases other than such personal guarantor, the jurisdiction will still be DRT unless the provisions contained under IBC are notified.
- There is no provision of transaction audit etc as provided under section 43, 45 50, and 66 of the IBC 2016 under CIRP.
- The onus of examining the application lies with the resolution professional within ten days of his appointment and he has to study and submit his report with observations to Tribunal recommending for approval or rejection of application and this is going to be an uphill task considering the time available and difficulties in getting the information about the case in such a short time.
- There is no timeline prescribed under the IBC Code or its regulations for implementation of resolution plan which may defeat the purpose of law.
- There is no provision for any action against the Personal Guarantor if there is no cooperation by the Personal Guarantor.

The provisions regarding the initiation of Insolvency proceedings will need another round of changes as it evolves over a period of time.

EMBRACING MEDIATION IN INSOLVENCY PROCESS

- Dr. S K Gupta, CEO(IPA-ICAI)

& Simran Narsinngh

Student -National Law University, Nagpur

Mediation- a structured process

Mediation is structured process which is prevailing since the ancient times. It is a process wherein two or more parties to a dispute voluntarily submit their dispute to a mediator to arrive at an agreement beneficial to the parties indulged in the process. It mainly aims at identifying the goals and interests of the parties by resorting to a standard procedure. Negotiation, mediation, etc. are essentially subsets of the alternate dispute resolution processes (popularly called as ADR techniques) wherein the parties themselves are the decision makers. The process of mediation does not require the rigidity which is generally associated with the traditional litigation setting at large; however, it is an informal and flexible process, designed to cater the needs of the parties. The mediator does not adjudicate or advise the parties, he merely plays the role of an enabler, a facilitator. Mediation proceedings are not subjected to any strict rules of procedure. The parties are at liberty to present information they consider to be relevant, including such information which cannot otherwise be referred to in a court of law. A direct interface with the mediator is encouraged. The benefit of such out-of-court processes lies in the fact that the parties have an opportunity to amicably settle the issue with all possible information symmetry with additional benefits of saving time and cost.

Mediation seeks to provide an expeditious, economical and private resolution of the disputes that might have cropped up between the parties. The parties to a dispute are facilitated by a mediator who, in a way, supplements the thought processes of the parties with least intervention. The objective is to enable the parties to arrive at a conclusion. The parties discover the multifaceted dimensions of their relationship and strive to come to a desired result. Some of these issues cannot be dealt with in a conventional court setting where admissibility of information, etc. as evidence is governed by strict rules. In matters relating to business and personal relationships, confidentiality is often an important aspect for the parties involved.

Mediation in insolvency matters

The global trend towards Mediation in Insolvency matters serves different purposes in the broad framework of insolvency. Primarily, it may seek to solve a two-party dispute and avoid the complication and the corresponding costs of resorting to litigation in an overcomplicated

scenario. In furtherance to this, multiparty mediation may facilitate to avoid insolvency, and thus in a way it can operate in pre-insolvency situations to mediate between debtors and creditors; but also, once an insolvency proceeding commenced then it can promote refinancing, restructuring or liquidation plan amongst the interested parties in the insolvency situation. The voluntary process of Mediation in its multi-dimensional character, the insolvency framework makes it quasi-necessary some kind of legal or judicial intervention on the basis of involvement of number of parties.[1]

Parties who can commence Mediation

The restrictions as stated in Law, it is being accepted at large that the parties cannot resort to mediation in the adjudication of bankruptcy applications, formal restructurings such as applications of postponement of bankruptcy by the process of Conciliation. Mediation can be instrumental for the stakeholders who are indulged in a dispute who yearn to come to a potential solution through discussions and negotiations[2] in matters pertaining to continuity of the business and the payment of debt as soon as possible with the aid of consensual discussions. Therefore, the debtor and/or ideally its leading financial creditors who have their inherent interest and the finance creditors who have their interest in the matter of continuity of business for the resolution of debt can give momentum to commence the mediation proceedings. In the similar vein, parties including debtor, creditors and/or insolvency administration who yearn to conclude an amicable settlement with their counterparties and resolve their disputes may also give effect to commence mediation process.

Need for Mediation in Insolvency Matters

Mediation, particularly in the pre-insolvency stage, is encouraged by many institutions at the international level pertaining to the fact that many instruments are following it like the World Bank principles for Effective Insolvency and Creditor Rights System,[3]the UNCITRAL Model Law on International Commercial Conciliation (2002),[4] the UNCITRAL Practice Guide on Cross-

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[1] *Allan L. Gropper, "The Mediation of Bankruptcy Disputes in the United States", in Laura Carballo Piñeiro and Katia Fach Gómez (eds.), TDM 4 (2017) Special Issue on "Comparative and International Perspectives on Mediation in Insolvency Matters."*

[2] *Berkoff L.A. et al., Bankruptcy Mediation. American Bankruptcy Institute, Alexandria, VA, 2016*.

[3] *World Bank Principles for Effective Insolvency and Creditor Rights Systems as revised in 2015, Principle B.*

[4] *Guide to Enactment and Use of the UNCITRAL Model Law 2002, para. 39 and 40.*

Border Insolvency Cooperation (2009)[5] including some pertinent recommendations on the practice of Mediation in the matters pertaining to Insolvency.[6]

The legal environment in a particular country encompassing the business laws and the national perspectives compromise the efficiency and effectiveness of mediation. While many European Union or non-European Union countries such as Belgium, Greece, Italy, Portugal, Spain, UK, Australia, Japan and Singapore respectively have undertaken recent reforms in the insolvency laws to take mediation in, however the success of these reforms is not granted. Moreover, many countries are not convinced by this particular approach. This has compelled the European Commission to issue a Proposal for a Directive of the European Parliament and the Council on resisting the restructuring frameworks, second chance and resorting to measures to increase the efficiency of restructuring, insolvency, discharge procedures and amending Directive[7] on grounds of the lack of the said 2014 Recommendation's success in reaching a bottom-up harmonization pertaining to these matters across the European Union.[8] Undoubtedly, the 2014 European Commission Recommendation and the proposed Directive on restructuring particularly mention mediation as a mechanism to help the revival of business. In short, it mentions the important role endorsed by Mediator as witnessed in the Common Law regime.[9] On the touchstone of flexibility of this ADR method, it can be stated that the mediation is in consonance with the new EU Approach to business failure and insolvency.[10]

Cross-Border Restructuring

The international insolvency should not be deprived of the benefits of mediation, as it is a great tool to avoid complex litigation scenarios. The Art. 72 of EU Regulation of the European Parliament and the Council on insolvency proceedings[11] allocates the mediating tasks to the coordinator of the insolvency proceedings opened over debtor-companies belonging to the

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[5] UNCITRAL Practice Guide (2009), para. 68, 72, 149.

[6] Restructuring Directive Proposal and Recommendations 1:07 to 1:09 of Rescue of Business in Insolvency Law (2017).

[7] (COM) (2016) 723 final, this Proposal is not only indebted to the 2014 European Commission Recommendation, but also to the Action Plan set up in 2015.

[8] Directorate-General Justice & Consumers of the European Commission, "Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency", 30 September 2015.

[9] 2014 European Commission Recommendation, at 32.

[10] Galanti, see supranote 6, at 8-9.

[11] This Regulation recasts Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ [2000] L 160/1.

same category of group. This provision can be considered as a first rule wherein it particularly mentions the mediation in cross-border insolvency matters, and this adherence to mediation in domestic insolvencies will boost its use in the international framework.

In order to reduce the divergences and inefficiencies it is imperative to encourage greater coherence between the domestic insolvency frameworks which hamper the early restructuring of viable companies in financial difficulties and subsequently a possibility of second chance for the honest entrepreneurs, thereby, to reduce the cost of restructuring both for debtors and creditors. A greater coherence and an increase in the efficiency in national insolvency rules would maximise the returns to all types of creditors and investors and promote cross-border investment. Greater coherence facilitates the restructuring of groups of companies irrespective of where the members of the group are located in the Union. Furthermore, by removing the barriers to effective restructuring of viable companies helps in saving jobs and also contributes wide to economy at large.[12]

The Prevalence of Mediation in the EU Members state

It has been observed that the EU Recommendation introduces the mediator as a new insolvency professional, but does not describe eloquently the mediator's role. The European legislator only provides that:

(a) The function of the mediator comprises of assisting the parties, so as to arrive at a compromise with regard to a restructuring plan;

(b) Where the parties cannot manage the negotiation by themselves, mediator may be appointed *ex officio* or on request by the debtor or creditors.

This lack of information concerning the role and professional qualifications creates a vacuum in the sphere of such an '*insolvency mediator'* introduces the need for a comparative study of the practical use of mediation in those few EU Member States that have developed a practice of mediation for the rescue of distressed company, as request by the European Commission Recommendation.[13]

Practice of Mediation in matters pertaining to insolvency in France

The French Insolvency Law provides a set of flexible proceedings, such as: *Mandat ad hoc, Conciliation Procedure, Procedure de Sauvegarde.* It is pertinent to note that, these proceedings exhibit different characteristics, but they are equipped with the same objective: they consider the interference of some third party between the debtor and financial creditors to facilitate

[12] *European Union Recommendation, 2014 on a New Approach to Business failure and Insolvency.*

[13] *For these considerations and for an overview of the use of mediation in matters of insolvency in the EU Member States and, in the U.S., see, European Law Institute (ELI), Report on Rescue of Business in Insolvency Law.*

negotiations, with view of reaching a consensual restructuring agreement, thus not adhering to open the ordinary means of insolvency proceedings. *Mandat ad hoc* is a flexible procedure, which can be initiated by debtor in financial difficulties, though not insolvent, at any time. Taking into account, the request of the debtor the President of the Court may appoint a *Mandataire ad hoc* and the duration of the procedure is freely determined by the President having regard to the debtor's application. There is a close regulation of Conciliation Procedure. The results derived from this particular method consists of rescheduling of payments; or reducing debtor's indebtedness; but often the rescue strategy demands more sophisticated operations. If the debtor has reaped the benefits *via* opening of conciliation proceedings, it is to note that following the termination of the earlier proceeding, the debtor is not able to file for another consecutive conciliation proceeding for at least three months. In order to make the same enforceable, the agreement reached through the conciliation procedure should be approved by the President of the Court.

In the practice of the French insolvency system debtors tend to start to conduct negotiations within the *mandat ad hoc's* framework. Then, when an agreement is about to be reached, the debtor requests for the opening of conciliation proceedings in order to benefit from a court approval of the restructuring agreement.

Even more interestingly, apparently the success rate of these proceedings was approximately 70%[14] SFA is an accelerated financial safeguard proceeding to rapidly implement a restructuring plan without affecting the position of non-financial creditors. With the ordinance of March 12, 2014,[15] the French legislator introduced the accelerated safeguard proceeding as a new variant for conciliation, which have a different *"deterrent effect"* on minority creditors. SFA procedure allows to cram-down all creditors, except employees, and not only financial creditors.[16] Since minority creditors are aware that their hold-up value is rather limited, often, in practice they prefer to negotiate some limited advantages within the framework of a consensual conciliation agreement.

Practice of Mediation in matters pertaining to insolvency in Spain

[14] *Report dated 1 July 201 of the aut Comit uridique de la lace inanci re de Paris (HCJP) on insolvency proceedings, p. 7.*

[15] *Ord. no 2014-326, ratified by the law no. 2016-1547 of 18 Nov. 2016.*

[16] *French Insolvency Proceedings: La Révolution a Commencé, Gallagher A.; Rousseau A. American Bankruptcy Institute Journal; Alexandria33.11 (Nov 2014), 20-21,64-65*

In Spain, the legislator has implemented many changes in the insolvency system. The reforms amended several parts of the Insolvency Law, out of Court solutions.[17]

The Spanish Royal Decree 2015 specifically introduced some amendments both in the voluntary payment settlement regulation as well as in the Mediator role. Currently, the Spanish law promotes three types of out-of-Court agreements: *Acuerdo de Refinanciación; Acuerdo de Refinanciación Homologado and Acuerdo Extrajudicial de Pagos*. Fundamentally, these three procedures are conducted without any judicial intervention. As long as certain conditions are met, they also permit a greater protection to debtors: during the negotiation period, no creditors (with some exceptions to public creditors) may file for executions over the company's assets; no creditors may file for bankruptcy; once approved, the agreement is protected from *ex-post* avoidance actions.

In the year of 2013, it has been observed, that the Spanish Insolvency Act has included a new chapter regulating the *'insolvency mediator'*. To enhance the rescue of distressed small and medium-sized businesses (SMEs), the Spanish legislator considers the intervention of a *Mediador concursal* as a valuable solution in helping debtors to seek an agreement on payments with creditors. In this scenario, the role of this insolvency professional is not limited to resolving disputes, but at the same time the professional needs to address the key issues of organizing and managing meetings between debtor and creditors, drafting restructuring plans and other supporting activities that have a major role for the success of the procedure.

Therefore, in light of the spectrum of functions it offers Mediation can be considered to be an effective alternative dispute resolution system that can be applied by the parties in dispute and fill the gap which financially distressed debtors are in urgent need of due to the absence of a legislation regulating the informal restructuring proceedings and insufficient formal restructuring proceedings. Both financially distressed debtor and its creditors may apply mediation and negotiate the terms of the debt restructuring, the reorganization project of the business, the protection period and repayment of the debt on the new due dates throughout the mediation process. The role performed by the mediators in this scope can be to facilitate communication across all the stakeholders, with a view to help them arrive at a voluntary resolution which allow the business to survive and the debtor to pay back more of its debts than if its business was forced to close down and be liquidated.

It is to be taken into consideration that a one way of facilitating the process is by introducing guidelines, which in practice operate as a structured code of conduct for work-out participants

[17] *For an overview of the out-of-court debt restructurings procedures available in Spain, see I. Tirado, Out of Court Debt Restructuring in Spain. A Modernized Framework, Working paper, Oxford, (2017*).

such as those contained in the London approach.[18] Through the incorporation of Mediation mechanism an enhanced work-out practice is allowed for restructuring process, it can help us to solve the inter-creditor conflicts.

Use of Mediation in Indian Insolvency Framework

The insolvency law in India has come a long way with the introduction and gradual evolution of the Insolvency and Bankruptcy Code, 2016 ('Code'). The main objective of the Code is to restructure and rehabilitate the companies along with balancing the interests and the rights of varied stakeholders. However, efficient implementation of the Code has suffered for multiple reasons. Misuse of the law for debt recovery rather than insolvency resolution, protracted timelines, overburdening of NCLTs are some of the difficult aspects experienced while implementing the Code.

In order to realise the true spirit of this legislation, it becomes imperative to find a solution which has the potential to address such issues. Mediation, as a possible solution, has been advocated by various working groups and committees from time to time.

The Report of the Working Group on Individual Insolvency as published by IBBI recommended to amend the code for the purpose of providing time bound mediation in respect of insolvency of individuals and the partnership firms.[19] The report further recommended for the recognition of a new cadre of professional mediators and certain mediation centres to provide mediation facility. It is to be noted, that the same process can be applied on the matters pertaining to Corporate Insolvency cases. A mandatory reference to mediation within the framework of Insolvency Code is the need of the hour.

Judicial precedents

In one Dutch judgment[20], the Court observed, "On the occasion of this hearing, the Court of Appeal will in any case also want to discuss with the parties whether the parties can reach an amicable settlement in whole or in part, or whether referral to (insolvency) mediation is an option."

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[18] The London Approach was originally designed by the Bank of England in the 1970s, and was a non-statutory and informal framework for dealing with temporary support operations mounted by banks and other lenders to a company in financial difficulty.

[19] Report of the Working Group on Individual Insolvency (Regarding strategy and approach for implementation of the provisions of the Insolvency & Bankruptcy Code, 2016 to deal with the insolvency of Guarantors to Corporate Debtors and Individuals having business)

[20] See here: https://leidenlawblog.nl/articles/the-mediator-in-insolvency-law-exploring-new-terrain

In the Indian context, in the case of *V.K. Parvinder Singh v. Intec Capital Ltd.*[21] An Appeal was filed by the authorised representative of the Promoters against the admission order passed by the Adjudicating Authority and further they submitted that they are ready to settle the claims of the Financial Creditors. This was done prior to the Constitution of Committee of Creditors (hereinafter referred to as 'CoC'). Since the parties to the present case agreed for the mediation, the Appellate Tribunal appointed a retired Judge to commence the mediation proceedings between the parties. Finally, the matter was settled through mediation and the report was placed before the Appellate Tribunal. The Hon'ble Appellate Tribunal set aside the order of Adjudicating Authority and recorded that the terms of settlement should be treated as the orders and directions of this Appellate Tribunal. In the recent times, mediation can be used as a powerful tool to resolve the disputes between the home buyers and the promoters in matter concerning real estate disputes. It is imperative to note that under the current regime, the creditors are best aware of the financial viability of the corporate debtors and they should be provided with mediation as a tool for initiating the course of action.

Conclusion

Mediation itself is not a *panacea*, a way to resolve all the insolvency matters, but there are no doubts that a disruption of the company value can be prevented if all the parties involved in the restructuring process adopt a more problem-solving attitude. The disputes in the context of insolvency and bankruptcy can be very well tackled with the tool of Mediation as it is time and cost effective in nature and it preserved the estate of debtor to fulfil the debts to the Creditors thus benefiting Creditors. Mediation's goals however go beyond the dispute resolution approach to avoid the impoverishment of the company's asset. In order to resolve the corporate distress, Mediation in a particular way imposes responsibility on the shoulder of the participants for the effective restructuring process.

Litigation is a time consuming and a cumbersome process, particularly when the insolvency practitioners are equipped with limited resources. It is particularly, not in the interest of the Creditors to indulge in a long process of litigation. A mediation (or any other ADR Processes) helps in fulfilling the duties and the obligations of insolvency new paradigm of business rescue moves the focus from Courts which traditionally have a control role in formal insolvency procedure to the actors (namely debtors, creditors and all the parties interested), who are the real players of out of Court debt restructurings. In addition to those actors, an appointed mediator, or a Court appointed supervisor, plays a key role: it ensures the proper functioning of negotiations and the efficient handling of procedures for the benefit of creditors as well as another stakeholder. The Insolvency and Bankruptcy Code is an economic legislation, and it

[21] *V.K. Parvinder Singh v. Intec Capital Ltd & Anr. Company Appeal (AT) (Insolvency) No. 968 of 2019*.

needs an amendment in way of mediation just like any other legislation. practitioners as it may sometimes lead to early and quick disposal of disputes.

The new paradigm of business rescue moves the focus from Courts which traditionally have a control role in formal insolvency procedure to the actors (namely debtors, creditors and all the parties interested), who are the real players of out of Court debt restructurings. In addition to those actors, an appointed mediator, or a Court appointed supervisor, plays a key role: it ensures the proper functioning of negotiations and the efficient handling of procedures for the benefit of creditors as well as another stakeholder. The Insolvency and Bankruptcy Code is an economic legislation, and it needs an amendment in way of mediation just like any other legislation.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 238A - LIMITATION PERIOD

- **K.R.V. Uday Charan Rao v. Bank of India - [2020] 113 taxmann.com 54 (NCL-AT)**

Where corporate debtor acknowledged debt and also made offer for one-time settlement, CIRP application filed under section 7 within 3 years of such acknowledgement was not barred by limitation.

CIRP application filed under section 7 was admitted against the corporate debtor on 8-07-2019. The shareholder of the corporate debtor contended that CIRP application was barred by limitation as loan was availed by the corporate debtor on 20-8-2010 from the financial creditor. The financial creditor on the other hand stated that the corporate debtor had acknowledged debt in 2018 and had also made offer of one-time settlement through various letters in 2017.

Held that for counting period of limitation in filling application under section 7, article 137 of the Limitation was applicable. Since the corporate debtor acknowledged debt for purpose of accepting liability on 17-3-2015, 20-3-2015 and 5-3-2018, CIRP application filed under section 7 within 3 years of such acknowledgement was not barred by limitation and the Adjudicating Authority had rightly admitted same.

Case Review: Sainath Estates Pvt. Ltd v. Bank of India [2020] 113 taxmann.com 53 (NCLT - Hyd.), affirmed.

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

- **Vinayaka Exports v. Colorhome Developers (P.) Ltd. - [2020] 113 taxmann.com 116 (NCL-AT)**

Provisions of section 5(6) do not apply and one cannot take plea of existence of dispute in case CIRP application is filed u/s 7 of IBC.

Appellants-financial creditors had disbursed debt to the corporate debtor and the corporate debtor, towards security, executed Mortgage Deed and also issued Promissory Notes. The corporate debtor having made default in repayment of debt, appellants filed application under section 7 which was dismissed by the Adjudicating Authority under section 5(6) on ground of existence of dispute and pendency of civil suit between parties.

Held that application filed before the Adjudicating Authority was under section 7 and not under section 9, plea of existence of dispute between parties could not be taken and provision of section 5(6) could not be made applicable. Since there was a debt due and payable which was more than Rs. 1 lakh and same had been defaulted by respondent, CIRP petition was to be admitted.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Rajiv Choudhary v. Hukum Singh - [2020] 113 taxmann.com 135 /[2020] 157 SCL 699 (NCL-AT)**

Where prior to constitution of CoC, corporate debtor handed over banker's cheque to financial creditor for amount of default, order admitting CIRP application against corporate debtor was to be set aside.

The financial creditor filed an application under section 7 against the corporate debtor claiming default of Rs. 1.18 crores, which was admitted. The corporate debtor in instant appeal came up with Banker's Cheque for Rs. 1.18 crores and handed over same to the financial creditor for onward transmission. Thus, total amount stood paid in favour of the financial creditor. Till date Committee of Creditors had not been yet constituted.

Held that order admitting CIRP application was to be set aside.

Case Review: Hukum Singh v. Adaab Hotels Ltd. [2020] 113 taxmann.com 134 (NCLT - New Delhi), reversed.

SECTION 3(8) - CORPORATE DEBTOR

- **Ranjan Goyal v. Sharad Vadehra - [2020] 113 taxmann.com 209 (NCL-AT)**

Where appellant's subsidiary company launched a residential project but allotment letter and demand notice was issued by appellant to allottees on its letter head and allottees disbursed amount for which receipt was also issued by appellant, appellant could not raise a plea that it was not a corporate debtor and therefore, application under section 7 initiated by allottees for non-delivery of possession against appellant was maintainable.

The appellant company through its subsidiary company 'G' launched a residential project and the respondent was allottee in said project. When the respondent failed to get possession of allotted unit even after expiry of grace period, the respondent filed petition under section 7 for initiation of corporate insolvency resolution process against the appellant. The appellant raised a plea that application by the respondent was not maintainable because it had no agreement with the respondent rather, the respondent was an allottee of 'G'. It was noted that pursuant to demand notice issued by the appellant, respondent disbursed amount for which receipts were issued by the appellant. Subsequently, allotment letter was issued by the appellant on its letter head. From said allotment letter, receipts and demand notice, it was found that the appellant was also a party along with 'G' and therefore, plea of the appellant that it was not a corporate debtor, was incorrect.

Held that application under section 7 initiated by allottees for non delivery of possession against appellant was maintainable.

Case Review: *Sharad Vadehra v. Homestead Infrastructure Development (P.) Ltd. [2020] 113 taxmann.com 208 (NCLT - New Delhi), affirmed.*

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Sarita Vishal v. Aarti Security Services - [2020] 113 taxmann.com 211 /[2020] 157 SCL 562 (NCL-AT)**

Where parties had reached settlement prior to constitution of 'Committee of Creditors', order admitting CIRP under section 9 was to be set aside.

The adjudicating Authority by impugned order admitted an application under section 9 in case of the corporate debtor and the Interim Resolution Professional (IRP) was appointed. Prior to constitution of 'Committee of Creditors' parties had reached settlement and in terms of settlement, cheque had also been issued to the operational creditor. Further, the IRP had also received payment towards fees and costs and was satisfied with same.

Held that in view of fact that parties had reached a settlement and the Committee of Creditors was not yet constituted, impugned order was to be set aside.

Case Review: Aarti Security Services v. Shahi Infrastructure (P.) Ltd. [2020] 113 taxmann.com 210 (NCLT - New Delhi), Set aside

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

- **Ruchita Modi v. Mrs. Kanchan Ostwal - [2020] 113 taxmann.com 310 /[2020] 157 SCL 705 (NCL-AT)**

Where CoC was not yet constituted when corporate debtor and operational creditor settled their dispute and signed settlement deed and corporate debtor handed over draft and post dated cheques towards payments, CIRP order was to be withdrawn.

CIRP against the corporate debtor was admitted for default in payment of operational debt to the operational creditor. While CoC was not yet constituted, parties settled their dispute and signed deed of settlement. The corporate debtor handed over draft and post dated cheques to the operational creditor as mentioned in deed of settlement.

Held that the CIRP order was to be set aside as withdrawn.

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

- **Rahul Jain v. Rave Scans (P.) Ltd. - 2020] 113 taxmann.com 342 /[2020] 157 SCL 531 (SC)**

Where appellate authority opined that resolution plan approved by Tribunal did not conform to test in section 30(2)(e), and was discriminatory against similarly situated 'secured creditors' in view of fact that resolution process began well before amended regulation 38 of 2016 Regulations came into force in January 2017, and, moreover resolution plan was prepared and approved before that event, impugned directions of appellate authority requiring appellant to match pay-out offered to other financial creditors with second respondent i.e. one of secured creditors, was not justified.

Corporate Insolvency Resolution Process was initiated against the respondent company. Resolution plan submitted by the appellant was approved by the NCLT. The second respondent i.e. one of the financial creditors dissented with the resolution plan contending that it had been provided with 32.34 per cent of its admitted claim, whereas other financial creditors had been provided with 45 per cent of their admitted claims. The appellate authority i.e. NCLAT set aside the Tribunal's directions and required the appellant to increase liquidation value of offer to the

second respondent. According to the appellate authority, resolution plan approved by the Tribunal did not conform to test in section 30(2)(e), and was discriminatory against similarly situated 'secured creditors'.

Held that since resolution process began well before amended regulation 38 of the 2016 Regulations came into force in January 2017, and, moreover, resolution plan was prepared and approved before that event, impugned directions of the appellate authority, requiring the appellant to match pay-out offered to other financial creditors with the second respondent, was not justified. Therefore, impugned order was to be set aside and order passed by the Tribunal was to be restored.

SECTION 22 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - APPOINTMENT OF

- **State Bank of India v. Metenere Ltd. - [2020] 113 taxmann.com 380 (NCL-AT)**

Where NCLT by impugned order directed substitution of Resolution Professional who was ex-bank employee on ground that such Resolution Professional was unlikely to act fairly, operation of said order was to be staged.

The NCLT by impugned order directed substitution of the Resolution Professional, who was ex bank employee on ground that such Resolution Professional was unlikely to act fairly and could not be expected to act as an independent umpire.

Held that operation of impugned order of the NCLT was to be stayed.

Case Review : State Bank of India v. Metenere Ltd. [2020] 113 taxmann.com 379 (NCLT - New Delhi), stayed

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

- **Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh - [2020] 113 taxmann.com 421 /[2020] 158 SCL 567 (SC)**

Where once a resolution plan has been approved by committee of creditors statutory mandate on Adjudicating Authority under section 31(1) is to ascertain that a resolution plan meets

requirement of sub-sections (2) and (4) of section 30 thereof and there is no provision in Code or Regulations that bid of any resolution applicant has to match liquidation value.

Order approving resolution plan of the applicant was appealed against by one of the promoters of the corporate debtor as well as the financial creditor on ground that amount offered under resolution plan was less than liquidation value of the corporate debtor. The NCLAT allowed appeals and directed the appellant to increase upfront payment accordingly and held that failure to deposit enhanced amount with escrow account within thirty days would lead to setting aside of the resolution plan. On appeal, the appellant submitted that the NCLAT had exceeded its jurisdiction in directing matching of liquidation value in the resolution plan.

Held that there is no provision in the Code or Regulations under which bid of any Resolution Applicant has to match liquidation value arrived at in manner provided in regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. For final approval of a resolution plan, the Adjudicating Authority has to be satisfied that requirement of sub-section (2) of the section 30 has been complied with. Once a resolution plan has been approved by the committee of creditors statutory mandate on the Adjudicating Authority under section 31(1) is to ascertain that a resolution plan meets requirement of sub-sections (2) and (4) of section 30 thereof. Where no breach of said provisions in order of the Adjudicating Authority in approving resolution plan had been found, the Appellate Authority could not have interfered with the order of the Adjudicating Authority.

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

- **Navin Raheja v. Shilpa Jain - [2020] 113 taxmann.com 459 /[2020] 159 SCL 421 (NCL-AT)**

Where in spite of offer of possession of flats, allottes of flats wanted refund of amount with higher rate of interest and refused to take actual amount in terms of agreement, CIRP would be held malicious.

The respondent-allottees booked apartment in the Residential Project being developed by the 'corporate debtor'. It was alleged that possession of the apartment was to be provided within 36 months i.e. on 3-8-2015 but the construction was not completed. Thus, the 'corporate debtor' was under obligation to pay the allottee(s) compensation at the rate of Rs. 7 per sq. ft. of the super area per month for the entire period of such delay.

Held that for competent authority's delay in granting approval on account of non-availability of necessary infrastructure facilities to be provided by Government for carrying development activities in concerned area, real estate developer cannot be held responsible. Where developer can point out that in falling real estate market, allottee does not, in fact, want to go ahead with his obligation to take possession of flat/apartment under RERA, but wants to jump ship and really get back, by way of coercive measure under code, monies already paid by it, allottee is to be held as a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. Where respondent-allottees, in spite of offer of possession of flats, wanted refund of paid amount alongwith higher rate of interest and refused to take actual amount in terms of agreement, CIRP would be held malicious.

Case Review : Pioneer Urban Land & Infrastructure Ltd. v. Union of India [2019] 108 taxmann.com 147/155 SCL 622 (SC) followed.

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

- **Gaurav Agrawal v. Tuf Metallurgical (P.) Ltd. - [2020] 113 taxmann.com 489 /[2020] 160 SCL 49 (NCL-AT)**

Where financial creditor gave advance to corporate debtor to keep corporate debtor running to assure supply of future raw material by corporate debtor and interest was payable on said amount, it was clearly a case of borrowing/lending for time value of money and corporate debtor having failed to pay amount due, CIRP application under section 7 was maintainable.

The respondent financial creditor stated that it was purchasing raw material from the corporate debtor and when the corporate debtor was in difficulty, it advanced loan to the corporate debtor to assure supply of future raw material. A share pledge/financial facility agreement was also executed in that regard. Since there was default on part of the corporate debtor in repayment, the respondent filed application under section 7. The corporate debtor contended that amount received by the corporate debtor from the financial creditor was only an advance for future supply of goods and could not be considered as financial debt.

Held that when the corporate debtor had executed promissory note acknowledging debt as 'short term urgent unavoidable loan' and on facts it was clear that the financial creditor gave advance to keep corporate debtor running, to ensure that its raw material would become available to the financial creditor, and interest was also payable on said amount, it was clearly a case of borrowing/lending for time value of money for loan which the financial creditor was

advancing. Considering the fact that the corporate debtor had not paid amounts claimed, which were clearly more than Rs. 1 lakh, CIRP application was maintainable.

Case Review : TUF Metallurgical (P.) Ltd. v. Albus India Ltd. [2020] 113 taxmann.com 488 (NCLT-New Delhi) affirmed.

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

The corporate debtor awarded a contract to the operational creditor to undertake civil construction under which work was executed. The operational creditor claimed that bill of Rs. 2.41 crores was due and payable. On CIRP petition filed by the operational creditor, the corporate debtor stated that the operational creditor had not adhered to specification of work order and demand was raised by the operational creditor only in respect of running bills and final bills had never been raised nor accepted by the corporate debtor. The corporate debtor pleaded that there was pre-existing dispute before issuance of demand notice. It was noted that final bills had not been raised and contract was to conclude only on submission of final bills by the operational creditor. On perusal of email communication relied upon by the corporate debtor, it was clear that before issuance of demand notice, there was pre-existing dispute.

Held that CIRP petition filed by operational creditor was to be rejected.

Case Review : Ved Contracts (P.) Ltd. v. Pan Realtors (P.) Ltd. [2020] 113 taxmann.com 490 (NCLT - New Delhi), affirmed.

SECTION 25 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - DUTIES OF

- **Asset Reconstruction Company (I) Ltd.(ARCIL) v. Koteswara Rao Karuchola Resolution Professional of Viceroy Hotels Ltd. - [2020] 113 taxmann.com 494 /[2020] 160 SCL 68 (NCL-AT)**

After constitution of CoC, without its permission, Resolution Professional was not competent to entertain more applications to include one or other person as financial creditor.

A business transfer agreement was entered into between Viceroy Hotels Ltd. (VHL) and Mahal Hotel Pvt. Ltd. (MHPL) and VHL was paid part of consideration amount by MHPL. MHPL canceled business transfer agreement and amount paid by MHPL was shown as forfeited and was so reflected in balance sheet of VHL. CIRP against VHL was initiated and CoC was constituted. List

of creditors as disclosed in Information memorandum, did not include MHPL. Meanwhile CoC directed the RP to convene a meeting for change of RP. Thereafter, RP circulated an email alongwith updated list of members of CoC by including MHPL as financial creditor. The appellant-Asset reconstruction company, contended that inclusion of MHPL as financial creditor was intentionally made by the RP to ensure that he is not removed by CoC. It was also submitted that MHPL was involved in money laundering.

Held that after constitution of CoC, without its permission, RP was not competent to entertain more applications to include one or other person as financial creditor - Held, Yes - Whether money laundering case having been initiated against MHPL, said hotel could not be allowed to be member of Committee of Creditors.

Case Review : Asset Reconstruction Co. (I) Ltd. v. Koteswara Rao Karuchola [2020] 113 taxmann.com 493 (NCLT - Hyd.), set aside.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.