November,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 MESSAGE

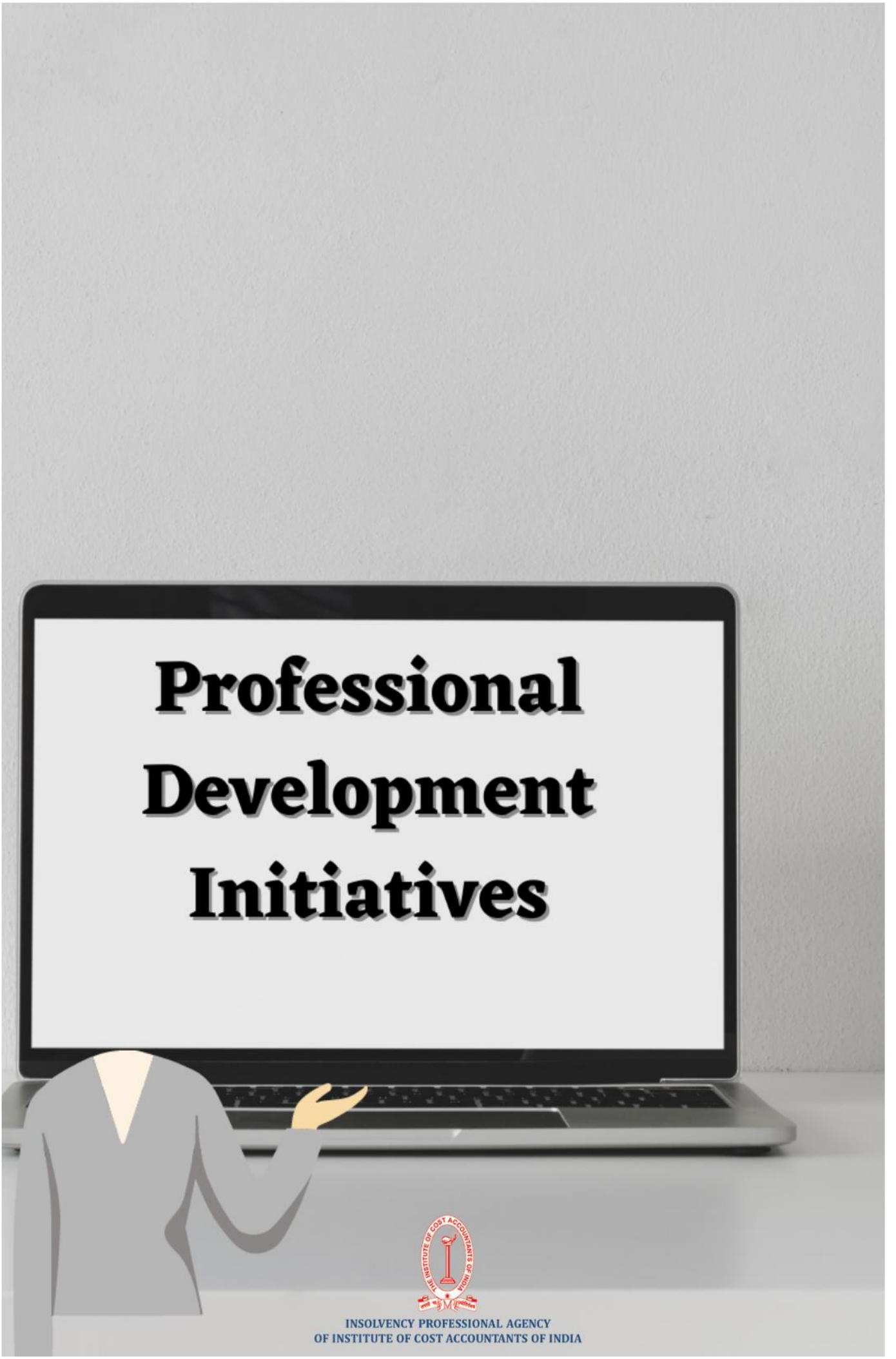
The institution of Insolvency Professional stands on conduct and capability of the professionals. An Insolvency practitioner involves a balance between adherence to rules of ethical conduct, maintains avoidance of conflicts of interest, and looks for avenues to find the most cost-effective methods of debt collection or resolution under the statutory regime. As the potential conflict of interests are so inherent in nature due to the multifaceted role granted to such professionals under the insolvency regime, be it a financial distress- personal or commercial in nature- capability needs to be enhanced continuously with evolving legal and regulatory framework and also jurisprudence and evolution of best practices including the use of modern technology to keep yourself apace with.

Every function which an Insolvency Professional performs is required to be performed under the strict adherence to the Code and it requires the highest level of professional conviction and excellence including financial engineering and an apt methodology of maximisation of asset value-to achieve the essence of the Code. Unless an Insolvency Professionals strives for excellence and perfection, following the Code of Conduct in true spirit of word and its meaning and sets up a precedence of fairness and just imbibes the confidence of inspiration among its stakeholders, the purpose of the Code stands defeated.

Conflicts serve as a medium of understanding to effective administration of the insolvency and bankruptcy process. On one hand it helps examine whether oversight of professional ethics and avoidance of conflicts becomes a matter of legislative intervention or best left to the profession. Disclosures is just an example of understanding of such potential conflicts and accountability to its related stakeholders through the process of appointment/engagement. The fundamental issue is on how one manages to handle these conflicts while maintaining the integrity of the system simultaneously.

Code of Conduct is an evolution from Codes of Ethics. These ethics are nothing but some benchmark norms of right karma at a certain given moment which the system/regime expects from an individual. These eventually evolved thereby strengthening the mankind and its legal system. All the religious scriptures prescribe a code of conduct for its followers. Here in our Code, it is expected to be compliant to some fundamental principles of Integrity, Objectivity, Professional competence, Due diligence, Confidentiality and Professional Approach.

An Insolvency Professional is adorned a wide range of functions forming an important ecosystem around himself. As he serves as the backbone of the entire process of Corporate Insolvency Resolution Process (CIRP) or Liquidation, as the case may be, it becomes important to effectively strive to maximise the value of the assets of debtor during the resolution process. As the processes described in the Code, viz., CIRP or withdrawal of the CIRP or liquidation process, is executed by the IPs success thereof fulcrums on the conduct and competence of the Insolvency Professional. He is the one-point connection of the entire process and link between the Adjudicating Authority, Creditors, Debtors and other stakeholders so the integrity and the adherence to the Code of Conduct is highly sought for to safeguards the interests of all the stakeholders.



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

NOVEMBER,2020	
Date	Events
30th Oct– 6th Nov,20	30 Hours certificate course on IBC
31st Oct – 07th Nov,2020	Pre- Registration Training jointly by 3 IPAs
4th Nov, 2020	NeSL – Platform for distressed Assets for IPs jointly by 3 IPAs
23rd – 29th Nov, 2020	Pre – Registration Training jointly by 3 IPAs

IBC AU COURANT

Updates on insolvency and bankruptcy code

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INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

POWERS AND DUTIES OF LIQUIDATOR UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

Mr. Rajesh Kumar Gupta

Insolvency Professional & Research scholar

Introduction

Liquidation Process is led by the Insolvency Professional viz., the liquidator. '*Liquidator*' means insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of Part II, as the case may be. He ensures that the liquidation process should be completed in an efficient and time bound manner.[1] Further, he will regulate both the financial as well as procedural aspects throughout the liquidation of a company. The key function of liquidator is to manage the property of the company which is in liquidation, further, to act in the best interest of creditors.

Moreover, he consolidates and verifies claim of the creditors, takes the custody of assets and property of corporate debtor, evaluates the assets and prepares the report to ease the process of liquidation. The fee payable to liquidator shall form a part of the liquidation cost. Thus, in the conduct of liquidation process, liquidator has immense powers and responsibilities in respect of all the requirements conferred upon him under the Code.

Appointment of Resolution Professional as Liquidator

The Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process shall act as the Liquidator for the purposes of Liquidation unless replaced by the Adjudicating Authority under section 34(4). in this context, the resolution professional is required to submit a written consent to the Adjudicatory Authority in specified form.[2]

An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director, is

[1] Section 5(18) of the IBC Code, 2016
[2] Section 34, Ibid.

independent of the corporate debtor. A person shall be considered independent of the corporate debtor, if :-

(a) He is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;

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

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

(i) of a firm of auditors or secretarial auditors or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor contributing to more than 10% of the gross turnover of such firm, in the Last three financial years.

A liquidator is required to disclose the existence of any pecuniary or personal relationship with the concerned corporate debtor or any of its stakeholders as soon as he becomes aware of it, to the Board and the Adjudicating Authority.

An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation process.[3]

Public Announcement by Liquidator

The public announcement would call upon stakeholders to submit their claims as on the liquidation commencement date and provide the last date for submission of claim, which would be thirty days from the liquidation commencement date.[4]

The term "liquidation commencement date" has been defined under section 5(17) of the Code which means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be.

The public announcement would be in one English newspaper and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the liquidator, the

[3] Regulation 3 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

[4] Form B of Schedule II within five days from his appointment in terms of regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

corporate debtor conducts material business operations. Besides, announcement shall be published on the website of the corporate debtor as well as the Board.

Cessation of Power of Board of Directors to vest in Liquidator

On the appointment of a liquidator, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.[5]

Rendering Assistance and Cooperation to Liquidator

Section 34(3) imposes an obligation on the personnel of the corporate debtor to provide all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the corporate debtor. Further, section 19 of the Code, which lays down the provisions regarding personnel to extend co-operation to interim resolution professional, would apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

Thus, section 19 would be read as-

"*The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor.*

Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the liquidator does not assist or co-operate, the liquidator may make an application to the Adjudicating Authority for necessary directions.

The Adjudicating Authority, on receiving an application, shall by an order, direct such personnel or other person to comply with the instructions of the liquidator and to cooperate with him in collection of information and management of the corporate debtor."

Replacement of Resolution Professional Appointed as Liquidator

Circumstances of replacing the resolution professional[6]

The Adjudicating Authority shall by order replace the resolution professional -

(a) if the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in section 30(2); or

(b) where the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing; or

[5] Section 34(2,) , IBC, 2016
[6] Section 34(4), IBC,2016

(c) if the resolution professional fails to submit written consent under section 34(1).

(ii) Proposal of IP's name by the Board

In case, the resolution plan submitted by the resolution professional was rejected or the resolution professional fails to submit written consent, the Adjudicating Authority may direct the Board to propose name of insolvency professional to be appointed as a liquidator.[7]

The Board is required under sub-section (6) of section 34 of the Code to propose the name of another insolvency professional along with written consent from the insolvency professional in the specified form within ten days of the direction issued by the Adjudicating Authority.

Thus, we can say that the process of appointment of a liquidator may entail some time, which could be saved if the Adjudicating Authority has a ready panel of IPs recommended by the Board and it can pick up any name from the Panel while issuing the Order.

(iii) Order of appointment of insolvency professional

On receipt of the proposal of the Board for the appointment of an insolvency professional as Liquidator, the Adjudicating Authority shall by an order appoint such insolvency professional as the liquidator.[8]

Liquidator: Powers and Duties

Section 35 of the Code as well as Chapter HI of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 lay down the several powers and duties of liquidator to ensure orderly completion of the liquidation proceedings. Such powers and duties are exercisable by the liquidator subject to the directions of Adjudicating Authority. The list of powers and duties is inclusive and not exhaustive.

(i) Verification of claims of all the creditors

The liquidator has power to verify the claims of all the creditors. He would verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be.

Section 3(5) of the Code defines the term 'claim' which means -

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

[7] Section 34(5}, IBC, 2016
[8] Section 34(7), IBC, 2016

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

(ii) Custody or control over assets

The liquidator has power to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor.

(iii) Disclaimer of onerous property

Regulation 10 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 deals with the disclaimer of onerous property.

(a) Onerous property: Meaning

In case, any part of the property of a corporate debtor consists of: (a) land of any tenure, burdened with onerous covenants; (b) shares or stocks in companies; (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or (d) unprofitable contracts, then these would be considered as onerous property.

(b) Application to NCLT for disclaiming the property or contract

The liquidator would make an application to the Adjudicating Authority within six months from the liquidation commencement date, or such extended period as may be allowed by the Adjudicating Authority, to disclaim the property or contract. However, the liquidator would not disclaim if a person interested in the property or contract inquired in writing whether he will make an application to have such property disclaimed, and he did not communicate his intention to do so within one month from receipt of such inquiry.

(C) Service of Notice

The liquidator is required to serve a notice to persons interested in the onerous property or contract at least seven days before making an application for disclaimer to the Adjudicating Authority. It is pertinent to note that a person is interested in the onerous property or contract if he is entitled to the" benefit or subject to the burden of the contract; or claims an interest in a disclaimed property or is under a liability not discharged in respect of a disclaimed property.

(iv) Evaluation of assets and property of the corporate debtor

This is the power of liquidator to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report. Further, the Board has power to issue guidelines for the purpose of valuation of the assets of a corporate debtor.

(v) Power to protect and preserve the property

The liquidator has power to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary.

(vi) Carry on the business of the corporate debtor

The liquidator has power to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.

(vii) Power to sell immovable and movable property of corporate debtor

Subject to section 52, the liquidator has power to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.

However, the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant. 'Persons ineligible to be resolution applicant' has been described in section 29A of the Code.

(viii) Power to draw, accept, make and endorse any negotiable instruments

The liquidator has power to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business.

(ix) Taking out letter of administration in his name

Section empowers the liquidator to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself.

(x) Obtain professional assistance

The liquidator can obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities In terms of regulation 7

of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, a liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration. Such remuneration would form part of the liquidation cost.

However, a professional will not be appointed who is his relative, is a related party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the Liquidation commencement date.

Further, a professional appointed or proposed to be appointed would require disclosing the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned corporate debtor as soon as he becomes aware of it, to the liquidator.

(xi) Power to invitation and settlement of claims

The liquidator is empowered to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of the Code.

(xi) Institute or defend any suit

The liquidator has power to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor.

(xii) Investigation of the financial affairs of corporate debtor

The liquidator can investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions.

(xiii) Execution and verification of documents

Section 35, further, empowers the Liquidator to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator.

(xiv) Power to apply for required orders or directions of Adjudicating Authority

The liquidator has power to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board.

(xv) Requirement as to reporting

The liquidator is required to prepare and submit the following reports to the Adjudicating Authority from time to time: -

(a) a preliminary report,

(b) an asset memorandum,

(c) progress report(s),

(d) sale report(s),

(e) minutes of consultation with stakeholders and

(f) the final report prior to dissolution.

The report would be preserved in a physical as well as an electronic form for eight years after the dissolution of the corporate debtor.

The liquidator would make the reports and minutes available to a stakeholder in either electronic or physical form, on receipt of (a) an application in writing; (b) costs of making such reports and minutes available to it; and (c) an undertaking from the stakeholder that it shalt maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person.

(xvi) Registers and books of account to be maintained by liquidator

It is the duty of liquidator to maintain the registers and books, further, make them complete and bring up-to-date if the books of account of the corporate debtor are incomplete on the liquidation commencement date. The registers and books includes cash book, ledger, bank Ledger, register of fixed assets and inventories, securities and investment register, register of book debts and outstanding debts, tenants ledger, suits register; decree register, register of claims and dividends, contributories ledger, distributions register; fee register, suspense register, documents register, books register, register of unclaimed dividends and undistributed properties, such other books or registers as may be necessary to account for transactions entered into by him in relation to the corporate debtor.

These are required to be preserved for a period of eight years after the dissolution of the corporate debtor. Moreover, the registers and books may be maintained in the forms indicated in Schedule III of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, with such modifications as the liquidator may deem fit in the facts and circumstances of the Liquidation process.

The liquidator would keep receipts for all payments made or expenses incurred by him.

(xvii) Power to consult with stake holders

The liquidator shall have the power to consult with any of the stakeholders entitled to a distribution of proceeds. The stakeholders consulted shall extend all assistance and cooperation to the liquidator to complete the liquidation of the corporate debtor. In this regard, the liquidator is required to maintain the particulars of any consultation with the stakeholders as specified in Form A of Schedule II of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Further, it is pertinent to note that any such consultation shall not be binding on the Liquidator.

(xviii) Duty of personnel to extend cooperation to liquidator

The liquidator can seek information from the personnel he is or has been an officer, auditor, employee, promoter or partner of the corporate debtor, or who was the interim resolution professional, resolution professional or the previous liquidator of the corporate debtor; or who has possession of any of the properties of the corporate debtor. After the liquidator has made reasonable efforts to obtain the information from such person and failed to obtain it, he can file an application to Adjudicating Authority for a direction that such personnel would cooperate with him in the collection of information necessary for the conduct of the liquidation,

(xix) Perform other specified functions

The Board can specify any functions other than as mentioned above and the liquidator would require performing the same.

(xx) Powers of liquidator to access information

Section 37 of the Code, 2016 empowers the liquidator to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor. There are following sources from which the information can be derived :

(a) An information utility;

(b) Credit information systems regulated under any law for the time being in force;

(c) Any agency of the Central, State or Local Government including any registration authorities;

(d) Information systems for financial and non-financial liabilities regulated under any law for the t.me being in force;

(e) Information systems for securities and assets posted as security interest regulated under any law for the time being in force;

(f) Any database maintained by the Board; and

(g) Any other source as may be specified by the Board.

Section 37 further stipulates that the creditors may require the liquidator to provide them any financial information relating to the corporate debtor in such manner as may be specified. However, such information would be furnished to creditors who have requested for such information within a period of seven days from the date of such request. In case, the financial information could not be made available to the creditor by the liquidator, he would require providing reasons for not providing such information.

Recovery of monies due by liquidator

The liquidator would endeavour to recover and realize all assets of and dues to the corporate debtor in a time-bound manner for maximization of value for the stakeholders. [Regulation 39 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016]

Fees Payable to Liquidator to be deducted from Distribution of Liquidation Assets

Sub-section (3) of section 53 provides that the fees payable to the liquidator shalt be deducted proportionately from the proceeds payable to each class of recipients under section 53(1), and the proceeds to the relevant recipient shalt be distributed after such deduction. In other words, the entire fees cannot be recovered out of the realisation of the sale of assets, however, it is related to distribution to each class of recipients i.e. deducted proportionately from the proceeds payable to each class of recipients and the balance amount only would be distributed.

Punishment to Liquidator for Contravening the Provisions of Code

If the liquidator contravenes the provisions of the Code, the Adjudicating Authority may impose a fine or punish him with imprisonment or both. In terms of section 70(2), if an insolvency professional deliberately contravenes the provisions of Part II (i.e. Insolvency Resolution and Liquidation for Corporate Persons), he would be punishable with imprisonment for a term which may extend to six months, or with fine which shall not less than one lakh rupees, but may extend to five lakhs rupees, or with both.

Relevant Judicial Analysis

In ***Sandeep Kumar Gupta v. Stewarts & Lloyds of India Ltd***.[9] where resolution professional filed an appeal against order of Adjudicating Authority, wherein he was not appointed as 'Liquidator', but Adjudicating Authority was not satisfied with performance of the Resolution Professional and it had jurisdiction to engage another person as 'Resolution Professional' or 'Liquidator', therefore, the appeal was dismissed.

[9] (2018) 50 CLL 562(NCL-A T) : 2018 TaxPub(CL) 465 (NCL-A T): (2018) 144 CLA 161 (NCL-A T): (2018) 91 taxmann.com 409 (NCL-A T): (2018) 146 SCL 591 (NCL-A T)

In ***Sahara Fincon (P) Ltd v. Tirupati Ceramics Ltd***.,[10] when no resolution plan had been submitted by Resolution Professional (RP) under section 30, then, its rejection for failure to meet the requirements mentioned in section 30(2) did not arise, Board had also not recommended replacement of the existing RP with another RP to Adjudicating Authority, therefore, application for replacement of the existing RP to act as liquidator could not be accepted, thus, the application was dismissed and the existing RP was appointed as the liquidator for the purposes of liquidation.

Concluding Remarks

The Company Liquidator is authorized to perform all the Powers and Duties as prescribed under the IBC, 2016. The Liquidator is accountable to shareholders and the creditors of the Company. There is a fiduciary relationship between the Liquidator and the Company and its creditors. The primary purpose of appointing Liquidator is to wind up a failed business and act with professional efficiency.

[10] 2018) 51 CLL 334 (NCL T-Chd): 2018 TaxPub(CL) 560 (NCL T-Chd): (2018) 4 CLI 369 (NCL T-Chd) (2018) 144 CLA 381 (NCL T-Chd) (2018) 210 Comp Cas 265 (NCL T-Chd) (2018) 147 SCL 123 (NCLT-Chd) (2018) 92 taxmann.com 268 (NCLT-Chd),

EMPANELMENT OF INSOLVENCY PROFESSIONALS BY IBBI APPOINTMENT BY NCLT

The Regulator Insolvency and Bankruptcy Board of India (IBBI) prepares a list of Insolvency Professionals (IPs) for appointment by Adjudicating Authority (AA) as Interim Resolution Professional (IRP), Resolution Professional (RP), Liquidator, Bankruptcy Trustee(BT) in case of CIRP, Liquidation as well as Bankruptcy of Individuals and Corporate Guarantors, required under various sections and regulations issued by IBBI from time to time.

The Board prepares such List of IPs every six months considering the following:

(a) there is no disciplinary proceeding, whether initiated by the Board or the IPA of which he is a member, pending against him;
(b) he has not been convicted at any time in the last three years by a court of competent jurisdiction;
(c) he expresses his interest to be included in the Panel for the relevant period;
(d) he undertakes to discharge the responsibility as IRP, Liquidator, RP or BT, as he may be appointed by the AA;
(e) he holds an Authorization for Assignment (AFA), which is valid till the validity of Panel. For example, the IP included in the Panel for appointments during January - June 30, 2021 should have AFA valid up to June 30, 2021.

The guidelines further state that the AA will choose any name from the panel prepared by the Board for appointment of IRP, Liquidator, RP or BT, for a CIRP, Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a corporate debtors and personal guarantors to corporate debtors, as the case may be.

The DRT may pick up any name from the Panel for appointment as RP or BT, for an Insolvency Resolution or Bankruptcy Process for personal guarantors to corporate debtors, as the case may be.

The concept of preparation of panel by IBBI is to save time – reference by AA to Board and Board's response to IBBI recommending the name of IP for appointment in a specified case.

The Board also considers while preparing the list the following criterion for ranking of the IPs.

Ongoing Assignments 11. The eligible IPs will be included in the Panel in the order of the volume of ongoing processes they have in hand. The IP who has the lowest volume of ongoing processes will get a score of 100 and will be at the top of the Panel. The IP who has the highest volume of ongoing processes will get a score of 0. The difference between the highest volume and the lowest volume will be equated to 100 and other IPs will get scores between 0 and 100 depending on volume of their ongoing assignments.

IP	Volume of ongoing assignments	Difference between the highest volume and the volume of ongoing assignments of the IP	Formula	Score
1	20	100	100 /100 *100	100

2	40	80	80 / 100 * 80 100
3	60	60	60 / 100 * 60 100
4	80	40	40 / 100 * 40 100
5	100	20	20 / 100 * 20 100
6	120	0	00 / 100 * 00 100

Volume of the ongoing assignments is valued is based on the following weights

IRP of a Corporate Insolvency Resolution Process	**05**
RP of a Corporate Insolvency Resolution Process	10
IRP of a Fast Track Process	03
RP of a Fast Track Process	03
Liquidation / Voluntary Liquidation	05
Individual Insolvency	01
Bankruptcy Trustee	01

The Board very carefully works out the criterion and prepares the panel by a team of officers of the Board may be identified by the Whole Time Director.

Till now everything is perfect and there is no problem for any IP in getting his name empanelled by the Board.

However, the choice given to AA / DRT to pick up any name from the panel is giving room for the abuse of the empanelment. Though there are names in the top of the panel which is due to not having any assignments till now, the AA / DRT picking up names from the panel is biased towards IPs who are presently working on assignments and is creating a heartburn for the IPs who did not a single assignment even after empanelment for last four half years.

Some time back the Board has also attempted to conduct a survey on number of assignments an IP should handle, no further action has forth-come from this study. However, many IPs have objected to this process also.

However, the guidelines should include selection of name by AA/DRT based on the serial number of the empanelment only considering that the IP is not handling too many assignments to avoid excessive load on an individual IP. This is required as the Board has already considered the volume of on-going assignments against each IP while fixing the score and arriving at the serial number in the list of IPs prepared.

This would definitely help distribution of assignments in a rational manner by AA / DRT.

PRE – PACK INSOLVENCY MECHANISM

Dr. S K Gupta
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Introduction

The Insolvency and Bankruptcy Code, 2016 is a paradigm shift in the legal system regulating insolvency and bankruptcy in India. It provides for "institutionalized creditor-in-control mechanism" for reorganization and insolvency resolution of various entities, in a time-bound manner. Despite being at a nascent stage, IBC is a highly significant commercial law in India.

The COVID-19 outbreak and the ensuing lockdown have affected the Indian economy adversely, causing financial hardships to several businesses across the country. In the wake of the prevalent situation and to prevent mass insolvency proceedings, the President has promulgated an ordinance and suspended the filing of new cases under the Insolvency and Bankruptcy Code, 2016. The decision to suspend IBC will provide some breathing space to the businesses. However, once the suspension is lifted, the tribunal i.e. National Company Law Tribunal will be flooded with insolvency applications. Thus, it is an opportune time to revisit the pending reforms and explore alternative solutions to the conventional corporate insolvency resolution process.

Pre – pack Insolvency framework

A prepack is a form of corporate rescue which involves a combination of certain elements of various restructuring methods.[11] They are typically employed to serve dual purpose of not only preserving the company as a going concern but also to retain its enterprise value.[12] Pre - pack strive to create a balance between the interests of the creditors and those of the debtor by means of a restructuring plan being negotiated even prior to the filing of the insolvency application.[13]

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[11] *Himani Singh, Pre-Packaged Insolvency in India: Lessons from the USA and UK, Available at - http://blogs.harvard.edu/bankruptcyroundtable/2020/04/28/pre-packaged-insolvency-in-india-lessons-from-usa-and-uk/#:~:text=Corporate%20rescue%20is%20used%20as,of%20the%20debtor%20sustainable%20again.*

[12] *Finch V., Corporate Rescue: A game of Three Halves, LEGAL STUDIES, 32(2), 302-324 (2012) https://www.cambridge.org/core/journals/legal-studies/article/corporate-rescue-a-game-of-threehalves/247133711181660F64CE0DB44BECD62F*

[13] *Supra at 17.*

In this context, the definition of pre-packs provided by the Association of Business Recovery Professionals may be referred. It provides that a pre-pack is "*an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment".*[14]

A "Pre- Packaged Insolvency" is an arrangement, where the sale of all or part of a company's business or assets is negotiated with a purchaser before the appointment of an insolvency professional as the administrator. The actual sale is then executed on the appointment and approval of the insolvency professional. The pre-pack mechanism essentially facilitates the formulation of a resolution plan before any formal proceedings. This arrangement reduces the time and money spent on court proceedings and directly moves to getting a fair resolution for the company. The main objective of pre-packs is to strike a balance between the interests of the creditor and protect the business from liquidation

Pre - packs in the United States of America

The US introduced pre-packaged insolvency by enacting the Bankruptcy Reform Act of 1978. As of today, nearly one fifth of all bankruptcy applications filed in the US are pre - pack. A similar popularity is enjoyed by pre - pack in the UK, Netherlands, France and Germany.[15] Pre-packs under US laws are commenced under the provisions of Chapter 11 of The US Bankruptcy Code, 2011, which envisages a debtor in possession (DIP) regime, allowing the corporate debtor to negotiate the terms of restructuring while still remaining in possession of its assets.

In cases of pre - pack, the corporate debtor negotiates and enters into an agreement with its key creditors and solicits acceptance to the terms of the resolution plan before filing a bankruptcy petition. It is only after obtaining the requisite majority of votes in favour of the plan, that the corporate debtor goes ahead with filing the petition and seeking approval of the court with respect to the plan. All the tools otherwise available under Chapter 11 for business restructuring are available to a corporate debtor looking to enter into a pre-packaged insolvency deal.

An automatic stay is provided for during the bankruptcy process and it brings to a halt, all proceedings against the corporate debtor, and prohibits the initiation of new proceedings. Under the DIP model, the debtor is given the charge of handling its day-to-day activities and the existing management is not replaced. It is interesting to note that the US has not only popularly accepted pre - pack, but also forayed into the domain of Ultra-Expedited pre - pack. In 2016, Roust Corporation set a record for the fastest pre-packaged bankruptcy. The entire pre-packaged proceedings were approved by the bankruptcy court in a matter of merely seven

[14] *Evolving landscape of corporate stress resolution, (December 2019), available at, file:///C:/Users/hp/Downloads/evolving-landscape-of-corporate-stress-resolution.pdf*

[15] *Shayan Ghosh, Jayshree P. Upadhyay, Govt plans pre-packaged IBC deals to ease caseload, available at, https://www.livemint.com/news/india/govt-plans-pre-packaged-ibc-deals-to-ease-caseload-11588789472048.html (last visited 30/5/2020)*

days.[16] However, this record set by Roust Corporation was very short-lived and was overturned in two years by FullBeauty Brands.[17]

Full Beauty Brands Holdings Corporation Prepack : A case Study

FullBeauty Brands Holdings Corporation is a consumer retail brand, which is engaged in the business of plus-size apparels. FullBeauty filed a bankruptcy petition on 3rd February, 2019.[18] It had been experiencing a distressed market for retail apparel, reduced profits and lower revenue. To add to this, it had an outstanding payment of about USD 25 million in payment of interest dues. FullBeauty encountered a number of other hurdles.[19] It faced multiple difficulties due to merchandising and pricing issues and a declining EBIDTA. These circumstances, coupled with the competition from new players in the market led to FullBeauty's decline.

To deal with this effectively, FullBeauty appointed a new executive team and engaged restructuring advisors to restructure its debts. It was finally decided to enter into a restructuring plan and file for a pre-packaged bankruptcy. The treatment of claims under the plan provided for payment in full for holders of allowed claims under ABL facility, pro-rata payment to holders of FILO claims and 2nd & 3rd liens. However, the position of general unsecured creditors and administrative claims was not affected.[20]

On 3rd January 2019, FullBeauty announced that it had entered into a restructuring agreement with its creditors.[21] On 3rd February, 2019, it filed for bankruptcy proceedings. FullBeauty received unanimous support for the restructuring plan before the bankruptcy court. The hearing commenced on 4th February, but with such massive support for the plan, there was little to consider and the bankruptcy court approved the restructuring plan that very afternoon. The entire restructuring proceeding was completed within a period of merely twenty-four hours.

Pre - pack in the United Kingdom

The UK Insolvency Act does not expressly provide for pre-packs, yet the courts have supported their use, confirming that an administrator has the power to execute a pre-pack despite the

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[16] *In re Roust Corp., Case No. 16-23786 (RDD) (Bankr. S.D.N.Y.)*
[17] *In re FullBeauty Brands Holdings Corp., Case No. 19-22185 (RDD) (Bankr. S.D.N.Y.)*
[18] *In re FullBeauty Brands Holdings Corp., Case No. 19-22185 (RDD) (Bankr. S.D.N.Y. 2019), Disclosure Statement [Docket No. 14] (the Disclosure Statement), at 42–43.*
[19] *On 31 October 2018, the Company was scheduled to pay approximately US$26.2 million in interest payments.*
[20] *https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-1/article/fast-fashion-the-case-of-fullbeauty-brands*
[21] *'FullBeauty Brands Enters Into Comprehensive Restructuring Support Agreement with Debt and Equity Holders', http://www.prnewswire.com/news-releases/fullbeauty-brands-enters-into-comprehensive-restructuring-support-agreement-with-debt-and-equity-holders-300772300.html*

objections of the majority creditor.[22] The pre-pack administration is therefore a market tool developed by market actors to achieve a speedy and efficient resolution of financial distress. The Enterprise Act, 2002 introduced has made it possible for an administrator to be appointed out of court.[23] The administrator needs to be a licensed insolvency practitioner, bound by the Statements of Insolvency Practice (SIP).[24]

Apart from the Insolvency Act and the rules thereunder, the administrator is required to adhere to guidance notes in the form of SIP 16 issued by the Joint Insolvency Committee. [25] In the event the sale of the business or assets of a debtor company is envisaged in a pre-pack, the SIP 16 requires that the assets of the debtor company, which are proposed to be sold, must be marketed widely to ensure that the debtor obtains the best deal possible and to minimise the chances of a circuitous transfer of assets. Once a potential buyer is finalised, the debtor company files for administration and usually proposes the IP to act as the administrator.[26] Therefore, pre-packs are essentially used to describe sale transactions, where business and assets of the debtor are transferred to a purchaser and creditors are rolled into the new structure, to the extent that the sale is a share sale and they have structurally senior claims, or left behind.[27]

Pre - pack: The Indian Context

In India, IBC has already provided for a robust insolvency resolution mechanism. Yet the need for pre - pack has not gone unnoticed. The Bankruptcy Law Reforms Committee (BLRC) report deliberated on whether the recognition and availability of pre - pack is viable and finally concluded that the Indian market is still not ready for out of court restructuring, without intervention from the NCLT.[28]

A pre-packaged insolvency — under the proposed framework in India — is an arrangement where the resolution of a company's business is negotiated with a buyer before the appointment of an insolvency professional. It will be a blend of informal and formal mechanisms, with the

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[22] DKLL v. HMRC (2007) EWHC 2067
[23] Sandra Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations' Report to the Association of Business Recovery Professionals (2007).
[24]Pre-Pack Administration, available at, https://www.begbies-traynorgroup.com/pre-pack-administration
[25] Statement Of Insolvency Practice 16 Pre-Packaged Sales In Administrations, available at, https://insolvency-practitioners.org.uk/uploads/documents/f30389ce35ed923c06b2879fecdb616a.pdf
[26] Sanjana Rao, INSOLVENCY PROCEDURES — INVESTIGATING THE PRE-PACK PARADIGM IN INDIA, available at, http://www.glcmumbai.com/lawreview/volume10/Sanjana%20Rao.pdf
[27] Ibid
[28] Bankruptcy Law Reform Committee, The Interim Report of the Bankruptcy Law Reform Committee, THE MINISTRY OF FINANCE (Feb. 2015), https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf

informal process stretching upto NCLT admission, followed by the existing NCLT-supervised process for resolution as specified under the IBC,

However, the decision in Binani Cement Insolvency[29] led to an uproar. In this case, the NCLT allowed an out of court settlement, which led to the revival of the debate on the need for pre - pack in India. While the Apex Court was quick to strike down the impugned order, the question was being mooted again. Another point being considered is that BLRC was in favour of pre - pack with NCLT approval in its interim report.[30]

In light of the COVID-19 Pandemic, the Union Government suspended the initiation of insolvency proceedings in India, with effect from 25th March 2020,[31] and this provision is still in force.[32] Thus, the need for having a parallel mechanism to deal with stressed assets pressing. The previously available alternative mechanisms are filing Summary suits,commercial suits, civil suits, proceedings under the RDB Act, proceedings under the SARFAESI Act or even a petition for winding up of the company under the Companies Act, 2013. Other alternative mechanisms that may be considered here are:

RBI's Prudential Framework for Resolution of Stressed Assets: It mandates banks to review stressed accounts, and initiate a review of default within 30 days. Post which the banks can implement a resolution plan within 180 days. This is applicable for all large accounts which have a system-wide exposure of over Rs 2,000 crores effective June 2019 and for all accounts over Rs 1,500 Cr. effective January 2020.[33]

Project Sashakt: It may be termed as a precursor to introduction of Pre-packs in India and suggests an approach to manage bad loans of up to ₹ 50 crore at the bank level, with a deadline of 90 days. For bad loans between 50 crore and 500 crores, banks would have to enter into an inter-creditor agreement, authorising the lead bank to implement a resolution plan within 180 days or refer the asset to NCLT. For loans above 500 Crores, an AMC supported by an AIF will have to be established for restructuring the stressed assets.[34]

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[29] Binani Industries ltd V. Bank of Baroda and another, Company Appeal (AT) (Insolvency) No. 82 of 2018

[30] Supra at 34

[31] The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 - https://ibbi.gov.in//uploads/legalframwork/741059f0d8777f311ec76332ced1e9cf.pdf

[32] https://www.cnbctv18.com/economy/nirmala-sitharaman-sitharaman-press-conference-news-live-updates-20-lakh-crore-economic-package-coronavirus-stimulus-package-indian-economy-ibc-suspension-anurag-thakur-lockdown4-lockdown-exit-5941141.htm,

[33] RBI's June 7 circular: Banks to see impact as 210-day deadline ends, available at, https://www.cnbctv18.com/finance/rbis-june-7-circular-banks-to-see-impact-as-210-day-deadline-ends-5006861.htm

[34] Gopika Gopakumar, Mint Primer: What is Project Sashakt and how it will work, available at, https://www.livemint.com/Industry/xx5DASBD0xB9fgEPzKGwUO/Mint-Primer-What-is-Project-Sashakt-and-how-it-will-work.html

While these alternative approaches may be efficacious to a certain extent, they are beneficial only where the objective is recovery of dues and not if the objective is rehabilitation of the stressed corporate debtor, which has often been held to be the objective of IBC.[35] There is no doubt that the Insolvency and Bankruptcy Code, 2016, which repealed several schemes such as JLF[36], CDR[37]and SDR[38] has been helpful in improving stressed asset resolution. However, it cannot be denied that the Code is still undergoing teething problems and has immense scope for improvements and bringing in new mechanisms.

Pre - pack in India: Broad contours of the proposed structure

The Union Government has been considering the introduction of pre - pack in India since 2019. In light of the current scenario, it has become extremely vital to introduce statutorily recognised schemes of pre-packaged insolvency.[39] While there are a number of concerns surrounding the efficacy of pre - pack in India, the benefits offered by pre - pack cannot be ignored.

The objective of the government in introducing these pre-packaged insolvency schemes is to provide more options to the lenders and corporate debtors for resolution of bad debts. These schemes are specifically directed to reduce costs and the time taken for insolvency resolution of debtors, while at the same time reducing the judicial burden on adjudicating authorities under the Insolvency and Bankruptcy Code, 2016.[40]

It is reported that the government is planning to introduce these schemes right after the termination of the moratorium on proceedings, imposed by virtue of Section 10A of the Insolvency and Bankruptcy Code, 2016. While the details of these schemes are still being worked out, the proposal is expected to allow stressed companies to prepare reorganisation plans with the approval of at least 2/3rd of its creditors. The said resolution plan, is then to be placed before the NCLT for approval.

Two schemes are being envisaged to work on this mechanism. One scheme seeks private discussions between promoters and financial creditors, while the other one proposes involves

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[35] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17

[36]RBI, Corporate Debt Restructuring, Reserve Bank Of India (Aug. 23, 2001), available at, https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=440&Mode=0)

[37]RBI, Strategic Debt Restructuring Scheme, Reserve Bank Of India (Jun. 8, 2015),available at, https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9767&Mode=0)

[38]RBI, Strategic Debt Restructuring Scheme, Reserve Bank Of India (Jun. 8, 2015),available at, https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=9767&Mode=0)

[39] India: Pre-Packaged Deals in IBC - https://www.mondaq.com/india/insolvencybankruptcy/933504/pre-packaged-deals-in-ibc

[40] Govt working on 'prepackaged' insolvency scheme to cut insolvency delays, Available at - https://www.financialexpress.com/industry/govt-working-on-prepackaged-insolvency-scheme-to-cut-insolvency-delays/2093766/

bringing in a third party to ensure appropriate market-based price discovery.[41] However, the plans for introducing pre - pack are still in their infancy and while they are developing quickly, there is still some time before we can see the implementation of these schemes in the Indian Insolvency ecosystem.

Purpose of Introducing Prepack mechanism

The purpose of introducing pre - pack is to strike a balance between safeguarding the interests of creditors on one hand and maintaining the business and assets of the debtor company on the other hand. It provides quick and efficient means for effectuating the sale of a business without considerable costs. For a business, pre - pack are a highly viable option, particularly in cases in which the company does not have access to sufficient funding to enable it to continue trading.

IBC has several objectives, of which the first order objective of IBC is resolution. The second order objective is maximisation of value of assets of the firm and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objectives is sacrosanct.[42] Liquidation of companies is neither the objective of the Code nor a desirable result. However, by December 2019, a total of 562 applications for CIRP were admitted, out of which resolution plans were approved in only 30 cases and only 14 cases were settled, while a whopping 132 cases went into liquidation.[43] This seems to point to the possibility that the IBC is promoting corporate deaths rather than rehabilitation and resolution. The problem comes around in an even more disturbing manner when it comes to the micro, small and medium enterprises (MSMEs), which are mostly at the receiving end due to a lack of investor interest in their assets during CIRP.

It is interesting to note that the NCLT, in Lokhandwala Kataria Construction Limited v. Nisus Finance and Investment Managers[44], allowed a settlement by entering into consent terms by the parties after the insolvency proceedings under section 7 of the Code had been admitted. The Apex Court, while observing that the Tribunal does not have such a power, invoked its discretionary power under Article 142 to put a quietus to the matter.[45]

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[41] *Gaurav Noronha, Govt Weighs 2 options for pre-pack IBC resolution, Available at - https://economictimes.indiatimes.com/industry/banking/finance/banking/govt-weighs-2-options-for-pre-pack-ibcresolution/articleshow/79359697.cms?val=3728&from=mdr*

[42] *Binani Industries Limited v. Bank of Baroda & Anr., [CA (AT) No. 82,123,188,216 & 234 -2018]*

[43] *The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, Vol. 3, October- December, 2019, available at, https://ibbi.gov.in/publication*

[44] *Lokhandwala Kataria Construction Limited V. Nisus Finance And Investment Managers, LLP, Civil Appeal No. 9279 Of 2017 (Supreme Court, 20/11/2017)*

[45] *The Frenzy Of Private Settlement Under The Insolvency And Bankruptcy Code , Available At, Https://Ibbi.Gov.In/Uploads/Engagement/2ndprizeshefalichawlanliubhopal.Pdf*

Perceived benefits from pre-pack

Pre - pack can maximise enterprise value by "combining the efficiency, speed, cost, and flexibility of workouts with the binding effect and structure of formal insolvency proceedings".[46] In fact, pre - pack in certain jurisdictions have led to improved recovery rates.[47] One of the major benefits of Pre-Packs is the surety of outcome. The Resolution plan is already negotiated and finalized, giving confidence to the creditors. Another advantage is that pre - pack can facilitate going concern sale of business at 'fair value' and not just 'liquidation value'.[48]

Pre-pack being an Out of court Settlement process, significantly reduce the time involved in resolution of a stressed debtor. The CIRP becomes smoother with an already decided plan and creditors on board. The current framework prescribes about 330 days for insolvency resolution after admission of a petition, which is usually delayed due to several rounds of litigation.[49]

Under CIRP, the parties approach NCLT once before initiating the process and once for approval of resolution plan. However, in case of pre - pack, the parties' approach NCLT only after agreeing to a resolution plan, in order to seek its approval and secure its enforceability. Pre - pack also provide a substantial protection to brand name. The company in distress can avoid negative publicity drawn out of bankruptcy process and the chances of non-responsive creditors can also be negated to a great extent. Ultimately, it also reduces the burden on the adjudicating authority, providing access and certainty to potential resolution applicants.[50]

Certain jurisdictions also provide for confidentiality of details of the corporate debtor's financial stress and the resolution plan. This element of confidentiality prevents destruction of value that takes place on the proclamation of insolvency and can contribute substantially in preserving the going-concern value of the company.[51]

Potential issues in a pre-pack

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[46] Jose M. Garrido, Out-of-Court Debt Restructuring (World Bank Study 2012), para 101, Available at - http://documents.worldbank.org/curateden/417551468159322109/pdf/662320PUB0EPI00turing09780821389836.pdf

[47] S. Frisby, 'A Preliminary Analysis of Pre-Packaged Administrations (Report to the Association of Business Recovery Professionals)' (2007), https://www.iiiglobal.org/sites/default/files/sandrafrisbyprelim.pdf

[48] Alpha Partners, Pre-Packs Save Financially Distressed Companies, available at, https://www.mondaq.com/india/InsolvencyBankruptcyRe-structuring/877106/Pre-Packs-Save-Financially-Distressed-Companies

[49] ArcelorMittal India Private Limited v. Satish Kumar Gupta, 2019 SCC OnLine SC 1478

[50] Ibid.

[51] Teresa Graham, 'Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP' (2014) http://data.parliament.uk/DepositedPapers/Files/DEP2014-0860/Graham_review_into_pre-pack_administration_-_June_2014.pdf

One of the main criticisms of pre-packs is that they are fixed deals between the management and the administrator. Another disadvantage is the lack of transparency and potential bias towards secured creditors.[52] This places the interest of CD and secured creditors at a higher pedestal. Thus, the process of pre-packs is often described to be opaque. [53]

Pre - pack pose a large threat in terms of preferential, undervalued, fraudulent and extortionate credit (PUFE) transactions. While the debtor and the creditors negotiate the structure of the agreement, there is a high probability of the corporate debtor entering into a PUFE Transaction and reducing the ability of creditors to recover their rightful dues.

Another concern is that certain directors of the corporate debtor may be motivated to retain control of the business, and pre - pack might be used towards this cause. In fact, even Section 29A loses its effectiveness when it comes to Pre-Packs. Considering the situation in such sales, most of the times the promoters of the company themselves bid and come up with a resolution plan and in such a scenario, the effectiveness of Section 29A stoops to zero.

The element of confidentiality is also pretty much a double-edged sword. While it helps CD to reorganise itself without letting out much into the public domain, it also poses a challenge to the implementation of the prepack. Since the entire process is opaque and only seeks to receive the assent of secured lenders, it fails to provide enough encouragement to the unsecured creditors to actively participate in the process. There might also arise a situation, where the assets of the CD are transferred without making due payment to the unsecured creditors. Thus, adequate remedies and recourse must be introduced in pre - pack to protect the interest of unsecured creditors.[54]

The lack of a moratorium is another concern with pre - pack. It may give rise to a situation where creditors can approach the Courts to enforce their remedies, while the debtor is negotiating a pre-pack resolution. Such action will ultimately lead to a lesser realisable value of the debtor's estate as well as reduced ground for negotiation in a prepack.

Suggestions for introducing Pre - pack in India

In order to make pre - pack workable in India, the schemes will have to be structured in consonance with the CIRP procedure. Considering most of the insolvency cases don't reach their conclusion due to lack of consensus, it would be necessary to ensure cooperation between creditors. In this regard, the following suggestions may be considered:

1. Parties must be free to appoint a resolution professional (RP) to administer the process. However, this can only be done on the occurrence of a default and not otherwise.
2. Post appointment, the RP must constitute a committee of creditors (COC), similar to the one formed during the regular CIRP under the IBC.
3. To avoid multiplicity of proceedings, an agreement creating moratorium shall be entered between the Creditors and Corporate Debtor. During this period, all creditors must be invited to submit their claims against the CD to the RP.

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[52] *Ibid.*
[53] *Ibid.*
[54] *Pre-Packaged Insolvency: A Solution in the times of COVID-19, Available at - https://lexlife.in/2020/08/25/pre-packaged-insolvency-a-solution-in-the-times-of-covid-19/*

4. The RP may invite bids, subject to adequate marketing. He must also take adequate steps to preserve the market value of the debtor, to avoid reputational risks and loss of employment or customer confidence.
5. The RP must ensure that confidentiality of all aspects of the process is maintained.
6. A criterion of eligibility must be prescribed by IBBI, providing appropriate clarification on the eligibility/ ineligibility of certain people (promoters of the corporate debtor and other related persons), as far as making a resolution application is concerned.
7. The RP shall carry out the valuation of the assets of the debtor and shall collate the claims of creditors.
8. Once a resolution plan is negotiated between the COC and potential buyers, a public announcement of the plan must be made.
9. The resolution plan must then be put to vote before the COC and approved by at least 66% votes of the COC.
10. After approval by COC, the plan must be presented before the NCLT for approval. The NCLT must give dissenting creditors or other interested parties, an opportunity to raise objections, and a fair hearing to such objections before approval of the plan.

Conclusion

Since India has never had any expedited insolvency resolution mechanism, the introduction of pre - pack would require serious consideration coupled with due diligence. A comprehensive study of the ground level problems may be helpful in ensuring a robust scheme of pre - pack. Before Pre-pack can be introduced in India, the IBC may have to go through certain amendments, laying out the role, powers and responsibilities of a resolution professional in a Pre-pack insolvency resolution process.

It is also pertinent to mention that Pre-packs have been most successful in US and UK for debtors with concentrated debt and a small group of creditors. For this reason, it is important to place a restriction on large conglomerates with highly heterogeneous debt and larger groups of diverse creditors to opt for a Pre-pack. [55] It is important to note here that the role of an IP will assume utmost importance in pre - pack, as he will be responsible for driving the entire process starting from the very initiation of negotiations between the corporate debtor and the creditors. The insolvency professionals must also balance the interests of all stakeholders, ensuring that no stakeholder can get the benefit of unjust enrichment. Therefore, in order to ensure that insolvency professionals, discharge their duty with utmost integrity or righteousness, with the sole objective of rehabilitating/ reorganising the stressed corporate debtor, the IBBI may have to prescribe stringent regulations. The regulations may also be supplemented through comprehensive professional development initiatives by way of regular workshops, seminars and trainings on the conduct and approach of insolvency professionals during a pre-packaged insolvency resolution process. Pre - pack would strengthen the existing framework for dealing with stressed companies. Therefore, it is felt that India not only needs, pre – pack mechanism but also deserves a good framework dealing with pre-packaged insolvency resolution.

[55] *Ibid.*

APPLICATION OF ASSIGNMENT OF CLAIMS/ASSETS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

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Assignment of claims and assets under IBC has come to play an important role. This Article covers provisions relating to assignments during CIRP and Liquidation Process and deals with application of assignment of claims and assets, in particular to 'not readily realizable assets' (NRRA) which has been under discussion recently under the Code and various issues and legal precedents thereof. Recent amendment by IBBI to Liquidation Regulations has brought focus back on completion of liquidation process expeditiously. With large number of ongoing liquidation cases, challenge is to ensure that dissolution process does not become as cumbersome as in pre-IBC regime.

Under Insolvency and Bankruptcy Code, 2016 (IBC or the Code), while corporate insolvency resolution process (CIRP) deals with the formulation of resolution plan by reorganization of liabilities, liquidation largely deals with sale of assets, distribution of proceeds to stakeholders and eventual dissolution of the Corporate Debtor (CD). Generally, debt and claim terms are used interchangeably but have different meanings. IBC has defined the 'claim' as well as 'debt; as follows:

As per Section 3(6) of the Code, "Claim" means:

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

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

As per Section 3(11) of the Code, "Debt" means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt.

From above, it is clear that claim is a wider term and includes debt but is not vice-versa. In case of debt, the rights and obligation of the parties are identified and fixed unlike in case of a claim.

Assignment of financial debt is one of the most common form of transactions in the financial markets. It essentially entails transfer of a debt from a creditor (assignor) to a third-party (assignee). On assignment, third party investor steps into the shoes of the creditors and obtains whatever rights the creditor has against the debtor. There can be various reasons for assignment of a debt by a creditor which inter alia includes exiting a particular exposure, monetize debt, risk and balance sheet management, etc.

In India, the assignment of debt / claims is governed by the Indian Contract Act, 1872 and thus it is important to understand the basic rules and legality of assignment with respect to debt and claims. As a rule, the rights are assignable simply without permission of the other party but the law and legal interpretations relating to assignment of obligations are not so straightforward.

During liquidation and eventual dissolution of a company, assets have to be disposed of to pay claims. Prior to enactment of IBC, the winding up could be ordered only by the High Court and lengthy processes kept substantial assets unrealized and undistributed. Expeditious disposal of assets and eventual dissolution of CD have assumed importance since as per latest figures, 893 cases are pending to be dissolved. In 160 cases, liquidation process is ongoing for more than two years and in 370 cases, liquidation process is ongoing for more than one year but less than two years. A liquidator faces many challenges to dispose of various types of assets of CD completely including 'not readily realizable asset' before dissolution is ordered. Liquidators as expert professional and specialist are required to dissolve in a quick and efficient manner given wide powers given to them under IBC.

Liquidation proceedings require more of legal and accounting skills for dissolution of CD as compared to operations management skill during CIRP. Delays in dissolution impact the possibilities of rapid use of productive assets lying dormant in these proceedings.

This article deals with application of assignment of claims and assets, in particular 'not readily realizable assets' (NRRA) which has been under discussion recently under the Code and various issues and legal precedents thereof. The Liquidation Regulations have been amended recently on November 13, 2020 and has brought focus back on quick disposal of various types of assets under the Code to ensure completion of liquidation process and dissolution of CD expeditiously.

Assignment of debt during CIRP

During CIRP, while the CD's resolution process is ongoing, some creditors may assign/transfer their debt to third parties to inter alia manage risks, balance sheet management and to create liquidity upfront. Assignment of debt is allowed during CIRP under regulation 28 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations') as follows:

"Transfer of debts due to creditors

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

(2) The resolution professional shall notify each participant and the Adjudicating Authority of any resultant change in the committee within two days of such change."

The constitution of Committee of Creditors (CoC) under Section 21 of the Code, also governs treatment of assigned debt under sub-section (5) as:

"Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer".

Hence, a creditor can assign its debt during CIRP. The Code permits treatment of assignee as creditor who has acquired debt through an assignment, and it is explicitly provided in Part II of the Code applicable to both CIRP and Liquidation process.

Section 5(7) of the Code states: "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to'.

Section 5(20) of the Code states: ` "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred'.

It may be observed that focus has been on assignment done in compliance with various laws including Indian Stamp Act, 1899. The Hon'ble Supreme Court (SC) in the matter of ICICI Bank Limited v Official Liquidator of APS Star Industries Ltd. & Ors. (2010) held that:

"…rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned."

The Hon'ble NCLAT made the following observations in respect of assignment of debt by creditors:

In the matter of Fortune Pharma Private Limited (2018):

"…A legal transfer of 'debt' account from a 'creditor' (assignor) to a third party (assignee) provides the rightful ownership to the assignee. The 'debt assignment' is a transfer of debt with all the rights and obligations associated with it from a creditor to a third party, who is' assignee'.

The 'debt' is in the form of loan from a 'financial institution', the debtor is referred as a 'borrower' and if the debt is in the form of securities, such as bonds, the debtor is referred to as an 'issuer'. Undisputedly, the assignment is the transfer of one's right to recover the debt of another person as a contractual right. Rights of an 'assignee' are no better than those of the 'assignor'. It can be, therefore, held that 'assignor' assigns its debt in favour of the 'assignee' and 'assignee' steps in the shoes of the 'assignor'. The 'assignee' thereby takes over the right as it actually did and also takes over all the disadvantages by virtue of such assignment."

In the matter of Synergies Dooray Automotive Limited (2018):

"In the result, we hereby declare that both 'Synergies Castings Limited' and 'Millennium Finance Limited' were eligible to execute the assignment agreements in question and all rights flow those agreements to 'Millennium Finance Limited'. After getting assignment of rights, the 'Millennium Finance Limited' is fully competent to participate in 'Committee of Creditors' in question and it cannot be called a related party as explained."

During CIRP process, financial creditors assign their debt to third parties – asset reconstruction companies (ARCs), distressed debt investors, etc. Many cases of CIRP have witnessed significant debt assignment. Of late, trend has been observed that financial creditors choose to assign their debt in proximity to the final process of submission of resolution plan. Above ensures better interest and participation by investors on account of reduced uncertainty of resolution as well as holding period of investment and improved visibility of resolution amount.

In August-September 2020, Axis Bank sold its debt of KSK Mahanadi Power Limited (KSKMPL) to Aditya Birla ARC Limited/Varde Partners and Federal Bank sold its debt to CFM ARC Limited. In November 2020, IDBI Bank has also proposed sale of Rs 645.6 crore ($88.2 million) non-performing loans of KSKMPL.

Liquidation Process under IBC

Upon commencement of liquidation process, the liquidator has to recover and realize all assets and dues to the CD in a time-bound manner for maximization of value for stakeholders as per Regulation 39 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations)[1]. The liquidator forms liquidation estate and holds the liquidation estate as a fiduciary for the benefit of all the creditors as per Section 36(2) of IBC. The liquidator works under the overall directions of the Adjudicating Authority (AA) and has powers and duties as specified in section 35(1) of the Code.

The term liquidation is derived from the word 'liquid' that implies that a liquidator has to convert the assets into liquid cash and then distribute to the stakeholders.

Unlike earlier regime of liquidation in pre-IBC period, wherein liquidation was carried out by court attached Official Liquidator (OL), who had to approach High Court for various approvals including for confirmation of sale of assets, liquidator under IBC has been given wide powers which are more than that of Resolution Professional also. A research paper was prepared by Vidhi and EY in December 2019 which evaluates how the office of the OL may be integrated with the IBC system without compromising on the new law's efficiency objectives so that some shortcomings (specific to certain types of liquidation cases) in the liquidation process under IBC can be overcome sooner by utilizing the office of the OL[2].

As against RP, liquidator is not under administrative control of CoC, though a mechanism for oversight and monitoring of the liquidation process has been created through the constitution of Stakeholders Consultative Committee (SCC) under regulation 31A of Liquidation Regulations w.e.f. 25th July, 2019. The liquidator constitutes SCC, with representatives from all classes of stakeholders, within sixty days from the liquidation commencement date. Unlike for IRP/RP, there is no specific provision for a liquidator to be replaced under IBC.

Regulation 44 provides that the liquidator shall liquidate the CD within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under Chapter II of Part II of the Code, before the AA or any action thereof. Further, Section 44(2) provides that if the liquidator fails to liquidate the CD within one year, he shall make an application to the AA to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation. Further, as per Section 45(3), the liquidator has to submit an application along with the final report and the compliance certificate in Form H to the AA for closure of the liquidation process/dissolution of the CD.

As per Section 35(1)(k) of the Code, the liquidator is also empowered to institute or defend any suit or legal proceedings.

The Liquidation Regulations under the Code tie the payment of liquidator's fees in proportion to the amount realised and distributed from the sale of assets, and fee decreases with the time taken to liquidate the CD. In cases where the CD has negligible assets, liquidators may not earn much from conducting the liquidation, and hence, may not be motivated to take up such cases. The amendment by the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 ('CIRP Second Amendment Regulations') and also the Liquidation Amendment Regulations seek to address this, by providing that excess liquidation costs shall be met by the CoC or by financial institutions in the CoC.

The Liquidation Regulations have been amended over a period of time to provide more flexibility and powers to the liquidator to find viable solutions to close liquidation process expeditiously.

The status of liquidation processes as on June 30 and September 30, 2020 and amounts of claims, realizations and distribution as on September 30, 2020 under IBC as per IBBI Newsletters[3] are as follows:

Status of Liquidation	Numbers	
	June 2020	**September 2020**
Initiated	**955**	**1025***
Final Report submitted #	88	132
Closed by dissolution	66	77
Closed by going concern sale	3	4
Compromise/Arrangement	0	1
Ongoing	**867**	**893**
>2 years	104	160
>1 year < 2 years	324	370

*Excludes 8 cases where liquidation order has been set aside by NCLT/NCLAT/SC

#Excludes two cases where application for early dissolution has been filed with NCLT

(Rs in crore)

Total Stakeholders (Nos)	Amount of claim admitted	Liquidation value	Amount realized	Amount distributed
132 Liquidations where Final Report submitted				
1,745	18,916.90	266.77	280.36	275.56
Ongoing 806 Liquidations*				
2026,179	575,904.37	30,412.80**	Not Available (N.A.)	N.A.
Total				
2027,924	594,821.77	30,412.80	N.A.	N.A.

*Data for other liquidation cases not available

**Out of 893 cases, liquidation value of only 770 cases available.

As may be observed from above under IBC, in 1,025 cases liquidation has been initiated, Final Progress Report has been submitted in 132 cases and 77 cases have been dissolved. Further, liquidation has been initiated in 1,025 cases, Final Progress Report has been submitted in 132 cases and 77 cases have been dissolved. In 160 cases, liquidation process is ongoing for more than two years and in 370 cases, liquidation process is ongoing for more than one year but less than two years.

Total claim admitted under ongoing liquidation cases is Rs 575,904 crore which is a significant amount though liquidation value under these cases is low. As may be observed, total amount realized from 132 liquidation processes where final report has been submitted as on September 30, 2020 is Rs 280.36 crore, which appears to be abysmally low. It may be possible that aggregate amount realized under balance cases of ongoing liquidation is not available and therefore not added/reflected in the total amount realized from liquidation cases which can be significant number. It is therefore suggested that information on amount realized under balance cases of liquidation where final report is not submitted should also be available so as to project overall realizations under liquidation process so far.

Assignment of Debt during Liquidation

Unlike CIRP, the assignment of debt by the financial creditors after commencement of the liquidation process was not specifically provided for in the Liquidation Regulations. As per amendment in Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations) dated November 13, 2020 issued by IBBI[4], following regulation has been inserted to provide assignment of debt during liquidation process:

"30A. Transfer of debt due to creditors.

1) A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.
2) Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.
3) The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31.

Above provision will provide way for assignment of debt by a creditor, similar to provided under CIRP regulations. It should be noted that above provision is applicable to assignment of debt though it is not related to expeditious closure of liquidation process, it will enable exit to the

creditors who would not like to wait until the realization of assets and distribution to creditors by liquidator.

Assignment of debt during liquidation process is not new. In 2003, in one of the earliest assignment agreement even prior to assignment under SARFESI became applicable, ICICI Bank assigned its debt in Electronics and Computers(India) Limited, a company under liquidation to a private investor by way of assignment agreement for realization of its dues. Above assignment agreement with underlying asset in Ghaziabad, Uttar Pradesh was duly registered.

IBC Provision on Dissolution of Corporate Debtor

As per Section 54 of the Code, where the assets of the CD have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such CD. The Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the CD shall be dissolved from the date of that order and the CD shall be dissolved accordingly.

Section 481 of the Companies Act, 1956 - Dissolution of company

As per Section 481 of the Companies Act, 1956, when the affairs of a company have been completely wound up or when the Court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made], the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

As may be observed, specific power as per the Companies Act, 1956 wherein Court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made, does not find mention in IBC. As per IBC assets of the CD are to be completely liquidated before dissolution of the CD but in regulation 14 of Liquidation Regulations some provision for early dissolution inconsistent with Section 54 are there to cover situation given in Section 481 of the Companies Act, 1956.

Recently, in the matter of Gee Ispat Pvt Limited (2020), in an application for passing an order of dissolution as per section 54 of IBC, on November, 2020, NCLT observed from Compliance Certificate - Form H filed by the liquidator the pendency of certain investigations. NCLT held that that dissolution puts an end to the legal existence of a company and liquidator shall also not be able to represent the non-existent company before the investigative forum. Hence, it

was viewed that pendency of an investigation creates a bar in ordering dissolution of the company and the application of dissolution was not approved.

Recently, the Hon'ble NCLT, Bengaluru Bench vide its order dated November 16, 2020 in the matter of *Synew Steel Private Limited*, exercising its inherent powers conferred, ordered direct liquidation of the CD from CIRP thereby obviating the mandatory requirement to undergo the liquidation process in the interest of speedy justice. Above order was passed on account that the CD had nil assets or funds to meet the expenses of CIRP and CoC could not be constituted as claims received were only from related parties, which in turn made it certain that the liquidation process would not have been successful. Hence, to save the unfruitful cost that would have been incurred, the CD was allowed a direct dissolution. Notably, in said case the requirement of avoidance examination was not done due to non-availability of funds and effectively a clean chit was given to the above CD without any inquiry whatsoever, thereby raising issue whether such precedent can be misused to erase avoidance transactions, if any.

Sale of Assets under Liquidation – Issues and Challenges

A liquidator faces many challenges in disposing of assets of the CD and pay to creditors from asset that were otherwise not realized for years and whose value may also deteriorate with time. There are also significant instances wherein the liquidators are unable to sell the asset expeditiously for various reasons including dispute pending with respect to such assets.

Regulations 32(b), 32(e), and 32 (f) of the Liquidation Regulations provide for a mechanism to sell the assets of a CD on a slump sale basis and the ownership or the business of the CD on a "going concern" basis, respectively, from the liquidator. Recently, NCLT, Ahmedabad in liquidation process of ABG Shipyard Ltd on December 2, 2020 allowed the liquidator's application under Section 35(1)(f) of the Code and 33(2)(d) of Liquidation Regulations to dispose of the assets of above CD by way of public auction or private contract, after four e-auctions had failed which will expedite sale of assets.

The modification to the Regulation 32 of the Liquidation Regulations by inserting the concept of 'sale as a going concern' provide a statutory framework for providing a second chance to a viable CD or an operational 'undertaking' of such a CD to be rescued even in a situation where the liquidation proceedings have been commenced. Section 32A for sale as a going concern was added vide the IBBI (Liquidation Process) (amendment) Regulations, 2019 w.e.f. July 25, 2019 to provide more clarity on sale as a going concern.

Till September 30, 2020, four CDs were closed by sale as a going concern under liquidation process. These four CDs with claims of Rs 736.53 crore realized Rs 81.58 crore as against liquidation value of Rs 60.03 crore. Number of cases and amount resolved/realized in liquidation

process through by going concern basis is not significant. Number of liquidation cases and amount involved therein which are being run as going concern basis is not available.

Though running a CD under liquidation as going concern may be a practical step, it has to be for a very limited and finite period. If such numbers of cases increase and period over which such cases are run on going concern basis elongate, it may result into 'BIFR like' scenario wherein companies 'half dead and half alive' were limping along for a long period. Such companies compete against healthy companies as there is no interest liability being borne by such companies thereby promoting unhealthy competition in the marketplace.

The provision relating to going concern of a CD during liquidation has however been opposed by the 'Insolvency Law Committee' in para 5.9 of its report of February 2020[5] as under:

"*In light of the above, the Committee agreed that it would be contrary to the scheme of the Code to allow a CD to be sold as a going concern after the conclusion of its liquidation process, which envisages a dissolution of the corporate entity. However, where the business of the CD can be sold as a going concern, the liquidator may attempt the same. Accordingly, the Liquidation Regulations should be appropriately amended to prevent a going concern sale of the corporate debtor.*"

To address many of the above issues which impacted expeditious completion of corporate liquidation process under the IBC, the Insolvency and Bankruptcy Board of India (IBBI) issued 'Discussion Paper on Corporate Liquidation Process' dated 26th August, 2020 ('DP')[6]. DP envisaged the introduction of assignment of **Not Readily Realisable Assets** (NRRA). Major points discussed in the DP are as below.

1. **Contingent assets** : A liquidator is required to take action to recover the amount receivable from the contingent assets (receivables), e.g., disputed receivables, disputed assets, a lawsuit pending against competitor for infringement of patents, pending claims under warranty, pending claims against project authority for cost overrun on account of not providing scheduled right of access, etc., which may accrue to a CD based on an occurrence of uncertain future events. The CD or liquidator does not have any control over the occurrence of such future events. The Code also casts duty on liquidator to examine avoidance transactions in which the CD was involved before the onset of insolvency process to ascertain whether any of the CD's property/assets that should be available for distribution among all his or her creditors was diverted improperly. Such transactions may usually be contested with a view to reclaim these assets from the recipient or beneficiary for the benefit of the creditors.

2. **Lack of funds for meeting legal expenses** : One of the greatest hurdles faced by a liquidator in taking up legal proceedings to maximise the value of the CD, is lack of funding for meeting the legal expenses involved in the process. Further, such litigation causes inordinate

delay in completion of liquidation process. The liquidator may have been left with few or no assets and the creditors may be reluctant to risk losing more money in funding the litigation. Hence, the practical challenge before the liquidator is to arrange funds for taking legal action. The delays caused in pursuing such actions may result in loss to the stakeholders, depletion in value of resources and uncertainty in closure of the liquidation process. In such a scenario, there is no effective mechanism to pursue contentious receivables, once the liquidation process is completed.

3. **Assignment of NRRA :** It is worth considering assignment of NRRA for whatever amount, the market is willing to pay, and distribute the same among stakeholders and close the liquidation process. To benefit the stakeholders, particularly creditors, when the liquidation estate is insufficient to pay the debts, the liquidators can be provided with the right to assign certain statutory rights of action (such as avoidance transactions actions, contingent claims etc.) to the third parties, subject to certain safeguards. Looking at the best interest of the estate as a whole, the liquidator may go forward to assign these assets to realise some value out of them and expedite to complete the process within the prescribed timelines under the Code/Regulations to the best possible extent.

Options for Assignment

Absolute Assignment – Option I

Under this option, assignment of NRRAs will be absolute and the assignee (party to whom the assets are assigned by liquidator (assignor) would have right over the assets and any action related thereto. The assignment would include the transfer of all the legal rights, remedies and power to bring the action to an end (e.g., by settlement) without the interference of the assignor.

Assignment with recompense facility – Option II

Assignment with recompense facility will allow the liquidator to assign the asset with an initial price. Any subsequent net discovery (i.e., value realised less costs incurred in the recovery process) of the value over and above the initial price would be shared between assignee and the assignor, as per terms of the engagement entered into to enforce the assignment. Where the liquidator assigns a right of action for a share of the 'winnings' terms which is less than absolute, he exposes the CD or himself open to a claim for adverse costs from the defendants in the event of unsuccessful claim. Thus, liquidator has to be cautious in the terms of assignment agreement and needs to take adequate safety measures with regard to unsuccessful action while opting for an assignment agreement with recompense facility (like sharing only in successful recovery and assignee bearing the costs of an unsuccessful action).

The liquidator also has to provide for distribution in the terms of assignment, in case the share of assignment proceeds is received later than the dissolution of the CD.

4. **Consultation with SCC :** The liquidator may also be required to have deliberations on assignment of NRRA with SCC, who may have access to relevant records and seek following information as may be required for effective assignment in terms of merit of cause of actions, actions to be taken and likely realization. Against this, SCC may evaluate whether to hold and continue action or assign and take decision accordingly.

In line with regulation 31A of Liquidation Regulations, the SCC may advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the SCC, present and voting. However, the advice of the SCC shall not be binding on the liquidator. Post such consultation with SCC, if the liquidator takes decision(s) that is contrary to the views expressed by SCC (with at least sixty-six percent majority), he shall record the reasons in writing for such contrary view and mention it in subsequent progress report / final report submitted to the AA.

5. **Principles to be followed by Liquidator :** The liquidator may be required to consider the following basic principles before assigning these assets:

a. Acting in the best interest of liquidation estate;

b. Seeking maximum consideration for the assignment;

c. Consulting the SCC;

d. Assignment through an auction or if an auction is not possible, on an arm's length basis;

e. Assignment shall be subject to section 29A of the Code;

f. Liquidator to be reasonable, fair and should act in good faith.

Based on above discussion paper, as per IBBI (Liquidation Process) (Fourth Amendment) Regulations, 2020[4], in the principal regulations, after regulation 37, the following regulation has been inserted on November 13, 2020, namely:—

"*37A. Assignment of not readily realisable assets*

1) A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

Explanation—For the purposes of this sub-regulation, —"not readily realisable asset" means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential,

undervalued, extortionate credit and fraudulent transactions referred to in Sections 43 to 51 and Section 66 of the Code."

Further, in the principal regulations, in regulation 38, in sub-regulation (1), for the words —"cannot be readily or advantageously sold", the words —"could not be sold, assigned or transferred" shall be substituted.

As may be seen, liquidator has to follow a transparent process for transfer or assign and has to be in consultation with the stakeholders' consultation committee in accordance with regulation 31A. Further, modification of Section 38 also remove ambiguity with respect to these assets.

Liquidator has been bound by various provisions to whom the assets can be sold . As per Proviso to section 35(1)(f) of the Code, the liquidator shall not sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. Further, sub-regulation 8 of regulation 37 of Liquidation Regulations provides that even a secured creditor cannot sell or transfer an asset, which is subject to any security interest, to a person ineligible under Section 29A of the Code.

In *State Bank of India vs. Anuj Bajpai, Liquidator (2019)*, the NCLAT considered the issue whether a 'Secured Financial Creditor', while opting out of liquidation process under Section 52(1)(b) of the Code is barred from selling the secured assets to the 'promoters' or its related party or the persons who are ineligible in terms of Section 29A of the Code. The NCLAT held that a secured creditor releasing assets outside of liquidation process under the Code cannot sell the assets to persons ineligible under section 29A of the Code.

Analysis and Impact of above Regulations

The said Amendment addresses cases wherein liquidator may have been left with few or no assets and the creditors may be reluctant to risk losing more money in funding the litigation. In cases, where sufficient assets or funds are available, liquidator as an expert professional with support of the SCC may carry on realization from the assets for the maximization of the realizations from the assets of CD.

These changes will enable liquidators to undertake actions for expeditious closure of CD. However, despite of above changes, liquidators are going to face multiple issues in in its implementation. However, the liquidator will continue to face challenges as follows:

1. Currently, there is hardly any market for sale/purchase of actionable claims (contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in Sections 43 to 51 and Section

66 of the Code) at present. In the absence of a market, liquidators may find difficult to assign or may not find any value.

2. In case of disputed claim, the parties will have counter claims and assignment of obligation without permission of other party will remain a challenge.

Assignment of Rights and Obligations

As per law, assignability of a right can be curtailed by way of explicit provisions in the contract itself. Therefore, a non-assignment clause will restrict the assignability of rights under the contract.

In Khardah Company Ltd v. Raymon & Co (India) Private Ltd. AIR 1962 SC 1810, question arose as to whether an obligation coupled with a benefit was assignable and Hon'ble SC stated, "An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule, an obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties."

"As a rule, a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This rule applies both at the common law and in equity (vide para 337 of Halsbury's Law of England, Fourth Edition, Part 9). Where a contract involves mutual rights and obligations an assignee of a right cannot enforce that right without fulfilling the co-relative obligations."

The Calcutta High Court in *Hindustan Steel Works Construction Ltd. v. Bharat Spun Pipe Co., AIR 1975 Cal 8*, while deciding the application for setting aside an arbitral award, discussed the scope of assignment and held that the correct position in law seems to be that whether the contract is assignable or not depends upon the nature of the contract. A contract in the nature of a personal covenant cannot be assigned. Secondly, the rights under a contract can be assigned, but the obligations under a contract lawfully cannot be assigned. Thirdly, the intention about assignability would depend upon the terms and the language used in a contract. Lastly, existence of an arbitration clause *per se* does make neither the contract assignable or non-assignable. [7]

One may therefore have to first identify whether the rights and obligations under the contracts are severable or otherwise. The rights would be assignable if the rights arising under the

contract are not arising out of or connected to the obligations, however, assigning only rights, where such rights arise out of the obligations, may not be possible. Assignment of a liability is not possible without permission of the other party. The other party can seek performance against the original party or assignee as it may chose if assignment is one without permission of the other party. There may be counter-claims in the litigation that is proposed to be transferred. If counterclaims exist and are successful, then the amounts receivable or recoverable from a transferred claim will be reduced to the extent that any such counterclaim or set-off is awarded to the counterparty.

The Madras High Court in the case of MT Rajamanickam Chetty and Anr v TR Abdul Halim Sahib held that the restriction under section 6(e) of the Transfer of Property Act, 1882 (TOPA), which provides that a mere right to sue cannot be transferred, was limited to the right to transfer the contesting of a legal proceeding, and that the provisions of section 6(e) did not prohibit the transfer of benefits that may arise from the results of pending litigation.[8]

On assignment, parties will have to pay stamp duty under Indian stamp laws (which differ from state to state), as assignment transactions are subject to stamp duty, which would need to be factored into the cost. In several states, a deed of assignment attracts significant stamp duty, which is paid on an *ad valorem* basis, and in some states no distinction is made between conveyances of real estate and transfers or assignments of receivables, with both attracting similarly high stamp duties. Registration of assignment deed may also be required if asset involved is an immovable property.

Assignment of Arbitration claims mainly for EPC Companies

In the past, EPC companies have monetized their litigated claims which are akin to NRRA. However, investors take comfort from assignor/obligor continued to be involved/assist in litigation. In year 2018, Patel Engineering Limited undertook transfer/Assignment of actionable claims and certain rights of real estate assets to a Special Purpose Vehicle (SPV) with corresponding debts and liabilities, aggregating approximately Rs 2,169 crore - about 51% of equity, was taken by a new investor, Eight Capital.

In 2019, HCC Limited signed terms with a consortium of investors led by Blackrock, whereby it agreed to assign its beneficial interest/rights in a portfolio of identified arbitration awards and claims for Rs 1,750 crore to an SPV. As per terms, HCC shall continue to take recovery measures/litigate the Specified Claims on behalf of the SPV. HCC was to also issue a corporate guarantee of Rs 625 crore in favour of the investors to provide comfort on the expected cash flow arising from the Specified Assets. As may be observed, above transactions were mainly to provide priority funding to distressed corporates against litigated claims rather than litigation

funding. Indian market is yet to see litigation funding without recourse available in the western countries. In above structure, these companies continued to pursue litigation for the recovery of claims which if required to be done by CD under liquidation by CD, CD will not be dissolved.

In resolution of Era Infra Engineering Limited, it is understood that receivables aggregating Rs 23,000 crore are stuck in arbitration and Company has received arbitration awards of Rs 1,200 crore during the insolvency period. Resolution applicants are committing to pay mainly from arbitral awards the CD gets as part of resolution plan.

The Delhi High Court in *Kotak Mahindra Bank v. S. Nagabhushan & Ors.*, 2018 SCC OnLine Del 6832, while deciding the application under Section 34 was faced with the question whether there was valid assignment of arbitration agreement or not. The arbitrator decided that since the claimant is not signatory to the arbitration agreement the matter cannot be decided through arbitration. However, the Court held that the loan agreement by its very nature was assignable. The Court viewed that once the rights under the loan agreement are assigned in favour of the petitioner, the rights under the arbitration agreement, being only in the nature of a remedy for enforcement of such rights, are equally assignable and have been duly assigned in favour of the petitioner in the present case by way of the assignment agreement. The Court followed *Bestech India Private Ltd. v. MGF Developments Ltd.* (2009) 161 DLT 282 and held that if a contract is assignable, an arbitration clause will follow the assignment of the contract.[7]

By virtue of Section 36 of the Arbitration and Conciliation Act, 1996, on expiry of the period for an application of setting aside, an arbitral award shall be enforceable in accordance with the provisions of Civil Procedure Code, 1908 (CPC) in the same manner as a decree of a court. Therefore, the award is assignable according to the provisions of the CPC dealing with assignment of decree.[7]

However, in order to have successful recovery of the underlying claim, assignee or investor is likely to require considerable assistance and co-operation from the assignor in terms of assisting with the production of witnesses and the giving proof in support of the claims until the recovery is done. In such cases, liquidator is not likely to be exiting completely on assignment of NRRA.

Concluding Observations

In cases, wherein liquidator is unable to close liquidation by sale of valuable rights wherein obligations/counter-claims will continue and funds are available, liquidator and SCC may not be in a hurry to close the process quickly unless there is deterioration of value. Other contentious issues which a liquidator will have to deal with at the time of assignment are:

1. validity of assignability as per law;
2. valuation of such assets;
3. shallow market of such assets;
4. information memorandum;
5. disclosures while selling such assets;
6. Fraud or criminal proceedings and attachments, if any;
7. non-recourse basis; and
8. distribution of proceeds/consideration.

Taking into account, number of cases under liquidation and amounts involved, it is also suggested to have a common platform wherein all assets including NRRA for sale/transfer/assignment put up by a liquidator can be viewed by various investors for getting investor's interest and better price discovery.

Another practical issue observed in liquidation process is the lack of a common portal/ platform for publicity of auction notices under liquidation unlike available in case of invitation of resolution plan on IBBI portal. It leads to lack of awareness among the prospective buyers as the current source of publicity of auction notices are mainly newspapers or company's website. In case of CD which are not well known in market the auction notices get unnoticed. Accordingly, a common portal for displaying liquidation notices is the need of the hour so that assets under liquidation may reach maximum eyeballs beyond geographical boundaries.[9]

Introduction of (a) assignment of NRRA and (b) assignment of Claims/Interests by amendment to IBBI (Liquidation Process) (Fourth Amendment), 2020 is a step in right direction and will go long way to create market for trading of such illiquid assets. It will also expedite the liquidation process and eventual dissolution of CDs thereby releasing substantial idle resources in an orderly manner for fresh allocation to efficient usage in the economy.

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CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **C. Shivakumar Reddy v. Dena Bank - [2020] 114 taxmann.com 219 /[2020] 158 SCL 375 (NCL-AT)**

Where application to initiate CIRP was filed for purpose other than for resolution of insolvency or liquidation of corporate debtor, said application was to be dismissed.

The corporate debtor defaulted in making repayment, thus, the financial creditor declared account of the corporate debtor as NPA. Later on, the financial creditor filed an application under section 7 to initiate CIRP against the corporate debtor. It was noted that the financial creditor had already filed an application before the Debt Recovery Tribunal (DRT) and the DRT had allowed said application and recovery certificate was issued. In fact, for non-payment, an FIR was also lodged by the financial creditor against the corporate debtor and the corporate debtor had been declared as a wilful defaulter.

Held that application to initiate CIRP was filed for purpose of execution of decree passed by DRT in favour of financial creditor, i.e., for purpose other than for resolution of insolvency, or liquidation of corporate debtor, therefore section 7 application was to be dismissed.

Case Review : Dena Bank v. Kavveri Telecom Infrastructure Ltd. [2020] 114 taxmann.com 218 (NCLT-Bengaluru), reversed.

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

- **Arcelormittal India (P.) Ltd. v. Abhijit Guhathakurta - [2020] 114 taxmann.com 246 /[2020] 158 SCL 406 (NCL-AT)**

Proviso to sub-section (4) of section 31 which relates to obtaining approval from Competition Commission of India under Competition Act, 2002 prior to approval of such resolution plan by Committee of Creditors, is directory and not mandatory.

The appellant was one of the 'Resolution Applicants', whose 'resolution plan' was not voted in its favour by the 'Committee of Creditors'. The appellant preferred miscellaneous application challenging decision of the 'Committee of Creditors' which was rejected by the Adjudicating Authority. The appellant filed instant appeal contending that approval of plan was in contravention of mandatory requirement under proviso to section 31(4) which required 'Resolution Applicants' to obtain approval of the Competition Commission of India prior to approval by the 'Committee of Creditors'.

Held that proviso to sub-section (4) of section 31 which relates to obtaining approval from the 'Competition Commission of India' under Competition Act, 2002 prior to approval of such 'Resolution Plan' by the 'Committee of Creditors,' is directory and not mandatory , therefore, it was always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve 'Resolution Plan' subject to such approval by the Competition Commission. Since, in instant case, approval of the Competition

Commission of India had already been taken to 'Resolution Plan', instant appeal was to be dismissed being not maintainable.

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

- **Sujeet Suresh Shah v. Savino Del Bene Freight Forwarders India (P.) Ltd. - [2020] 114 taxmann.com 274 /[2020] 158 SCL 183 (NCL-AT)**

Where pursuant to order initiating CIRP against corporate debtor, shareholder of corporate debtor undertook to repay all outstanding amount to operational creditor and also fee and cost to interim resolution professional, CIRP order was to be set aside as CoC had not been yet constituted.

On application under section 9 filed by the operational creditor, corporate insolvency resolution process was initiated against the corporate debtor. The appellant, a shareholder of the corporate debtor, submitted that the appellant had agreed to pay default amount and settle matter. The Interim Resolution Professional (IRP) submitted that six claims were received but the Committee of Creditors had not been yet constituted. The appellant undertook before court to repay amount towards full and final settlement of all outstanding dues of the corporate debtor.

Held that in view of facts and circumstances that parties had reached settlement and the appellant undertook to pay fee and cost of the IRP, CIRP order passed against the corporate debtor was to be set aside.

Case Review : Savino Del Bene Freight Forwarders India Pvt. Ltd. v. Olive Tree Trading Pvt. Ltd. [2020] 114 taxmann.com 273 (NCLT - Mumbai), reversed.

SECTION 11 - CORPORATE INSOLVENCY RESOLUTION PROCESS - PERSONS NOT ENTITLED TO MAKE APPLICATION

- **Meka Dredging Company (P.) Ltd. v. Sapura Engineering & Construction (India) (P.) Ltd. - [2020] 114 taxmann.com 280 /[2020] 158 SCL 220 (NCL-AT)**

Where liquidation order had been passed against a company, such company under liquidation could not make an application as an operational creditor against a third company for initiation of CIRP under section 9.

The appellate company was ordered for liquidation. The appellant through its liquidator filed an application as an operational creditor against a third company. The appellant stated that there was no pre-existing dispute.

Held that since the appellant was a corporate debtor, in respect of whom 'liquidation order' had been made, the appellant could not make an application for initiation of CIRP and same was not maintainable as per section 11.

Case Review : Meka Dredging Company (P.) Ltd. v. Sapura Engineering & Construction (India) (P.) Ltd. [2020] 114 taxmann.com 279 (NCLT - Mumbai), affirmed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Sesh Nath Singh v. Baidyabati Sheoraphuli Cooperative Bank Ltd. - [2020] 114 taxmann.com 282 /[2020] 158 SCL 211 (NCL-AT)**

Where corporate debtor committed default in repaying financial debt, financial creditor issued demand notice under SARFAESI Act and High Court restrained financial creditor from taking any steps against corporate debtor under SARFAESI Act and subsequently, financial creditor filed application to initiate CIRP against corporate debtor, period from date of notice under section 13(2) to when High Court had passed order against financial creditor was to be excluded in computing period of limitation for filing CIRP application.

The financial creditor granted cash credit facility to the corporate debtor. The corporate debtor committed default in repayment. Account of the corporate debtor was declared NPA and the financial creditor issued demand notice under section 13(2) of the SARFAESI Act to the corporate debtor. The corporate debtor filed a writ petition challenging said demand notice and the High Court restrained the financial creditor from taking any steps against the corporate debtor under the SARFAESI Act, till further orders. Thereafter, the financial creditor filed instant application under section 7. The corporate debtor raised a dispute that application had been filed after about 5 years and 5 months from date of accrual of cause of action, thus, said application was time barred. As per section 14(2) of the Limitation Act, in computing period of limitation, time during which the financial creditor has been prosecuting with due diligence another civil proceedings against the corporate debtor for same relief is to be excluded.

Held that period from 18-1-2014 (date of notice under section 13(2) of SARFAESI Act) to 24-7-2017 (when High Court had passed order against financial creditor), was to be excluded and if this period of 3 years and 6 months was excluded then application filed under section 7 was within limitation period of three years - Held, yes [Para 10]

Case Review : Baidyabati Sheoraphuli Co-operative Bank Ltd. v. DEBI Fabtech Ltd. [2020] 114 taxmann.com 281 (NCLT - Kolkata), Affirmed.

SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

- **Edelweiss Asset Reconstruction Co. Ltd. v. Sai Regency Power Corporation (P.) Ltd. - [2020] 114 taxmann.com 284 (NCL-AT)**

Where gas supply agreement executed by corporate debtor to procure gas from ONGC and GAIL come to end and members of CoC with requisite majority decided to provide letter of comfort to lead bank who was willing to provide interim finance to corporate debtor to participate in tender, however, appellant-financial creditor was reluctant to release same, since,

law provide that decision taken by majority CoC would be binding, collective decision of CoC to provide letter of comfort could not be interfered with.

The corporate debtor was engaged in business of generation and sale of electricity. In order to generate electricity, the corporate debtor procured major requirement of gas from ONGC and GAIL in terms of Gas Supply Agreements. Said agreements with ONGC and GAIL completed its term. ONGC and GAIL asked the corporate debtor to participate in fresh tender and to pay security deposit. Meanwhile, corporate insolvency resolution process was initiated against corporate debtor. Members of CoC with 66 per cent voting share decided to provide letter of comfort to lead bank who was willing to provide interim finance to participate in fresh tender. However, the appellant being member of CoC was reluctant to release letter of comfort. According to the appellant as per amended section 30(4), insolvency resolution process costs which includes interim finance could only be recovered from secured creditors and not from unsecured creditors like the appellant. Appellant also submitted that only consenting members of the CoC ought to be directed to provide letter of comfort to raise interim finance.

Held that decision taken by majority would be binding and, dissenting financial creditor, even with dissent, would remain bound by decision taken by majority of CoC members, therefore, collective decision of CoC to provide letter of comfort could not be interfered with.

CASE REVIEW : Sai Regency Power Corporation (P.) Ltd. v. Committee of Creditors of Sai Regency Power Corpn. (P.) Ltd. [2020] 114 taxmann.com 283 (NCLT - Chennai), affirmed.

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

- **Shyam Sunder Bhatiya v. Khozim Yusuf Nagarwala - [2020] 114 taxmann.com 289 /[2020] 158 SCL 397 (NCL-AT)**

Where prior to initiation of CIRP, financial debt was repaid by corporate debtor to financial creditor, corporate debtor was to be released from rigour of CIRP.

The financial creditor granted loan to the corporate debtor. The corporate debtor issued a post dated cheque in name of the financial creditor for ensuring repayment of loan. However, said cheque was dishonoured and thus, a complaint under section 138 was filed against the corporate debtor. Subsequently, the financial creditor filed application to initiate corporate insolvency resolution process (CIRP) against the corporate debtor. However, prior to initiation of CIRP, alleged financial debt was repaid by the corporate debtor to the financial creditor and the financial creditor had not denied receipt of same.

Held that there was no default and therefore, corporate debtor was to be released from rigour of CIRP.

Case Review : Khozim Yusuf Nagarwala v. Raj Buildhome (P.) Ltd. [2020] 114 taxmann.com 288 (NCLT - Jaipur), Reversed.

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Karoli Co-Operative Multi-Purpose Society Ltd. v. UG Hotels and Resorts Ltd. - [2020] 114 taxmann.com 329 (NCL-AT)**

Where more than three years had passed from date of bills raised by operational creditor, CIRP application under section 9 was barred by limitation.

Application filed by the operational creditor against the corporate debtor was rejected by the Adjudicating Authority on ground of limitation. The appellant-operational creditor contended that the corporate debtor returned goods worth Rs. 27,000 leaving behind net balance of Rs. 42 lakhs as on 10-3-2016. It was noted that admittedly bill was raised from period 3-4-2014 to 29-8-2014 and more than three years had passed.

Held that CIRP application under section 9 was barred by limitation; therefore, order of the Adjudicating Authority was not to be interfered with.

Case Review : The Karoli Co-operative Multi-purpose Society Ltd. v. UG Hotels and Resorts Ltd., [2020] 114 taxmann.com 328 (NCLT - Chandigarh), Affirmed,

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SECTION 52 - CORPORATE LIQUIDATION PROCESS - SECURED CREDITOR IN

- **Bank of Baroda v. Mrs. Deepa Venkat Ramani - [2020] 114 taxmann.com 342 (NCL-AT)**

Where amount sought to be collected by liquidator for purpose of section 53 was part of security interest of a secured creditor, order of liquidation was to be set aside and matter was to be remanded to Adjudicating Authority to decide security interest of such secured creditor before liquidator could be given assets of corporate debtor.

The Adjudicating Authority passed a liquidation order of the corporate debtor and issued direction that the liquidator shall collect amount deposited with the DRT by one of client of the corporate debtor to be dealt with under section 53. The appellant bank contended that the appellant was a secured creditor and the corporate debtor pledged his assets including outstanding money, receivables, etc. to the appellant bank as bank guarantee for availing cash credit. Further, amount sought to be collected by the liquidator was receivable by the corporate debtor and was part of security interest of the appellant bank whereas the appellant had not relinquished its right or security interest to liquidate.

Held that liquidation order of the corporate debtor was to be set aside and matter was to be remanded to the Adjudicating Authority to decide security interest of appellant bank before liquidator could be given assets of the corporate debtor to be dealt with under section 53.

Case Review : Mrs. Deepa Venkat Ramai, In re [2020] 114 taxmann.com 341 (NCLT - Chennai), reversed.

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

- **Kline Technical Consulting LLC v. Central Electronics Ltd. - [2020] 114 taxmann.com 389 (NCL-AT)**

Where corporate debtor placed an order with operational creditor for supply of certain equipments and it raised a dispute that operational creditor had not supplied some of equipments as per purchase order and colluded with employees of corporate debtor to get payment released, since said dispute was raised prior to issuance of demand notice, there being pre-existence of a dispute, application filed under section 9 by operational creditor was not maintainable.

The respondent/corporate debtor placed an order with the operational creditor for supply of some equipments and raised invoices. Since the corporate debtor failed to pay, the operational creditor initiated CIRP against the corporate debtor. The corporate debtor raised a dispute that it had already paid 90 per cent of amount of invoices although the operational creditor had not supplied some of equipments as per purchase order and colluded with its employees to get payment released. The corporate debtor also submitted that when this came to its knowledge, it initiated enquiry against its employee who was guilty of causing financial loss to it in collusion with the operational creditor. It was noted that said dispute was raised by the corporate debtor much prior to issuance of demand notice.

Held that since there was pre-existence of a dispute, application filed by the operational creditor under section 9 was not maintainable; thus, the Adjudicating Authority had rightly rejected application for initiation of CIRP.

Case Review : Kline Technical Consulting LLC v. Central Electronics Ltd. [2020] 114 taxmann.com 388 (NCLT - New Delhi), Affirmed.

SECTION 74 - CORPORATE PERSON'S OFFENCES AND PENALTIES - PUNISHMENT FOR CONTRAVENTION OF MORATORIUM OR RESOLUTION PLAN

- **Rajiv Kumar Agarwalla v. Rajesh Kumar Kejriwal - [2020] 114 taxmann.com 391 (NCL-AT)**

Where during moratorium period directors/promoters of corporate debtor diverted funds of corporate debtor, same was in violation to provisions of section 14 and therefore, contempt proceeding was to be initiated against corporate debtor for alleged violation.

The financial creditor granted loan facilities to the corporate debtor. The corporate debtor committed default in repayment. Thus, the financial creditor filed application under section 7 against the corporate debtor. The Adjudicating Authority while admitting said application also passed order of moratorium under section 14 and directed the corporate debtor to co-operate with the RP. However, the appellant directors of the corporate debtor did not comply with directions of the Adjudicating Authority and diverted funds of the corporate debtor. Thus, Resolution Professional (RP) of the corporate debtor filed interlocutory application for violation of section 14 and for issuing direction to the corporate debtor to recall funds. The Adjudicating Authority by impugned order directed refund of money to account of the corporate debtor.

Appellants challenged order of the Adjudicating Authority admitting section 7 application on ground that the corporate debtor being a non-banking financial institution rendering 'financial service' was excluded from definition of 'corporate person'. However, the corporate debtor had not filed certificate of registration issued by Reserve bank of India which could show that the corporate debtor was a financial service provider. On other hand, the financial creditor had shown that the corporate debtor was not actually performing business of 'financial service provider' and thereby did not come within meaning of 'financial service provider'.

Held that for aforesaid reasons, appeal against impugned order passed by the Adjudicating Authority was to be dismissed with liberty to the Adjudicating Authority to initiate contempt proceeding against appellants for alleged violation.

Cases Review *: Olympic Credits & Mercantile (P.) Ltd. v. Prithvi Finvest Company (P.) Ltd. [2020] 114 taxmann.com 390 (NCLT - Kolkata), Affirmed.*

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

- **Munish Kumar Bhunsali v. Kotak Mahindra Bank Ltd. - [2020] 114 taxmann.com 413 (NCL-AT)**

Acknowledgement given after expiry of three years was not sufficient to keep debt alive and just sending a letter to settle issue does not amount to acknowledgement; CIRP application filed under section 7 beyond three years from date, when account of corporate debtor was declared NPA, was barred by limitation.

Application filed under section 7 by Bank was admitted and CIRP was initiated against the appellant-corporate debtor. The appellant contended that date of default was 30-9-2015 whereas application was filed on 30-1-2019, i.e. three years after occurrence of default; therefore, same was barred by limitation. The appellant further contended that one time settlement letter dated 12-12-2018 relied upon by the bank was barred by Evidence Act, 1872 and moreover even if said OTS offer was admissible, it was necessary that alleged admission must be made during period of three years for a continuous cause of action.

Held that it could not be denied that an acknowledgement given after expiry of three years was not sufficient to keep debt alive and just sending a letter to settle issue did not amount to acknowledgement. In view of fact that account of corporate debtor was declared as NPA on 30-9-2015, CIRP application filed by bank on 31-1-2019 was barred by limitation, therefore, CIRP order was to be set aside in furtherance of substantial cause of justice and application filed by bank under section 7 was to be dismissed.

Case Review : Kotak Mahindra Bank Ltd. v. Kew Precision Parts (P.) Ltd. [2020] 114 taxmann.com 412 (NCLT - New Delhi), reversed.

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