DECEMBER, 22 & JANUARY, 2023

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 enroll 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 bye laws 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 endeavor 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.

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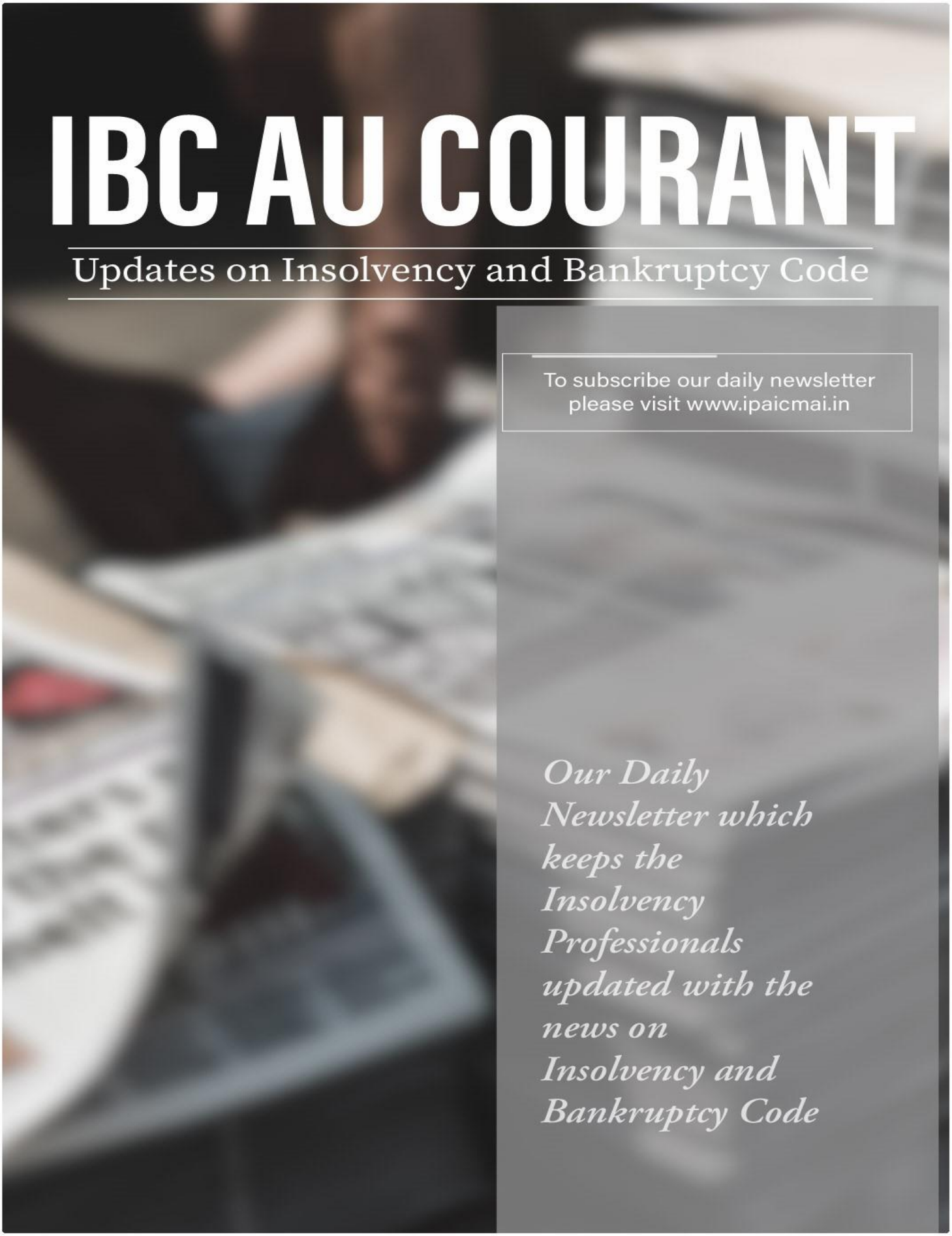

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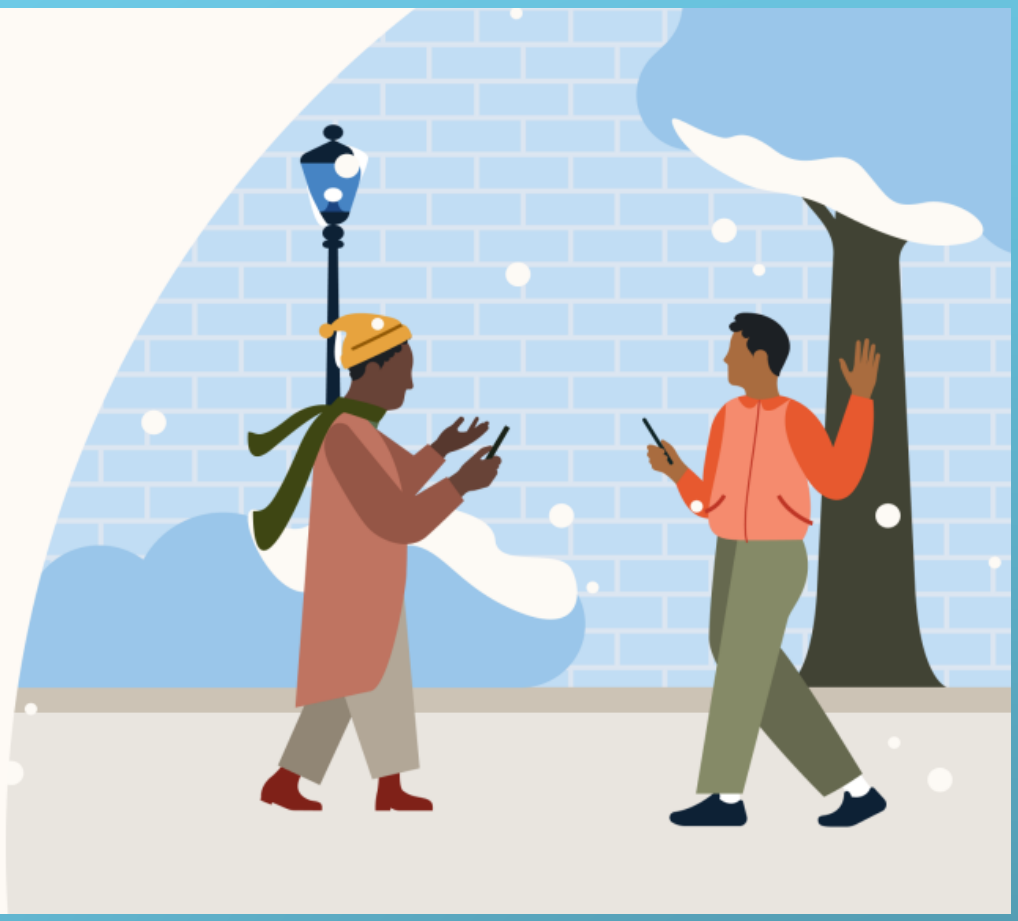

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Settlement Finality & Avoidance Transaction

Varinder Kumar & Anjali Mukaty

GIP IV BATCH (2022-24), IICA

INTRODUCTION

The UNCITRAL Legislative Guide on Law of Insolvency delineate avoidance proceedings as "provisions of the insolvency law that allow transactions for the transfer of assets or the undertaking of obligations before insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors."[1]

The Insolvency and Bankruptcy Code (IBC) 2016 seeks to maximize the value of a company's assets and ensure their accessibility to creditors. When a company is on the verge of bankruptcy, creditors frequently try to sell debtor assets in order to reduce losses. Often, during the liquidation process, the company's assets are found to be of negligible value, leaving creditors with no chance of recovery. To protect the interests of creditors, the Code bestow for the avoidance of preferential (sections 43 and 44), undervalue (sections 45 to 48), extortionate (sections 50 and 51) and fraudulent (sections 49 and 66) transactions. The primary purpose of these provisions is to make the assets of corporate debtors available for a resolution that going concern and liquidation.

IMPORTANCE OF MAINTAINABILITY OF AVOIDANCE TRANSACTION UNDER THE IBC:

According to the IBBI Newsletter, a total of 809 applications have been filed for avoidance transactions holding an aggregate value of Rs. 2,28,932.54 crores. Out of these, only 98

[1] UNCITRAL Legislative Guide on Insolvency Law, 2005, pg. 4

applications have been disposed of recovering a mere Rs. 64.33 crores.[2] This finding depicts the enormous value that avoidance transactions hold, the recovery of which can substantiate the recoveries by creditors under the IBC.

The Resolution Professional (RP) or Liquator must recognize a situation and find solutions to prevent it so that creditors can pursue their claims. Preferential, undervalued, deceiving creditors and extortionate transactions are the four categories of avoidable transactions listed in the Code. Avoidable transactions generally must have occurred within the relevant period or look period. The lookback period is the suitable timeframe during which the RP or liquidator can see transactions that are likely avoidable. Those transactions that defraud creditors are exempt from the look-back period provisions. The IBC mandates avoidance of PUFE transactions and its main purpose is to increase the pool of assets that can be distributed to creditors and prevent one party from gaining an unfair advantage at the expense of other creditors.

In accordance with Regulation 40A[3], the resolution professional is required to identify PUFE transactions not later than the 115th day after the start of the corporate insolvency resolution process (or "CIRP") and submit applications to the adjudicating authority for the avoidance of PUFE transactions not later than 135 days after the start of the CIRP. However, because a corporate debtor's CIRP must be completed in 330 days (including all extensions from the date of admission into CIRP)[4], coupled with the common delay in the disposition of ordinary applications about avoidance of PUFE transactions about a corporate debtor, many of these applications are frequently still pending when the CIRP of such corporate debtor is completed.

Here, it is to be noted that the IBC does not specify the criteria for determining the kind and quantity of contributions; instead, it leaves this up to the Adjudicating Authority. The specifics and questions pertaining to each of these transactions vary, necessitating the RP who has been given an affirmative obligation under Section 25(2) (j) to make various sets of enquiries. On the

[2] IBBI Quarterly Newsletter, Jul-Sep 2022, pg- 16

[3] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

[4] Section -12 of the Insolvency & Bankruptcy Code, 2016

verdict in **Venus Recruiters Private Limited vs. Union of India & Ors[5].** and its effects, much has already been written off. In this judgement, a single judge of the Delhi High Court stated the short observation on the corporate insolvency resolution process (or "CIRP") ends once the resolution plan is accepted by the Adjudicating Authority ("AA") under IBC in the context of the prosecution of avoidance applications. RP loses the ability to represent the corporate debtor and declared functus officio. This would mean that the avoidance applications would fail. Consequently, it is crucial for resolution plans to include explicit clauses that allow the RP or any other designated organisation to continue the pursuit of avoidance petitions. Later, The National Company Law Appellate Tribunal ("NCLAT") decided in **Interups Inc. vs. Kuldeep Kumar Bassi and Ors[6]** that this strategy had also been used.

The Venus Recruiters case was noted in the case where S. Rajendran's complaint was rejected on the merits (and against which an appeal has been filed). The resolution plan should provide a method for any applications that need to be pursued or continued after the resolution plan has been approved.

The Insolvency Law Committee discussed the issue opinionated in the case of Venus Recruiters Private Limited vs. Union of India & Ors. and highly recommended that, in the light of the meaning of Section -26 of the Code, proceedings concerning PUFE transactions be viewed as independent of the CIRP. As a result, the Committee concluded that PUFE transaction processes could extend past the CIRP deadline. In response to the Committee's suggestion, Regulation 38(2)(d) was added to the CIRP Regulations. According to this regulation, a resolution applicant must now outline in the resolution plan itself the procedure to be followed for PUFE transactions after the resolution plan has been approved, as well as the distribution of any proceeds.[7]

However, it is linked to a number of issues. While it appears that the resolution applicant has the option to select how the earnings will be shared, one has to wonder if the COC would be ready to adopt a plan that distributes the proceeds to creditors other than itself. Furthermore,

[5] Writ Petition (Civil) No. 8705/2019

[6] Company Appeal (AT) (Insolvency) No. 454 of 2021

[7] Insolvency Law Committee Report(ILR), May 2022

while such earnings, or portions thereof, may be received long after the adoption of a resolution plan since the way of distribution must be specified in the resolution plan, the distribution anticipated may have to comply with the concept of non-discriminatory distributions to creditors of the same class. While most resolution applicants would be on the side of caution, it would be fascinating to observe if resolution applicants would also choose on the side of caution.

Treatment of Avoidance Transaction after Judgement of Hon'ble Delhi High Court in Case Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors[8]

According to the learned council's ruling in the particular case, avoidance applications may be heard following the conclusion of the CIRP, and the creditors will be entitled to any advantages from the adjudication. The RP will pursue the avoidance applications since he is only functus officio with respect to CIRP and not the avoidance applications. The contested judgement was thrown out by the Honorable High Court. The NCLT has been told to move forward with the application for avoidance hearing. The money that is recovered may be divided among the secure creditors in accordance with the law as established by the NCLT under Sections 44 to 51 of the IBC, 2016. The Hon'ble Court explicitly noted the imminence of resolution of avoidance applications, holding, *"amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. This amount should be made available to the creditors who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them."*[9]

CONCLUSION

In the past there was no provision regarding the redressal of avoidance transactions after the approval of the successful resolution plan. The landmark judgment of *Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors* provides foremost guidance on the context of avoidance

[8] Delhi High Court, LPA 37/2021.

[9] *Supra note 8*

transactions under the IBC. This judgment plays an important role in the redressal of avoidance transactions filed against the corporate debtor in the future. It ultimately helps to increase the recovery for secured financial creditors who have to bear the haircut after approval of the resolution plan.

"Treatment of Public Equity Shareholders under IBC"

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Introduction

- Recently, the Securities and Exchange Board of India (SEBI) has come up with a proposal to protect the interests of public equity shareholders in the case of listed companies undergoing the Corporate Insolvency Resolution Process (CIRP).[10] There is currently no distinct division between equity shareholders under Insolvency & Bankruptcy Code (IBC). Since all equity shareholders are regarded as owners of the insolvent business, they are placed last in the "distribution waterfall." Also, the Committee of Creditors (CoC), which is made up of financial creditors, runs the CIRP with no input from public equity shareholders.
- When a publicly listed company implements a resolution plan, there are generally two possible outcomes:

The company remains listed despite a large capital reduction in accordance with the resolution plan. In such a company public equity shareholders must continue to hold at least 5% of shares as part of the requirements for its continuing listing;

The company gets delisted pursuant to a resolution plan or undergoes liquidation.

- As a result, in most cases, public equity shareholders of a publicly listed company under IBC end up losing the significant or entire value of their shareholdings at the conclusion of the CIRP. The CoC, which is located at the top of the IBC pyramid, does not even provide equity

[10] Framework for Protection of Interest of Public Equity Shareholders in case of Listed Companies Undergoing CIRP under IBC, Available at https://www.sebi.gov.in/reports-and-statistics/reports/nov-2022/framework-for-protection-of-interest-of-public-equity-shareholders-in-case-of-listed-companies-undergoing-corporate-insolvency-resolution-process-cirp-under-the-insolvency-and-bankruptcy-code-ibc-_64850.html (Accessed on 22th January, 2023)

owners—including non-promoter shareholders, who are often regular retail shareholders in the case of listed companies—the opportunity to submit their grievances.

DHFL's Case[11]

- A National Company Law Tribunal (NCLT) decision to enable the delisting of DHFL's shares from exchanges was challenged in the Supreme Court by retail investors. DHFL's shares ceased trading on the markets following the decision by NCLT, which had authorized the resolution plan of Piramal Capital and Housing Finance Limited (PCHFL) to take over the insolvent shadow bank. According to the resolution plan, the company will buy the equity shares owned by shareholders by reducing paid-up capital to zero.
- Retail investors rushed to purchase DHFL shares in response to the news, anticipating windfall gains once the new management takes control. Once NCLT approved the resolution plan, the stock remained one of the highly traded stocks.
- The excitement around the stock, however, was short-lived as it was revealed that the stock would be delisted in accordance with the resolution plan that had been authorized and that retail investors would receive nothing in exchange for their DHFL shares.
- These shareholders include both those who stayed involved in the business during its heyday as well as those who were duped into thinking DHFL would remain listed under the new management.

The Proposal: SEBI's attempt at rescuing public equity shareholders

- Numerous complaints and grievances[12] about companies that were delisted after a resolution plan was approved have been received by SEBI. The complainants' concerns, among others, included:

[11] Economic Times, 6th December, 2022, https://economictimes.indiatimes.com/prime/corporate-governance/minority-investors-often-get-a-raw-deal-during-insolvencies-can-sebis-new-proposal-change-things/primearticleshow/96015757.cms

[12] *Supra* note 1

- If the new entity is formed after the bankrupt firm has been acquired by the new management (the resolution applicant) in accordance with an NCLT-approved resolution, SEBI should ensure that the existing shareholders receive shareholding in the company.
- Since only the major players are currently purchasing the shares of the struggling debtor company at throwaway prices and the retail shareholders receive no consideration against their shareholding in the company, SEBI should decide to give the business of the debtor company the proper value and ensure that all small stakeholders receive the appropriate value for their stakes.
- It is unacceptable for a resolution process to result in an overnight decrease in the value of equity shares in the case of companies that delist after a resolution plan has been approved, without giving the public shareholders any prior notice or opportunity to even argue their case before the Committee of Creditors (CoC).

- In order to allow the public equity shareholders of an insolvent company a chance to participate in the company's revival under the new management, SEBI has suggested that the resolution applicant acquiring the insolvent company be required to make an offer of shares to those shareholders.
- According to the consultation paper[13], the offer must be made at the amount the resolution applicant had paid for the shares. Depending on the equity ownership of the resolution applicant, the amount of equity granted to the public equity shareholders might range from 0% to 25%. Such offers will not be available to the former promoter and his or her family, partner group firms, directors, key management people, or trusts with the previous promoter as beneficiary.
- It has also been suggested that if this offer is accepted by 5% of the public equity shareholders, the new firm will continue to be listed. Public equity shareholders will be reimbursed in line with the rules of the CIRP offer if the resolution applicant fails to obtain a 5% public ownership leading to mandatory delisting.

[13] *Supra* note 1

Why the proposal is a step in right direction?

- *Prevents Unjust Enrichment of Successful Resolution Applicant*
  - A firm is subjected to the IBC process when a default takes place. The business need not be a balance sheet insolvent.[14] According to the Insolvency & Bankruptcy Board of India (IBBI), financial creditors (FCs) realised at least 100% of their claims in 56 cases out of the 517 firms resolved through resolution plans until June 30, 2022. Therefore, it is conceivable that some of these businesses may still have equity with value. If the remaining equity value is eliminated by the resolution plan, the purchaser will unfairly get value from the shareholders. From this angle, SEBI's suggestion is really logical.[15]
- *May lower down Resolution Applicant's Financial Burden*
  - Apart from offering small public equity shareholders a chance to participate in CIRP, SEBI appears to expect that new guidelines will be well-received by acquirers because it will lower their financial burden by raising funds from public equity shareholders. As a result, the company might receive more resolution plans. Additionally, following the reorganisation, the firm will be able to maintain its status as a listed corporation with a minimal public float.
- *Fair Treatment to Public Equity Shareholders*
  - The public equity shareholders who otherwise would have been pushed out will gain the necessary trust as they will be permitted to participate at the same price that is applicable to the resolution applicant.

Possible Implications of the Proposal

- *May Impact Successful Resolution Applicant's Operational Autonomy*

  The effects of starting the company again with non-promoter, public equity shareholders (who can own up to 25% of the shares) may need to be considered by resolution applicants. Despite the good intentions behind SEBI's suggestion, an applicant might not want to give public equity

[14] According to Section 4 of the Insolvency & Bankruptcy Code, 2016 CIRP is triggered when default amount is more than INR 1 crore.

[15] CKG Nair & MS Sahoo, *'Ensure Equity in IBC Resolution',* Hindu Business Line, 4th December 2022, https://www.thehindubusinessline.com/opinion/ensure-equity-in-ibc-resolution/article66223450.ece

shareholders a say in how the firm is reorganised post-CIRP. Additionally, existing shareholders might not want to invest money in buying shares of a business where they have already lost money.

- *Goes Against the Contract Between Equity and Debt*
  - A limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.[16]
- *Compliance Burden for Listed Company Might Drive Away Prospective Applicants*
  - Successful Resolution Applicant might prefer to operate, at least temporarily, free from the stringent compliance requirements under SEBI's LODR Regulations which are applicable to all listed companies. It would be a turn-off if this factor drives away potential resolution applicants who wanted to submit a resolution plan.
- *Shareholder Enrichment at the Cost of Haircuts for Creditors*
  - If public equity shareholders receive consideration for their shareholding when various creditors are taking "haircuts," it would lead to "shareholder enrichment" at the expense of creditors. Therefore, the basic premise of the insolvency law shall stand violated.
- *Resolution Plan vis-a-vis Section 230 Scheme*
  - The way the IBC is formulated makes the resolution plan different from a mutually agreeable settlement (say, under section 230 of the Companies Act, 2013). Resolution plans are forced, unlike Section 230 schemes which may also offer protection to members and creditors.[17]

[16] Report of Bankruptcy Law Reforms Committee, Pg. No. 10

[17] Sikha Bansal, *'Minority Shareholders under IBC',* Vinod Kothari Consultants, 25th August, 2021, https://vinodkothari.com/2021/08/minority-shareholders-under-ibc/

Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs. NBCC India Limited & Ors.18

- The resolution plan stipulated that public equity shareholders would receive INR 1 crore in consideration for the extinction of their rights and the delisting of the company. Public equity shareholders raised objections to this, claiming that the CoC had not appropriately balanced their interests. They also argued that the delisting should follow the SEBI's Delisting Regulations.
- The Supreme Court (SC) found that the plan takes care of the interests of all stakeholders and refrained from interfering with the CoC's commercial wisdom. The SC found that the resolution plan pays the public equity shareholders a sum larger than the value they would have received in the event of liquidation. The SC also pointed out that, in accordance with the Explanation to Section 30(2)(e) of the Code, all shareholder approvals are deemed to have been given upon approval of the resolution plan and that the SEBI (Delisting of Equity Shares Regulations), 2009 provide certain exemptions to delistings pursuant to resolution plans approved under the Code. It concluded that the minority shareholders' appeal to the resolution plan was unjustified.[19]

Way Forward

- For some, the continued listing may be a welcome proposition while others may consider it burdensome. There could be ways to lighten the burden. For example, a longer time frame could be considered to raise public float to 25%. Utmost caution should be taken to ensure that entitlements for public equity shareholders do not complicate the legal framework.[20]
- Also, the current legal framework provides certain options for minority shareholders. One, minority shareholders, non-promoters, and non-controlling shareholders are not covered by section 29A. That is to say, either individually or collectively, the minority shareholder may

[18] Civil Appeal No. 3395 of 2020

[19] *Supra* Para No. 151.1 & 151.2

[20] *Supra* note 6

submit a resolution proposal (provided they are not otherwise disqualified under other clauses of section 29A). However, a situation like that would be slightly uncommon. Two, there is no restriction on public equity shareholders submitting a section 230 scheme under the Companies Act, 2013 after the commencement of CIRP. Therefore, the minority shareholders may offer a plan to the NCLT if it is better than an insolvency resolution. An issue that has to be overcome is the concurrent functioning of a section 230 scheme and the CIRP.

- It has been observed that it is difficult and complex to successfully resolve the insolvency of listed corporations. Adding more complexities may prove to be a deterrent.

Development of Secondary Market for Corporate Loans

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Introduction

RBI has released a discussion paper upon introduction of Securitisation of Stressed asset framework as on 25th January 2023 which is forthcoming method ***to Securitisation of Stressed accounts from the companies[21]***. The RBI has previously issued a circular on ***Securitisation of Standard asset[22]*** as on 24th September 2021 and amended on 05th December 2022 which deals only about ***standard asset classified by RBI prudential framework circular[23]***. But for purchase of standard asset the market is very robust and investors are ready to purchase Standard asset. A contractual arrangement in which an entity mitigates the credit risk associated with a securitisation exposure and, in substance, provides some degree of added protection to other parties to the transaction so as to mitigate the credit risk of their securitisation exposures. This new circular enables for Stressed assets to be securitised where the account has been declared NPA and the methods to get more funding for such accounts to revive them.

Object

RBI aimed at development of a strong and robust securitisation market in India, while facilitating simpler securitisation structures, the revised framework aligned the regulatory framework for ***securitisation*** of standard assets. prudentially structured securitisation transactions can be an important facilitator in a well-functioning financial market as it improves risk distribution and

[21] https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/DISCUSSIONPAPERSSAFC40C389A61784DC89658068746511EA7.PDF

[22] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/85MDSTANDARDASSETSBE149B86CD3A4B368A5D24471DAD2300.PDF

[23] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/PRUDENTIALB20DA810F3E148B099C113C2457FBF8C.PDF

liquidity of lenders in originating fresh loan exposures. Lenders resort to loan transfers for various reasons, ranging from liquidity management, rebalancing their exposures or strategic sales. Also, a robust secondary market in loans will help in creating additional avenues for raising liquidity.

Concept of Securitisation of stressed asset

Securitisation involves pooling of loans and selling them to a special purpose entity (SPE), which then issues securities backed by the loan pool. A well-developed securitisation market can provide a market-based mechanism for management of credit risk by financial institutions and can help in development of a secondary loan market.

The SPE appoints a servicing entity to manage the stressed assets, typically with a fee structure that incentivises them to maximise recoveries on the underlying loans. Investors are paid based on the recovery from underlying assets, as per the waterfall mechanism depending upon the seniority. If not SSAF eventually the account will land under bankruptcy but at least by this way it can have a good chance of revival.

The Line of difference between SSA *(securitisation of standard asset)* and SSAF *(securitisation of stressed asset)* is that while for SSA, the credit risk associated with the borrower is borne by the investors in securitisation notes, in SSAF the assets are already in NPA or deemed to be. They are securitised at a discount to their nominal value, based on current market valuation of these underlying assets after discounting losses and likelihood that resolution of underlying may generate sufficient recoveries to cover net value of NPA.

Does SSAF should also include standard asset to minimize the risk on return?

Yes, it is very important to include standard assets along with the stressed asset which will make the investor to find an opportunity even in the pile of stressed asset. This can also mitigate the possibility of Negative return on the investment and could neutralize the sting of possible loss. Inclusion of standard asset up to a certain limit along with stressed asset seems to be a viable option and primarily for structuring purposes also.

Conditions for a Special purpose entity

The method of transferring the NPA to SPE is a separate creation of risk of wrongfully ending up in the hands of originator and the RBI has issued guidelines even conditions to be fulfilled for an SPE so that its above suspicion.

1. The originator should not have any ownership, proprietary or beneficial interest in the SPE except those specifically permitted under these directions. The originator should not hold any share capital in the SPE
2. Any transaction between the originator and the SPE should be strictly on arm's length basis.
3. If the SPE is set up as a trust

a) The trust deed, if any, should lay down, in detail, the functions to be performed by the trustee, their rights and obligations as well as the rights and obligations of the investors in relation to the securitised assets.

b) The trust deed should not provide for any discretion to the trustee as to the manner of disposal and management or application of the trust property. In order to protect their interests, investors should be empowered in the trust deed to change the trustee at any point of time.

4. The SPE should be bankruptcy remote and non-discretionary.
5. The SPE should make it clear to the investors in the securitisation notes issued by it that these securitisation notes are not insured and that they do not represent deposit liabilities of the originator, servicer or trustees.

Portfolio of resolution manager

In case of large corporate accounts appointing resolution managers (RM) who take is of paramount importance because of their involvement with resolution of the underlying exposures and reporting requirements to financial regulators. The role of the RM is related to the experience in

1. working-out the NPAs including due diligence;
2. effectiveness of the business plan;
3. recovery strategies;
4. loan management;
5. legal network;

6. reporting and IT.

It is vital that the RM is an entity independent from the originator. Having an independent RM under SSAF is perceived as a strong point for the investors compared to the case where originator manages the assets via their specialized servicing unit. RMs who are independent from the originator can bring up-to date recovery mechanism and would be able to treat all portfolios in a similar manner.

Overall, the role of SPE and RM is central to the SSAF wherein they are directly responsible for resolution and recovery of underlying stressed pool, it is desirable that they should be within the regulatory purview of RBI.

Securitisation of stressed asset in other countries.

Globally the initiative has been taken for creation of secondary market for NPA and RBI 's initiative also finds to be very prudent in nature as this will enhance the liquidity of company under distress.

This method has proven to be globally a great initiative and here are some past amendments on implementation

1. **Basel Committee on Banking Supervision (BCBS)** vide CRE-451 on 'Securitisations of Non-Performing Loans' dated November 26, 2020 has issued guidelines for calculation of capital and risk weights applicable to exposures to NPE Securitisations, to become effective on January 01, 2023.[24]
2. **Prudential Regulation Authority of UK** has issued policy statement PS24/213 as part of Implementation of Basel Standards – Non-performing Loan Securitisations.[25]

3. **European Union (EU)** has also released regulation for NPE Securitisation vide Regulation (EU) 2021/5572 effective from April 09, 2021.[26]

[24] Basel Committee on Banking Supervision – CRE 45 – Securitisation of non-performing loans (version effective as of January 01, 2023)
[25] PS24/21 | CP10/21 - Implementation of Basel standards: Non-performing loan securitisations
[26] Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021

Valuation of Securitisation notes under SSAF

The valuation of securitisation notes has been left to be determined as per the board approved policies. A similar approach may be adopted for NPA securitisation notes but given the inherent risks involved in the resolution of stressed assets in India, it is desirable that a graded form of risk-sensitive write-down can be provided in order to avoid the cliff-effect at the maturity of the securitisation notes. Hence, a minimum 20% write-down of the outstanding value of unamortised notes each year, may be considered, corresponding to a full write-down over a maximum five-year period.

The five year-period is in sync with the resolution period prescribed for asset reconstruction companies, and also takes into account the gradual deterioration in values of collateral with delays in resolution.

However, as the underlying pool of assets in SSAF have the distinctive pre-eminent risk of incorrect valuation of the NPAs and information asymmetry at the time of transfer from originator to SPE, the capital requirement for securitisation notes in SSAF needs to be markedly different from SSA, which is underpinned by the assumption that the assets are performing at the time they are securitised, credit risk being the main regulatory driver.

CONCLUSION

Thus, RBI's this framework creates a much more standardised market for stressed and secondary assets which attracts foreign investments via AIF (Alternate Investment fund), ECG (External Commercial borrowings) and other recognised methods. The ARC being a primary player in the NPA market now this circular also opens new avenues for broader category of investors to invest via security receipts. The transferee has the unfettered right to transfer or otherwise dispose of the loans free of any restraining condition to the extent of economic interest to them. The master direction also provides a procedure for the transfer of loans that are not in default.

Thus, this is about secondary market for stressed market loans.

ADJUDICATING AUTHORITY IS NOT ENTITLED TO SUBSTITUTE ITSELF FOR A LIQUIDATOR?

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INTRODUCTION

Section 60 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") specifies the authority and jurisdiction of the Adjudicating Authority ("**Authority**") for corporate persons. Sub-section 5 of the Section 60 of Code clearly lays down the jurisdiction of the National Company Law Tribunal ("**NCLT**"), as the Authority, and provides that the NCLT has the jurisdiction to entertain or dispose of the following: (i) any application or proceeding by or against the corporate debtor or corporate person; (ii) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code.

From a plain reading of the Section 60 of the Code, it is clear the Authority/ NCLT has wide-ranging power and jurisdiction to decide upon all issues under Part I and Part II of the Code, including various matters arising out of or relating to corporate insolvency resolution process and the liquidation process of corporate persons. However, it is not very clear as whether the Authority has the power to substitute itself for a liquidator and perform, on its own, certain specific functions required to be performed by a liquidator under the Code.

This article analyses the issue of the Authority's authority and jurisdiction to conduct, in supersession of the liquidator's obligations, private sale of the assets of a corporate debtor, in light of the recent judgement (dated January 25, 2023) of the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") in the matter of ***State Bank of India v. Bhuvee Stenovate Private Limited & Others***.

BACKGROUND

The factual matrix of this case (***State Bank of India v. Bhuvee Stenovate Private Limited & Others***) involves the following key parties:

(i) Hon'ble National Company Law Tribunal, Kolkata ("**NCLT Kolkata**") – The Authority that passed the impugned order which was challenged before the NCLAT.

(ii) Bhuvee Stenovate Private Limited ("**CD**") – The corporate debtor.

(iii) State Bank of India ("**Appellant**") – The financial creditor.

(iv) Liquidator ("**Liquidator**") - The liquidator of the CD.

(v) Laser Solar LLP ("**Laser**") – One of the two bidders for the CD's assets.

(vi) Jindal Stainless Limited ("**Jindal**") - One of the two bidders for the CD's assets.

The Appellant challenged an order dated 16.06.2022 passed by the NCLT Kolkata ("**Impugned Order**") wherein the NCLT Kolkata confirmed a sale of certain assets of the CD by private treaty in favor of Laser.

The Impugned Order was passed in reference to certain applications filed by Laser and Jindal before the NCLT Kolkata against the actions of the Liquidator, when the Liquidator rejected the offers made by Laser and Jindal to acquire the certain assets of the Corporate Debtor. In response to the said applications filed by Laser and Jindal, the NCLT Kolkata directed Laser and Jindal to submit their respective bids under sealed cover before the NCLT Kolkata. The NCLT Kolkata opened the said bids in open court and confirmed the sale by private treaty in favour of Laser (being the highest bidder out of the two).

The Appellant, in its appeal before the NCLAT for challenging the Impugned Order, submitted, inter-alia, as follows:

(i) The NCLT Kolkata exceeded its jurisdiction in asking the only two applicants who were present before the NCLT Kolkata to submit their bids, and on the basis of the said bids confirming auction of assets of the CD.

(ii) The Code lays down the manner and procedure for liquidation and has specified, under Section 33, that it is the liquidator who is required to conduct the sale of the assets either by public auction or by private sale.

The NCLAT deliberated upon, inter-alia, the above-mentioned issues raised by the Appellant, and held as follows on the said issues:

(i) The manner and procedure under which liquidator is required proceed to auction/ sell the assets of a corporate debtor is specified in the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Regulations**").

(ii) The NCLT Kolkata could have directed the Liquidator to conduct the private sale so that apart from Laser and Jindal, other interested persons would have also got the opportunity to bid.

(iii) The NCLT Kolkata, by adopting a process of taking two bids, one by the Laser (an applicant) and another by Jindal (an intervenor) could not have concluded the sale of the CD without giving an opportunity to the Liquidator to take steps for private sale. An opportunity has to be given to the Liquidator to explore the possibility of conducting a private sale to elicit any higher offer for the assets of the CD.

(iv) The actions of the NCLT Kolkata of itself taking two bids and confirmed the sale without giving opportunity to the Liquidator to take steps to sell the assets of the CD is not the proper procedure for maximisation of the assets of the Corporate Debtor.

ANALYSIS AND CONCLUSION

The NCLAT, rightly so, set aside the Impugned Order passed by the NCLT Kolkata approving the private sale of the assets of the CD by private treaty in favour of Laser, and permitted the Liquidator to conduct a private sale of the assets of the CD.

As per the provisions of the Code, it is the liquidator who has been authorised and obligated to conduct the liquidation of a corporate debtor. The liquidator, under the Code, has been given ample authority and discretion to decide upon the method of disposing of the assets of the corporate debtors – auction or private sell. The Code and Regulations contain detailed provisions governing conduct of the liquidator and also sufficient safeguards to ensure that interest if stakeholders is protect and the realisations from the sale of assets are maximised.

The Impugned Order appears all the more surprising in light of the fact that neither Laser nor Jindal seem to have made any prayer before the NCLT Kolkata requesting it to conduct the private sale of assets of the CD, and the NCLT Kolkata on its own wisdom chose to conduct and confirm the private sale of the assets of CD without any reference to the liquidator who has the statutory obligation to do so under the Code.

The author is of the view that the NCLT Kolkata breached the jurisdiction vested in it under Section 60 of the Code, and applauds the views and position taken by the NCLAT in holding that the NCLT Kolkata erred in conducting the auction and confirming the sale on its own, thereby usurping the statutory obligation of the liquidator and powers of the stakeholders and the Stakeholders' Consultation Committee.

The author believes that this judgement of the NCLAT, being on the lines of the jurisprudence adopted by the Hon'ble Supreme of India in the case of *R.K. Industries (Unit-II) LLP vs. H.R. Commercials Private Limited and Other (2022 SCC Online SC 1124)*, would provide great confidence to various parties involved in the liquidation process, including the stakeholders and the liquidator and shall go a long way in minimizing unwarranted litigations.

What is ailing the Pre-Packaged Insolvency Resolution Process (PRE- PACK)

By CA Vikram Kumar,
Insolvency professional

INTRODUCTION

The Central Government enacted the Insolvency and Bankruptcy Code (Amendment) Act, 2021 on August 11, 2021 which was deemed to have come into force on April 4, 2021 introducing the Pre-packaged Insolvency Resolution Process (PPIRP or Pre-packs) for corporate MSMEs.

As per the data published by IBBI (Quarterly newsletter for the period July to September 2022), it is dismaying to note that in the last 21 months since its implementation, there are only two applications for PRE-PACK which were admitted by the Adjudicating Authority (NCLT) under Section 54C of the IBC, 2016 as per details stated below and the resolution to the said two accounts are still pending.

Table 11: List of cases admitted for PPIRP as on September 30, 2022

Sl.	Name of the CD	Date of admission	Name of the NCLT Bench
1	GCCL Infrastructure & Projects Ltd.	14-09-21	Ahmedabad
2	Loonland Developers Pvt. Ltd.	29-11-21	Principal Bench, New Delhi

The obvious question which therefore arises is –
(a) Is Pre-pack a viable tool for rescue of corporate MSMEs?

(b) What is ailing Pre-pack?

The author has delved into the present framework of Pre-packs and what is ailing the pre-pack process.

Pre-pack is a rescue tool for corporate MSMEs, that ensures quicker, cost- effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of the businesses of MSMEs.
The COVID-19 pandemic has impacted the business operations of the MSMEs and exposed many of them to financial stress. Resolution of the stress in the MSME sector requires different treatment, due to the unique nature of their businesses and simpler corporate structures.

Therefore, it was considered expedient to provide an efficient alternative insolvency resolution process under the Code for the MSMEs.

Like Project Sashakt, which is a corporate rescue mechanism aimed at quicker recoveries to creditors and it is proposed to be a precursor to the IBC, a pre-pack in some ways would be similar to Project Sashakt as it would contemplate corporate rescue prior to initiation of proceedings under the IBC. The differentiating factor being on finalisation of the terms of the pre-pack, a Pre-Pack application would be filed by the debtor company and the pre-pack plan promptly implemented as a resolution plan under the IBC. Under Project Sashakt, however, a successful resolution of the debtor company precludes it from being subject to CIRP under the IBC.

Pre-pack is a hybrid approach where a debtor-in-possession would be allowed during pre-pack insolvency resolution process, while the creditors would have enough power to maintain checks & balances to prevent any kind of abuse.

The Key features of the Pre-pack:

a) Pre-pack starts with an informal process, where a resolution plan is agreed between the unrelated financial creditors and the debtor, which becomes a base resolution plan. (BRP).

b) Post admission of an application for Pre-pack by the NCLT, the BRP then goes through a 90-day formal process, where a swiss challenge at the option of the CoC may be run to achieve value maximisation. If the BRP impairs the debts of operational creditors, alternate resolution plans (BAP) have to be mandatorily invited and if the BRP does not impair the debts of operational creditors, the CoC may without inviting BAP may approve the BRP for submission to the NCLT for its final approval.

c) The existing management continues to run the business with a high possibility of retaining it through the BRP, this avoids inevitable shock to operations associated with CIRP.

d) The Pre-pack process can end with no result i.e., termination of the Pre- pack process or initiation of CIRP process or initiation of liquidation process or approval of a resolution plan (BRP or BAP)

Key advantages of PRE-PACK:

a) A pre-pack reduces the strenuous and cumbersome exercise, which all involved parties are put through, during a CIRP process of a company.

b) The insolvency resolution process is a costly procedure and the costs of the same are borne by the estate of the debtor company. It is from the assets of the debtor company that the insolvency resolution process costs are discharged. Unlike a CIRP Process, the CoC is not required to incur the cost of insolvency resolution process.

c) Pre-pack is a speedy procedure with resolution process ending in 120 days.

d) Job protection for employees of the debtor company is one of the primary considerations for pre-packs, where existing management retain control over the company.

e) The corporate debtor can join hands with a financially sound investor and can submit a Base Resolution Plan (BRP) jointly with any other person.

Pre-Packs Vs. CIRP

The key difference between Pre-packs and CIRP is explained in the table Below:

Sl.	Point of difference	PIRP	CIRP
1	Minimum amount of default	Rs. 10.00 Lacs w.e.f. 09.04.2021	Rs. 1.00 Crs w.e.f. 24.03.2020
2	Default during the period 25.03.2020 to 24.03.2021 (Sec 10A)	PPIRP can be initiated.	CIRP cannot be initiated
3	Eligible CDs	Only MSME	All CDs
4	Who can initiate	Only the CD	FC, OC and CD
5	Time period for completion	120 days, no provision of extension	330 days

6	Preparation of resolution plan	Prior to the start of the process	After the EOI is invited
7	Public announcement and EOI	May or may not be published in newspapers.	To be published in newspapers
8	Insolvency resolution process cost	to be borne by CD	To be borne by the CoC
9	Meeting of CoC	Meetings are held even prior to admission of the application by the NCLT	First meeting of the CoC on or before 30th day of the insolvency commencement date.
10	Control over the CD during insolvency resolution process	Management of the affairs of the CD shall continue to vest in the Board of Directors	With the RP
11	Moratorium	Limited moratorium [Section 14(2) & 14(2A) not applicable]	Full moratorium

From the table it can be noted as below:

a) A default of Rs. 10.00 lacs shall entitle a MSME to initiate a Pre-Pack process as compared to Rs. 100.00 Lacs of default for CIRP.
b) Even default during the period from 25.03.2020 to 24.03.2021 also called as covid period default as defined under Section 10A of the Code shall entitle a MSME to initiate a Pre-Pack process which is not permissible in case of CIRP.
c) The timer period for Pre-Pack is only 120 days with no provision for any extension of the period, whereas in CIRP, the CIRP period can be extended upto 330 days.
d) Insolvency resolution process cost has been kept at a bare minimum in Pre-Packs with no requirement of issuing public announcement and EOI in newspapers whereas it is mandatory to issue public announcement and EOI in newspapers in CIRP.
e) CD enjoys a limited moratorium in Pre-Packs as compared to full moratorium in CIRP.

PRE-PACK Vs. OTS

Banks and financial institutions are more likely to enter into a one-time settlement (OTS) arrangement with the borrowers as compared to Pre-packs, since OTS is less time consuming, not subject to judicial delays and scrutiny and there is no risk for the borrower of losing control over its entity. However, Pre-pack provides several advantages to a borrower as compared to OTS as stated below:

a) In OTS only the financial debt can be restructured, whereas in a Pre- pack, both the operational and financial debt can be restructured, moreover if there are multiple financial lenders to a corporate debtor, it is easier to have a resolution through a Pre-pack process as compared to a OTS process.

b) Reliefs and various concessions can be obtained under a resolution plan presented before the RP in a Pre-pack process through the order of an Adjudicating Authority which is not possible in an OTS proposal.

c) Resolution under Pre-pack is approved by an order of the Adjudicating Authority, which provides a binding nature to the arrangement.

d) Limited moratorium is enjoyed by the corporate debtor under Pre-Packs as compared to no moratorium under OTS

The key difference between Pre-Packs and OTS is explained in the table Below:

Sl.No.	Point of Differnce	PIRP	OTS
1	Judicial intervention	Hybrid process, partly informal (out of court), and partly formal (i.e., with approval of NCLT)	Out of court process with no judicial intervention
2	Possibility of promoters losing control over the CD	Possible	Not possible
3	What debts can be restructured	All debts i.e., OC & FC	Only FC
4	Relief & Concessions	Can be obtained from the Adjudicating Authority through a resolution plan approved by the Adjudicating Authority	Cannot be obtained as there is no Judicial intervention

5	Time period for completion	120 days, no provision of extension	No time period specified
6	Preparation of resolution plan	Prior to the start of the process	Not required
7	Control over the CD during the process	Management of the affairs of the CD shall continue to vest in the Board of Directors in normal circumstances. Management of the affairs of the CD can vest in RP in special circumstances.	Management of the affairs of the CD shall continue to vest in the Board of Directors.
8	Moratorium	Limited moratorium [Section 14(2) & 14(2A) not applicable]	No Moratorium

Key irritants and what can rejuvenate the PRE-PACK process as a successful tool of resolution:

a) CD being an MSME entity alone can initiate the process of Pre-pack, hence it is crucial that the MSME entities are well versed with the nuances of a Pre-pack process, its benefits and pitfalls. However, there is very little awareness amongst the MSMEs about the Pre-pack, which acts as a major impediment in promoting this important tool for resolution of financial stress in MSME entities. There is therefore an urgent need to educate and create awareness amongst MSMEs through MSME industry associations about the advantages of Pre- pack.

b) The report dated 08th Jan, 2021 submitted by the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process had recommended as follows-

"The Code may make a skeletal provision enabling pre-pack, and prescribing the contours of subordinate legislation. This will keep the process flexible that will allow emergence of many sophisticated variants of pre-pack in course of time and enable plugging in learning from market continuously. Given the urgency to roll out pre-pack, the Code may be amended quickly, preferably by an Ordinance. The subordinate legislation should not be overly prescriptive which may choke innovation in market or take away the essence of pre- pack. It should be grounded on realities and address the market failure and do no more."
However, the present framework for prepack is an extremely complex and cumbersome process with very little scope of innovation and deviation from the laid down process. The Sub-Committee of the Insolvency Law Committee had recommended a skeletal provision and the subordinate legislation (i.e., the Pre-Pack Regulations) should not be overly prescriptive,

however in reality the present framework is highly prescriptive and watertight. More leeway needs to be given in the present framework to the debtor and the creditor to arrive at a workable solution

c) Small Industries Development Bank of India (SIDBI) is the premier institution for financing MSMEs; hence a few live cases should have been identified and SIDBI should have been encouraged to test the success of the present framework of Pre-Packs and based on the inputs received from SIDBI, the Pre-Packs framework could have been tweaked to make it a success. Unfortunately, very little effort has been put in by the various stakeholders to popularise this important legislation for resolution of financial stress in the MSME sector.

d) Awareness amongst banks and financial institutions also needs to be created about the Pre-pack process. Most of the banks and financial institutions don't have an internal policy and framework in place to approve an application for Pre-pack. As the approval for Pre-pack process has to be given by the financial creditors at a preinitiation stage, it becomes difficult for the public sector banks and financial institutions to approve an application for Pre-packs. Indian Bank's Association (IBA) may take the initiative for creating a common policy framework for implementing the Pre-pack process amongst its member banks. This shall go a long way in promoting Pre-pack as a tool for resolution of financially stressed MSMEs. Banks are keen to push for OTS as compared to Pre-Packs as banks are wary of taking haircuts and being questioned later by the investigating authorities.

e) Since impairment of debts owed to operational creditors in the BRP entails a mandatory value maximisation process by inviting best alternate resolution plans, (BAP), the BRP submitted by the MSME corporate debtor would mostly propose impairment of financial debts only. When this is compared to CIRP process, the operational creditors are at a disadvantaged position as compared to financial creditors. Hence it is necessary to create a level playing field and the operational creditors may have to take a haircut in line with the financial creditors.

f) A mandatory forensic audit needs to be conducted prior to filing an application before the NCLT by bank empanelled forensic auditors to ensure that the corporate MSME is not subject to any avoidance transactions as laid down under Section 43, 45, 50 and 66 of the Code. The requirement of RP forming an opinion and determining the avoidance transaction should be dispensed with, considering the stringent timelines for Pre-packs. Under the present framework for Pre-packs, if the RP forms an opinion & determines avoidance transaction, the likelihood of the corporate debtor going in for liquidation is extremely high.

g) Restricting Pre-packs only to MSME is also not desirable as the benefits of this tool must be available across the board for all category of corporate debtors.

h) Approving a resolution plan for a corporate debtor is a commercial decision of the CoC, the provisions of Section 29A needs reconsideration. Ideally the resolution applicant (RA) should

only provide an affidavit to the effect that the RA is not a wilful defaulter, not defaulted in implementation of a resolution plan in the past and the other provisions of Section 29A. The CoC should thereafter be given the option to decide if the resolution plan of the said RA shall be considered or not. This arrangement will assist the CoC in distinguishing genuine defaults from fraudulent defaults.

With little ground work and creating awareness amongst the stakeholders about the advantages of Pre-pack, this important tool of corporate rescue can go a long way in resolving stress and promoting Pre-pack as a tool for insolvency resolution.

It is imperative for any Government to carry out a root cause analysis for failure of any scheme promoted by it and which has not yielded desired results to examine the cause of failure. Just formulating schemes with very little effort in educating the stakeholders and with very little effort towards successful implementation the Pre-Pack process is a recipe for disaster. It is hence necessary to constitute a sub-committee of the Insolvency Law Committee to examine the pitfalls in the present frame work and design of Pre-Packs and recommend changes to rejuvenate this important tool for resolution of financial stress. Insolvency Professionals can play a very important role of educating the stakeholders. All the industry associations and chamber of commerce in the country may be roped in to educate its members and with concerted effort, Pre-Packs can become the most preferred tool for resolution of financial stress for corporate India.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 27 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - REPLACEMENT BY COMMITTEE OF CREDITORS

Anil Kumar Ojha v. Chandramouli Ramasubramaniam Resolution Professional of SLO Industrial Ltd. [2022] 140 taxmann.com 107 (NCLAT - Chennai)

It is only Committee of Creditors which is empowered to change Resolution Professional during CIRP period with a majority of 66 per cent votes and no such right has been conferred under provisions of IBC upon suspended board of director of corporate debtor to replace Resolution Professional and, therefore, application filed by appellant-suspended board of director of corporate debtor to replace Resolution Professional was rightly dismissed by NCLT.

The appellant was suspended board of directors of the corporate debtor. The appellants preferred an application to replace the Resolution Professional. NCLT by impugned order dismissed said application holding that no right had been conferred under provisions of the I&B Code upon suspended board of director to replace the Resolution Professional. The appellant contended that it had every locus standi to prefer said application before NCLT.

Held that it was only Committee of Creditors which was entitled and empowered to change the Resolution Professional in CIRP and that too with a majority of 66 per cent votes and suspended board of directors under I&B Code was not enjoined with power to displace exisiting Resolution Professional and to seek for a replacement of another Resolution Professional being appointed in his place. Therefore, appeal filed by the appellant was to be dismissed.

Case Review : Order of NCLT-Chennai in IA(IBC)/1095/CHE/2021 in CP 1264/IB/2018, dated 23-12-2021 (para 11) *affirmed.*

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Vrundavan Residency (P.) Ltd. v. Mars Remedies (P.) Ltd. [2022] 140 taxmann.com 113 (NCLAT- New Delhi)

Where application filed by financial creditor under section 7 against corporate debtor was rejected by NCLT on ground of limitation as last date of payment was in 2015 and application was filed in 2020, NCLT having not perused documents whereby corporate debtor categorically acknowledged debt, order of NCLT was to be set aside and matter was to be remitted back to pass fresh orders.

The appellant-financial creditor advanced unsecured loan to the corporate debtor between 2011 to 2015. The corporate debtor defaulted in repayment and the financial creditor filed an application under section 7 against the corporate debtor on 20-2-2020. The Adjudicating Authority rejected said application on ground that debt was barred by limitation as last payment was made in 2015. It was noted that financial statements for years 2016 and 2017 of the corporate debtor showed an amount of Rs. 54.71 lakhs as 'long term borrowing' and account ledger confirmation of financial creditor for April 2015 to March 2016 was duly signed by the corporate debtor but NCLT did not peruse those documents.

Held that order passed by NCLT was to be set aside and matter was to be remitted back to pass fresh orders after perusing documents whereby the corporate debtor categorically acknowledged debt.

Case Review : Vrundavan Residency (P.) Ltd. v. Mars Remedies (P.) Ltd. [C.P. (IB) No. 300/NCLT/AHM/2020, dated 22-3-2021] (para 9) *reversed.*

SECTION 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

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Ashok Kumar v. KTC Foods (P.) Ltd. [2022] 140 taxmann.com 158 (NCLAT-New Delhi)

Where corporate debtor was sold as a going concern to R2 and entire sale proceed was paid towards admitted claim of sole financial creditor, order of NCLT rejecting application of operational creditor seeking direction to R2 to remit its claim was not to be interfered with as sale as e-auction notice clearly enumerated that sale of corporate debtor as a 'going concern' was without previous liabilities or encumbrances.

NCLT initiated corporate insolvency resolution process against the corporate debtor on application filed by the appellant-operational creditor. No resolution plan in respect of the corporate debtor was received and order for liquidation of the corporate debtor was passed by NCLT. The liquidator filed an application for closure of liquidation process and R2 opted to buy the corporate debtor as a going concern. NCLT approved closure of liquidation process of the corporate debtor. R2 remitted entire bid amount and acquired the corporate debtor. Sale proceeds were distributed by liquidator as per waterfall mechanism and entire amount was paid towards 13.17 per cent of admitted debt of sole financial creditor(oriental bank) of the corporate debtor. The appellant filed an application before NCLT seeking direction to R2 to make payment of claim of the appellant but same was rejected. The appellant contended that R2 had acquired the corporate debtor as a going concern and, therefore, its assets and liabilities should also be owned by it.

Held that since entire sale proceed was paid towards R1- sole financial creditor, which was higher in priority to all 8 operational creditors and e-auction notice clearly enumerated that sale of the corporate debtor as a 'going concern' was

without previous liabilities or encumbrances, order passed by NCLT was not to be interfered with.

Case Review : Order dated 18-5-2020 passed by NCLT (Chandigarh) in CA No. 1189/2019 & IA No. 132/2020 in CP(IB) No. 136/Chd/Hry/2018, (para 26) *affirmed.*

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

Hardwin Construction (P.) Ltd. v. ONGC Petro Additions Ltd. [2022] 140 taxmann.com 159 (NCLAT- New Delhi)

Where FCIPL, contractor of corporate debtor, issued work orders to operational creditor and corporate debtor assured direct payment to operational creditor on receipt of invoices approved by FCIPL, application filed under section 9 by operational creditor against corporate debtor based on invoices unapproved by FCIPL, had rightly been rejected on ground that there was no privity of contract between operational creditor and corporate debtor.

FCIPL-contractor/supplier of the corporate debtor issued two work orders to the appellant-operational creditor. The corporate debtor issued letters of assurance that it will make payment directly to the operational creditor after receipt of invoices duly certified by FCIPL. Appellant raised certain bills, invoices and notice under section 8 demanding payment from the corporate debtor. The corporate debtor refuted all claims made by the appellant and stated that all bills issued by the appellant certified by FCIPL had already been paid. The appellant filed an application under section 9 against the corporate debtor and same was dismissed

by the Adjudicating Authority on ground that there was no privity of contract between the appellant and the corporate debtor.

Held that since certification of invoices by FCIPL was condition precedent for making payment, the corporate debtor would not be treated to be substituted in place of original contractor and limited liability to make payment was accepted by corporate debtor subject to certification of bills by original contractor i.e. FCIPL. Since invoices raised by the appellant were unapproved by FCIPL, the Adjudicating Authority had not committed any error in rejecting application filed by the appellant under section 9.

Case Review : Order passed by NCLT (Ahmedabad) in Hardwin Construction (P.) Ltd. v. ONGC Petro Additions Ltd. [CP (IB) No. 355/9/NCLT/AHM/2018, dated 2-2-2021] (para 15) *affirmed*.

SECTION 238 - CORPORATE INSOLVENCY RESOLUTION PROCESS - OVERRIDING EFFECT OF CODE

Kotak Mahindra Bank Ltd. v. Ashok Oswal Suspended Director of Oswal Spinning & Weaving Mills Ltd. [2022] 140 taxmann.com 246 (NCLAT- New Delhi)

Since proceedings under I&B Code are time bound proceedings which has an overriding effect by virtue of section 238, pendency of counter claim of corporate debtor before DRT could not be a ground to stay distribution of funds to financial creditors in liquidation proceeding.

The Adjudicating Authority passed an order directing for liquidation of the corporate debtor. In liquidation proceeding, the liquidator invited claims from all financial creditors. The appellant and other financial creditors filed their claims and the liquidator partly admitted claim of the appellant. The suspended director of the corporate debtor filed an application before the Adjudicating Authority claiming that counter claim of the corporate debtor was pending before DRT, therefore, disbursement could not be made to financial creditors in liquidation proceedings. The Adjudicating Authority passed an ex parte interim order directing liquidator to maintain status quo with regard to distribution of funds.

Held that proceedings under I&B Code are time bound proceedings, which has an overriding effect by virtue of section 238, therefore pendency of counter claim of the corporate debtor before DRT could not be a ground to stay distribution of funds to financial creditors as per claim admitted by the liquidator. Therefore, interim order passed by the Adjudicating Authority was to be recalled/vacated

Case Review : Order of NCLT in I.A. No. 555 of 2020 in CP (IB) No.

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

Jagbasera Infratech (P.) Ltd. v. Rawal Variety Construction Ltd. [2022] 140 taxmann.com 288 (NCLAT- New Delhi)

Amount invested by appellant as a 'promoter'/'investor' for development of a real estate project under a joint venture agreement would not fall within ambit of definition of 'financial debt' as defined under section 5(8).

The appellant entered into a memorandum of understanding (MoU) and joint venture agreement with the respondent in terms of which the appellant paid certain amount to the respondent for development of residential complex. The appellant, alleging default on part of the respondent, filed an application under section 7 for initiation of corporate insolvency resolution process against the respondent. NCLT dismissed said application holding that the appellant was not a financial creditor.

Held that from MoU entered into between parties, it was crystal clear that the appellant was classified as a 'promoter' who would be entitled to raise loans in its own name from bank/financial institution for project and there would be no liability on developer for re-payment of loan or interest. Since relationship between the appellant and the respondent was that of land owner and developer, amount invested in joint venture project by the appellant in its capacity as a 'promoter' and 'Investor' did not fall within ambit of definition of 'financial debt', therefore, instant appeal was to be dismissed.

Case Review : Jagbasera Infratech (P.) Ltd. v. Rawal Variety Construction Ltd. [2019] 103 taxmann.com 266 (Chd.) (para 9) *affirmed.*

SECTION 9 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR

Yuvrraj Agarwal v. Aspek Media (P.) Ltd. [2022] 140 taxmann.com 292 (NCLAT- New Delhi)

Where corporate debtor appointed appellant No. 1 as CEO, who was also director of appellant No. 2 and terminated his service for reasons of unfair trade practice, in

view of fact that there was no evidence to prove that corporate debtor hired consultancy services of appellant No. 2, there was no illegality or infirmity in order passed by NCLT rejecting joint application filed by appellants under section 9 against corporate debtor.

The appellant No. 1-operational creditor, who was director of the appellant No. 2 was appointed as CEO of the respondent-corporate debtor. When dues were sought to be paid, the corporate debtor accused the appellant No. 1 of unfair trade practice and terminated his services. A combined notice under section 8 was issued to the corporate debtor by appellant Nos. 1 and 2. Subsequently, a joint application under section 9 was filed by appellants against the corporate debtor. NCLT by impugned order dismissed said application on ground that petition under section 9 could only be filed individually and not jointly. The appellant No. 1 claimed that he was acting on behalf of the appellant No. 2 who was also arrayed as an operational creditor. It was noted that there was no documentary evidence with respect to consultancy services having been hired by the corporate debtor from appellant No. 2.

Held that in light of termination letter issued by the corporate debtor terminating services of the appellant No. 1 in his capacity as an 'employee', there was no merit in submission of the appellant No. 1 that a joint application was maintainable as the corporate debtor hired services of appellant No. 2 and appellant No. 1 was acting behalf of appellant No. 2. Since individual operational creditors have to issue their individual claim notice and petition under section 9 would contain separate individual data, there was no infirmity in order of NCLT.

Case Review : Order passed by NCLT (New Delhi) in C.P. No. IB -221/ND/2019, dated- 5-3-2021 (para 18) *affirmed.*

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

Smt. Sushila Lakhotia v. Zeal Developers (P.) Ltd. [2022] 140 taxmann.com 352 (NCLAT- New Delhi)

Where appellant entered into an investment agreement with respondent-corporate debtor and corporate debtor itself admitted that an amount remained due and payable to appellant, NCLT committed an error in rejecting application filed by appellant under section 7.

The appellant entered into an investment agreement with the respondent-corporate debtor as per which an amount of Rs. 75 lakh was received by the corporate debtor from the appellant. The appellant issued notice calling upon the corporate debtor to execute sale deed of commercial area allotted to the appellant and to handover possession and transfer all security deposits. The corporate debtor paid Rs. 25 lakhs with balance remaining. The appellant filed an application under section 7 for initiation of CIRP against the corporate debtor. NCLT by impugned order dismissed said application observing that there was no debt.

Held that since the corporate debtor itself stated that amount was received and it had paid Rs. 25 lakhs and agreed to make payment of remaining amount when project would start paying back, there was clear admission of debt on behalf of the corporate debtor and NCLT had committed error in observing that there was no debt proved by the appellant. Therefore, impugned order passed by NCLT was to be set aside.

Case Review : Order of NCLT-New Delhi in IB-237/(ND)/2019, dated 28-5-2019. (para 10) *reversed.*

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

G. Eswara Rao v. Stressed Assets Stabilisation Fund [2022] 140 taxmann.com 455 / 232 COMP CASE 92 (NCLAT- New Delhi)

Where account of corporate debtor was declared as NPA on 30-9-2002 but multiple one time settlement proposals had been forwarded by corporate debtor from 10-6-2005 to 14-3-2015 and extract from balance sheet and details reflected in short time borrowing as provided in balance sheet for year 2016-17 made it clear that there was debt due and payable in law by corporate debtor, CIRP application filed on 25-3-2019 was within limitation period.

The appellant-corporate debtor obtained various loan facilities from IDBI Bank. IDBI bank declared account of the corporate debtor as Non-Performing Assets (NPA) on 30-9-2002. IDBI bank assigned all its debt in respect of the corporate debtor to respondent No. 1- financial creditor. DRT allowed recovery proceedings in favour of the respondent No. 1 and passed a decree for a sum along with interest against the corporate debtor. The Respondent No. 1 filed application under section 7 for initiation of CIRP against the corporate debtor. NCLT admitted application filed under section 7 by respondent No. 1. On appeal, the corporate debtor contended that application filed by respondent No. 1 was barred by limitation as debt became NPA more than 12 years back. It was noted that multiple one time settlement proposals had been forwarded by the corporate debtor from 10-6-2005 to 14-3-2015 and respondent No. 1 had submitted balance sheet and auditors report of the corporate debtor for financial year 2004-05 till 2016-17.

Held that balance sheet acknowledgement would give life to due debt otherwise payable in law. Since extract from balance sheet and details reflected in short time borrowing as provided in balance sheet for year 2016-17 made it clear that there

was debt due and payable in law, CIRP application filed on 25-3-2019 was within limitation period.

Case Review : Order passed by NCLT-Hyd. in CP(TCP) (IB) No. 87/7/AMR/2019 [CP (IB) No. 200/7/HDB/2019, dated 1-10-2019] (para 9) *affirmed.*

SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

Aashray Social Welfare Society v. Saha Infratech (P.) Ltd. - [2022] 140 taxmann.com 503 (NCLAT- New Delhi)

As per statutory scheme, there is no requirement in law that Authorised Representative shall represent creditors in a class before Adjudicating Authority in an adjudication, hence, where appellant homebuyers filed impleadment application to implead them as party respondent, they had every right to be heard before Adjudicating Authority.

Appellant No. 1 was a registered society comprising of 102 members who were all allottees of a real estate project being developed by corporate debtor. Appellants were also allottees in said project of the corporate debtor. Pursuant to commencement of CIRP of the corporate debtor, two financial creditors (Respondent Nos. 2 and 3) filed their claims before the IRP but same were rejected. Thereafter, they filed an application before NCLT in which appellants had not not been impleaded as party respondents. Accordingly, appellant-homebuyers filed an application and prayed for impleadment to oppose claim filed by respondent Nos. 2 and 3. NCLT rejected impleadment application filed by appellants on ground that Authorised Representative (AR) of homebuyers who

were creditors in class were not representing creditors in a class before Adjudicating Authority.

Held that as per statutory scheme, there is no such requirement in law that Authorised Representative (AR) shall represent creditors in a class before the Adjudicating Authority in an adjudication. AR has a limited role assigned under statutory scheme i.e. to attend meetings of CoC and to cast votes on behalf of creditors in a class. It could not be said that since AR had not came up before the Adjudicating Authority for filing impleadment application, appellants who themselves were homebuyers had no right to participate in adjudication initiated by filing applications by respondent Nos. 2 and 3. Since allegation of connivance had been made against appellants by respondent Nos. 2 and 3 before the Adjudicating Authority, appellants had every right to be heard before the Adjudicating Authority. Therefore, the Adjudicating Authority committed error in rejecting impleadment application filed by appellants to implead them as party respondent.

Case Review **:** Order passed by NCLT, New Delhi Bench II in I.A. No. 2365 of 2021 and I.A. No. 2366 of 2021 in I.A. No. 2286 of 2021 and I.A. No. 2275 of 2021 in C.P. (IB) No. 1781 (ND)/2018) dated 21-10-2021, *set aside*.

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

S. S. Engineers v. Hindustan Petroleum Corporation Ltd. [2022] 140 taxmann.com 524 /173 SCL 477 (SC)

Claim of corporate debtor that there existed a dispute in relation to quality of work done by operational creditor, breach of terms and conditions of purchase orders was sufficient to refuse entertainment of insolvency application filed by operational

creditor and, thus, NCLAT was justified in setting aside NCLTs order admitting section 9 application filed by operational creditor on ground of pre-existing dispute

The corporate debtor 'HBL', awarded contract to the operational creditor for enhancing capacity of boiling house of the corporate debtor. Invoices were raised by the operational creditor. The corporate debtor failed to pay. The operational creditor thus, filed an application to initiate CIRP against the corporate debtor. Said application was admitted by NCLT. The rtespondent, being holding company of the corporate debtor filed an appeal on the corporate debtor's behalf contending that quality of work done by the operational creditor was poor and the operational creditor had breached terms and conditions of purchase orders causing huge losses to the corporate debtor. NCLAT by impugned order set aside order of NCLT.

Whether NCLT, exercising powers under section 7 or 9, is not a debt collection forum. It is not object of IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. The operational creditor can only trigger CIRP process, when there is an undisputed debt and a default in payment thereof. Various communications between the operational creditor and the corporate debtor reflected that dispute existed between parties prior to receipt of demand notice and, therefore, NCLAT was justified in setting aside NCLTs order admitting section 9 application filed by the operational creditor.

Case Review : Order of NCLAT in Company appeal (AT) (Insolvency) No. 332 of 2020, dated 10-01-2022 (para 33) *affirmed.*

SECTION 3(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - CLAIM

Ashok Kumar Juneja Resolution Professional of Mastana Foods (P.) Ltd. v. Excise & Taxation Officer of State Tax [2022] 141 taxmann.com 45 (NCLAT-New Delhi)

When prospective resolution plans had been received, opened and were being actively considered by CoC, in view of such advanced stage of CIRP, claim of respondent Excise & Taxation Officer filed after delay of 405 days should not be included in CIRP since such inclusion would create unneccesary delay in CIRP.

The respondent-Excise and Taxation Officer had submitted its claim to the appellant-Resolution Professional (RP). RP rejected said claim on ground that claim was filed after delay of 405 days. NCLT by impugned order passed an ex-parte order condoning delay in filing claim by the respondent. It was noted that when the respondent filed its claim, resolution plan was under consideration of CoC and later same was approved. Thereafter, resolution plan was placed before NCLT for further approval.

Held that when prospective resolution plans had been received, opened and were being actively considered by CoC, in view of such advanced stage of CIRP, claim of the respondent should not be included in CIRP as such inclusion would mean that resolution plan would have to be invited afresh leading to unnecessary delay in CIRP. RP who had rejected claim should have been heard to arrive at a judicious, fair and transparent decision and since that had not been done in instant case, impugned order passed by NCLT was erroneous and was to be set aside.

Case Review : Order of NCLT - New Delhi in I.A N. 1374 of 2021 and I.A No. 95 of 2021 in CP(IB) No. 630 (PB)/ 2019, dated 6-4-2021 (para 17) *affirmed.*

SECTION 5(20) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL CREDITOR

Mando Automotive India (P.) Ltd. v. Chennai Clamptech Designer (P.) Ltd. [2022] 141 taxmann.com 133 (NCLAT - Chennai)

Where appellant filed an application under section 9 against corporate debtor, which was devoid of qualitative and quantitative details and both appellant and corporate debtor had been supplying materials mutually exclusive with one and another, appellant was not an operational creditor qua corporate debtor and, therefore, NCLT rightly dismissed said application.

The appellant-operational creditor filed an application under section 9 for initiation of CIRP against the respondent-corporate debtor. NCLT by impugned order dismissed said application holding that the appellant failed to place necessary documents along with CIRP application. It was further held that both the appellant and the corporate debtor had been supplying materials mutually exclusive with one and another and in said circumstances, the appellant alone could not be treated as an operational creditor in respect of the corporate debtor.

Held that since the appellant-operational creditor and the respondent-corporate debtor were supplying materials mutually, appellant singly could not be considered as an operational creditor qua the corporate debtor. Since application projected by the appellant before NCLT was devoid of necessary qualitative and quantitative details, coupled with facts the appellant was not an operational creditor pertaining to the respondent-corporate debtor, impugned order passed by NCLT in dismissing application filed under section 9 was free from legal infirmities and, therefore, instant appeal was to be dismissed.

Case Review : Order passed by (NCLT - Chennai) in IBA/13/4/2022 order dated 29-9-2021 (para 34) *affirmed.*

SECTION 4 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION OF

Metal's & Metal Electric (P.) Ltd. v. Goms Electricals (P.) Ltd. [2022] 141 taxmann.com 134 (NCLAT - Chennai)

Threshold limit of Rs. 1 crore for default specified in Notification No. 12505(E), dated 24-3-2020 will be applicable for application filed under section 7 or 9 on or after 24-3-2020.

The applicant had sold and supplied the goods as an operational creditor to the corporate debtor and corporate debtor had received, accepted and utilized those goods. The corporate debtor had never raised any dispute as to the quality or quantity of the material supplied. The operational creditor had issued a demand notice dated 10-10-2020 as per section 8 to the corporate debtor. On corporate debtors failure to pay, operational creditor filed an application under section 9. NCLT observed that the amount claimed was in a sum of Rs. 17,91,112 and on and from 24-3-2020 the pecuniary jurisdiction for entertaining the petition under the provisions of sections 7, 9 and 10 stands in relation to threshold limits increased from Rs. 1,00,000 to Rs. 1,00,00,000. The petition had been filed on 12-3-2021 i.e much after 24-3-2020 being the date of increase of the threshold limit and thus, in the circumstances, it had no jurisdiction to entertain the petition and was constrained to dismiss the same for 'lack of pecuniary jurisdiction'. Challenging the dismissal of the application, the operational creditor filed an appeal contending that the amount in default was Rs. 17,91,112 and the correct interpretation of the Notification dated 24-3-2020 was that in case of 'default' that takes place on or after 24-3-2020, the threshold limit would be Rs. 1,00,00,000. As such, if a 'default' had been committed by a 'corporate debtor' before the issuance of the Notification i.e., prior to 24-3-2020, then, for the purpose of initiation of CIRP under section 9 the threshold limit would be considered as Rs. 1 lakh.

Held that date of initiation of CIRP shall be date on which an application is made; date of default is not to come into operative play and same ought not to be taken into account for anything but computing period of limitation. Threshold limit of Rs. 1 crore specified in Notification No. 1205(E), dated 24-3-2020 will be applicable for application filed under section 7 or 9 on or after 24-3-2020. Thus, where application under section 9 was filed on 12-3-2021 involving debt lower than threshold limit (Rs. 17.91 lakhs), said application was not maintainable because of lack of pecuniary jurisdiction and, thus, impugned order passed by NCLT dismissing said section 9 application was free from legal infirmities.

Case Review : Order of NCLT in CP/IB/23/CHE/2021, dated 15-3-2021 (para 29) *affirmed.*

SECTION 3(31) - CORPORATE INSOLVENCY RESOLUTION PROCESS - SECURITY INTEREST

Engineering Projects (India) Ltd. v. Ram Ratan Kanoongo, Resolution Professional of D. Thakker Construction (P.) Ltd. [2022] 141 taxmann.com 197 (NCLAT- New Delhi)

Where appellant-project owner issued two bank guarantees (performance bank guarantee and mobilisation advance bank guarantee) to corporate debtor to ensure performance of an obligation to construct residential quarters and towards security for execution same, since corporate debtor was unable to execute work with given advance and bank guarantee, same could not be said to be an asset belonging to corporate debtor.

The appellant/project owner had awarded construction work to the corporate debtor for an amount of Rs. 17.32 crore to be completed within a period of 15 months. In pursuance to stipulation of contract, the appellant submitted bank guarantees (performance bank guarantee and mobilisation advance bank guarantee) to the corporate debtor for 'performance of an obligation'. Subsequently, the corporate debtor vide letter expressed its inability to complete the work and requested the appellant to take up project. Meanwhile, CIRP proceedings against the corporate debtor was Initiated and moratorium was imposed. The Adjudicating Authority allowed application filed by RP and directed to refund money equivalent to bank guarantees which had been encashed by the appellant by invoking bank guarantees during CIRP. The appellant contended that a bank guarantee being an independent contract between guarantor bank and a beneficiary and specifically a 'performance bank guarantee' was not covered under definition of security interest provided in section 3(31). The appellant further contended that amount given as an 'advance' under mobilisation advance bank guarantee was not a 'debt' or an obligation in respect of a claim and it was only given for a completion of project/execution of contract in its totality, therefore said amount did not belong to the corporate debtor.

Held that since the corporate debtor was unable to execute work with given advance under mobilisation advance bank guarantee, which was generally issued at commencement of contract, same could not be said to be an asset belonging to the corporate debtor, therefore RP had no jurisdiction to take third party assets which did not belong to the corporate debtor. Therefore, the Adjudicating Authority ought not to have allowed refund of amounts covered under bank guarantees hence, appeal was to be allowed and order of the Adjudicating Authority was to be set aside.

Case Review : Order of NCLT in C.P. No. 4513/MB/2018, dated- 20-1-2022 (para 26) *reversed*.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

Sanjeev Mahajan v. India Bank (Erstwhile Allahabad Bank) [2022] 141 taxmann.com 203/[2022] 173 SCL 296 (NCLAT- New Delhi)

Although settlement had to be encouraged in IBC but no direction can be issued by adjudicating authority to financial creditor-bank to positively grant benefit of OTS to a corporate debtor.

The corporate debtor and its other three entities were engaged in hospitality business and against the corporate debtor and its other three entities certain amounts were due to financial creditor-bank. A compromise proposal offered by the corporate debtor for Rs. 260 crores was accepted by the financial creditor and an amount of Rs. 154 crores was paid and amount of Rs. 102 crores remained pending. Consequently, an earlier compromise failed and an application under section 7 was filed against the corporate debtor. During pendency of section 7 application, the financial creditor had issued a proposal for sale of NPA's to Asset Reconstruction Companies (ARC). Thereafter, the corporate debtor gave an one time settlement offer (OTS) of same amount at which the financial creditor proposed to assign its debt to Asset Reconstruction Company. However, said OTS proposal was rejected by the financial creditor. NCLT by impugned order admitted section 7 application. The corporate debtor submitted that due to obstinate attitude of the financial creditor, the corporate debtor could not be settle matter and revive its business.

Held that settlement had to be encouraged in IBC but no direction could be issued to the financial creditor to positively grant benefit of OTS to a corporate debtor. Since there was an existence of debt and default, NCLT had rightly admitted application filed by the financial creditor under section 7.

Case Review : Order of NCLT [New delhi] in CP [IB] 1913[ND]/2019], dated 24-12-2021 (para 12) *affirmed.*

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

Electrosteel Castings Ltd. v. UV Asset Reconstruction Co. Ltd. - [2022] 141 taxmann.com 218 (NCLAT- New Delhi)

Where financial creditor filed an application to initiate CIRP of appellant and NCLT was yet to take a decision, application before NCLT seeking order of stay or keeping in abeyance section 7 application until final adjudication and disposal of application pending before DRT, to adjudicate whether or not any debt was due and payable by appellant was rightly rejected by NCLT.

Appellant stood as guarantor in respect of loan taken by a borrower from finance company 'SREI' and mortgaged its property. 'SREI' assigned debts of borrower in favour of respondent-ARC who had taken recourse of section 13(4) of SARFAESI to take possession of mortgaged property. The appellant filed an application before DRT under section 17 of SARFAESI on ground that assignment agreement was invalid in view of discharge of entire debt. Meanwhile, the respondent filed CIRP application in respect of the appellant. The appellant filed an application before NCLT seeking order of stay or keeping in abeyance section 7 application until final adjudication and disposal of application before DRT but same was rejected by NCLT by impugned order. It was noted that the appellant had filed its reply to section 7 application, where all issues including contention that there was no debt in existence had already been raised and NCLT was yet to consider submission of parties and take a decision.

Held that, issues, which had been raised by the appellant before NCLT, had to be gone into by NCLT and said issues need not be gone in instant appeal. Thus, NCLT did not commit any error in rejecting application for stay.

Case Review : Order of NCLT-Cuttack in IA No. 139/C/2021 in CP(IB) No. 16/C/2021, dated 3-2-2022 (para 14) *affirmed*.

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

Essar Steel Ltd. v. State of Gujarat [2022] 141 taxmann.com 219 /[2022] 173 SCL 286 (Gujarat)

Where resolution plan approved by Supreme Court in respect of corporate debtor provided that all past dues, claims and liabilities against corporate debtor stood extinguished, civil application filed by corporate debtor seeking extinguishment and discharge of liability raised by operational creditor against corporate debtor towards water charges attributable to period prior to CIRP was to be allowed.

The Adjudicating Authority on basis of petitions filed by the financial creditors under section 7 started corporate insolvency resolution process (CIRP) against the corporate debtor and Resolution Professional (RP) was appointed. RP made public announcement inviting claims. The respondent filed its claim in its capacity as an operational creditor with respect to water charges. Resolution plan submitted by the corporate debtor was approved by CoC and subsequently by Supreme Court in Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta [2019] 111 taxmann.com 234. Said resolution plan provided that claims and liabilities of the corporate debtor whether contingent or crystallized, known or unknown, filed or not filed would stand irrevocably and unconditionally abated, discharged, settled and extinguished in perpetuity upon approval of the resolution plan.

Held that instant civil application filed by the corporate debtor seeking extinguishment and discharge of liability raised by respondent-operational creditor towards water charges against corporate debtor, attributable to period prior to insolvency commencement date, was to be allowed.

SECTION 15 - CORPORATE INSOLVENCY RESOLUTION PROCESS - PUBLIC ANNOUNCEMENT

Akshar Plastchem Investment (P.) Ltd. v. Bijay Murmuria, Resolution Professional of Kitply Industries Ltd. - [2022] 141 taxmann.com 294 (NCLAT- New Delhi)/[2022] 173 SCL 388 (NCLAT- New Delhi)

Where public notice published by IRP was in compliance with statutory requirements however, financial creditor filed its claim after 20 months from last date of receiving claims, such financial creditor could not be allowed to challenge order of Adjudicating Authority approving resolution plan.

Corporate insolvency resolution process (CIRP) was initiated against the corporate and IRP was appointed. IRP issued a public announcement in two newspaper and also uploaded notices on website of the corporate debtor as well as on website of the Board. In pursuance of public announcement, IRP received only one resolution plan which was considered by CoC and same was further approved by the Adjudicating Authority. The appellant-financial creditor challenged said order on ground that public announcement made by IRP was not in accordance with regulation 6(2)(ii) due to non-publication of notice at place where the appellant was carrying on its business. It was noted that publication was made not only at registered and corporate office of the corporate debtor but also same was uploaded on website of the corporate debtor and Board, which itself indicated that claim form could be downloaded from website of Board.

Held that on date of approval of resolution plan by the Adjudicating Authority, all claims, which are not part of resolution plan, shall stand extinguished. Whether since appellant filed its claim after 20 months from last date of receiving claim, and public notice published by IRP was in compliance with statutory requirements, appellant could not be allowed to challenge order approving resolution plan by the Adjudicating Authority.

Case Review : Order of NCLT (Guwahati) in I.A. no. 46 of 2020 in CP IB/02/GB/2018, dated 27-11-2020 (para 14), *affirmed*.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITY - APPEALS AND APPELLATE AUTHORITY

Union of India v. Infrastructure Leasing and Financial Services Ltd. [2022] 141 taxmann.com 315 /[2022] 173 SCL 311 (NCLAT- New Delhi)

Where corporate debtor filed an application seeking approval of NCLAT to implement restructuring proposal and sought directions that claims of operational/CAPEX creditors be extinguished, in view of fact that claim of creditors had been admitted by Claim Management Advisor and same had to be dealt with in resolution plan when it would be drawn, restructuring proposal of corporate debtor was to be allowed but relief sought to extinguish claims of operational creditor was not allowed.

CIRP was admitted against the corporate debtor at instance of the financial creditor. On other hand, the corporate debtor sent restructuring proposal regarding settlement of its outstanding debt, which was approved by the financial creditor of the corporate debtor. The corporate debtor filed instant application seeking approval to implement restructuring proposal. The corporate debtor also sought directions that claims of operational/CAPEX creditors be extinguished. Basis given by the corporate debtor to extinguish claims was that proceedings were initiated against it and its group companies under PMLA and said creditors were also under scope of investigation and the Adjudicating Authority under PMLA passed provisional order directing the corporate debtor not to make any kind of payment to said creditors.

Held that since there was no order of the Adjudicating Authority under PMLA confirming or continuing said order and claim of the operational/CAPEX creditors had been admitted by Claim Management Advisor, prayer of the corporate debtor for extinguishing claim of the operational creditors was not acceptable. Admitted claims of the operational/CAPEX creditors had to be dealt with in resolution plan when it would be drawn. Thus, restructuring proposal of the corporate debtor was to be allowed but relief sought to extinguish claims of the operational creditor was not to be allowed.

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

Kishore K. Lonkar v. Hindustan Antibiotics Ltd. [2022] 141 taxmann.com 551 /[2022] 173 SCL 502 (NCLAT- New Delhi)

Section 5(21) includes any claim in respect of provision of goods and services including employment, however initiation of CIRP on ground that LTC and EL encashment had not been paid, which fell within ambit of service benefits, could not be said to be intent and objective of Code and, therefore, there was no illegality in order passed by NCLT rejecting CIRP application based on non-payment of LTC and EL encashment etc.

The appellant was working as an employee in respondent company. The appellant attained superannuation and service benefits such as gratuity etc., EL encashment were due and payable. The appellant issued demand notice under section 8 demanding to clear dues and thereafter, filed an application under section 9 for initiation of corporate insolvency resolution process (CIRP) against the respondent company. Said application was dismissed by NCLT. The appellant contended that gratuity, LTC and EL encashment all constituted salary and, therefore, fell within ambit of definition of operational debt. It was noted that

section 5(21) includes any claim in respect of provision of goods and services including employment, however, it was not case of the appellant that amounts claimed were due towards any emoluments/salary for services rendered by him to respondent company.

Held that initiation of CIRP on ground that LTC and EL encashment had not been paid, which fell within ambit of service benefits, could not be said to be intent and objective of the Code. Therefore there was no illegality or infirmity in well reasoned order of NCLT, and instant appeal was to be dismissed.

Case Review : Order of NCLT-Mumbai in C.P. IB NO. 1060/MB/2019,dated- 6-9-2021 (para 10) *affirmed*.

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

Employees Provident Fund Organisation v. Subodh Kumar Agarwal Resolution Professional Ambient Computronics (P.) Ltd. [2022] 141 taxmann.com 553 (NCLAT- New Delhi)/[2022] 173 SCL 512 (NCLAT- New Delhi)

Where EPFO had not filed any claim before Resolution Professional during CIRP proceedings of corporate debtor, same was not required to be included in approved resolution plan, wherein no allocation had been made towards dues of EPFO.

The corporate debtor committed default in compliance of EPF provisions and a case was registered by appellant-EPFO for assessment of dues of all categories of employees of the corporate debtor. Meanwhile, insolvency proceedings were initiated against the corporate debtor by order of NCLT. The appellant sent a

letter to RP informing that inquiry had been initiated against the corporate debtor for determination of dues. A resolution plan submitted by R2- director of the corporate debtor was approved by NCLT wherein no allocation had been made towards dues of appellant. The appellant contended that the appellant having issued show cause notice to the corporate debtor and successful resolution applicant i.e. R2, it was obligatory on part of SRA to provide for payment of PF dues of employees. It was noted that no claim had been filed by the appellant before RP during CIRP period or before NCLT at any point of time.

Held that there is no requirement for any claim, which was not filed, during CIRP period to be included in resolution plan. Since claim of the appellant crystalized after closing of CIRP process, there was no fault in resolution plan nor said resolution plan needed interference and instant appeal was to be dismissed.

Case Review : Order of NCLT - Kolkata in I.A.(IB)No. 802/KB/2021 IN C.P (IB) No. 993/KB 2018, dated 14-12-2021 (para 17) *affirmed.*

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

✓ The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.

✓ The article should be topical and should discuss a matter of current interest to the professionals/readers.

✓ It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.

✓ The length of the article should be 2500-3000 words.

✓ The article should also have an executive summary of around 100 words.

✓ The article should contain headings, which should be clear, short, catchy and interesting.

✓ The authors must provide the list of references, if any at the end of article.

✓ A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.

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