ISSUE.SEPTEMBER'2021

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

INDEX

CHAIRMAN MESSAGE

The Corporate Insolvency Resolution Process of Videocon Industries Ltd. is getting murkier and a protracted one. It has been engaging the attention of various interest groups for more than three years. The timelines provided in the Insolvency & Bankruptcy Code are up for a toss. Before delving on the issue, it would be pertinent to put the things in a brief perspective as follows:

a) The Company had a Reserves and Surplus of Rs. 10,028.09 crores as on 31,03,2014
b) The Reserves & Surplus declined to a negative figure of (-) Rs.2,972.73 Crores as on 31.03.2019
c) Secured Loans stood at Rs.20,149.23 Crores as on 31.03.2014
d) Secured Loans went up to Rs. 28,586.87 Crores as on 31.03.2019

It is surprisingly shocking that despite the steep decline of Reserves & Surplus, how the Banks/Financial Institutions kept increasing their lending/exposure to the Company in a blatant defiance with their lending norms. The plausible reasons could be (i) Ever greening to save the account from slipping to Non Performing Assets during the tenure of any particular Top Official of the deciding bank(s) and (ii) Overt or Covert complicity in the broad day-light loot of the public money. The Serious Fraud Investigation Office which is investigating into the case must fathom the robbery and its perpetrators at the earliest and bring them to justice. The seriousness and the magnitude of the loot can be understood by the following figures:

(a) Amount of default admitted by NCLT Rs. 62,000.00 crores
(b) Accepted Offer of Resolution Applicant Rs.2,962.00 crores
(c) Haircut(loss) to the lenders - 95.22%

Since the loss to the lenders is too huge, the Ministry of Corporate Affairs, Government of India filed an application under Sections 241 & 242 of the Indian Companies Act, 2013 before NCLT seeking attachment of the moveable and immoveable properties of the Corporate Promoters and the Senior Executives of the Company. Section 241 empowers the Government to file an application before a Tribunal, if the affairs of the company are being conducted in a manner prejudicial to the interests of the public at large. Section 242 deals with the oppression and mismanagement of the company. The NCLT Mumbai Bench ordered attachment of the moveable and immoveable properties and freezing of the Bank Accounts,

Lockers, Demat Accounts and the securities owned in any company or society in the names of the promoters and the CEO and CFO of the Company held in single name or in joint names.

The impugned order of NCLT was appealed before NCLAT by Mr Arvind Bali (Former CEO) and Mr Satpal Bansal (Former CFO) of the Company as they were not given an opportunity of hearing and to file their reply. They alleged in their appeal that denial of an opportunity amounted to violation of the Principles of Natural Justice. The NCLAT has ordered that NCLT should go for fresh determination and pass new orders after providing the opportunity of hearing to the former CEO & CFO whose assets have been attached and the bank accounts frozen. NCLT Mumbai Bench was further directed to pass necessary fresh orders in a fair, just and dispassionate manner on merits of the case as NCLAT found that there was negation of the Principles of Natural Justice.

The original decision of the NCLT, Mumbai Bench was surprising in view of the following facts:

i) Natural Justice is an expression of Common Law involving a procedural requirement of fairness to the concerned parties in the justice delivery system

ii)The concept and doctrine of the Principles of Natural Justice has its place since the beginning of the justice delivery system

iii) The Principles of Natural Justice are founded on the reason and enlightened Public Policy

iv) The Principles of Natural Justice are applicable to the decisions of the Government Agencies, Tribunals and all the Courts while deciding the case and passing adverse orders against any person

The Principles of Natural Justice have to be applied mandatorily, as its application is not dependent on any statutory provision. Even though, it is regarded as a, pervasive facet of the secular law, making fairness a creed of life, no Tribunal can show an oblivion to the mandatory nature of its application.

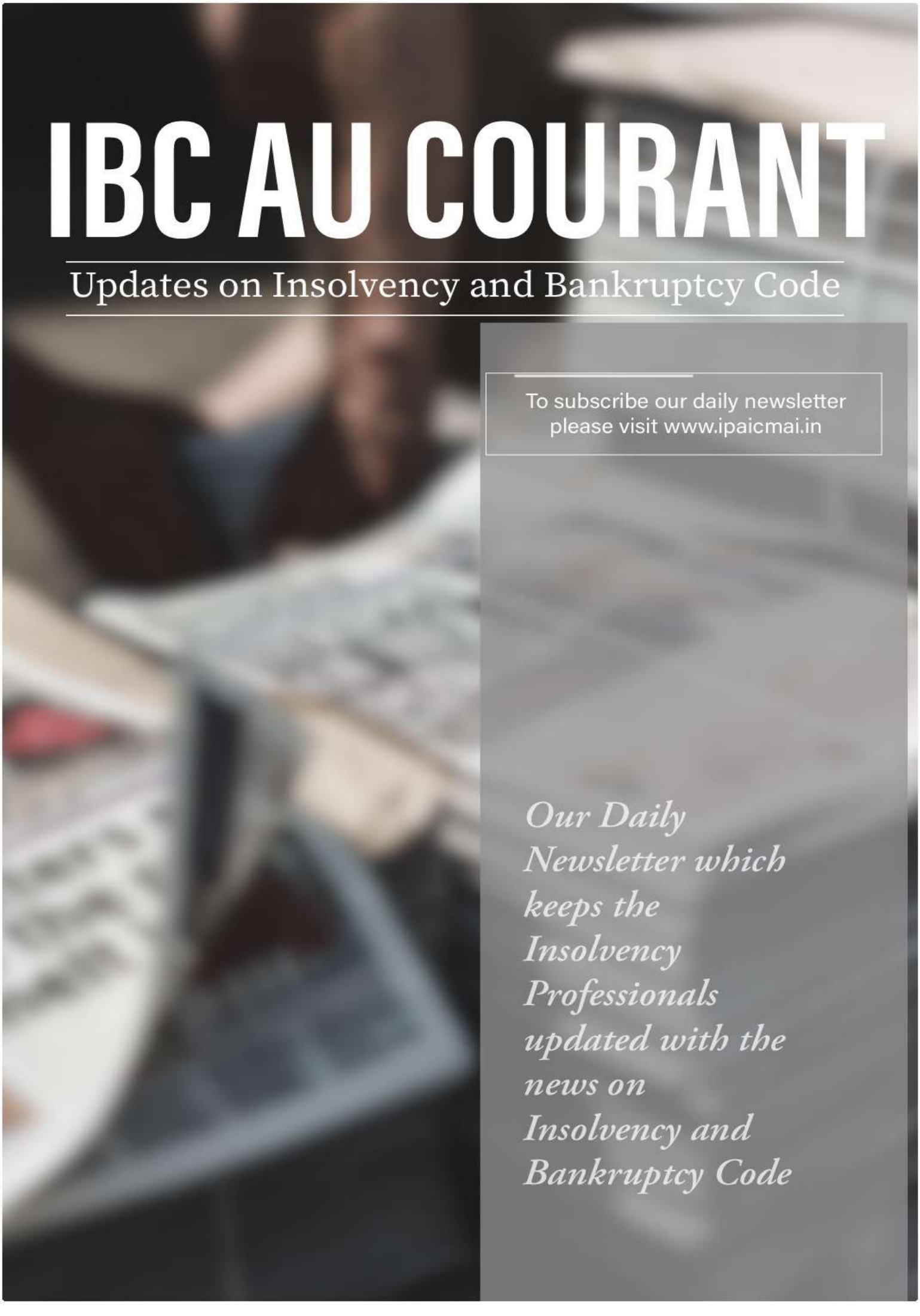
"Audi Alteram Partem" - No Man Shall Be Condemned Unheard - is one of the strong pillars of the Principles of Natural Justice and need to be adhered to mandatorily. It is therefore beyond comprehension as to how it escaped the attention of the Tribunal in such a high profile case. It has given a breather to those who seek to delay the proceedings on some pretext or the other.

Professional Development Initiatives

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

SEPTEMBER'21	
10th-12th Sept, 2021	Master Class on Emerging Scenarios under IBC
18th Sept, 2021	IP Conclave in association with all three IPAs
25th-26th Sept, 2021	Learning Session on How to handle CIRP as a Project
28th Sept, 2021	Insolvency & Bankruptcy Code (2016) Journey So Far and Way Forward



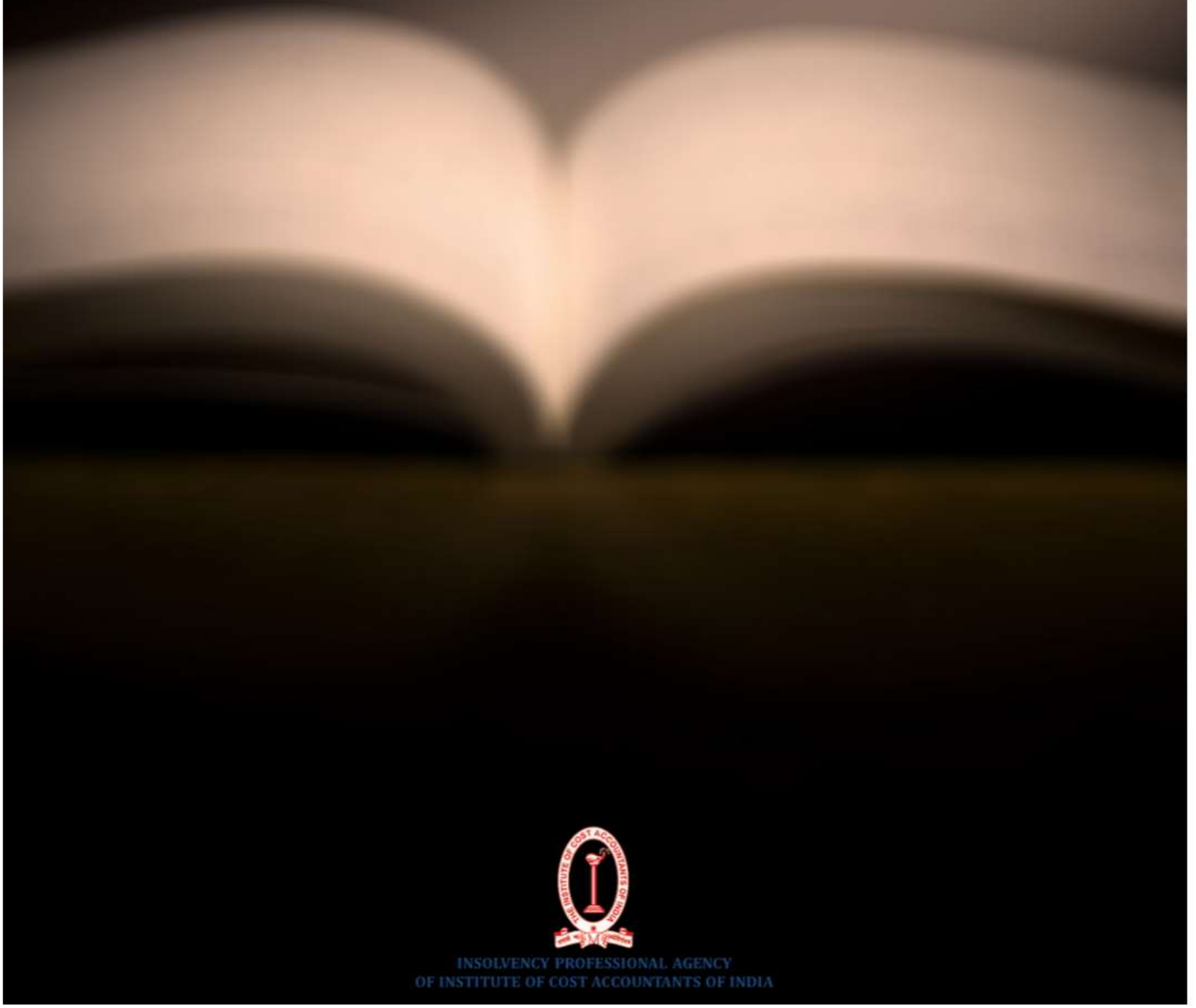
IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

To subscribe our daily newsletter
please visit www.ipaicmai.in

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

ARTICLES



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

FINANCIAL DEBT' INCLUDES INTEREST FREE LOANS ADVANCED TO FINANCE THE BUSINESS

DR. M. GOVINDARAJAN
Insolvency Professional, CS

A financial creditor can initiate corporate insolvency resolution process against a corporate debtor for his default in making the repayment of the loan obtained by it from the financial creditor. The definition of 'financial debt' has been interpreted in various ways in many case laws of the Adjudicating Authority, NCLAT and Supreme Court. One such interpretation is discussed in this article. The interpretation involves whether interest free loan amounts to 'financial debt' and the financial creditor who gives such interest free loan is entitled to initiate corporate insolvency resolution process

Debt

Section 3(11) of the Insolvency and Bankruptcy Code, 2016 ('Code' for short) defines the term 'debt' as a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

Financial debt

Section 5(8) of Code defines the phrase 'financial debt' as a debt along with interest, ***if any***, which is disbursed against the consideration for the time value of money and includes-

a) money borrowed against the payment of interest;
b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;
c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
e) receivables sold or discounted other than any receivables sold on non-recourse basis;
f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.

Financial creditor

Section 5(7) of the Code defines the phrase 'financial creditor' as any person to whom a financial debt is owed and includes a person to whom such debt has been legally ***assigned*** or transferred to.

A financial creditor may initiate a corporate insolvency resolution professional against a corporate debtor who has defaulted in making payment of the loan obtained from the financial creditor before the Adjudicating Authority. The Adjudicating Authority, if it is satisfied, may admit the application filed by the financial creditor and the corporate insolvency resolution process starts on the date of admission.

Interest free loan

In any transaction for a loan the acceptor is liable to repay the loan along with interest. Rarely interest free loan or deposit will be paid to the receiver. The issue to be discussed in this article is whether the loan given free of interest is coming under the purview of the code and whether corporate insolvency resolution process may be initiated against the receiver by the lender under the Code with reference to decided case law.

Case law

In **'Orator Marketing (P) Limited v. Samtex Desinz (P) Limited' – [2021] 164 CLA 87 (SC),** Sameer Sales (P) Limited advanced a loan of Rs.1.60 crores to Samtex Desinz Limited (Corporate debtor). The lender assigned the loan to 'Orator Marketing (P) Limited' (the appellant). The corporate debtor made some payments but Rs.1.56 crore is still remain outstanding.

The appellant filed a petition before the Adjudicating Authority under Section 7 of the Code for initiating corporate insolvency resolution process against the corporate debtor. The Adjudicating Authority rejected the application filed by the appellant holding that mere grant of loan and admission of taking loan will ipso facto not treat the applicant as 'financial creditor' within the meaning of section 5(8) of the Code. The onus lies on the applicant to prove that the loan was given against the consideration for time value of money. The onus is also to prove

to establish that the debt claimed in the application comes within the purview of 'financial debt'. The applicant miserably failed to substantiate with supporting documentary evidence that is payable as per the agreed loan covenants.

The Adjudicating Authority relied on the order passed in 'Dr.B.V.S. Lakshmi v. Geometric Laser Solutions (P) Limited' in which it has been observed the financial creditor coming within the definition of 'financial debt' the claimant is required to show that-

- there is a debt along with interest, if any, which has been disbursed; and
- such disbursement has been made against the consideration for the time value of money.

In the present case neither the loan agreement has any provision regarding the payment of interest nor there is any supporting evidence to establish applicable rate of interest to be paid on the said loan. Therefore, the Adjudicating Authority dismissed the application as not maintainable.

The appellant, aggrieved against the order of the Adjudicating Authority filed appeal before the National Company Law Appellate Tribunal ('NCLAT' for short). The NCLAT dismissed the appeal. The NCLAT held that money borrowed against payment of interest comes within the definition of 'financial debt'. If the money borrowed is not against payment of interest, the core requirement is to find whether there is 'consideration for the time value of money'. The NCLAT observed that the corporate debtor was unable to get any further loan from the market after having taken loan from Tata Capital Financial Services Limited, Sameer Sales, a related party to the corporate debtor, extended interest free unsecured loan to the corporate debtor payable on or after 01.02.2020. The NCLAT analyzed the loan agreement. From the same the NCLAT observed that the sister concern which extending the loan did not record anything other than the problem of the corporate debtor, for granting the loan. Since nobody is willing to give loan Sameer Sales agreed to extend the loan to the tune of Rs.1.60 crores.

The appellant filed appeal against the order of NCLAT before the Supreme Court. The short question involved in this appeal is whether a person who givers a term loan to a corporate person, free of interest, on account of its working capital requirements is not a financial creditor, and, therefore, incompetent to initiate the corporate insolvency resolution process under section 7 of the Code.

The Supreme Court observed that the Adjudicating Authority and NCLAT have misconstrued the definition of 'financial debt' under section 5(8) of the Code, by reading the same in isolation and out of context. On constructing and/or interpreting any statutory provision, one must look

into the legislative intent of the statute. The intention of the statute has to be found in the words used by the Legislature itself. In case of doubt, it is always safe to look into the other object and purpose of the statute or the reason and spirit behind it. Each word, phrase or sentence has to be construed in the light of the general purpose of the law. The interpretative effort must be illuminated by the goal, through guided by the words.

The eligibility of a person, to initiate the corporate insolvency resolution process, if questioned, has to be adjudicated upon consideration of the key words and expressions in Section 7 and other related provisions.

The Supreme Court observed that the Adjudicating Authority and NCLAT have over looked the words 'if any' as contained in the definition under Section 5(8) of the Code ('financial debt' as a debt along with interest, ***if any***, which is disbursed against the consideration for the time value of money) which could not have been intended to be otiose. The phrase 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both the Adjudicating Authority and NCLAT have failed to notice that section 5(8)(f) in terms whereof 'financial debt' includes any amount raised under any other transaction having the commercial effect of borrowing.

Furthermore, section 5(8)(a) to (i) of the Code are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or extensive. Where the word is defined to include something, the definition is *prima facie* extensive.

The Supreme Court held that the trigger for the initiation of the corporate insolvency resolution process by a financial creditor under section 7 of the Code is the occurrence of a default by the corporate debtor. 'Default' means nonpayment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes, inter alia, financial debt. The definition of financial debt in section 5(8) of the Code does not expressly exclude an interest free loan. 'Financial debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

The Supreme Court allowed the appeal and set aside the impugned orders of the Adjudicating Authority and NCLAT

PERSPECTIVES ON INDIVIDUAL INSOLVENCY

Dr. S K Gupta
Managing Director
ICMAI Registered Valuers Organization

Simran Bais
Student - National Law University, Nagpur

The lockdown has hurt India's poor and marginalized communities the most as they have lost access to their livelihoods, food, shelter, and other necessities. Apart from affecting people who were already suffering from poverty, the crisis will also force many small businesses and households who were financially healthy before the crisis to dip into their savings for mere survival. Thus there is an urgent need for rolling out Individual Insolvency Provisions of the IBC 2016

The Perspective

The causal effect of financial deepening on economic growth has been a subject of study over the past few decades. Credit to individuals, as opposed to firms, has also come to play an increasingly important role in promoting growth. In all countries, credit to individuals is a mechanism for small business financing, thus promoting a culture of entrepreneurship. Another reason for personal credit is consumption smoothing, through which households shift consumption through time. Low-income households, especially, require credit as their incomes are reliant on seasonal cycles such as agricultural harvest, but their consumption patterns require liquidity over the entire year. In the event of shocks like bad harvests, or illnesses, credit allows for stability of consumption.

There is a critical difference with respect to the philosophical foundations of the spheres concerning corporate insolvency regime and personal insolvency regime. The former regime certainly has an overarching objective of the rescue and therefore, it would be correct to state that the economic considerations are also attached with the corporate insolvency while on the other hand, the latter regime concerns itself more with the humanitarian angle, as the objective is to save an individual from being harassed by the fellow creditors and the growing hatred from the society at large. The main objective of the later regime is to facilitate the individual so that he can start living peacefully again.

Decoding the Social and Economic dimensions of personal insolvency

It is worthwhile to note that evolving a single approach concerning the legal treatment of the insolvency of natural persons not engaged in the business activities according to the general

consensus is usually considered to be premature.[1] It must be borne in mind that the insolvency of natural persons is interconnected with the social, political, and cultural issues that represent a wide range of concerns and differences which cannot be treated in a uniform manner. However, because of this particular problem, the insolvency of natural persons should not be left out from the broad scope of research. In order to address the insolvency problem of the natural persons, one should take into consideration all the adjacent contexts of laws, policies, and practices and all these elements should coordinate with each other. Perhaps it is also important to note that the regime for insolvency of natural persons also includes certain salient features of data protection and personal privacy, as well as a host of social and economic regulatory issues which involves the elements pertaining to social welfare provision, housing policy, individual counselling to name a few. Practically speaking with the legal implications, it can be stated that financial distress and insolvency are linked with a credit extension, banking, taxation, and business entrepreneurship as well as involving some of the fundamental laws with respect to contractual obligations and property and interaction of the applications and the property. The perception of the society to conceive debt will also cast an impact on the matter for consideration of the treatment of the excessive burdens of that particular debt. For instance, a given legal or cultural system might regard debts as a collective obligation of a family, tribe, or some larger group beyond the individual debtor most directly responsible for the creation of the obligation. This particular perspective will certainly affect the need for a proper structure of a system for the treatment of insolvency of a natural person because it is certainly different from the basic tenet of individual liability.[2]

Individual Insolvency - The focus is on the treatment of insolvency and not poverty

It has been observed that the reasons for providing insolvency relief to natural persons are generally compared to the reasons for providing social welfare assistance especially to the impoverished. While it can be stated that the insolvency and social support regimes work in tandem however there is a small area of overlap in terms of coverage with distinct goals in mind. The goals pertaining to insolvency regime is mostly focused on the economic aspect which is avoiding wastage and magnifying the levels of productivity while the structures and the goals of social assistance regimes vary greatly because they are primarily driven by humanitarian concerns for social solidarity and social planning and they are often not concerned with the economic impact on any segment of the society per se. The primary goal of most social support regimes is simply to redistribute income or other types of resources to the individuals who do not have access to the appropriate resources however it is important to note that this particular redistribution occurs over an extended time period regardless of the "need."

[1] Kilborn. J., Report on Treatment of the Insolvency of Natural Persons, World Bank, 2019
[2] Ibid

Individual Insolvency - Social assistance and social insurance

There is a thin line of distinction between social assistance and social insurance and the insolvency regime is leaned more towards social insurance. The concept of social assistance is designed in such a manner to ensure that every member of the society has access to a baseline level of resources so as to meet their basic needs of life such as food, shelter, and healthcare while on the other side, social insurance has the main objective of protecting individuals from the trap of financial tragedy. It must be noted that the distinction which exists between the regimes to combat poverty and the regimes to treat insolvency is having the common element of poverty which cannot be "solved" in one procedure for any given individual instead the pragmatic problems of the insolvency process can be resolved in one procedure. The real problem of insolvency flows not from the inability of the debtor to repay but from the creditors and the failure of the state to recognise this particular inability and appropriately try to curtail the destructive pursuit of uncollectible debts. The need of the hour is to provide a rational compromise for ceasing the destructive pursuit and providing an instantaneous solution to the problems that distressed debt poses for the creditors, debtors, and society.

A well-crafted insolvency regime will certainly mandate entry-level requirements and by eliminating the unserviceable debt burden and reinvigorating the capacity of the debtor for self-support, the brief procedure of insolvency regime provides relief not gradually over an extended period of time however it provides relief at a quicker pace.[3]

Individual Insolvency – Social Stigma

The stigma of financial failure has been around throughout history and was particularly severe in ancient times, when it was accompanied by severe punishments for the unfortunate debtor. The inability to meet one's financial obligations has been interpreted at various times by many groups in society as a breach of trust and lack of financial self-restraint. Stigma is relevant since it can impede the proper functioning of rescue mechanisms within insolvency laws and reduce the opportunities for a "fresh start". Although much reduced, residual traces of social stigma related to bankruptcy can be seen in the UK and even in the US, despite its generous debt forgiveness regimes for businesses and consumers.

Framework for Personal Insolvency

The report of the BLRC attempts to provide a rationale and design concerning the significant impact of lack of recovery frameworks on the credit market, and hence, was inspired by the

[3] Business, Innovation and Skills, Credit, Debt & Financial Difficulty in Britain, 2009/10: A Report using data from the YouGov DebtTrack Survey (2011).

potential impact a personal insolvency law could have on the same.[4] Henceforth, it is important to understand the broad framework concerning personal insolvency.

The framework concerning individual insolvency pursues the objectives which are enshrined in the code. The objectives prevent the debtor from getting harmed by the creditor. It enables the individual to phase in and out of business, and attempt to promote entrepreneurship. It increases the expected returns of the creditors and thereby promotes the availability of credit. In this particular structure, it is important to note that it does not take future income of the debtor after fresh start and therefore does not undermine the incentive to work. The debtor is relieved of the burden of debt and isolates certain minimum assets for his subsistence which brings in equity and fairness.

A brief summary under the IBC/ Rules are mentioned below:

- Application for initiating insolvency resolution process in respect of the personal guarantor is to be made under section 94 (1) of the code by the debtor himself or the application can be initiated by the creditors under CIRP by filing an application according to Section 95 (2).
- There is a concept of "interim moratorium" in terms of section 96 under the realm of insolvency process for a guarantor in relation to any debts of the guarantor as soon as the application for insolvency is filed before the Adjudicating Authority as per Section 94 or Section 95.
- In the cases concerning personal guarantors, regardless of whether the application against guarantee is admitted by the Adjudicating Authority or not, an interim moratorium shall immediately apply preventing the enforcement of any debts of the guarantor and staying any ongoing legal proceedings in relation thereto.
- Similar to a Resolution Plan, the code mandates Guarantor in consultation with the Resolution Professional to prepare a Repayment Plan ("Plan") which provides a brief framework regarding restructuring mechanism for the debt owed by the Guarantor, justification for the preparation of such plan and reasons on the basis of which creditor may agree upon the plan.

Fresh-Start Process under the Code

The code envisages a concept of fresh start which is aimed at providing debt relief to the poorest. It is imperative to take into account the fact that only the debtor can trigger this particular process[5] and the default has to be on qualifying debts. If it is observed that the

[4] Report of the Bankruptcy Law Reforms Committee: Rationale & Design, Vol 1, Nov 2015, New Delhi.
[5] Section 80 of IBC, 2016

debtor has triggered the process through a RP, then the Debt Recovery Tribunal ("DRT") will only check if there is any pending disciplinary proceeding against the professional and in case no proceeding is found then the RP is allowed to go further with the process. The code particularly specifies desired list of particulars that must be submitted along with the application. On the examination of the information, the RP will submit a recommendation to the DRT with respect to its views on rejecting or accepting the application.[6] To provide a conducive environment for the process to go through, a moratorium will always be applicable on all the creditors of the applicant for a period of 6 months.[7] The inspiration behind the fresh start process seems to devolve from the difficulties in the transaction cost of the IRP-bankruptcy route being larger than the debt at stake for low income, low stressed debtors. The fresh start process also provides an insurance function by essentially providing a more systematic debt waiver.

The Individual Resolution Process under the Code

The Insolvency Resolution Process ("IRP") is the process through which all the creditors and debtors agree on a negotiated repayment plan.[8] At the relevant DRT, the IRP can be initiated by the debtor or the creditor through an application in the form and manner which is notified by way of regulations from time to time. The RP examines the application because he is also responsible for making a recommendation of acceptance or rejection to the DRT.[9] The debtor is required to propose a repayment plan under the supervision of a RP, which should meet the approval of majority of creditors which are defined as more than three fourth in value.[10] The plan becomes valid as soon as it is approved by the creditors and sanctioned by the adjudicating authority.

Position in UK

In UK, there is an Individual Voluntary Arrangement ("IVA") procedure available to insolvent individuals. This method is the most commonly used insolvency procedure and the main intention of the procedure is to deal primarily in high-end debt cases involving business debtor with complicated matters. It should be noted that since the mid-2000s there was revamping of IVA method by commercial IVA firms into a mass marketed consumer insolvency remedy.[11] Any relief which is to be provided under the IVA must be negotiated between the creditors and

[6] Section 83 of IBC, 2016
[7] Section 84 of IBC, 2016
[8] Part III of IBC, 2016
[9] Section 99 of IBC, 2016
[10] Section 111 of IBC, 2016
[11] Insolvency- A Second Chance, Stationary Office, July 2001

debtors with the intervention of "Insolvency Practitioner" and the proposed repayment plan of the data will only be accepted and become an IVA if 75% of the creditors approve its terms.[12] Pragmatically speaking, there is standardization of IVA terms in the protocol which is negotiated between the IVA forms and creditors. It has been observed that on an average 5-6 years are taken by the IVAs during which debtor pays to the creditors out of their non-essential income, before the remaining unsecured debts are discharged. The individuals who enter into an IVA generally will keep their homes, however, this is considered to be the chief attraction of the entire IVA process in UK.[13] The completion of a long-term repayment plan which is prolonged many years, under the threat of one in three chance of failure is a long route to a fresh start.

Individual Insolvency management

Out of Court processes and mechanisms can play a very important role in dealing with Individual Insolvency

- **Mediators:** Individuals often lack financial and legal sophistication and insolvency procedures frequently require production of financial and legal documents as well as navigation through complex legal processes. Non-judicial assistance is crucial and insolvency law for individuals and partnership firms should encourage informal negotiation and resolution to enable the creditors and debtors to bargain in the shadow of insolvency. The majority of insolvency and bankruptcy proceedings involving individuals may not involve contentious issues, voluminous stakeholders, and high amount of debt or disputes justifying adjudication by authorities such as the DRT. These issues might well be more efficiently resolved with the intervention and assistance of a trained cadre of mediators. Only issues that remain unresolved or legal issues that require adjudication by a quasi-judicial authority could be referred or appealed to such quasi-judicial authority. Mediation assistance may be rendered pro bono in certain cases as if so, directed by the Adjudicating Authorities.

Counselling: Counselling is a critical component of individual bankruptcy. It is essential not only to prevent repeat bankruptcies but also to further rehabilitative goals of behavior modification. There are mainly two kinds of counselling required in insolvency and bankruptcy – debt counselling and social counselling. Debt counselling is based on the assumption that bankruptcy is a consequence of imprudent or unwise use of credit or the need for individuals to adapt their credit behaviour to more desirable norms.

[12] Walters, Adrian, Individual Voluntary Arrangements: A 'Fresh Start' for Salaried Consumer Debtors in England and Wales? (September 6, 2008). International Insolvency Review, Vol.18, No. 1, pp. 5-36, 2009, Available at SSRN: https://ssrn.com/abstract=1264406

[13] Lorraine Conway, House of Commons, Individual Voluntary Arrangements, August 2021

Financial Literacy: Yet another aspect very closely related to treatment of insolvency is prevention of insolvency. The policies should incorporate a desire to attempt to address insolvency by avoiding it altogether through financial literacy training. Financial literacy education is crucial not only for treating existing insolvency, its primary purpose is to prevent its recurrence as well.

The design of good Individual bankruptcy law:

The goals of bankruptcy law for individuals overlap considerably with goals of corporate bankruptcy. A key element of a credit contract is predictability around what happens if the borrower cannot repay. It may be possible for debtors to restructure payments. This requires a conversation between the creditors and the debtor. The mechanism has to be designed such that the debtor can renegotiate payment, and the creditor can enforce payment. At the same time, the creditor needs to be prohibited from coercive collection. The following elements are thus important in the design of the insolvency process:

- **Participation of both the creditors and debtor:** When the debtor is facing financial difficulties, it may be in the interest of both the creditors and the debtor to re-negotiate the terms of repayment, and come to a new agreement. Voluntary decisions by both sides are best in terms of obtaining flexibility and maximising the recovery rate. This allows the debtor to reorganise payments in line with expected cash flows.
- **Fair and orderly process:** The process of re-negotiation needs to be fair and orderly for everyone to participate. It has to be timely as delays can be costly. If the re-negotiation fails, then there has to clarity on what follows, and in what time period the actions follow.
- **Release from financial liabilities:** The debtor will only meaningfully participate in the process if there is the certainty that participation in the process will lead to a clean slate and the possibility of starting all over again. If the process allows the debtor to keep certain crucial assets such as tools of trade, then the debtor has a better chance at a restart.
- **Ex-ante incentives:** The participants in the process will naturally want to maximise their own value first. In this process it is likely that either the creditors or the debtor will game the system to their own advantage at the cost of the others. This can skew incentives and lead to a poor credit market.
- **Care about frictions:** The institutional design needs to be mindful that for most individuals, as with most small firms, the magnitude of the debt at stake does not justify substantial expenditures on negotiation, payments for insolvency professionals, and processes at a judicial forum.

Monitoring Mechanism

Confirmation of a repayment plan may not be the end of the matter. Debtors who struggle to budget and distribute proper payments to creditors before an insolvency procedure are likely to struggle afterward, as well. To facilitate proper implementation of, and debtor compliance with, a plan, a neutral insolvency representative is most commonly appointed to monitor and even collect and distribute payments for creditors. Generally, the insolvency collects periodic payments made by debtors on their own, though some systems require or allow for plan payments to be formally assigned to the representative and automatically deducted from debtors' periodic income to ensure timely payment.

Way Forward

The fresh start process is inherently very crucial to eliminate the individual indebtedness in India, it would be appropriate if the process could become simpler, cost effective and efficient in the economic sphere. The process of fresh start is viewed as a social instrument which should be further supplemented by other social insurance policies and studies should be conducted on a regular basis also so that the problem can be resolved in a more holistic manner. Since the concept of personal insolvency can also be related with debt waiver it becomes important to understand the state capacity building and the load bearing capacity of the public administration at large and this particular issue becomes extremely relevant because they are susceptible to political interference.

CROSS BORDER INSOLVENCY: A WAKEUP CALL FOR INSOLVENCY AND BANKRUPTCY REGIME OF INDIA

Ms. Shilpa Newati,

Ph.D. Research Scholar, Faculty of Law, University of Delhi

Cross-border insolvency or international insolvency, regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country across the globe. A cross-border insolvency law helps in providing effective mechanisms for dealing with cases of cross-border insolvency, and it is by promoting cooperation between the courts and other competent authorities of different countries. India is becoming a sought-after destination for foreign investors. Hence, it is important to ensure that foreign entities have full rights to collect their dues, just like Indian entities.

With increasing globalization and liberalization of economy, countries all over the world have open their economic and industrial activities for foreign investments and participation through different mode to get more FDI and to reduce their Fiscal Deficit. This is envisaged to boost economic development and improvement in the living standard of people of those countries and simultaneously increasing the employment opportunities. However, there are some macro-economic and geo-political factors can influence the operation of companies negatively and positively.

The ongoing COVID-19 Pandemic and measures adopted by the Govt. to contain it, has far reaching impact on the local and global economies and businesses of almost all the companies. The consumption and productions of goods, materials, and services by the local and multinational companies /MNCs have drastically reduced over the last few months thereby reducing their loan repayment capability. Those companies suffered huge losses despite various stimulus steps taken by the Govt. in different countries. In some cases this loss is so high that some companies/promoters are forced to shut their business or forced to sell their stake/equity shares other to service their debts. Nevertheless, with selling of business, there is no guarantee that he will able to service his debts fully. To address this issue in a holistic manner, many of the countries enacted legislations for Insolvency and Bankruptcy of Companies/corporate and individuals/promoters in their countries. Many developed countries like US, UK, have these enacted these laws before 50-30 Years. However, In India, a consolidated law for Insolvency & Bankruptcy i.e. the Insolvency and Bankruptcy Code 2016 (IBC 2016) is just around 4 years

old only. This Code is still in its evolving state, so whenever requirement (out of cases being heard by adjudicating authority/courts) arose, it is amended, accordingly.

Cross Border Insolvency is very important aspect of Insolvency and Bankruptcy regime to address issues related to companies operating and/or having business relationship across different countries. This aspect was also highlighted and questioned by the Legislators/MPs during the passage of IBC Bill, but with the assurance from central government that a dedicated chapter regarding Cross Border Insolvency Regime will be added soon in the Code, with that assurance and foresight of legislators the bill was approved. However, till date the issue CBI has not been adequately understood and dealt with by the law makers.

UNCITRAL and its Model Law on Cross Border insolvency

The United Nations General Assembly established the United Nations Commission on International Trade Law (hereafter refers to as UNCITRAL) on 17th December 1966. The major function of UNCITRAL is to develop a framework for harmonic trade relationship among various countries. It also makes model laws, which can be adopted by countries in field of commercial laws. UNCITRAL proposed the Model Law on Cross Border Insolvency (hereafter refers to as MLCBI) in 1997 and adopted it on 30th May, 1997 at its thirteenth session held in Vienna. The purpose of this Law is to provide effective mechanisms for dealing with cases of CBI as well as to promote:

a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
b) Greater legal certainty for trade and investment;
c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
d) Protection and maximization of the value of the debtor's assets; and
e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

States/Countries are free to implement this Model Law into their domestic regimes in order to have assistance, coordination, and resolution of issues related to Cross-Border Insolvency. It does not unify the insolvency laws of different jurisdictions, but aims to make co-operation possible without damaging the sovereignty of each jurisdiction. As of today, 44 States (Countries) and in 50 jurisdictions, have adopted this Model law with variation as per their local needs and requirements.

What is Cross Border Insolvency?

Cross Border Insolvency (hereafter refers to as CBI) sometimes also referred to as International Insolvency, which covers a financially distressed debtor have assets and creditors in more than one country. As per UNCITRAL MLCBI can applied in following three situations:

1. Where the insolvent debtor, has assets in more than one state (i.e. country).
2. Where some of the creditors of the debtor are not from the State (i.e. country) where the insolvency proceeding is taking place.
3. Where insolvency proceedings concerning the same debtor have commenced in more than one state (country).

Key features of MLCBI

The MLCBI has following key features:

1. No requirement of notification to UN or any other States in regard to its implementation.
2. Does not attempt unification of substantive insolvency law
3. Respects differences in procedural law
4. Framework is unilateral
5. Harmonization- model law vs Convention
6. Uniform interpretation

Key elements of MLCBI

There four key elements of MLCBI:

1. Access

It specified regarding locus-standi i.e. who can initiate an action for recognition of a foreign proceeding and for assistance. It allows foreign representatives and creditors to commence and/or participate in local proceedings. Addresses the formalities to be satisfied and establishes evidentiary presumptions. It also authorizes courts of enacting State to seek assistance abroad for local proceedings.

2. Recognition.

It establishes clear, straightforward conditions for recognition without unnecessary formality or procedure. If satisfied, the result is certain and predictable. It also provides a presumption as to authenticity and accuracy of documents.

3. Relief (assistance)

Provides for discretionary interim relief (before recognition) to protect assets of debtor and interests of creditors. It provides for a standardized "automatic" stay as an effect of recognition of foreign main proceedings. It does not import the effects of the foreign insolvency order

4. Cooperation and coordination

It provides express legislative authority for judicial cooperation to facilitate communication and case management coordination. It also authorizes cooperation, to maximum extent possible, including direct communication, between: (1) Courts (2) Courts and foreign representatives (3) foreign representatives. However, facilitated coordination of concurrent proceedings, does not prevent commencement of local proceedings, nor terminate or prevent recognition of foreign proceedings

Cross Border Insolvency (CBI) Laws an Urgent Need for Indian Economy and Business

While the passing of Insolvency and Bankruptcy bill, question regarding cross border insolvency were raised. On the assurance from the central government that this will be elaborately added soon into the code, the bill was passed with addition of two provision which may deal with CBI on temporary basis (till extended and elaborated law enacted in respect to CBI) though introduction of Section 234 and 235 of IBC 2016.

Thereafter committees were set up for looking into the matter of CBI. The Insolvency Law Committee in the Chairmanship of Shri Injeti Srinivas submitted its report to the Ministry of Corporate Affairs on 16th October, 2018 recommending amendments in the Insolvency and Bankruptcy Code, 2016 with respect to sections related to Cross-Border Insolvency. These recommendations were made by keeping in mind the UNCITRAL MLCBI and modified as per the requirements of Indian commercial laws/activities.

Key recommendations of the Committee on Insolvency Law include the following:

i. **Applicability:** The Committee recommended that at present CBI regime should be extended to Corporate Debtors only.

ii. **Duplicity of Regimes:** The Committee observed that at present the Companies Act, 2013 also dealing with insolvency of foreign companies. Thus once CBI is enforced under IBC, there will a duplicity for one issue being dealt with two legislations. Hence to keep the objective of IBC in mind i.e. to make a single window for matters related to Insolvency and Bankruptcy, Companies Act 2013 must be amended accordingly.

iii. **Reciprocity:** The Committee recommended that the Model Law may be adopted initially on a reciprocity basis.

iv. **Access to Foreign Representatives:** access to foreign creditors is already given under Code. With regard to access of foreign Insolvency Professionals to domestic courts to seek remedies directly, committee recommended to take decision by the Central Government itself.

v. **Centre of Main Interests (COMI) and Non-Main Proceeding**: Committee recommended to adopt provision of MLCBI in this regard.

vi. **Cooperation:** by considering evolving state of current IBC along with the infrastructure of Adjudicating Authority under it, committee recommended that the cooperation between Adjudicating Authorities and foreign courts is proposed to be subject to guidelines to be notified by the Central Government.

vii. **Concurrent Proceedings:** The Committee recommended adopting provisions in relation to these as given in the Model Law which allows initiation of domestic insolvency proceeding, when a foreign insolvency proceeding is already initiated and vice versa and advocates for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.

viii. **Public Policy Considerations:** committee recommended to give power to Adjudicating Authority for refusing to take action under the Code if it is contrary to public policy for which, Authority is bound to give notice to the central government. If the Authority does not issue notice, the central government may be empowered to apply to it directly.

Why we should be concerned about Cross Border Insolvency Regime

Until recently, companies operations and business, relationships are diversifying at a fast pace catering to different segments of customers/clients/consumers and have multiple funding modes in different countries. Due to onslaught of Corona Virus/COVID-19 Pandemic, many companies have suffered huge losses or shut their businesses across the continents. The consumption pattern and consumer behavior has also changed during this period. So, it highly probable that many companies operating in different countries may not sustain. As a result, they would be forced to file for Bankruptcy or Insolvency proceedings may be initiated against them would include the CBI. Though most of countries have introduced stimulus packages to sustain business and economic growth, but growth has not picked up the envisaged pace. India as of now does not have a well-documented, functioning, and transparent CBI Regime. So the following instances make institutiionalization of CBI regime in India a much need piece of legislation in the current constraint and lockdown scenario impacting the social life of people and economic life of companies/industries:

1. Absence of legal framework for CBI Proceedings.

In Civil Law i.e Section 13, 14 and Section 44A of Code of Civil Procedure 1908 (hereafter refers to as CPC), have provision to recognized and apply the foreign courts decisions in India. but this is not a very straight forward matter as foreign court decisions have to pass through some mandate (given under Section 13 of CPC), then only it will be honor in Indian courts.

While in the Insolvency and Bankruptcy Code 2016 contains the following two provisions related to CBI:

Section 234: The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of IBC in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India subject to such conditions as may be specified.

Section 235. If the resolution professional, liquidator or bankruptcy trustee is of opinion that assets of the corporate debtor or debtor, personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. The Adjudicating Authority, on being satisfied that evidence or action relating to such assets is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

These sections are not able to serve purpose as we have seen in the JET AIRWAYS case, where tribunal had to look up MLCBI for giving relief to Dutch creditors.These sections are more of a guiding posts which are inadequate and insufficient for addressing the cross border insolvency cases already initiated or waiting to be initiated in short term in India or abroad. These sections have also many limitations and challenges including (but not limited to) the following challenges:

i. These sections do not spell out the contours of proceedings for the assets/creditors in countries with which there is no reciprocal agreement.
ii. How the insolvency proceedings would be initiated if assets were in jurisdictions where a reciprocal arrangement exist with one country but absent in another. How will bi-lateral arrangements work in cases involving assets, proceedings, and creditors in multiple jurisdictions where conflicting provisions exist in different bi-lateral agreements?
iii. How to meet strict timelines to resolve insolvency cases dealing with assets, proceedings and creditors in multiple jurisdictions in 180 days, extendable by 90 days in the absence of a cross border framework or reciprocal treaty? In addition, obtaining letter of authority

under Section 235 may cause considerable delay and it may not have legal sanctity, unless routed through diplomatic channels coming under Ministry of External Affairs.

The procedure adopted for CBI may not be consistent with international best practices and may not falls in line with the objectives outlined in the UNCITRAL Model Law of Cross Border Insolvency. The absence of well-defined procedure, structure and legal framework may not create a level playing field for the stakeholders. A well-defined procedure and legal regime would enhance the transparency in business environment and confidence of foreign investors in India. The standard jurisprudence may not sufficient and may not apply in the case of CBI, as the decisions will have to be based on country specific agreement and not based on any one global standard or practice. Without a well-defined CBI framework, IBC will yield to envisaged outcome for Indian Economy and would not be in synchronicity to fast changing international business environment and practices. In the constraint scenario of Covid-19, immediate enactment of laws and procedures/rules for Cross Border Insolvency is the need of hour which would further enhance the predictability of Indian Business Environment and boost confidence of foreign investors for increasing FDI and thence increasing the ranking of Doing Business in India.

2. Increasing cases of Cross Border Insolvency in India

There are many cases like Amtek Automobiles, Essar Steels, Videocon , Jet Airways and ongoing Reliance Industry case, which are in the ambit of Cross Border Insolvency. Due to lack of CBI law, judicial intervention happened in case of Jet Airways and enabling laying down of legal protocol, which narrow down the gap between CBI regime and IBC. However, this legal protocol is case specific and applied only in case of Jet Airways. A comprehensive model, which can be applied for all, is still much awaited. In case of Jet Airways, following principles were called to give relief to Dutch Creditors who initiated insolvency proceeding against Jet Airways in Netherlands.

a. Administration in order to reduce the cost
b. Promote communication among party and creditors
c. Enhance communication between the adjudicating authorities i.e NCLT, NCLAT and Dutch court
d. Sharing information and data to avoid duplication
e. Maximization of assets value

Numerous difficulties were faced during proceedings of Jet Airways such as delay, logistic and legal cost, cumbersome procedure and formal requirements, lack of authorization to cooperate, conflicting courts decisions on the same ground or same matter, uncertainty and unpredictability, lack of national and international legal regimes providing solution.

Immediate Necessity of Enactment of Cross Border Insolvency laws and their fusion with IBC 2016

It has been observed that the number of cases filed under IBC have increased, which involved assessment of assets of debtor present in India as well as aboard make it mandatory to have CBI in IBC so that these assets can evaluated for the purpose of invitation for expression of interest or liquidation of corporate debtor.

In current times, Covid-19 pandemic disrupted the economies of countries all around the world and many multinational businesses are filling for insolvency. In this situation, for safe guarding the interest of Indian creditors as well as foreign creditors cross border insolvency regime become pivotal need for successful working of IBC in this time of crises and later too. In addition to above, to make India a preferred destination for foreign direct investments (FDIs), especially after decision of many multinationals companies to shift their businesses/operations/manufacturing/assembly units out of China to other countries. So, if India introduces a well-defined, transparent and hassle free Cross Border Insolvency legal regime immediately, then it would enable major inflow of Foreign Direct Investment in India. This will not only boost the economy but also help in the employment opportunities for huge no. of unemployed people in India. It is right time for India to convert this Covid-19 pandemic threat into a golden opportunity for attracting FDI by immediately enacting laws and procedures for Cross Border insolvency and fusing it with existing regime of IBC 2016.

Conclusion

With Covid-19 pandemic and economies crashing around the world, India should enact laws and procedures related to Cross Border Insolvency, so that its creditors and investors interest can be protected. This would increase the predictability of carrying out business in India , thereby attracting more foreign investments for setting up business operation and manufacturing units and increasing employment opportunities for Ind

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

Where CIRP proceedings had been initiated against corporate debtor on account of default in repayment of its dues under loan agreement and NCLT admitted CIRP application after verifying document evidencing outstanding loan amount, order of NCLT was to be upheld.

✓ **Srei Equipment Finance Ltd. v. Rajeev Anand - [2020] 119 taxmann.com 136 / [2020] 162 SCL 605 (SC)**

CIRP proceedings had been initiated against the corporate debtor on account of default in repayment of its dues under loan agreement. The NCLT, after a perusal of documents, pleadings, and supplementary affidavit explaining payment already made, including counter affidavit, came to conclusion that default was committed by the corporate debtor in repayment of its dues under loan Agreement and hence admitted the section 7 application. The NCLAT set aside order of the NCLT admitting section 7 application on ground that there was no evidence in support of the fact that any amount was outstanding. However, it was found that documents evidencing outstanding loan amount were produced. Further, a counter affidavit by the corporate debtor was also produced in which a clear admission of debt being outstanding was made.

Held that order of the NCLAT was to be set aside and that of NCLT was to be restored.

Case Review: Rajeev Anand v. Srei Equipment Finance Ltd. [2020] 114 taxmann.com 61/158 SCL 432 (NCL - AT), set aside.

SECTION 63 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - CIVIL COURT, NOT TO HAVE JURISDICTION

✓ **GE Power India Ltd. v. NHPC Ltd. - [2020] 119 taxmann.com 158 (Delhi)**

Jurisdiction vested in NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to insolvency resolution has to be determined by NCLT; jurisdiction of Civil Court is expressly barred.

A contract was entered between the plaintiff's predecessor Alstom and LIL. Said project was awarded to LTHPL by LIL. Consequently, LIL was liquidated by the NCLT and LTHPL was acquired by the defendant NHPC under a resolution plan which was approved by the NCLT. The plaintiff filed a suit against NHPC, for allegedly infringing the plaintiff's copyright in drawings/specifications and other documents prepared pursuant to contract between the Plaintiff's predecessor Alstom and LIL. NHPC however, submitted that it had received drawings from LTHPL in terms of the resolution plan of LTHPL and also disputed the High Court's jurisdiction to try suit itself, stating that it was expressly barred under sections 60, 63, 231, and 238 of the IBC.

Held that sections 63 and 231 create a bar on jurisdiction of the Civil Court in respect of any matter in which the NCLT and the NCLAT has jurisdiction under IBC and the Adjudicating Authority under Code is competent to pass any order. Further jurisdiction vested in the NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to insolvency resolution has to be determined by the NCLT. Dispute raised in present suit falls within ambit of section 60 (5) as same arises out of and/or is in relation to insolvency resolution plan of LTHPL, hence has to be adjudicated by the NCLT and proceedings in the Civil Court are barred.

(i) SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

(ii) SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

Office of the Specified Officer v. V. Venkatachalam - [2020] 119 taxmann.com 163 (NCL-AT)

(i) *Where corporate debtor was operating in SEZ and in resolution plan, an estimated amount was provided to be paid to Customs Department for de-notification of SEZ which was subject to assessment by Development Commissioner, there was no need to intervene in merits of Resolution plan.*

CIRP against the the corporate debtor was admitted. The NCLT approved the Resolution Plan. The corporate debtor was operating in an area notified as SEZ which had been exempted from duties of Customs. The appellant - Specified Officer of SEZ contended that exemption concession in respect of customs duty granted by the NCLT was in direct conflict with provisions of SEZ Act, 2005. However, it was found that it was only an estimated amount that was provided in the Resolution Plan which was to be paid to Customs Department for de-notification of SEZ. Said sum was subject to assessment to be made by the Development Commissioner. It was also noted that dues or penalty payable was to be calculated at time of exit from SEZ with approval of the Development Commissioner.

Held that the appellant-Specified Officer had failed to carve out a case for judicial intervention in merits of the Resolution Plan.

(ii) Appeal filed even 30 days beyond extended timelines of 45 days envisaged under proviso to section 61(2), would barred by limitation.

The appellant-Specified Officer of SEZ claimed that it was not a party to CIRP proceeding before the Adjudicating Authority but came to know about NCLT's order approving the Resolution Plan. The appeal was filed by him 30 days beyond extended timelines of 45 day as envisaged under proviso to section 61(2).

Held that appeal being hopelessly time barred deserved to be dismissed on count of limitation alone.

Case Review : Indian Opportunities III Pte. Ltd. & Vistra ITCL (India) Ltd. v. Sai Wardha Power Generation Ltd. [2019] 111 taxmann.com 421 (NCLT - Hyd.) affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS – MORATORIUM

✓ **Vijay Kumar V Iyer v. Bharti Airtel Ltd. - [2020] 119 taxmann.com 178 (NCL-AT)**

No dues can be set off during period of Corporate Insolvency Resolution Process (CIRP) when moratorium is in force as provisions of Code will prevail over accounting conventions.

Held that accounting conventions cannot supersede any express provisions of specific law on subject. No dues can be set off during period of Corporate Insolvency Resolution Process (CIRP) when moratorium is in force as provisions of the Code will prevail over accounting conventions.

Case Review: Bharti Airtel Ltd. v. Vijaykumar V. Iyer [2019] 106 taxmann.com 103/154 SCL 56 (NCLT - Mum.), set aside.

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

✓ **Rakesh Wadhwan v. Bank of India - [2020] 119 taxmann.com 180 /[2020] 162 SCL 209 (NCL-AT)**

Where debt owed by corporate debtor to financial creditor bank was more than Rupees One Lakh and default in repayment of such debt was admitted and Adjudicating Authority had afforded ample opportunity to both parties to settle matter amicably, but, despite that, corporate debtor failed to make payment or arrive at a settlement, application filed under section 7 had rightly been admitted.

Respondent No. 1 Bank (Financial creditor) filed an application under section 7 for initiation of CIRP against the corporate debtor on ground that it committed default in repayment of facilities granted to extent of Rs. 522 crores. However, during pendency of the petition, the corporate debtor proposed to settle matter by submitting One Time Settlement (OTS). Resultantly, the petition was withdrawn. After that, the corporate debtor again committed default in making payment as per terms of OTS. In compliance of OTS, the corporate debtor had issued post-dated cheques which were all also dishonoured. Therefore, respondent-bank revoked OTS and called upon the corporate debtor to pay off Rs. 522 crores. After that, respondent filed second petition, which was admitted by the impugned order. The corporate debtor stated that the impugned order had been passed without affording an opportunity to the corporate debtor to file reply and the Adjudicating Authority had not given any finding of debt and default, and order had been passed even though application was not complete. However, even though statutory provisions under the Code do not permit to provide several opportunities to the corporate debtor in hope of settlement, the Adjudicating Authority had tried its best to afford ample opportunity to both parties to settle matter amicably. But, despite that, the corporate debtor failed to make payment or arrive at a settlement. Further, debt in instant case was of more than rupees one lakh and default in repayment of such debt was admitted and application in Form-1 was also complete.

Held that no interference was called for in teh impugned order of the Adjudicating Authority admitting petition.

Case Review: Bank of India v. Housing Development and Infrastructure Ltd. [2020] 119 taxmann.com 179 (NCLT - Mum.), affirmed.

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

✓ **V Nagarajan Resolution Professional v. SKS Ispat and Power Ltd. - [2020] 119 taxmann.com 182 (NCL-AT)**

Where appellant had neither filed any application for condonation of delay nor filed any evidence to prove that certified/free copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for Condonation of Delay could not have been extended.

Held that as per section 61 an appeal filed before the Appellate Tribunal against Order of the Adjudicating Authority can be filed within 30 days. However, proviso to section 61 provides that the Appellate Tribunal may allow an appeal to be filed after expiry of statutory period of 30 days and this extension of 15 days depends upon satisfaction of the Appellate Tribunal, on being shown sufficient cause for not filing Appeal within time limit. Where the appellant had neither filed any application for condonation of delay nor filed any evidence to prove that certified copy was not supplied to appellant on date of order, time limit of filing of appeal without any application for condonation of delay could not have been extended.

Case Review : V. Nagarajan v. SKS Ispat & Power Ltd. [2020] 119 taxmann.com 181 (NCLT - Chennai), affirmed.

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

✓ **Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd. - [2020] 119 taxmann.com 184 (NCL-AT)**

Adjudicating Authority, after approval of Resolution Plan by CoC has no jurisdiction to entertain or to permit withdrawal of Resolution Plan.

Successful resolution applicant filed application seeking withdrawal of its resolution plan already approved by the Committee of Creditors (CoC) of the corporate debtor before the NCLT, due to investigations by the Special Frauds Investigation Office and other governmental agencies against the corporate debtor company. The Adjudicating Authority by means of impugned order allowed successful resolution applicant to withdraw its approved 'Resolution Plan' which was approved by a majority of 75.36 per cent voting share of CoC and pending approval before the Authority as per section 31.

Held that the Adjudicating Authority, in law cannot enter into arena of majority decision of the 'Committee of Creditors' other than grounds mentioned in section 32(a to e). Once resolution plan is approved by the CoC and thereafter submitted to the NCLT for its approval, then NCLT is to apply its judicial mind to 'Resolution Plan' so presented and after being subjectively satisfied that plan meets or does not meet requirements mentioned in section 34 may either approve or reject such plan. Where resolution applicant had accepted conditions of the 'Resolution Plan' keeping in mind that no change or supplementary information to the 'Resolution Plan' shall be accepted after submission date of the 'Resolution Plans', applicant could not have been allowed to withdraw the approved 'Resolution Plan'. The NCLT after approval of Resolution Plan by the CoC has no jurisdiction to entertain or to permit withdrawal of the Resolution Plan.

Case Review : EBIX Singapore Pte. Ltd. v. Mahendra Kumar Khandelwal [2020] 119 taxmann.com 183 (NCLT - New Delhi), set aside.

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

- ✓ **Rita Kapur v. Invest Care Real Estate LLP - [2020] 119 taxmann.com 200 /[2020] 162 SCL 806 (NCL-AT)**

Insolvency proceedings could not be triggered on basis of debt which had been converted into equity as once debt is converted into capital it cannot be termed as financial debt.

The appellant had given loan to a company to be repaid in four installments. However, the appellant claimed that she had not been paid either principal amount or interest and her loan had been converted into equity, against terms and conditions of the loan agreement. Further her late husband had also invested in the company which amount had also not been repaid. Hence, the appellant claiming to be a financial creditor of the company filed an application under section 7 seeking to initiate CIRP against the company. The Adjudicating Authority by impugned order rejected application of the appellant. It was found that provisions of section 7 provide for initiation of CIRP by the financial creditor only and that too, if there is a debt and default. However, once debt was converted into capital it could not be termed as financial debt and the appellant could not be described as a financial creditor.

Held taht grievance of the appellant did not fall under provisions of the Code and CIRP at instance of the appellant could not have been initiated.

Case Review : Rita Kapoor v. Invest Care Real Estate LLP [2020] 119 taxmann.com 199 (NCLT - New Delhi), affirmed.

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

- ✓ **State Bank of India v. Metenere Ltd. - [2020] 119 taxmann.com 239 /[2020] 162 SCL 504 (SC)**

Merely because resolution professional was earlier remained in service of the creditor bank and was getting pension, he could not be dis-entitled to be resolution professional.

Held that merely because the resolution professional remained in service of the creditor bank and was getting pension, he could not be dis-entitled to be resolution professional. Such an order passed by the NCL-AT, was not to be treated as a precedent.

Case Review : State Bank of India v. Metenere Ltd. [2020] 118 taxmann.com 143 /[2020] 161 SCL 513 (NCL-AT), reversed.

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

- ✓ **Regional Provident Fund Commissioner-II v. Bijay Murmuria - [2020] 119 taxmann.com 240 /[2020] 162 SCL 621 (NCL-AT)**

Beyond period of appeal of 30 days, power of Appellate Tribunal to allow appeal shall not exceed 15 days more.

Order was passed by the NCLT approving resolution plan on 7-12-2018. The appellant stated that the appellant became aware of order of the NCLT through the Resolution Professional on 2-7-2019 and thereafter received a certified copy of order on 24-1-2020. Limitation of 30 days expired on 24-2-2020 and instant appeal was filed on 17-3-2020. The appellant sought to condone delay of 22 days in filing instant appeal. It was noted that the appellant received communication from company secretory of the corporate debtor on 11-12-2018 therefore the appellant had knowledge since 11-12-2018.

Held that beyond period of appeal of 30 days, power of the Appellate Tribunal to allow appeal shall not exceed 15 days more, after expiry of 30 days period of filing appeal, the Appellate Tribunal cannot condone delay beyond prescribed 15 days.

Case Review : Kitply Industries Ltd. v. IDBI Bank Ltd. [2019] 101 taxmann.com 410 (NCLT - Guwahati), affirmed.

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

✓ **Vistara ITCL (India) Ltd. v. Dinkar Venkatasubramanian - [2020] 119 taxmann.com 241 /[2020] 162 SCL 709 (NCL-AT)**

Where appellant lent money to third party, and not to corporate debtor directly, creation of pledge of shares by corporate debtor would not tantamount to a guarantee or indemnity so as to bring it within meaning of financial debt.

Held that creation of pledge of shares by the corporate debtor does not tantamount to a guarantee or indemnity so as to bring it within meaning of financial debt. Since claim of the appellant in capacity of a secured financial creditor was rejected back in year 2017, it was not open to the appellant to raise same issue in 2020. Also since creation of pledge of shares by the corporate debtor was said to be in regard to money lent to third parties and appellants had not lent any money directly to the corporate debtor, basic ingredients of financial debt i.e. debt along with interest disbursed against time value of money was lacking, therefore, application seeking direction to RP to include the appellant in CoC as a secured financial creditor was not maintainable.

Case Review : Corporation Bank v. Amtek Auto Ltd. [2020] 119 taxmann.com 57 (NCLT-Chandigarh), affirmed.

SECTION 42 - CORPORATE LIQUIDATION PROCESS - APPEAL AGAINST DECISION OF LIQUIDATOR

✓ **Bharat Heavy Electricals Ltd. v. Anil Goel - [2020] 119 taxmann.com 242 (NCL-AT)**

Liquidator had fiduciary responsibility and duty to avoid loss/further loss to corporate debtor, hence, where appellant operational creditor pointed out material errors and illegalities in auction process followed, only because appellant did not ask for stay of auction, would be no reason not to cancel auction sale after having noted irregularities.

The appellant-operational creditor and the corporate debtor signed Letter of Award (LOA) for supply and erection of plant and machinery. There being dues pending under LOA, the appellant initiated Arbitration proceedings against the corporate debtor for recovery of its dues. Subsequently, CIRP under section 7 was filed against the corporate debtor. The appellant submitted its claim before IRP/RP. Due to failure of CIRP, liquidation proceedings were initiated and liquidator was appointed, who published public notice of liquidation process. The appellant filed its claim before the liquidator and also claimed statutory charge/lien on plant and machinery erected by the appellant at project site and on unused material. The liquidator, provisionally admitted claim at Rs. 290 crores as against amount claimed at Rs. 665 crores. The appellant filed an appeal challenging liquidator's order. Subsequently, the liquidator issued an advertisement for auction of assets of the corporate debtor including plant and machinery supplied by the appellant. The Adjudicating Authority set aside order of the liquidator provisionally admitting claim of the appellant and directed the liquidator to verify claims of the appellant afresh and pass a reasoned order. Thereafter, the liquidator issued a Sale Certificate in favour of 'A' (auction purchaser). The liquidator accepted the appellant's monetary claim at Rs. 572 crores but rejected its claim of lien and/or charge and categorised the appellant as unsecured creditor. The appellant prayed for cancellation of auction and restitution, primary request being for return of its goods. The Adjudicating Authority held that action of the liquidator in issuing sale certificate before deciding claim of security interest of the appellant was not correct, however, since no application was made by the appellant for stay of auction process and same had been completed, auction sale could not have been cancelled.

Held that the liquidator had fiduciary responsibility and duty to avoid loss/further loss to the corporate debtor, hence, when the appellant had from initial stage itself moved the liquidator and the Adjudicating Authority with regard to auction sale which had come to its notice and sought reliefs, only because the appellant did not ask for stay of auction, would be no reason not to cancel auction sale even after noticing material errors and illegalities in process followed. Further, auction purchaser having paid consideration would also be no reason not to set aside auction, considering illegal factors. Therefore, claim of the appellant seeking setting aside of auction was to be accepted.

Case Review : Bharat Heavy Electricals Ltd. v. Anil Goel [2019] 112 taxmann.com 296 (NCLT - Kolkata), set aside.

GUIDELINES FOR ARTICLES

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.*
- ✓ *In case the article is found not suitable for publication, the same shall not be published.*

***Disclaimer**: The information contained in this document is intended for informational purposes only and does not constitute legal opinion, advice or any advertisement. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*