APRIL,2022

THE INSOLVENCY PROFESSIONAL YOUR INSIGHT JOURNAL

VISION 2025

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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

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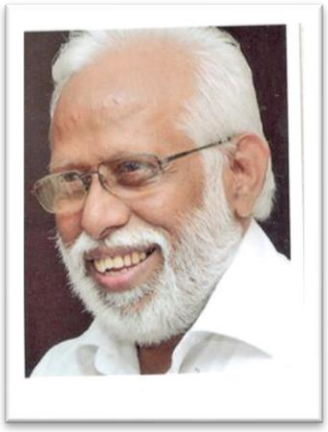
FROM THE DESK OF CHAIRMAN



India is at a pivotal position in the world today; the IMF recognises India as being among the fastest growing large economies, with a growth rate of 7.3% for 2020 and 7.5% for 2021despite lockdown and pandemic. The general expectation is that the growth rate will move further to 8% plus in the medium term, supported by an enabling economic environment. For Growth to be sustained at such levels, apart from productivity, the market demand backed by the adequacy of purchasing power shall be the key factor. India would need to create more jobs and lower levels of unemployment to ensure the sustained levels if demand. With a view to maintain purchasing power parity, the inflation would need to be kept under check. Overall, it would be a daunting task for the managers of the Indian Economy. This would certainly be required to be accompanied by better use of Resources – Land, Labour, Capital and Technology. Concomitantly, enhancing the conditions for Country's Competitiveness will play a critical role in improving Productivity.

Accordingly, the distressed assets and their resolution mechanism under the eco-system of Insolvency and Bankruptcy Code has focussed on the questions of what can make the Code in respect to the growth of India to be more 'Competitive' in the backdrop of a rapidly changing World Order, brought about by policy changes as well as by unprecedented Technology disruptions. In this rapidly changing scenario, the whole eco-system of Insolvency regime together with all the related stakeholders opine that a medium term (2025) perspective should be an appropriate measure to evaluate the efficiencies and deficiencies in terms of the Code, the regulations, the provisions, the timelines, the judicial system, the flow of information, digitization, retention of records, retrieval and further usage of the same, so on and so forth.

While there have been several studies in the field of the Insolvency and Bankruptcy and also to realise the long-term potential of India, the Insolvency Professional Agency of ICAI has tried to evaluate the factors which could influence the developments and outcomes in the field of Insolvency and Bankruptcy resolution during next 2-3 years. Such a time frame also enabled it to examine and recommend a mix of strategic, tactical and operational elements for the future and effectiveness of this very dynamic and evolving law as a reform measure. In addition to it, IPA also feels need for some basic amendments identified along the way.

To connect to those issues and also to understand the different common challenges that are faced by the professionals as well as the other stakeholders, it is expected that certain amendments or additional provisions being added to the Code, will

enhance its overall functioning and would also lead to improvements overall competitiveness of India.

The focus areas include the road map traversed by IBC so far, its success vis a vis the other tools like SARFAESI, Lok Adalat or DRT, the cases admitted for CIRP, delays in admission, possible counter measures to obviate those delays, reasons for more of liquidation cases as compared to fewer resolutions and so on. The sudden growth in the number of Voluntary Liquidation and withdrawals, the effectiveness of the Adjudicating Authorities and various other challenges faced by them, the Digitisation of records, the importance of digitization and handling of the cross-border cases and also the everlasting hearings of the PUFE transactions are also causing concern. All these factors seriously impact not only the timelines but also adversely affect the value maximization for the stake holders.

Some discussions and views have been collated by the experienced professionals to unearth some mechanism to meet these challenges and make it an effective tool for enhancing the competitiveness of India.

Resolution through Insolvency and Bankruptcy Code was a parameter for Ease of Doing Business and India has earned the 63rd position in the year 2020, a place among the world's top ten improvers. The dynamic changes in the Code will go a long way to improve India's ranking in Ease of Doing Business' as exit from a failing venture becomes easier.

We believe that this is an appropriate time to set the ball rolling for a policy debate on how India can become economically competitive in the Medium Term – just a few years from now with the efficient use of this tool of IBC, 2016. Our members can play an important role in this regard as they are a very critical entity in the IBC eco-system. Contributions by the Insolvency Professionals, germinating out of their practical experience would be more relevant and appropriate to bring about desired changes.

The primary objective of such an exercise should be to stimulate minds to suggest measures, take views and draw attention of stakeholders and the policy makers, corporate communities and other stakeholders eventually leading to overall good to every single stakeholder.

Warm Regards,

Dr. Jai Deo Sharma,
Chairman, IPA ICAI

FROM THE DESK OF MANAGING DIRECTOR

Legislation is generally first and think-tanks start later once the situational complexity is heaped and the confused becomes more confused. Probably that is where the seed of evolution germinates.

In India, the legislation of Insolvency and Bankruptcy Code for Individuals as well as of the Corporates is an inspiration of a host of previous legislations such as the Sick Industrial Companies (Special Provisions) Act, 1985, Financial Institutions Act, 1993, the Recovery of Debt Due to Banks, SARFAESI and Companies Act, 2013. The erstwhile legislations were piecemeal, fragmented and lacked an efficient mechanism for the closure or restructuring of unviable firms. Various insolvency and recovery procedures led to a multiplicity of proceedings before adjudicating authorities and erosion in the value of recovery by creditors due to delayed resolutions. To overcome the lacunae under the erstwhile legislations, the government introduced robust and comprehensive legislation, i.e., IBC, 2016, referred frequently as the Code, on 28th May 2016. The focused objective and essence of the Code, which governs insolvency and bankruptcy of Corporate Persons, LLPs, partnership firms and individuals in India, to resolve in a time-bound manner with maximization of value of such assets of such persons, to promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

The provisions of the Code were notified pertaining to Corporate Insolvency Resolution Process (CIRP) and brought in force in December 2016. The provisions relating to Individual Insolvency were also proposed to be notified in three phases, firstly being the Personal Guarantors to Corporate Debtors (PG to CD) (from December 2019), to be followed by partnership firms and proprietorship firms and then other individuals (yet to come in force). The institution of Insolvency Professionals made a major departure from the past and successfully addressed the deficiencies of official liquidator's expertise in the valuation of assets of insolvent companies. IBC has achieved success, and the positive benefits of this change will be visible in the long run. In terms of informal work-out arrangements, the RBI has also issued a prudential framework dated 7th June 2019, under which inter-creditor arrangements may be entered to enable the resolution of stressed assets.

But was the purpose of IBC just a debt recovery mechanism or to correct the behavior of the borrowers/promoters? With each day of progress of IBC, the experience of lenders/promoters cannot be described as smooth, despite its pro-creditor tilt and on the other hand the promoters, fearing of losing control of the company, do not want to be dragged into IBC. Since the time the law has been put into force, borrowers have a stifled resolution process through numerous petitions and counter-petitions. The net result, hardly any major case under IBC was resolved within the time frame of 270 days, and thus came the amendment of extension to 330 days.

The fundamental principles of macroeconomy underwent a sea change, but with hardly any impact on the debt recovery laws. On the contrary, the NPAs rose sharply in 2016, 2017, and 2018. This jump in NPAs happened when economic growth was considered to be robust against the 1990 situation. On the operational side, IBC's strategy to adjudicate CIRP cases before NCLT is no different from what was adopted in the 1990s. The overburdened high court had virtually stopped lenders' recourse to the winding-up provisions under the Companies Act. Even under SICA, the recovery was low due to the misuse of SICA provisions. To bypass this legacy, DRTs were introduced but eventually they themselves burdened with cases (around 29,500 under DRTs and 91,300 under SARFAESI), the use of NCLT is just another attempt in the hope that resolution can be achieved in time. Though the ordinances have been promulgated for amendments, to close loopholes in the original law to address barred promoters and willful defaulters to bid in the Resolution process in 2017, address the issue of home buyers in 2018, bringing the clarity on the distinction between the operation creditor and the financial creditor. Roping of PMLA, 2002 and ringfencing of criminal liability for a successful bidder under IBC is another step forward. More such reforms, amendments and changes would be witnessed to finally have a robust and strong Insolvency regime is what we foresee in the coming days of IBC, which inspired the concept of **IBC: Vision 2025**, as brought by your IPA.

AVM Rakesh Kumar Khattri (Retd.)
Managing Director, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

EVENTS

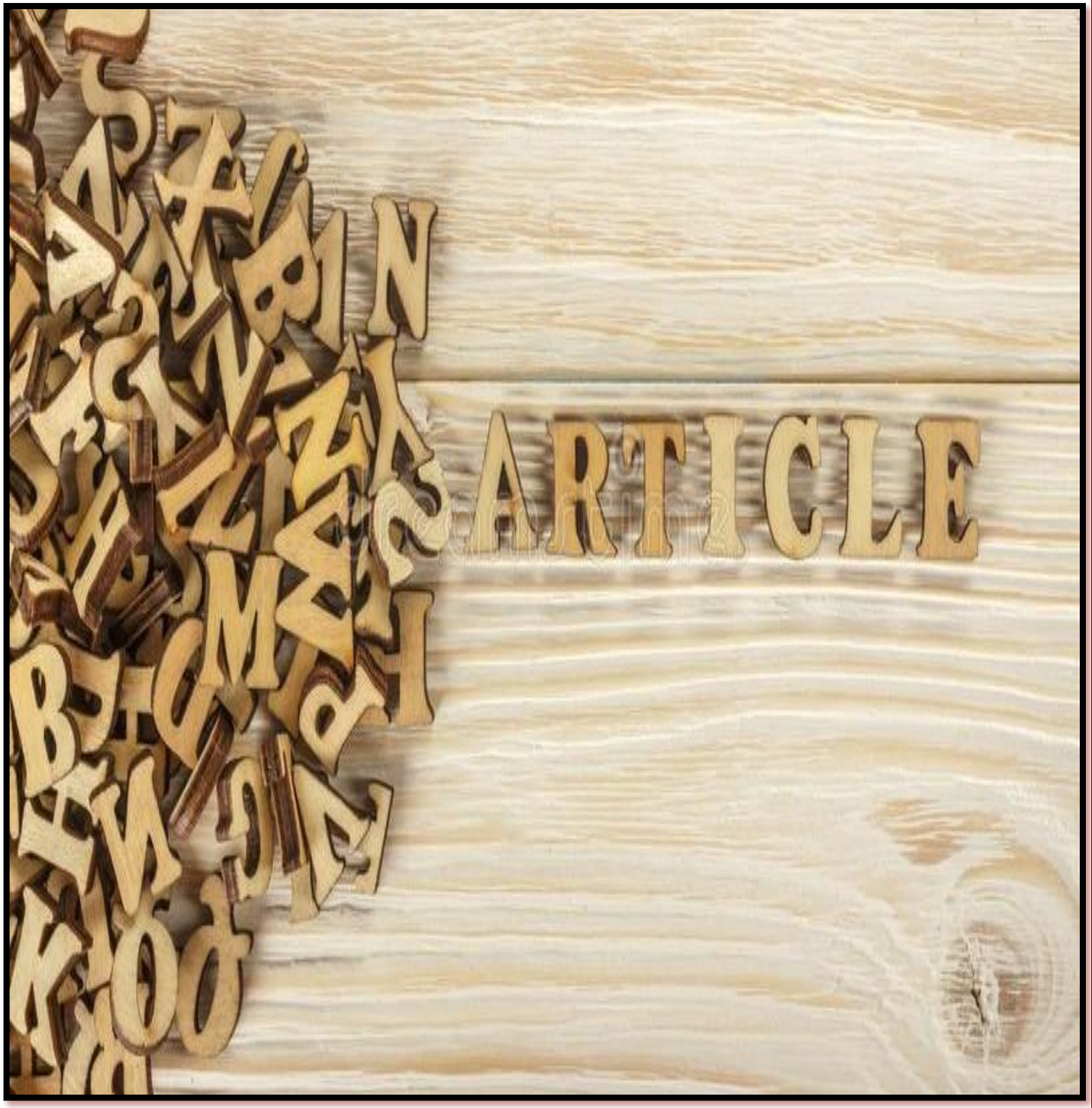
APRIL, 2022	
1st April, 2022 to 3rd April, 2022	Master Class on Emerging Dimensions under IBC
9th April, 2022 & 10th April, 2022	Learning Session on Avoidance Transactions
11th April, 2022	Seminar on Cross Border Insolvency - Chennai
13th April, 2022	Workshop on Management of Corporate Debtor as a going concern in CIRP & Liquidation
16th April, 2022	Interactive Session with the Professional Members on Enforcement Mechanism & Effectiveness of IUs
22nd April, 2022 to 23rd April, 2022	Learning session on Evaluation Matrix, fair value & Liquidation Value
24th April, 2022	Seminar on IBC and its Emerging Scenario - Coimbatore
29th April, 2022	Workshop on NRRA: Practical Aspects and challenges.

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



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA (IPA ICAI)

IBC-VISION 2025

CMA (Mr.) J.K. Budhiraja
CEO-ICMAI MARF
Company Secretary and Insolvency Professional
Former CEO of IPA ICAI & Senior Director (Technical) ICAI

Synopsis
IBC 2016 came into existence with effect from 1st December, 2016 and completed five years of its existence. There are many amendments and judicial interpretations during five years and are yielding a rich body of insolvency and bankruptcy jurisprudence which speaks volumes about the vitality of the Code. But there is further scope for improvements in IBC 2016 and discussed hereunder IBC-Vision.

Introduction

The Insolvency and Bankruptcy Code 2016 ["IBC 2016" or "Code"] has come into force with effect from 1st December 2016 in India. Since then, IBC 2016 has come a long way and has been constantly tested and the jurisprudence for the same is evolving each day. In furtherance of that, the clarity has been provided by the higher court on interpretations of several provisions and settling the position of law. During its more than five years' existence, the Code has witnessed six major legislative interventions and there were many amendments in Regulations framed under the Code to keep it responsive to emerging market realities and has undergone prompt course corrections to stay in sync. with time.

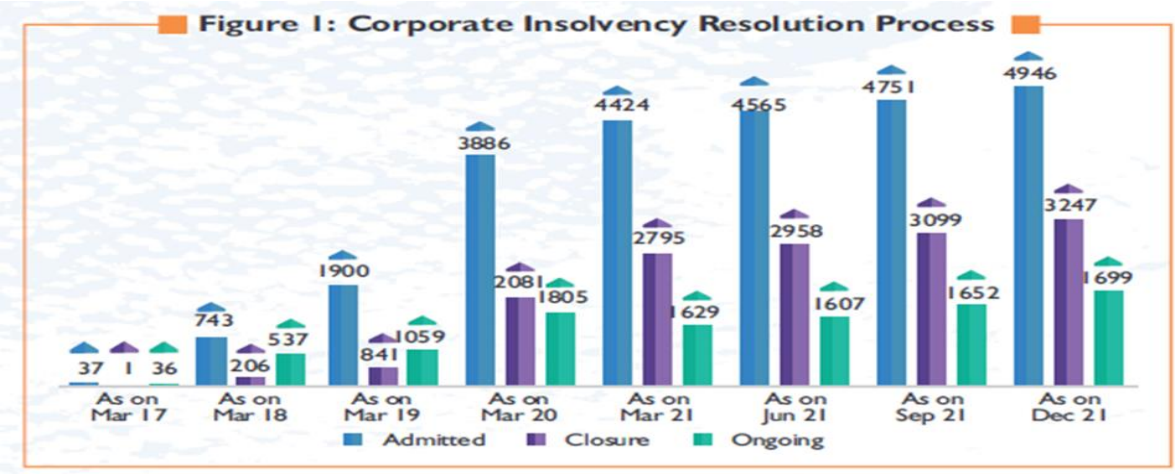
In view of the COVID-19 pandemic, the Central Government through IBC (Amendment) Ordinance, 2020 dated 5th June 2020 suspended initiation of the CIRP of a corporate debtor (CD) for any default arising on or after 25th March 2020. Further, the suspension of the Code was extended twice for 3 months each on 24th September 2020 and 22nd December 2020, to provide relief to the firms undergoing stress due to the pandemic. The relaxation combined with continued resolutions led the number of cases to decline during 2020- 21.

Five years of the IBC 2016- Outcomes under the Code

In a short span of five years of its existence, the IBC, 2016 has established its supremacy of markets and the rule of law in resolution of stress assets. It has provided a freedom of exit to rescuing companies in financial stress; releasing the idle resources from inefficient uses; helping creditors to realize their dues and has brought out a behavioural change amongst the debtors and creditors. The Code provides for resolution of stressed assets in two ways: first rescue the stressed companies by resolution plan; and failing which, by the closure of the company through liquidation process. Due to reforms in "*resolving insolvency*", the world ranking of India under "resolving insolvency" criterion has improved to 52nd rank as per the "*Doing Business Report 2020*" from 136th rank three years ago.

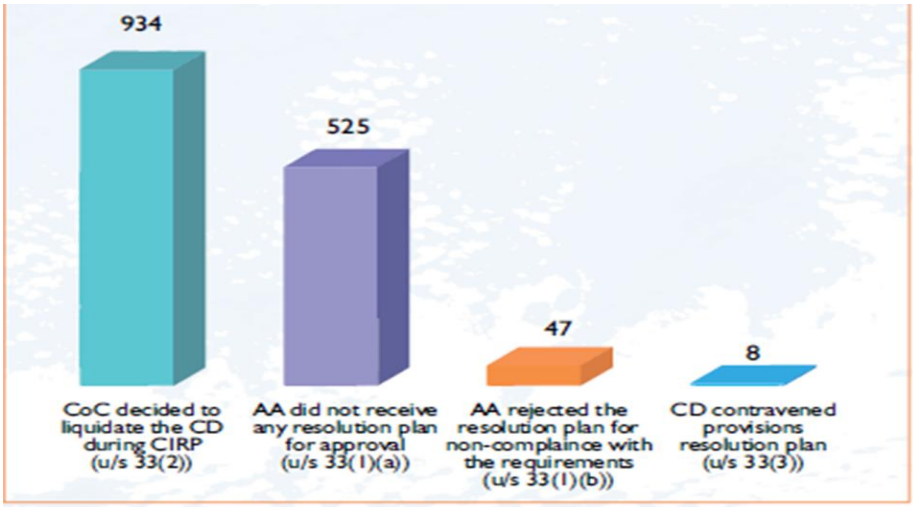
As per the statistics provided by IBBI in its quarterly newsletter Oct-Dec 2021, the following position regarding CIRP, Liquidation and Voluntary Liquidation mentioned:

Corporate Insolvency Resolution Process:



Liquidation: Till quarter Oct-Dec 2021, total CIRPs ending in liquidation were 1,514 excluding 13 cases where liquidation orders were set aside by NCLT/ NCLAT/HC/SC. Of these final reports have been submitted in 292 cases. There are 1,222 ongoing liquidation process cases as on December 31, 2021. The reason for liquidation is given in the following chart:

Reasons for Liquidation:



Voluntary Liquidation: 1,115 Corporate Persons initiated Voluntary Liquidation. Final reports in respect of 546 voluntary liquidation have been submitted and ten processes have by withdrawn by December 31, 2021. **The status is given below:**

Ecosystem under the Code as on 19th April 2022

1. National Company Law Appellate Tribunal (NCLAT)- **2 (Delhi and Chennai)**
2. National Company Law Tribunal (NCLT)- 15 Benches

   (Six at New Delhi (*one being the principal bench*) and two at Ahmedabad, one at Allahabad, one at Bengaluru, one at Chandigarh, two at Chennai, one at Cuttack, one at Guwahati, three at Hyderabad of which one is at Amaravati, one at Indore, one at Jaipur, one at Kochi, two at Kolkata and five at Mumbai)

3. Insolvency and Bankruptcy Board of India- **Principal Regulator under IBC 2016**
4. Insolvency Professional Agencies (three)**- Frontline Regulators for Insolvency Professionals**
5. Insolvency Professionals- **4079 registered as on 19.4.2022 with IBBI**
6. Insolvency Professional Entities- **As on 19.4.2022 Active IPEs are 92. Registered 137 out of which 45 have been deactivated**.
7. Information Utilities (IUs)- One

Vision-2025 in respect of IBC 2016- Further scope for Improvement in Code

The progress of anything can be looked based on time frame, the cost incurred in such resolution, and the quality of resolution in terms of value maximization. In terms of all three parameters - time, cost, and quality of outcome - the Code has delivered a multiple of those obtained under the erstwhile regime. *However, there is further scope of improvement in Code and my Vision 2025 with respect to IBC 2016 is as follows*:

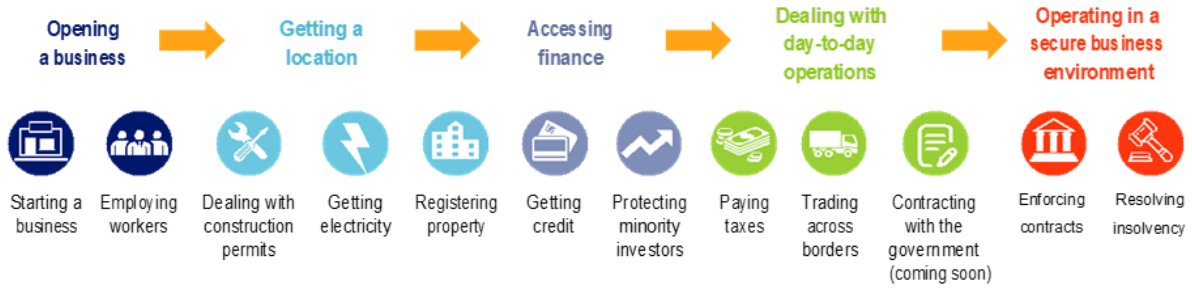
1. Improvement of World's Ranking through "Resolving Insolvency"

As we know one of the criteria in Ease of Doing Business was "*Resolving Insolvency*" as a direct result that India has earned a place among the world's top ten improvers for the third consecutive year, released by World Bank. India has ranked 63rd position as per the World Banks Ease of Doing Business Report 2020, which is improvement as compared to the last year's ranking of 77. This feat was achieved due to sustained business reforms over the past several years and is directly on account of significant improvement in *resolving insolvency framework*, *India's rank moved under this criterion* ***from 108 to 52***.

On September 16, 2021, World Bank Group management took the decision to discontinue the **Doing Business report**. The World Bank Group (WBG) is working on a new approach to assessing the business and investment climate. The new approach of WBG will aim to complement and fill gaps in existing indicators of "Doing Business". As per Doing Business Report 2020, the ranking of various countries/ economies is based on 10 topics including "**Resolving Insolvency**".

However, (11) Employing Workers and (12) contracting with the government indicators ***do not constitute part of the ease of doing business ranking.***

FIGURE O.1 What is measured in *Doing Business*?



Note: The employing workers and contracting with the government indicator sets are not included in the ease of doing business ranking.

Source: Doing Business Report 2020

Even though, the World Bank Group management is working on a new approach to assessing the business and investment climate, but "Resolving Insolvency" will be one of such indicators. Accordingly, there is a long road ahead for India to develop a robust insolvency regime and for that, the constant efforts are required from the Government to address the challenges that are being faced with the implementation of the IBC 2016.

2. ***Pre-packaged insolvency resolution process for Normal CIRP***

Pre-packaged Insolvency Resolution Process (PPIRP) is another reform carried out by the Government after Insolvency and Bankruptcy Code 2016 on 4th April 2021 through an ordinance which was replaced by IBC (Amendment) Act 2021 dated 12th August 2021, to provide an efficient alternative insolvency resolution framework for corporate persons classified as MSMEs under section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006; and to *ensure quicker, cost-effective and value maximizing outcomes for all the stakeholders,* to the continuity of MSMEs businesses and preserves jobs.

Though the threshold default limit for filing of an insolvency application under normal CIRP is Rs. 1 crore but due to above reasons, the Government kept the threshold of default for PPIRP to Rs. 10 lakhs. Further, the PPIRP is to be completed within 120 days as compared to Normal CIRP in 180 days with one-time extension upto 90 days. Total Time Frame for CIRP has been amended to 330 days by IBC Amendment Act 2019 (w.e.f. 16.08.2019), that includes any

extension granted by Adjudicating Authority and the time taken in legal proceedings.

PPIRP has informal and formal processes. Pre-admission of application under PPIRP by Adjudicating Authority (NCLT) shall be the informal process. Post admission of the Pre-pack application by the NCLT- shall be Formal with effect from the date of commencement of PPIRP.

As PPIRP applicable to MSMEs, is more quick, cost-effective and value maximizing outcomes for all the stakeholders and the IBC 2016's road is not fully developed, in order to strengthen it, the Government may like to bring in future the similar process for normal CIRP for the stressed Corporate Debtors, however the experience gained under PPIRP will guiding force to the Government.

3. ***Urgent need to bring Cross Border Insolvency provisions***

At present, IBC 2016 provides for the domestic laws for the handling of an insolvent enterprise. Presently, there is no standard instrument to restructure the firms involving cross border jurisdictions. Cross border insolvency signifies circumstances in which an insolvent debtor has assets and/or creditors in more than one country. There are various insolvency cases in which corporations owe assets and liabilities in more than one country. The absence of standardized cross border insolvency framework creates complexities and raises various issues e.g. administration of insolvency; access of assets in foreign countries; priority of payments; recognition of claims; taxation and other issues. Accordingly, there is urgent need to bring provisions on Cross Boarder Insolvency under IBC 2016.

4. ***Increase in Benches of NCLT/ NCLAT***

As mentioned under Ecosystem of Code, there are 15 benches of NCLT and 2 benches of NCLAT. There are huge numbers of cases pending with various benches of NCLT. Also, there are only two benches of NCLAT but there are large number of cases of appeal. In view of workload being handled by NCLTs/NCLATs not only related to CIRP and Liquidation cases but also related to Companies Act, 2013 and there are numbers of cases in other jurisdictions, the Government may decide to establish NCLT/NCLAT benches at other places

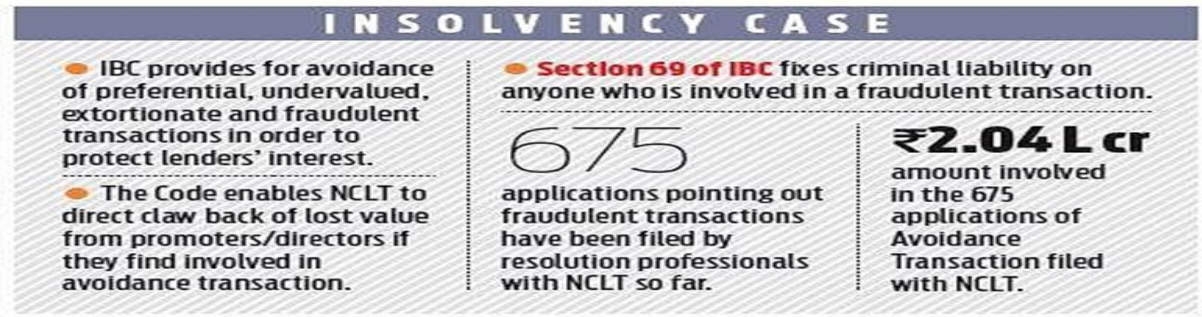
also to ease out the workloads of NCLTs and NCLATs.

5. ***Treatment of PUFE transactions in Resolution Plan***

IBC 2016 lists four types of vulnerable transactions, namely Preferential, Undervalued, Fraudulent, and Extortionate [PUFE) Transactions which are covered under sections 43, 45, 66, and 50 of IBC. The look back period for related parties' transactions is 2 years and one year for un-related parties. However, there is no limit of look back for Fraudulent transactions under section 66 of IBC 2016. The Resolution Professional or Liquidator is duty-bound to form an opinion and identify such transactions and report them to the adjudicating authority for the appropriate relief, in cases where the CD has been subjected to a PUFE transaction.

In a recent case of ABG Shipyard Ltd (ABGSL)'s case involving loan exposure of Rs. 22,842 crores, that was probably the biggest loan fraud case recorded in India, where Resolution Professional had pointed out over half-a-dozen transactions involving over a thousand of crores, took almost three years for CBI to lodge a formal FIR against the company and its promoters.

As reported by Indian Express in its article dated 21st March, 2022, "*According to the Insolvency and Bankruptcy Board of India (IBBI), so far resolution professionals have filed 675 applications with NCLT pointing out fraudulent transactions to the tune of Rs 2.05 lakh crore undertaken by the promoters of the companies undergoing insolvency process*."



Source: Indian Express dated March 21, 2022

But despite these transactions being reported by resolution professionals or Liquidator, they are not necessarily leading to further investigations by government agencies like CBI or SFIO. Accordingly, Adjudicating Authority

needs to close the applications on Avoidance Transactions on time giving the necessary legal sanctity to the findings of resolution professionals.

Further, to above, IBBI in its discussion paper for issues related to CIRP, mentioned as of 28th February, 2022, 708 applications in respect of avoidance transactions valued at around Rs. 2.00 lakh crore have been filed with AA. Of these, only a handful of applications have been disposed of by the AA and few appeals have been filed against the orders of the AA disposing these applications. Several such applications are pending even after approval and implementation of resolution plan. Accordingly, CIRP Regulations are being amended to include as to how the avoidance applications and proceedings will be pursued, shall be specifically mentioned as part of resolution plan submitted to AA for approval.

6. ***Implementation of other provisions of Individual, Partnership and Proprietorship Firms***

Part III of the Code makes provisions for insolvency resolution and bankruptcy of individuals and partnership firms. For this purpose, it classifies individuals into three categories, namely, (i) personal guarantors (PGs) to corporate debtors (CDs), (ii) partnership firms and proprietorship firms, and (iii) other individuals. This enables implementation of individual insolvency in a phased manner considering the wider impact of these provisions. As a first step in implementing Part III of the Code, the Government has notified the commencement of provisions relating to insolvency and bankruptcy processes for PGs of CDs, with effect from 1st December, 2019. As Code has already completed its 5 years of existence, implementation of other provisions related to individuals, partnership firms and proprietorship firms is need of the hour.

7. ***Implementation of provisions related to Fresh Start Process***

The Code envisages Fresh Start Process (FSP) which allows an indebted individual to restart his life afresh, where the chances of recovery are so low that the cost of resolving the insolvency becomes an additional burden to either the debtor or the creditor or the State. It, however, provides for a court supervised and Insolvency Professional assisted FSP. The IBBI, based on advice of the advisory committee, has already suggested a redesign of the process to make it accessible, simpler, quick, and cost effective.

The Insolvency Law Committee (ILC) found this feasible and has recommended an amendment to the Code to this effect. Accordingly, FSP provisions need to be notified by the Government as soon as possible.

8. Implementation of Group Insolvency

A Working Group on Group Insolvency under the Chairmanship of Shri U.K. Sihna, Former Chairman, SEBI was constituted by IBBI on 17th January 2019 for recommending framework to facilitate insolvency resolution and liquidation of Corporate Debtors in a Group. The Committee submitted its report on 23rd September 2019. The provisions on Group Insolvency under IBC 2016 are yet to be notified by the Government.

There may be situations where the fate of one company is linked to that of another. In such cases, the stakeholders may maximize their interests and the possibility of revival of companies may be higher, if such linked companies are resolved together. The Code, however, does not envisage a framework to either synchronize insolvency proceedings of different companies in a group or to resolve their insolvencies together. However, the Courts have taken cognizance of this gap and have started the process of addressing the same.

In the landmark case of "***State Bank of India & Anr v. Videocon Industries Ltd & Ors"*,** filed by a consortium of banks led by State Bank of India, NCLT, Mumbai Bench has allowed substantive consolidation of thirteen of the fifteen Videocon companies on the grounds of common control, common directors, common assets and liabilities, amongst others. The decision was arrived at by referring to several US and UK case laws where it was held that bankruptcy courts may order for consolidation while exercising their equitable powers.

Similarly in other cases, Group insolvency was allowed. In case of "***Edelweiss Asset Reconstruction Co Ltd v. Sachet Infrastructure Pvt Ltd & Ors***", the NCLAT ordered for a simultaneous CIRP to be initiated against a group of five companies through a common Resolution Professional in order to develop a residential real estate project and complete it in one go. In the matter of "***Chitra Sharma v. Union of India***", the Supreme Court (SC) directed the parent company (**Jaypee Group**) to deposit a substantial amount in lieu of the insolvency proceedings initiated against its group companies.

SC while exercising its powers under Article 32 of the Constitution, in case of "***Bikram Chatterji & Ors. v. Union of India***", aided the aggrieved homebuyers by ordering attachment of properties of all forty group companies in the Amrapali group and freezing of bank accounts of all companies and their directors.

In the case of "***Axis Bank Ltd & Ors v. Lavasa Corp Ltd***", NCLT consolidated the Lavasa group insolvencies in order to avoid potential losses likely to be caused by fractured insolvencies while noting that the insolvency of the subsidiaries largely depended on the outcome of their parent's insolvency.

There are other case laws on Group Insolvency in India, accordingly there is urgent need to notify the provisions of Group Insolvency under IBC 2016.

9. ***Need for an Interim Moratorium***

The Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 provides inter-alia an interim moratorium which shall commence on and from the date of filing of the application till its admission or rejection. The explanation to Rule 5 (b) provides that "interim moratorium" shall have the effect of the provisions of sub-sections (1), (2) and (3) of Section 14. In case of CIRP, there is concern that till the CIRP commences, there may be an incentive to siphon off the assets of the corporate debtor. Internationally too, jurisdictions such as the UK and the US have provisions for the application of a moratorium from the filing of the application itself. Accordingly, the Government may like to address the issue related to interim moratorium to safeguard the interest of all stakeholders.

10. ***Strengthening Information Utilities (IUs)***

Section 215 of the Code provides submission of financial information by the financial creditors mandatorily and optional for operational creditors. There is a further need to enforce compliance with Section 215 and incentivize submission of information to IUs. The information mentioned in the application will be get verified and authenticated by information utilities at the time of filing applications to initiate CIRP. In due course of time, with the evolution of a more robust framework of IUs, the government may amend

Section 215 to require creditors other than financial creditors to also provide financial information to information utilities.

11. Treatment of Profit and Loss accrued during CIRP

If there is a profit or loss during the period of CIRP for running the corporate debtor as going concern, will it be distributed to financial creditors and operational creditors equally; or should the treatment of profit or loss be provided in Resolution Plan? This issue needs to be addressed by the Government urgently.

12. Priority to Interim Finance

Though the interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower is treated 'liquidation cost' but it not the same in case of CIRP i.e. it is not treated as 'insolvency resolution process costs'. Section 5(13) includes interim finance within insolvency resolution process costs, which is accorded the highest priority under a resolution plan and in the liquidation waterfall under Section 53; but once a company enters the insolvency resolution proceedings, it may find it extremely difficult to obtain credit, as few lenders would be willing to lend to a troubled debtor. It is suggested that similar treatment as of Liquidation Cost be given in respect of interest on interim finance in CIRP.

Conclusion

Keeping in view nascent stage of IBC 2016 and jurisprudence is being developed each day, we should not be dishearten with so many amendments in IBC 2016 and many judicial interpretations thereon. All these amendments and judicial interpretations are yielding a rich body of insolvency and bankruptcy jurisprudence which speaks volumes about the vitality of the Code. No Act of the legislature is perfect and can ensure 100% success within a short span of five to ten years as there is a transition from old legal order to a new legal order. We are in the middle of such a transition. Jurisprudence is developing and accordingly, the IBC 2016 will be most effective legislation over a period of time.

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Improving Process and Outcome of Resolution Plans under IBC- Vision and Recommendations

Dr. S K Gupta
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Synopsis
The introduction of the Insolvency and Bankruptcy Code 2016 (IBC) as a consolidated code with provisions for the reorganization and insolvency resolution of distressed corporates, partnerships and individuals is one of the most remarkable economic reforms. However, the continued success of the IBC will undoubtedly depend on the effective process of submission consideration and approval and certainty of the implementation of resolution plans. There is an imperative need to bring about necessary legal and process reforms to improve the outcome of Resolution plans under IBC.

The Perspective

The Insolvency and Bankruptcy Code (IBC) was passed by the Parliament, bringing about a structural change in the framework that governs the corporate insolvency resolution process in India. The IBC provides for a time-bound resolution of firms, addressing the vexed problem of firm exit in India. It has strengthened the hands of creditors in enforcing their rightful claims against corporate debtors. The threat of losing control over their company has emerged as a powerful deterrent for errant promoters not wanting to meet their financial obligations. However, despite a considerable improvement over the erstwhile architecture, on various parameters, outcomes under the IBC have not been as favorable as envisaged.

Resolution Plan – Key aspect of IBC

The objective of the Resolution Plan is to get a proposal from a Resolution Applicant that aims to provide a resolution to the problem of the corporate debtor's insolvency and its consequent inability to pay off debts. The objectives of the Resolution Plan under the Code with the order of its priority is:

- The first objective is "resolution".
- The second objective is "maximization of value of assets of the 'Corporate Debtor'' and
- the third objective is "promoting entrepreneurship, availability of credit and balancing the interests of all stakeholders

Section 5(26) of IBC, 2016 - "Resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; it has been further clarified by the explanation that resolution plan may include provisions for restructuring of the Corporate debtor including by way of merger, amalgamation and demerger.

In order to understand it more clearly it has to be further stated that:

- Resolution is not a sale, but the resolution of corporate debtor as a going concern
- Resolution is not an auction, feasibility and viability of a resolution plan are not amenable to bidding or auction. It requires application of mind by financial creditors who understand the business well;
- Resolution is not recovery. While recovery bleeds the corporate debtor to death, resolution endeavors to keep the corporate debtor alive. IBC prohibits and discourages recovery in several ways;
- Resolution is not liquidation. Liquidation is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully.

The Resolution plan enhances the economic value as under:

- Resolution Plan is a proposal by the Resolution Applicant, providing Revival Plan to ensure continuity of business along with most effective use of assets and equipment. The proposal takes into consideration the production facility and infrastructure which can be put to optimum economic use.
- The plan provides for continuance of workers and employees in the employment, and additional employment to be generated by employing additional workforce.
- The plan provides to explore company's history of the business and goodwill to its full extent

- The resolution applicant provides to infuse required funds for debt restructuring and capital restructuring working capital requirement and refurbishing of the plant and machineries. The objective of debt restructuring is to satisfy the secured lenders through settlement terms and release the securities.
- The Resolution applicant provides to take over the management of the company by inducting professional, experienced, successful promoter directors and independent directors for success of the Resolution plan. The resolution applicant enjoys full freedom of management of the company.
- The resolution applicant is required to abide by its commitment to infuse the funds requirement for initial payment and subsequent instalment in a timely manner.
- The Resolution applicant normally has adequate resources to induct additional capital as it will be required in future with the consent of new board of directors and its shareholders.
- The resolution Applicant may acquire the business of the Corporate debtor and merge with its existing business to create inorganic growth to use scale of operations.

Resolution Plan – Concerns and Challenges

A resolution plan approved under the IBC for a company by the adjudicating authority has a statutory binding effect on creditors, employees, shareholders and other stakeholders involved in the resolution process, including government bodies seeking the payment of dues from distressed companies undergoing an insolvency resolution process. In spite of the strong emphasis in the IBC regarding time-bound implementation, there have been several challenges that have held up the timely implementation of resolution plans.

Systemic challenges

- Prolonged litigations post-approval of resolution plans by the committee of creditors – either due to objections to the plan or the limited bandwidth of the adjudicating authority in view of the lack of judicial members – often lead to a significant delay in plan approval and, consequently, implementation.
- The IBC does not provide any material consequence for erring resolution applicants, such as disqualification or exemplary monetary

liability. The only recourses of creditors in such circumstances are to seek the invocation of the performance guarantee and to file a complaint with the Insolvency and Bankruptcy Board of India or the central government to initiate a complaint under section 74 of the IBC

- The absence of any provision in the IBC regarding the effect of the resolution applicant reneging on its commitments in the period between approval by the committee of creditors and approval by the adjudicating authority is a gap that has been sought to be exploited by several resolution applicants. Such withdrawal from the implementation of the resolution plan, if allowed, would render the entire resolution process futile

- It is also pertinent to highlight that there has been a reluctance by several sector regulators to accept the primacy of the provisions of the IBC in the context of the resolution and settlement of dues under approved resolution plans. With regulators in mining, electricity and telecoms sectors not providing timely approvals critical for implementing resolution plans on account of the insistence of the payment of pre-insolvency dues, resolution applicants are increasingly wary of challenges in the implementation of approved plans in companies that have government concessions, grants and allotments.

Resolution Plans - Vision and Recommendations

There is a need to contemplate, during any consideration of substantive reforms, the shape of the legal provisions that will embody future reforms in the aspect of Resolution plans under IBC.

- A comprehensive and robust framework regarding the implementation of resolution plans is thus the need of the hour. While the Supreme Court has settled the jurisprudence on the limited role of the adjudicating authority to only verify the legal compliance of the approved resolution plans without interfering in commercial wisdom, providing a mandatory legislative timeline for the adjudication of resolution plans and administrative directions on necessary compliance is likely to aid in time-bound resolution. It is equally important for the central government to fill the adjudicating member vacancies so that infrastructural challenges plaguing the adjudicating authority are resolved.

- The adjudicating authority under the IBC may be vested with the power to act as a single-window clearance with powers to direct sector regulators to consider and grant approvals in a time-bound manner during the pendency of the proceedings for approval of the resolution plan. The authority may immediately adjudicate and decide on any issue of withholding of approval by any sector regulator contrary to the scheme and objects of the IBC.
- With the new IBC in place, a new rescue mechanism came into existence. This dissertation dealt with the detailed analysis of the rescue culture in India and the United Kingdom. In case of procedural differences, the main component that needs to be highlighted is the case of Corporate Rescue, which is better achieved in UK than India owing to the fact that India has only one procedure for the rescue which is the "Resolution plan" but UK has many alternatives to save the company from slipping into the process of liquidation. UK Insolvency Law is far more advanced owing to the fact that the element of third-party interference is much lower in the United Kingdom which is also one of the reasons why corporate rescue culture in India is not much successful. Just like the free-standing moratorium under the UK Act, a similar implementation of the like in India will enable the creditors "a breathing space" to analyze and implement the rescue plan
- In India the influences of the external entities on the corporate insolvency procedure are highly controversial and needs to be kept in check. Such as in a recent case wherein the UK based Liberty House who was the Amtek Auto's biggest bidder by the committee of creditors backed off and in such a case the whole rescue procedure is completely dependent on a different entity.
- It is pertinent to confer NCLT and NCLAT with the necessary powers to successfully implement the resolution plan. The reason for this is because public awareness of a breach of the resolution plan causes a massive damage to the corporate debtor's market position, which is difficult to recoup for a company that is already insolvent and burdened. However, there are occasions when the corporate debtor (together with its members and employees), creditors, and other relevant parties lose the struggle because the successful bidder fails to follow the Code's

obligation. Stern and articulated provisions are the sole means by which this lacuna can be corrected.

- ***Approval of Resolution Plan stage*:** Regulation or amendment is required directing the government authorities to adhere to specific timelines for providing their view on a resolution plan, and after which no other dispute should be entertained. Timeline for submission of objections on resolution plan should be limited through legislation, allowing discretionary powers to court in rare situations.

- ***Implementation of Resolution Plan stage*:** Penalty on resolution applicant in case of delay – Withdrawal of plan by the resolution applicant or delayed implementation of plan which frustrates the entire CIRP process. While the RP and the CoC may have a performance guarantee in place, which does act as a deterrent, but usually is a small percentage of the overall recovery for creditors. The RP and CoC may consider having a higher performance guarantee from resolution plan applicants.

- ***Conduct of judicial function*:** It is essential to unclog the NLCT benches by stopping frivolous litigation and instituting stricter adherence to timelines of the Code in various aspects of the process. Mechanism to levy penalties and costs on claims/appeals that turn out to be frivolous. Limit the extension of hearings to, say, a maximum of three. Online filing and hearings to be promoted, which shall result in fewer adjournments and more disposal of case.

- ***The introduction of prepacks*:** The government has signaled its willingness to consider introducing prepackaged insolvency resolution processes, or prepacks, within the IBC framework, and the Insolvency Law Committee has published a report proposing such a process. There are two factors that may, however, dilute the efficacy of prepacks: the applicability of section 29A to a prepack process, and the incentives of secured creditors. The report of the Insolvency Law Committee also proposes retaining the applicability of section 29A to prepacks: all debtors must be allowed to participate in prepacks and be exempt from section 29A in order to enable a prepack framework to serve its larger

economic objectives of allowing greater flexibility for debtors. Additionally, secured creditors would only participate in a prepack if they received a higher value for their assets than they would if the firm went into liquidation. A prepack process would therefore have to ensure that secured creditors are sufficiently incentivized to participate in negotiations during the period of insolvency.

- ***Building an insolvency database*:** For example, one suggestion is about analyzing assets of the CD, both before the resolution process has been started and after its completion and also assessing CD's enterprise value (market cap plus debt) and the capital structure of the resolved entity. Once a time series data of such indicators is available, it is possible to study the effect of various events and actions on the valuation. It is possible that such impact can be seen only with a lag but nevertheless, it would be useful to see the changes in the value of assets over time as this could facilitate the measurement of possible maximization of value of assets of the CD

- ***Avoiding delay between CoC approval and National Company Law Tribunal (NCLT) approval:*** There have been times where the application for approval of resolution plans have been pending before the NCLT for over 12-15 months. Considering such delay will severely affect the feasibility and viability of resolution plan and given that the scope of judicial intervention is minimal in a resolution plan approved by the CoC, in its commercial wisdom and the RP is duty bound to check the compliance of resolution plan with applicable laws, endeavor should be made by NCLTs to approve/ reject the resolution plan in a time bound manner.

- ***Online Bidding Mechanism*:** The government in 2019 considered establishing an online bidding mechanism with a limited time period for resolution applicants to make their bids. In this process, resolution applicants who fulfil some eligibility criteria will be allowed to bid online for a limited period, thereby resulting in strict adherence to timelines. However, one has to take into consideration the fact that submission of resolution plans cannot be equated to submitting bids. There are various facets to a resolution plan and each resolution plan

would differ in these aspects. Some plans may offer a greater return to the creditors on their admitted claims while others may offer a greater infusion of funds into the corporate debtor. Each resolution plan requires significant discussions with the members of the CoC who are tasked with selecting the plan which would be best suited to take the corporate debtor out of insolvency. Further, such a mechanism, while resulting in strict adherence to timelines, would tie the hands of the CoC in case a better plan is available after a resolution plan has been selected through online bidding. The suggestions made in this article would provide sufficient time for the CoC to explore different resolution plans that may be offered- resulting in value maximization while also ensuring that the process remains time-bound.

- Considering that the ultimate aim of the Insolvency and Bankruptcy Code, 2016 is to revive the Company and keep it as a going-concern and turn to Liquidation only as a last resort, it is likely that Courts might consider bona fide requests for modification of an approved Resolution Plan if such a modification is supported by CoC. The Code never intended for an innocent resolution claimant to be compelled to take over a constantly bleeding corporate debtor in an unviable scheme solely to support one class of stakeholders – the creditors. On the contrary, it seeks to strike a balance between the conflicting interests of all insolvency resolution stakeholders. The aim of the plan's approval is to save the corporate debtor and get it back on its feet. This cannot be achieved by a reluctant resolution applicant whose proposal has become economically unviable as a result of subsequent "material adverse effects" due to circumstances beyond its control. Approval of such a scheme would be counterproductive to the Code's goals, as it could lead to the Corporate Debtor's repeated insolvency or liquidation.

- As a result, the NCLT should look at the validity of the applicant's claim as well as the terms of the settlement plan itself to see whether it can be withdrawn or changed after it has been accepted. The CoC's commercial decision is reflected in the schedule. If the plan is contingent or premised on the fulfillment of such contingencies or conditions, the plan will be withdrawn or modified if such contingencies or conditions are not met. It must be required to be removed or suitably changed in

situations where the proposal has become unviable, which means the plan's underlying commercial basis has deteriorate. In many cases, the reason for deterioration in the value of the corporate debtor is delay in approval of the resolution plans by NCLT, and inordinate delay in such approval is not only leading to erosion in the value of the assets of the corporate debtor but also affecting the projections of the resolution applicant.

Conclusion

The introduction of the Insolvency and Bankruptcy Code 2016 (IBC) as a consolidated code with provisions for the reorganization and insolvency resolution of distressed corporates, partnerships and individuals is one of the most remarkable economic reforms that has led to the resolution of several distressed entities. With its emphasis on time-bound resolutions, the maximization of the value of assets and the power of commercial decision-making left to an informed committee of creditors, the IBC has become the most powerful tool for creditors to achieve time-bound resolution of distressed debts. However, the continued success of the IBC will undoubtedly depend on the certainty of the implementation of resolution plans. There is an imperative need to bring about necessary legal and process reforms to improve the outcome of Resolution plans under IBC.

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INSOLVENCY AND BANKRUPTCY CODE, 2016: VISION 2025

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Synopsis

Good visions are long-term sustainable ones, describing the desired end-state well into the future. The understanding of the base issue is of paramount importance for establishing a lucid vision. The present legislature, regulator & judiciary has termed IBC as *'Resolution Mechanism'*, which might be the reason be short of desired effect on Indian economy whereas the 'recovery' which is basic commercial requirement, has a direct impact on interest rates and hence the need is speedy 'recovery mechanism' and consequential resolution and not otherwise.

The Introduction

In 2014, the Ministry of Finance constituted the Bankruptcy Law Reform Committee with the goal of resolving the double balance sheet problem. The BLRC stated through its 2015 report that the existing insolvency framework is incoherent and fragmented, with many uncertainties regarding monetary recovery, and recommended a complete overhaul and streamlining of insolvency law, which resulted in the enactment of the Insolvency and Bankruptcy Code, 2016.

A track of IBC so-far

IBC'16 was promulgated, in line with world trend in this regard to resolve insolvency of corporates; whereas up till now in most of the cases, it has been triggered to arm-twist with an evident intent to recover the monies. Though, even after being well aware of the ground level facts of recoveries, the regulators & judiciary has always preferred to term IBC as 'resolution tool' instead of 'recovery tool'; whereas every IBC practitioner knows that initiation

of IBC proceedings stems from an intent to intimidate the corporate debtor of dire consequences of CIRP so as to achieve speedy settlement of financial recovery. As far as nationalized banks are concerned this IBC has also served as shield anchor for safeguarding of the officials

involved. The law makers, regulators & judiciary has not only failed to address recovery issue but also has avoided to address the truth by substituting fancy word 'resolution'.

Apparently, the draftsmen have left IBC with many grey areas to be settled by the court of law. The regulators instead of help rectifying the odd effect of poor drafting, has passed through rules & regulations the grey-area burden on the fourth pillar of IBC, that is, the resolution professional who has no teeth to implement the CIRP in time, no defined way to finance the ongoing CIRP, no legal power to deal with various indirect stakeholders involved more particularly, the other government authorities with whom he has to deal while discharging his duties during CIRP. It could be termed as an eighth wonder of the world that neither IBC nor the rules/regulations have any decisive say on the remuneration of a resolution professional leave aside payments thereof. Failure on the part of judiciary is also evident in the precedents available so far as regards to fee and payments thereof to resolution professionals.

It's true that only the CoC has a commercial wisdom & financial hold on CIRP, however, contrary to qualified resolution professional, it has never been trained nor has passed through some eligibility test or has any minimum qualification criteria to act as representative of CoC. There is no regulatory watchdog over the CoC nor there is a threat of professional misconduct on the part of the CoC. Moreover, egoistic disputes among the CoC members cannot be help settle by the resolution professional because he is not having even a slightest intervening legal force leading to delays in CIRP at the cost of stakeholders.

Probably a police constable has more power to implement the law and order than a qualified resolution professional resulting in a lackadaisical implementation frustrating the desire of IBC. One might observe that a few judgements has treated resolution professional as 'officer of court' yet in practice, not a single judgement on 'contempt of court' proceeding at the

instance of resolution professional for non-cooperation by the stakeholders. This inaction by the NCLTs speaks louder than the provisions under the IBC.

NCLT precedents has indicated that resolution professionals have duty to collate a claim so received without a power to adjudicate it; while verifying a claim how to hair-split between 'collate vs adjudicate' is a matter of potential litigation to be decided by the court in time to come. Many more such drafting lacunae are yet to be addressed by amendments & precedents.

The statistical dereliction track of IBC so-far

To some extent it may be said that Insolvency and Bankruptcy Code, 2016 has helped in economic reforms in India, which has brought about desired behavioral change in the attitude of both corporate borrowers and creditors, significant conversion of sub-standard accounts into standard accounts, improvement in the quality of standard accounts, and overall reduction in non-performing assets because of speedy financial resolution mechanism. A critical analytical study in this regard may change the conclusions.

The Insolvency and Bankruptcy Code has since 2016 helped recover Rs.2.5 lac crore from bad assets compared to admitted claims of Rs.7 lac crore, hence a recovery rate of 36% as of June 2021 as per a report by CRISIL. The recovery rate through the Insolvency and Bankruptcy Code mechanism was 46% at the end of 2020. While banks had recovered more than Rs.1 lakh crore at the end of 2019 through the IBC route, the figure dropped to a little over Rs.27,000 crore by March 2020. Recovery through the IBC has been higher in FY20, according to the RBI, at 46%, compared with SARFAESI, DRTs or Lok Adalat.

A measure the success of insolvency resolution is the recovery rate. In past it was around 20% only which means that recovery rate of 46% in 2020 was a clear success. True, when the dirty dozen was sifted to begin with, the recovery rates were impressive at around 70%, but this is exactly where the confusion lies. As proceedings usually get delayed, the realization value of assets will fall.

The foundering timelines of IBC so-far

The Code provides for a time bound resolution process. However, the fact that the Code is even after 5 years, remains at its too young stage and that there

are a number of issues which are not yet settled, makes the target of 330 days difficult to achieve? Thus, it's routine that almost every corporate debtor files application for an extension or exclusion of certain time period from the computation of 270/330 days. It is imperative that the object and intent of the IBC are not compromised due to repeated extensions and that the extension or exclusion is granted only in genuine and justifiable cases and not to abuse and delay the process.

A plain reading of statistics says progress has been more than satisfactory so-far, but India has to work hard to ensure that the resolution processes get stronger and timely. There is still a subjective debate on whether the IBC has been a success in terms of macroeconomic resolution process which could sustain for decades. The view here is that it may be provided the needed corrections are made in time by the legislature, regulators and the adjudicating authorities.

Before IBC era, that is in 2015, the 'World Bank Doing Business Indicators' highlighted that it took 4.3 years for resolution of insolvency with a recovery of 25.7%. When the IBC came up with numbers like 180 + 90 days, it was said that it is being done after careful deliberation. Now, it is 330 days whereas at an average of 433 days (as of September 2020), timeline is better than 4.3 years reported under the earlier laws. The average time taken for completion of corporate insolvency, where corporates get rescued through a resolution plan, at 433 days may still be above the legally stipulated timeline of 330 days.

Blindness so-far

The long-term sustainability can be achieved by equality of law. Coloring the monies by prioritizing financial creditor over the other creditors is a moot lacuna to which the courts, though has taken note of, yet left undecided at the mercy to legislature.

The amount of money in a nation's money supply is crucial to the health of its economy. If there is not enough money in circulation, the economy cannot grow. To highlight as to where financial blood lies, a sweeping statement can be made that "if operational credit is secured by some FOOL PROOF mechanism, the existence of financial creditor might be extinguished due to easy availability of routine credits in the market". This statement itself

indicate how faulty is legislative discrimination under IBC between financial & operational creditors is adversely affecting macroeconomics.

Even after 5 years of setting up of NCLTs, why are vacancies in the NCLT a major issue is a moot point since as on date the combined strength of the current NCLT benches around the country is currently only 29 members against the total sanctioned strength of 63 members. This is causing delays in the admission of insolvency cases by NCLTs and the approval of resolution plans which are the key reasons behind the non-adherence of timelines under the IBC. The delays on the part of the NCLT in admitting cases allows defaulting owners an opportunity to divert funds and transfer assets. The MCA being a nodal ministry, should take greater responsibility to streamline the operational processes under IBC. The constantly monitoring and analyzing the workflow, disposal and outcomes with regard to resolutions, recoveries, time taken, etc. should be taken care of. Delays in appointment of members at NCLTs is another area need to be addressed before moving to set vision.

Artificial Intelligence could help reduce pendency of cases, increase efficiency of IBC. AI can help with the admin; it can support adjudicating authority's decision-making. The deployment of IA has remained a distance dream till date in relation to IBC.

The efforts so-far

Pandemic has altered the way of doing business. The increased monetary threshold to trigger a CIRP from Rs. 1 lac to Rs. 1 crore was based on hypothesis which has vitiated the very basic intent of IBC. Had these restrictions were temporary, it would be understandable; however, since the minimum threshold has been set substantially high, therefore, most of the operational creditors are out of the reach of IBC remedy. Now pandemic is over and there are no statistical indicators that earlier threshold limit of Rs. 1 lac was low enough to flood the number of CIRPs, the limit could now be restored/revised based on supportive data rather than on the uproar of the industrial polity.

The IBC was enacted to provide uniformity and to bring a consolidated framework for conducting insolvency and bankruptcy proceedings against individuals and companies under one umbrella. However, it is important to

note that at present the implementations only covers the insolvency resolution process for personal guarantors and not for other individuals and partnership firms which continue to be governed under the old acts that is under the Presidency Towns Insolvency Act, 1920 (for individuals in the erstwhile presidency towns of Chennai, Kolkata, and Mumbai). The Provincial Insolvency Act, 1920 (for individuals in areas other than the erstwhile presidency towns) provided for insolvency proceedings against all individuals including personal guarantors. However, the said legislations could not meet the growing need to secure the interest of the stakeholders and were debtor centric. Further the same were unable to meet the need to conduct the process within strict timelines, due to the absence of timelines and time bound procedure. Substantial delays were caused which were unable to protect the interests of all the stakeholders. Slow & partial implementation & enforceability of personal insolvency part of the IBC has also a non-enthusiastic approach on the part of regulators.

Vision visible so-far

As far as IBC is concerned, it has travelled less in past, 2016 to 2021 regime then it should have, all because of inadequate buttress by four pillars of IBC found mentions in the BLRC report: the insolvency professionals, information utilities, adjudicating authorities, and the Insolvency and Bankruptcy Board of India.

The piecemeal promulgation of IBC has been amended many a times. The Centre has even proposed further fresh changes to the IBC Framework so as to further its objective of achieving time-bound resolution of stressed assets while maximizing its value and balancing the interests of all stakeholders. Public comments were invited to have been sent online latest by January 13, 2022. One may wonder that still a mega amendment is in pipeline to tweak the process. All this hints illusion or delusion of the executives of the IBC components. It appears that IBC regulators & draftsmen are unaware of ground realities of private sector. Here is a need that such thought process be done by those who has direct first-hand experience of recovery & resolution in private sector.

Addressing the immediate & visible anomalies as surfaced through past experience & statistics such as strengthening enforceability of the CIRP process, pragmatic addressing to the aspects of issues arising due to conflicts with various stakeholders including conflict with the government departments is far more important before setting up a vision for 2025.

Vision for 2025 to be visualized

The Parliamentary Standing Committee on Finance has recently recommended that the IBC be amended to provide micro, small and medium enterprises (MSMEs), which are operational creditors under the IBC, with greater protection in the current economic environment. The IBC currently prioritizes financial creditors over operational creditors. This is appreciated that at least some thoughts are in process in this regard.

For better & speedy circulation of stagnant monies laying in savings of cash rich Indian gentry, a steel-caged credit security-safety by legislation be implemented in spirit, which in turn will flood out monies in open market in such huge volumes that the prevailing interest rates may plunge to an abysmal low. The vision 2025 must address money recovery on priority rather than resolution which should be an automated by-product.

India is facing high interest rates hindering the industrial growth rate. The interest rate in US is lower than India only because of subscribing to the theory that when money supply is large then interest rates will be lower. American economy is based on cashless transactions, so even though the narrow money is only 0.86 lac crore dollars, the broad money is around 16 lac crore dollars. This is due to money creation effects in the economy. This is huge and so the interest rates are low now. The IBC if so, visualized as of fool-proof money recovery mechanism then only it could lead to bring savings of large number of people in India to be available for commercial circulation which in turn will bring interest rates much lower. This could act as a tool to economic growth to India.

Good visions are long-term sustainable, describing the desired end-state well into the future. The understanding the base issue is of paramount importance for establishing a lucid vision. The present legislature, regulator & judiciary has termed IBC as 'resolution mechanism', which might be the reason be short

of desired effect on Indian economy whereas the 'recovery' which is basic commercial requirement, has a direct impact on interest rates and hence the need is speedy 'recovery mechanism' and consequential resolution and not otherwise.

The artificial intelligence could assist adjudicating authority & resolution professional to a great extent in the IBC process to avoid human errors and speed up the process. IA system to provide streamlined access to justice, free from human bias can guide stakeholder to navigate many issues without the need for a professional help thereby reducing the IBC process cost which ultimately is born by the stakeholders only.

Conclusion

The enactment of law & consequential punishment based thereon is only to induce a formidable consequence so that commission of potential illegality is curbed at the nip of the bud. A sustainable vision must incorporate features of begetting a public good by macroeconomic betterments through addressing help first secure money recoveries then only go for resolution if situation arises as to insolvency. The logical IBC factors, strengthening the executive powers of resolution professionals coupled with applied usage of Artificial Intelligence in IBC process will help setting-up a true achievable socio-economic justice to private sector industry.

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IBC CODE 2016-VISION DOCUMENT FOR 2025

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Synopsis
While the laws in force are adequate to resolve the issues, tardy implementation has led to the poor recovery syndrome. IBC 2016 was introduced recently for CIRP, provides some relief but has certain lacunae, as only some of the issues are addressed. The author briefly discusses the current tools that are available for recovery, presents a few cases of indebtedness of corporate borrowers who made near mockery of the system to evade repayments and circumvent the clutches of law. As a conclusion, an attempt is made seeking a paradigm shift and envisions some changes in the Code to pre-empt an increase in nonperforming assets instead of *postmortem* in cases of willful default

Introduction

It is needless to state about the non-performing Assets in Indian Banking sector. Their increase to humongous proportions is nibbling away into the economic health of our nation. As per the current statistics the public sector banks alone have NPAs of **Rs 6.16 lakh crores** for the FY2021. While the laws in force are adequate to resolve the issues, tardy implementation has led to the poor recovery syndrome. IBC 2016 was introduced recently for CIRP, provides some relief but has certain lacunae, as only some of the issues are addressed. The author briefly discusses the current tools that are available for recovery, presents a few cases of indebtedness of corporate borrowers who made near mockery of the system to evade repayments and circumvent the clutches of law. As a conclusion, an attempt is made seeking a paradigm shift and envisions some changes in the Code to pre-empt an increase in nonperforming assets instead of postmortem in cases of willful default.

Laws in force

Debt Recovery Tribunal: To recover the bad debts laws are in place like Debt recovery tribunal for recovery of dues to financial institutions.

Resolving the issue through DRT is a slow legal process treating the debt recovery as any other Civil case and drags on for years. The interest so accumulated over the period of years surpasses the principle by a factor of two or three.

SARFAESI ACT 2002: This act permits enforcement of Security interest without the intervention of court and provides the procedure to transfer the assets of NPA to Asset Reconstruction companies and subsequently securitize them. Brought some semblance of speedy recovery from the defaulting debtors but lackadaisical approach in acting in a swift manner by the Banks and various provisions of the act protecting the borrower seems to have blunted the purpose of this act. Asset reconstruction companies associated with this process are also lagging behind in the very purpose of maximization of asset value.

IBC 2016(Code): The code has come in handy now for financial institutions for quicker resolution. Defaulting debtors have no easy way to escape the clutches of the code as tight time frames are stipulated for the CIRP. Moreover, moratorium will be in place on the corporate debtor, further setting constraints on fraudulent transfer of assets to related parties or otherwise. NCLT has been instituted for quicker adjudication which has resulted in settling the issues in a time bound manner of say 180 days. In cases, where no approved resolution plan by COC (committee of creditors) is submitted, tribunal may pass winding up orders. The assets are sold out as quickly as possible and proceeds of sale are distributed to the stake holders as specified in section 53 of the Code.

Case Studies

1. **ABG Shipyard Ltd**:

Finance Minister Mrs. Nirmala Sitharaman made a statement in Parliament that ABGSL was declared as NPA in August 2013. The company was financed by a consortium of Banks led by ICICI. The default amount was Rs 14439 crores as of 2013. Since then, loan restructuring was being done without any signs of repayment. The current outstanding is Rs 22482 crores. NCLT Ahmedabad passed an order to liquidate the company vide their order

no:53/NCLT/AHMD/2017. The order was issued on 25/04/2019. Now CBI has registered a case against the Company and its Directors and issued a lookout notice. It can be clearly observed that no concrete action was taken by the concerned to take necessary and fast track action for a period of nine years since declaration as an NPA. The Debt has mounted to Rs 23000 crores. The asset value might have deteriorated to abysmally low levels and now declared as a fraud perpetrated by the directors of the company with no signs of recovery

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2. **Sintex Industries:**

Sintex was admitted to CIRP by an application made by one of the financial creditors, Asset Management after Sintex defaulted on principal and interest on non-convertible bonds in September 2019. After collating all the claims Resolution professional admitted dues of Rs 7719 crores to financial creditors, Rs 74 Crores to operational creditors and Rs 11 crores to employees. Lenders to the debt ridden Sintex Industries have approved a resolution plan of Rs. 3650 crores by Reliance and needs the approval of NCLT, Ahmedabad. It is clear that not even 50 % of the debt amount can be recovered by the financial creditors, not forgetting that the operational creditors will get a meagre percentage. Once again time is the essence. In the financial year 2022, the company reported a loss of Rs 442 crores. As the time lapses, losses mount and recovery become difficult.

3. **S.V.E.C Constructions, Hyderabad**:

SVEC constructions availed credit facilities since the year 2005 from SBI and three other Banks to the tune of Rs 305 Crores as working capital and long-term loans for various purposes. As the repayments had become very irregular the loan was restructured in the year 2013 under CDR Mechanism. On further defaults by the corporate debtor an application for CIRP was filed with NCLT through Resolution professional at the instance of SBI. Resolution plan was approved by the COC for a meagre percentage of 0.89% of the amount admitted as outstanding by the corporate debtor. Excerpts of the Order by the Adjudicating authority relevant to this topic are furnished here.

"Counsel for the Applicant/Resolution professional filed an Application bearing No. lA (IBC)/3/2022, inter-alia bringing certain facts for consideration of the Resolution Plan submitted for approval by this Adjudicating Authority and has stated as under:-

> *a. That the machinery and equipment have not been in use for the last many* years; these have become rusted and only have junk value.
> b. *The land and building consist of land at some rural hamlets which were earlier acquired by the Corporate Debtor for using as stock yards and without any proper approach these land masses are said to have little value.*
> *c. The buildings of the Corporate Debtor consist of camp sites at different locations which have become obsolete.*
> *d. The inventory/stock is NIL as per books of account as on CIRP Commencement date. There is only Rs.20 Lakh receivable from one M/s. BSCPL Infrastructure Ltd, which can be realized only after persuasion.*
> *e. That the other current assets comprising of Rs.2.55 Cr of security deposit pertaining to two projects given to Government Departments can be recovered only after infusion of additional funds to mobilise/ deploy necessary plant and machinery to complete work. That the current assets include an amount of Rs.1.31 Cr as loans and advances given to sub-contractors by the Corporate Debtor. The projects for which these amounts were given as advances were held up, thus recovery of this amount depends on execution and completion of said project, which is very remote and uncertain.*

In terms of Regulation 27 of CIRP Regulations, Liquidation value was ascertained through two registered valuers. The Liquidation value as ascertained by RP is Rs. 4,02,07,398/- and the fair market value is Rs.7,06,62,736/-

REALIZATION TABLE AT A GLANCE

Category	Amount Claimed (Rs.)	Amount admitted (Rs.)	Amount provided (Rs.)	Percentage %
Financial Creditors	6,17,42,24,968	6,17,42,24,968	5.5 crores	0.89%
Operational Creditors	8,17,61,911	7,95,99,483	20 Lakhs	2.51%

(Total amount offered by Resolution applicant was Rs 6 crores)

It is amply evident that there was considerable delay in taking necessary action to realize the indebted amount from the corporate debtor. As stated in above paragraphs the asset value has eroded tending to zero, leaving nothing to the lenders.

Inferences from the Case Studies

One can presume from the above instances that the errant corporate debtor does not extend any cooperation for the CIRP and instead seeks asylum in the inherent delays of the legal system. The IP has to make an application to the adjudicating authority in cases of hostile attitude of the Debtor, thus making the whole process leading to a legal battlefield. As such it is absolutely necessary to find remediation before the entity becomes an NPA and find an optimal solution resulting in the maximization of asset value which is the real intent of the IBC. Vision document of IBC 2016 to year 2025, calls for a Paradigm shift Preamble of the code: "IBC2016 is an act to consolidate and amend laws relating to reorganization and insolvency resolution of corporate persons etc.; in time bound manner, maximization of value of assets of persons, to promote entrepreneurship and balance the interest of all stake holders….." Subsequent sections lay down the procedure, rules and regulations on how to seek redressal by the Creditors from the defaulting entity. Sections 6, 7, 8 of code speak of initiating CIRP on default by the corporate debtor.

Inadequacy of the Code

The author opines that the important aspect of prevention of entities becoming nonperforming assets and repeated occurrences to be highlighted in the code. Necessary actions are to be taken in the early

stages before the enterprise becomes an NPA. The above case studies provide substantial proof to buttress the argument. Prevention is better than cure.

To summarize the scenario, CIRP is not an easy process and results in considerable financial losses to the lenders and an early exit method has to be designed to "nip in the bud" the cancerous growth of nonperforming assets. Whole of the IBC has to be recast to enable the lenders, especially the financial creditors to seek an easy access to the resolution process in the early stages of the sickness. A few sections of IBC are redone here below to illustrate.

The recast preamble may read like *"IBC 2016, as amended is an act to consolidate and amend the laws relating to prevention and reorganization of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets and render necessary techno-commercial support to run the entity as a going concern, to incorporate such mechanisms and to balance the interests of all the stake holders. The Insolvency board of India established to deal with the matters connected therewith or incidental thereto will continue to do so."*

An enterprise may become an NPA for multiple reasons including obsolescence such as technical, economic or other reasons. The lenders shall keep a watchful eye on the Company, its Directors and or Managers of the company, the moment there lies a tendency of the unit to become an NPA, whether any mala fide interests exist in driving the company to end up as a dysfunctional entity. **Restructuring of loans should be based on merits and the factual position of revival but not as a routine permitted by the banking regulations.**

Section 7 of the Code may be amended as *"soon after the entity becomes an NPA, the financial creditor either by itself or jointly with other financial creditors shall appoint a committee comprising of techno-commercial experts to make suitable recommendations through an exhaustive study about the viability of the enterprise either to finance further or initiate corporate insolvency resolution process. Financial*

creditors shall keep the concerned regulatory authorities informed and the actions taken to forestall any malpractices".

Here the essence of time is given utmost importance so that the asset value remains intact at a higher level than after of a long drawn legal battle. The lenders will recover major portion of the debt and not a miniscule percentage, as in cases of CIRP or liquidation of the company.

The other sections of the code also need a recast, but the article is limited just to present a gross level concept. This may be treated as a prelude for the amendments to be made in the Code.

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PENDENCY OF EXECUTION OF PROCEEDINGS – BAR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS?

Dr. M. Govindarajan
Company Secretary & Insolvency Professional

Synopsis
The Insolvency and Bankruptcy Code, 2016 provides the procedure for initiating Corporate Insolvency Resolution Process against the Corporate Debtor. The Adjudicating Authority shall admit the application if the application is complete. There are reasons for the Adjudicating Authority to reject the application. The issue to be discussed in this article is whether the application for initiation of corporate insolvency resolution process by an operational creditor against the corporate debtor is maintainable when an execution petition is pending before the Civil court with reference to decided case law.

Insolvency resolution by Operational Creditor:

Section 8 of the Insolvency and Bankruptcy Code, 2016 ('Code' for short) provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in Form 3. The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor-

- existence of a dispute, if any, or and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
- the payment of unpaid operational debt.

After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the Adjudicating Authority

for initiating a corporate insolvency resolution process.

The Adjudicating Authority may reject the application if-

- the application is incomplete;
- there has been payment of the unpaid operational debt;
- the creditor has not delivered the invoice or notice for payment to the corporate debtor;
- notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
- any disciplinary proceeding is pending against any proposed resolution professional.

Issue:

The issue to be decided in this article is whether the application for initiation of corporate insolvency resolution process can be initiated against the corporate debtor by the Operational Creditor, while an execution petition is pending before the Civil Court.

In **'Punjab National Bank v. Vindhya Cereals Private Limited' – Company Appeal (AT) (Ins.) No. 854 of 2019** in which it was held by the National Company Law Appellate Tribunal ('NCLAT' for short) that Section 7 being an independent proceeding is nothing to do with the pendency of Criminal Case relating to misappropriation of funds. In **'Karan Goel v. Pasupathi Jewellers and others' – Company Application (AT) (Ins.) No.1021/2019,** the NCLAT held that merely because suit has been filed by the Financial Creditor and pending cannot be a ground to reject the application under section 7 of the Code.

Pending Execution Petition:

In case of a filing civil suit by any person the decree may be passed by the Court in favor of the plaintiff. If the judgment debtor does not pay the amount as decreed by the Civil Court, the plaintiff can enforce the recovery by filing execution petition before the competent court. Whether the creditor may initiate corporate insolvency resolution process against the Corporate Debtor while the execution petition is pending before the Civil Court?

The NCLAT analyzed the same and held that filing of corporate insolvency resolution process is not barred when execution petition is pending before the Civil Court inn **'Mukul Agarwal, suspended Director of Greatech Telecom Technologies Private Limited v. Royal Resinex Private Limited and others' – Company Appeal (AT)(Insolvency) No. 777 of 2020**.

In the above case, Royal Resinex Private Limited ('Operational Creditor') supplied poly propylene (PP) to the Greatech Telecom Technologies Limited ('Corporate Debtor') as per the demand raised by the Corporate Debtor. Invoices were issued by the Operational Creditor to the creditor but the same have not been paid. The Operational Creditor was shocked and surprised, since Corporate Debtor stopped conducting business with the Operational Creditor without clearing the outstanding amount. There were various oral communications between the Corporate Debtor and the Operational Creditor regarding the outstanding amount due from Corporate Debtor, but the Corporate Debtor failed to pay the said outstanding amount and interest thereupon.

Therefore, the operational creditor filed a civil suit against the corporate debtor for the recovery of Rs.16.45 lakhs. The said suit was decreed by Additional District Judge on 08.09.2016 for Rs.16.45 lakhs along with interest @ 12% per annum. Since the decreed amount with interest has not been paid the operational creditor filed an Execution Petition.

While the Execution Petition was pending the Operational Creditor issued notice to the Operational Creditor under Section 8 of the Code on 06.04.2019 claiming the debt amount to the tune of Rs.25,04,630/-. The said notice was not replied by the Corporate Debtor. Therefore, the Operational Creditor filed an application before the Adjudicating Authority under section 9 of the Code for the initiation of Corporate Insolvency Resolution Process ('CIRP' for short). The Corporate Debtor replied to the application filed under section 9 of the Code on 18.09.2019.

The Adjudicating Authority admitted the application 31.07.2020 and appointed an Interim Resolution Professional. Aggrieved against the order of the Adjudicating Authority the appellant, the suspended Director of the Corporate Debtor filed the present appeal before the NCLAT, New Delhi.

The appellant submitted the following before the NCLAT-

- The notice under Section 8 of the Code dated 06.04.2019 issued by the Operational Creditor was not served on the corporate debtor. The notice was sent to wrong address at '24 Sainki Farms, Delhi -110062. The Adjudicating Authority directed the Operational Creditor to submit the proof for the service of notice to the Corporate Debtor. But the Operational Creditor could not be able to do so. It is mandatory under section 8 of the Code for the service of notice. Without complying with Section 8, no application can be filed for initiation of CIRP by the operational Creditor. Therefore, the order admitting the application for CIRP is not sustainable under the Code.
- The Operational Creditor filed the application on the basis of the decree of the Civil Court, dated 08.09.2016. The decree cannot be considered as operational debt and so the respondent shall not be considered as Operational Creditor. The Operational Creditor ought to pursue the Execution proceedings and no right to file application under section 9 of the Code. Therefore, the application filed by the Operational Creditor under Section 9 of the Code is not maintainable.
- The appellant is a going concern. The appellant came forwarded to settle the case by paying Rs.16,44,500/- by means of draft but the said offer was not accepted by the Operational Creditor.

The appellant relied on the following judgments-

- **'Jaya Patel v. Gas Jeans Private Limited' – Company Appeal (AT) (Ins) No. 308 of 2018;**
- **'Anil Siyal v. Sanjeev Kapur and another' – Company Appeal (AT) (Ins.) No. 961 of 2019;**
- **'HDFC Bank Limited v. Bhagwan Das Auto Finance Limited' – Company Appeal (AT) (Ins.) No. 1329 of 2019;**
- **'Digamber Bhonwen v. JM Financial Asset Reconstruction Company Limited' – Company Appeal (AT) (Ins.) No. 1379 of 2019;**
- **'International Asset Reconstruction Company Private Limited v. Jayanth Vitamins Limited' – Company Appeal (AT) (Ins.) No. 1472 of 2019;**
- **'Sushil Anjal v. Ashok Tripathi and others' – Company Appeal (AT) (Ins.) No. 452 of 2020.**

The Operational Creditor, respondent No.1 submitted the following before the NCLAT-

- Notice under Section 8 of the Code dated 06.04.2019 was sent to the Corporate Debtor, which was duly received by it. No reply was submitted by the corporate debtor and therefore the Operational Debtor filed an application under section 9 of the Code.
- The appellant filed reply to the application filed under Section 9 of the Code in which the appellant did not plead that the notice has not been received by it.
- The Operational Creditor has filed an affidavit of compliance and an affidavit has also been filed before the Adjudicating Authority. The Postal Authorities made a mistake in the address of the receipt issued to the Operational Creditor. The door number was indicated as '24' instead of '54-A'.
- The notice was issued in the name of Corporate Debtor at the correct address of the Corporate Debtor, that is, 54-A, Sainik Farm, Khanpur, New Delhi – 110062.
- The Operational Creditor filed an affidavit before the Adjudicating Authority for the proper delivery of the notice with proof.
- The debt, which was due on the Corporate Debtor, was towards supply of poly propylene, which was supplied by the Operational Creditor to the Corporate Debtor.
- The Corporate Debtor failed to discharge his obligation to pay the debt due to the Operational Creditor.
- The Operational Creditor had full authority to initiate proceedings under Section 9 of the Code.
- The Adjudicating Authority has rightly admitted the Application filed by the Operational Creditor.

Conclusion

The NCLAT heard the submissions put forth by the parties to the present appeal. The NCLAT observed that the notice was addressed at the correct address of corporate debtor i.e., 54-A Sainik Farm, Khapur, New Delhi – 110062. When the notice was issued by the Operational Creditor at the correct address of the Corporate Debtor, NCLAT has no doubt that the envelope containing the address of the Corporate Debtor must be same as reflected in the notice dated 06.04.2019. The mere fact that receipt, which

was issued by India Post mentions address of the Corporate Debtor instead of No.54-A, it is mentioned 24, does not bely the sending of notice.

NCLAT further observed that in the reply filed by the corporate debtor to the application filed under Section 9 of the Code specifically mentioned the issue of notice dated 06.04.2019 issued by the Operational Creditor. There is no specific denial by the Corporate Debtor about the non-receipt of the notice.

With regard to the second ground raised by the appellant, the NCLAT observed that the operational Creditor, in Part IV of the application, has indicated the debt due in detail. The transaction was for supply of poly propylene by the Operational Creditor to the Corporate Debtor and due to non-payment of the amount towards the material supplied by the Operational Creditor, the amount became due. The fact that amount was adjudicated, and a Decree was passed, in no manner take away the nature of 'operational debt'. Further the Operational Creditor in Form 3 Part V gave the particulars of the order of the Civil Court and also attached the copy of the said judgment. When the Form-3 itself contemplates about giving details of particular of an order of Court, the Decree of the Civil Court in favor of the Operational Creditor, it in no manner affect the maintainability of the Application filed by the Operational Creditor under Section 9 of the Code. The NCLAT was satisfied that the application filed by the Operational Creditor under section 9 was fully maintainable. The claim of the Operational Creditor is operational debt.

The NCLAT also analyzed the judgments relied on by the appellant. The NCLAT held that the facts of the judgments relied on by the appellant as not applicable to the present case.

The NCLAT held that Section 238 of the Code shall have an overriding effect. Hence the Application under Section 9 filed by the Operational Creditor cannot be defeated on the ground that any Application for execution was pending, more so, when in spite of Decree passed on 08.09.2016, no payment was made by the Corporate Debtor.

The NCLAT held that the respondent was an Operational Creditor, and the decreed amount is 'operational debt' and the application under section 9 is maintainable. The NCLAT rejected the contentions of the Corporate Debtor that since Corporate Debtor is a going concern, hence, the Application under

Section 9 was not maintainable. Even when a going concern is unable to discharge its debt, the Operational Creditor is entitled to invoke Section 9, hence, the Application filed by Operational Creditor under Section 9 cannot be said to be non-maintainable on the ground that Corporate Debtor is a going concern.

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End of the Mighty Pen

Mr. Debajyoti Ray Chaudhuri
MD & CEO
National e-Governance Services Limited

Synopsis

When English author Edward Bulwer Lytton said in 1839 that, "***The pen is mightier than the sword***" he only meant that the written word is more effective than violence as a tool for communicating one's opinion on any issue. In 2025 the written word will continue to be effective as before but will not be conveyed through a pen but through the digital mode, through a digital pen or a direct digital message.

The other day there was a visitor to my office after many years and as he was ushered into my cabin, he remarked "You have a nice collection of pens!!". I was surprised as I realized only then that I did have a decent collection of pens. It also dawned on me that I had not used a pen for months. The digitization in our lives has increased in the wake of lock downs because of COVID-19. In the IT hub of Bengaluru where I stay, on my way to office and back, I see several ATMs of banks, and I never see a soul inside or outside. Even I have never been to an ATM in the last 6 months as my maid and driver accept digital payments and when I go for walk and have coconut water, I make payments through my mobile. A colleague of mine even got his shoes polished in Mumbai and paid for it digitally. I do not need to carry my wallet any more except to ensure its safe custody till the time I am able to give up the numerous credit and debit cards and remaining cash. It is often lamented that, while a couple of decades back, India and China were in the same stage of development, but today in most indices of development, China is ahead. However, as far as digital payments are concerned, it is India, which has surpassed China.

I think many of us had similar experiences wherein every financial transaction is being done through the digital mode. However, when we go to a bank in India to avail a loan or even when we apply online for a loan, how is it that we still need to take our pens to make that rare signature to get access to certain services. All that is now changing, and it has already changed for many of the banks and financial institutions who have already availed the Digital Document Execution (DDE) services of NeSL. More than three lac transactions have now been carried out on the DDE platform and these are valued at hundreds of thousands of crores. Everyday thousands of transactions are taking place on the NeSL DDE platform, and it is estimated that 20% of these transactions are happening outside of banking hours. And we have not even scratched the surface, if we consider the total number of financial transactions done by the banks and financial institutions.

Even before the launch of DDE, banks were sanctioning and disbursing loans online but in the absence of a mechanism for online procurement of stamp duty or authentication, they were doing so by way of a click wrap agreement. This is like the acceptance of terms and conditions, which one would do when installation of the latest version of software on our phone. As the law of the land earlier did not permit payment of stamp duty for loan documentation through the digital mode, the click wrap agreement served a useful purpose in ensuring loan sanctions and disbursements happened in a fully digital mode. The banks and other lending institutions were also happy with this arrangement especially as the delinquency rate in such loans was very low.

During the last couple of years, the number loans disbursed through the digital mode has increased exponentially, it is also possible that the delinquency rate would increase because of external events like the outbreak of COVID-19. The time has probably come to reconsider if the documentation for such loan products needs to be more robust. To meet the requirements of banks, NeSL has also launched its Digital Documentation Execution (DDE) platform which ensures that documentation and disbursement happens through the digital mode. The banks are now able to secure themselves with documentation, which is fully digital, but which is quite like the offline or physical mode.

One of the challenges faced by NeSL in the implementation of a fully digital document execution platform was that stamp duty is under the jurisdiction of the State Governments. Accordingly, NeSL approached each of the State Governments separately and with the facilitation of the state government and the support of the Central Government, digital execution of contracts and payment of stamp duty is today valid in 22 states of this country. Another challenge was the integration with the loan management and accounting system of banks to ensure a seamless digital journey of the customer starting from submission of the loan application, processing by the bank, the documentation and disbursement of the loan. Many banks have now done this integration, and this now ensures a fully digital journey for the customer, which is the need of the hour.

DDE is not just about giving up the pen, DDE is document execution at one's convenience with the opportunity to read all terms and conditions. It is fully digital, from procurement of stamp paper, affixation of the document text and execution by digital signature. It can be done across all customer segments like individuals and companies and across all product categories like personal loans, vehicle loans, working capital and term loans. The digital signature can be done through Aadhaar based E-sign provided one's mobile number is linked to the Aadhaar number. It can also be done through the biometric mode or dongle-based DSC. It is especially convenient where there are multiple signatories to a document or signatories are available at multiple locations. The executed document is immediately available for perusal both by bank and borrower, can be retrieved by the bank separately or stored in a secure manner by NeSL. As per our records, one of the largest loan documents executed was for more than a thousand crores, while it was used with great success by banks for the smallest of loans like the street vendor loan scheme of the Government of India where the biometric authentication facility also ensured identification of the borrower.

DDE is also a huge benefit to the state governments as it facilitates ease of doing business. The ease of procurement of stamp duty ensures against leakage of revenue and facilitates payment of correct stamp duty. The states also have access to MIS regarding stamp duty procurement in various regions of the state which is an indicator of economic activity in the region.

This information can also be made available almost on a real time basis, based on which the state can take corrective action, if required.

Now the question may arise as to why a company like NeSL, which is registered as an Information Utility (IU) under the Insolvency and Bankruptcy Code (IBC), gets into DDE. The reason is that the role of the IU, under the IBC is that of a repository of financial information including loan documents. An obligation for IUs under the IBC is get information submitted by a creditor authenticated by all parties to a debt like borrowers/co-obligants/guarantors. By getting the documents executed through DDE, this is being accomplished *ab initio* at the time of execution of contract. This is followed by submission of other information like the outstanding, date of disbursement etc. This information can be available to other creditors who are registered on the IU with the consent of the debtor, as per the provisions of the IBC. Moreover, when, insolvency proceedings are initiated against the person, all information including documents are readily available to the insolvency professional. It can seamlessly flow to the IP when the law permits the same. This information can also be provided to the Adjudicating Authority to take decisions like that of admission of insolvency proceedings.

The issues relating to admissibility and enforceability of digital documents has also been addressed under the various provisions of the Indian Evidence Act, 1872 (IEA). The term 'evidence' under the IEA includes electronic records within its ambit. Further, Section 91 of the IEA provides that when the terms of a contract have been reduced to the form of a document, then, no evidence shall be given to prove the transaction, except the document itself or secondary evidence of its contents, while Section 61 provides that the contents of a document may be proved either by primary evidence or secondary evidence. Section 65B lays down the detailed procedure for proving the contents of electronic records, inter-alia providing that a computer output stored, recorded, or copied in optical or magnetic media produced by a computer, shall be deemed to a 'document'. A reference can also be made to Section 65B (2), which lays down the four conditions which are required to be satisfied for admitting an electronic record as evidence, while 65B (4) provides for production of a certificate for giving evidence in relation to these matters. This certificate is being provided by NeSL and can

be downloaded by the user on completion of the documentation through the DDE.

The other relevant issue is the place of execution of the document executed through the digital mode as in India stamp duty varies from one state to another. Based on applicable law and available jurisprudence, the agreement executed electronically is deemed to be executed at the principal place of business of the borrower or the branch of the bank where the loans is disbursed. The stamp duty is payable in accordance with the stamp laws of the state where the principal place of business of the Borrower or the branch of the bank is situated, whichever is higher. However, the parties to the agreement may agree upon the place of execution and in such case, the stamp duty of such place shall be payable on the agreement. The difference in the stamp duty shall be payable in case the principal place of business is different from the registered place of business and the agreement is transmitted to the registered place of business for any purpose including for filing charge with the office of Registrar of Companies.

As a regulated entity NeSL has some obligations under the law. The law provides that NeSL shall have a Compliance Officer appointed by the Board of Directors who reports independently to the Regulator. Any document to be executed on our platform goes through a three-point check. Firstly, digital execution of the document should be permitted under the Information Technology Act, the principal law governing digital document execution. For example, mortgages are not permitted. Secondly, it should have been permitted by the State Government under the Stamp Act of the state eg bank guarantees are not permitted by all states. Finally, if it passes the above two checks, it

should also be permitted under the IBC, as NeSL is registered under the provisions of the IBC. For example, a document like an adoption deed would not be executed on the DDE platform.

The inspiration for the DDE came from the dematerialization of securities under the directions of the SEBI a couple of decades back. This marked a paradigm shift in the way securities are traded in the Indian stock markets, it brought in confidence among shareholders by eliminating the risks of loss,

forgery or destruction and increased the size of the market manifold. A similar transformation can take place in the banking industry. The banks/FIs can go for increased digitization in all loan processes, including loan documentation, without being concerned about getting all the signatories of a document at one place, identification of the signatories and subsequently storing the documents and avoiding the attendant risks

Today banks are facing increasing competition from digital lending platforms for their sheer convenience and ease of operations. This has also posed some challenges as some of these platforms are not regulated, levy usurious rates of interest and are not transparent in their dealings with customers. In some cases, borrowing from such platforms have brought about financial distress on the borrowers and lenders have resorted to unethical methods of recovery which in turn has led to the borrowers even ending their own lives. Using the DDE platform, even mainstream banks can offer a fully digital lending product which meet the requirements of the regulators and fulfil the expectation of stakeholders. On a later date, if banks feel the need to set up a digital banking unit, they have a platform which can support their operations.

Finally, I would say that I have nothing against the humble pen. When mobile phones became omni present, the utility of a watch as a time keeping instrument has come down,but watches have not disappeared. So, brands like Rolex continues to thrive and the smart watches which have come up, serve all purposes along with the conventional one of keeping time. Similarly, pens can still be a premium product to adorn our desk or as an utility for our laptop or tablet. But the days of taking out your pen to sign a document are over.

When English author Edward Bulwer Lytton said in 1839 that, **"The pen is mightier than the sword**" he only meant that the written word is more effective than violence as a tool for communicating one's opinion on any issue. In 2025 the written word will continue to be effective as before but will not be conveyed through a pen but through the digital mode, through a digital pen or a direct digital message.

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CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

- **63 Moons Technologies Ltd. v. Administrator of Dewan Housing Finance Corporation Ltd. - [2021] 128 taxmann.com 356 (NCL-AT)**

Where appellant debenture holder of DHFL had voted in favour of resolution plan of 'P' in case of DHFL and it had been thoroughly discussed and decisions had been taken by Committee of Creditors by majority, resolution plan of 'P' could not have been stayed.

Company appeal was filed against impugned order passed by the Adjudicating Authority vide which interlocutory application of the Administrator under section 30(6) and section 31 were approved and resolution plan of 'P' was accepted by the Adjudicating Authority in case of DHFL. The appellant, debenture holder of DHFL filed instant interlocutory applications for stay of respective impugned orders. The appellant also prayed that any term in resolution plan expressly or impliedly providing that benefit of any orders passed in avoidance application filed or to be filed by the Administrator shall be for benefit of 'T' (successful resolution applicant) and not for benefit of creditors of DHFL be declared as contrary to law. However, it was found that the appellant had voted in favour of the resolution plan and there were detailed deliberations on how to deal with avoidance application and once it had been thoroughly discussed and decisions were taken by the Committee of Creditors by majority, same were not open for deliberations. Moreover, it was found that objections raised to the resolution plan which had been challenged in company appeal were also based on similar footing. Rival claims, which were more questions of law would have required deliberation and decision at appropriate stage.

Held that it was not a fit case to pass interim orders as sought with regard to resolution plan of 'P', approved in case of DHFL.

Case Review: 63 Moons Technologies Ltd. v. Administrator Dewan Housing Finance Corp. Ltd. [2021] 128 taxmann.com 355 (NCLT - Mum.), affirmed.

SECTION 64 - CORPORATE PERSON'S ADJUDICATING AUTHORITY - APPLICATIONS, EXPEDITIOUS DISPOSAL OF

- **IDBI Trusteeship Services Ltd. v. Shiv Nandan Sharma (IRP of Saha Infratech Pvt. Ltd) [2021] 128 taxmann.com 358 /[2021] 167 SCL 797 (NCL-AT)**

Where Corporate Insolvency Resolution Process (CIRP) initiated against corporate debtor was pending and there were disputes regarding appellant financial creditors to be related parties decision in same was yet to be taken one way or other by Adjudicating Authority, application filed by appellants seeking stay on holding of meetings of CoC on ground that they would constitute 68 per cent of CoC could not have been allowed.

CIRP initiated against the corporate debtor was pending. Appellants financial creditors claiming to be assignees of financial debt had earlier filed two interlocutory applications challenging decision of resolution professional to hold appellants as 'related parties'. One application was disposed of as infructuous and in second application interim relief to stay CoC meeting was not granted. Appellants, thus, filed instant appeals seeking to be part of the CoC. They claimed that they would constitute 68 per cent of CoC and thus would have an important stake involved. However, it appeared that disputes regarding appellants to be related parties were yet to be decided one way or the other by the Adjudicating Authority.

Held that since CIRP had already consumed so much of time, it could not be appropriate for the Appellate Authority to entertain instant appeals against impugned orders on basis that holding of meetings of CoC could have been stayed. The Adjudicating Authority was to be requested to consider and decide applications pending at the earliest so that CIRP continued smoothly.

SECTION 3(7) - CORPORATE PERSON

- **Gyanchand Mutha v. Aditya Birla Money Ltd., Gujarat - [2021] 128 taxmann.com 422 (NCL-AT)**

CIRP cannot be initiated against a financial service provider/non-banking financial company as financial service providers are excluded from definition of corporate debtor in terms of section 3(7); merely because corporate debtor had concealed its status of being a financial service provider in its KYC form corporate debtor could not have been subjected to CIRP as a punishment for such concealment.

The applicant/operational creditor claimed that the respondent/corporate debtor had availed services of the operational creditor and had opened a trading account. KYC was filled up between parties, so that the corporate debtor could trade in shares and securities. As per the applicant's books of account, a sum of Rs. 90 lakh became due from the respondent. The applicant issued a demand notice and the respondent denied any outstanding amount to the applicant. Thereafter, the applicant filed an application under section 9 for debt due and in default. The Adjudicating Authority after hearing the parties admitted said application. The appellant, shareholder of the corporate debtor on appeal, submitted that provisions of section 9 could not have been invoked against the corporate debtor as the corporate debtor was financial service provider. Certificate of NBFC in favour of the corporate debtor had been filed. However, it was found that in KYC Form, the corporate debtor ticked 'Public Limited Company' and not 'Financial Institution'.

Held that CIRP cannot be initiated against a financial service provider/non-banking financial company as financial service providers are excluded from definition of corporate debtor in terms of section 3(7). Merely because the corporate debtor had concealed its status of being a financial service provider in its KYC form, would not render the corporate debtor liable to be subjected to CIRP as a sort of punishment for such concealment. Even though conduct of the corporate debtor may subject the corporate debtor to any other appropriate legal action but initiation of CIRP under the I&B Code could not be sought merely for such an act of concealment.

Case Review: Aditya Birla Money Ltd. v. Arkay International Finsec Ltd. [2020] 116 taxmann.com 328 (NCLT - Jaipur), set aside.

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

- **Orator Marketing (P.) Ltd. v. Samtex Desinz (P.) Ltd. [2021] 128 taxmann.com 424 /[2021] 167 SCL 610 (SC)**

Definition of 'Financial Debt' in section 5(8) does not expressly exclude an interest free loan; a person who gives a term loan to a corporate person free of interest on account of its working capital requirements is a financial creditor, and, therefore, is competent to initiate Corporate Insolvency resolution process under section 7.

'S', i.e. 'original lender', advanced a term loan of Rs. 1.60 crores to the corporate debtor for a period of two years, to enable the corporate debtor to meet its working capital requirement. The original lender had assigned the outstanding loan to the appellant. According to the appellant the loan was due to be repaid by the corporate debtor in full within 1-2-2020. The appellant claimed that the corporate debtor made some payments, but Rs. 1.56 crores still remained outstanding. The appellant filed a petition under section 7 before the NCLT for initiation of corporate insolvency resolution process. The petition was, however, rejected by a judgment and order dated 23-10-2020 holding that neither the claim could be termed to be a 'financial debt' nor did the applicant came within the meaning of 'financial creditor' and once the applicant did not come within the meaning of 'financial creditor' he became ineligible to file application under section 7. The appellant filed an appeal under section 61. The appeal had been dismissed by the NCLAT, by the impugned order and the order dated 23-10-2020 of the NCLT dismissing the petition filed by the appellant under section 7 with the finding that the appellant was not a financial creditor of the respondent was confirmed.

On appeal before the Supreme Court:

Held that '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 loan, only outstanding principal would qualify as a financial debt. Further, trigger for initiation of corporate insolvency resolution process by a financial creditor under section 7 is occurrence of a default by the corporate debtor. The definition of 'Financial Debt' in section 5(8) does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance business operations of a corporate body. Thus, a person who gives a term loan to a corporate person, free of interest, on account of its working capital requirements is a financial creditor, and therefore, is competent to initiate corporate insolvency resolution process under section 7.

Case Review : Orator Marketing (P.) Ltd. v. Samtex Desinz (P.) Ltd. [2021] 127 taxmann.com 903 (NCLAT - New Delhi), set aside.

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

- **Appollo Distilleries and Breweries (P.) Ltd. v. Union of India [2021] 129 taxmann.com 150 /[2022] 169 SCL 105 (Madras)**

Where as regards to shares held by corporate debtor in petitioner company, avoidance application had been filed by RP prior to approval of resolution plan in respect of corporate debtor and petitioner filed instant writ stating that transaction had not been avoided by an order of a Competent Authority and thus, such transaction was not to be assailed in already concluded insolvency proceedings, since matter pertain to IBC a specialized fora, instant writ was to be disposed off by requesting NCLT to dispose off avoidance application.

Creditors of the corporate debtor company filed an application under section 7 that culminated in a resolution plan being put in place, and had attained finality. The petitioner company filed instant writ petition stating that prior to approval of the resolution plan, avoidance application had been filed by the RP as regards shares held by the corporate debtor in petitioner company and since, transaction had not been avoided by an order of a competent authority, transaction was deemed to have gone through and it was not to be assailed in already concluded insolvency proceedings.

Held that legal issue was, indeed, of some substance but since matter pertained to Insolvency and Bankruptcy Code, a specialized fora to entertain proceedings thereunder, it was better to allow the NCLT to answer legal issue. Therefore, instant writ was to be disposed off by requesting the NCLT to dispose off avoidance application together with other applications filed in connection therewith.

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

- **Jyoti Strips (P.) Ltd. v. JSC Ispat (P.) Ltd. [2021] 129 taxmann.com 270 (NCL-AT)**

Where operational creditor despite being very much in knowledge of registered address of corporate debtor did not serve demand notice at such registered address, CIRP against corporate debtor was dismissed for violation of section 8.

The operational creditor supplied goods to the corporate debtor and raised invoices. The corporate debtor made only part payment. The operational creditor issued demand notice to the corporate debtor which was returned as 'Addressee left without instructions'. Therefore, the operational creditor filed CIRP petition under section 9. The corporate debtor contended that the operational creditor was very much aware that the corporate debtor had already shifted from address mentioned in notice and furthermore the operational creditor was required to serve notice at address which was mentioned on invoices issued by the operational creditor or should have taken steps to serve notice to key managerial staff/director of company which was well within knowledge of the operational creditor. The Adjudicating Authority dismissed petition on ground that provisions of section 8, read with rule 5, of the Insolvency and Bankruptcy Rules, 2016 had not been complied with.

Held that service of demand notice to the corporate debtor on 'Registered Address' is mandatory for initiating corporate insolvency resolution process under section 9. Since documentary evidence established that the operational creditor was very much in knowledge of registered address of the corporate debtor as legal notice issued prior to demand notice was addressed to registered address and furthermore a perusal of invoices on record also evidenced that the operational creditor had supplied goods to the registered address of the corporate debtor, the Adjudicating Authority had rightly dismissed the application.

Case Review : Jyoti Strips (P.) Ltd. v. JSC Ispat (P.) Ltd. [2021] 129 taxmann.com 269 (NCLT - New Delhi), affirmed

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

- **Hytone Merchants (P.) Ltd. v. Satabadi Investment Consultants (P.) Ltd. - [2021] 129 taxmann.com 302 (NCL-AT)**

Where on corporate debtor's failure to repay loan amount, financial creditor filed an application to initiate CIRP against corporate debtor, since, said application was filed in collusion with corporate debtor to escape its liability as corporate guarantor Adjudicating Authority had rightly rejected said application.

The applicant/financial creditor sanctioned loan of Rs. 3 lakhs to the corporate debtor company. The corporate debtor committed default in repayment. The financial creditor thus, filed an application under section 7 to initiate CIRP against the corporate debtor. On perusal of master data of the corporate debtor it was found that networth of the corporate debtor was Rs. 15 crores and it had already given a corporate guarantee worth Rs. 482 crores, thus, it was hard to believe that the corporate debtor was unable to repay a loan of Rs. 3 lakhs only and it appeared that the corporate debtor colluded with financial creditor to escape its liability as a corporate guarantor.

Held that where application to initiate CIRP is filed collusively not with purpose of insolvency resolution but otherwise, then despite fulfilling all conditions, the Adjudicating Authority can exercise its discretion in rejecting application relying on section 65. Therefore, even though application filed under section 7 met all requirements, the Adjudicating Authority had rightly rejected said application.

Case Review : Hytone Merchants (P.) Ltd. v. Satabdi Investment Consultants (P.) Ltd. [2021] 129 taxmann.com 301 (NCLT - Kol.) (SB), affirmed.

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

- **Deputy Commissioner, CGST Kalol, Gujarat v. Gopala Polyplast Ltd. [2021] 129 taxmann.com 312 (NCL-AT)**

Where appellant-operational creditor on behalf of CGST department challenged approved resolution plan by which its claim of outstanding GST dues was substantially reduced, Resolution Plan approved is binding on Central Government, State Government, any local authority, Guarantors and other stakeholders and sufficiency or insufficiency of amount being matter of commercial decision of Committee of Creditors, same could not be interfered with.

During corporate insolvency resolution process (CIRP) of the respondent, the appellant-operational creditor on behalf of CGST, 'Department of Goods and Services Tax' had filed claim of outstanding GST dues recoverable from the corporate debtor. The appellant stated that claim was admitted to extent of a sum. However, the resolution plan approved by Committee of Creditors had made provision of meagre sum as full and final settlement of dues of the appellant. The NCLT by impugned order approved said resolution plan.

Held that resolution plan approved is binding on Central Government, State Government, any local authority, Guarantors and other stakeholders, and sufficiency or insufficiency of amount is matter of commercial decision of Committee of Creditors and it would not be appropriate on part of the Appellate Tribunal to interfere in same, therefore, appeal was not to be admitted.

Case Review : Vikash G. Jain v. Gopala Polyplast Ltd. [2020] 120 taxmann.com 273(NCLT - Ahd.), affirmed.

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

- **Bansal Constructions Works (P.) Ltd. v. National Company Law Tribunal [2021] 129 taxmann.com 341 (Madhya Pradesh)/[2021] 167 SCL 628 (Madhya Pradesh)**

Where original order against which instant writ petition had been filed in High Court of Madhya Pradesh was passed by NCLT Indore Bench at Ahmedabad, it would only be High Court of Gujarat that would have jurisdiction to entertain instant writ petition and, therefore, petition was to be dismissed for want of territorial jurisdiction.

The petitioner-company having registered office at Bhopal entered into a contract with company 'G' for rehabilitation and upgradation of Sindoor River. Pursuant to an application under section 9 before the NCLT, Indore Bench at Ahmedabad, impugned order was passed. The petitioner filed instant petition against said order in Madhya pradesh High Court. An objection had been taken with regard to territorial jurisdiction as NCLT was situated at Ahmedabad and outside territorial jurisdiction of the High Court of Madhya Pardesh.

Held that merely because the petitioner was situated in Madhya Pradesh or fact that NCLT at Ahmedabad, which passed impugned order on account of notification passed by the Central Government on 31-1-2020 was now vested with all cases, which would otherwise have been tried by NCLT at Indore, could not give jurisdiction to Madhya Pradesh High Court. Further, since original order itself had been passed by NCLT at Ahmedabad, it would only be High Court of Gujarat that would have jurisdiction to entertain instant petition, therefore, writ petition was dismissed for want of territorial jurisdiction.

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

- **Mani Kumar Singh v. Alchemist Asset Reconstruction Company Ltd. [2021] 129 taxmann.com 389 (NCL-AT)**

Where there was debt and default on part of corporate debtor in respect of financial debt owed to financial creditor and despite availing seven opportunities, corporate debtor chose not to file reply, Adjudicating Authority had no option but to proceed

further in terms of provisions of section 7(4) and there was no violation of principle of natural justice in admitting CIRP application.

CIRP petition filed by the financial creditor was admitted by the Adjudicating Authority. The corporate debtor filed an appeal against the impugned order stating that rules of natural justice had been violated inasmuch as corporate debtor had not been granted an opportunity of hearing. Record revealed that despite availing seven opportunities, the corporate debtor chose not to file reply and the Adjudicating Authority had no option but to proceed further in terms of provisions of section 7.

Held that since the Adjudicating Authority had dealt with all aspects concerning debt and default as required for deriving satisfaction that the application was complete and there was debt and default on part of the corporate debtor in respect of financial debt owed to the financial creditor, it could not be said that in admitting CIRP application, the Adjudicating Authority had violated rules of natural justice.

Case Review : Siemens Financial Services (P.) Ltd. v. Panacealife Healthcare (P.) Ltd. [2021] 129 taxmann.com 388 (NCLT - All.), affirmed.

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

- **Apya Capital Services (P.) Ltd. v. Guardian Homes (P.) Ltd. [2021] 129 taxmann.com 393 (NCL-AT)**

Where liability was admitted by corporate debtor and same was not discharged, dispute in regard to quantum of debt was immaterial at stage of admission of CIRP application.

The appellant provided its services to the corporate debtor for raising finance to extent of Rs. 280 crores in respect whereof it raised proforma invoice for its fees at rate of 1 per cent, i.e., Rs. 2.80 crores. The corporate debtor raised issue of delay in providing services; however, claimed to have amicably decided to conclude deal at a fee of Rs. 150 lakhs out of which Rs. 75 lakhs had been admittedly paid. The

appellant issued demand notice claiming an amount of Rs. 2.05 crores and further filed CIRP application against the corporate debtor. The Adjudicating Authority rejected CIRP application holding that there was no debt as claimed by the appellant besides there being deficiency in service provided by the appellant

Held that once liability was admitted and same was not discharged by the corporate debtor, dispute in regard to quantum of debt was immaterial at stage of admission of CIRP application. Therefore, order of the Adjudicating Authority was to be set aside and application of the appellant was to be admitted after giving opportunity to the corporate debtor to settle claims of the appellant.

Case Review: Apya Capital Services (P.) Ltd. v. Guardian Homes (P.) Ltd. [2021] 129 taxmann.com 392 (NCLT - Mumbai), set aside.

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

- **Sri Ganapathi Financiers v. Srirangam Priya Promoters (P.) Ltd. [2021] 129 taxmann.com 422 (NCLAT - Chennai)**

Where Memorandum of Understanding executed between appellant and respondent wherein respondent had undertaken to repay outstanding debt was not signed by appellant and other lenders, said document could not be taken as admissible evidence for initiation of CIRP against respondent and, therefore, there was no illegality in order passed by Adjudicating Authority in rejecting application filed by appellant under section 7.

The appellant, involved in business of providing financial assistance, had given a loan to director of the respondent company engaged in business of real estate. According to the appellant, a deed of mortgage was executed by directors of the respondent company and a Memorandum of Understanding (MoU) was executed between the respondent and the appellant and other lenders wherein the respondent had undertaken to repay entire amount. However, the respondent failed to repay loan and the appellant filed an application under section 7 for initiation of CIRP against the respondent. The Adjudicating Authority by impugned order dismissed said application holding that no proof had been filed to satisfy that

amount claimed by the appellant was paid into account of respondent and MoU being unregistered was to be rejected.

Held that loan amount did not come into account of the respondent company and transaction was between the appellant, a partnership firm, and Director of the respondent company in his personal capacity. Since there were no signatures of the appellant and other lenders on each page of the MoU, said document could not be taken into consideration for purpose of initiation of section 7. Further, since genuineness of (MoU) was questioned, same could not be considered as financial contract and, therefore, order of Adjudicating Authority was justified.

Case Review: Sri Ganapathi Financiers v. Srirangam Priya Promoters (P.) Ltd. [2021] 129 taxmann.com 421 (NCLT - Chennai), affirmed.

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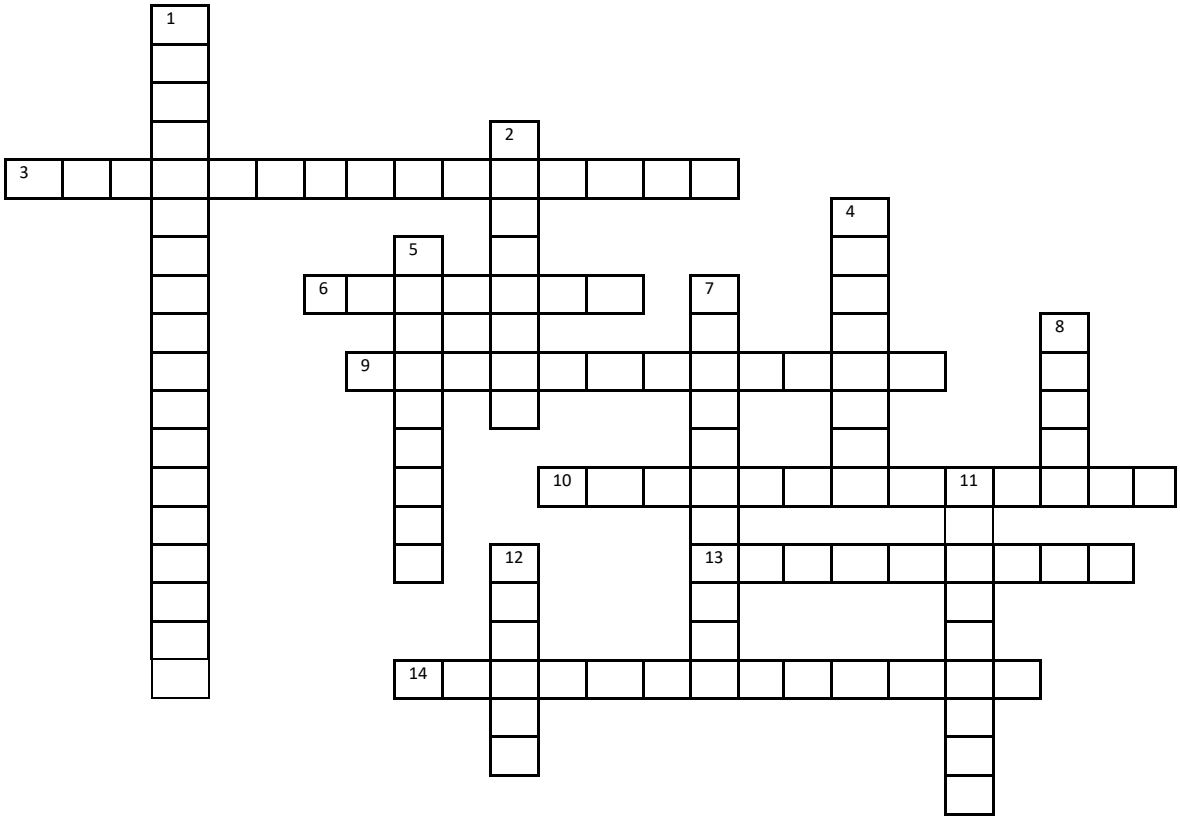


Across

3. A request by a creditor to allow the creditor to take action against the debtor's property that would otherwise be prohibited by the automatic stay.

6. Neutral individual responsible for protecting the interests of both the debtor and the creditor(s).

9. Written statement along with supporting documentation filed by a creditor. A claim describes the reason the debt is owed, any amounts owed, the type of claim, and whether the claim is entitled to priority.

10. A debt that is not secured with an asset or lien.

13. A court order that denied a bankruptcy petition making the debtor still liable for all debts.

14. An injunction that automatically stops lawsuits, foreclosure, garnishments, and all collection activity against the debtor the moment a bankruptcy petition is filed.

Down

1. A meeting of creditors at which the debtor is questioned under oath by creditors, a trustee, examiner, or the United States trustee about his/her financial affairs.

2. An application by debtor (or his or her creditor) to a court to declare the debtor bankrupt. This starts the bankruptcy process.

4. An individual, organization, or company that claims the debtor owes property, service, or money.

5. To give the property back to the creditor and then are cleared of all liability for the secured debt and lien.

7. Debt backed or secured by collateral to reduce the risk associated with lending, such as a mortgage.

8. Bankruptcy filer is filing a bankruptcy case without the aid of a bankruptcy lawyer.

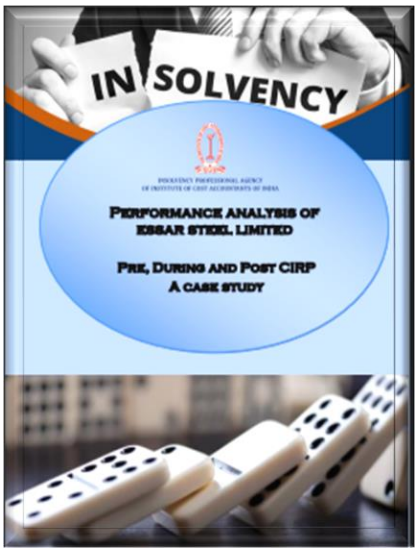
11. Means the individual is released from personal liability for the debt. Even though the individual is not responsible for repaying the debt, the lien is still valid and enforceable, meaning that the property can still be foreclosed.

12. Party who has debt, or owes money, to the creditor and who files a petition under the Bankruptcy Code. Can be a company or an individual.

Across: Motion of Relief, Trustee, Proof of claim, Unsecured debt, Dismissal, Automatic stay
Down: Meeting of Creditors, Petition, Creditor, Surrender, Secured debt, *pro se*, Discharge, Debtor

PUBLICATIONS

IBC AU COURANT



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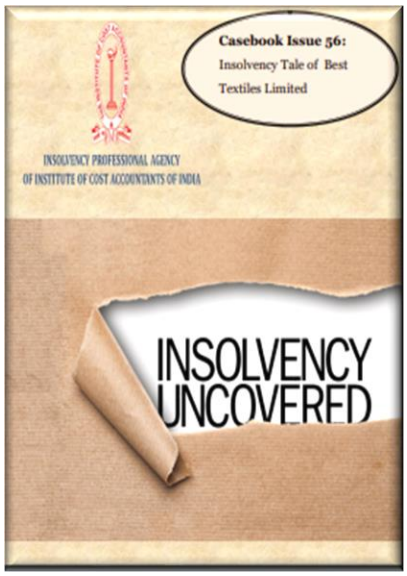
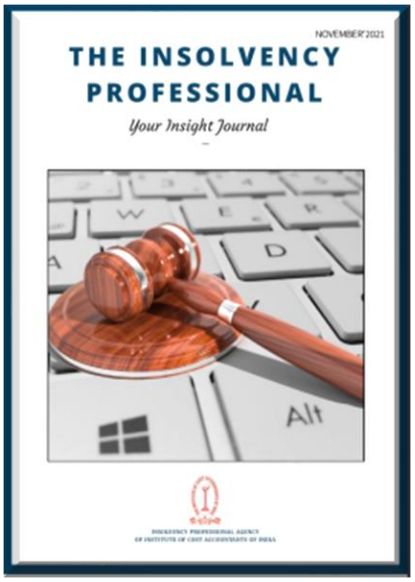


CASEBOOK



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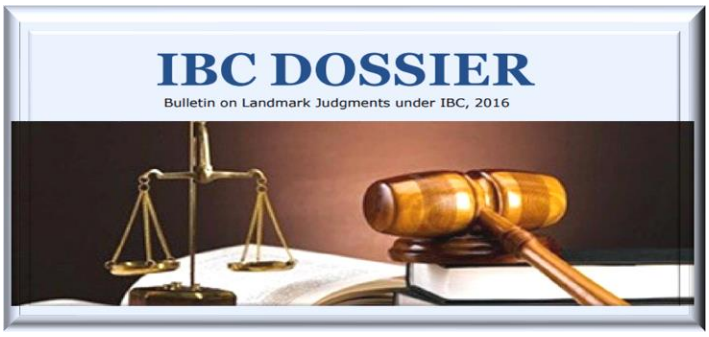

IBC DOSSIER

GALLERY




INTERACTIVE SESSION WITH THE PROFESSIONAL MEMBERS ON ENFORCEMENT MECHANISM AND EFFECTIVENESS OF IUs, NEW DELHI

SEMINAR ON INSOLVENCY AND BANKRUPTCY CODE AND ITS EMERGING SCENARIO, COIMBATORE

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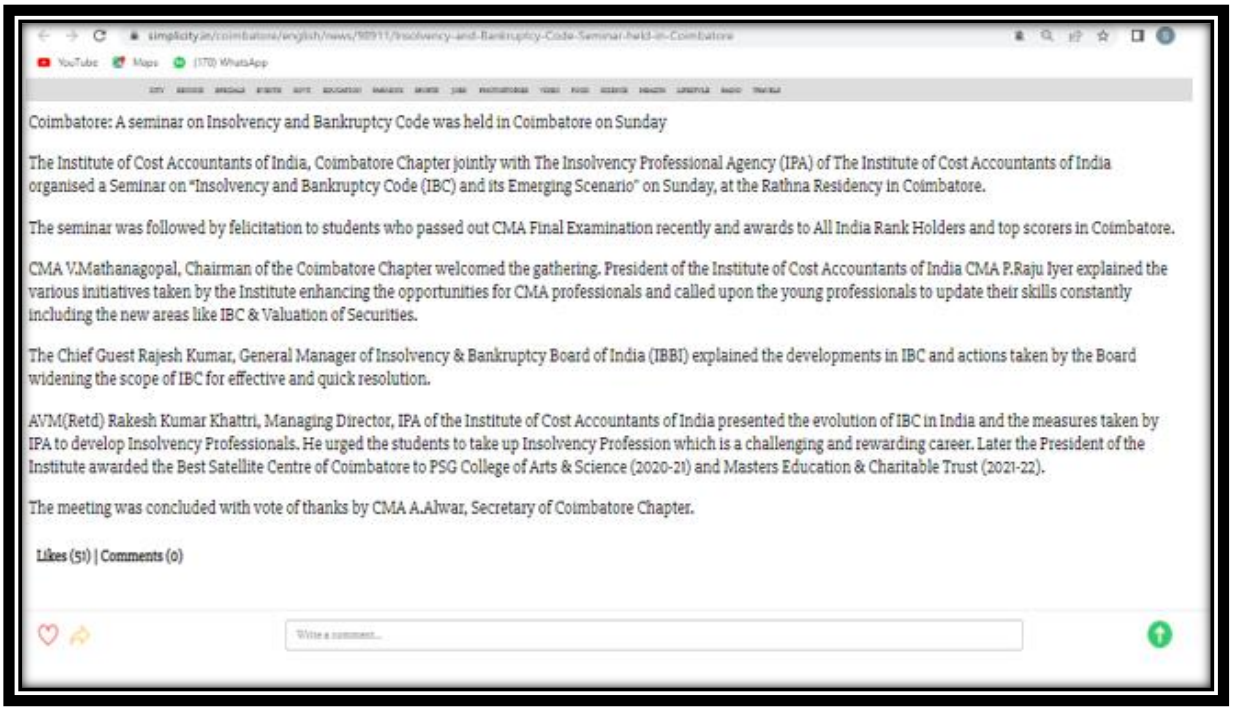

Coimbatore: A seminar on Insolvency and Bankruptcy Code was held in Coimbatore on Sunday

The Institute of Cost Accountants of India, Coimbatore Chapter jointly with The Insolvency Professional Agency (IPA) of The Institute of Cost Accountants of India organised a Seminar on "Insolvency and Bankruptcy Code (IBC) and its Emerging Scenario" on Sunday, at the Rathna Residency in Coimbatore.

The seminar was followed by felicitation to students who passed out CMA Final Examination recently and awards to All India Rank Holders and top scorers in Coimbatore.

CMA V.Mathanagopal, Chairman of the Coimbatore Chapter welcomed the gathering. President of the Institute of Cost Accountants of India CMA P.Raju Iyer explained the various initiatives taken by the Institute enhancing the opportunities for CMA professionals and called upon the young professionals to update their skills constantly including the new areas like IBC & Valuation of Securities.

The Chief Guest Rajesh Kumar, General Manager of Insolvency & Bankruptcy Board of India (IBBI) explained the developments in IBC and actions taken by the Board widening the scope of IBC for effective and quick resolution.

AVM(Retd) Rakesh Kumar Khattri, Managing Director, IPA of the Institute of Cost Accountants of India presented the evolution of IBC in India and the measures taken by IPA to develop Insolvency Professionals. He urged the students to take up Insolvency Profession which is a challenging and rewarding career. Later the President of the Institute awarded the Best Satellite Centre of Coimbatore to PSG College of Arts & Science (2020-21) and Masters Education & Charitable Trust (2021-22).

The meeting was concluded with vote of thanks by CMA A.Alwar, Secretary of Coimbatore Chapter.

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Insolvency and Bankruptcy Code Seminar held at Coimbatore

https://simplicity.in/coimbatore/english/news/98911/Insolvency-and-Bankruptcy-Code-Seminar-held-in-Coimbatore

THE TIMES OF INDIA

ICAI organises seminar on bankruptcy code

The Institute of Cost Accountants of India-Coimbatore Chapter jointly with the Insolvency Professional Agency (IPA) of the Institute of Cost Accountants of India (ICAI) organised a seminar on 'Insolvency and bankruptcy code (IBC) and its emerging scenario' recently. Students who passed out CMA final examination recently were felicitated after the seminar. ICAI president CMA P Raju Iyer explained the various initiatives taken by the institute to enhance the opportunities for CMA professionas and called upon the young professionals to update their skill constantly.

Times of India, Chennai News Edition

THE HINDU

Meeting held

The Institute of Cost Accountants of India, Coimbatore chapter, and the Insolvency Professional Agency of the Institute of Cost Accountants of India organised a seminar on "Insolvency and Bankruptcy Code and its Emerging Scenario" here recently. The organisers also felicitated students who passed out of CMA final examination and presented awards to All India Rank Holders and top scorers in Coimbatore, a press release form the Institute of Cost Accountants of India said.

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The Hindu, Chennai News Edition

Our Authors of this Edition

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CMA CS IP Shri J. K. Budhiraja is the CEO of ICMAI MARF and Incharge of ICMAI MARF. In past he has worked with the Institute of Cost Accountants of India, as Senior Director (Technical), Director (Professional Development, and Training & Placement). He had also worked as the founder CEO of Insolvency Professional Agency of the Institute. Besides being associated with the Institute for last 10 years, he has also worked in many PSUs [Central Electronics Ltd (CEL), National Fertilizers Ltd (NFL), Hindustan Fertilizer Corporation Ltd (HFC), EdCIL (India) Ltd) as General Manager (Finance), CFO cum Company Secretary and other Senior Positions. Mr. Budhiraja has written many Books; Guidance Notes and Technical Guides for Industries and Members of the Institute and represented Institutes on various forums and Ministries of Govt of India.

Dr. S. K. Gupta
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M.Com.(Gold Medallist), FCS, FCMA, Ph.D. Corporate Governance

With over 42 years of corporate experience in leadership positions with various public and private sector organizations in the domains of Finance, Costing, Internal Audit, Legal and Company Secretarial functions. He has dealt with Mergers and Acquisitions, Corporate restructuring, Anti - Dumping Duty and Corporate Governance mechanisms. Currently he is the Managing Director of Registered Valuers Organization of the Institute of Cost Accountants of India. He was earlier MD and CEO of the IPA of Institute of Cost Accountants of India. He has been a visiting faculty at various leading business schools for over 3 decades. He is member in various Industry Association and is Editor-in-chief for various professional journals with over 250 articles and research papers published in various professional national and international journals.

CS & IP Rajesh Lohia
Company Secretary and Insolvency Professional

Mr. Rajesh Lohia is an MBA (Dr. HS Gaur University, Sagar), an FCS and PCS since 1997. He is an IBBI Registered Valuers and also Insolvency Professional been appearing before NCLTs regularly.

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The Author Surya Prakasa Rao Ponnada, M.Tech is a Valuer of P&M registered with IBBI, IBBI/RV/04/2021/14214 (July 2021), with 45 years of industrial experience in Public and private sectors and as an entrepreneur. He works as a freelance consultant.

Dr. M. Govindarajan
B.Sc.(Chemistry), BL;MA (Eng/Economics/Journalism and Mass communication), MBA, MCA, FCS, FCMA, PhD.

With 38+ years in DoT and BSNL, he retired as Accounts Officer on 31.03.2018. Presently he is a practising Company Secretary and an Insolvency Professional. He has published nearly 2575 articles in various law journals and websites on taxation, company laws, labour laws, SEBI laws, Management, Insolvency etc. He published a book on GST during June 2017 followed by a second edition. He is author of 'A guide to students-Company Law and procedures'- co-authored with Dr.V.Balachandran. Study material and guidance notes for professional institutes. He is faculty for nearly 15 years in Madurai Chapter of ICSI and ICMAI and a speaker in some professional topics.

Shri Debajyoti Ray Chaudhuri
MD & CEO-NeSL
MBA, CAIIB

He is an MBA from the Faculty of Management Studies (Delhi) and Certified Associate of the Indian Institute of Bankers. As on date he is Managing Director and CEO of National E-Governance Services limited, which is an Information Utility regulated by IBBI. Immediately prior to joining NeSL, he was the Chief General Manager in the Insolvency and Bankruptcy Board of India (IBBI) where he took some path breaking initiatives like the implementation of the Companies (Registered Valuer and Valuation) Rules, 2017. His articles on issues related to insolvency have been published in reputed publications/national newspapers and he has been a speaker in numerous seminars/workshops related to corporate insolvency and also in educational institutions like the NLUs. Prior to joining IBBI, he was at the corporate office of India's largest bank, SBI, where he was responsible for compliance and risk, and implementation of the Insolvency and Bankruptcy Code, at its largest business vertical. Among his other assignments in SBI was the setting up SBI's Dubai operations as a highly profitable unit within a short span of time. As the CEO of SBI, he was much sought after by other Indian banks and also the Indian community for his views on issues like Indian economy, personal investment, trade flows and exchange rates. He was conferred the "Business Excellence and Innovative Best Practices Academia Awards-2020" by the New Delhi Institute of Management.

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.***
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