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ON

INSOLVENCY AND BANKRUPTCY CODE, 2016

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I. OVER VIEW OF INSOLVENCY LAWS IN INDIA[1]

Insight on prevailing laws on Insolvency in India

Insolvency occurs when an individual, company, or other organization cannot meet its financial obligations for paying debts as they become due. Bankruptcy is not exactly the same as insolvency. Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Insolvency describes a situation where the debtor is unable to meet his/her obligations. Bankruptcy is a legal scheme in which an insolvent debtor seeks relief.

The Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016 includes provision for determination of sickness, application for revival, appointment of interim/Company administrator, time bound revival process and if revival not possible, liquidation process through single regulator 'National Company Law Tribunal'.

The Companies Act, 2013 provides for regulation of insolvency, including revival, winding-up and liquidation of companies in time bound manner. It incorporates international best practices based on models suggested by the United Nations Commission on International Trade Law (UNCITRAL). The powers and jurisdiction of Company Law Board, Board of Industrial and Financial Reconstruction and High Court in this regard, is being exercised by National Company Law Tribunal and Appellate Tribunal. The purpose of creation of the Tribunal is to avoid multiplicity of litigation before various courts or quasi-judicial bodies or forums regarding revival or rehabilitation or merger and amalgamation, and winding up of companies.

Need for IBC

Before the enactment of the Insolvency and Bankruptcy Code, there was no single law in the country to deal with insolvency and bankruptcy. There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution. The legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system.

The objective of the Insolvency and Bankruptcy Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. An effective legal framework for timely resolution of insolvency and bankruptcy will not only encourage entrepreneurship but will also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

[1] INSOLVENVCY LAW & PRACTICE BOOK, available at: https://www.icsi.edu/media/webmodules/FINAL%20INSOLVENVCY%20LAW%20&%20PRACTICE%20BOOK%2017-02-2020.pdf

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.

Difference between Insolvency, Bankruptcy and Liquidation

Insolvency is a state when an individual, corporation, or other organization cannot meet its financial obligations for paying debts as they become due. Bankruptcy is not exactly the same as insolvency. Technically, bankruptcy occurs when a court has determined insolvency, and given legal orders for it to be resolved. Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Insolvency describes a situation where the debtor is unable to meet his/her obligations. Bankruptcy is a legal scheme in which an insolvent debtor seeks relief. Insolvency is a situation where individuals or companies are unable to repay their outstanding debt. Bankruptcy, on the other hand, is a situation whereby a court of competent jurisdiction has declared a person or other entity insolvent, having passed appropriate orders to resolve it and protect the rights of the creditors. It is a legal declaration of one's inability to pay off debts.Bankruptcy, on the other hand, is a situation whereby a court of competent jurisdiction has declared a person or other entity insolvent, having passed appropriate orders to resolve it and protect the rights of the creditors. It is a legal declaration of one's inability to pay off debts.

Object of the Code

The predominant objective of the Insolvency and Bankruptcy Code, 2016 is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. Sections 4 to 77 of Part II of the Insolvency and Bankruptcy Code, 2016 [IBC] contain provisions for Corporate Insolvency Resolution (CIRP) and liquidation of Corporate Persons. Sections 78 to 178 of Part III of IBC contain provisions for insolvency resolution process and bankruptcy of individuals and partnership firms. Most important provisions as regards initiation of CIRP and sanction of a resolution plan are contained in Sections 4 to 54. The National Company Law Tribunal [NCLT] is the Adjudicating Authority for insolvency resolution of corporate persons and Debt Recovery Tribunal is the Adjudicating Authority for insolvency resolution and bankruptcy for individuals and partnership firms.

Applicability of the Code

Section 35 provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. In accordance with Section 37, the provisions of this Act or the rules made thereunder shall be in addition to and not in derogation of, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force.

Difference between winding-up and liquidation

The terms “Winding up” and “Dissolution” are sometimes erroneously used to mean the same thing. But, the legal implications of these two terms are quite different and there are fundamental differences between them as regards the legal procedure involved. The entire procedure for bringing about a lawful end to the life of a company is divided into two stages i.e. ‘winding up’ and ‘dissolution’. Winding up is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law. Dissolution brings about an end to the legal entity of the company. The main purpose of winding up of a company is to realize the assets and pay the company’s debts expeditiously and fairly in accordance with the law. If any surplus is left, it is distributed among the members in accordance with their rights.

II. CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

By definition, The Corporate Insolvency Resolution Process or CIRP is a recovery mechanism made available to creditors under the Insolvency and Bankruptcy Code, 2016 (IBC). When a corporate entity becomes insolvent, the concerned creditor may initiate the CIRP.
The Insolvency and Bankruptcy Code, 2016, is aimed at balancing the interests of all stakeholders by amending and consolidating the laws related to reorganisation and insolvency of corporate entities, individuals and partnership firms in a time-bound manner. Today, the maintainability of applications for initiating corporate insolvency resolution process chiefly depends on the applicant first satisfying the Tribunal that it falls either within the definition of '*Financial Creditor*' or '*Operational Creditor*' under the IBC.

Corporate Insolvency

A company is considered to be insolvent under English law if it is unable to pay its debts. There are two tests for corporate insolvency:

- **The Cash-Flow Test:** is the company currently, or will it in the future, be unable to pay its debts as and when they fall due for payment?
- **The Balance Sheet Test:** is the value of the company's assets less than the amount of its liabilities, taking into account as-yet uncertain and future liabilities?

If the evidence proves that the answer to either of these questions is yes on the balance of probabilities, then the company is deemed insolvent under English law.

Who can initiate CIRP?

The financial creditor or the operational creditor can initiate CIRP against corporate debtor and corporate debtor voluntarily itself can initiate CIRP against himself.
However, CIRP cannot be initiated against failing to make the initial payment on principal amount.

Who is a financial creditor?

Under the IBC, "financial creditor" is any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
In the landmark judgment *Pioneer Urban Land & Infrastructure Ltd. v. Union of India* - the real estate allottees or home buyers were brought within the ambit of financial creditors under IBC 2016.
A financial debt is defined under Section 5(8) of the IBC to mean:

"*a debt alongwith interest, if any, which is disbursed against the consideration for time value of money and includes-*

a. *Money borrowed against payment of interest;*

b. *Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;*
c. *Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
d. *The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
e. *Receivable sold or discounted other than any receivable sold on non-recourse basis;*
f. *Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;*
g. *Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
h. *The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause*"

Who is an operational creditor?

An operational creditor is an entity who has the claim (corporate has the debt) for providing any of the four categories to the defaulted corporate goods, services, employment and government dues.
Like the financial creditor, an operational creditor too has a right to initiate a resolution process. They have a right in the committee of creditors as well. An operational creditor is defined under Section 5(20) of the IBC to mean

"*any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*".

In order to ascertain whether a person would fall within the definition of an operational creditor, the debt owed to such a person must fall within the definition of an operational debt as defined under Section 5(21) of the IBC.

An operational debt is defined under section 5(21) of the IBC to mean:

"*a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*".

a) Financial and operational creditors must be given similar treatment (which has been interpreted to mean the same percentage of haircut); and
(b) Discrimination amongst financial creditors on the basis of existing priorities or security interest is not permitted in a resolution plan.

Distinction between a financial creditor and operational creditor has been drawn by the Bankruptcy Law Reforms Committee in para 5.2.1 of its final report[2]. It states:

"*Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or debt security. Operational creditors are those whose liabilities from the entity comes from a transaction on operations...The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt*."

It is clearly evident that the law makers have chalked out distinct definitions of 'financial creditor' and 'operational creditor' and that they are not to be interpreted as inclusive or exclusive of each other.

Procedure and Timeline –

Section 12 of the Code provides timelines for the completion of the CIRP within a period of 180 days extendible to a maximum of 270 days from the ICD. In the *RComm* case, even the maximum period of 270 days for completing CIRP (commencing from May 15, 2018) had sufficiently expired.

In order to succeed in initiating corporate insolvency resolution process against a debtor, it is sine qua non to prove that the creditor falls within the ambit and scope of the definition of either '*Financial Creditor'* under Section 5(7) or '*Operational Creditor*' under Section 5(20) of the IBC.

III. EFFECTS ON ADMISSION OF INSOLVENCY APPLICATION

The Admission of the insolvency application under the Insolvency and Bankruptcy Code, 2016 triggers the whole Corporate Insolvency Resolution Process. It causes the happening of a lot of things such as the order of moratorium, appointment of resolution professional, constitution of the committee of creditors, formulation of the resolution plan and the repayment of the claims of the creditors. This module, deals with each concept in detail.

Moratorium

Simply put, a moratorium is the suspension of some kind of activity for a specific period. This kind of suspension is generally put for cases of financial distress. Moratorium under IBC, 2016:

Under section 13 of IBC, once the insolvency application has been admitted before the adjudicating authority, they have to declare moratorium by order.

The moratorium period begins from the date of such an order and ends at the end of the corporate insolvency resolution process. The time limit for the completion of corporate insolvency resolution process is 180 days which is extendable by not more than 90 days and only once.

What activities get suspended during a moratorium?

Under section 14 such a moratorium puts a suspension on the following activities:

1. Institution of suits or continuation of pending suits or proceedings against the corporate debtor get suspended. This includes execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.
2. Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein is not allowed.
3. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 gets suspended.
4. Recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor is not allowed under the moratorium.

Exceptions

During the moratorium period, supply of essential goods or services to the corporate debtor as may be specified does not get terminated or suspended or interrupted. Also, prohibitions made by the moratorium are not applicable on transactions notified by the Central Government in consultation with any financial sector regulator.

Until when does the moratorium last?

The moratorium does not last forever. A moratorium ordered under section 14 of the Code ceases to have effect if the adjudicating authority passes a resolution plan or orders for liquidation.

What is the importance of a moratorium?

A moratorium holds a lot of importance during the Corporate Insolvency resolution process. Since this process aims for repayment to the creditor, it is important that the assets of the corporate debtor stay put together. That is exactly what a moratorium does. It suspends all kind of activities which would lead to the assets of the debtors to be transacted.

IV. INTERIM RESOLUTION PROFESSIONALS & RESOLUTION PROFESSIONALS

Section 5(27) defines a resolution professional as "an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional".

Under Section 3(19) of the Act, "insolvency professional means a person enrolled under Section 206 with an insolvency professional agency as its member and registered with the Board and an insolvency professional under section 207" of the IBC, 2016.

Interim Resolution Professional (IRP)

Under section 16 of IBC, as soon as the insolvency resolution process has been initiated, an interim resolution professional has to be appointed by the Adjudicating Authority, for a period not exceeding 30 days.

Under section 5(1) of the Code, 'adjudicating authority', for insolvency resolution and liquidation for corporate persons, means the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

Appointment of IPR is done after the public announcement of the corporate insolvency resolution process has been done under section 15. IRP has to be appointed within 14 days of commencement of insolvency process.

The appointment of the Interim Resolution Professional is made on the basis of whether the application for the insolvency resolution process was made by a financial creditor, corporate debtor or operational creditor.

In case of the Financial creditor or Corporate debtor, a proposal for an interim resolution professional has to be made under section 7 or 10, as the case may be. Then, the IRP shall be appointed on the condition that no disciplinary proceedings are pending against him/her.

In case of the Operational creditor, there are two ways of appointing the IRP:

1. When no proposal for IRP is made:

   In such a case, the adjudicating authority will make a reference to the Insolvency and Bankruptcy Board of India for recommendations. The Board then has to make recommendation of an IP against whom no disciplinary proceedings are pending.

2. When a proposal for an IRP is made:

   In such a case, the person proposed for under section 9(4) of the Code shall be appointed if no disciplinary proceedings are pending against that person.
   From the date of appointment of the IRP all the powers regarding the affairs of corporate debtor vest in him.

What are the duties of the IRPs?

Section 18 postulates the duties of IRPs. The duties are as follows:

- Collecting all information relating to the assets, finances and operations of the corporate debtor for determining his financial position. This including information such as business operations, financial and operational payments for the previous two years along with the assets and liabilities.
- Receiving and collating all the claims submitted by creditors after the public announcement.
- Constituting a committee of creditors.
- Monitoring the assets of the corporate debtor along with the operations.
- Filing information collected with the information utility.
- Taking control and custody of any asset over which the corporate debtor has ownership rights including tangible assets, intangible assets, securities and assets located in a foreign country.

Resolution Professional (RP)

Once the Committee of Creditors gets created by the IRP, the COC has to hold a meeting within 7 days for the appointment of RP. A resolution professional may either be a different person or the IRP himself, depending on the decision of the COC. Once appointed, the RP then takes over the management of the operations of the corporate debtor and take the insolvency resolution process forward.

So, are the duties of a resolution professional different from IRP?

The duties of the RP are similar to that of IRP. Precisely, they are postulated under section 25 of the Code and are as follows:

- Taking custody and control of all the assets of the corporate debtor, including the business records;
- Represent and acting on behalf of the corporate debtor with third parties;
- Exercising rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
- Raising interim finances subject to the approval of the committee of creditors;
- Appointing accountants, legal or other professionals in the manner as specified by Board;
- Maintaining a list of claims and updating it regularly;
- Convening and attending all the meetings of the committee of creditors;
- Preparing the information memorandum;

- Inviting prospective lenders, investors, and any other persons to put forward resolution plans;
- Presenting all resolution plans at the meetings of the committee of creditors;

What is the importance of IRPs and RPs?

Resolution Professionals play a vital role in the efficient conduct of the Corporate Insolvency Resolution Process. They are the ones who play the role of a mediator between the creditors and the debtor. From the admission of the insolvency application to the repayment of debt and the end of the insolvency resolution process, they look after and are involved in everything. Therefore, it is very essential that they remain unbiased. Hence, proper guidelines are given in the IBBI Regulations 2016 for their appointment.

Claims

During insolvency, the corporate debtor is unable to repay the creditors the amount that he had borrowed. When this happens, that borrowed money becomes a claim of the creditor. The creditors basically demand the repayment of their money when they file a claim to the RP in the Corporate Insolvency Resolution Process.

Definition under IBC, 2016:

Under section 3(6) of the Code, claim is defined as follows:

1. A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

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

The whole insolvency resolution process revolves around claims made by creditors against the corporate debtor. They are the very basis of the insolvency resolution processes.

Let us understand the whole concept a little better by going through the process.

How and when are claims filed?

Once the Interim Resolution Professional is appointed, he has to make a public announcement to all the creditors of the initiation of the CIRP. Then, all the creditors put forward their claim in accordance with the money owed by the corporate debtor to them. Once all these claims are collated, the IRP then has to form a Committee of Creditors (COC) in which they all the creditors have voting rights to the resolution plan directly in proportion to their claim. It is important to note that all the creditors have to file their claims before a resolution plan gets approved. If they fail to so, their claim will not be included because the resolution plan is binding on all the stakeholders once approved.

Who all can file claims?

Chapter III of the IBBI Regulations, 2016 contains the provisions related to proof of claims for the CIRP. According to the regulations, these claims can be filed by financial creditors, operational creditors, creditors in a class, other creditors, workmen and employees. All the claims have to be necessarily accompanied with proof and proper documentation. The RP may call for more evidence, if required.

Why is filing of claims important?

Creditors file claims in order to get the repayment of the debt owed by the corporate debtor to them. If no claims are filed by the creditors, it means that there exists no debt.

So, is there a prescribed time limit to file claims?

It is always advisable that the creditors file their well before a resolution plan gets approved and accepted by the Committee of Creditors. Once a resolution plan gets approved, there is no going back. Therefore, to establish that the debtor owed something to the creditor, a claim has to be filed as soon as possible.

Registered Valuers

As the name suggests, Registered Valuers undertake the task of the valuation of the assets of the corporate debtor. By the circular dated 18th October, 2018 and from the commencement of section 247 of the Companies Act, 2013, the Central Government has made it mandatory to appoint no other person than the Registered Valuer for the valuation of assets. IBBI had then made it clear that from 1st February, 2019, the same shall be applicable to valuations done under the Insolvency and Bankruptcy Code.

How are Registered Valuers appointed?

Section 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states provision for the appointment of the Registered Valuer.

It states that the resolution professional shall appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor within seven days of his appointment and not later than forty-seventh day from the insolvency commencement date. This has to be done in accordance with regulation 35.

What does regulation 35 say?

Regulation 35 deals with fair value and liquidation value and the manner in which they shall be done.

This regulation provides that Fair value and liquidation value have to be determined in the following manner:-

(a) The two registered valuers have to first estimate the fair value and the liquidation value which has to be computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor. Thereafter, they are supposed to submit the same to the resolution officer.

(b) After that, if the resolution professional finds the two estimates of a value to be significantly different, he can appoint another registered valuer to estimate the same and submit it to him again.

(c) Average of the two closest estimates of a value is then considered the fair value or the liquidation value, as the case may be.

What is done with these estimates and values?

Once a resolution plan is received in accordance with the Code and these regulations, the resolution professional has to provide the fair value and the liquidation value to every member of the committee of creditors in electronic form. An undertaking is taken from the members of the committee to maintain confidentiality of the fair value and the liquidation value and not use such values to cause an undue gain or undue loss to itself or any other person. Even the resolution professional and registered valuers themselves have to maintain the confidentiality of the fair value and the liquidation value.

Who cannot be appointed as Registered Valuers?

Regulation 27 clearly states that the following persons cannot be appointed as registered valuers:

(a) a relative of the resolution professional;

(b) a related party of the corporate debtor;

(c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or

(d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

Steps Taken By The RP/IRP During The CIRP

As discussed earlier, the resolution professionals play a key role in the corporate insolvency resolution process. They are the ones who complete the whole process and handle all the matters incidental to the process. They general take the following steps to come to end of the process:

STEP 1: Managing the Affairs of the Corporate Debtor

The resolution process provided for under the Code follows the 'creditor-in-possession' regime. Therefore, as soon as the IRP is appointed, the possession of the assets of the Corporate debtor vest in him. It the RP after the IRP who manages all the affairs pertaining to the assets of the debtor. Once, the Committee of creditors gets constituted, there are some activities like amending constitutional documents, changing capital structure etc. which can only be done with the prior approval of the Committee.

Under section 18, the ownership of all the assets owned shall come in the control of the IRP, which has to protected and preserved as it is by the IRP under section 20 of the Code.

Section 20 clearly provides that the management of the operations of the corporate debtor shall be done as a going concern. Going concern means that the company or entity which has to be managed continues in operation in the future and no situation of liquidation arising is foreseeable. Therefore, the IRP/RP have to manage the affairs of the corporate entity as it was, with no changes.

STEP 2: Constituting the Committee of Creditors

The committee of creditors is constituted by the IRP under section 21 of the Code, after the collation of all the claims has been done. It is constituted of all the creditors who filed their claims after the public announcement. This committee then appoints the RP and it is the RP who conducts and convenes all the meetings of the Committee.

The Committee of Creditors plays a crucial role throughout the CIRP and decides whether the repayment of debt has to be done by liquidating the assets of the corporate debtor or by the way of a resolution plan by the resolution applicant. The resolution applicant is a buyer to whom the affairs of the corporate debtor are transferred. The consideration given by him is then used to repay the creditors.

STEP 3: Preparation of Information Memorandum

The Information Memorandum is prepared in order to facilitate the formulation of a suitable resolution plan for the concerned corporate insolvency resolution process. It is prepared by the RP under section 29 of the Code.

The Information Memorandum consists of all the relevant information required by the resolution applicant for the formulation of the resolution plan. This memorandum includes information about the financial position of the corporate debtor, any dispute against him or any other matter incidental to it.

The Resolution Professional is supposed to make all the relevant information available to the applicant both in electronic and physical form.

STEP 4: Facilitation of the Resolution Plan

Once the resolution has been prepared after due consideration of the Information Memorandum by the resolution applicant, it has to be examined by the resolution professional. Under section 30, it is mandatory that the resolution plan conforms to some requirements. The resolution plan must:

- Provide for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
- Provide for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor;
- Provide for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- Provide for implementation and supervision of the resolution plan;
- Not contravene any of the provisions of the law for the time being in force;
- Confirm to such other requirements as may be specified by the Board.

After examining the resolution plan on the above mentioned grounds, the RP had to present it to the committee of creditors who have to approve it by at least 75% voting share of the financial creditors. If the plan gets approved by the creditors, it has to be presented to the adjudicating authority who can either approve or reject the plan.

Once it is approved, it is sent to the IBBI.

Therefore, the IRP/RP play a very crucial role in the entire corporate insolvency resolution process. They are the ones who can be said to be the backbones of the whole process. Even though they do not prepare the resolution plan themselves, it is their efforts that lead to its formulation and ending the whole process peacefully.

V. IMPORTANT CONCEPTS EXPLAINED IN DETAILED UNDER THE CODE

Interim Resolution Professional

A resolution professional is a licensed professional who has to fall under the ambit of the following conditions:

- Has qualified the Limited Insolvency Examination
- Is enrolled with the Insolvency Resolution Agency
- Is registered with the Board

Insolvency professional and Registered Insolvency Professional can be assigned as Interim Resolution Professional. It is a provision present in the Insolvency and Bankruptcy Code,2016 where an Interim Resolution Professional is appointed. According to section 16 (2) of IBC, the resolution professional, as specified in the application under section 7 and section 10 shall be appointed as the interim resolution professional, if there no disciplinary action against them. According to section 16 (5), the term for the interim resolution professional shall continue till the date of appointment of the resolution professional as mentioned in the conditions in section 22. As per section 23, the function conducting insolvency resolution process and manages the operations of the corporate debtor during the period of the CIR Process. As provided by Section 17, on and from the date from which the IRP is appointed he is vested with the management of the affairs of the corporate debtor.

Committee of Creditors

Creditor's committee is a group consisting of people who represent the company's creditors at the time of a bankruptcy meeting. The committee focuses on the representation of the creditors who even owed relatively small number of sums in the company. Members on a creditors committee is a big commitment. It is assured by the creditors committee whether the company should immediately be liquidated and negotiation deals be held among the debtors and other creditors. The creditors committee plays a cardinal role in tasks of the insolvency professional that is to bring the creditors together. In the first meeting it is decided by the COC, who will be constitute the resolution professional, who then assembles and manages the meetings of the committee. Later, according to section 24(2), the resolution professional conducts all the meetings of the committee.

Resolution Applicant

A person who individually or jointly with another person submits a resolution plan the resolution professional to the invitation made under section 25 clause (2) (h). Even after the amendment act, no changes were made to the IBC Ordinance. The criteria that have to be fulfilled by a resolution applicant is determined by the resolution committee of creditors, depending upon the complexity and scale of operations of the business of the corporate debtor, and other conditions. These specific conditions are given by the Board. No amendments are made in this provision.

Resolution Plan

The COC has the responsibility to pass a resolution plan with not less than 66 percent of votes in the favour. The plan so proved goes under the inspection of the Adjudicating Authority who further approves it, if satisfied by the outcome. So, according to section 30 (4), the said resolution would be passed. The same resolution would be binding on the corporate debtors, their employees, members, creditors including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

VI. INSOLVENCY AGAINST PERSONAL GUARANTORS

With the pace at which the cases pertaining to insolvency of companies are dealt, it always remains a pervasive matter of concern among banks whether they will ever be able to recover their monies. Therefore, to with this, the Insolvency and Bankruptcy Code (IBC) also lays a provision to for banks to initiate simultaneous insolvency proceedings against the personal guarantors (usually the promoters) of the company, so as to ensure that they can recover the maximum amount possible from the money advanced.

Section 60 of the Act provides that "the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal…" It was then in 2019 that the Government rolled out provisions for the Bankers to move application for insolvency against the personal guarantor.

Who Is A Personal Guarantor?

Section 5(22) of the IBC defines Personal Guarantor as "an individual who is the surety in a contract of guarantee to a corporate debtor." In more elaborative terms, a Personal Guarantor is an individual/group of individuals who promises to repay the debt on behalf of the original debtor, in case the original debtor fails to pay it on own accord.

A contract of guarantee is entered tri-laterally and consists of the Creditor, the Debtor, and the Surety. In a Contract of Guarantee, when the Creditor advances a loan or debt to the Debtor, it becomes the Surety's responsibility to ensure that the debt is repaid by the debtor. In case of failure on part of the debtor in making such repayment, the Surety becomes liable to pay it on behalf of the Debtor.

For instance, specifically in terms of IBC, a Company A is desirous of obtaining a loan from a Bank B. A Person C, who is also the promoter of the Company A, has opted to become the personal guarantor in this transaction. Now if the Company A fails to repay the loan to the Bank, the Person C will become personally liable to repay on behalf of his Company.

Initiation Of Insolvency Proceedings

These insolvencies have the same effects as a usual insolvency would have had. The personal guarantor (Promoter) remains free to start afresh only once the insolvency proceedings against him have concluded. Moreover, the banks would also have the liberty to recover their money from the collateral deposited or the guarantor's personal assets (even those assets which have been transferred to someone else can be attached, provided they were mentioned for in the list at the time of advancing the loan), in a ways, making the guarantor unlimitedly liable.

Once the application moved by the bank is admitted by the NCLT, the Personal Guarantor has to submit a repayment plan for restructuring the debts, which has to be approved by the creditor. A creditor committee approves or modifies a repayment plan by 75% in value of the creditors present in person or by proxy and voting on a repayment plan. The personal guarantor goes into bankruptcy only if the NCLT rejects the repayment plan submitted by him.

Guardians Liability And Moratorium Period

Moratorium, in context of IBC, refers to a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor. Section 14 of IBC provides:

"Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: –

(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

The moratorium does not affect the of High Courts' jurisdiction under Article 226 of the Constitution of India. Section 14 covers legal proceedings of any nature within its purview. The intention of the legislature in relation to section 14(1)(a) is to ensure that after the declaration of moratorium, there is a standstill period during which the creditors cannot resort to individual enforcement action which would frustrate the very object of the corporate insolvency resolution process.

Right To Debt Recovery Via Insolvency Proceedings

The primary purpose of the IBC is to assist creditors in recovering their money from the defaulting debtors. It contains certain provisions to ensure that there are minimum losses at both sides. Prior to coming into force of IBC, only the debtor could initiate insolvency proceedings. The creditor could only follow up with separate actions.

However now, after coming into force of IBC, a Financial Creditor, or an Operational Creditor can start initiate the proceedings. Main difference between Financial and Operational Creditors is that the former are those whose relationship with the debtor firm is a based on financial contract, such as a loan or debt security, whereas the latter are those whose liabilities from the entity comes from a transaction on operations.

To recover the defaulted debt, the Creditor can serve a 10-days' notice to the defaulting debtor. If the repayment is not processed within the said 10 days, the Creditor can file an application, under the section 7 of the Act, and the adjudicating authority, i.e. the NCLT has to either accept or reject the application within 14 days. The insolvency proceedings may be initiated against the debtor and the personal guarantor.

Welcome Deviation From SICA Practices

The Sick Industrial Companies Act, 1985 (SICA) of India was introduced for timely detection and rehabilitation of Sick Industry Units (SIU), as mentioned in the Industries (Development and Regulation) Act, 1951. The purpose of this board was made to take preventive, ameliorative, remedial and other measures to secure the SIUs from liquidation. As per the SICA, the liquidation proceedings under any other forum would be suspended if the sick company was going through any rehabilitation procedure in its accordance.

This barring provision took away the rights of creditors to initiate proceedings for recovery of debts as such proceedings could only be done with prior permission of BIFR. Though there was no direct mention of barring the jurisdiction of DRT, section 22(1)44 of the SICA Act which came into force in the year 1985 in contrast to RDDBF Act being made applicable in the year 1993.

The 34(2) of RDDBF Act lays that "The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of … the Sick Industrial Companies (Special Provisions) Act, 1985". Going by the language of the section, the words "not in derogation of" give an inclination for purposive interpretation. Therefore, the SICA could be said to have an overriding effect over the RDDBFI Act.

The stay on proceeding against the guarantor ensured that recovery of debt happened from the debtor company. Even in this procedure, priority was given to banks and financial institutions and second preference was paying the worker companies. Other Creditors did not have any lawful remedy than to wait. However, later, SICA was made ineffective by bringing in the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 on December 1, 2016.

Major Concerns Being Raised By The Guarantors

One major concern in moving an insolvency application against the guarantors is that it would contradict the National Law Company Tribunal's holding that there cannot be two insolvencies in regards to the same debt. Since the defaulting company is already in the process of insolvency, there is no merit in moving one against the guarantor as well, and violate the basic principles of law, merely to provide a little more bolster to the creditors.

Another issue raised by the personal guarantors, who are mostly the promoters of the company, is that it would be highly unjust in moving an application against them, since they were not even involved in the company's management which led it to the verge of insolvency in the first place. Their contention is, that since it is the Board of Directors who manages affairs in the company, the Promoters alone should not be held liable.

It is a appreciable that the law authorities are taking concrete steps to ensure that no person has to suffer unnecessary losses. By allowing creditors to initiate insolvency proceedings against debtors, as well as personal guarantors, it has been made clear that there just cannot be easy escapes after defaulting a loan.

VII. <u>CONCEPT OF AVOIDANCE OF TRANSACTIONS FOR CORPORATE DEBTOR AND PERSONAL GUARANTORS</u>

When a company becomes insolvent, or is undergoing the proceedings for insolvency, it is tacitly implied that it is not at its best state when it comes to financial affairs. Such precarious financial position of the firm is enough to petrify the banks and justifies them for demanding additional bolsters for protecting their interests. The concept of avoidance does just that by restricting certain transactions of the firm to ensure that its already instable financial position does not deteriorate further, and that the banks can recover the maximum possible amount from their debts advanced.

Under the IBC, the concept of avoidance can be traced from Sections 43 to 51. Section 26 of the act clarifies that the filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional will not affect the proceedings of the corporate insolvency resolution process. The concept, in its codified form under the said sections, differentiates between the three types of transactions that are to be avoided, their time duration and some procedural norms, among others. The three types of avoidable transactions, viz. 'preferential transactions', 'undervalued transaction' and 'extortionate credit transactions', are explained as follows:

<u>Preferential Transactions</u>

Provided for under section 43 of the act, there are certain transactions which would disturb or hamper the distribution of assets among the creditors during the liquidation process. Such transactions, which must be strictly avoided, involve giving one of the many creditors, all of whom have equal right over the assets, preference by transferring to them any asset or interest, thereby putting them in a more beneficial position than the others. As per the section, a transaction would fall under this category if there is 'transfer' of any 'property or interest' by the corporate debtor to any of the several creditors, in exclusion of others, and against an antecedent debt or liability, and such transfer puts the transferee creditor in a better financial position and while hampering the commensurate distribution of assets.

However those transactions would be excluded from this category, which were either made in ordinary course of business, or any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

"(i) such security interest secures <u>new value</u> and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) Such transfer was registered with an information utility <u>on or before thirty days</u> after the corporate debtor receives possession of such property: Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor."

Undervalued Transactions

Provided for under section 45 of the act, these are the second category of transactions covered under the ambit of this concept. These are the transactions wherein the value fetched by the debtor by transferring a property is much lower than the book value or the value which could reasonably be expected from the transfer of such property. These primarily include the following transactions, which are made outside the ordinary course of business:

- makes a gift to a person; or
- Enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Extortionate Credit Transactions

Provided for under section 49 of the act, these transactions are avoidable because herein, the debtor purposely tries to 'defraud' the creditors by, in some manner, putting the assets beyond the reach of creditors or otherwise hamper the interest of any person who is making or might make a claim against him. Following are the requisites for a transaction to fall under this category:

- There was a transaction made by the debtor in regard to any asset of the firm,
- The transaction was a deliberate attempt to keep the property outside the reach of the creditors.

However, the following transactions will not be included herein:

- Where the transferee acquired the property from some other person than the debtor,
- The property was acquired in good faith
- The transfer was made without the knowledge or notice of the debtor.

VIII. LIQUIDATION UNDER THE CODE

Difference between insolvency resolution and liquidation process

When a company is in state of insolvency, its creditors will have two options i.e. either recovery or resolution. In other words, when insolvency proceedings commence against a company, there are two possible outcomes i.e. the sale of the existing business as a going concern (known as Insolvency Resolution) or the sale of the assets of the company (Known as Liquidation). The IBC is a single consolidated law which provides provisions for both; insolvency resolution and liquidation. The general motto is- "Law should provide a reasonable opportunity for rehabilitation of a business before a decision is taken to liquidate it so that it can be restored to productivity and become competitive".

The Insolvency and Bankruptcy Code was enacted to strike a balance between Resolution and liquidation. Creditors of a sinking company should first explore the option to revive the potentially viable company. Where revival or resolution is not feasible, then they should go for liquidation. In case, a business attains resolution, the creditors will have the option to recover their dues from future earning of the company. In the contrary, liquidation is the drastic solution. Liquidation brings the life of a firm to an end. It destroys organizational capital and renders resources idle till their reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus left after satisfying the claims of a prior set of stakeholders fully. The code therefore does not allow liquidation of a firm directly. It allows liquidation only after the process fails to yield resolution.

Revival of the stressed company may be the primary objective of the Code, but official data show that more companies have gone for liquidation in the new regime so far than the resolution as lenders have failed to endorse any viable plan for their revival. According to the data available on the IBBI website, till the end of June 2018, total 1547 applications for the Insolvency Resolution were filed out of which 977 applications had been admitted into resolution process and of which 91 were closed on appeal or review. Data further reveals that till 30th June 2018, total 136 companies yielded liquidations while only 34 companies achieved resolution.

Liquidation in the first meeting of CoC:

If it appears that the company will not be able to achieve any resolution in 180 days or the extended 270 days, liquidation can be only option to realise the money trapped. According to Section 33, where the resolution professional at any time during the CIRP but before confirmation of a resolution plan, submits to the tribunal the decision of the committee of creditors to liquidate the company by the requisite majority, the tribunal may pass a liquidation order against such company. The tribunal has passed liquidation order at initial stage in many cases such as VIP Finvest Consultancy Private Limited v. Bhupen Electronics, Chivas Trading Private Limited v. Abhayam Trading Limited, C.A. Rajendra K. Bhuta v. Best Deal TV Pvt.

Ltd, etc., on the ground that there was no hope for revival, and the creditors were not willing to spend their hard earned money to recover the drowned money.

Initiation of Liquidation Process

Liquidation may be initiated under Section 33 of the Code when Adjudicating Authority ("AA") either does not receive the Resolution Plan under Section 30(6) of the Code or the maximum period prescribed for corporate insolvency resolution process expires or in case where AA rejects the resolution plan under Section 31 of the Code. Further, the Committee of Creditors ("CoC") may also, with at least 66 % votes, decide to liquidate the Corporate Debtor ("CD") under Section 33(2), any time before the resolution plan is approved and the Resolution Professional intimates AA of such decision. Also, if the CD contravenes any terms of an approved resolution plan, any person whose interest is prejudicially affected by such contravention may apply for liquidation of CD. AA while passing the order of Liquidation of CD, shall direct issuance of public announcement under Section 33(1) of the Code that the CD is in liquidation and require that such order is also sent to registering authority of CD, such as Registrar of Companies in case of companies.

Maintenance of the Corporate debtor as a going concern

While the Code recognizes going concern sale as one of the methods of sale, however, it does not provide for the definition of going concern". The meaning of the term has been provided interpreted in various rulings. 'A Going Concern Scheme' means selling on "as is where is basis" which enables the sale of business of the company including all its assets and properties. When the company goes into liquidation, the liquidator prior the amendment had limited options either to sell the assets as piecemeal or slump sale but after Section 32(c) is in effect the liquidator has options to sell the company with all its assets i.e selling the business as a whole without bifurcating its properties and liabilities. Thus, one of the essential objectives of Insolvency and Bankruptcy Code,2016 was to ensure speedy recovery of cases but in numerous cases it is seen that due to delay in liquidation process there was a loss to the company, its employees, workers and CoC could play no role in this process. Alternatively, now the company can be sold as a going concern provides better utilization of resources of the company. Also, if the company is transferred as a going concern, there is no question of disposal of the assets of the company, either by way of a piecemeal sale or a slump sale. Therefore, it may be argued that strictly speaking, sec 53 of the Code does not apply. The assets stay in the company, and so do the liabilities, along with all attendant claims, limitations, licenses, permits or business authorizations. The company survives as it was – the ownership of the company is moved by the liquidator to the acquirer.

In Jindal Steel and Powers Ltd vs. Arun Kumar Jagatramka & Ors., and S C Sekaran vs. Amit Gupta & Ors. , it was held that even in liquidation proceeding, steps are required to be taken to revive and continue the operations of the CD by protecting it from its management. Liquidator should explore compromise and arrangement with its creditors under Section 230 of the Companies Act, 2013, and on failure, try and sell the business as going concern. Death of CD by liquidation, is the last step which should be avoided.

Waterfall Mechanism

The waterfall mechanism provided under section 53 of the IBC is not a unique concept. The differential treatment prescribed for secured, unsecured and operational creditors, government dues and workmen's dues in case of distribution of assets during liquidation under the Companies Act, 1956, and the IBC needs an overhaul. The differential treatment has to be analysed in light of the Companies Act, 1956, because the winding-up provisions under the Companies Act, 2013, came into effect much after the enactment of IBC.

IX. AMENDMENTS BROUGHT ABOUT IN THE CODE AND ITS SWOT ANALYSIS

The Insolvency and Bankruptcy Code came in the year 2016 to make the insolvency process easier and faster. However, with the passage of time various changes needed to be made to the Code which were affected by the way of various amendments to the Code till date.

AMENDMENT OF 2017

The first ever amendment to the Insolvency and Bankruptcy Code was brought about on 23rd November 2017. This amendment made the following changes:

Section 29A Inserted:

The insertion of section 29A to the Code was the most notable and important amendment made by this Act. Under this section, certain persons were declared to be not eligible for becoming a resolution applicant. It stated that a person would be ineligible if that person or any other person acting jointly or in concert with such person—

- Is an undischarged insolvent;
- Is a willful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- Has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949. It is also important that at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor. However, if such a person makes payment of all overdue amounts with interest and charges relating to non-performing asset accounts before submission of resolution plan he/she shall be eligible to submit a resolution plan;
- Has been convicted for any offence punishable with imprisonment for two years or more;
- Is disqualified to act as a director under the Companies Act, 2013;
- Is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- Has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;
- Has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;
- Has been subject to any disability under any law in a jurisdiction outside India; This was done in order to keep the defaulters away from the insolvency resolution process.

Amendment to Section 30:

Under section 30, the Committee of Creditors was prohibited from approving a resolution plan which is submitted by a person who is ineligible to become a resolution applicant. In such a case, the resolution plan would have to invite fresh applications.

Resolution plans are supposed to provide a solution to the proper allocation of the amount to all the creditors. If an ineligible person such as a defaulter himself comes up with a resolution plan, it could heavily impact all the stakeholders and pose more problems.

Amendment to section 35:

Since certain people have been barred from becoming a resolution applicant, this amendment inserted that the movable or immovable property or actionable claims of the corporate debtor should not be sold to any person who is not eligible to become a resolution applicant.

Section 235A inserted:

BY this amendment, section 235A was introduced. It provides that if any kind of contravention of those rules and regulations happen for which no penalties have been specifically provided, the punishment for such a contravention shall be a fine of Rs. 1Lack or more extending up to Rs. 2 Crores. This was inserted in order to punish those who would take advantage of provisions with no penalties.

AMENDMENT OF 2018

Under this Amendment Act, the following amendments have been made:

Home buyers:

By this amendment, the definition of 'financial debt' was expanded to include that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. This meant that now home buyers could be considered as 'financial creditors'. This, in turn, would enable them to become a part of the Committee of Creditors and influence the whole resolution process, especially the making of the resolution plan. Earlier, the home buyers would face a lot of difficulty in getting their money back.

Initiation of CIRP made easier for the Operational Creditor:

This amendment made things easier for the Operational Creditor by making it optional for such a creditor to file a certificate of him/her not having received any amount from the corporate debtor. Earlier, this certificate had to be mandatorily filed. Also, after this amendment, it was clarified that the operational creditors could not file an application to initiate the resolution process if any disputed existed before filing.

Percentage of Voting requirement of the COC reduced:

This amendment reduced the 75 % of votes required to pass a resolution plan to 66%. Earlier, if a resolution plan did not get at least 75% of the votes of the share of financial creditors, it could not be passed. This created a lot of problems as sometimes even after getting a majority of votes, the resolution couldn't get passed and the corporate debtor had to go into liquidation.

Non-extension of moratorium to guarantors:

This amendment made it clear that moratorium under section 14 of the Code which would put a suspension on the movement of the assets of the debtor and ensure that his assets stay as it is, would not be applicable to the guarantors. Earlier, there was a lot of doubt regarding whether is was or was not applicable.

Tenure of Interim Resolution Professional:

The tenure of the Interim Resolution Professional would extend to the date of the appointment of the Resolution Professional, under this amendment. Earlier, the tenure was fixed at 30 days. The new rule is more practical.

Section 29A:

Section 29A was inserted in the Code by the previous amendment to list out all those who would not be eligible to become a resolution applicant. This amendment has added more details to the section. By the way of an explanation, it has been made clear that a financial entity would be eligible to become a resolution applicant as it would not be included under 'related party'. This is applicable if it is a financial creditor of the corporate debtor who is a 'related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date'. Also, the MSMEs could now bid in the resolution process.

Application of Limitation Act:

By the way of this amendment, it has been made clear that the Limitations Act would be applicable to all the processes under the Insolvency and Bankruptcy Code. This has been cleared by the insertion of section 238A in the Code which states that 'the provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be'.

AMENDMENT OF 2019

Following are the amendments brought about by this Act:

Corporate Restructuring:

Corporate restructuring is done by the way of mergers, amalgamations etc. These can be effectively utilized in making resolution plans for the repayment of debts. This amendment made it clear that such things as mergers, demergers and amalgamations would be included in resolution plans. This came as a huge relief to the market.

Time limit of disposal of resolution application:

By this amendment, it has been made clear that it is mandatory for the NCLT to dispose of the resolution application within 14 days. It can delay this only in special circumstances. This amendment was done as earlier there was a lot of confusion regarding time of disposal of applications.

Duration of Completion of CIRP increased:

By this amendment the duration of the completion of the whole corporate insolvency resolution process has been increased from 180 days (plus 90 days extension) to 330 days. These 330 would include all the extensions given during the whole process. This was majorly done considering the fact that the completion of the resolution process within 180 days was becoming difficult for a lot of people.

Voting by representative of creditors:

By this amendment, it has been made clear that when a representative votes on behalf of a class of creditors in a Committee of Creditors, his/her votes would be counted in accordance with what more than 50 % of the votes given by the class of creditors represented indicates.

Distribution of amount to the creditors:

The scenario regarding the repayment of debt amount to the creditors has been further clarified by this amendment. As required by this amendment, the repayment has to be fair and equitable. It states that the amount received by the operational creditors must not be less than the higher of the following:

- That amount which would be paid to such creditors in the event of a liquidation of the corporate debtor under section 53 of IBC, 2016; or
- That amount which would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53 of the Code.

In case any financial debtor had not agreed to and voted against the resolution plan, the payment received by him shall be in line of the regulations stipulated by the Insolvency and Bankruptcy Board of India and in any case shall not be less than the amount he/she may have received had the assets of the corporate debtor been liquidated.

The amendment has also made it clear that these rules regarding repayment of the amount of debt would have retrospective action.

Binding action of Resolution Plan:

The resolution plan is generally binding on all the stakeholders involved in the insolvency process. By this amendment, it has also been clearly mentioned that even the Central Government, State Government and Local Authorities would come under its purview. They would be bound by the resolution plan too.

Liquidating and other powers of the COC expanded:

By this amendment, the power of the Committee of Creditors regarding the liquidation has been expanded. Now they can do this even before the resolution plan gets passed and approved. Under this amendment, they can also decide the manner in which the amount of debt has to be distributed.

AMEDMENTS OF 2020

In the year 2020, an Ordinance was first promulgated by the President as a rescue to the corporate debtors during the time of the pandemic. An amendment Act was further passed in September, 2020 which repealed and replace this ordinance.

Under this Act, the following provisions were made:

Insertion of Section 10A:

By the insertion of this section in this Code, the initiation of the corporate insolvency resolution process was suspended under sections 7, 9 and 10. It states that no application can be filed for the defaults that arise on or after 25th March, 2020 for a period of at least 6 months, which may extend to 1 year but not more than that.

It has also been made clear that this will only be applicable to defaults arising after 25th of March, 2020 and not before that date, in view of the pandemic.

Personal Contributions by directors or partners of the corporate debtors

By the way of this amendment it has been provided that if it is proved that the person did not exercise diligence required to reduce the potential loss to creditors, the directors and partners of the corporate debtor may be required to make personal contributions.

By this amendment, even the Resolution Professionals have been barred from filing applications for the initiating of the corporate insolvency resolution process.

In summary, it can be clearly made out that the Insolvency and Bankruptcy Code, 2016 has actually been successful in improving the situation of the market, thereby attracting more investors in the Indian market. However, many problems still do exist which have further been worsened by the incoming of the corona virus pandemic and the necessary amendments are being made to suit the circumstances.

X. NCLT PROCEDURES AND PRACTICALITIES OF FILING DOCUMENTS AS PER FORMATS UNDER THE CODE

The Insolvency and Bankruptcy Procedure, 2016 (IBC), under section 5, has provided that the National Company Law Tribunal (NCLT) will be the same as that under section 408 of the Companies Act, 2013. **The NCLT Rules, 2016** have broadly defined the procedures that are to be followed by the NCLT. Below discussed are some of the procedures.

1. What Is NCLT And NCLAT?

National Company Law Tribunal (NCLT) is a body that was originally established under Section 408 of Companies Act, 2013. However, it also serves as an Adjudicating Authority under the IBC by virtue of 5(1) of the Act. It is a body having original Jurisdiction, and can take fresh matters related to recovery and insolvencies. At present, it has 16 Benches across India.

National Company Law Appellate Tribunal (NCLAT) is an appellate body that was established under Section 410 of Companies Act, 2013. It also serves as appellate authority for disputes under the IBC, and hears appeals from the NCLT. Section 61 of the IBC provides that any person aggrieved by the order of the Adjudicating Authority may prefer an appeal to the National Company Law Appellate Tribunal.

2. Filing of Petition/Application; Rule 34(3) & 34(4)

Rule 34(3) of the Rules is regarding the filing of petition before the NCLT. This has to be filed in Form no. NCLT 1 along with the requisite attachments, and also along with Form no. NCLT 2 wherein contained is the 'Notice of Application'. However, if it is an interlocutory application, Form NCLT 1 has to be filed along with Form NCLT 3, wherein contained is the 'Notice of Application'. Rule 34(4) provides for filing an affidavit under Form no. NCLT 6 which has to be accompanied along with every petition.

3. Advertisement; Rule 35

In cases where it is necessary to advertise a petition, the provisions of Rule 35(1) have to be applied. Form no. NCLT 3A has to be filed and the advertisement has to be issued in not less than 14 days before the date of hearing. Rule 35(2) states that "every such advertisement shall state;-

- the date on which the application, petition or reference was presented;
- the name and address of the applicant, petitioner and his authorized representative, if any,

- the nature and substance of application, petition or reference; (d) the date fixed for hearing;
- a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition Or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorized representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing.

While Clause (3) provides that where the advertisement is being given by the company, then the same may also be placed on the website of the company, Clause (4) mandates filing of an affidavit before the Tribunal, not less than three days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served.

Clause (5) of the Rule provides, *"Where the requirements of this rule or the direction Of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit."*

4. Filing of Notice to the Opposite Party; Rule 37(1)

Once the application under Section 34 has been admitted, the NCLT is required to send a Notice of it to the Respondent. Such Notice has to be filed in Form no. NCLT 5 accompanied by a copy of the petition. In case the Respondent doesn't appear, the NCLT may even proceed with ex-parte proceedings.

Section 37(1) provides, *"The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT.5 shall be accompanied by a copy of the application with supporting documents."*

Rule 38 provides that such notices and/or summons have to be submitted either through post or via email on the address provided in the petition itself.

5. Ex-parte order; Rule 37(2)

At some instances, it is possible that the Respondent does not appear before the authority on the specified date. It may be owing to some personal reasons, technical or commutation problems, or simply the reluctance of the party. Irrespective of the reason for not appearing, the NCLT has the power under Rule 37(2) to proceed with the application without the presence of the Respondent and pass such ex-party order as it may deem fit.

6. Process for Contest by Respondent; Rule 37(3) & 41

Rule 37(3) provides that if the Respondent wishes to contest the petition, he may file a reply, which has to be accompanied by an affidavit and the relevant documents, and can be submitted either personally or through an authorized representative. Rule 41 provides that the reply shall contain admit, denial or rebuttal of facts claimed by the petitioner and other additional facts as may be necessary. These will be recorded.

7. Filing of Rejoinder

Once the Respondent has filed a reply, the NCLT may allow the petitioner to file a rejoinder to such reply, in accordance with Rule 42. In simplified terms, a rejoinder is a further "reply" given by the Petitioner in response to the reply filed by the Respondent. The Rule reads, *"Where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply filed by the respondent, with an advance copy to be served upon the respondent."*

8. Powers of the Bench

As per Rule 43, the Bench (i.e. NCLT) has the power to call for further evidences and/or information, as it may consider necessary. It may call for the said documents for the following reasons:

(a) For the purpose of satisfying itself as to the truth of the allegations made in the petition or application; or

(b) For ascertaining any information which, in the opinion of the Bench, is necessary for the purpose of enabling it to pass orders in the petition or application.

Under this Rule, the Bench can even allow such documentary and other mode of recordings in electronic form including e-mails, books of accounts, book or paper, written communications, statements, contracts, electronic certificates and such other similar mode of transactions that are legally permitted.

9. Service of notices and processes; Rule 38

Rule 38 has provided for the service of Notices and processes by the NCLT. The Rules have taken note of the development in technology and therefore provide that a notice can be served both by post as well as e-mail. The physical notice can be served in any of the following manner:

(a) By hand delivery through a process server or respective authorized representative;

(b) By registered post or speed post with acknowledgment due; or

(c) Service by the party himself.

It is also provided that a notice or process may also be served on an authorized representative of the applicant or the respondent, as the case may be, in any proceeding or on any person authorized to accept a notice Or a process, and such service on the authorized representative shall be deemed to be a proper service.

10. Evidence by Affidavit; Rule 39 & 40

Rule 39 has empowered the NCLT to direct the parties to give evidences. The Evidences have to be submitted by an Affidavit in Form No. NCLT7. The Tribunal may also order cross - examination of any deponent on the points of conflict either through information and communication facilities such as video conferencing or otherwise as it may deem fit, on an application moved by any party.

However, the parties to the proceedings cannot produce additional evidence before the Bench, either oral or documentary, which was in the possession or knowledge but was not produced before the Inspector, appointed by the Central Government for the purpose of investigating the affairs of the concerned Company, during investigation.

However, if the Bench requires any additional evidence, or if the Inspector so appointed for the said purpose has not given sufficient opportunity to the party to adduce evidence, the Bench, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be produced.

11. Hearing; Rule 44

It is up to the Bench to decide as to when the hearings of the case have to be conducted. On the ascertained date of hearing, if the petitioner fails to appear, the bench may dismiss the case, and is not mandated to open it unless the petitioner shows causes sufficient enough to satisfy the court within 30 days of such dismissal. If the Respondent fails to appear on the ascertained date of hearing, the bench may proceed with the case ex-parte. An ex-parte order may also be set aside if the respondent produces sufficient show cause. It also has the power to send an evidence for verification, if the other party raises an objection regarding its originality.

12. Substitution of Legal Representation; Rule 53

Rule 53 provides for "substitution of legal representatives". As per this Rule, if any of the parties dies during the pendency of the proceedings, instead of abating the proceedings, the Bench can allow any legal representative of the deceased party to continue with the remainder part. However, there is a time limit of 90 days for the legal representative to apply before the Bench. If no application is received within the said 90 days, the Bench may abate the proceedings.

13 Pleadings; Rule 55

This Rule puts a bar on the presentation of additional pleadings by the Petitioner, once the Reply has been filed by the Respondent. Further pleadings can be presented only with the leave of the Court, and with such necessary conditions as the Bench may deem fit.

14. Order Copy; Rule 50

The Rule 50 provides that the Registry is responsible to send a certified copy of final Order passed to the parties, free of cost, and that the certified copies may be made available with cost at some fees, in all other cases.

15. Power to regulate procedure; Rule 51

Rule 51 provides that the Tribunal may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Act.

XI. INFORMATION UTILITY AS MENTIONED IN THE IBC (INSOLVENCY AND BANKRUPTCY CODE)

Insolvency and Bankruptcy Code, 2016, came into force with the main objective of reorganization and resolution. One of the biggest challenges during the process of insolvency is to collect and consolidate information about the lender's financial transactions.In the resolution process, it has clearly been identified that the massive barrier is the lack or shortage of information to develop the facts as to what are the assets, who are the claimants and what contracts are in the force.The Information Utility under IBC tries to eliminate the wide gap and helps to fill up the same, as it provides information and details of the financial transactions made by the lender at one place and which can be accessed by all without any hurdle. But the important thing that we all have to keep in mind is that,the importance of information utility can only be understood after having the fair idea of the Insolvency and Bankruptcy Code.

Information utilities is a professional organization,which is registered under IBBI under section 210 of IBC, it is a very important concept to know about as it gives detailed financial information.

The time before the code of Insolvency and bankruptcy was enforced in India there were various laws which overlapped with each other pertaining to insolvency of individuals and companies in India.The main deadblock for the existing laws back then was that it was not very effective and also did not give a timely help or aid in recovery. Hence as the consequence of this problem, the strain was being caused on the Indian credit system.

As the drawbacks were pretty lucid,the government decided to enact IBC. This provides a very well explained insolvency legislation for companies,individuals and partnerships as well which also allows the creditors to make a plan for the revival and speedy liquidation.We also can say that it gives an institutional framework, having regulators, insolvency professionals, information utilities and adjudicatory mechanisms to provide a time-bound insolvency resolution process and liquidation.

Kinds of information available in IU:

The Information Utilities provide the following categories of information:

1. All the records of liabilities of a solvent organization.
2. All the proof of the instances of default.
3. Records of all the assets pledged against the secured credit contracts.
4. Records pertaining to the balance sheet and cash flow of the organization

The information and the details recorded in the IU is done in the universally accepted format. The authentic information is provided by getting it verified by the concerned parties.

Main objectives and goals of Information utility :

Providing complete information and details about the initiation of insolvency procedure.

- It also performs as a credit and contract Repository
- Accepts financial information from debtors and creditors.
- Authenticating all the information stored by the concerned parties so that it can be used in legal proceedings.
- It is understood as the two way communication tool between creditors and debtors for authentication and submission for recording of the said disputes.
- This is also a Cost-effective tool for proof of borrower, borrowing, security interest and for default.

The Insolvency and Bankruptcy code is a composition of these main four pillars:

- Regulator (Insolvency and Bankruptcy Board of India).
- Adjudicatory body (National Company Law Tribunal).
- Insolvency professionals.
- Information utilities.

We can surely understand that these pillars help in initiating and completing formal insolvency resolution process as well as liquidation in a stipulated period of time.

Important obligations and responsibilities of Information utility:

- As the main purpose is to provide the service to any and every person possible the information utility has to abide by these following things:
- To create and maintain the financial details in a universally accessible and acceptable format.
- To accept electronic submissions of financial details from people who are under the obligation to hand in financial details or information under subsection of section 215.
- To meet the minimum service quality standards as may be specified by
- the rules regulations
- To collect the information and also to get the same authenticated by all the related parties so that there is no confusion and problem in the future while dealing with the recorded information.
- One of the very important ones is to give or make the information maintained and recorded available to any individual who wants or intends to access the particular information in such a manner that is legal and specified under the regulations.
- To publish the statistical information as it is allowed under the regulations.
- To haveaninter-operability with other information utilities Section 215 Procedure for submission.

The main reasons behind creating the Information Utilities:

Before the bankruptcy and insolvency resolution cycle can start, a pivotal step to accurately build up current facts regarding what resources or assets are accessible, who all the candidates or the applicants are, and what agreements are in power. This is usually an elaborate paper-based procedure and it has its own moves, for example, the need to ensure that the reports close by are genuine. All partners engaged with the indebtedness or liquidation cycle of the account holder ought to approach the borrower's dependable monetary data. However, lopsidedness of data hampers the current cycle and the reasonable dealings among indebted people and banks. Vital time is squandered in deciding the presence of obligation and default.

Subsequently, to beat these issues, the Bankruptcy Law Reforms Committee (BLRC) thought of an answer for digitizing all credit exchanges, to make them accessible on an advanced stage subject to get to rules and to give lawful sanctity to such records. Such electronic records would permit quick ID of leasers, foundation of the Committee of Creditors (COC) on default and evaluation of the suitability of the indebted person by the board.

To put the above arrangement in letter, the IBC has ordered the making of a managed data industry as IUs. In view of the data accessible with IUs, the time taken to set up obligation and default will be diminished and the indebtedness and insolvency cycle will be quickened.

Admissibility of Electronic Records of IU as evidence:

The Information and Technology Act, 2000 revised definitions in the Indian Evidence Act, 1872 to incorporate electronic records as "proof". Meaning of "reports" and "affirmation" was likewise altered to incorporate electronic records. It can along these lines be said that the electronic records of IU are acceptable as proof.

For the IU record to be indisputable, it should fulfill the guideline for convincing proof as set down in Section 31 of the Indian Evidence Act, 1872.

When the data is put away in an IU, the leaser and the borrower will be stopped from questioning any of this data.

In Innovative Industries Ltd. versus ICICI Bank and Ors, the Supreme Court has held that when a corporate borrower submits default of a monetary obligation, the settling authority has just to see the records of the data utility or other proof created by the monetary leaser to fulfill itself that a default has happened.

Information Submission:

Whether or not the lender or the indebted person starts the Corporate Insolvency Resolution Process (CIRP) under the IBC, both of them may utilize the data accessible to IUs to demonstrate the presence of the obligation and default.

According to Section 215 of IBC, monetary loan creditors are obliged to submit monetary data to IUs. Be that as it may, the Code doesn't, notwithstanding, specify any punishment for not presenting this information. It shows up, hence, that if the leaser doesn't present this data, the 'punishment' is that, in case of default, the lender can't get benefitted from the quick and simple cycles permitted by the IU system.

As per Section 215(3), it is discretionary for operational lenders to submit monetary data to the IUs.

The monetary data which is needed to be submitted to the IU is as per the following:

1. Records of an individual's obligation;
2. Records of the individual when the individual is dissolvable;
3. Records of the resources over which the security has been made;
4. Procedures of default by the individual against any obligation; and
5. Monetary record and cash flow of the individual.

The Working Group on Information Utilities is of the view that the accommodation of all the monetary data alluded to above isn't compulsory. Just data straightforwardly applicable to the assurance of the presence of obligation and default for the reasons for the CIRP ought to be made required. Accommodation of monetary records by the monetary leaser is discretionary.

Ownership and Immutability of IU Information:

The IU isn't considered as the proprietor of the data yet as the caretaker of the data. Thus, the IU is obliged to be a decent steward of the data. When the data is put away in an IU, it ought not be erased or altered at all. That is basic to guarantee that an IU preserves the authenticity of the data, so it very well may be acknowledged as decisive proof in a courtroom. Nonetheless, if a record put away in an IU is off base, this ought to be set apart as mistaken by the IU.

Guidelines to be agreed by Information Utility

A significant standard utilized by the IU business is a typical Application Programming Interface (API) whereby all IUs collaborate with different partners in the exhibition of their center administrations. This API determines

how an IU can be asked for data, how data can be submitted to an IU, how it tends to be validated, how it very well may be recovered and how IU costs can be questioned.

Core Services of Information Utility:

The center administrations of an IU are dictated by two areas of the IBC. These are Section 3(9) of IBC and Section 3(13) of IBC. Segment 3(9) characterizes center administrations and Section 3(13) characterizes monetary data. These arrangements recommend that center administrations of an IU ought to incorporate the acknowledgment, stockpiling, verification and admittance to data which incorporates resources, obligations, security premium, asset report and income articulations and default.

The basic to the bankruptcy goal technique is the credit contract record and the event of a default. It is this data which is utilized to start the CIRP.

Eligibility Criteria to get registered as Information Utilities:

The IBC states that each IU ought to be set up as an organization under the Companies Act and it ought to be a public organization. The Working Group on Information Utilities has proposed the base approved money to be Rs.75 crores and the base settled up funding to be Rs. 60 crores. It has likewise recommended a FDI cutoff of 49%.

To get enrolled as an IU an application must be made to the IBBI in Form An of the Schedule of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017.

Swiss Ribbons Pvt Ltd. & Anr. Vs. Union of India & Ors. and WP(Dated 25th January 2019).

The aforesaid Regulations also make it clear that apart from the stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, the utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, as has been conceded by the learned Attorney General, is only prima facie evidence of default, which is rebuttable by the corporate debtor, makes it clear that the challenge based on this ground must also fail"

While talking of Information Utilities the Supreme Court acknowledged it as the only prima facie evidence of default.

In the current situation the data utilities are not broadly utilized by the lenders or the creditors. I am of the assessment that if the data utilities are generally utilized by the leasers, it leads to the creation of a financial information database for all credit seeking entities and more importantly it aids the completion of the corporate insolvency resolution process in a time bound manner.