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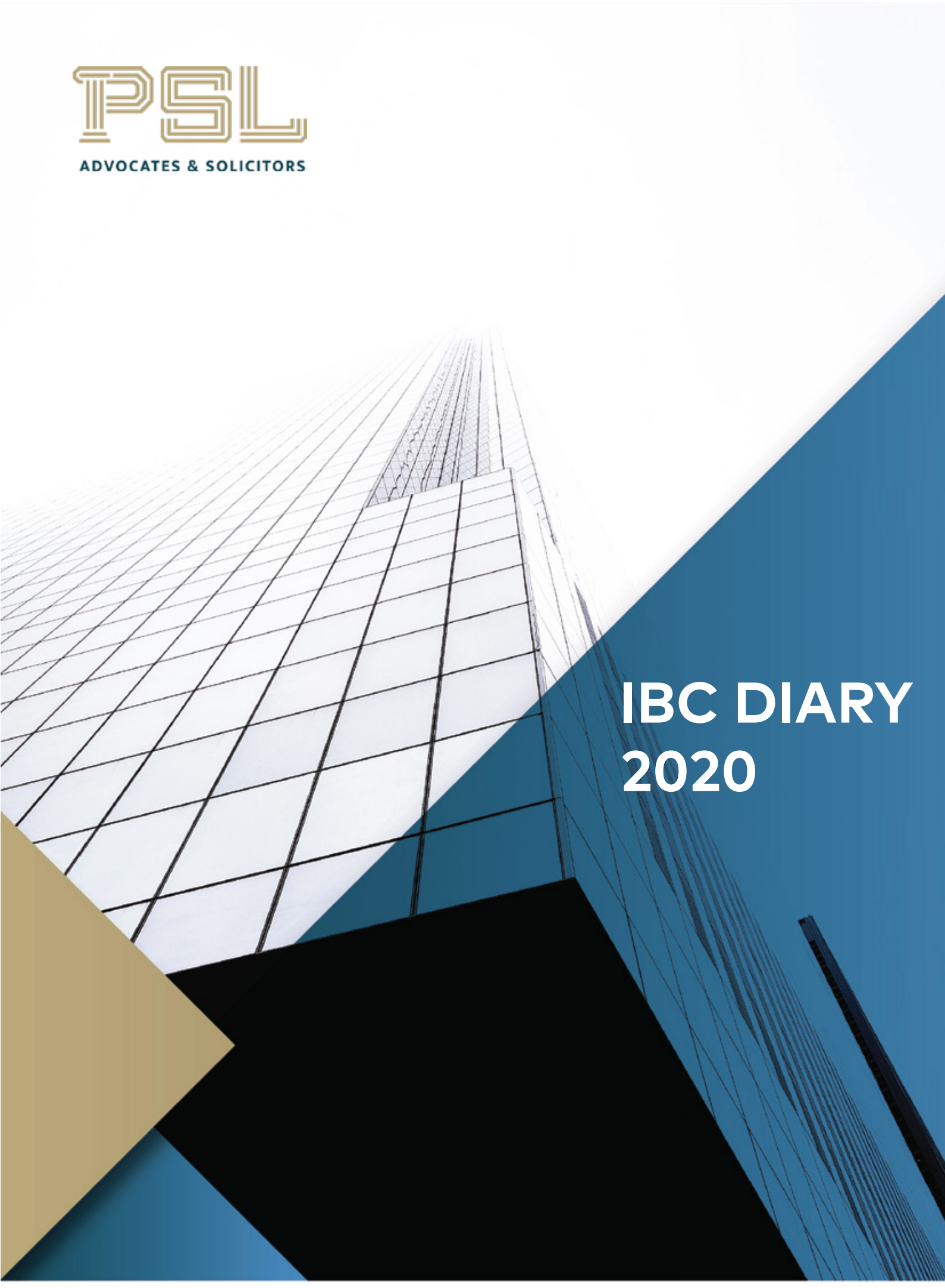
ADVOCATES & SOLICITORS



# IBC DIARY 2020

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# 2020

# INTRODUCTION

As someone rightly said 'Knowledge is Empowerment'.

As part of our continued endeavour to author and consolidate works in the area of our core competence, we are releasing the Insolvency and Bankruptcy Code Diary. This diary is a compilation of articles our team wrote as part of our #LockdownSeries, which contains short and concise pieces on various topics relating to insolvency and bankruptcy law.

We hope that that this IBC Diary will be a useful guide in appreciating the different facets of the Insolvency and Bankruptcy Code, 2016. We will be happy to discuss to discuss those and more areas in depth, do write to us.

# INDEX

# 01 FUNDA-MENTAL 1: FINANCIAL CREDITOR V. OPERATIONAL CREDITOR

Insolvency and Bankruptcy Code, 2016 (**'Code'**) recognizes two kinds of debts that are usually referred to during the process of corporate insolvency resolution:

**(a)** the **'financial debt'** which is defined under Section 5(8) of the Code[1];

**(b)** the **'operational debt'** which is defined under Section 5(21) of the Code.[2]

On the basis of the said distinction, the Code identified two kinds of creditors i.e. **'financial creditor'** (to whom a financial debt is owned by the Corporate Debtor) and **'operational creditor'** (to whom a financial debt is owned by the Corporate Debtor). However, the Code creates various distinctions in the treatment granted to them in terms of (i) right to apply to NCLT (scope of adjudication), (ii) rights as a member of the Committee of Creditors (**'CoC'**) (iii) right to receive amounts under Resolution Plan and upon liquidation of the Corporate Debtor, *inter alia*.

## I. Right to Apply before the Adjudicating Authority

| Financial Creditor | Operational Creditor |
|---|---|
| Application under S. 7 read with Regulation 4 (Form 1) | Application under S. 9 read with Regulation 6 (Form 5) |

1 "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–
(a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
(e) receivables sold or discounted other than any receivables sold on non-recourse basis;
(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
Explanation. -For the purposes of this sub-clause, -
(i) 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; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;
2 "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment 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;

| | |
|---|---|
| *Pre Condition*: No notice is required. Default ought to have happened. Additional conditions applicable to home buyers as defined under S.21(6A)(a) and (b). | *Pre Condition*: Notice should have been issued under S. 8 of the Code.[3] Period of 10 days should have elapsed from the receipt of the Demand Notice by the Corporate Debtor. There should be no pre-existing disputes. |
| More than one financial creditor can file a composite application.[4] | No such corresponding provision. |
| *Scope of adjudication*: To adjudicate whether there has been a default and that the debt has remained unpaid. | *Scope of adjudication*: To adjudicate whether there has been a default in paying the amount due and there is no pre-existing dispute. |

Note: The pre-conditions specified herein are in additional to those applicable to both [like limitation, quantum of debt being atleast INR 1,00,00,000/- (Rupees One Crore Only) which was earlier fixed as INR 1,00,000/- (Rupees One Lakh Only)]. Further, S. 11 of the Code prescribes for certain category of entities who are disabled from making an application.

### II. Right as a member of the Committee of Creditor

| Financial Creditor | Operational Creditor |
|---|---|
| *Voting Right*: Available as a proportion of their debt in the total debt owed by the CD. | *Voting Right*: Available only if the CoC does not comprise of financial creditors (total debt owed by the CD).[5] Otherwise, if its aggregate due is 10% of the debt owed by the CD, then they have a right to attend the meeting of the CoC.[6] |

Note 1: For home buyers and other categories of financial creditors named in Section 21(6A), they have a right of participation in the meeting of the CoC only through their appointed authorised representative.

Note 2: For submission of claims before the Resolution Professional, there is a further categorization both under Operational Creditors and Financial Creditors as provided under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('**CIRP Regulations**').

| Operational Creditors | | Financial Creditors | | Other Creditors |
|---|---|---|---|---|
| Workmen and Employees | Others Operational | Belonging to a Class | Other Financial | Form F (Reg. 9A) |

3 Form 4: If Invoice Based
Form 3: If based on other information
4 S. 7(1)
5 Proviso to S. 21(8) read with regulation 16 of the CIRP Regulation
6 S. 24(3)(c)

| | | | | |
|---|---|---|---|---|
| Form D (Reg. 9) | Creditors<br>Form B (Reg. 7) | of Creditors<br>Form CA (Reg. 8A) | Creditors<br>Form C (Reg. 8) | |

### III. Treatment under the Resolution Plan and during Liquidation

| Financial Creditor | Operational Creditor |
|---|---|
| *Amount to be Offered under Resolution Plan*: No set rule | *Amount to be Offered under the Resolution Plan*: Not less than the amount, if the amounts offered under the Resolution Plan were being paid as per the waterfall mechanism of S.53 of the Code or Not less than Liquidation Value [S.30(2)(b)]. |
| *Priority of Payment while disbursing from Liquidation Estate*: | *Priority of Payment while disbursing from Liquidation Estate*: |
| Priority No. 2: Secured Financial Creditor (not relinquished security interest under S. 52) | Priority No. 2: Workmen's dues for a period of 24 months prior to the Liquidation Commencement Date |
| Priority No. 4: Unsecured Financial Creditors | Priority No. 3: Wages and dues to employees (other than workmen) for a period of 24 months prior to the Liquidation Commencement Date |
| Priority No. 5: Unsecured Financial Creditor (Remaining portion of unpaid debt after enforcement of security interest under S. 52) | Priority No. 5: Statutory dues for a period of 24 months prior to the Liquidation Commencement Date<br><br>Priority No. 6: Other Operational Creditors |

#### Intelligible Differentia in the Distinction: Supreme Court

This differential treatment and preference granted to 'Financial Creditors' over 'Operational Creditors' was challenged before the Hon'ble Supreme Court of India in the judgment in the case of ***Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India.***[7]

The classification was contended to be discriminatory and violative of Article 14 of Constitution of India and that there was no intelligible differentia having relation to the objects sought to be achieved by the Code. The

7 2019 4 SCC 17

Supreme Court had occasion to refer to and analyse the Bankruptcy Law Reforms Committee's Report, Insolvency and Bankruptcy Bill and Insolvency Law Committee's report (the literature that led to the promulgation of the Code).

The Court held that preserving the corporate debtor as a going concern while ensuring maximum recovery for all creditors being the objective of the Code; financial creditors are clearly different from operational creditors.[8] Therefore, it was conclusively held that there is obviously an 'intelligible differentia' between the two which has a direct relation to the objects sought to be achieved by the Code.

8 The Court made the following observations on the basis of the afore-referred conclusion was drawn:
i) Most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country.
ii) The nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business.
iii) Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less.
iv) In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business.
v) Financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations.
vi) The forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately.
vii) Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable.
viii) Financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do.

# 02 FUNDA-MENTAL 2: CIRP – THE PROCESS

Insolvency and Bankruptcy Code, 2016 (**'Code'**) provides for the procedure to be followed in case an application filed under Section 7 (by financial creditor), 9 (by operational creditor and 10 [Corporate Debtor (**'CD'**) itself] is admitted. This is the point of commencement of the Corporate Insolvency Resolution Process (**'CIRP'**). The Insolvency and Bankruptcy Board of India has issued the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 (**'CIRP Regulations'**) to prescribe for the details of the procedure of CIRP.

## Essential Features

### (a) Imposition of Moratorium

While the passing of the Order of admission,[9] the Learned Adjudicating Authority in addition to appointing the interim resolution professional (**'IRP'**) is required to pass directions for imposition of the moratorium,[10] which prohibits the following:

**Enforcement of Security Interest**

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 Securitisation and Restruction of Financial Assets and Enforcement of Security Interest Act, 2002

**Civil Legal Proceedings**

Institution of suits or continuation on pending suits or procedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.

**Return of Property (Not owned by CD)**

Recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

**Change in interest and ownership of Assets by Corporate Debtor**

Trasfering, incumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or benificial interest therein.

[9] Section 13 of the Code
[10] Section 14 of the Code

### (b) Takeover of the Corporate Debtor:[11]

Upon the passing of the order of admission, the IRP issues a publication informing commencement of the CIRP of the CD. Further, the power of the board of directors of the CD stand suspended and the management of the CD vests in the IRP. The officers and management report to and act under the instructions of the IRP and the IRP represents the CD, wherever required.

### (c) Time Bound Procedure:

The Object of the Code itself stats that it has been promulgated with the intent of maximizing assets of the Corporate Debtor in a time bound manner. The Code hence prescribes the time limit for completion of the CIRP.[12] It is required to be completed within a period of 180 days (which can be further extended by a period of 90 days with the approval of 66% of the CoC). Further, an outer limit of 330 days has been prescribed for completion of CIRP; which has been held to be directory in nature by the Hon'ble Supreme Court.[13]

## Stages of CIRP

### (a) Constitution of Committee of Creditors

The IRP immediately after receipt of the Order of Admission is required to publish in the newspaper an Invitation of Claims by the creditors of the CD. Thereafter, the IRP is required to collate the claims received;[14]

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[11] Section 18 of the Code

[12] Section 12 - **Time-limit for completion of insolvency resolution process**
(1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares.
(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days
Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once:
Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:
Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

[13] Judgment dated 15.11.2019 passed in the case of Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors.

[14] Manner of Submission of Claims by Creditors
Operational Creditor Type 1: Workman and Employee: **Form D**
Operational Creditor Type 1: Workman and Employee through Authorised Representative: **Form E**
Operational Creditor Type 2: Other than Workman and Employee: **Form B**
Financial Creditor Type 1: Creditors in a Class: **Form CA**
Financial Creditor Type 2: Other than Workman and Employee: **Form C**
Other Creditors (other than Operational Creditor and Financial Creditor): **Form F**

by verifying them against the books of the CD. The invitation includes the instructions for appointment of the authorised representative in case of a situation of 'Creditors in a Class' (like home buyers and depositors).

On the basis of the verified claims, the Committee of Creditors ('**CoC**') of the CD is constituted. The CoC shall comprise of all the financial creditors.[15] Voting rights are determined as per the proportion of their debt. The operational creditors having a verified claim of more than 10% of the total debt of CD and the members of the suspended board of directors shall have a right to participate in the meeting of the CoC; but they do not have any voting rights.[16] In case there are no financial creditors, then the operational creditor shall comprise the CoC.[17]

The CoC in its first meeting is required to take steps for appointment of the Resolution Professional ('**RP**'). The IRP can also be confirmed as the RP or the CoC can pass a resolution for appointment of a fresh RP (subject to final approval of the Adjudicating Authority).

### (b) Appointment of Valuers

The RP is required to appoint two registered valuers to determine the 'fair value'[18] and the 'liquidation value'[19] of the CD.[20] This information is required for being shared with the members of the CoC, when the Resolution Plans that have been received are being evaluated. This information is confidential in nature and is allowed to be shared only with the members of the CoC; on submission of an undertaking by them to ensure that the confidentiality of the information shall be maintained.[21]

### (c) Formulation of the Information Memorandum and Evaluation Matrix

Simultaneously to the above procedure, the RP is required to take steps towards drafting of:

(i) *the Information Memorandum*: which is a statement of the affairs of the CD (asset and liability, financial position, employee structure, list of creditors etc.).

(ii) *the Evaluation Matrix*: which contains the paramaters and mode of application of those parameters by the CoC, while evaluating the Resolution Plans received by the RP.

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[15] Section 21 of the Code
[16] Section 24 of the Code
[17] Regulation 16 of the CIRP Regulations
[18] Regulation 2(1)(hb) of the CIRP Regulations
""fair value" means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion."
[19] Regulation 2(1)(k) of the CIRP Regulations
""liquidation value" means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date."
[20] Regulation 27 of the CIRP Regulations
[21] Regulation 35 of the CIRP Regulations

Both these documents are considered as a confidential document and required to be only shared with the members of the CoC at the earlier stage for getting their approval.

### (d) Invite Resolution Applicant

Parallely, the RP is required to publish a Notice inviting Expression of Interest (**'EoI'**) from proposed resolution applicants (**'PRAs'**). This is issued in the format provided in Form G, containing the timelines for participating in the CIRP of the CD. No person disqualified under Section 29A can submit an EOI and then the Resolution Plan.

Upon receipt of the EoIs, the RP is required to draw a Provisional List of eligible PRAs and share with the CoC and the PRAs. If there are any objections and submissions, then after considering the same, the RP is required to issue the Final List of PRAs. The RP is then required to invite Resolution Plans by sharing the Information Memorandum and the Evaluation Matrix (finalized) with the PRAs (all named in the Provisional List and those objecting their non-inclusion in the Provisional List).

### (e) Evaluate the Resolution Plan received and Approval of Resolution Plan by the CoC

The RP is required to evaluate the Resolution Plans received as per the Evaluation Matrix and to confirm if the Resolution Plans are in compliance of the Code. The RP is obliged to place only those Resolution Plans before the CoC which are in compliance of the Code [especially as provided in Section 30(2) of the Code].[22] The CoC is then required to consider the Resolution Plans.

## Conclusion of CIRP

Broadly depending upon the different permutations and combinations, the following are the possible conclusions of the process of CIRP:

### (a) Approval of Resolution Plan by CoC and the Adjudicating Authority

If the Resolution Plan received by the RP is approved by 66% of the voting share of the financial creditors (after considering its feasibility and viability, the manner of distribution proposed, inter alia); then the RP is required to place the same for approval before the Learned Adjudicating Authority. If the Adjudicating Authority is also satisfied with the Resolution Plan and the procedure followed leading to the approval by the CoC, then it by an order approves the Resolution Plan. Such a Resolution Plan, by virtue of operational of law, shall be binding on (i) the corporate debtor and (ii) its employees, (iii) members, (iv) 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, (v) guarantors and (vi) other stakeholders involved in the resolution plan.

[22] Section 30(3) of the Code

### (b) Non-Receipt of EoIs or Resolution Plans

If no EoI is received, then the RP may issue a fresh Notice inviting EoIs. Further, upon receipt of EoIs and after issuance of the Information Memorandum and the Evaluation matrix, no Resolution Plans are received, then the RP may either invite the PRAs yet again to submit Resolution Plan or may issue a fresh Notice inviting EoIs.

### (c) Rejection of Resolution Plan by CoC or the Adjudicating Authority

If the Resolution Plan is rejected by the CoC, then the options discussed in (b) above can be followed. In case, the Resolution Plan is rejected by the Adjudicating Authority, then it may pass an order to consider exercising the options discussed in (b) above.

### (d) Order for Liquidation

However, in all cases of failure of CIRP as discussed above and (i) either there being not enough time to re-do the process of inviting Resolution Plans or (ii) the time for CIRP already having elapsed; then the Learned Adjudicating Authority is bound to pass orders for liquidation. In all situation, efforts are made towards avoiding liquidation; however, as per Section 31 as a natural corollary of failure of CIRP, the orders for liquidation need to be passed.

# 03 FUNDA-MENTAL 3: LIQUIDATING A CORPORATE DEBTOR

As per, the Insolvency and Bankruptcy Code, 2016 (‘**Code**’), if the process of corporate insolvency resolution of a Corporate Debtor does not succeed; then the natural corollary for the same is passing of the order directing commencement of the process of liquidation. The Insolvency and Bankruptcy Board of India has issued the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (‘**Liquidation Regulation**’) to govern the entire liquidation process.

### Commencement of Liquidation Type 1: When CIRP pursued

Section 33 of the Code provides that the Adjudicating Authority will pass an order of liquidation order in the following circumstances**:**

**During CIRP**

Before the confirmation of resolution plan, if the same has been approved by not less than 66% of the voting of CoC members.

**Before Completion of CIRP**

| No Resolution Plan received | Resolution Plan is received; but has been rejected by the Commitee of Creditors or the Adjudicating Authority. |
|---|---|

**After Completion of CIRP**

As the time period prescribed under Section 12 of the Code expires and no resolution plan has been recieved or approved.

**After Approval of Resolution Plan by Adjudicating Authority**

If the provisions of the Resolution Plan have been contravened.

### Commencement of Liquidation Type 2: Voluntary

Section 59 of the Code provides for passing of liquidation order when the Corporate Debtor voluntarily decides to go for liquidation. However, an order for voluntary liquidation can be passed only when the majority of the directors are in a position to confirm on affidavit that:

a) they have made full inquiry and confirm that there is no outstanding debt or that it will be able to pay its debts from the proceeds of the assets; and

b) the process has not been initiated to defraud the creditors.

### Essential Features

Once the Liquidation Order is passed, the following consequences ensue.

**a)** Legal Proceeding against the Corporate Debtor: No suit or legal proceeding shall be instituted when liquidation order passed.

**b)** Legal Proceeding by the Corporate Debtor: Suit or legal proceedings can be instituted after the passing of liquidation order; only with the prior approval of the Adjudicating Authority.

**c)** Status of Officers, Employees and Workmen: Order of liquidation is deemed to be a notice of discharge except when the business of the Corporate Debtor is continued during process of liquidation as well.

**d)** Appointment of Liquidator: The Adjudicating Authority appoints the liquidator. The Resolution Professional can also be confirmed as the Liquidator, if the Committee of Creditors has approved it and consent to act as creditor was filed by the Resolution Professional. All powers of Board of Directors and Key Managerial Personnel vest in the Liquidator and they cease to have effect.

### Stages of Liquidation

*Step 1: Preliminary Procedures*

**a)** Public Announcement Of Liquidation: Within 5 days

The Liquidator is required to make a public announcement of the order [Form B of Schedule II of the Liquidation Regulations] in order to invite claims form all the creditors.

**b)** Consolidation and Verification Of Claims: Within 30 days

After the public announcement, the liquidator is required to collect the claims of the creditors and thereafter, these claims have to be verified.[23] The Liquidator (unlike the Resolution Professional) has the power to either

[23] Section 39 of the Code

admit or reject the claim in whole or in part.[24] The decision of admission or rejection has to be recorded in writing and communicated to the creditor within 7 days of such admission or rejection. On the basis of the above procedure, the Liquidator has to draw up the List of Stakeholders and submit it with the Adjudicating Authority.

**c)** Appointment of Valuers

The Liquidator is required to appoint 2 registered valuers to value to assets of the Corporate Debtor. The report of such valuer has to be received within 75 days of the liquidation order; to enable the Liquidator to file the Asset Memorandum with the Adjudicating Authority.

*Step 2: Preparation of Asset Memorandum and Other Reports*

The Liquidator has to prepare and submit the following reports before the Adjudicating Authority:

**a)** Asset Memorandum: The asset memorandum shall contain value of the assets as per valuation report; intended manner of sale; expected amount of realisation and relevant information as such which have been obtained in respect of the Corporate Debtor.[25]

**b)** Preliminary Report**:** The Preliminary Report provides for the capital structure, estimate of assets and liabilities of the Corporate Debtor and the proposed plan for conducting the liquidation process and its timelines.

**c)** First progress report and subsequent reports: The liquidator is also required to submit on quarterly basis to the Adjudicating Authority a settled list of stakeholders, details of properties which are remains to be sold, expenses and other details.

[24] Section 40 of the Code
[25] Regulation 36 of the Liquidation Regulation within 75 days from liquidation order

*Step 3: Formation of Liquidation Estate*

To enable distribution of monies to the stakeholders, the Liquidator is first required to formulate the Liquidation Estate broadly by comprising and excluding the following:[26]

| Included In Liquidation Estate | Excluded From Liquidation Estate |
|---|---|
| • Assets over which the Corporate Debtor has ownership rights<br>• Movable and Immovable assets<br>• Intangible and Tangible assets<br>• Assets in respect of which security interest has been created<br>• Assets of which ownership has to be decided by the court<br>• Value of assets received from proceedings of avoidance transactions. | • Assets which are in the posession of ther Corporate Debtor, but owned by 3rd party<br>• Assets in security collateral held by financial services providers and are subject to set off<br>• Personal assets of any shareholders or partners of the Corporate Debtor<br>• Assets of any Indian or foreign subsidiary of Corporate Debtor. |

*Step 4: Sale of Assets*

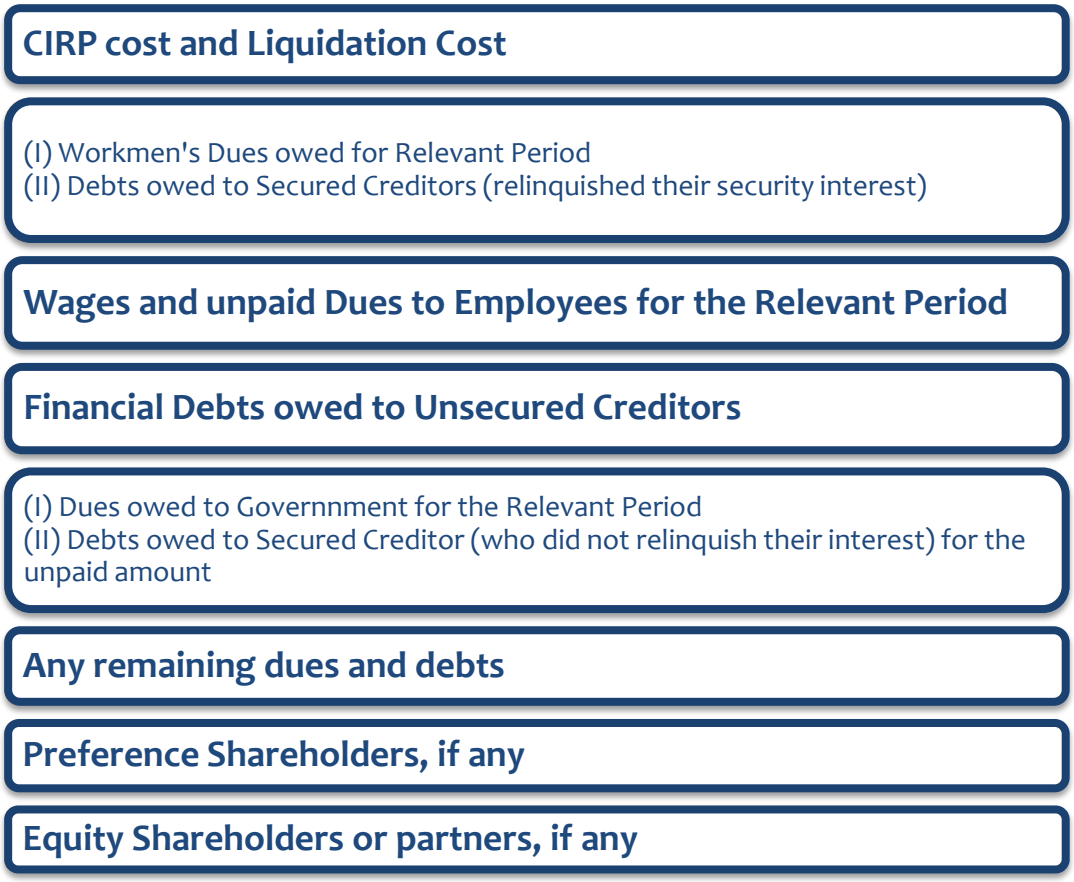
The secured creditors have to exercise their option of relinquishing their security interest or retaining the same.[27] The Liquidator is enabled to conduct the sale of only those assets in respect of which the security interest has been relinquished. Numerous modes are prescribed for conducting the sale of assets of the Corporate Debtor, which are enlisted below:[28]

- **Asset on standalone basis**
- **Asset in a slump sale**
- **Set of assets collectively**
- **Assets in parcels**
- **Corporate Debtor as going concern**
- **Business of Corporate Debtor as going concern**

[26] Section 36 of the Code
[27] Section 52 of the Code
[28] Section 32 of the Code

*Step 5: Distribution of Assets Of Corporate Debtor*

Upon formulation of the Liquidation Estate, the distribution has to happen as per the following waterfall mechanism providing the order of priority.




The expression Relevant Period refers to the period of 24 months prior to the Liquidation Commencement Date. Any contractual arrangements between recipients with equal ranking under the above waterfall mechanism, if disrupting the prescribed order of priority, shall be disregarded by the Liquidator. Further, at each stage of the distribution of proceeds, in respect of a class of recipients that rank equally, each of the debts will either be paid in full or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full.

*Step 6: Dissolution of Corporate Debtor*

Upon conclusion of the above steps, the order of dissolution is passed by the Adjudicating Authority. The Liquidator has been granted a time period of two years; in respect of which extension can also be sought by the Liquidator (if he has been unable to complete the process in the stipulated time).[29]

[29] Section 54 of the Code

# 04 ROLE OF DIFFERENT PLAYERS: CIRP PROCESS VS. LIQUIDATION

Under the Insolvency and Bankruptcy Code, 2016 ("**Code**"), once an application under Section 7, Section 9 or Section 10 of the Code is admitted against the Corporate Debtor ("**CD**"), the Corporate Insolvency Resolution Process ("**CIRP**") stands initiated against the CD. As a part of the CIRP, the existing board of directors of the CD (the main executive organ of a company) is suspended and several new stakeholders come into control of the CD. Furthermore, if the CIRP is not concluded successfully, the CD is required to undergo Liquidation, wherein the roles of each of the players undergoes certain modifications. Therefore, in the present piece, we have analysed and compared the role of each of the players during the CIRP and at the stage of Liquidation.

| PLAYER | ROLE DURING CIRP | ROLE DURING LIQUIDATION |
|---|---|---|
| **SUSPENDED BOARD OF DIRECTORS** | • Once an IRP is appointed, the powers of board of directors of the CD are suspended and exercised by the IRP [Section 17(1)(b)].<br>• The suspended board of directors have a right to attend all the meetings of CoC, and the Resolution Professional is bound to give notice of each such meeting to them. [Section 24]<br>• The Supreme Court in a judgment titled as ***'Vijay Kumar Jain vs. Standard Chartered"***[30] held that suspended board of directors has a right to receive copy of resolution plan. | After the liquidation proceedings are initiated, the powers of board of directors of the CD are suspended and exercised by the Liquidator. [Section 34] |
| **RESOLUTION PROFESSIONAL V. LIQUIDATOR** | • After the admission of application for insolvency of the CD, an Interim Resolution Professional ('IRP') is appointed by the Adjudicating Authority to manage the affairs of the CD, invite and collate the claims of the creditors (received from *creditors* pursuant to issuance of public announcement of initiation of CIRP against CD) etc. and thereby, constitute the CoC and then, call for the first meeting of the Committee of | • After the CD goes under liquidation and an order under Section 34 is passed to that effect, the RP itself acts as a liquidator (unless CoC resolves for substitution).<br>• It is the duty of liquidator to manage the affairs of the CD.<br>• The liquidator is required to make public announcement of initiation of liquidation proceedings against |

[30] 2019 SCC OnLine SC 103

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| | Creditors ('CoC').<br>• After the CoC is constituted, the CoC has the option to appoint the IRP as Resolution Professional ('RP') or appoint a new RP.<br>• It is the duty of RP to issue notice inviting Expression of Interest ('EOI') from the proposed resolution applicants ('PRA'). Thereafter, the process is initiated for formulating the Evaluation Matrix (requires the co-ordination of the CoC and the RP).<br>• Upon receipt of the Resolution Plans, the RP is obliged to mark them as per the Evaluation Matrix after preparing a report under Section 30.<br>• Further, the RP is required to ensure that the CD remains a going concern during the CIRP process<br>• The RP is also required to appoint two registered valuers for assessing the 'fair value' and 'liquidation value' of the CD<br>• Any application for withdrawal of proceedings under Section 12A, after CoC is constituted, is also submitted before the RP, who in-turn places the same before the Adjudicating Authority.<br>• If any resolution plan is approved by the CoC, the RP is required to place the same before Adjudicating Authority for its approval. | CD and thereafter consolidate and verify claims received from the *stakeholders*.<br>• The liquidator is required to take all necessary steps for liquidation of the assets of CD.<br>• The liquidator is required to appoint two registered valuers to evaluate the assets of the CD.<br>• The liquidator is required to formulate liquidation estate as per Section 36, wherein the movable/ immovable assets owned by the CD are included; whereas, the assets owned by third parties, held as security or assets being personal assets of shareholders or any subsidiary, are excluded. The Liquidator is required to obtain the relinquishment from the secured financial creditors, if any.<br>• Thereafter the liquidator is required to sell the assets of the CD and distribute the monies to its stakeholders as per the waterfall mechanism provided under Section 53.<br>• The Liquidator has the power to reject a claim as he can adjudicate the claim. |
| **CREDITORS** | • The Code broadly defines three classes of Creditors; (i) Financial Creditors, (ii) Operational Creditors and (iii) Other Creditors, who submit their claims after the CIRP is initiated against the Corporate Debtor<br>• The Financial Creditors constitute the CoC and get a right to vote on several decisions relating to CD, including | • The classification of creditors remain same however, there is no role of CoC under liquidation.<br>• Secured creditor under Section 52 has the option to either relinquish their security or retain the same. If the secured asset of such creditor is not sufficient to repay its debt then such unpaid debt of secured |

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| | approval of resolution plan.<br>• Operational Creditors are not allowed to become members of CoC, (except in cases where there is no financial creditor) and do not have any voting rights. However, they have limited rights such as attending meeting of CoC and receiving copy of the Resolution Plan (as per the decision of Supreme Court in **Vijay Kumar Jain case**, supra).<br>• Other Creditors (not part of 'Operational Creditor' or 'Financial Creditor') fall in this category. | creditor will be paid as per the waterfall [refer Section 53 (1)(e)]. |
| **COMMITTEE OF CREDITORS v. STAKEHOLDERS' CONSULTATION COMMITTEE** | • On various subjects, the RP has to take the approval of the CoC before taking a decision.<br>• The CoC has been given very wide powers in the name of Commercial wisdom under the CIRP Process. The Adjudicating Authority cannot overturn a decision taken by CoC in by exercising its commercial wisdom.<br>• Once a Resolution Plan has been approved by CoC, the adjudicating authority is required to verify if the same is compliant of the provisions of the code.[31]<br>• The CoC may accept a resolution plan which offers lesser amount than the liquidation value of the assets of CD.[32] | • The Stakeholders' Consultation Committee's (SCC) constitution depends on the nature of break up of the type of claims received by the Liquidator.<br>• The SCC can advise the Liquidator by a vote of atleast 66% of the members. The Liquidator is not bound by the advise of the SCC. |
| **RELATED PARTIES** | • If the financial creditor is a related party of the CD then he cannot become a member of CoC.<br>• Related parties neither have the right to vote nor have the right to attend the CoC meetings (except suspended board of directors). Hence, they play no role in approving a resolution plan. | • Section 53 provided for the waterfall mechanism on the basis of which payments are to be made to the Creditors. Section 53(d) keeps all the unsecured financial creditors at par and does not differentiate between the financial creditors who are a related or not. |

[31] K. Sashidhar v. Indian Overseas Bank and Ors: 2019 12 SCC 150
[32] Maharasthra Seamless Limited vs. Padmanabhan Venkatesh & Ors: 2020 SCC OnLine SC 67

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| | • Ineligible to propose a resolution plan. | |
| **PROPOSED RESOLUTION APPLICANT v. BIDDER/ AUCTION PARTICIPANT** | • The PRA's submit their EOI pursuant to receipt of notice from the RP inviting EOI.<br>• The RP makes a list of all the eligible PRA's and submits the same before CoC.<br>• After considering the objection and submissions of the CoC, the RP then shares the Information Memorandum and Evaluation Matrix with the PRA's further inviting Resolution Plans from them.<br>• Thereafter, the RP places compliant resolution plans received from PRA's before the CoC.<br>• If any Resolution Plan is approved by the CoC and Adjudicating authority, the same is required to be implemented. | • The Liquidator has the right to sell the assets of the Corporate Debtor through public auction or private sale; as per the Regulations. |
| **WORKMEN AND EMPLOYEES** | • The dues of workmen and employees are treated as operational debt under CIRP | • In liquidation, dues of workmen are paid in priority to the dues of employees [Section 53]. |

# 05 COMMITTEE OF CREDITORS: ROLE AND COMMERCIAL WISDOM

In 2016, the law of insolvency and bankruptcy, a legal regime that had been long forgotten, was unified and codified in the form of the Insolvency and Bankruptcy Code, 2016 ('Code'). The first set of provisions of the Code came into effect from 05.08.2016. Majority of the Part I (*Preliminary*) and II (*Insolvency Resolution And Liquidation For Corporate Persons*) of the Code had come into effect by 15.12.2016.

As per the Code, the Parliament had devised a new method for empowering the financial and other creditors of a company, to seek resolution of a company by engaging independent professional to take charge of the company from the board of directors, when the company had defaulted in paying a debt for an amount over INR 1,00,000/- (Rupees One Lakh Only)[33]. All the creditors of such a company were created into an organism and that has been referred to as Committee of Creditors ('CoC')[34] of the company.

## I. ROLE OF THE COC

The CoC has been enabled under the Code, like the board of directors, to take the decisions in respect of the Corporate Debtor, during the currency of the corporate insolvency resolution process ('CIRP'). As a part of this enabling system, the Adjudicating Authority while commencing the process of CIRP for a company, appoints a resolution professional, who co-ordinates and executes all the decision making during the CIRP and thereby conducts the CIRP of the company. In respect of numerous aspects, the Resolution Professional is bound to take the prior approval of the CoC, as per Section 28 of the Code.

Taking a leave from the earlier regimes of Corporate Debt Restructuring and Strategic Debt Restructuring, as prescribed by the Reserve Bank of India (RBI), the Code also vests the supreme authority to take decisions in respect of the Corporate Debtor in the CoC.

One such crucial aspect in this power, lies the right of the CoC to consider and then approve a resolution plan with respect to a company (as per Sections 30 and 31 of the Code). This approval is subject to the final approval of the resolution plan by the concerned Adjudicating Authority (Section 31 of the Code. Over the period of three years of the Code having been in effect, the Adjudicating Authority, then the National Company Law Appellate Tribunal ('Appellate Tribunal') and the Hon'ble Apex Court of India have time and again given weightage to *commercial wisdom of CoC*, to finalise the next course of action of the Corporate Debtor and thereby, bring resolution to the Corporate Debtor.

[33] The pecuniary value has been modified vide Notification dated 24.03.2020, and now the minimum amount of debt has been set at INR 1,00,00,000/- (Rupees One Crore Only).
[34] The CoC is a modified version of the Joint Lender's Forum (as was constituted in pursuance of the circulars issued by the Reserve Bank of India).

## II. CHECKS AND BALANCES ON THE POWER

The Code under Section 30(4), obliges the CoC to assess the viability and feasibility of the Resolution Plan. In respect of the same, the Code prescribes for the manner in which the Resolution Plan will be evaluated (described in the Evaluation Matrix). On the basis of the score of the different resolution applicants, the CoC if approves a resolution plan by a vote of not less than seventy-five sixty-six per cent; then the same is required to be placed before the Learned Adjudicating Authority (under Section 31).

The Learned Adjudicating Authority is required to satisfy itself whether the approved resolution plan meets the following requirements [as provided in Section 30(2) of the Code] and provides for means for its effective implementation:

a. provides 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;
b. provides 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 under section 53;
c. provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
d. the implementation and supervision of the resolution plan;
e. does not contravene any of the provisions of the law for the time being in force;
f. conforms to such other requirements as may be specified by the Board.

The Resolution Professional in the earlier part of CIRP submits a report on the compliance of Section 30(2) of the Code before the CoC [as per Section 30(2) of the Code]. Once the Adjudicating Authority approves the Resolution Plan, the same binds the corporate debtor, its 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.

## III. JUDICIAL PRONOUNCEMENTS ON 'COMMERCIAL WISDOM' OF THE COC

While, the scope of enquiry to be made by the Adjudicating Authority has been prescribed in the Code; the scope for challenging the approval of resolution plan before the Appellate Authority has also been enumerated under Section 61 (3) of the Code. While exercising their power under the Code, the Adjudicating Authority and the Appellate Tribunal have on numerous occasions been tempted to adjudicate the extent of interference that may be permitted in such cases.

(a) In ***K. Sashidhar v. Indian Overseas Bank and Ors.***[35], the Hon'ble Supreme Court conclusively held that the legislature, while enacting the Code, has consciously ensured that no ground is available to question the 'commercial wisdom' of the individual financial creditors or the collective decision of the CoC before the

[35] 2019 12 SCC 150

Adjudicating Authority, in approving or rejecting a resolution plan and such commercial considerations are outside the scope of judicial review.

The Supreme Court further held that the amendment made to Section 30 (4) of the Code in June, 2018 [which introduced the requirement for the CoC to consider the feasibility and viability of a resolution plan before approval] was a mere restatement of the factors that the CoC was required to consider in any event, whilst considering a resolution plan.

(b) This judgment has been followed in numerous cases by the Adjudicating Authorities and the Appellate Tribunal. Thereafter, the Hon'ble Supreme Court reaffirmed this view in ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors.***[36]**,** holding that, it is clear that the scope of judicial review while approving resolution plans was required to be within the four corners of:

i. Adjudicating Authority: Section 30(2) of the Code;

ii. Appellate Tribunal: Section 32 read with Section 61(3) of the Code;

and which in no circumstance could trespass upon a business decision of the majority of the CoC. The Apex Court further observed that the Learned Adjudicating Authority cannot interfere on merits with the commercial decision taken by the CoC, the limited judicial review available is to see that the CoC has taken into account the following factors:

i. that the Corporate Debtor needs to continue as a going concern during the insolvency resolution process;

ii. that it needs to maximise the value of the assets of the Corporate Debtor; and

iii. that the interests of all stakeholders including operational creditors has been taken care of.

## IV. CONCLUSION: QUESTIONS FOR CONSIDERATION

Thus, if the Adjudicating Authority or the Appellate Tribunal finds, in a given set of facts, that the aforesaid parameters have not been considered or have been breached; then it has also the power to reject the Resolution Plan or send it back to the CoC, if the time permits.

However, the question then arises is whether the said power is unfettered or like every other power required to be balances with necessary checks and balances. These have been considered in some cases by the Adjudicating Authority, the Appellate Tribunal and the Hon'ble Supreme Court and shall be brain stormed about in our next release.

[36] 2019 SCC OnLine SC 1478

# 06 HOMEBUYERS: THE AMENDMENTS TO IBC

The real estate sector in India is one of the sacred industries as the ownership of immoveable property is seen as an essential and an important investment of income. But, the last two decades have witnessed numerous builders having defaulted in their obligations to deliver the flats timely and hence, there was a surge in such home buyers in seeking remedies under Consumer Protection Act, 1986 and under the specialized law of Real Estate (Regulation and Development) Act, 2016.

Thereafter, when the Insolvency and Bankruptcy Code, 2016 ('**IBC**') was promulgated, numerous home buyers sought to invoke the same due to the nature of definition of 'financial debt' and 'default'[37] provided under the IBC originally, and filed applications under Section 7 of the IBC.

### RELIEF FOR HOMEBUYERS UNDER IBC: PRIOR TO AMENDMENT OF SECTION 5(8)

As initially the homebuyers were not specifically included under the definition of 'financial creditor', there was some chaos with respect to their position under IBC. The clarity on the position of law came with the order of the Hon'ble National Company Law Appellate Tribunal ('**Appellate Tribunal**') in the case of ***Nikhil Mehta and Sons (HUF) v. AMR Infratsructure***[38] wherein it was held that amounts raised by developers under assured return schemes had the "commercial effect of a borrowing", which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head of "financial costs". As a result of this, it was conclusively decided that such allottees were held to be "financial creditors" within the meaning of Section 5(7) of the IBC and hence, were eligible to apply for commencement of the process of CIRP for a corporate debtor.

Thereafter, this issue was also dealt with by the Hon'ble Supreme Court of India ('**Apex Court**') in the case of ***Chitra Sharma v. Union of India***[39], whereby it upheld the right of the home buyers and appointed a representative of the home buyers; to participate in meetings of the Committee of Creditors of Jaypee Infratech Ltd. A similar direction was also passed by the Hon'ble Apex Court in the case of ***Bikram Chatterji v.***

[37] Section 3(12) provides as follows:
"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.
Section 3(11) provides as follows:
"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.
[38] Final Order dated 21.07.2017 reported at 2017 SCC OnLine NCLAT 377; also available at http://ibbi.gov.in/webadmin/pdf/order/2017/Jun/21stJuly2017_in_the_matter_of_Nikhil_Mehta_and_Sons_Vs_AMR_Infrastructure_Ltd_Company_Appeal_AT_Insolvency_No_07_of_2017.pdf
[39] Judgment dated 11.09.2017 reported 2018 18 SCC 575;

***Union of India***[40]**,** qua another group of builders namely the Amrapali group; substantially on the same lines as the order passed in the case of ***Chitra Sharma (supra)***.

### AMENDMENTS TO DEFINITION OF FINANCIAL DEBT UNDER SECTION 5(8) OF THE CODE

In view of the aforementioned judgments passed by Appellate Authority and Supreme Court, an amendment was necessitated to give clarity regarding the provision of 'financial debt'and the status of homebuyers under IBC.

The Insolvency Law Committee ('**Committee**') was constituted by the Ministry of Corporate Affairs with the purpose of suggesting modifications required to the IBC which also considered the issue of homebuyers inter alia discussing whether the amounts advanced by them fall under the definition of financial debt.

The Insolvency Law Committee then submitted its report on 26.03.2017, suggesting that amendments be made in the Code seeking to clarify, as a matter of law, that allottees of real estate projects are financial creditors.[41]

Thereafter, accepting the recommendations of the Committee, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 ('**Ordinance**') was promulgated on 06.06.2018. By virtue of Clause 3(ii) of the Ordinance, Section 5(8)(f) which provides that:

> *"(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–……*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;……."*

was amended and the following Explanation was incorporated:

> *"Explanation.- For the purpose0073 of this sub-clause-*

[40] Order dated 10.05.2018 reported at 2018 17 SCC 691;

[41] The Committee after reviewing numerous financial terms of agreements between home buyers and builders and the manner of utilisation of the disbursements made by home buyers to the builders, observed it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. The Committee deliberated that the amounts so raised are used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. It was also noted that the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. The Committee noted that the definition of financial debt as provided under Section 5(8)(f) of the IBC was wide enough to include amounts paid by allottees/ home buyers.
The Committee finally recommended including of an explanation to the said definition with a view to clarify that homebuyers are to be treated as a financial creditor under the IBC. Though, certain members of the Committee, namely Shri Shardul Shroff, Shri Sudarshan Sen and Shri B. Sriram, differed on this issue.
The Report is available at http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf

*(i) 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; and*

*(ii) the expressions, "'allottees" and "real estate projects" shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (6 of 2016);"*

Simultaneously an amendment was carried out to the CIRP Regulations on 03.07.2018 which came into effect from 04.07.2018, by making a separate category for the homebuyers (in respect of submission of claims to the resolution professional) as 'Creditors In A Class' and prescribing Form FA for submission of their claims.[42] The amendment further provided that representation of the claims of such 'Creditors In A Class' be made by an appointed Insolvency Resolution Professional, who shall act as their authorized representative and shall alone represent them in the meetings of CoC.

The amendment incorporated by the Ordinance finally received the approval of the Parliament and thereafter, the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018[43] was passed on 17.08.2018.

### CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF AMENDMENT TO SECTION 5(8)(F)

After the inclusion of homebuyers under the definition of financial creditors, a downside of the same was observed as even single homebuyers filed petitions before NCLT threatening the builders to either settle with them providing their refund or let their Company go under CIRP. Facing such rampant use of the provisions of IBC and the threat being caused by homebuyers, the builders approached the Hon'ble Supreme Court.

The constitutional validity of amendment whereby as described above, the Explanation to Section 5(8)(f) was incorporated; was challenged before the Hon'ble Apex Court. The Hon'ble Apex Court in the case of ***Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.***[44] upheld the validity of the clarification that 'Homebuyers' were 'financial creditors' observing that delay in completion of flats/ apartments had become a common phenomenon and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/ apartments. The Hon'ble Apex Court while discussing the Report of the Committee also distinguished the reasons for dissent of few of the members of the Committee. The Hon'ble Apex Court rendered an observation that the home buyers should have representation in the

[42] Regulation 8A was introduced.
[43] The Amendment was passed by the Lok Sabha on 31.07 2018 and then the Rajya Sabha on 10.08.2018. The Amendment received the assent of the President of India on 17.08.2018. The Amendment was published in the official gazette on 17.08.2018. The Amendment is available at https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf
[44] Judgment dated 09.08.2019 reported at (2019) 8 SCC 416

Committee of Creditors; though not that each of the home buyers should have direct position in the Committee of Creditors.[45]

This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code Under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be house.

The Hon'ble Apex Court also construed the amendment to Section 5(8)(f) of the IBC and introduced a caveat to the inclusion of such homebuyers in the expression of 'financial creditor'. It was observed that speculative investors and those not genuinely interested in purchasing the flat/ apartment could be excluded from the definition of 'financial creditor'.

### CURTAILMENT OF THE EARLIER RELIEF TO HOMEBUYERS

Numerous real estate companies as a result of this inclusion were faced with spiraling litigations against their company by all categories of home buyers and even the Adjudicating Authorities started clubbing the challenges against each of the builder corporate debtors; to take a holistic view of the exposure to the said corporate debtors.

In respect of certain corporate debtors, it was seen that the home buyers holding a majority led to a lot of indecisiveness; as the creditors in such cases were not able to consider resolution conclusively and there was lack of unanimity indecision making. This led to the executive to consider making further amendments to the Code, for efficacious enforcement of the Code.

#### 1. *Minimum Threshold qua Homebuyers*

On 12.12.2019, the Hon'ble Finance Minister introduced the Insolvency and Bankruptcy (Second Amendment) Bill, 2019 in Lok Sabha which prescribed that in case of home buyer, an application under Section 7 could be only filed jointly by not less than:

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[45] Following are the relevant observations in the judgment of **Pioneer Urban Land and Infrastructure Limited & Anr. (Supra)**

"Shri Shardul Shroff, a member of the said committee, went on to state if the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors. Our report ought to be altered to the extent that home buyers financiers should be treated as unsecured financial creditors and they should be representatives of the home buyers**. There should be no direct right given to home buyers to be on the CoC."**

"Even the dissent of Shri Shroff recognises that in the case of home buyers, who have taken loans from banks, such banks ought to be on the Committee of Creditors. If such banks ought to be on the Committee of Creditors as representatives of the home buyers, and they are to vote only in accordance with the home buyer's instructions, why should the home buyer himself then not be on the Committee of Creditors, and why should it make any difference as to whether he has borrowed money from banks in order to pay instalments under the agreement for sale or whether he does it from his own finances? These matters have not been addressed by the dissenting view which in principle, as we have seen, supports home buyers who have taken loans as against home buyers who have used their own finances."

"Perhaps the real reason for Shri Shroff's dissent is the fact that unsecured, as opposed to secured, financial creditors are being put on the Committee of Creditors. If there is otherwise good reason as to why this particular group of unsecured creditors, like deposit holders, should be part of the Committee of Creditors, it is difficult to appreciate how such a group can be excluded."

a) 10 percent of the total number of such creditors in the same class, or

b) 100 of such creditors in the same class.

The said bill was referred to the Parliamentary Standing Committee on 23.12.2019 for further review. However, meanwhile, the President promulgated the Insolvency and Bankruptcy (Amendment) Ordinance 2019 exercising powers under Article 123 of the Constitution on 28.12.2019 and thereby, Section 7 was modified (as proposed in the Said Bill). The amendment gave a period of 30 days for parties to comply with the said modification (and if not complied, then the application would be deemed to have been withdrawn before its admission).

As a result of this overhaul, the Learned Adjudicating Authorities had passed directions to the corporate debtors (in pending applications under Section 7 of the Code) to upload the details of their various projects and the home buyers in such cases; on their official websites. In case of *Manish Kumar* v. *Union of India*,[46] a challenge was raised to the validity of this amendment before the Hon'ble Apex Court. The Hon'ble Apex Court vide Order dated 13.01.2020 granted protection and directed that '*status-quo, as of today, with respect to the pending applications, shall be maintained in the meanwhile*'. This matter is pending adjudication before the Hon'ble Apex Court.

As a note for completion in narration, the amendment carried out by the Ordinance was thereafter passed by the Parliament. When the session resumed, the Report of Parliamentary Committee was received and put before both houses. This bill was passed by the Lok Sabha and Rajya Sabha on 06.03.2020 and 12.03.2020, respectively. The Bill received the assent of the President on 13.03.2020 and was notified in the official gazette on the same date as Insolvency and Bankruptcy (Amendment) Act, 2020.

### 2. *Minimum Threshold qua Default*

The Central Government exercising powers under Section 4 of the Code passed a notification on 24.03.2020, raising the minimum amount of default from INR 1,00,000/- (Rupees One Lakh Only) to INR 1,00,00,000/- (Rupees One Crore Only).

## CONCLUSION

As a direct result of these amendments, what is clear is that an effort is being made at reducing the scope of initiation of CIRP at the hands of home buyers. However, whether these amendments will stand the test of constitutionality will be deciphered only in the time to come. Intriguingly, many of the Corporate Debtor – builders had to face the music of the Code.

[46] Writ Petition (C.) No. 26 of 2020

# 07 JURISPRUDENCE SURROUNDING HOMEBUYERS

The Insolvency and Bankruptcy Code, 2016 ('**Code**') has been amended from time to time in respect of the home buyers. As elucidated in our earlier excerpt, the challenge to the constitutionality of the latest amendment to Section 7 of the Code, remains pending. However, in the meanwhile, the Learned National Company Law Tribunal and the Hon'ble National Company Law Appellate Tribunal have been posed with various intriguing questions and have applied various unprecedented theories. We have discussed two of these case studies and their consequences on the legal jurisprudence applicable to home buyers and them being labeled as a 'financial creditor'.

## THE RAHEJAS

Sooner, than later, came the time to apply the tests suggested by the Hon'ble Apex Court in the ***Pioneer Urbans Judgment (supra)*** before the Hon'ble National Company Law Tribunal, New Delhi (Hon'ble Tribunal) in ***Shilpa Jain and Anr. v. Raheja Developers Ltd.***

In the said petition, the allottees of Raheja Developers Limited had filed an application under Section 7 of the Code alleging the default in timely delivery of the possession of the flat. The objection raised by Corporate Debtor were that there was no default on their part as the Occupation certificate has been received back in 2016 and the delay was only on the part of government authorities as the water and sewage lines were not provided. It was claimed that they had already offered possession to the Applicants.

The Learned NCLT relied on the provisions of the Flat Buyer agreement and held that the Corporate Debtor had failed in delivering the possession of the flat (which was due upon completion of 36 months, which got over on 30.08.2015). It also held that the notice of possession issued by the Corporate Debtor could not be regarded as delivery of possession since the Corporate Debtor sought a further period of four weeks to handover the possession and thereafter, another period of three weeks for registration. It was held that the Corporate Debtor had failed to show compliance of the conditions provided in the NOC dated 11.11.2016. The reliance on the ***Pioneer Urbans judgment (supra)*** by the Corporate Debtor was held to be baseless and directions were passed to initiate CIRP vide Order dated 20.08.2019. [47]

The promoter/shareholder of the Corporate Debtor filed an appeal before the Hon'ble Appellate Tribunal in ***Navin Raheja vs Shilpa Jain***[48] alleging fraudulent and malicious initiation of proceedings.

[47] Company Petition (IB) No. 1321 (PB)/2018, Also available at: https://nclt.gov.in/sites/default/files/Interim-order-pdf/Shilpa%20jain%20anr%20Vs.%20Raheja%20Developers%20Ltd%20_2.pdf.
[48] 2020 SCC OnLine NCLAT 46, Also available: https://nclat.nic.in/Useradmin/upload/5887186925e281fd62be13.pdf.

The Hon'ble Appellate Tribunal vide Order dated 27.08.2019 issued notice to the respondents; but directed the IRP not to issue public notice if not yet issued or not to constitute CoC if not yet constituted. During the pendency of the petition, several intervention applications were being filed by other allottees, being the creditors of the Corporate Debtor. In light of these circumstances, the Hon'ble Appellate Tribunal vide Order dated 03.09.2019, directed the IRP to issue public notice inviting claims in order to assess the total number of such claimants/ allottees. Meanwhile, as per the directions of the Hon'ble Appellate Tribunal, the suspended board of directors, officers and employees continue to function in respect of the affairs of the Corporate Debtor and in fact were directed ensure that the Corporate Debtor remains a going concern.

The Hon'ble Appellate Tribunal vide Final Order dated 22.01.2020, set aside the Order dated 22.08.2019 passed by the Learned NCLT (whereby directions were passed initiating CIRP against the Corporate Debtor). The Hon'ble Appellate Triunal relied on the Supreme Court judgment ***Pioneer Urban Land*** (supra) and made the following observation:

> *"It has come to our notice that in large number of cases, in the language of the Hon'ble Supreme Court, the allottees are speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. Such case of allottee is covered under Section 65 of the Code."*
>
> *"Delay in granting approval by the Competent Authority cannot be taken into consideration to hold that the 'Corporate Debtor' defaulted in delivering the possession. The Adjudicating Authority failed to appreciate the fact and also ignored the decision of the Hon'ble Supreme Court though rendered prior to the admission of the application which is binding on all the Court(s) and Tribunal(s)."*
>
> *"Taking into consideration the fact that many of the allottees are filing applications under Section 7 fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, the Hon'ble President of India has recently promulgated an Ordinance further making amendment in the 'Insolvency and Bankruptcy Code, 2016' by published in the Gazette of India extraordinary Part II-Section 1 dated 28th December, 2019 wherein an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent, of the total number of such creditors in the same class, whichever is less."*

As per our information derived from the public records, no appeal has been filed before the Hon'ble Apex Court to challenge the Final Order passed by the Hon'ble Appellate Authority.

However, the matter of Raheja Developers Limited definitely stands out as an example of a Corporate Debtor, where despite passing of an admission order, no CoC could be formed and the Corporate Debtor was run by the promoters itself and the admission order was set aside after a period of five (5) months. In fact the Hon'ble Appellate Tribunal was also not put to consider the question of offering possession without obtaining

the Occupation Certificate. The Hon'ble Apex Court has held that the receipt of the Occupancy Certificate is a condition precedent to offering possession to the allottees possession offered, in the absence of the Occupancy Certificate, does not amount to transfer of 'possession'.

This matter also brings to light a scenario where due to non-handing over of charge from the promoters to the Interim Resolution Professional; numerous actions which require immediate action by the CoC get postponed. For example, compliances with respect to appointment of valuers, undertaking of auditing of the books of the Corporate Debtor in respect of the preferential transactions, extortionate transactions, etc. The flip side to the argument remains that in a case where the admission order has been incorrectly passed, then the management of the Corporate Debtor ought not to be made to suffer and accordingly, interim orders to protect the same deserve to be passed.

## APPLICABILITY OF THEORY OF COMMERCIAL WISDOM TO HOME BUYERS: THE PARADOX (UMANG REALTECH)

This bring us to the theory of 'commercial wisdom' of the Committee of Creditors. This theory is based on the assumption that CoC had the requisite business expertise to evaluate a resolution plan and assess its viability feasibility. An interesting change in jurisprudence was observed in the judgment rendered by the Hon'ble Appellate Tribunal in the case of ***Flat buyers Association Winter Hills – Sector 77 Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP and Ors.***[49] In this case, the concept of 'commercial wisdom' came up in case of a corporate debtor where only homebuyers were the members of the CoC.

The matter reached for consideration before Learned NCLT when the allottees of Corporate Debtor i.e. Umang Realtech Private Limited filed an application under Section 7 titled as ***'Rachna Singh & Anr. vs Umang Realtech Private Limited'*** for initiation of CIRP process (arising out of failure to deliver possession of flat in the project 'Winter Hill- Sector 77, Gurgaon' ). Objections were raised by the Corprate Debtor that there was no willful default on its part and that it was entitled to extension of time under the force majeure clause. It was further contended that the Applicants have willfully defaulted in making timely payments of the installments

The Learned NCLT refused the accept the argument of the Corporate Debtor in respect of 'force majeure' (as the grace period of six months had already expired on June, 2016) and that yet there had been an inordinate delay of two and a half years. It was further observed that as the amount raised from an allottee under real estate project had the commercial effect of a borrowing, it was covered under the definition of 'financial debt' under the Code. It was held that the observations given by the Supreme Court in **Pioneer Urbans judgment** (supra) did not apply in the present case (as the Corporate Debtor had at no stage offered the possession of the said unit to the Applicants). Holding this view, the Learned NCLT Tribunal admitted the application of the allottees thereby initiating CIRP process against the Corporate Debtor vide Order dated 20.08.2019 and

[49] Company Appeal (AT) (Insolvency) No. 926 of 2019, Also available at https://nclat.nic.in/Useradmin/upload/18011332575e3d0b157e29a.pdf.

directed the applicants to deposit the initial amount of INR 2,00,000/- (Rupees Two Lakhs Only) for conducting the CIRP.[50]

An appeal was filed against the said order dated 20.08.2019. The issue that arose before the Hon'ble Appellate Tribunal was that although the Learned NCLT had ordered the financial creditors/ allottees to deposit the said amount; however, the same was insufficient to keep the Corporate Debtor a going concern. A promoter/ shareholder of the Corporate Debtor i.e. Uppal Housing Pvt. Ltd had filed an intervention application and proposed to act as lender (financial creditor) to ensure that resolution was achieved. During the CIRP, various allottees including the Applicants received the possession of their flats and the Intervenor was asked to give a time frame for completion of the other facilities.

Addressing these issues, the Hon'ble Appellate Tribunal observed as follows:

> *"8. The 'allottees' (Homebuyers) come within the meaning of 'Financial Creditors'. They do not have any expertise to assess 'viability' or 'feasibility' of a 'Corporate Debtor'. They don't have commercial wisdom like Financial Institutions/ Banks/ NBFCs. However, these allottees have been provided with voting rights for approval of the plan. Many of such cases came to our notice where the allottees are the sole Financial Creditors. However, it is not made clear as to how they can assess the viability and feasibility of the 'Resolution Plan' or commercial aspect/ functioning of the 'Corporate Debtor' in terms of the decision of the Hon'ble Supreme Court in in* ***"Innoventive Industries Limited v. ICICI Bank and Anr."***[51] *followed by* ***"Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors."***[52] *and* ***"Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.".***[53]***"***

The Hon'ble Appellate Tribunal further went onto hold that in case of a real estate corporate debtor, if an application is filed in respect of one project, the same cannot have any effect on the other projects. The Appellate Tribunal proceeded to hold that home buyers/ allottees of the other project cannot file their claims before the Interim Resolution Professional. It also held that '*Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority*'. Strangely, the following was observed by the Hon'ble Appellate Tribunal:

> *"21. …If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised."*

This judgment has also added another theory in the jurisprudence of insolvency law in respect of Corporate Debtors dealing in real estate developers, i.e. concept of **Reverse CIRP**. The Hon'ble Appellate Tribunal used

[50] Company Petition (IB) No. 1564 (PB)/2018; Also available at https://nclt.gov.in/sites/default/files/Interim-order-pdf/Rachna%20Singh%20%26%20Anr%20Vs.%20Ms.%20Umang%20Realtech%20Pvt%20Ltd%20_6.pdf.
[51] Judgment dated 31.08.2017, reported at 2018 1 SCC 407.
[52] Judgment dated 25.01.2019, reported at (2019) 4 SCC 17.
[53] Judgment dated 15.11.2019, reported at 2019 SCC OnLine SC 1478.

this case as an experiment "*as to whether during the Corporate Insolvency Resolution Process the resolution can reach finality without approval of the third party resolution plan*". In the Final Order it is recorded that the applicant before the Learned NCLT (and various other allottees) had already taken possession of their flats and sale deeds had been registered.

The Hon'ble Appellate Tribunal permitted the promoter of Corporate Debtor to disburse the amount 'from the outside' as a lender (and not as a promoter) required to complete the projects and provided for a time frame for the same as a part of the concept of 'Reverse CIRP'. Intriguingly, by considering the submissions of the intervenor and applicant, timelines have been fixed for completing the relevant project and the following direction has been passed in case the timelines are duly complied with:

> "*26. The 'Uppal Housing Pvt. Ltd.' – Intervenor (One of the Promoter) is directed to cooperate with the Interim Resolution Professional and disburse amount (apart from the amount already disbursed) from outside as Lender (financial creditor) not as Promoter to ensure that the project is completed with the time frame given by it...*
>
> *29. All these processes should be completed by 30th August, 2020. If it completed, the Corporate Insolvency Resolution Process be closed after intimating it to the Adjudicating Authority (National Company Law Tribunal). The resolution cost including fee of the Interim Resolution Professional will be borne by the Promoter. Only after getting the certificate of completion from the Interim Resolution Professional/ Resolution Professional and approval of the Adjudicating Authority (National Company Law Tribunal) unsold flats/ apartments etc. be handed over to the Promoter/ Uppal Housing Pvt. Ltd.*
>
> *30. ....Once the project is completed, the Interim Resolution Professional will mover application before the Adjudicating Authority (National Company Law Tribunal) with the report of completion and ask for disposal of application under Section 7, 'Rachna Singh' and 'Ajay Singh' (Allotees – Financial Creditors) having already occupied their flats.*
>
> *31. However, if the 'Promoter' fail to comply with the undertaking and fails to invest as financial creditor or do not cooperate with the Interim Resolution -34- Company Appeal (AT) (Insolvency) No. 926 of 2019 Professional/ Resolution Professional, the Adjudicating Authority (National Company Law Tribunal) will complete the Insolvency Resolution Process. The appeal stands disposed of with aforesaid observations and directions.*"

As per our information derived from the public records, no appeal has been filed before the Hon'ble Apex Court to challenge the Final Order passed by the Appellate Authority. However, this Final Order of the Hon'ble Appellate Tribunal is ingenious in its various aspects of observing that:

i Home Buyers do not have the requisite commercial wisdom.

ii CIRP could relate to only one project of the Corporate Debtor (and not all of its assets),

iii The promoter could be permitted to infuse further monies and complete the projects and if so completed within the time frame prescribed, the CIRP would be considered to have been achieved and IRP would move Learned NCLT for seeking disposal of the application under Section 7.

Furthermore, the striking part of this Final Order is its non-consideration of the applicability of Section 29A of the Code to the said case. The intervenor if was a shareholder and thus, prohibited from submitting a resolution plan under Section 29A and also to submit a scheme under Section 230 of the Companies Act, 2013; then whether he could be permitted to by this 'indirect devise' to retain and take back control of the company (despite CIRP having been commenced).

The other striking feature of this Final Order is non-reference to the Committee of Creditors. It appears in this case, the CoC was not formed/ had not taken control of the Corporate Debtor and operations were being run through the IRP.

## CONCLUSION

Like the Code, the concomitant of 'Home Buyers' and the jurisprudence around it has been ever evolving. The Tribunals have surprised us with their efforts at ensuring maximization of assets, by non-orthodox methods. Hence, validity of these surprises and experiments will have to be tested in future litigations (of appeal and/ or cases where they are cited as precedents).

# 08 REGULATION MAKING POWER OF IBBI: A CASE OF SUBORDINATE LEGISLATION OR INSUBORDINATION?

## PART A: CIRP REGULATIONS

The Insolvency and Bankruptcy Board of India (**"IBBI"**) was established on 01.10.2016 in terms with Section 188 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**). Under Section 240 (1) of the Code, the IBBI has been empowered to make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of the Code. From a bare reading of the said Section, it is apparent that:

**(a)** the Regulations made by IBBI are for the purposes of ensuring a smooth functioning and implementation of the provisions of the Code;

**(b)** such Regulations must be consistent with the Code.

In the present piece, we are discussing certain Regulations that have been promulgated by the IBBI; however, which are surrounded by corresponding ambiguity whether IBBI had the requisite power to promulgate the same.

### Introduction

The grounds on which a subordinate legislation can be challenged are no longer res integra. Such grounds have been enumerated by the Hon'ble Supreme Court of India in the matter of *State of T.N. & Anr. Vs. P. Krishnamurthy & Ors.*,[54] as hereunder:

**(a)** Lack of legislative competence to make the subordinate legislation;

**(b)** Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act;

**(c)** Violation of fundamental rights guaranteed under the Constitution of India;

**(d)** Violation of any provision of the Constitution of India;

**(e)** Repugnancy to the laws of the land, that is, any enactment; and

**(f)** Manifest arbitrariness/unreasonableness (to an extent where the court might hold that the legislature never intended to give authority to make such rules).

[54] State of T.N. & Anr. Vs. P. Krishnamurthy & Ors. reported at (2006) 4 SCC 517

Keeping the above principle tenets of law in mind, this piece proceeds to analyse different provisions of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 [**'CIRP Regulations'**].

### I. Regulation 12(2) of the CIRP Regulations.

Regulation 12(2) relates to the time period within which a creditor can submit its claim. When it was promulgated, it read as "*A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee*".

This provision came up for interpretation before the Hon'ble National Company Law Tribunal (**'NCLT'**) in the case of *Alchemist Asset Reconstruction Co. Ltd. v. Moser Baer India Limited.*[55] The NCLT vide its Order dated 31.01.2018 held as follows

> "*It is appropriate to mention that Public announcement of Corporate Insolvency Resolution Process is required to be made by the Insolvency Resolution Professional by incorporating the information indicated in section 15(1). It also includes that the public announcement shall contain the last date of submission of claims. There is no provision in the Parliamentary Statute i.e. Insolvency & Bankruptcy Code for extending the period beyond the last date for submission of claims. However, Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 vide regulation 12(2) has provided that a Creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement. According to the provisions of regulation 12(2) such claim can be till the approval of a resolution plan by the Committee. The filed aforesaid regulation comes in direct conflict with the provisions of Parliamentary Statute with the provision of section 15(1)(c) of the Insolvency & Bankruptcy Code. We do not think that by subordinate legislation the timeline provided by Insolvency & Bankruptcy Code could be eroded in such a manner as cause delay in the Corporate Insolvency Resolution Process. Therefore we are unable to persuade ourselves to issue directions to the Resolution Professional to entertain the claim made by the applicant. If such a course is to be adopted, then Resolution Professional has to invite fresh claims from rest of the world by inserting a new Public Notice so as to enable all other left out claimants to file their claim before Resolution Professional. It will cause considerable delay in the finalization of Corporate Insolvency Resolution Process.*"

It appears as a result of the above, the IBBI commenced the internal process of amending the provision and hence, the said issue was placed in the agenda for a meeting held on 15.03.2018;[56] though, the decision on the

[55] Company Petition (IB) No. 378 (PB)/ 2017
[56] Agenda is available at https://ibbi.gov.in/Agenda_04C_150318.pdf.

subject was deferred.[57] Eventually, an amendment was made in the Code to Section 240 and the following provision was incorporated with effect from 06.06.2018:

> *"(ja) the last date for submission of claims under clause (c) of sub-section (1) of section 15;"*

At the same time, Section 15(1)(c) of the Code was also amended by the same amended:

| Prior to Amendment | Post the Amendment |
|---|---|
| (c) the last date for submission of claims | (c) the last date for submission of claims, *as may be specified*; |

In pursuance of the above amendments to the Code, the following amendment was carried out in CIRP Regulations to Regulation 12(2) with effect from 04.07.2018:

| Prior to Amendment | Post the Amendment |
|---|---|
| A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, *till the approval of a resolution plan by the committee*. | A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, *on or before the ninetieth day of the insolvency commencement date*. |

Hence, the IBBI taking cue from the lack of legislative competence, took the necessary steps to enable it in this regard.

### II. Regulation 30A of 'CIRP Regulations'.

By way of Regulation 30A, the IBBI has prescribed the manner in which an Application, after having been admitted by the Adjudicating Authority, can be withdrawn purportedly in terms with Section 12A of the Code.

Initially, there was no provision in the Code which permitted for withdrawal of an Application filed under Section 7, 9 or 10 of the Code after the Application had been admitted. Thereafter, the Hon'ble Supreme Court [58], recommended amendment of the Code, to vest the competent authorities with the necessary inherent powers. This recommendation was thereafter also supported by the Insolvency Committee.[59]

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[57] Decision is available at https://ibbi.gov.in/Decision_04C_150318.pdf

[58] Judgment dated 13.11.2017 in Uttara Foods And Feeds Private Limited Vs. Mona Pharmachem [Civil Appeal No. 18520 Of 2017]

[59] The Insolvency Law Committee in its report published in March, 2018 recommended as under:

> "On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously

In furtherance of such recommendation, Section 12A[60] was inserted in the Code with effect from 06.06.2018.[61] Section 12A enables the applicant to withdraw an application with the approval of 90% voting share of the Committee of Creditors (**COC**) (implying to be applicable only after the same has been admitted by the Adjudicating Authority and the CoC having been constituted), in such manner as may be prescribed. Thus, from a bare reading of Section 12A it is clear that the same can come into play only after the constitution of the CoC (therefore, after the admission of the application)[as elucidated in the Report of the Insolvency Law Committee]. In respect of the same, Regulation 30A was incorporated in the CIRP Regulations. However, after the Hon'ble Supreme Court passed the judgment in the case of *Swiss Ribbons (P.) Ltd. Vs. Union of India*[62] Regulation 30A was further modified to enable filing an application under Section 12A even before constitution of the CoC. A comparative analysis of the amendments is provided hereinbelow:

<table>
<tr><th>Amendment dated 03.07.2018</th><th colspan="2">Amendment dated 25.07.2019</th></tr>
<tr><td rowspan="2">"(1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A."</td><td colspan="2">"(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority -</td></tr>
<tr><td>(a) before the constitution of the committee, by the applicant through the interim resolution professional;</td><td>(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:<br>Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation"</td></tr>
</table>

agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent."

60 "**12A. Withdrawal of application admitted under section 7, 9 or 10. –**
The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

61 This amendment was inserted vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 dated 17.08.2018

62 Swiss Ribbons (P.) Ltd. & Anr. Vs. Union of India 7 Ors. in Writ Petition (Civil) No.99 of 2018, in which case the Hon'ble Court held as under:

"52. … A question arises as to what is to happen before a committee of creditors is constituted (as per the timelines that are specified, a committee of creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the committee of creditors is not yet constituted, a party can approach the NCLT directly, which Tribunal may, in exercise of its inherent powers Under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case"

The earlier Regulation 30A also came under the scanner before the Hon'ble Supreme Court in the matter of *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal and Ors.*[63] observed as under:

> *"The only reason why the withdrawal was not allowed, though agreed to by the Corporate Debtor as well as the Financial Creditor -State Bank of India and the Operational Creditor-Respondent No.3, is because Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest.*
>
> *According to us, this Regulation has to be read along with the main provision Section 12A which contains no such stipulation.*
>
> *Accordingly, this stipulation can only be construed as directory depending on the facts of each case."*

Furthermore, various other requirements have been prescribed under Regulation 30A for being able to file an application under Section 12A, including in respect of the format to be adopted (Form FA). It further requires as a pre-condition to be (i) accompanied by a Bank Guarantee of the amount of the CIRP Cost, (ii) making application through Resolution Professional and (iii) submission of application within three days of receipt thereof or within three days of receipt of the approval from the CoC, as the case may be. Section 12A is relevant to note ends with the expression "*in such manner as may be specified*". Though like various other provisions, there are no corresponding enabling provisions in this regard in Section 240 of the Code.

Hence, these requirements would have to be tested in light of the decision rendered by a Three Judge Bench of the Hon'ble Supreme Court of India in the matter of *Kunj Behari Lal Butail & Ors. Vs. State of H.P. & Ors.*[64] wherein it was held that "*a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.*"

Thus, whether the present Regulation 30A of the CIRP Regulations passes the test of permissible delegated legislation in light of the express language of Section 12A of the Code (requiring vote of the CoC) remains to be seen.[65]

### III. Regulation 36A of the CIRP Regulations

Section 25(2)(h) of the Code empowers a Resolution Professional to invite prospective Resolution Applicants to submit Resolution Plans subject to the criteria which may be laid down by the Resolution Professional. Furthermore, under Section 240(2)(sa) of the Code, the IBBI has been empowered to make Regulations in respect of "*other conditions under clause (h) of sub-section (2) of section 25*".

[63] Judgment dated 14.12.2018 in Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal - Special Leave to Appeal (C) No(s). 31557/2018
[64] Kunj Behari Lal Butail & Ors. vs. State of H.P. & Ors. reported at (2000) 3 SCC 40
[65] Our earlier piece on different modes available for an exit for a promoter, discusses the said provision in detail.

In furtherance of Section 25(2)(h) read with Section 240(2)(sa), Regulation 36A[66] was incorporated vide Notification bearing No. 2017-18/GN/REG024 (with effect from 06.02.2018). This Regulation 36A was thereafter substituted by the IBBI vide Notification bearing number 2017-18/GN/REG031 dated 03.07.2018 (with effect from 04.07.2018).[67] The said Regulation 36A requires the Resolution Professional to publish an "Invitation for Expression of Interest" in Form - G prior to the calling of a resolution plan under Section 25(2)(h).

[66] 36A. Invitation of Resolution Plans
(1) The resolution professional shall issue an invitation , including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.
(2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.
(3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be.
(4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process-
(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub regulation (1);
(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).
(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule: (a) on the website, if any, of the corporate debtor; and (b) on the website, if any, designated by the Board for the purpose.

[67] Comparative analysis of the Regulation 36A as amended from time to time is provided hereinbelow:

| **Prior to Amendment 03.07.2018** | **Post amendment 03.07.2018** |
|---|---|
| 36A. Invitation of Resolution Plans | 36A. Invitation for expression of interest. |
| (1) The resolution professional shall issue an invitation , including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans. | (1) The resolution professional shall publish brief particulars of the invitation for expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested and eligible prospective resolution applicants to submit resolution plans. |
| (5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule: (a) on the website, if any, of the corporate debtor; and (b) on the website, if any, designated by the Board for the purpose | 2) The resolution professional shall publish Form G- (i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations; (ii) on the website, if any, of the corporate debtor; (iii) on the website, if any, designated by the Board for the purpose; and (iv) in any other manner as may be decided by the committee. |
| (2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans. | **-N.A-** |
| (3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be. | **-N.A-** |

| | |
|---|---|
| (4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process- (a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1); (b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2). | **-N.A-** |
| **-N.A-** | (3) The Form G in the Schedule shall - (a) state where the detailed invitation for expression of interest can be downloaded or obtained from, as the case may be; and (b) provide the last date for submission of expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation. |
| **-N.A-** | (4) The detailed invitation referred to in sub-regulation (3) shall- (a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of section 25; (b) state the ineligibility norms under section 29A to the extent applicable for prospective resolution applicants; (c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for expression of interest; and (d) not require payment of any fee or any non-refundable deposit for submission of expression of interest. |
| **-N.A-** | (5) A prospective resolution applicant, who meet the requirements of the invitation for expression of interest, may submit expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3). |
| **-N.A-** | (6) The expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected. |
| **-N.A-** | (7) An expression of interest shall be unconditional and be accompanied by- (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25; (b) relevant records in evidence of meeting the criteria under clause (a); (c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable; (d) relevant information and records to enable an assessment of ineligibility under clause (c); (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process; (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and (g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29. |
| **-N.A-** | (8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with- (a) the provisions of clause (h) of sub-section (2) of section 25; (b) the applicable provisions of section 29A, and (c) other requirements, as specified in the invitation for expression of interest. |

Regulation 36A came under the scanner in the matter of *State Bank of India Vs. Su Kam Power Systems Limited,*[68] wherein the Hon'ble NCLT vide Order dated 05.09.2018 opined as extracted hereinbelow:

> *"We are further of the view that Section 25(2)(h) added on 23.11.2017 by way of amendment does not contemplate floating of an expression of interest. It is beyond our understanding as to how the IBBI has taken upon itself the task of framing Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 using the expression 'invitation of expression of interest' along with Form G. Such an assumption of power would be beyond the competence of IBBI as the source of power to frame regulations under IBC is drawn from Section 240 of IBC, 2016. Section 240(1 in categorical terms provides that the IBBI may by notification make regulation consistent with the Insolvency and Bankruptcy Code, and further subject to the Rules framed by the Government tinder Section 239 of IBC, 2016 for carrying out the provisions of the Code ... By use of the words 'expression of interest the speed is retarded and time is wasted. In the present case on 04.06.2018 expression of interest was invited and last date for expressing interest to submit the resolution plan was 18.06.2018 without in fact inviting any resolution plan. Such a course is negation of the salient features highlighted by Supreme Court that the speed is essence of the IBC 2016, therefore, we have no other option except to declare Regulation 36A as ultra vires of Section 240 of IBC, 2016..."*

The Hon'ble NCLT further directed the IBBI to frame Regulations according to its competence and the source of power as given to it by the Code. It is not clear whether the earlier Regulation 36A was before the Hon'ble NCLT or as modified with effect from 04.07.2018. However, the reasoning given in the said order, applies to the modified Regulation 36A of the CIRP Regulations.

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| **-N.A-** | (9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under subregulation (8). |
| **-N.A-** | (10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest. |
| **-N.A-** | (11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list. |
| **-N.A-** | (12) On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee. |

[68] Order dated 05.09.2018 passed in Company Petition (IB) No. 540 (PB) of 2017 titled as State Bank of India Vs. Su Kam Power Systems Limited

Interestingly, thereafter, the IBBI approached the Hon'ble High Court of Delhi challenging the Order dated 05.09.2018.[69] The Hon'ble High Court vide its Order dated 26.09.2018 refused to interfere with the Order dated 05.09.2018; however, also held that the same would not come in the way of the matters where 'Expression of Interest' had already been issued. However, the said order seems to have been assailed in appeal before the Hon'ble High Court of Delhi and the Learned Division Bench vide order dated 05.10.2018[70] stayed the operation of the Order dated 05.09.2018 passed by the Learned NCLT to the extent it declares Regulation 36A of the CIRP Regulations as *ultra vires*.

Both the writ petition and the appeal are pending and *sub-judice* before the Hon'ble High Court.

In addition to the above provisions, there are certain other aspects of the CIRP Regulations which require attention and the same will be discussed in the subsequent piece.

[69] Insolvency and Bankruptcy Board of India V. State Bank of India & Ors. in Writ Petition (C.) No. 10189 of 2019
[70] Insolvency and Bankruptcy Board of India v.State Bank of India & Ors. In LPA 566 of 2018

# 09 REGULATION MAKING POWER OF IBBI: A CASE OF SUBORDINATE LEGISLATION OR INSUBORDINATION?

## PART B: LIQUIDATION PROCESS REGULATIONS

In the previous piece, we have analysed different provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 [**'CIRP Regulations'**]. In the present piece, we are proceeding to analyse different provisions of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 [**'Liquidation Process Regulations'**].

### I. Regulation 44 of the Liquidation Process Regulations

The Code, unlike the process of corporate insolvency resolution, does not define any time period within which a liquidator is required to conduct and/ or conclude the process of liquidation. Section 196(1)(t)[71] read with Section 240(2)(zv)[72] of the Code empower the IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under the Code, including mechanism for time bound disposal of the assets of the Corporate Debtor, as the case may be.

We hereby are discussing the exercise of power by IBBI whereby the time limit for completion of the process of liquidation (though not prescribed in the Code) has been prescribed under the Liquidation Regulations (which has also been modified once)[73]:

| As Originally Existing | As Amended with effect from 25.07.2019 |
|---|---|
| (1) The liquidator shall liquidate the corporate debtor within a period of two years. | (1) The liquidator shall liquidate the corporate debtor within a period of *one year* from the liquidation commencement date, *notwithstanding pendency of any application for avoidance of transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof:*<br>*Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may* |

[71] "(t). make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor"
[72] "the intervals in which the periodic study, research and audit of the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities under clause (r), and mechanism for disposal of assets under clause (t), of sub-section (1) of section 196;"
[73] Vide Notification No. IBBI/2019-20/GN/REG047 dated 25.07.2019 (with effect from 25.07.2019)

| | |
|---|---|
| | *take an additional period up to ninety days.* |
| (2) If the liquidator fails to liquidate the corporate debtor within two years, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation. | (2) If the liquidator fails to liquidate the corporate debtor within *one year*, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation. |

Thus, applying the basic tenets of administrative law in respect of delegated legislation, what comes into question is the power of the IBBI to stipulate for such time period. It is of relevance to consider that the said provision does not provide for a timeline which is final as the Adjudicating Authority have been vested with the power to extend the same in appropriate cases.

As a sequel to the above discussion, what comes into force is the latest amendment to the Liquidation Process Regulations in respect of incorporation of Regulation 47A (*Exclusion of period of lockdown*), which has been discussed in the later part of this piece.

### II. Regulation 2B of the Liquidation Regulations

Regulation 2B of the Liquidation Regulations inserted with effect from 25.07.2019[74] provides for a time limit within which a scheme of compromise or arrangement under Section 230 of the Companies Act, 2013 ('**Act**') may be undertaken and completed during the liquidation process.

At the very outset, it is pertinent to note that no such time limitations are prescribed for under Section 230 of the Companies Act, 2013. Thus, the notion of the availability of the remedy under Section 230 of the Act in matters of liquidation under the Code as well, was held by the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") vide its Final Order dated 29.01.2019 in the matter of *S.C. Sekaran Vs. Amit Gupta*.[75] In the said matter, the Hon'ble NCLAT held as under:

> "*In view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. Ltd.' and 'Swiss Ribbons Pvt. Ltd.', we direct the 'Liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the I&B Code. The Liquidator will access*

[74] Vide Notification No. IBBI / 2019-20/GN/REG 047 dated 25.07.2019 (with effect from 25.07.2019)
[75] S.C. Sekaran Vs. Amit Gupta in Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018

*information under Section 33 and will consolidate the claim under Section 38 and after verification of claim in terms of Section 39 will either admit or reject the claim, as required under Section 40.* ***Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law.***"

Thus, the Code does not provide for execution/ entering into of any Compromise or Arrangement between the parties as envisaged under Section 230 of the Act. Furthermore, the IBBI is not empowered under the Code or the Act to frame regulations in regard to matters of Section 230 of the Act. In such a situation, it is reasonable to conclude that a scheme of compromise or arrangement does not fall within the matters related to insolvency and bankruptcy and hence, the IBBI does not have the power to prescribe for regulations on a matter not covered under the Code.

However, the IBBI has further proceeded insert a Proviso to Regulation 2B(1)[76] in the Liquidation Regulations. The Amended Regulation 2B reads as follows:

"*2B. Compromise or arrangement.*

*(1) Where a compromise or arrangement is proposed under section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of section 33.*

*Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.*

*(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.*

*(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230:*

*Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.*"

[76] Vide Notification No. IBBI/2019-20/GN/REG/ 053 dated 06.01.2020

In pursuance of the above, a fresh disability has been introduced restraining any person ineligible under 29A (*Persons not eligible to be Resolution Applicant*) of the Code from participating in any manner in a scheme of compromise or arrangement as well. Before going into the reasons for the said amendment, it is relevant to consider that when Regulation 2B was introduced a corresponding amendment was done by the same notification to the definition of 'Liquidation Cost' as defined under Regulation 2(ea) of the Liquidation Regulations. A proviso was added to the said definition which stipulates that the costs incurred by the liquidator in relation to compromise or arrangement under Section 230 of the Act shall not form a part of the Liquidation Costs.

Hence, a clear demarcation was created between the cost incurred towards any compromise and arrangement undertaken during the currency of the Liquidation Process and the costs incurred towards all other activities involved in the Liquidation Process. Hence, it can be construed that a distinction was drawn between the Liquidation Process and a scheme of compromise or arrangement proposed under Section 230 of the Act after the passing of Liquidation Order by the Adjudicating Authority under Section 33 of the Code. As a result, the Liquidator is now (in light of the judgment of Hon'ble NCLAT in *S.C.Sekaran case*) required to make attempts at compromise under Section 230 of the Act and thereafter, proceed to liquidate the Corporate Debtor as per Regulation 32 of the Liquidation Regulations.

At this juncture, it is also relevant to consider the proviso to Section 35(1)(f)[77] of the Code, it is evident that any person who is ineligible to be a Resolution Applicant as contemplated under Section 29A of the Code would also be ineligible to buy the immovable and movable properties or actionable claims of the Corporate Debtor in Liquidation. This proviso was incorporated in the Code with effect from 23.11.2017.

It is arguable that this provision is intended to apply only to the process of liquidation under the Code which is distinguishable from the process of compromise under the Act. It is also of import to consider that while the Hon'ble NCLAT had directed in a manner to oblige liquidators to first endeavour to achieve a settlement under Section 230 of the Act; however, there is no prohibition on entering into a compromise even after the process of liquidation is commenced.

Having said that, what is due for emphasis is that the remedy of compromise is a statutory remedy arising out of the Act and the process of liquidation is provided for under the Code. This is so because in case of a compromise or arrangement as contemplated under Section 230 of the Act, there is no sale of the assets of the Corporate Debtor as contemplated under Section 35(1)(f) of the Code. What is achieved is a "compromise" or an "arrangement" between the company, its creditors and members / stakeholders with a

[77] "35(1)(f). subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:
**PROVIDED** that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

view to keep the company afloat. This is akin to the remedy available under Section 12A of the Code which allow the promoters and equity shareholders of the Corporate Debtor to regain control over the management of the Corporate Debtor (even though such persons may be ineligible to be Resolution Applicants in terms of Section 29A of the Code).

Therefore, from all of the above, the intent of the legislature could be construed to mean that in case there is a mutual settlement between the parties (as contemplated under Section 230 of the Act or Section 12A of the Code), then there is no requirement for imposition of a disability akin to Section 29A of the Code. This view though has its basis in the Final Order dated 24.10.2018 passed in *Jindal Steel and Power Limited* v. *Arun Kumar Jagatramka and Anr.*,[78] relevant extract whereof is reproduced below:

> "*11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below.....*
>
> *12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'.*"

This Final Order has been appealed against before the Hon'ble Supreme Court and the matter is pending adjudication.[79] The outcome of the abovementioned proceedings would have a direct bearing on the legitimacy of the said amendments as well. Thus, the Hon'ble Apex Court would have to opine whether a finding of the said nature would have the effect of virtually amending Section 230 of the Act and providing disqualifications therein (when none are prescribed in the Act itself thereby clarifying the legislative intent). Though, the question pertaining to power of IBBI to prescribe such time period and disqualifications, in the absence of them being provided for or enabled to do so under the Code; will have to be assessed in appropriate proceedings.

[78] Company Appeal (AT) No. 221 of 2018
[79] Arun Kumar Jagatramka v. Gujarat NRE Coke Ltd. (In Liquidation) - Civil Appeal No. 5316 of 2019

### III. Regulation 37(8) of the Liquidation Process Regulations

As a consideration of the above discussion, another provision that requires some analysis is Regulation 37(8) of the Liquidation Regulations [which was inserted with effect from 06.01.2020[80]], which is extracted hereinbelow for ease of reference:

> *"37. Realization of security interest by secured creditor .....*
>
> *(8) A secured creditor shall not sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor."*

This provision becomes applicable when a Secured Creditor in light of Section 52(4) of the Code is seeking to exercise its rights. The relevant provision is reproduced hereinbelow for ease of reference:

> *"52. Secured creditor in liquidation proceedings .....*
>
> *(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it....."*

This would entail that the Secured Creditor right to proceed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') or their right to enter into a compromise or arrangement under Section 230 of the Act.

Thus, room for doubt is created in the said provision that is whether the said amendment proceeds to the extent of affecting the rights of secured creditor under the independent statutes like the Act and the SARFAESI Act. It is stated at the cost of repetition that IBBI has not been empowered with providing for regulations/ guidelines under such independent Acts. It is of import to consider that the Proviso to Section 35(1)(f) of the Code provides for the power of the liquidator and in fact carves out the exception in respect of the right of a Secured Creditor under Section 52 of the Code to sell or transfer an asset which is subject to security interest of such creditor.

### IV. Regulation 40C of CIRP Regulations and Regulation 47A of the Liquidation Regulations

Recently, in view of the COVID-19 Pandemic[81], the following amendments have been carried out by IBBI in respect of exclusion of the time period of the lockdown:

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[80] Vide Notification No. IBBI/2019-20/GN/REG053, dated 06.01.2020 (with effect from 06.01.2020).

[81] COVID-19 was declared as a pandemic by World Health Organisation on 11.03.2020. Thereafter COVID-19 was declared as a Notified Disaster by the Government of India vide its Notification dated 14.03.2020. In pursuance of the same, the Government of India vide its Notification dated 24.03.2020 declared a complete lockdown in the country for 21 days with effect from

a) Regulation 40C[82] of the CIRP Regulations inserted with effect from 29.03.2020:

*"40C. Special provision relating to time-line.*

*Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process."*

b) Regulation 47A[83] of the Liquidation Process Regulations with effect from 17.04.2020:

*"47A. Exclusion of period of lockdown.*

*Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process."*

At the outset it is relevant to state that no amendment has been carried out by the Parliament in the Limitation Act, 1963 or the Code and no ordinance has also been passed in this regard, with respect to exclusion of period of the lockdown, yet. However, one order has been passed by the Hon'ble Supreme Court in this regard.[84] The Hon'ble NCLAT has passed Order dated 30.03.2020 in Suo Moto Company Appeal (AT) Insolvency 01 of 2020, wherein the following directions have been passed on the subject of exclusion of the period of lockdown,:

*"Having regard to the hardships being faced by various stakeholders as also the legal fraternity, which go beyond filing of Appeals/ cases, which has already been taken care of by the Hon'ble Apex Court by extending the period of limitation with effect from 15th March, 2020 till further order/s in terms of order dated 23rd March, 2020 in Suo Motu Writ Petition (Civil) No(s).03/2020, inasmuch as certain steps required to be taken by various Authorities under Insolvency and Bankruptcy Code, 2016 or to comply with various provisions and to adhere to the prescribed timelines for taking the 'Resolution Process' to its logical conclusion in order to obviate and mitigate such hardships, this Appellate Tribunal in exercise of powers conferred by Rule 11 of National Company Law Appellate Tribunal Rules, 2016 r/w the decision of this Appellate Tribunal rendered in*

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25.03.2020 and subsequent extensions have been issued thereafter vide Notification dated 14.04.2020, 01.05.2020 and 17.05.2020 thereby declaring lockdown till 31.05.2020.

[82] Vide Notifications No. IBBI/2020-21/GN/REG059 Dated 20.04.2020 with effect from 29.03.2020

[83] Vide Notification No. IBBI/2020-21/GN/REG060 dated 20.04.2020 with effect from 17.04.2020

[84] The Hon'ble Supreme Court of India in its order dated 23.03.2020 in Suo Moto Writ Petition No. 03/2020 passed the following order:

> "To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings. We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities."

*"**Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. in Company Appeal (AT) (Insolvency) No.185 of 2018**" decided on 8th May, 2018 do hereby order as follows: -*

(1) ***That the period of lockdown ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the Corporate Debtor may be located, shall be excluded for the purpose of counting of the period for 'Resolution Process under Section 12 of the Insolvency and Bankruptcy Code, 2016**, in all cases where 'Corporate Insolvency Resolution Process' has been initiated and pending before any Bench of the National Company Law Tribunal or in Appeal before this Appellate Tribunal.*

(2) *It is further ordered that any interim order/ stay order passed by this Appellate Tribunal in anyone or the other Appeal under Insolvency and Bankruptcy Code, 2016 shall continue till next date of hearing, which may be notified later.....*"

In respect of the above order, it is relevant to note that Section 12 of the Code provides for strict timelines to be followed within which the process of corporate insolvency resolution is required to be concluded. However, this provision of timeline has been held to be directory and not mandatory by the Hon'ble Supreme Court.[85]

At this stage it is noteworthy that Section 240 of the Code does not provide for such powers to the IBBI to exclude any such period from the CIRP process or from the Liquidation process.

Thus, when the time period has been prescribed by the Parliament in the statute and in the absence of any enabling provision (under Section 240 of the Code), the questions arises that with respect to the CIRP Regulations, whether the IBBI could have been sought to exclude the period of lockdown by way of a subordinate legislation. This is more pressing, especially considering the fact that the Hon'ble NCLAT has already passed directions to the same effect and prior in time and hence, what was the need for passing such an amendment to the CIRP Regulations.

On the count of Liquidation Regulations, as explained above, the Code does not prescribe any timelines. Regulation 44 of the Code also enables the Adjudicating Authority to in appropriate circumstances allow extension of time, if liquidation is not completed within a period of one year. Without going into the legitimacy of this regulation, the question that begs for consideration is in respect of the power of the IBBI to promulgate such an exclusion of time period.

### Analysis of Power of Making Regulations

Section 196(1)(t) of the Code provides as follows:

[85] Judgment dated 15.11.2019 passed by the Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.

*"196. Powers and functions of Board. -*

*(1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely: - .....*

*(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and....."*

In furtherance of the same and in pursuance of Section 240 of the Code, the IBBI promulgated Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018 [**'Mechanism for Issuing Regulations'**] on 22.10.2018, the following aspects whereof are worth noting:

**(a)** The Mechanism for Issuing Regulations were to come into immediate effect (from the date of publication in the Official Gazette), unless otherwise provided therein.

**(b)** They do not apply in respect of organisational matters pertaining to IBBI.

**(c)** Regulation 3 states that IBBI may made regulations in compliance of Regulation 4 and 5. Regulation 4 provides for Public Consultation, having the following characteristics:

**(i)** IBBI is required to publish the draft of proposed regulations and invite public comments.

**(ii)** A period of 21 days shall be granted for public to submit comments.

**(iii)** The comments with the analysis of the IBBI, is required to be uploaded on the website.

**(iv)** The general rule for enforcement of the regulations was required to be 30 days from the date of notification, unless otherwise specified.

**(v)** The Mechanism for Issuing Regulations further requires the IBBI to seek necessary advice. If required and to conduct economic analysis of the proposed draft regulations.

**(d)** Furthermore, the Mechanism for Issuing Regulations specifies that these rules shall apply to any proposed amendment.

**(e)** It also envisages an exemption from following the procedure under Regulation 4 and 5, in case of an urgency, in which case the approval of the Governing Body is required to be taken.

**(f)** However, the said regulations also provide a provision for review of the promulgated regulations every three years.

Thus, from a bare perusal of the above, it is clear that IBBI as a body has itself prescribed for the necessary checks and balances to ensure that transparency is retained the system and comment of all stakeholders are taken into account before issuing a regulation. As a natural corollary, if the exemption procedure was being adopted, then the same ought to have been recorded in the Amendment Regulations.

In respect of the amendments discussed in the present piece, the public comments have not been invited in any of the case, except the amendments dated 25.07.2019 (CIRP Regulations) and 06.01.2020 (Liquidation Process Regulations). Accordingly, it may have to be assumed that the Governing Board's approval would have been taken in this regard. However, the said factum has not found any place in any of the afore-referred amendment notifications.

What is intriguing is that the portal of IBBI presently does have six discussion papers[86] that were issued by IBBI calling for public comments. Though, the corresponding public comments, received by the IBBI, have not been uploaded as it is; however, they have uploaded an analysis of the comments received.

Having said that, it is important to state for the sake of completeness that the IBBI has devised a fresh mechanism by it's circular dated 04.05.2020;[87] whereby it has enabled any stakeholder to provide it's comments on any of the existing regulations.

### Conclusion

Upon seeking the conspectus of data provided hereinabove, the IBBI has without a doubt performed as a active regulator and thereby, ensuring constant updating and modifications of the regulations issued by them, in light of the orders passed by the Adjudicating Authority and the Appellate Tribunal from time to time. However, there do appear to be a few situations where the IBBI have exercised jurisdiction which does not appear to have been provided for in the parent statute (whereby the IBBI was constituted).

Hence, the outcome of various pending proceedings (including the one initiated by IBBI itself pending before the Hon'ble High Court of Delhi) shall lend guidance in this regard. Also, this piece does not contain an

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[86] (1) Discussion Paper on Bankruptcy Process for Personal Guarantors to Corporate Debtors along with Draft Regulations dated 26.04.2019
This resulted in the issuance of The IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.
(2) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 dated 07.05.2019.
This resulted in issuance of the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019 on 25.07.2019.
(3) Discussion paper on Insolvency Professional Agencies & Information Utilities Regulations dated 08.05.2019
(4) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 dated 12.05.2019
This resulted in issuance of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2019 and the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations
(5) Discussion paper on Amendments to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 dated 03.11.2019
This resulted in the issuance of the IBBI (Liquidation Process) (Amendment) Regulations, 2020 on 06.01.2020

[87] Press Release dated 04.05.2020 issued by the IBBI inviting comments from public on the Regulations notified under the Code.

> "5. Keeping in view the above, the IBBI invites comments from public, including the stakeholders and the regulated, on the regulations already notified under the Code. The comments received between 13th April, 2020 and 31st December, 2020 shall be processed together and following the due process, regulations will be modified to the extent considered necessary. It will be the endeavor of the IBBI to notify modified regulations by 31st March, 2020 and bring them into force on 1st April, 2021.
> 6. It is clarified that this is in addition to the extant approach of inviting public comments on draft regulations before notifying them."

exhaustive list of provisions which require attention (in terms of permissibility of passing the same within the scope of delegated legislation) and are merely a compilation of few of the provisions that we have been confronted, with in our matters from time to time.

# 10 MODES OF EXIT FOR A PROMOTER FROM CORPORATE INSOLVENCY RESOLUTION PROCESS

## PART A: STATUTORY EVOLUTION

The Insolvency and Bankruptcy Code, 2016 (**'Code'**) was brought with the intent to shift the reins of a company, from the promoters of the company to the creditors of the company, with the assistance of an independent profession (the insolvency resolution professional). There has been a continuous tussle since the promulgation of the Code between the promoters and the entire ecosystem created by the Code, to regain the control of the company.

The said ecosystem has hence over a period of time provided for mechanisms within the Code, to enable the promoters to settle the debts of the creditor or pay them off and thereby, regain the control of the company. The present segment discusses the evolution of the statutory rights of the promoters to seek termination of the corporate insolvency resolution process (**'CIRP'**).

### Phase I: Pre-Section 12A of the Code

Rule 8[88] of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (**'AA Rules'**) acknowledges the liberty of a party filing an application [whether under Section 7, 9 or 10 of the Code] to withdraw the same. This right was though statutorily provided only for the period prior to the admission of such an application.

As the jurisprudence under the Code evolved, the question arose in numerous situations about the availability of remedy in case the promoters of a corporate debtor settled with (i) the applicant (that commenced the proceedings under the Code) or (ii) the majority of the members of the Committee of Creditors (**'CoC'**) or (iii) all of the CoC. To buttress the said submission, reliance was sought to be placed on the inherent powers prescribed under the rules governing the Hon'ble Adjudicating Authority (**'NCLT'**) [Rule 11[89] of the National Company Law Tribunal Rules, 2013 (**'NCLT Rules'**)] and even the Hon'ble Appellate Tribunal (**'NCLAT'**) [Rule 11[90] of the National Company Law Appellate Tribunal Rules, 2013 (**'NCLAT Rules'**)] for accepting such settlement, after the admission order was passed.

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[88] "8. Withdrawal of application

The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."

[89] "11. Inherent Powers.-

Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

[90] "11. Inherent powers.-

In *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Pvt Ltd.*,[91] vide Final Order dated 26.07.2017, the Hon'ble Apex Court upheld the finding of Hon'ble NCLAT in the order dated 13.07.2017 that the NCLAT could not exercise its inherent power under Rule 11 of the NCLAT Rules (as the same were not specifically adopted by the Code). It was held conclusively that the NCLAT could not accept a settlement and conclude the corporate insolvency resolution process ('**CIRP**') proceedings despite there being a settlement. In this situation, however, the Hon'ble Apex Court exercised its inherent power under Article 142 of the Constitution of India, and accepted the settlement executed between the parties.

However, this led to various parties approaching the Hon'ble Supreme Court seeking acceptance of the settlement and conclusive closure of the CIRP proceedings.[92] Hence, in the Final Order dated 13.11.2017 passed in *Uttara Foods and Feeds Private Limited v. Mona Pharmachem*, the Hon'ble Supreme Court advised for the need for an amendment in the statutory scheme applicable to the proceedings under the Code in this regard.

### Phase II: Promulgation of Section 12A of the Code

This led to the passing of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 dated 06.06.2018,[93] which led to the incorporation of the following provision in the Code:

> *"12A Withdrawal of application admitted under section 7, 9 or 10.*
>
> *The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety percent voting share of the CoC, in such manner as may be specified."*

Thereafter, the Insolvency and Bankruptcy Board of India ('**IBBI**') by exercising its power under Section 240 of the Code, amended the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Regulations), 2016 ('**CIRP Regulations**') and inserted Regulation 30A[94] vide the Insolvency and Bankruptcy

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Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal."

[91] Civil Appeal No. 9279 of 2017

[92] Final Order dated 01.08.2017 passed by Hon'ble Supreme Court in Civil Appeal No. 9286 of 2017 in the case of Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited and Final Order dated 13.11.2017 passed by Hon'ble Supreme Court in Civil Appeal No. 18520 of 2017 in the case of Uttara Foods and Feeds Private Limited v. Mona Pharmachem.

[93] This ordinance was approved by the Parliament of India vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 dated 17.08.2018.

[94] "**30A. Withdrawal of application.**

(1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018 dated 03.07.2018.

**Phase III: Inter-play of Regulation 30A (incorporated on 03.07.2018) and Section 12A**

In the intervening period, the question arose pertaining to the relative limited scope of Regulation 30A of the CIRP Regulations as compared to Section 12A of the Code before the Hon'ble Supreme Court. Vide Final Order dated 13.11.2018, the Hon'ble NCLAT in the case of *Francis John Kattukaran v. The Federal Bank Ltd. & Anr.* held that Regulation 30A (as it then was) could not over-ride the provision of Section 12A of the Code and held that:[95]

> *"... However, Regulation 30A cannot over-ride the substantive provisions of Section 12A according to which the 'applicant' can only move application for withdrawal of the application before the Adjudicating Authority and not by the 'resolution professional'.*
>
> *Therefore, if the application for withdrawal is filed by the applicant in the present case, in such case the Adjudicating Authority will decide the case in accordance with the provisions of Section 12A..."*

Meanwhile, the Hon'ble NCLT, Chennai in respect of Brilliant Alloys Private Limited, vide its Order dated 01.11.2018[96] refused to accept a settlement between the promoter, the financial creditor and the operational creditor (applicant) as the Invitation for Expression of Interest had been published (in light of the express language of Regulation 30A of the CIRP Regulations). However, this view of the Hon'ble NCLT was set aside by the Hon'ble Apex Court vide its Final Order dated 14.12.2018 in the case of *Brilliant Alloys Private Limited v. S. Rajgopal*[97]. The finding of the Hon'ble Apex Court is reproduced for ease of reference:

> *"The only reason why the withdrawal was not allowed, though agreed to by the Corporate Debtor as well as the Financial Creditor -State Bank of India and the Operational Creditor-Respondent No.3, is because Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest.*
>
> *According to us, this Regulation has to be read along with the main provision Section 12A which contains no such stipulation.*
>
> *Accordingly, this stipulation can only be construed as directory depending on the facts of each case.*

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(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

[95] In Company Appeal (AT) (Insolvency) No. 242 of 2018; Vide Final Order dated 11.12.2018, the fact of withdrawal having been accepted by the Hon'ble NCLT [vide its Order dated 29.11.2018 in MA 1421/ 2018 in CP (IB) No. 1309/ MB/ 2017 in the case of Federal Bank Limited v. Trio Fab (I.) Pvt. Ltd.] was duly recorded by the Hon'ble NCLAT.

[96] M.A. No. 536 of 2018 in CP 582/IB/2017 in the case of Vimalchandrunwal v. Brilliant Alloys Pvt. Ltd. and Ors.

[97] Reported at 2018 SCC Online SC 3154

*Accordingly, we allow the Settlement that has been entered into and annul the proceedings..."*

### Constitutional validity of Section 12A

Thereafter, the question of validity of Section 12A of the Code came up before the Hon'ble Supreme Court in the case of *Swiss Ribbons v. Union of India*.[98] In the Judgment dated 25.01.2019 in the *Swiss Ribbons case*, the Hon'ble Apex Court while upholding the constitutional validity of Section 12A, explained following scenarios for withdrawal/settlement once an application in the Code has been admitted:

| Before Constitution of COC | After Constitution of COC |
|---|---|
| Parties can approach the NCLT for settlement, which in exercise of its inherent power under Rule 11 of the NCLT Rules[99] may allow or disallow the withdrawal/settlement. | The CoC has to be consulted before the parties are allowed to settle and settlement can be allowed only if it has received ninety per cent voting approval from the CoC. |

### Phase III: Further amendment of Regulation 30A (with effect from 25.07.2019)

Thus, in light of the judgments of the Hon'ble Supreme Court, the IBBI further amended Regulation 30A[100] vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second

[98] Reported at (2019) 4 SCC 17.

[99] We are in the present piece not discussing the validity of the view in the Swiss Ribbons case, relating to availability of inherent powers under NCLT Rules. We have had an occasion to write on the said conundrum in our piece published on 10.05.2019; which is available at https://lexisnexisindia.wordpress.com/2019/05/10/practices-and-perils-of-insolvency-and-bankruptcy-code-2016/.

[100] "**30A. Withdrawal of application.**

(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be: Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of

Amendment) Regulations, 2019 dated 25.07.2019. The following are the relevant considerations for the amendments to Regulation 30A of the CIRP Regulations.

| | **Amendment dated 03.07.2018** | **Amendment dated 25.07.2019** |
|---|---|---|
| Coming Into Effect | 1(2) On the date of its publication in the Official Gazette and shall apply to corporate insolvency resolution processes commencing on or after the said date. | 1(2) On the date of its publication in the Official Gazette. |
| 30A(1) | Submitted to the *Interim Resolution Professional Or The Resolution Professional*, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A. | (a) **before the constitution of the committee**, by the applicant *through the interim resolution professional*;<br>(b) **after the constitution of the committee**, by the applicant *through the interim resolution professional or the resolution professional*, as the case may be:<br>Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation. |

such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code."

## Conclusion

The statutory modifications of Regulation 30A of the CIRP Regulations has been analysed in a tabular form.[101] Since, 25.07.2019 there has been no further amendment to the statutory scheme applicable to processes of CIRP. In light of the above scheme, we shall analyse the various methods that have been accepted by the different authorities as permissible means of concluding CIRP, in our subsequent article.

[101] Comparative analysis of the amendments of Regulation 30A of the CIRP Regulations.

<table>
<tr><th>Amendment dated 03.07.2018</th><th colspan="4">Amendment dated 25.07.2019</th></tr>
<tr><td rowspan="2">(1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.</td><td colspan="4">(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority -</td></tr>
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<tr><td>N/A</td><td colspan="3">(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.</td><td>N/A</td></tr>
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<tr><td>N/A</td><td>N/A</td><td colspan="3">(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.</td></tr>
</table>

# 11 MODES OF EXIT FOR A PROMOTER FROM CORPORATE INSOLVENCY RESOLUTION PROCESS

## PART B: CASE STUDIES

Taking cue from the earlier article, in this piece the authors have sought to collate different cases where the promoters have been permitted to be have the corporate insolvency resolution process ('**CIRP**') of the corporate debtor, to be terminated. The analysis has been drawn as per the various stages of CIRP.

### Stage 1: Pre-Admission of Insolvency Application

Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('**AA Rules**') acknowledges the liberty of a party to withdraw it's application before the admission whether under Section 7 (financial creditor), 9 (operational creditor) or 10 (corporate debtor itself) of the Code.

### Stage 2: Post-Admission of Insolvency Application; but before constitution of CoC

In the matters of *Gupta Power Infrastructure Ltd v. Pan India Pvt Ltd.* (Application under Section 9 before NCLT, Mumbai),[102] the CoC had not been constituted, but a settlement between parties was arrived at post admission of the respective applications. In light of the same, the Hon'ble NCLT exercised its power under Rule 11 of the NCLT Rules and allowed the withdrawal of the main application.

In the case of *Arjun Bulchandani v. Rite Developers Private Limited*,[103] the petitioner had settled with the promoter of the Corporate Debtor after the admission of the petition under Section 7. An application under Section 60(5) of the Code read with Rule 11 was filed; as in the meanwhile the IRP had invited claims, but had not received any claims from any financial creditors and no CoC was constituted. Relying on the judgment in Swiss Ribbons case and Section 12A read with Regulation 38 of the CIRP Regulations, the Hon'ble NCLT allowed application to be withdrawn vide Order dated 06.05.2019.

In the matters of *Arjun Puri v. Kunal Prasad & Ors.* (Application under Section 7 before NCLT, Principal Bench, Delhi),[104] *Bajrang Choudhary v. Religare Finvest Ltd. & Anr.* (Application under Section 7 in respect of Bharat Road Network Limited before NCLT, Kolkata),[105] *Girish Agarwal v. M/s Lavie Signature Panel Pvt. Ltd.* (Application under Section 9 in respect of Nikunj Woods Private Limited)[106] and *Ashoke Ghosh Vs. Ranjan Kumar Sovasaria & Anr.* (Application under Section 9 in respect of Apeejay Tea Limited before NCLT, Kolkata)[107]

[102] Final Order dated 10.06.2019 passed by Hon'ble NCLT in C.P. (IB)-1619/(MB)/2017
[103] Final Order dated 06.05.2019 passed by Hon'ble NCLT, Mumbai in MA 1448/2019 in C.P.(IB)-4025/MB/2018
[104] Final Order dated 31.01.2019 passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 52 of 2019.
[105] Final Order dated 06.09.2019 passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 889 of 2019
[106] Final Order dated 13.09.2019 passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 847 of 2019
[107] Final Order dated 11.11.2019 passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1139 of 2019

, the CoC had not been constituted, but a settlement between parties was arrived at post admission of the respective applications. The Hon'ble NCLAT in exercise of inherent powers under Rule 11 of NCLAT Rules had in these matters set aside orders of admission of Applications under Section 7 and 9 of the Code and allowed withdrawal of applications post admission.

### Stage 3A: Post-Admission of Insolvency Application; after constitution of CoC

In the case of *A.K. Corporation v. Anupam Extraction Ltd.*,[108] earlier an application bearing number M.A. No. 2746 of 2019 was filed under Section 60(5) of the Code read with Rule 11 of the NCLT Rules seeking to withdraw the main petition. This application was dismissed vide Order dated 14.08.2019 passed by Hon'ble NCLT, Mumbai as the same was not maintainable having been filed once the CoC was constituted. Thereafter, M.A. No. 3080 of 2019 was filed after Form FA was filed by the Financial Creditor giving consent for the withdrawal of the main petition. Accordingly, the petition was dismissed as withdrawn.

In a similar situation before the Hon'ble NCLAT in the case of *K.C. Sanjeev Shareholder of Solar Offset Printers v. Mr. Easwara Pillai Kesavan Nair IRP of of Solar Offset Printers Pvt. Ltd.*,[109] the CoC was constituted by the IRP despite having received the settlement documents. Thereafter, during the pendency of the appeal, the promoter had entered into settlement with few of the other members of the CoC and was in the process of settling with others. Yet, the Hon'ble NCLAT remanded the matter to the Hon'ble NCLT and granted liberty to the operational creditor to follow the procedure under Section 12A of the Code.

### Stage 3B: Post-Admission of Insolvency Application; after constitution of CoC and after approval of the Resolution Plan

In an interesting case before the Hon'ble NCLT, Mumbai, the Resolution Plan by a resolution applicant was duly approved by 100% of the CoC [constituted in pursuance of admission of an application under Section 10 of the Code in respect of *SBM Paper Mills Ltd.*]. Furthermore, in the meanwhile, the One Time Settlement offered by the promoter of the corporate debtor was approved by the financial creditor (the sole member of the CoC). In pursuance of the same, while the application for approval of Resolution Plan was being considered by the Hon'ble NCLT, an application under Section 12A of the Code was filed by the promoter. In the meanwhile, the successful resolution applicant also sought to withdraw its approved resolution plan. The Hon'ble NCLT, Mumbai in the peculiar facts, vide its Order dated 20.12.2018 allowed the withdrawal of the main petition (after taking note of the affidavit filed by financial creditor conveying their consent for the withdrawal).[110]

A perusal of the proceedings subsequent to the passing of the Order dated 20.12.2018, shows that the promoter defaulted in abiding by the terms of the One Time Settlement. Thus, the Hon'ble NCLT vide Order dated 11.03.2019 passed strictures by issuing show cause notice to the promoter why government facilities be

[108] Order dated 04.11.2019 passed by Hon'ble NCLT in C.P. (IB)-2781/(MB)/2018 [in M.A. No. 3080 of 2019]
[109] Final Order dated 28.02.2020 in Company Appeal (AT) (Insolvency) No. 1427 of 2019
[110] M.A. 1396/2018, M.A. 827/2018, M.A. 1142/2018 and M.A. 828/2018 in C.P. (IB)-1362(MB)/2017

not suspended (including driving license, not permitting travel outside India, surrendering passport, etc.). In fact, vide Order dated 20.08.2019, the Hon'ble NCLT recorded a prima facie case for commencement of criminal investigation in respect of the promoters. It appears that the matter is yet to receive finality.

In a similar case, the Hon'ble NCLAT vide order dated 06.09.2019,[111] had granted liberty to the promoters of the corporate debtor to file an application under Section 12A and directed the CoC (if such an application was filed), to consider whether the proposal submitted by the promoters is better than the approved resolution plan.

**Other Considerations for closure of CIRP: Intriguing Case Studies on the Jurisprudence**

**a)** *Right to file application under Section 12A of the Code*

In respect of scope of jurisdiction of the Hon'ble NCLT while considering an application under Section 12A, the Hon'ble NCLAT in its Final Order dated 28.02.2019[112] observed that if the CoC approved the application under Section 12A by a majority of 90%, then the "*Adjudicating Authority cannot further look into the matter and is required to allow the applicant to withdraw the application, if it is filed*". Furthermore, the Hon'ble Supreme Court in its Judgment dated 22.01.2020 in the case of *Maharasthra Seamless Limited Vs. Padmanabhan Venkatesh & Ors.*[113] held that an application under Section 12A of the Code cannot be filed by a resolution applicant and can only be filed by the applicant who had invoked the provision of Section 7, 9 and 10 of the Code, as the case maybe.

**b)** *Maintainability of application under Rule 11 (on the date of admitting the application)*

In another intriguing case of admission of an application under Section 7 of the Code in respect of Vipul Limited, settlement (dated 15.01.2020) was entered into on the date immediately succeeding the passing of the order of admission (14.01.2020) in *Shambhu Agencies Pvt. Ltd v. Vipul Limited*.[114] A joint application under Rule 11 of the NCLT Rules was filed by the Corporate Debtor and the Financial Creditor seeking permission to withdraw the main petition and seeking termination of the CIRP proceedings. The application was heard; however, in the meanwhile an appeal was filed before the Hon'ble NCLAT seeking termination of the CIRP proceedings. There was a difference in opinion between the members of the Hon'ble NCLT bench on the reasoning; however both members dismissed the application vide Order dated 23.01.2020. One member dismissed the application on the ground that it was not filed in Form FA as per Regulation 30A of the CIRP Regulations. The other member disagreed with this view and opined that (I) the facts of the case made out for a situation for exercise of power under Rule 11 of the NCLT Rules (as had been done in many other cases), (II) regulations were procedural guidelines and could not surmount the law of termination of CIRP and non-filing in the format was a curable defect, (III) no right in *rem* had been created as the notice inviting claims had not

[111] Shaji Purushothaman Vs. Union Bank of India & Ors. in Company Appeal (AT) (Insolvency) No. 921 of 2019
[112] Sunshine Caterers Pvt. Ltd. Vs. Redreef Finance & Investment Pvt. Ltd. in Company Appeal (AT) (Ins.) No. 725 of 2018
[113] Civil Appeal No. 4242 of 2019
[114] CP (IB) 3051 (ND) of 2019

been published, *inter alia*. However, it was held by the other member that in light of filing of appeal and by passing of interim orders by the Hon'ble NCLAT, the said application had become *infructuous*.

Eventually, the Hon'ble NCLAT vide its Order dated 30.01.2020,[115] set aside the order of admission by exercising its inherent power under Rule 11 of the NCLAT Rules. Being a real estate company, on the date of passing of admission order, there were other petitions as well that were pending; hence, the fate of this corporate debtor remains to be considered.

**c)** *Relaxed application of provisions to MSMEs*

Furthermore, in the case of *Saravana Global Holdings Ltd. & Anr. Vs. Bafna Pharmaceuticals Ltd. & Ors.*[116] the Hon'ble NCLAT in the Order dated 04.07.2019 held that as the resolution applicant was the promoter of the Corporate Debtor, which was an MSME [exempted from the applicability of Section 29A of the Code], it was open for the CoC to defer the issuance of the Information Memorandum and grant an opportunity to the promoter, if he offers a viable and feasible plan maximising the assets and the balancing all the stakeholders. In fact, it went ahead to observe that "*For such purpose, it is not required to follow all the procedure as the case for accepting the proposal under Section 12A of the 'I&B Code'.*".

**d)** *Applicability of Section 29A to proceedings under Section 12A of the Code*

On the applicability of Section 29A, vide Final Order dated 28.08.2019, the Hon'ble NCLAT in the case of *Andhra Bank v. Sterling Biotech Ltd. (Through the Liquidator) & Ors.*, held that it is not applicable to proceedings under Section 12A of the Code. Hence, it is an accepted alternative mode for a promoter to regain the control of its company, despite being ineligible under Section 29A of the Code.

**e)** *'Reverse CIRP'*

On the aspect of the right to regain control of its company and not being affected by Section 29A of the Code, a new method was also devised by way of 'Reverse CIRP' by the Hon'ble NCLAT in the case of *Flat Buyers Association Winter Hills – 77, Gurgaon Vs. Umang Realtech Pvt. Ltd through IRP & Ors.*,[117] considered to be applicable to real estate companies. Vide Order dated 04.02.2020, by adopting a means of experimentation, the Hon'ble NCLAT permitted a promoter to infuse funds as there was no other source of Interim Finance (not as promoter; but as a lender to the Corporate Debtor) and to complete construction of the flats as per the schedule (as was assured by the promoters). In the said Order, the Hon'ble NCLAT directed as follows:

"29. *All these processes should be completed by 30th August, 2020. If it completed, the Corporate Insolvency Resolution Process be closed after intimating it to the Adjudicating Authority (National Company Law Tribunal). The resolution cost including fee of the Interim Resolution Professional will be borne by the Promoter. Only after*

[115] Punit Beriwala v. Shambhu Agencies Pvt. Ltd. and Ors. – Company Appeal (AT) Insolvency No. 104 of 2020
[116] Company Appeal (AT) (Insolvency) No. 203 of 2019
[117] Final Order dated 04.02.2020 in Company Appeal (AT) (Insolvency) No. 926 of 2019

*getting the certificate of completion from the Interim Resolution Professional/ Resolution Professional and approval of the Adjudicating Authority (National Company Law Tribunal) unsold flats/ apartments etc. be handed over to the Promoter/ Uppal Housing Pvt. Ltd."*

This Order clearly does not make reference to Section 12A; however, in a manner akin to the same provides for a method for the promoter to regain control of the Corporate Debtor (without submitting a resolution plan). This matter is pending in appeal before the Hon'ble Apex Court and hence, the validity of the same will have to await the outcome of the said proceedings.

**Conclusion**

The puzzle in respect of the remedy and rights in respect of settlement and methods of terminating the CIRP continues to be a riddle; where in some cases, the exercise of power is considered judicious and in some cases, the Tribunals have deemed it appropriate not to exercise their power. The consequences in such cases are grave, as these lead to the promoters losing the result of their earnest and years of effort. The jurisprudence though it appears will only over a period of time be standardised as the law on the said subject continues to be still evolving.

# 12 DECODING SECTION 32A OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Section 32A (*Liability for prior offences, etc.*) was incorporated in the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code"); whereby a legal fiction is created, providing immunity against prosecution of the Corporate Debtor and any action against its property in case of approval of Resolution Plan under Section 31 of the Act or in liquidation, on the condition that there is a change of management happening. This came into effect from 28.12.2019 and there was no such provision in the Code or the laws before the Code, prescribing for such immunity explicitly.

## TURN OF EVENTS LEADING TO INCORPORATION OF SECTION 32A IN THE INSOLVENCY AND BANKRUPTCY CODE, 2016

**12.12.2019**

- The Hon'ble Finance Minister of India introduced the Insolvency and Bankluptcy (Second Amendment) Bill. 2019 in the Lok Sabha for altering and amending the provisions of the Code.
- As the bill was strongly objected to,the Hon'ble Speaker of the Lok Sabha refared the aforesaid Bill for its review to Standing Committee (hereinafter referred to as "Committee").

**13.12.2019**

- TheWinter Session of the Lok Sabha ended.

**23.12.2019**

- The Committee chaired by Mr. layant Sinha (Former Minister of State for Finance) and including Dr. Manmohan Singh (Former Hon'ble Prime Minister of India) as a member was constituted, to examine and submit its report within thiee month.

**28.12.2019**

- As the Parliament was not in session the Hon'ble President Of India exercismg its power under Article 123 of the Constitution of India promulgated an amendment In the code by way of an Ordinance "hich came into effect on 28.12.2019 (including the Incorporation of Section 32A).

**04.03.2020**

- After the stait ofBudgd session ofParliament the report ofthe Committee was put before both the Houses.

**06.03.2020**

- The Bill was again introduced in Lok Sabha and was passed by the Lok Sabha.

**12.03.2020**

- TheRajya Sabha passed the Bill a voice vote

**13.03.2020**

- The Bill got the assent Of Presided Of India and it was notified in the official gazette on the same date as the Insolvency and Banlauptcy Code (Amendment) Act, 2020 (hereinafter refened to as "Amendment Act").

**Note:** The members of Opposition had objected to the promulgation of the Bill during the Winter Session, on various grounds including lack of information to the Members of the Parliament and without giving two days' notice while circulating the copies of the Bill to the members.

## POSITION OF LAW PRIOR TO PROMULGATION OF THE ORDINANCE IN RESPECT OF PENDING CRIMINAL PROSECUTIONS AGAINST THE CORPORATE DEBTOR

After the promulgation of the Code, the question of applicability of the moratorium to pending criminal matters against the Corporate Debtor arose numerous times. The National Company Law Appellate Tribunal (hereinafter referred to as "the Appellate Tribunal") had in the case of ***Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj***[118] held that Section 14 (*Moratorium*) of the Code is not applicable to cases under Section 138 of the Negotiable Instruments Act, 1881 as they are criminal proceedings. The Hon'ble Appellate Tribunal thereafter reiterated the said position of law in the case of ***Varrsana Ispat Limited vs. Deputy Director, Directorate of Enforcement***[119] and the relevant extract whereof is reproduced hereinbelow:

> *"8. Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the 'Prevention of Money Laundering Act, 2002' is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto."*

This position was again held by the Appellate Tribunal in the judgment of ***Rotomac Global Private Limited v. Deputy Director, Directorate of Enforcement***[120] [while referring to ***Varrsana Ispat (supra)***] that Section 14 of the Code does not have an impact on proceedings relating to the Directorate of Enforcement.

It is pertinent to note here that the Hon'ble High Court of Delhi had in the Judgment dated 02.02.2019 in the case of ***the Deputy Director Directorate of Enforcement Delhi Axis Bank v. Depute Director*** [121]held that:

> *"146. .....The moratorium enforced in terms of Section 14 of Insolvency Code cannot come in the way of the statutory authority conferred by PMLA on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route...."*

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[118] Final Order dated 31.07.2018 in Company Appeal (AT) (Insolvency) No. 306 of 2018; available at https://ibbi.gov.in/webadmin/pdf/order/2018/Aug/31st%20Jul%202018%20in%20the%20matter%20of%20Shah%20Brothers%20Ispat%20Pvt.%20Ltd.%20Vs.%20P.%20Mohanraj%20&%20Ors.%20CA%20(AT)%20No.%20306-2018_2018-08-07%2010:28:16.pdf

[119] Final Order dated 02.05.2019 in Company Appeal (AT) (Insolvency)No. 493 of 2018; available at https://nclat.nic.in/Useradmin/upload/15017852275ccc33bcbfc23.pdf

[120] Final Order dated 02.07.2019 in Company Appeal (AT) (Insolvency) No. 140 of 2019; available at https://nclat.nic.in/Useradmin/upload/12346211525d1b38981fb8b.pdf

[121] Available at https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Apr/RKG02042019CRLA1432018_2019-04-03%2014:45:26.pdf

With this consistent stand of continuance of criminal proceedings during the currency of the CIRP as well, the question that remained unanswered was with respect to the effect of these proceedings, once a resolution plan was approved by the relevant Adjudicating Authority. This was faced as a riddle by the various resolution applicants, whose resolution plans were approved by the concerned Adjudicating Authority and being implemented.

### INTENT BEHIND INTRODUCTION OF SECTION 32A

The Insolvency Law Committee in its report issued in February, 2020[122] considered the need for introduction of such provision under the act, as well as the difficulty faced by a successful resolution applicant in such cases including imposition of certain liabilities and restrictions on the Corporate Debtor even after they were lawfully acquired by the resolution applicant.

It was recommended by the Insolvency Law Committee that a new provision be inserted in the Code 'where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP', unless the resolution applicant was also involved or is a related party of the promoter group.

Thereafter, the Standing Committee on Finance in its sixth report issued in March, 2020[123] pertaining to the Bill had recorded the following observation with regard to Section 32A:

> *"3.11 The Committee are in agreement with the intent of this amendment to safeguard the position of the Resolution Applicant(s) by ring-fencing them from prosecution and liabilities under offences committed by erstwhile promoters etc. The Committee understand the need for treating the company or the Corporate Debtor as a cleansed entity for cases which result in change in the management or control of the corporate debtor ....."*

### SCOPE OF SECTION 32A OF THE CODE

| Liability for offence committed under any law prior to the commencement CIRP in respect of | Pre-condition For Applicability of section 32A: Change or Management | Clarifications in Section 32A |
|---|---|---|
| • **The Corporate Debtor** shall cease; and<br>• **The property of the Corporate Debtor forming a part Of the Resolution Plan:** No action shall be taken (including the attachment, seizure. retention or confiscation of such property under such law as | • a promoter or in the management or control of the corporate debtor or a related party of such a person: or<br>• a person with regard to whom the relevant Investigating authority has, | • Every person who was (I) an 'officer in default' and (II) was in any manner incharge of or responsible to the Corporate Debtor for the conduct of its businese associated with Corporate Debtor in any manner and (III) was involved |

[122] https://www.ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf
[123] https://www.ibbi.gov.in/uploads/resources/20ef77b3a1200f12ad19cee1c2c3dba9.pdf

| | | |
|---|---|---|
| may be applicable to the Corporate Debtor) | on the basis of material in its possession,reason to believe that he **had abetted or conspired for the commission of the offence**. and has submitted or filed a report or a complaint to the relevant statutory authority or court. | directly or indirectly in commission of the offence, shall continue to be prosecuted / punished for such offence, as defined under Section 2(60) of the Companies Act, 2013.<br>• There is no bar against action against property of any person other than (I) the Corporate Debtor or (II) such person that has acquired such property the CIRP process under the Code |

## CONCLUSION

Hence, there appears to sufficient resources to decipher the intent of legislature in promulgating Section 32A in the Code. However, the application of the Mischief Rule of interpretation to the said provision, answers a few questions with respect to the scope and applicability of the provision. But, most questions still remain unanswered. The Appellate Tribunal has had an occasion to construe Section 32A and the same shall be discussed in our subsequent release.

# 13 SECTION 32A: UNANSWERED LEGAL ISSUES

In continuation of our previous release wherein we explained the reasons and the intent of promulgation of Article 32A of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), the present article deals with various legal issues which have been left unanswered while dealing with the said provision by the Hon'ble High Court of Delhi ("**High Court**") as well as the Hon'ble National Company Law Appellate Tribunal, New Delhi ("**Appellate Tribunal**").

Section 32A of the Code, for the first time, came up for interpretation before the Hon'ble Appellate Tribunal in the case of ***JSW Steel Limited v. Mahendra Kumar Khandelwal & Ors.***, being Company Appeal (AT) (Insolvency) No. 957 of 2019.

The Appellate Tribunal not only interpreted Section 32A to have retrospective applicability; but, also went a step ahead and set aside all the attachments which had been made by the Enforcement Directorate under the Prevention of Money Laundering Act, 2002 ("**PMLA**") of the assets of the Corporate Debtor.

However, while doing so, the question that would arise is whether the benefit would also then accrue to all the other entities which had a conclusive successful resolution prior to the promulgation of Section 32A (and no adjudicatory proceedings were pending) and also qualified the parameters as laid down in the said section.

This question also appears to have been put to rest by the Hon'ble High Court vide Judgment dated 16.03.2020 in the case of ***Tata Steel BSL Limited v. Union of India.*** In the said petition, the summons issued by a Learned Sessions Judge in a case filed by the *Serious Fraud Investigation Office, prior to the promulgation of Section 32-A of the Code* were in challenge, *inter alia.* The Hon'ble High Court proceeded to grant benefit of prosecution to the said entity as well and held as under:

> "*6. It is clear from the express language of the aforementioned provision that a Corporate Debtor would not be liable for any offence committed prior to commencement of the CIRP and the corporate debtor would not be prosecuted if a resolution plan has been approved by the Adjudicating Authority.*
>
> *7. In the present case, there is no dispute that a resolution plan has been approved by the Adjudicating Authority (NCLT) and in the circumstances, there is much merit in the contention that the petitioner cannot be prosecuted and is liable to /be discharged.*"

Thus, it appears that Section 32A of the Code is applicable retrospectively; even to entities wherein resolution plans (involving a change in management) have been approved, prior to the promulgation of section 32A of the Code.

While, this provision may give a confidence boost to the prospective Resolution Applicants/ Bidders to take over the properties of Corporate Debtor while participating in a Corporate Insolvency Resolution Process or Liquidation, without having the threat of prosecution and uncertainty of acquisition of the properties of the Corporate Debtor, looming over their heads. However, a lot of legal as well as economic questions arise which will have to be answered by the Courts of law in the times to come. By way of this article, an effort is being made to raise certain question which requires to be immediately redressed so as to weed out any misuse of Section 32A of the Code.

**a.** The first issue, which requires consideration is the extent of power that can exercised by the Adjudicating Authority or the Appellate Tribunal in granting benefit under Section 32A of the Code to a Successful Resolution Applicant. As is seen from the judgment of the Appellate Tribunal in the ***JSW Steel Limited Case (Supra)***, the Appellate Tribunal has gone a step ahead to declare the attachments made under PMLA as illegal. Now, the Appellate Tribunal has been constituted in pursuance of the provisions of the Companies Act, 2013 and exercises jurisdiction in relation to matters under the Code, *inter alia*. However, such a jurisdiction cannot be equated with the one under Article 226 of the Constitution of India as exercised by the Hon'ble High Courts. Having said so, while granting benefit under Section 32A of the Code, the setting aside of attachment orders made by another authority under a different statute/ enactment, amounts to overreaching the powers conferred by the Companies Act, 2013 as well as the Code, raising questions about the legality of the order to that extent. In fact, such an exercise has been also frowned upon by the Hon'ble Supreme Court in the case of *Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors*[124]. This issue however may soon be clarified by the Hon'ble Supreme Court as an appeal against the said order is pending adjudication.

**b.** The second issue revolves around the impact of the promulgation of Section 32A of the Code has had on the numerous other enactments which have been promulgated to stop financial crimes. Section 32A appears to have turned PMLA into a toothless tiger and appears to give an opportunity to the offenders to legitimize money laundering through the Code; thereby, making the laws in relation to stopping of financial crimes completely redundant.

**c.** While granting benefit of Section 32A to a commercial entity, the legislature appears to have solely concentrated on the commercial interests of Resolution Entities (the Corporate Debtor and the Resolution Applicant) and completely ignored the victims of crime/ money laundering activities and/ or the processes thereunder.

**(i)** It is intriguing that Section 32A provides no exception for an encumbrance which may have specifically been created with a view to defeat the provisions of the PMLA. Contrarily, Section 9 of the PMLA, specifically provided for the power to the concerned authority for removal of any

[124] Reported at 2019 SCC Online SC 1542

encumbrance on the property or any lease hold right in case it was created with a view to defeat the provisions of PMLA.

**(ii)** Section 32A of the Code, in its bare reading, protects such encumbrances, taking them away from the ambit of any seizure, attachment and confiscation, even if the said encumbrances have been created to defeat the provisions of PMLA; thus obliterating the provisions of the PMLA, in so far as they relate to bringing back the proceeds of crime and making the process of law being pursued under the PMLA, perfunctory and of no consequence.

**(iii)** There is no protection under Section 32A of the Code for the victims of money laundering as they would neither come under the definition of the Operational Creditor nor the Financial Creditor. This infact poses a bigger problem as usually, money laundering as a *modus operendi* uses shell companies and various layers to hide the proceeds of crime. This almost amounts to rendering such victims, remediless. The PMLA in fact protected the interests of such victims.

**(iv)** In a given scenario, funds could be collected from the general public and siphoned off to another Company to purchase properties for seeking protection under the Code, leading to gross misuse. The victims of crime would only have claims over the first company, which collected the funds; however, insofar as the properties purchased from the said funds is concerned, they belonging to another Company. The victims of such offences will have no claims against the property of the other Company; thereby, in one way legitimising the money generated from the general public (by way of an offence), into legitimate property; by using the process under the Code.

**(v)** There ought to be checks and balances in the interpretation of the provisions, in order to ensure that such abuse is not permitted.

Section 32A of the Code has been carved out, to enable intending Resolution Applicants to take over a clean Company. However, at the same time, it is to be seen how such an enactment would hamper the legal processes brought into force to curtail and prevent acts of money laundering in our Country.

These questions are yet to be unanswered. However, it is matter of time that the said questions would be deliberated before the Hon'ble Apex Court in the pending proceedings [arising out of the ***JSW Steel Limited case (supra)***].

# 14 THE ORDINANCE AMENDING IBC: LACKING CLARITY AND LEAVING PERSONAL GUARANTORS IN JEOPARDY

For the last almost two months, the news was filled with the discussions being held by the Central Government to suspend the initiation of Corporate Insolvency Resolution Process ('CIRP') under the provisions of the Insolvency and Bankruptcy Code, 2016 ('IBC') to protect and give support to the industry, from the unfortunate economic collapse due to the impact of Covid-19 pandemic.

## Background

The whispers in the corridors were that the Central Government was considering the possibility of permitting blanket suspension of the various provisions of the IBC. Then came, the speech of the Hon'ble Finance Minister on 17.05.2020, following the discourse by the Hon'ble Prime Minister on 12.05.2020, when further light was shed on the aspects of the proposed amendments. Finally, an ordinance was promulgated to amend the IBC on 05.06.2020; thereby, inserting Section 10A providing the suspension of Sections 7, 9 and 10 of the IBC for any default arising on or after 25.03.2020 for a period of six months (which can be extended up to one year), *inter alia*.

The step taken by the Central Government by this Ordinance may be in right direction and with the good intention of giving much required breather to the industry. However, the broken threads, piecemeal consideration of issues, and lack of clarity in the language used, mars the amendment and leaves much to be desired. This piece is an attempt to analyze the IBC and its latest amendment vide ordinance dated 05.06.2020.

### *I.* *Section 10A: The Exclusion*

The preamble of the Ordinance provides for its main objects and purpose being to prevent corporate persons, which are experiencing distress on account of the Covid-19 pandemic and consequent nation-wide lockdown, from being pushed into insolvency proceedings under IBC for some time. The backdrop of this issue has been identified as the difficulty in finding an adequate number of resolution applicants to rescue the corporate person (who may default in discharging their debt obligations). Hence, it states that it was considered expedient to exclude defaults arising on account of this unprecedented situation for being considered as the basis for commencing CIRP under the IBC. Thus, Section 10A has been inserted, which reads as under:

> *"Section 10A. Suspension of initiation of corporate insolvency resolution process.*
>
> *10A. Notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on*

*or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation.- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.*"

This provision seeks to create a legal disability on a creditor/ debtor from being able to invoke the provisions of Section 7/ 9/ 10 of the IBC. However, strangely the provision creates a disability on the '*right to file*'; instead of creating an embargo on the right to invoke the proceedings under Sections 7/9 of the IBC of the creditor or Section 10 of the debtor or on the Adjudicating Authority from admitting proceedings, in respect of the defaults being excluded by the said provision. Having said so, a view can be taken that the intent of the provision is discernible and may not be the cause of any serious legal debate.

***II.*** *No protection to Personal Guarantor*

However, the one facet of concern that arises from the reading of Section 10A is that no corresponding protection has been granted to the personal guarantor of the Corporate Debtor. Commencement of insolvency proceedings against a Personal Guarantor is regulated by Part III of the IBC [wherein Section 94 provides for the right of a debtor and Section 95 provides for the right of a creditor]; whereas Part II covers the insolvency in respect of corporate persons. The Ordinance only suspends the provisions under Part II. More interestingly, Section 95 enables a larger sect of parties, by using the expression 'creditor', to commence insolvency in respect of personal guarantors; as opposed to only 'Financial Creditors' and 'Operational Creditors' having the right to initiate CIRP of a corporate person. Therefore, the Judgment dated 26.02.2020 passed by the Hon'ble Supreme Court of India in the case of *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Ors.*, may also not come to the rescue of the personal guarantors.

There is another facet of this concern, in terms of the revision of the quantum of default under Part II of the IBC as per Section 4, to an amount of Rupees One Crore Only [revised vide notification dated 24.03.2020]. This revision only relates to the minimum quantum of the default prescribed for corporate debtors under Section 4 of the IBC. However, the minimum quantum of default applicable to personal guarantors is prescribed under Section 78 of the IBC. This has not undergone any modification/ revision and the prescribed amount of default is "*not less than one thousand rupees*".

Thus, on a cumulative reading of the provisions, the law as on date permits any creditor to commence insolvency against a personal guarantor in respect of a default of corporate debtor for an amount of Rupees

One Thousand or more. The Ordinance has thus left the personal guarantors exposed and more vulnerable to litigation under the IBC, by way of the Ordinance. This differential treatment, despite both being victims of Covid-19 pandemic, may come under the judicial scanner as the effect of the economy on the industry is not independent of the consequences being faced by the corresponding personal guarantors.

***III.*** *Blanket Immunity to defaults during the Exclusion Period?*

Strangely, there is lack of clarity about the way in which the default needs to be evaluated in respect of defaults, where the quantum needs to be perceived on a cumulative basis (including for the period prior to 25.03.2020, the stipulated period of exclusion and the period subsequent to the exclusion). But, continuing defaults over a period of time (during the pre-moratorium as well as during moratorium period) may amount to more than Rupees One Crore. Thus, the question that arises is whether such a default would also be made a part of the exclusion or not. An endeavor appears to have been made by the explanation to exclude the defaults which occurred before 25.03.2020 from the exclusion under Section 10A of the IBC. However, the same is only a semi-baked attempt and hence, still leaves many lacunae hampering effective implementation of this Ordinance.

There are challenges raised by the Proviso to Section 10A as well, which disqualifies the filing of application ever for initiation of CIRP of a Corporate Debtor for the said default occurring during the stipulated period of six months.

In this background, it is relevant to note that all credit agreements covered under the regime of the Reserve Bank of India ('RBI') have been granted the relief of moratorium vide their Circular dated 27.03.2020 and subsequent amendment on 22.05.2020, for a period up to 31.08.2020. It has been specifically stated therein that the repayment schedules and revised due dates shall be drawn by the banks and financial institutions. Thus, so far as lenders governed by RBI are concerned, no fresh Non-Performing Assets/ defaulters can be declared during the moratorium as no defaults can happen during the period of moratorium.

However, there are numerous other loan agreements that are not governed by the regulations formulated by RBI. In these cases, assuming where there is no argument for a continuing default, then would this mean that such a creditor can never invoke insolvency proceedings under the IBC. For instance, is this remedy available to home buyers, whose houses were due to be handed over during the stipulated period of six months.

Furthermore, the purpose of granting time to a company appears to enable it to sail through tough times. Then, if the default is not regularized within the said period of exclusion, should the said creditors be required to sit as an audience and not be able to seek commencement of CIRP on this account? The corollary of the literal interpretation of this provision could also lead to a situation, where though the business of a company gets closed due to the losses during the lockdown, yet the company can never be wound up as the default has occurred this period of exclusion [as Section 10 of the IBC is also suspended in respect of such defaults].

Thus, the point to be mooted is whether such a blanket immunity was required in the present circumstances.

***IV.*** *Incorporation of Section 66(3): Protection to present directors, etc.*

The third aspect is the protection granted by insertion of Section 66 (3) to the IBC, which reads as under:

> *"(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub- section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A."*

Section 66 (Fraudulent Trading or Wrongful Trading) provides for the orders that Adjudicating Authority can pass if it is found that the person has carried out the business of the Corporate Debtor with the intent to defraud its creditors (prior to the commencement of CIRP). Section 66 (2) makes the director or partner of the Corporate Debtor liable to make such contribution to the assets of the Corporate Debtor as directed, if they have failed to exercise due diligence and take requisite steps to minimize the loss to the creditors when they know that the commencement of CIRP could not be avoided.

Keeping this in mind, Section 66(3) grants protection to such director/ partner by restraining the filing of any such application for the defaults, against which initiation of CIRP is suspended by virtue of Section 10A of the IBC. The obvious question arises is that whether it would not amount to promoting the willful default by such director or partner by in one way giving a license to run the affairs of a company in a manner detrimental to the creditors during the exclusion period. The entire scheme of the IBC and especially Section 29A provides a mechanism to keep the willful defaulter away from the pure stream of CIRP which seems to be diluted by the present amendment, which could have been avoided.

**Conclusion**

The Central Government has been relentless in making efforts at ensuring a holistic response to this pandemic. Thus, for long, the Government had been deliberating the need for bringing effective measures to assist the industry in making a robust mechanism for its revival. Hence, there was hope for a crystal-clear amendment, to explain the way defaults occurring during the lockdown, would be treated under IBC.

Unfortunately, this Ordinance does not qualify to be one with clarity on all subjects. Amending the definition of default under Section 4 and 78 of the IBC, excluding those occurring between 25.03.2020 to such period as deemed expedient to the Central Government, may have provided more clarity than the present mode of amendment. The same would have also been susceptible to several grounds of criticism; however, it was likely to leave fewer holes to plug.

It could be argued that the Ordinance is also not balanced, as creditors have been kept at the fence and in some cases, disqualified from initiating CIRP, despite the company being run in a manner that is detrimental to

all involved, including the creditors. The counter argument to which is, retaining the possible responsibility on the personal guarantors. However, whether no reference to personal guarantors in this Ordinance, was intentional or not, is not clear. But, the said mechanism of dealing with the lockdown has exposed the personal guarantors completely, making them liable for possible insolvency (having its own myriad of consequence) in these trying times of Coid-19 pandemic. What will need to be seen is whether this complete feeding of the personal guarantors to the lenders, would act as a deterrent to commission of defaults or not and whether this would amount to sufficient means for the lenders to seek resolution of their debts.

Numerous representations were also made by the experts suggesting that the provision of Section 10 of IBC ought not to be suspended. Section 10 of the IBC is the provision enabling the company itself to seek commencement of CIRP in case it is unable to pay its debts and there has been a default. However, a dichotomy has been created by this Ordinance as a company itself has been disabled from seeking commencement of CIRP; even if it now deems it necessary to do so.

Thus, this Ordinance as it stands today, leaves room for clarification, adjudication and interpretation. Further, the lockdown is not over yet; though gradually, the unlocking has commenced. Hence, there is a possibility for the Central Government, or possibly the Parliament (when the same is tabled before the two houses); to bring clarity on these aspects, to enable the creditors to seek their remedies as advised. Otherwise, these questions are likely to arise and the same shall be settled by the courts of law and the tribunals acting under the IBC.

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# CONTACTS

**Sandeep Bajaj**
Managing Partner
E: sandeep@pslchambers.com
T: + 91 11 4999.1252

**Sameer Jain**
Managing Partner
E: sameer@pslchambers.com
T: + 91 11 4999.1253

**Rahul Chaudhary**
Partner
E: rahul@pslchambers.com
T: + 91 11 4999.1256

**Siddharth Jain**
Partner
E: siddharth@pslchambers.com
T: + 91 11 4999.1251

**Angad Sandhu**
Partner
E: angad@pslchambers.com
T: + 91 11 4999.1255

**Soayib Qureshi**
Associate Partner
E: soayib@pslchambers.com
T: +91 11 4999.1265

**Aakanksha Nehra**
Associate Partner
E: aakanksha@pslchambers.com
T: +91 11 4999.1266

**Suvigya Awasthy**
Associate Partner
E: suvigya@pslchambers.com
T: + 91 11 4999.1257

# OFFICES



## NEW DELHI

A-220,
Defence Colony,
New Delhi - 110024

T: +91.11.49991250
E: delhi@pslchambers.com

## MUMBAI

10/A, 2nd Floor, Chamber No. 2, 59, Kala Ghoda Building-Bhadekaru Cooperative Premises Society Ltd. Mumbai-400023

T: +91. 22.4077.9120
E: mumbai@pslchambers.com

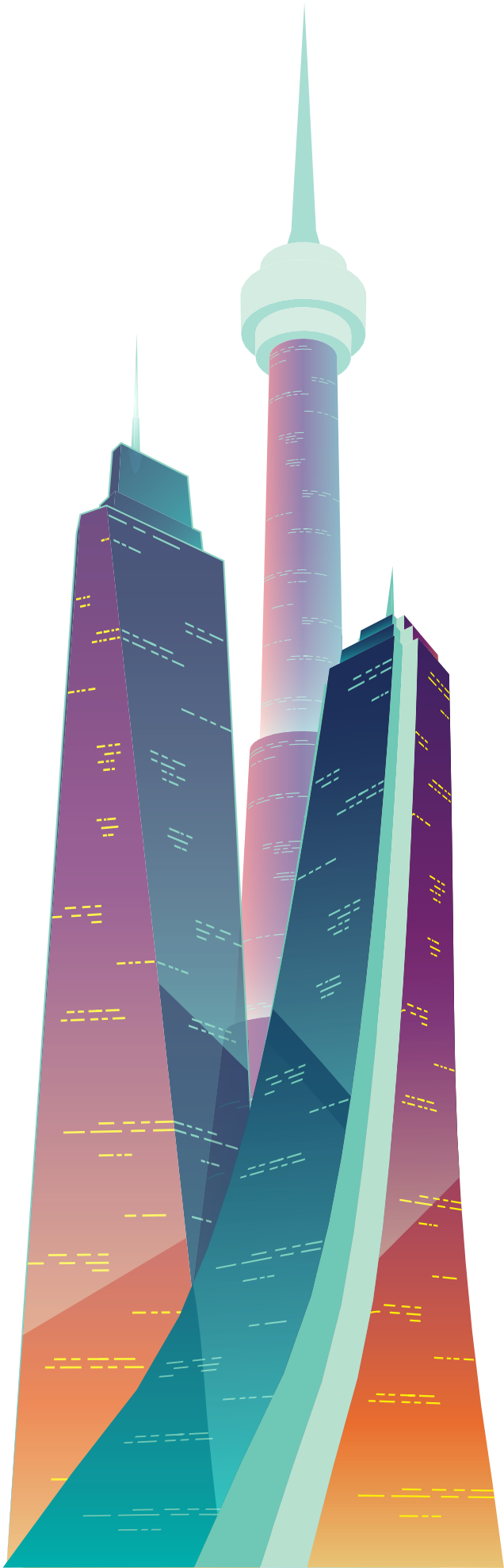
## CHANDIGARH

139-140,
M.S. Enclave, Dhakoli,
Zirakpur, Punjab

T: +91.9914.017.000
E: chandigarh@pslchambers.com

PSL

ADVOCATES & SOLICITORS



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