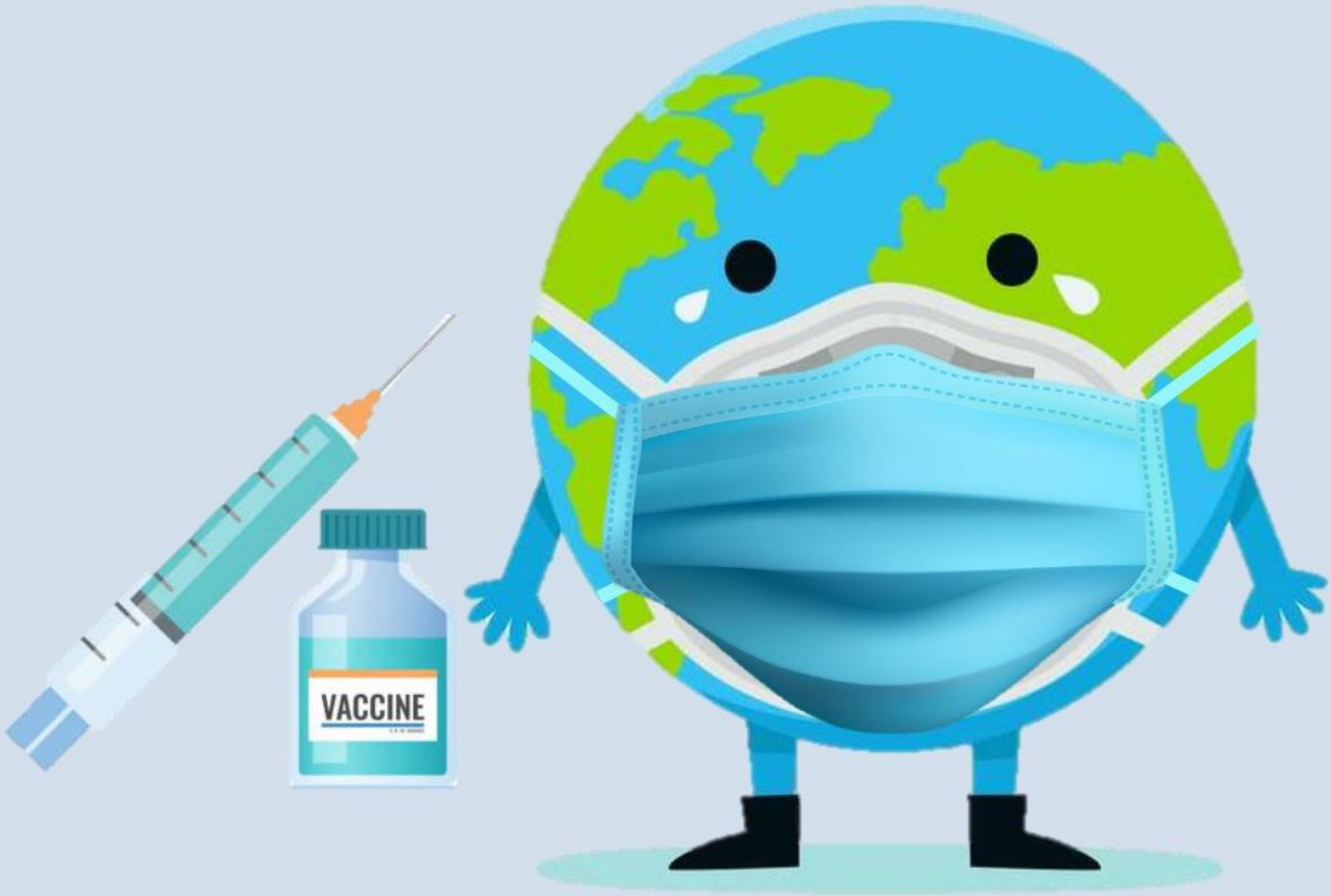
CGRF

SandBox®

May 2021

Volume 2 | Issue 5



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CIN: U73200TN2019NPL132843
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குறள்: 482
பருவத்தோடு ஒட்ட ஒழுகல் திருவினைத்
தீராமை ஆர்க்குங் கயிறு.

Thirukural: 482
Acting at the right season, is a cord that will immovably bind success (to a king).

From the Editor's Desk

Dear Readers of CGRF SandBox

The month of May is usually greeted by scorching sunshine, sweaty mornings and a long day, of course. While May 2020 saw the surge of Covid-19 and therefore kept people largely indoors, May 2021 is a mixed bag. The vaccination drive is on but yet to make a significant impact with several logistic issues and supply-chain constraints.

The second wave of Covid-19 with more disastrous consequences has forced many States to declare lock-downs, although some reliefs have been provided. Yet, the stark memories of huge exodus of migrant labourers have come again to haunt us. The health care eco system is bursting at its seams with the severe scarcity of liquid medical oxygen. The death tolls attributed to shortage of oxygen in various hospitals are really alarming.

(Image source: website)

Well, the pandemic will eventually get contained. But in the process, the devastation inflicted on micro, small and medium enterprises is going to cripple this sector for ever unless coordinated measures are taken at swift pace. Having said this, the banking industry will also come under phenomenal pressure as delinquencies are likely to go up substantially.

Prepack insolvency resolution for MSME units in corporate sector

We are glad to share with the esteemed readers of SandBox that in this May Issue of SandBox, we have brought out very informative articles on the PPIRP scheme and how does it vary from conventional restructuring schemes of banks.

Also covered in this Issue is an article on "Corporate Social Responsibility" giving an update on the recently amended provisions.

Relief measures from Government

There are a few communications from the Government extending the due dates for filing of Returns and Forms. Information relating to this has also been brought out in this issue.

CGRF SandBox earnestly requests all the readers to be very safe during this second and destructive wave of Covid-19. Try to work from home and avoid venturing out. Together, we can weather this storm and bring back the nation to normalcy.

Yours truly

S. Rajendran

Addressing Financial stress in MSME Sector

S. Venkataraman
Chief General Manager (Retd.) SBI
Insolvency Professional

Current Schemes of Banks Vs Prepack Insolvency Resolution Process (A Comparison Chart)

(Currently PPIRP is applicable to MSMEs in Corporate Sector and LLP firms only)

S.No	Various Schemes in Banks	Prepack Insolvency Resolution Process
1.	To address stress in MSME sector, there are multiple schemes available in Banks to restructure, rehabilitate or for one time settlement. They are either individual Banks' own schemes or RBI mandated schemes. These schemes depend upon the quantum of loan to MSMEs and different norms (covenants like D/E ratio, EBITDA margin, interest coverage etc.,) are fixed by banks for implementing such schemes. **They are, therefore, to some extent complex for understanding at operating staff level, to enable them to identify eligible borrowers, schemes and its effective implementation.**	PPIRP Scheme is applicable for all MSMEs irrespective of their size and borrowing levels from Banks as long as they are classified as MSMEs as defined under the Act. (ie., investment in plant and machinery upto Rs.50 cr and turnover upto Rs.250 cr)
2.	MSMEs' stress resolution, restructuring scheme formulation, finalisation, approval and implementation **are not time bound**. Consequently, it may have an adverse impact on the operations of such MSMEs as a time bound resolution elude them leading to further stress, sickness ultimately resulting in winding up.	**Time bound resolution is envisaged under PPIRP.** Resolution plan (RP) is to be finalised and approved by Committee of Creditors (COC) within 90 days from the commencement date of PPIRP. AA has to approve RP within next 30 days. The total time period for a resolution is set at 120 days.
3.	Finalisation of applicable resolution plan would depend upon the nature of credit facilities extended to the CD and also its borrowing arrangements viz., Sole Banking, Multiple Banking, Consortium Banking etc., Further, it also depends upon the applicability of relevant schemes of the lending bank.	Irrespective of nature of borrowing (credit facilities) and the arrangement of borrowing (sole, multiple, consortium) , if the entity fits into the scheme of PPIRP, the process of resolution under PPIRP is uniform for all. All banks and other FCs have to adhere to the IBC process. The COC constituted under this process would finalise a resolution plan, as per the laid down consensus process under IBC within the stipulated time norms. If approved by AA, all creditors including government has to abide by it.

S.No	Various Schemes in Banks	Prepack Insolvency Resolution Process
4.	Banks are following their individual applicable internal processes which are case specific. Lenders may or may not seek external professional support for drawing up a resolution plan. Most of the time resolution plans are drawn by internal teams only. Generally, if necessary only, TEV study is being carried out by CD at the request of lenders.	The resolution plan, including the base resolution plan is drawn by Insolvency professionals, with the consent of COC / CD, who are qualified professionals registered with IBBI. There are defined monitoring mechanisms including monthly reporting of operations of CD by RP to COC. During the process CDs operations effectively controlled by COC. IPs are mandated to follow all applicable rules and regulations of IBBI without any deviation for maintaining professional integrity.
5.	The resolution plan drawn by the Bank may or may not get the final approval from their ultimate approving authority. (Until it is approved by all lenders, in case of multiple banking, consortium arrangement, the resolution plan may go into hibernation)	Once the resolution plan is approved by COC, which is a representative body of all FCs, it is their responsibility to get all their internal approvals in time and follow all IBC time norms and rules/regulations.
6.	The sense or fear of accountability may linger in the minds of all staff members who are involved in finalisation and implementation of a resolution process. At times this itself may serve as a deterrent to initiate any resolution process.	Once the resolution plan is finalised by COC, and approved by AA, it carries the Legal approval and hence the concept of accountability at a later date is 'NIL'. Further, upon AAs approval, the resolution plan is binding on everyone (all creditors) including Government agencies.
7.	After implementation of a resolution plan, generally there is no structured monitoring mechanism in case of sole, multiple banking arrangement. This ultimately results in failure of the resolution scheme.	As per the decision of COC/ AA there shall be a proper Monitoring Committee (MC) constituted to oversee the resolution plan implementation. Periodical reporting to lenders will happen. Any adverse developments are taken seriously for any further remedial measures including initiating CIRP/Liquidation etc.
8.	The Scheme is worked out only with the existing management of the CD and the scope of inviting competition does not exist.	If the base resolution plan submitted by CD is unacceptable to COC, it may invite resolution plans from the open market to ensure better resolution for value maximisation. This process instils a sense of fear in the minds of CD to draw-up a best resolution plan, ab initio, and implement it properly.
9.	There is a possibility of PUFE transaction going unnoticed while drawing up a resolution/restructuring plan done by individual banks.	CD has to voluntarily declare such transactions at the time admission to PPIRP. If any PUFE transaction is found later, there are laid down procedures to deal with it under the IBC. Any adverse event might force the CD not only to lose its control over the entity but also face legal action such as penalty in the form of imprisonment and /or fine.
10.	Drawing resolution plan and monitoring implementation of the plan may not be cost effective for FCs as many a time they have to incur such costs.	PPIRP is cost effective for lenders as all costs incurred under PPIRP is borne by the CD, including all monitoring mechanism costs.

Credit Scores in India

CGRF Bureau

Adequate amount of quality information on counterparties is a critical component of financial infrastructure. Reducing the information asymmetry between lenders and borrowers will provide a fillip to growth of credit especially among disadvantaged sections of society and foster financial inclusion and inclusive growth. An efficient system of credit information sharing reduces cost of intermediation. It allows banks to effectively price, target and monitor loans and thereby enhances competition in the credit market. It also reduces credit defaults benefitting consumers with reduction in average interest rates. The overall systemic impact would be better quality of credit portfolios freeing the capital for further credit growth and thus deepening of credit markets. Additionally, it promotes objective and transparent scrutiny/processing of credit proposals making the process less expensive. Aiding and enabling bank supervisors to monitor build-up of systemic risks including in sensitive and unregulated sectors is another positive outcome from credit information.

In India, there was need for putting in place an institutional mechanism for collecting and furnishing, on request, information on both the existing and prospective borrowers of banks and other institutions. This would go a long way in arresting the growth of non-performing advances of banks and financial institutions. Therefore, a "Working Group to explore the possibilities of setting up a Credit Information Bureau in India" (under Chairmanship of Shri. N.H. Siddiqui) was set up in 1999. The Group reaffirmed the urgent need for establishment of a credit bureau in India in its report of November 1999. Accordingly, Credit Information Bureau (India) Ltd. (CIBIL) was incorporated in August 2000 by State Bank of India in association with HDFC and two foreign technology partners. CIBIL launched its credit bureau operations in April 2004 and its commercial bureau operations in May 2006.

The Working Group had also felt that a master legislation should be enacted for facilitating collection and sharing of information by the proposed Bureau. This would take care of the need for making amendments to various banking legislations, the provisions of which prohibited disclosure of information. Accordingly, the Credit Information Companies (Regulation) Act, 2005 (CICRA) was enacted in the year 2005 with a view to regulate Credit Information Companies and to facilitate efficient distribution of credit.

Subsequent to the enactment of CICRA 2005, the following three Credit Information Companies (CICs) were given in-principle Certificate of Registration (COR) in April 2009 to commence the business of credit information.

a) Equifax Credit Information Services Private Limited
b) Experian Credit Information Company of India Private Limited
c) High Mark Credit Information Services Private Limited

CIBIL was also given an in-principle approval in April 2009 to carry on the business of credit information since it was already functioning as a CIC, prior to the enactment of the Act. Subsequently, the first three CICs were given COR during the year 2010 while CIBIL was given COR in the year 2012.

[Source: RBI]

List of Credit Information Companies (CICs) in India

There are 4 Credit Information Companies in India, who have been granted Certificate of Registration by Reserve Bank of India [RBI]. They are –

- TransUnion CIBIL Limited (formerly CIBIL)
- Equifax Credit Information Services Private Limited
- Experian Credit Information Company of India Private Limited
- High Mark Credit Information Services Private Limited

What is a Credit Score?

A credit score is an indicator that depicts a consumer's creditworthiness of an individual. A credit score is based on certain parameters such as credit history, levels of debt, repayment capacity & history, and other factors. Lenders use credit scores to evaluate the probability of an individual in repaying of loans in a timely manner.

In India credit scores are three-digit number, typically between 300 to 900, designed to represent your credit risk, or the likelihood of your repayment capacity. The

higher the score, the better a borrower is placed, which may make potential lenders and creditors more confident when evaluating a request for credit.

Here is a general look at credit score ranges for individual having credit history of more than 6 months:

Category / Scores	Remarks
Poor: Under 550	Individual has defaulted in making multiple payments. Individuals under this category have very low or no chances of obtaining new credit.
Average: 550-650	Fair credit score. Individuals will still be required to improve their credit score.
Good: 650-750	Good credit score, and an individual will be able to obtain credit. However, he will not be able to negotiate the terms and conditions of the loans.
Excellent: 750-900	Indicates a borrower is financially responsible when it comes to credit. Most of his payments, including loans, credit cards, utilities, and rental fees, are made on time. Banks will be willing to provide loans to customers under this category at cheaper rates, and the customer will also have the leverage to negotiate the terms and conditions of the loan.

What if when you have not borrowed in the past or have never had a Credit Card or a loan? There will be no updates about you with the CICs and due to lack of details, the CICs was unable to comment on your scores. In such cases, banks / financial institutions find difficult to provide you with any unsecured credit facilities. Hence, first time borrowers always face challenges in getting a loan as there is no credit history available.

In 2014, the Committee to Recommend Data Format for Furnishing of Credit Information to Credit Information Companies made recommendations that "*First time borrowers' loan applications should not be rejected just because they have no credit history*".

Accordingly, TransUnion CIBIL Limited (formerly CIBIL) has launched a new version of their credit reports known as CIBIL TransUnion 2.0 which follows a different approach for evaluating the history of the borrower with less than 6 months of credit history.

Other two leading CICs, Experian and Equifax have also followed suit by offering credit scores for first time borrowers. Experian measures the scores of such customers on a grading scale of 1-6, where 1 means highest risk of default, and 6 means lowest risk of default. Equifax gives a score in the range of 300-900.

(Image source: website)

Credit Score for first time borrowers

Rating Score	Description
CIBIL Score 0 – NH	NH = No History or no credit track record available for the borrower
CIBIL Score 1 - 5	Score 1 indicates individual has a credit history of less than 6 months. Higher the score, lower the risk.
Experian Score 1 - 6	Grading Scale for new borrowers, where 6 being the lowest risk of default, and 1 being the highest risk of default.
Equifax Score 300-900	Higher the score better the borrower placed

However, many banks and NBFCs are still not comfortable lending to new borrowers.

Legal Maxim

Per incuriam, literally translated as "through lack of care", refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have been relevant.

The significance of a judgment having been decided per incuriam is that it need not be followed by a lower court.

All About Corporate Social Responsibility (CSR)

CGRF Bureau

Introduction

On April 1, 2014, India became the first country to legally mandate Corporate Social Responsibility. The provisions of Section 135 of Indian Companies Act, 2013 ('Act') and Companies (Corporate Social Responsibility Policy) Rules 2014 (CSR Rules) (both hereinafter referred to as "CSR Provisions") make it mandatory for applicable companies to spend at least 2% of their average net profits of the company made during the three preceding financial years towards Corporate Social Responsibility.

The evolution of CSR has been very intrinsic to the cultural development and evolution of Indian society. We have a deep-rooted culture of sharing and caring. The concept of CSR can be seen visible from the Mauryan history, where philosophers like Kautilya emphasized on ethical principles and practices while conducting business. CSR has been informally practised in ancient times in the form of charity to the needy and disadvantaged. Indian sacred scriptures have also mentioned the importance of sharing the earning with the poor. In India, religions have also played a major role in promoting the concept of responsibility of businesses and citizens towards nature, animals, and deprived sections of the society.

(Image source: website)

What is CSR

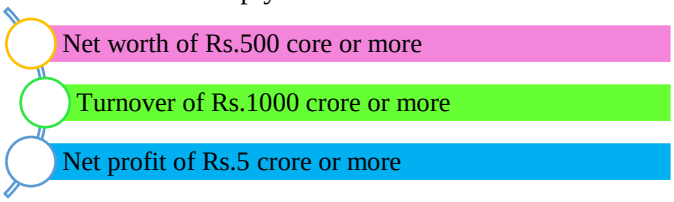
Corporate Social Responsibility refers to business practices involving initiatives that benefits the society. It is no longer enough for businesses to simply push their products and services without considering the larger world in which they operate. Hence, companies must voluntarily do business in an economically, socially, and environmentally responsible manner to be sustainable over a long period of time.

Corporate Social Responsibility means the activities undertaken by a Company in pursuance of its statutory obligation under CSR Provisions, which includes eradicating hunger, promoting education, promoting gender equality, environmental sustainability, protection of national heritage, promotion of sports, etc.

Now let us discuss the obligations and responsibility of Companies under CSR in India.

Applicability

Every company (including a foreign company having its branch office or project office in India), which fulfils the below mentioned criteria shall constitute a CSR Committee and comply with the CSR Provisions –



A company which ceases to be covered under the applicability provisions for three consecutive financial years is not required to comply with the CSR Provisions, till such time it meets the criteria.

Activities covered under CSR

The statutory provisions of the Act and the CSR Rules emphasis that while activities undertaken in pursuance of the CSR must be relatable to "*Schedule VII*" of the Companies Act, 2013, which includes eradicating hunger, promoting education, promoting gender equality, environmental sustainability, protection of national heritage, promotion of sports, etc., however shall not include any activities –

i. undertaken in pursuance of normal course of business of the company (subject to certain exception in R&D relating to COVID-19 during financial years 2020-23).

ii. undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level;

iii. benefitting employees of the company;

iv. supported by the companies on sponsorship basis for deriving marketing benefits for its products or services;

v. carried out for fulfilment of any other statutory obligations under any law in force in India; and

vi. any contribution of any amount directly or indirectly to any political party under section 182 of the Act.

It was also clarified that the entries in the said Schedule VII must be interpreted liberally to capture the essence of the subject enumerated in the said Schedule. The areas listed in Schedule VII, are broad-based and are intended to cover wide range of activities.

Company / Board's Responsibility

Board of Directors ("Board") of the Company which falls under the CSR applicability criteria shall –

- Constitute a CSR Committee;
- Approve CSR Policy for the Company;
- Ensure implementation of the activities included in the CSR Annual Action Plan;
- Ensure that the Company spends in every financial year, at least 2% of its average net profit during the three immediately preceding financial years in pursuance of its CSR Policy.
- Limit the administrative overheads to not exceeding 5% of total CSR expenditure of the Company for a financial year
- Satisfy itself that the funds so disbursed have been utilized for the desired purpose
- Disclose reasons Board's Report, if it fails to spend the 2%.

The obligations of constituting a CSR Committee shall not apply and the functions of CSR Committee may be discharged by the Board, if the amount to be spent towards CSR does not exceed Rs.50 lakhs.

CSR Committee

CSR Committee shall comprise of –

In case of a Private Company: 2 or more directors
In case of a Public Company: 3 or more directors, out of which one director shall be independent. if the Company is not required to appoint an independent director, the CSR Committee can be with 2 or more directors.

In case of a Foreign Company: At least two persons of which one person should be a resident Indian (authorized to accept on behalf of the company, any notices and documents required to be served on the company) and another person nominated by the foreign company.

The CSR Committee shall –

- formulate a CSR Policy and recommend to the Board;
- recommend the amount to be incurred on the CSR activities;
- monitor the CSR Policy from time to time; and
- Formulate an annual action plan, which shall include –

  (a) the list of CSR projects or programmes that are approved;

  (b) the manner of execution of such projects or programmes;

  (c) the modalities of utilisation of funds and implementation schedules for the projects or programmes;

  (d) monitoring and reporting mechanism for the projects or programmes; and

  (e) details of need and impact assessment, if any, for the projects undertaken by the company

CSR Policy

CSR Policy is a statement containing the approach and direction of the Board of the Company, taking into account the recommendations of its CSR Committee, and includes guiding principles for selection of activities to be undertaken, implementation and monitoring of activities as well as formulation of the annual action plan.

CSR Implementation

(1) From 1st April 2021, CSR activities can be undertaken either by the Company itself or through-

  (a) A Section 8 company or a registered public trust or a registered society (*registered u/s.12A and 80G of IT Act, 1961*), established by the company, either singly or along with any other company (subject to Committees of the respective companies are able to report separately on such projects in accordance with the CSR Rules); or

  (b) A Section 8 company or a registered trust or a registered society, established by the Central Govt / State Govt; or

  (c) Any entity established under an Act of Parliament or a State legislature; or

  (d) A Section 8 company or a registered public trust or a registered society (*registered u/s.12A and 80G of IT Act, 1961*), and having an established track record of at least three years in undertaking similar activities.

  which has registered itself with the Ministry of Corporate Affairs by filing Form CSR-1 electronically and having allotted unique CSR Registration Number.

(2) Company should give preference to the local area or areas around where it operates.

(3) Company may engage international organisations for designing, monitoring and evaluation of the CSR projects or programmes as per its CSR policy as well as for capacity building of its own personnel for CSR.

(4) In case of an ongoing project (*projects undertaken having timelines not exceeding 3 years excluding the financial year in which it was commenced*), the Board shall monitor the implementation of the project with reference to the approved timelines, year-wise allocation and shall make modifications

for smooth implementation of the project within the overall permissible timeline.

CSR Expenditure

A company which meets the criteria for CSR obligations should -

- Spend in every financial year, at least 2% of the average net profits of the company made during the three preceding financial years. If the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years.
- If company fails to spend 2% on CSR, the same shall be reported in the Board's Report specifying the reasons thereof and such unspent amount shall be transferred to a Funds (*viz., Prime Minister's National Relief Fund, PM CARES Fund, or any other funds set up by the central. Govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities, and women etc*), within a period of 6 months of the expiry of the financial year.
- Amount remaining unspent pursuant to any ongoing project (not exceeding 3 years) undertaken by the Company in pursuance of CSR Policy shall be transferred within 30 days to a 'Unspent CSR Account" to be opened in that behalf for that financial year in any schedule bank and such amount shall be spent in pursuance of its obligations towards CSR within a period of 3 years, failing with the company shall transfer the same to a Funds as stated above within a period of 30 days from the date of completion of the third financial year.
- Administrative overheads should not exceed 5% of total CSR expenditure of the company for the financial year.
- Any surplus arising out of the CSR activities shall not form part of the business profit of a company and shall be ploughed back into the same project or shall be transferred to the Unspent CSR Account and spent in pursuance of CSR policy and annual action plan of the company or transfer such surplus amount to a Fund specified in Schedule VII, within a period of 6 months from the expiry of the financial year.
- Excess amount spent on CSR during a year, may be set off against future CSR commitments during the immediate succeeding 3 financial years subject to the conditions that –

  (i) the excess amount available for set off shall not include the surplus arising out of the CSR activities,

  (ii) the Board of the company shall pass a resolution to that effect.

- Companies having average CSR obligation of Rs.10 crore or more, in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of Rs.1 crore or more, and which have been completed not less than one year before undertaking the impact study.
- Company undertaking impact assessment may book the expenditure towards CSR for that financial year, which shall not exceed 5% of the total CSR expenditure for that financial year or Rs.50 lakhs, whichever is less.

Creation of Capital Asset

- CSR amount may be spent for creation or acquisition of a capital asset, which shall be held by -

  (a) a company established under section 8 of the Act or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number; or

  (b) beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or

  (c) a public authority:

- Any capital asset created prior to 22nd January 2021, shall within a period of 180 days comply with the requirement of above conditions, which may be extended by a further period of not more than ninety days with the approval of the Board based on reasonable justification.

Disclosures

- Annual Report on CSR Activities as per specified format should form part of Board's Report.
- In case of a foreign company, the balance sheet filed under section 381 of the Act, shall contain an Annual Report on CSR.
- The impact assessment reports shall be placed before the Board and shall be annexed to the Annual Report on CSR.
- Company shall mandatorily disclose the composition of the CSR Committee and CSR Policy and Projects approved by the Board on their website, if any, for public access.

Mystery around Liquidator's Fee under IBC

CGRF Team

Liquidation of a Corporate Debtor may be initiated under Section 33 of the Code, when –

- No Resolution Plan is received within the maximum period prescribed for Corporate Insolvency Resolution Process (CIRP).
- NCLT rejects the resolution plan approved by Committee of Creditors for non-compliance of the requirements of the Code.
- Committee of Creditors with not less than 66% votes, decides to liquidate the Corporate Debtor any time before the resolution plan is approved during CIRP; and
- When Corporate Debtor contravenes any terms of an approved resolution plan.

When a company goes into liquidation under the Code, generally the Committee of Creditors recommends the liquidator and decides on the fee to be paid for his services. However, in the absence of the fee fixed by Committee of Creditors, the liquidators shall be entitled to a fee as a percentage of the amount realised (net of other liquidation cost) and distributed through the liquidation process.

To address uncertainties in issues involving liquidator's fees, the Insolvency and Bankruptcy Board of India has amended the liquidation process regulations which came into effect from 25th July 2019 and inserted further clarifications vide amendments dated 5th August 2020. Further, CIRP Regulations have also been amended to include estimation of liquation cost and plan providing for contribution for meeting the shortage in liquid assets, fixing of fee of the liquidator etc.,

Now the Liquidator may be paid either based on a fee fixed by the Committee of Creditors while approving the resolution plan or deciding to liquidate the Corporate Debtor or where the Committee of Creditors has not fixed such fees, liquidator shall be entitled to a fee as a percentage of the amount realised (net of other liquidation cost) and distributed as provided in Regulation 4(2)(b) of liquidation process regulations.

Calculation of Liquidator Fee

(a) If fixed by Committee of Creditors:

Committee of Creditors either while approving the resolution plan or while deciding to liquidate the Corporate Debtor during CIRP, may in consultation with the resolution professional, fix the fee payable to the liquidator.

The Code specifies that the Liquidator is entitled to charge such fees for the conduct of the liquidation proceedings in such proportion to the value of the liquidation estate assets. Hence, while fixing the liquidator fees, Committee of Creditors should consider different stages of the liquidation process as given below and fix liquidators' fee accordingly.

- Period (not exceeding 90 days) during which the liquidator may strive to get a compromise or arrangement under Section 230 of the Companies Act, 2013.
- Period during which the liquidator attempts to sell the Corporate Debtor as a going concern basis; and
- Balance period of Liquidation

(Image source: website)

(b) If not fixed by Committee of Creditors:

Where Committee of Creditors has not fixed the fees as stated above, then the Liquidator shall be entitled to the following fees:

- Same fees as paid to the resolution professional during CIRP, for the period (not exceeding 90 days) during which the liquidator may strive to get a compromise or arrangement under Section 230 of the Companies Act, 2013; and
- As a percentage of the amount realised (net of other liquidation cost) and of the amount distributed for the balance period of liquidation. The amount of realisation / distribution and the

percentage of fee is provided in Reg.4(2)(b) of Liquidation process regulation.

Realisation and Distribution

The Liquidator fee is further divided into two components viz, percentage based on amount realised and for amount distributed. Are realisation and distribution two separate functions, such that the liquidator is entitled to fees on both realisation and distribution separately?

The justification for two separate fee components, one based on realisation and other based on distribution, is rational as there may be realisation with no corresponding distribution, and there may be distribution, with no connected realisation. The regulations seem to have considered the realisation as the toughest part, which involves more time and efforts, and hence a higher fee attached with realisation, compared with distribution.

"Distribution" must be read in the light of section 53, and therefore, it will mean distribution to stakeholders. The possibility of there being a realisation but no equivalent distribution is when there are amounts paid over to third parties not coming under section 53, such as items not forming part of liquidation estate. There may be security deposits or other third-party monies which the liquidator may be required to return. There may be tax payments which take a part of the sale proceeds of property. On the other hand, there may be distributions, with no corresponding realisation. This may mostly be the case because of cash or cash equivalents available at the start of the liquidation proceedings or excess amount realised by the secured creditors under section 52 of the Code, paid to liquidator.

It is also noticeably clear from the Regulations that if the proceeds of an asset have been realised, but have not been distributed, then the liquidator is entitled to only half of the fee related to realisation. However, if the proceeds have also been distributed, the liquidator shall be entitled to the entire fee on realisation, as well as the fee payable on distribution.

Further, it is also clarified that where the liquidator realised any amount, but does not distribute the same, he shall be entitled to a fee corresponding to the amount realised by him and where a liquidator distributes any amount, which is not realised by him, he shall be entitled only to a fee corresponding to the amount distributed by him.

The Code states that the fees for conduct of liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estates. There are several points that arise in respect of computation of liquidator's fees under Reg 4 (2)(b). What makes the issue extremely sensitive is that the liquidator has to pay himself his fees out of the liquidation estate, and therefore, he is treading the very delicate issue of conflict, where his duties as a fiduciary might be conflicting with his claim to the fees. There are views that even shortfall of amounts pending to be contributed to employee benefit funds also does not form part of liquidation estate. Hence, Liquidator must be extremely careful while calculating his fees under Reg.4(2)(b), to avoid even the farthest chance of an allegation of self-dealing.

Feedback Matters

Happy to receive this SandBox Edition month after month and needless to say, it provides a wealth of information and insights, touching base on the various enactments effecting every stakeholder in his journey. Kudos and keep continuing to share knowledge as the saying goes," Knowledge Shared is Knowledge Gained".

- Mr.L.Venkataraman
  Director,
  RSales ARM IT services Pvt Ltd

Pre-Pack Insolvency Resolution Process for MSMEs

Mr.G.S. Sudhir, B.com, ACA
Chartered Accountant

Introduction

On April 4, 2021, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 was promulgated to allow pre-packaged insolvency resolution process (PPIRP) for corporate debtors classified as micro, small or medium enterprises under section 7 of Micro, Small and Medium Enterprises Development Act, 2006 by the introduction of a new Chapter IIIA in the Insolvency and Bankruptcy Code, 2016 (Code) and making consequential amendments to the provisions of the Code. The PPIRP rules and regulations have also been notified on April 9, 2021.

The preamble to the Ordinance provides that the PPIRP has been introduced as an alternative insolvency resolution process for MSMEs to ensure quicker, cost effective and value maximising outcome for all the stakeholders especially at a time when there is a high likelihood of increase in insolvencies with the suspension on initiation of Corporate Insolvency Resolution Process (CIRP) having already expired on 24th March 2021. The framework aims to ease out the burden on the Adjudicating Authority (AA) and also addresses special requirements of the MSMEs while resolving insolvency due to the unique nature of their business and simpler corporate structures.

Applicability and Eligibility

Prepacks will be applicable to corporate debtor classified as MSMEs which meets the definition of MSME as per section 7 of the MSME Act and has committed a default of not less than Rs. 10 lakhs.

It may be noted that even for default which has occurred during the IBC suspension period (25th March 2020 to 24th March 2021) PPIRP can be initiated.

Micro, Small and Medium Enterprises Development Act, 2006 defines MSMEs as follows:

Type of investment	Micro	Small	Medium
Investment in plant and machinery and equipment (not exceeding)	Rs. 1 crore	Rs. 10 crores	Rs. 50 crores
AND			
Turnover (not exceeding)	Rs. 5 crores	Rs. 50 crores	Rs. 250 crores

Who can initiate PPIRP?

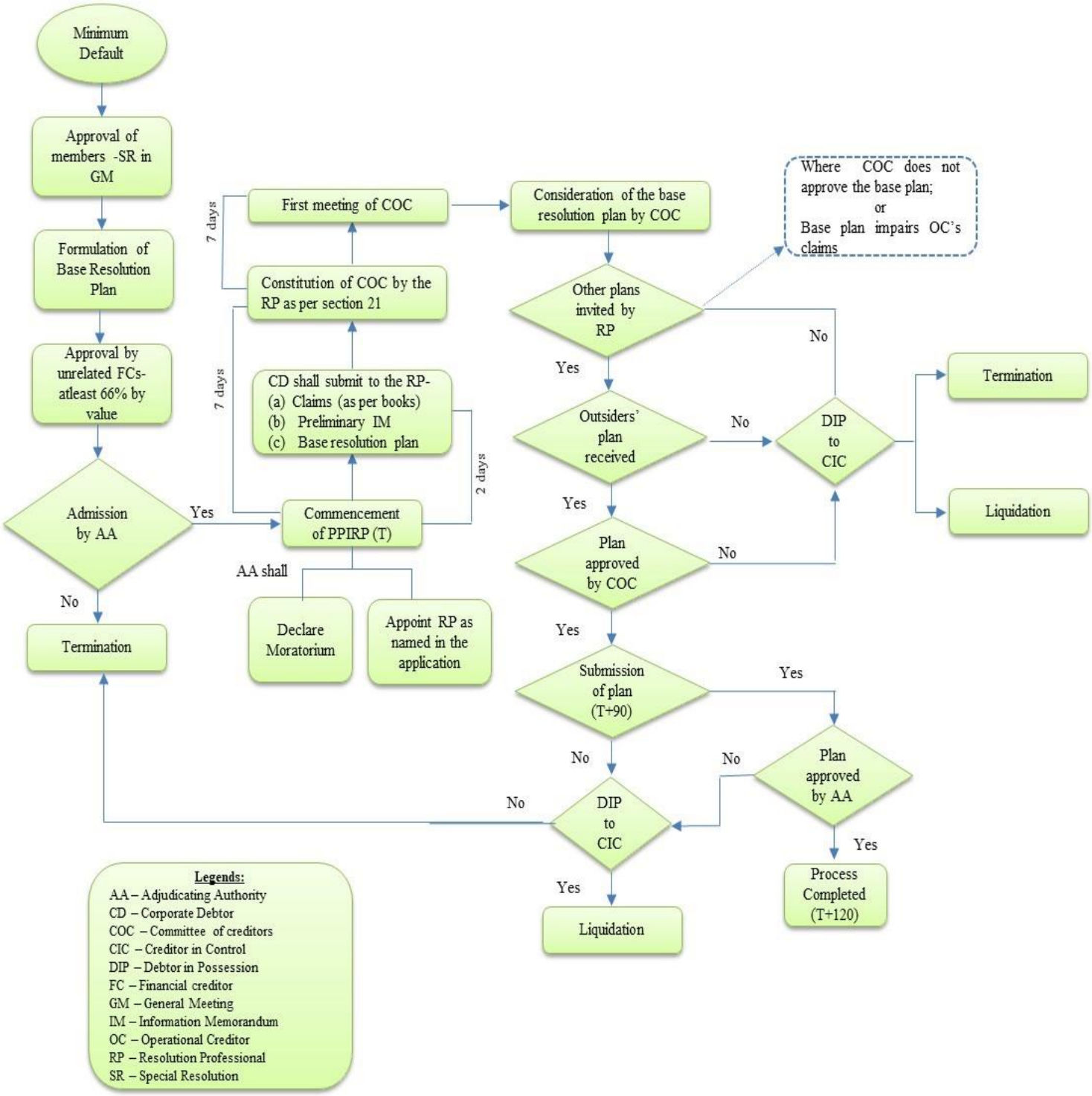
An application for initiating pre-packaged insolvency resolution process may be made by a corporate applicant which means any of the following:

- Corporate Debtor ("CD").
- Member or partner of the corporate debtor who is authorized to make an application for PPIRP under the constitutional document of the corporate debtor.
- An individual who is in charge of managing the operations and resources of the corporate debtor.
- A person who has the control and supervision over the financial affairs of the corporate debtor and mentioned in constitutional documents of the CD.

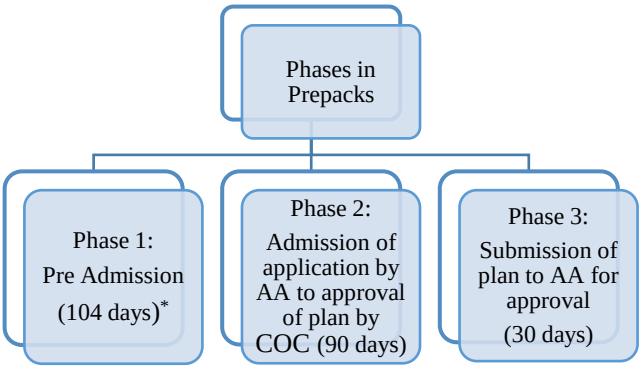
(Image source: website)

PPIRP Process

PPIRP commences on the date of admission of application by AA and continues for a period of 120 days (90 days for submission of plan to AA plus 30 days for AA to approve /reject the plan) without any provision for an extension.


Minimum Default
Approval of members -SR in GM
Formulation of Base Resolution Plan
Approval by unrelated FCs- atleast 66% by value
Admission by AA
Yes
No
Termination
Commencement of PPIRP (T)
AA shall
Declare Moratorium
Appoint RP as named in the application
2 days
7 days
CD shall submit to the RP-
(a) Claims (as per books)
(b) Preliminary IM
(c) Base resolution plan
Constitution of COC by the RP as per section 21
First meeting of COC
Consideration of the base resolution plan by COC
Where COC does not approve the base plan;
or
Base plan impairs OC's claims
Other plans invited by RP
Outsiders' plan received
Plan approved by COC
Submission of plan (T+90)
DIP to CIC
Liquidation
Termination
Plan approved by AA
Process Completed (T+120)
Legends:
AA – Adjudicating Authority
CD – Corporate Debtor
COC – Committee of creditors
CIC – Creditor in Control
DIP – Debtor in Possession
FC – Financial creditor
GM – General Meeting
IM – Information Memorandum
OC – Operational Creditor
RP – Resolution Professional
SR – Special Resolution

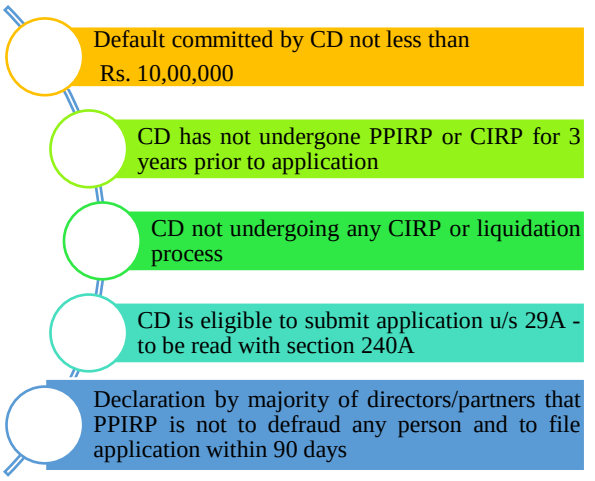
The entire process of prepack could essentially be divided into three phases-



* {CD to file application within 90 days + Time taken by AA to admit/reject application within 14 days}

Phase 1: Pre-Admission

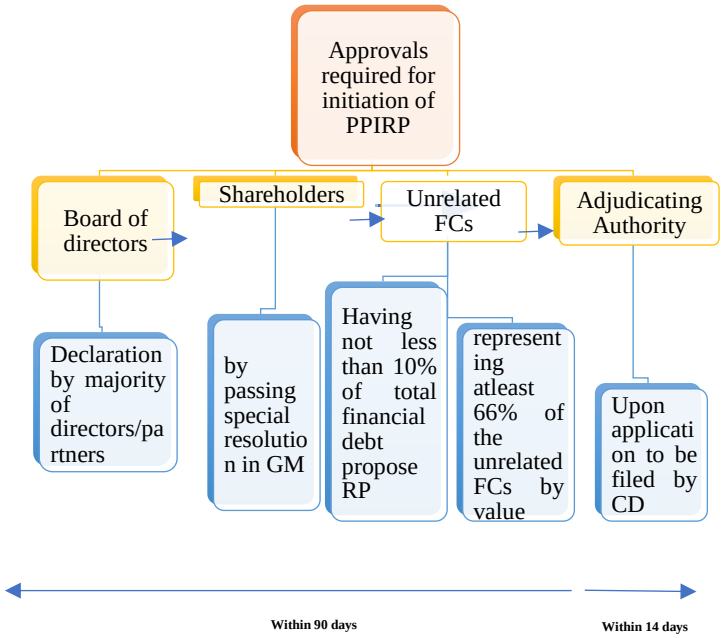
Eligibility/Conditions for initiating PPIRP – Section 54A



Sequence of events to be followed:

1. Convene a Board meeting for authorising the directors to provide declaration in Form P6 for initiating PPIRP and for fixing the date for general meeting.
2. Hold general meeting and pass a special resolution or obtain consent from atleast 3/4th of the total number of partners in case of LLP, approving the filing of application for initiating PPIRP.
3. Then convene a meeting for getting approval from atleast 66% of unrelated FCs. Prior to seeking approval from FCs, the corporate debtor shall provide them with the following:
    - Declaration provided by board of directors
    - Copy of special resolution passed at GM
    - Base resolution plan

Approvals for initiation



Duties of Resolution Professional during this stage – Section 54B

1. Prepare report as prescribed in Form P8 confirming that CD meets the eligibility and compliances.
2. File reports and other documents with IBBI

Admission or rejection of application Sec. 54-C

Documents to be filed along with application

- Application in Form 1 along with proof of payment of fees of Rs 15000
- declaration, special resolution, approval of FC.
- Name and written consent of IP proposed.
- Declaration w.r.t existence of avoidance transactions by management in Form P7.

AA shall within 14 days	
Condition	**Outcome**
If application is complete	Admit
If application is incomplete	Reject, and give applicant 7 days to rectify the defects

PPIRP commencement date (PPICD): Date the application is admitted.

Moratorium starts from PPICD (Section 54E)

Phase 2: Admission of application by AA to approval by COC

Corporate Debtor

Section 54G

Within 2 days of PPICD, submit to RP

- List of claims
- Preliminary IM

Section 54H

- Management of affairs of CD continue with board of directors
- Take all endeavour to protect and preserve the value of the property of CD
- Continue business operations as going concern
- Perform fiduciary duties under the Companies Act, 2013 as usual

Resolution Professional

Section 54F

- Public announcement
- Conform, inform, maintain list of claims
- Monitor management of affairs of CD
- Constitute COC, convene, attend meetings
- Inform COC on breach of obligations of board of director or partners
- Prepare IM
- File application for avoidance of transactions
- Inviting resolution plans
- Appointment of registered valuers
- Filing of resolution plan with AA

Section 54I

Constitute COC – Within 7 days of PPICD

Vesting of management of CD with resolution professional – Section 54J

If COC at any time during PPIRP period, by a vote of atleast 66% resolves to vest the management with resolution professional, RP shall make an application to AA.

If AA is of the opinion that affairs of CD have been conducted in a fraudulent manner, or grossly mismanaged pass an order vesting the management if the CD with the resolution professional.

Resolution plan – Section 54K

- CD shall submit the base resolution plan within 2 days of PPICD
- RP shall present the base resolution plan to the COC
- The COC may approve the base resolution plan for submission to AA if it does not impair any claims owed to operational creditors

Base plan

- Is not approved by COC, or
- Base plan impairs dues to OC

RP shall invite prospective resolution applicants to submit a resolution plan, which shall fulfil such criteria as may be laid by COC.

- **Competitive Bidding**
  a. RP shall invite plans from prospective resolution applicants (PRAs).
  b. The RP shall provide the PRAs with
     - Basis for evaluation as approved by COC, and
     - relevant information as referred in section 29.
  c. Highest ranking new plan will be submitted by RP to COC
  d. If the highest ranking new plan is significantly better than the base resolution plan, it may be considered for approval directly
  e. Otherwise, it shall compete with the base resolution plan in a 48-hour window which each party can present higher bids of a minimum pre-specified uptick
  f. COC will approve the winning plan by a vote of atleast 66%.

Dilution of shareholding: If base plan provides for impairment of claims owed by CD, the COC may require the promoters of the CD to dilute their shareholding. The COC may approve a plan which does not provide for dilution after recording the reasons in writing.

Phase 3 – Submission of plan to AA for approval

Approval of resolution plan

AA shall within 30 days of receipt of plan	
Condition	**Outcome**
Plan meets requirements of section 30(2) and is implementable	Approve the plan
If plan does not conform to section 30(2)	Reject the plan and pass order for termination of PPIRP (section 54N)

Circumstances of termination of PPIRP

- No resolution plan approved by COC within 90 days of PPICD
- COC with 66% voting share, resolves to terminate the PPIRP
- COC with 66% voting share, resolved to initiate CIRP against the CD
- AA rejects the resolution plan for non-compliance with section 30(2)
- Where the AA orders vesting of management of CD with RP after the COC has approved a resolution plan and the plan does not result in change in management or control of CD, AA shall order for liquidation of CD

Treatment of simultaneous application of CIRP and PPIRP

Scenario	Outcome
Pending PPIRP application but CIRP application is filed afterwards	AA shall first dispose of PPIRP application prior to CIRP application
Pending CIRP application but PPIRP application filed within 14 days of CIRP application	AA shall first dispose of PPIRP application prior to CIRP application
Pending CIRP application but PPIRP application filed after 14 days of CIRP application	AA shall first dispose of CIRP application prior to PPIRP application

Court Orders

CGRF Legal Team

(Image source: website)

Ghanashyam Mishra and Sons Pvt Ltd vs. Edelweiss Asset Reconstruction Co. Ltd
Civil Appeal No.8129 of 2019
Supreme Court Order dated

13th April, 2021

Can creditors initiate proceedings to recover claims not part of resolution plan, after approval of the resolution plan

CIRP was initiated against Orissa Manganese & Minerals Limited (CD) by SBI under section 7 of Code by State Bank of India and the same was admitted on 03.08.2017. Out of the resolution plans received during the conduct of the Corporate Insolvency Resolution Process of the CD, the plan submitted by Edelweiss Asset Reconstruction Co. Ltd (EARCL) was first declared as H1 bidder. However, since it failed to satisfy the CoC during the negotiations the same was rejected. Thereafter, CoC negotiated with Ghanashyam Mishra & Sons Pvt Ltd (GMSPL), the H2 bidder. Since GMSPL's plan was also found to be unacceptable, the CoC decided to invite fresh resolution plans from all applicants who had earlier submitted their Expression of Interest.

In response to the said invitation, three resolution plans were received from GMSPL, EARCL and SREI Infrastructure Finance Ltd (SIFL). After evaluation of the resolution plans, CoC ranked GMSPL again as the H1 bidder. After being satisfied that the resolution plan proposed by GMSPL meets all requirements under the Code, the same was approved by CoC with 89.23% of the voting share and the approved resolution plan was submitted with NCLT for its approval.

EARCL filed two application with NCLT, one challenging the approval of GMSPL resolution plan by

CoC and another challenging the decision of RP for not admitting its claim relating to a corporate guarantee (CG) provided by CD towards its sister concern namely Adhunik Power and Natural Resources Ltd (APNRL). EARCL insisted that GMSPL (successful resolution applicant) should undertake to pay the full amount due and payable under the said CG. Another application was filed by District Mining Officer, Department of Mining and Geology, Jharkhand challenging non-admission of its claim. In the meantime, NCLT on 22.06.2018 approved the resolution plan submitted by GMSPL.

Being aggrieved by the Order approving the resolution plan of GMSPL by NCLT, EARCL preferred an appeal before NCLAT against the rejection of its claims as financial creditor and thereby its non-inclusion in CoC. Certain other appeals were also filed by Employees and Workers Union, claiming dues of their salary. NCLAT while holding that RP was justified in not accepting the claim of EARCL, observed that the rejection of the claim for the purpose of collating and making its part of the resolution plan will not affect the right of EARCL to invoke the Bank Guarantee against the CD, in case the principal borrower failed to pay the debt amount, since the moratorium period had come to an end. NCLAT also while dismissing the other appeals observed that the said orders passed in the appeal would not come in the way of appellants to move the appropriate forum for appropriate relief.

Aggrieved by the observations made by NCLAT, GMSPL, the successful resolution applicant preferred an appeal with Hon'ble Supreme Court questioning whether the claims of the parties, which are not included in the resolution plan could be agitated before other forums as observed by NCLAT.
Similar appeals in other matters have been filed with Hon'ble Supreme Court, wherein the following common issue arose. The claims of creditors in other matters also included statutory authorities like state commercial tax department, state mining department, income tax authorities etc., in respect of their respective outstanding demands against the respective CDs.

(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by NCLT under subsection (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (Code)?

(ii) As to whether the amendment to Section 31 is clarificatory / declaratory or substantive in nature?

(iii) As to whether after approval of resolution plan by the NCLT a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the NCLT?

When is a resolution plan binding?

Hon'ble SC observed that that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by NCLT is limited to the extent provided under Section 31 of the Code and of the Appellate Authority is limited to the extent provided under subsection (3) of Section 61 of the Code, is no more *res integra*.

Section 31 of the Code would also make it abundantly clear, that once the resolution plan is approved by the NCLT, after it is satisfied, that the plan, as approved by CoC, meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors, and other stakeholders. *Such a provision is necessitated since one of the dominant purposes of the Code is, revival of the Corporate Debtor and to make it a running concern*. (Emphasis added)

The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations based on which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

Hon'ble SC after detailed consideration concluded that –

(i) Once a resolution plan is duly approved by the NCLT under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the CD and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the

NCLT, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) The amendment to Section 31 of the Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the Code has come into effect;

(iii) All the dues including the statutory dues owed to the Central Government, any State Government, or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the NCLT grants its approval under Section 31 could be continued.

Hon'ble SC while allowing the appeal of GMSPL stated that the observations made by NCLAT giving liberty to EARCL to take recourse to such proceedings as available in law for raising its claims is totally unsustainable and conflicts with the provisions of Code.

After coming to such finding, the only option available with NCLAT was to dismiss the appeals and the observations made by NCLAT is unwarranted. Further, it opined that if such claims are permitted to remain, it would totally frustrate the object of Code of revival of a CD and to resurrect it as a going concern.

ASSET RECONSTRUCTION COMPANY (INDIA) LIMITED
VS
BISHAL JAISWAL & ANR.
(Supreme Court) (15.04.2021)

Entries in balance sheets would amount to acknowledgement of debt for the purpose of extending limitation under Sec. 18 of the Limitation Act, 1963 and Under IBC as well

Brief Facts of the Case:

Corporate Power Ltd., the Corporate Debtor (CD), had availed loan from a Consortium of Lenders for setting up a coal-based power plant at Chandwa in Jharkhand. The CD defaulted in repaying the dues which lead to recalling of the loan facility by State Bank of India, the Consortium Leader issuing notices on 20.06.2015 under Section 13(2) of the SARFAESI Act, 2002 demanding total amount of Rs.5997,80,02,973/-. However, the CD failed to discharge its liability. The Lenders had assigned the debt in favour of 'Asset Reconstruction Company (India) Ltd.', who filed an Application under Section 7 of the Code, 2016 for initiation of CIRP against the CD, which raised various issues including the issue pertaining to limitation. (Date of assignment – date of filing by ARCL).

Admission of CIRP by the Hon'ble NCLT

The Application was admitted by the Hon'ble NCLT, Kolkata Bench, observing that the balance sheets of the corporate debtor, wherein it acknowledged its liability, were signed before the expiry of three years from the date of default, and entries in such balance sheets being acknowledgements of the debt due for the purposes of Section 18 of the Limitation Act, 1963, the Section 7 Application is not barred by limitation.

Appeal before the Hon'ble NCLAT:

Against the admission of the aforesaid Application, an Appeal was filed before the hon'ble NCLAT, by the CD's Ex-Director, Mr. Bishal Jaiswal, primarily on the ground that the account of CD was declared as NPA on 28.02.2014 and the Application u/s 7 came to be filed in Dec. 2018, after a delay of around five years, and that it was barred by limitation. The Financial Creditor, on the other hand, contended that the right to sue for the first time accrued to it upon classification of the account as NPA on 31.07.2013 but thereafter, the CD had admitted, time and again, and unequivocally acknowledged its debt in the Balance Sheets for the years ending 31st March 2015, 31st March, 2016 and 31st March, 2017. Hence, according to the Financial Creditor, the right to sue stood extended in terms of Section 18 of the Limitation Act, 1963.

The Appellants before the Hon'ble NCLAT (Three-Member Bench) relied upon the Full Bench judgment of the Hon'ble NCLAT in *V. Padmakumar v. Stressed Assets Stabilisation Fund, Company Appeal (AT) (Insolvency) No. 57 of 2020 (decided on 12.03.2020)*, wherein a majority of Four-Members of the Bench (out of Five) held that entries in balance sheets would not amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the Limitation Act1963. It was viewed that the acknowledgement of debt should be voluntary and cannot be given under compulsion of law

or with the threat of any penalty/punishment and that the preparation of Balance Sheet is one such mandatory act as required by the Companies Act.

After a preliminary hearing, the Three-Member Bench of Hon'ble NCLAT in the present case, passed an order on 25.09.2020 doubting the correctness of the majority judgment of the Full Bench and referred the matter to the Acting Chairman of the Hon'ble NCLAT to constitute a Bench of coordinate strength, to reconsider the majority decision in V. Padmakumar case.

(The matter before the Three-Member Bench and the Five-Member Bench was covered in our SandBox Issue for the month of October 2020 and January 2021 respectively, under the Head, Court Orders.)

Therefore, it stood that with regard to initiation of CIRP proceeding the reflection of debt in the balance sheet could not be considered as an acknowledgment of debt under Section 18 of the Limitation Act, 1963 until the matter came to be decided by the Hon'ble Supreme Court in the captioned case.

Appeal before the Hon'ble Supreme Court

The Applicant Financial Creditor filed an Appeal before the Hon'ble Supreme Court against the Order dated 22.12.2020 of the Five-Member Bench of the NCLAT, which had refused to adjudicate the question referred, stating that the reference to the Bench was itself incompetent.

The main issue in the present case, before the Hon'ble Supreme Court was to answer, "*whether an entry made in a balance sheet of a corporate debtor would amount to an acknowledgement of liability under Section 18 of the Limitation Act".* The Court recalled that this issue has already been answered in several judgements *(Mahabir Cold Storage v. CIT, 1991 Supp (1) SCC 402), A.V. Murthy v. B.S. Nagabasavanna, (2002) 2 SCC 642,* S. Natarajan vs. Sama Dharman, Crl. A. No. 1524 of 2014 dated 15.07.2014, Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, 1961,) wherein it has been indicated that *an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act.*

Interestingly, the view taken by the Hon'ble NCLAT that acknowledgement of debt should be voluntary and cannot be given under compulsion of law (as mentioned above) has also already been addressed in the *Bengal Silk Mills* case, that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, thereby entries in Balance Sheet cannot be stated to be a compulsive act.

Thus, the Hon'ble Supreme Court observed that the Full Bench judgment of the Hon'ble NCLAT in *V. Padmakumar* case was contrary to the precedents of higher courts which have decided that entries in balance sheets would amount to acknowledgement of debt for the purpose of extending limitation under Sec. 18 of the Limitation Act, therefore the Hon'ble Supreme Court set aside the majority decision in V. Padmakumar Case (NCLAT).

In view of the above the order of the Hon'ble NCLAT in the present case was also set aside and the Order of the Hon'ble NCLT, Kolkata Bench was upheld.

Further, similar Appeals which were before the Supreme Court, were also taken up together and were set aside / remanded back to the Hon'ble NCLT to decide the question of acknowledgement of debt, as decided in the captioned case.

Conclusion

Thus, it is clear that the view of the Hon'ble NCLAT in V. Padmakumar Case was *per incurium.* And as observed by the Hon'ble Supreme Court, it stands, that the *entries in balance sheets would amount to acknowledgement of debt for the purpose of extending limitation under Sec. 18 of the Limitation Act*.

(Image Sourece: website)

Ruchi Soya Industries Ltd vs. Union of India
Writ Petition No.31090 of 2015
High Court of Judicature at Madras,
Order dated 26th April 2021.

The entire tax administration of the country is now in a pell-mell. All the tax authorities will have to make a beeline before NCLT every time to recover tax dues.

The Madras High Court recently observed that the 2019 amendment to Section 31 of the Insolvency and Bankruptcy Code, 2016 has left the entire tax administration of the country in a pell-mell. All the tax authorities will have to make a beeline before NCLT every time to recover tax dues if under any circumstance proceedings are initiated against CD under the Code.

The dispute raised was over the rate of customs duty to be paid on a bill of entry filed by a company that was undergoing the insolvency resolution process initiated by the NCLT. The petitioner contended that the rights of the Customs Department stood extinguished as it did not come forward with its claims before the RP.

The facts of the case are that the petitioner, M/s.Ruchi Soya Industries Ltd. has challenged the re-assessment done by the Commissioner of Customs on 22.09.2015 of the Bill of Entry dated 15.09.2015. It is the case of the petitioner that the amendment vide Customs Notification No.46/2015 –dated 17.09.2015 which increased the rate of duty from 7.5% to 12.5% cannot be said to have come into force on retrospective basis from 17.03.2012 as per Section 25 of the Customs Act, 1962. The petitioner urged that the amendment cited by the Customs Department was not applicable to the bill of entry in question.

Also, it was submitted that the petitioner was under CIRP during the pendency of the present writ petition. Petitioner contended that RP had called upon the creditors of the petitioner to submit their claims and since the Customs Department did not file their claim as per IB Code, it has lost all its rights as they stood extinguished.

As per the amendment made to the Code in 2019 vide Section 32A, when a resolution plan has been approved by NCLT, such resolution plan would also be binding on the Central/ State government or any local authority to whom a debt or dues are payable, including tax authorities.

The single Judge noted that the High Court, Chennai is bound by the judgement dated 13.04.2021 of the Hon'ble Supreme Court in "***Ghanashyam Mishra and Sons Pvt Ltd vs Edelweiss Asset Reconstruction Co Ltd***" wherein it was decided that " all the dues including the statutory dues owed to the Central Government , any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the NCLT grants its approval under Sec 32 could be continued".

The single Judge remitted the case back to NCLT and directed the petitioner to file an appropriate application before NCLT and get the issue clarified.

M/s Renganayaki Agencies Vs. Sreenivasa Rao Ravinuthala (RP)
CA (AT) (Insolvency) No.23 of 2021
NCLAT Chennai Order dated 19th April 2021

Adjudicating Authority cannot reject and order for fresh bids against the Commercial Wisdom of CoC

Andhra Bank (FC) filed an application under Section 7 of IBC for initiating CIRP against Samyu Glass Private Limited (CD) and the same was admitted by NCLT Hyderbad on 18.10.2019. During the CIRP, 3 resolution plans were received and after series of deliberations and negotiations with the prospective resolution applicants, two applicants (i) Mr. Chava Suresh Babu and (ii) M/s.Renganayaki Agencies (KALS Group) revised their resolution plan. The resolution plans were put to vote and the CoC approved the resolution plan submitted by M/s.Renganayaki Agencies (KALS Group) which was declared as successful resolution applicant with 100% voting share. Thereafter, CoC approved resolution plan was submitted with NCLT for its approval.

NCLT while scrutinizing the application observed that the resolution plan submitted by both the resolution applicants were almost equally placed except for the fact that KALS Group has scored in terms of faster payment of the amount for resolving the CD. NCLT opined that even though the resolution plan is approved with 100% voting in favour of it, there is scope for further improvement of the resolution amount and directed the CoC to take fresh bids from the existing two resolution applicants and submit a fresh resolution plan.

Dissatisfied with the order of NCLT, an appeal was filed by KALS Group (successful resolution applicant) with Hon'ble NCLAT. It was contended that NCLT upon satisfaction that the approved resolution plan was compliant with the requirements of Section 30(2) of the IBC was statutorily obligated to sanction the Resolution Plan approved by CoC. Instead, it has exceeded its jurisdiction by issuing directions to rebid in an endeavour to maximise the value. It was also reiterated that NCLT cannot trespass into the "Commercial Wisdom" of the CoC and indeed, has a restricted power, of course, within the four corners of Section 30(2) of IBC.

Hon'ble NCLAT after a careful consideration of the submission made by the Appellant, set aside the order of NCLT for rebidding and directed NCLT to approve the resolution plan submitted with 100% voting of CoC.

Next Orbit Ventures Fund vs. Print House (India) Private Limited
CA (AT) (Insolvency) No.417 of 2020
NCLAT Order dated 13th April 2021.

Resolution Plan can contemplate a change in business of Corporate Debtor to another line, when the existing business is obsolete or non-viable.

(Image source:Website)

Print House (India) Private Limited (CD) filed a petition under section 10 of IBC for initiating CIRP. The same was admitted by NCLT Mumbai on 9th Oct 2018. Resolution Plans were received from Next Orbit Venture Fund and Sify Technologies Limited. The CoC after considering both the resolution plans approved the resolution plan submitted by Sify Technologies Limited with 70.05% voting share. Thereafter CoC approved resolution plan was submitted with NCLT for its approval.

In the meantime, Next Orbit Ventures Fund (unsuccessful resolution applicant) and the Promoters of the CD raised objections by impleading themselves in the matter of approval of the resolution plan submitted by Sify Technologies Limited stating that the resolution plan is nothing but a plan for sale of the assets of the CD for recovery of debts of the majority FC. They also raised objection that the resolution plan approved by CoC does not intend to revive and restructure the business of the CD instead intend to change the main business of the CD from printing business to running Data Centres. Further they also contended that the CoC has failed to examine the viability and feasibility of the approved resolution plan.

NCLT approved the resolution plan of Sify Technologies Limited and on the objections raised by the Promoters observed that "*there is nothing in the Code inhibits a Resolution Applicant from pursuing a line of business that is different to the erstwhile business of the CD. If this proposition is accepted, then it would mean that there can never be a situation where the successful Resolution Applicant can revive a Corporate Debtor by pursuing a different line of business. We can easily conceive a situation where the business of the Corporate Debtor is overtaken by technology – examples that come to mind are the pager business, fax business, telex business etc., which were consigned to the dustbin of history when technology overran them. Besides, the Code only contemplates that to the extent possible, the Corporate Debtor shall be continued to be run as a going concern. That, by no means, is enough to bind the Resolution Applicant to the erstwhile business of the Corporate Debtor, especially when there is obsolescence of the business pursued by the Corporate Debtor.*" *(emphasis added)*

Aggrieved by the order of NCLT approving the resolution plan, an appeal was filed by Next Orbit Ventures Fund in Hon'ble NCLAT. It was contended that the NCLT has erred in approving the Resolution Plan which completely changed the nature of the business of the ''Corporate Debtor'' and is therefore in contravention to the objective of the Code, which is 'Resolution', maximization of the value of assets of the ''Corporate Debtor'', 'promoting entrepreneurship, availability of credit and balancing the interests of the Stakeholders'. Further, the Learned Counsel for Next Orbit Ventures Fund submitted that a 'Resolution Plan' under the 'IBC' is not an 'Auction' and 'feasibility and viability' of the 'Resolution Plan' are not amenable to variations.

Hon'ble NCLAT dismissed the appeal and observed that "***Merely because the 'Resolution Plan' does not stick to the core printing business, in its truest sense, it cannot be said that the approved 'Resolution Plan' lacks the right vision and proposition specially in the light of the converging market forces and refocused business models***. *(Emphasis added). Further, it has been agreed by the 'Resolution Applicant' that the new management will upgrade the skills of the workmen and employees for this business cycle. In* ***'Arcelor Mittal India Private Limited' (Supra)*** *it has been observed by the Hon'ble Apex Court that 'if there is a 'Resolution Applicant' who can continue to run the 'Corporate Debtor' as a going concern every effort must be made to try and see if this is*

possible'. 'Going concern' does not mean that the nature of the business cannot be changed with an objective to 'add value' or 'create synergy'. If it is viewed in this perspective, it would be interpreting the word 'going concern' in a very narrow compass which is not the scope and objective of the code.

It also pointed out that ***'IBC" provides for restructuring of the 'Corporate Debtor' change in technology, change in portfolio of goods and services produced or rendered by the 'Corporate Debtor' as long as the scope and objective of the Code is not hampered and therefore we are of the considered view that if the Resolution Plan contemplates a change in the nature of business to another line when the existing business is obsolete or non-viable, it cannot be construed that the Resolution Plan is not 'feasible or viable'*** *(emphasis added). It can be seen from the aforenoted Sections 30(2) & 31 and Regulations 37, 38 and 39 that there is nothing in the Code which prevents a 'Resolution Applicant' from changing the present line of business to adding value or creating 'Synergy' to the existing assets and converting obsolete line of business to a more 'viable and feasible' option.*

KIND ATTENTION!!

Articles are Invited!

We would be delighted to have you in our panel of writers to contribute articles / snippets / write-ups to add value to CGRF SandBox. This will go a long way in enhancing the quality of CGRF SandBox which is expected to have wide readership amongst top bankers, corporates, and professionals.

Your materials for publishing may please be sent to

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IBC Help Line

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cgrfibchelpline@gmail.com

Please feel free to drop a mail for any query in IBC. Information shared will be kept confidential. CGRF team will respond within 24 hours.

Do You Know

Insolvency and Bankruptcy Board of India vide Notification dated 13th April 2021 has amended the IBBI (Information Utilities) Regulations, 2017 by inserting, inter-alia provisions for publication of statistics relating to debt related information in its possession, quarterly.

MCA Circular

MCA vide General Circular No.05/2021, dated 22nd April 2021 has clarified that spending of CSR funds for "***setting up makeshift hospitals and temporary COVID care facilities***" is an eligible CSR activity covered under Schedule VII of the Companies Act, 2013.

Legal Maxims

Obiter dictum (usually used in the plural, obiter dicta) is the Latin phrase meaning "by the way", that is, a remark in a judgment that is "said in passing".

Statements that are not crucial, or which refer to hypothetical facts or to unrelated law issues, are obiter dicta.

Obiter dicta is simply remarks or observations made by a judge that, although included in the body of the court's opinion, do not form a necessary part of the court's decision.

MCA Circular

Ministry of Corporate Affairs considering the difficulties which have arisen due to resurgence of COVID-19 pandemic has vide -

- ✓ General Circular No.06/2021, dated 3rd May 2021 granted additional time upto 31st July 2021 for companies / LLPs to file such forms (other than Forms CHG-1, CHG-4 & CHG-9), which were /would be due for filing during 1st April 2021 to 31st May 2021, without any additional fees.
- ✓ General Circular No.07/2021, dated 3rd May 2021 granted relaxation of time for filing forms relating to creation or modification of charges (during the period as specified) under the Companies Act, 2013.
- ✓ MCA vide General Circular No.08/2021, dated 3rd May 2021 clarified that the gap between two consecutive meetings of the Board may be extended upto 180 days during the first two Quarters of financial year 2021-22, instead of 120 days as required under Sec.173 of the Companies Act, 2013.

Government eases Income Tax norms for cash received by Hospitals providing COVID treatment

Ministry of Finance vide Notification S.O.1803(E), 7th May 2021 has specified that hospitals, dispensaries, nursing homes, Covid Care Centre or similar other medical facilities providing Covid treatment to patients for the purpose of Section 269ST of Income-tax Act, 1961 for payment received in cash during 01.04.2021 to 31.05.2021, on obtaining the PAN or Aadhaar of the patient and the payee and the relationship between the patient and the payee by such hospitals, dispensaries, nursing homes, Covid Care Centres or similar other medical facilities."

MCA Circular

MCA vide General Circular No.09/2021, dated 5th May 2021 has further clarified that spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants', 'manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19' or similar such activities are eligible CSR activities.

Legal Maxims

Ad infinitum

"continue forever, without limit" and this can be used to describe a non-terminating process, a non-terminating repeating process, or a set of instructions to be repeated "forever," among other uses. It may also be used in a manner similar to the Latin phrase et cetera to denote written words or a concept that continues for a lengthy period beyond what is shown.

FIND THE WORDS

CLUES	WORDS
1. Legally protected names	
2. Buying stocks	
3. Four equal parts	
4. RBI borrows fund from commercial banks	
5. Employer's regular expense	
6. The number of a court room	

Note: The below group of letters can be used repeatedly for different clues

INV	CO	TE	TR	ART
ADE	PAY	EST	ROLL	REP
ERS	ING	QU	REV	MA
URTH	ERSE	RA	RKS	ALL

Answers

1. Trademark 2. Investing 3. Quarters 4. Reverse Repco rate 5. Payroll 6. Court hall

CGRF offers online/class-room Awareness/Training sessions on Corporate Laws, IBC, and other Commercial Laws.

We are glad to share with you that **CREATE & GROW RESEARCH FOUNDATION (CGRF)** is a premier, not-for-profit research organization established as a Section 8 Company under the Companies Act, 2013. CGRF has been organizing seminars and Awareness programs on IBC and various other corporate laws to bankers, corporate professionals, faculty members of Universities, Colleges, Legal Professionals, Students, Government Organizations like EPFO, ESIC, Income Tax, GST, etc.

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Companies Act 2013
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Competitions laws
Labour Laws
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Contract Management
Proxy Advisory Services for Institutional shareholders

We have rich expertise on the abovesaid commercial laws with practical exposure in several industries. Our association with all the major banks gives an edge to provide professional training on practical aspects. We also provide classroom training for students on latest developments in business environment, regulatory domain and challenges faced, etc. Online sessions are also available for 2 hours / 4 hours.

Our training sessions to various educational institutions, bankers and Government departments have been received well with appreciable improvement in recognizing importance of updating knowledge in relevant fields.

Call for more information: Ms. Priya Karthick - Contact No: 044 - 2814 1604.

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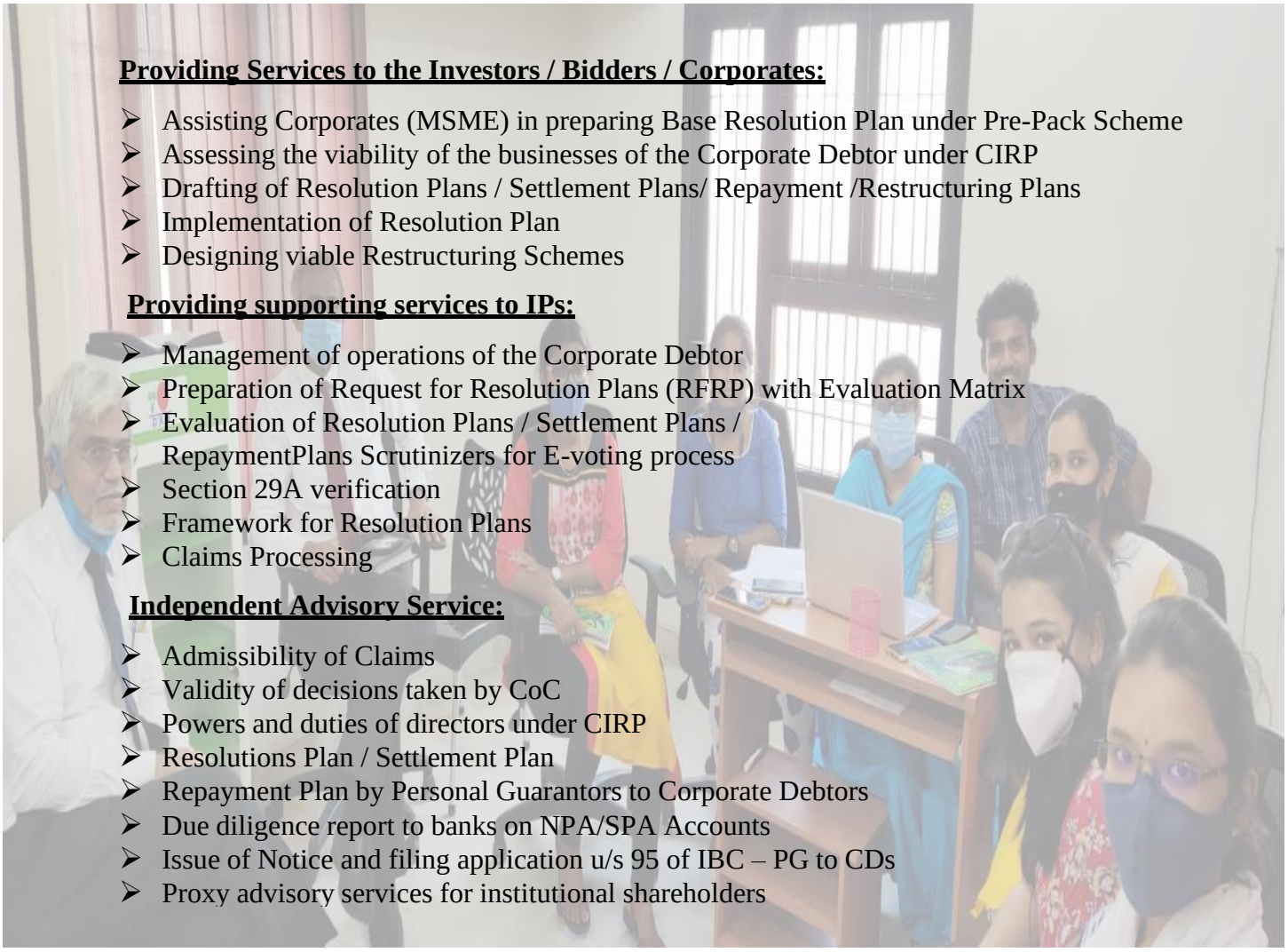
******Well-informed is well-armed******

Our Services



Providing Services to the Investors / Bidders / Corporates:

- Assisting Corporates (MSME) in preparing Base Resolution Plan under Pre-Pack Scheme
- Assessing the viability of the businesses of the Corporate Debtor under CIRP
- Drafting of Resolution Plans / Settlement Plans/ Repayment /Restructuring Plans
- Implementation of Resolution Plan
- Designing viable Restructuring Schemes

Providing supporting services to IPs:

- Management of operations of the Corporate Debtor
- Preparation of Request for Resolution Plans (RFRP) with Evaluation Matrix
- Evaluation of Resolution Plans / Settlement Plans / RepaymentPlans Scrutinizers for E-voting process
- Section 29A verification
- Framework for Resolution Plans
- Claims Processing

Independent Advisory Service:

- Admissibility of Claims
- Validity of decisions taken by CoC
- Powers and duties of directors under CIRP
- Resolutions Plan / Settlement Plan
- Repayment Plan by Personal Guarantors to Corporate Debtors
- Due diligence report to banks on NPA/SPA Accounts
- Issue of Notice and filing application u/s 95 of IBC – PG to CDs
- Proxy advisory services for institutional shareholders

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