CGRF SandBox®

September 2021
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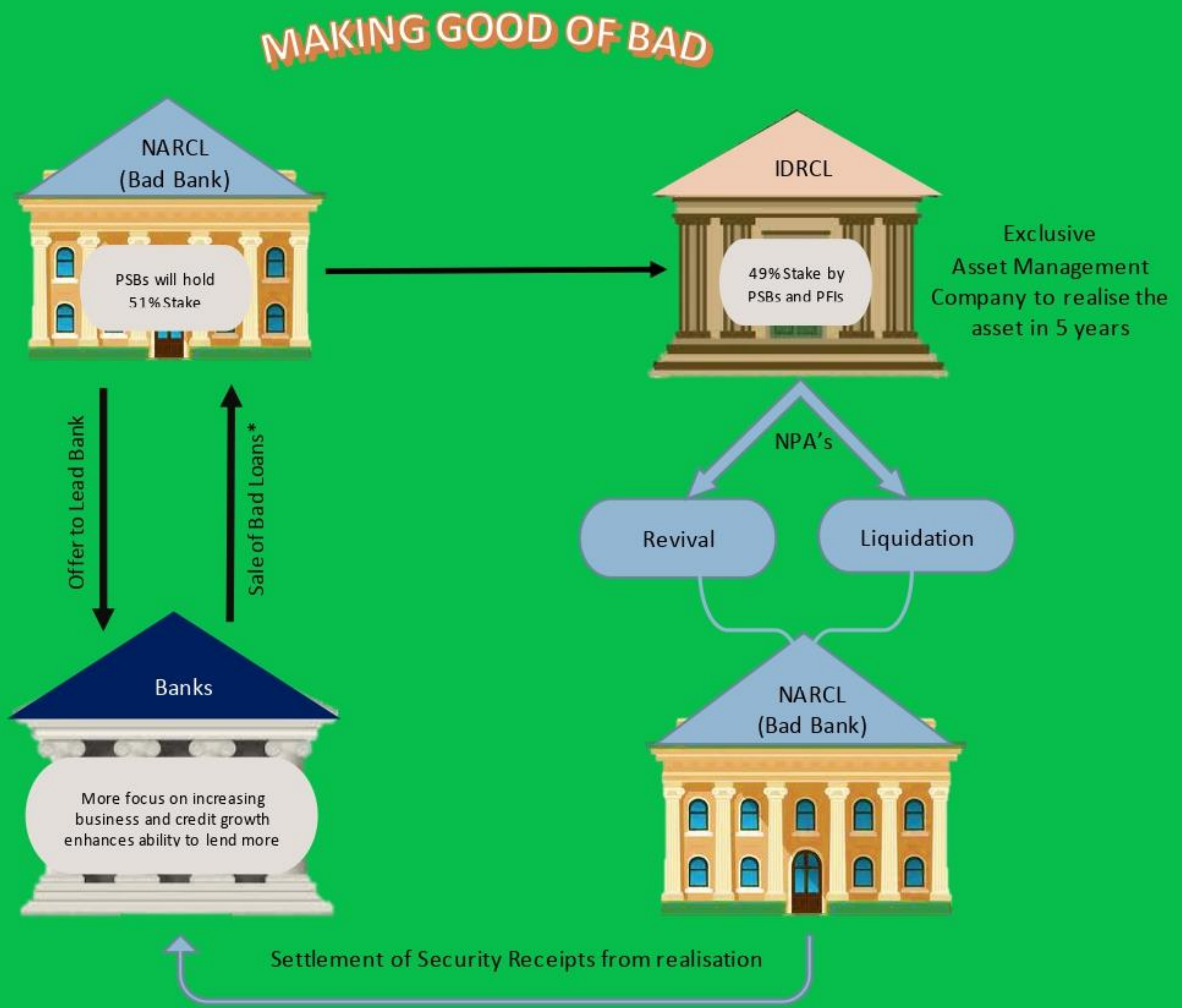


*Bad loan net asset sale value	
15%	Cash
85%	Tradeable Security Receipts

Guaranteed by Government of India for difference in face value of security receipts and realisation subject to maximum of Rs. 30,600 Cr

Create & Grow Research Foundation®

INDEX

<u>குறள்: 421</u>

அறிவற்றங் காக்குங் கருவி செறுவார்க்கும்
உள்ளழிக்க லாகா அரண்.

<u>Thirukural: 421</u>

Wisdom is a weapon to ward off destruction; it is an inner fortress which enemies cannot destroy.

From the Editor's Desk

Dear Readers of CGRF SandBox

It gives us immense pleasure to reach the esteemed readers of CGRF SandBox with our September 2021 issue.

The buoyancy in the economy is reflected by the surging Sensex going past the coveted level of 60,000. Well, the stock indices have their own fuzzy logic, if there is one. But, on the whole, the sentiments are suggestive of a remarkable turnaround in the key sectors. The olive branch extended by the Government to telecom sector has given much needed respite to the major players. The Covid-19 pandemic is unlikely as of now to threaten a major havoc as the vaccination drive has gained momentum. Reopening of schools and colleges have given a great relief to the younger generation. The festival season in the offing is expected to give a thumbs up to consumer spending.

Bad Bank (NARCL) and Asset Management Company (IDRCL)

The Government has put in place the mechanism to clean up the balance sheets of the public sector banks by selling the non-performing assets to the National Asset Reconstruction Company Ltd. (NARCL). An asset management company (India Debt Resolution Company Ltd. – IDRCL) has also been set up which will manage the bad assets and realise them within a specified time frame of five years freeing the banks from the rigmarole of monitoring these assets and the associated legal issues. The success of the **"twin-engine resolution machine"** depends on the remuneration structure for the IDRCL team of professionals who are supposed to manage the assets, turn them around and sell them off at a much better value rather than at a throw-away price under liquidation.

In this regard, the recently issued Master Direction by RBI on 24th Sept. 2021 on sale of loan exposures is worth mentioning as RBI has reportedly allowed the banks to sell loan accounts that have been classified as "fraud", provided the transferee is not connected to the borrower. The responsibilities of the transferor with respect to continuous monitoring, reporting and filing of complaints with law enforcement agencies shall also be transferred to the ARCs. It may also be noted that the transfer of such loan exposures to an ARC does not absolve the transferor from fixing the staff accountability as required under the extant instructions on fraud accounts.

(Image source: website)

Prepack Insolvency Resolution Process for MSME corporates

The first case of the Adjudicating Authority admitting a prepack insolvency resolution process has been reported. On 14th Sept. 2021, Hon'ble NCLT-Ahmedabad has admitted the application by GCCL Infrastructure & Projects Ltd. and passed an order under Sec.54A of IBC. The total debt amount is stated to be Rs.54.16 lakhs. More number of Prepack cases are likely to hit the NCLTs in the near future considering the debt defaults in MSME corporates due to Covid-19 stress.

Court orders

Supreme Court has come out with a few land-mark orders on matters like the sanctity of the time-lines under IBC. At the same time, NCLTs have also pronounced decisions highlighting the need to find a resolution rather than liquidation under IBC process. We are sure, SandBox readers will find them to be interesting.

With the festivals around the corner, we have great pleasure in wishing the CGRF SandBox readers great times ahead. We hasten to add here that let not caution be thrown to the wind. Please do follow "S-M-S" (Sanitize, Mask, Social Distance) mantra.
Happy Dusserah!!!

Yours truly
S. Rajendran

Understanding the Framework of Account Aggregator

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

In early September 2021, Reserve Bank of India, issued notification for launching Account Aggregator (AA) Framework. In our Country's journey of digitisation, successful implementation of Unique Identification Numbers for citizens (Aadhaar) and introduction of landmark payments system (UPI), we have now added another important layer viz., 'Digital access to data' through this framework of AA. We are all well aware, that digitisation is an unique economic strategy to reach out to every citizen, in one form or other. Further, we know that despite the digital and financial footprint, most data are not only fragmented, they are primarily controlled and used by respective entities for their own benefit only. Consequently, this AA framework will not only eliminate this data monopoly but also would help to consolidate the data to enable the customer to derive significant economic value from such shared data.

The AA framework has been created through an inter-regulatory play by multiple regulators viz Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority (IRDA), and Pension Fund Regulatory and Development Authority (PFRDA) through the initiative of Financial Stability and Development Council (FSDC).

AA, to be formed and registered as an NBFC, is expected to be a game-changer for opening up access to financial data of individual and business. Realising its potential and opportunities, AA quickly saw eight major banks viz., **SBI, ICICI Bank, Axis Bank, IDFC First Bank, Kotak Mahindra Bank, HDFC Bank, IndusInd Bank, and Federal Bank** joining the network.

A. The overall Structure of AA framework:

It is a three-tier structure viz.

1. *Account Aggregator,*
2. *FIP (Financial Information Provider) It is the data fiduciary, which holds customers' data. It can be a bank, NBFC, mutual fund, insurance repository or pension fund repository*
   And
3. *FIU (Financial Information User). It is the one which consumes the data from an FIP to provide various services to the consumer. An FIU can be a bank, NBFC or any other credit or other service provider who wishes to access customer data to determine if one qualifies for a loan or any other services to enable them to offer the best possible financial products or services. (Banks and FIs play a dual role – as an FIP and as an FIU).*

B. Account Aggregator:

(Image source: website)

An Account Aggregator is a non-banking financial company, formed for this specific purpose, engaged in the business of providing, under a contract, the service of retrieving or collecting and collating financial information pertaining to its customer. It is also engaged in consolidating, organising and presenting such information to the customer or any other financial information user as authorised. The AA framework allows customers – individuals, MSMEs and others - to avail various financial services from a host of providers on a single portal based on a consent model, under which the consumers can choose what financial data should be shared and also with which entity they should be shared.

An Account Aggregator allows a customer to transfer his financial information pertaining to various accounts such as banks deposits including fixed deposits, saving deposits, recurring deposits and current deposits, deposits with NBFCs, Structured Investment products, Commercial Papers, Certificate of Deposits, Government Securities, Equity shares, Bonds, Debentures, MF units, ETFs, Insurance Policies, Balances in NPS, Units of

Infrastructure Investment and Real estate investment trusts etc., These categories of information that fall under 'financial information', shall be shared with the Financial Information Utility.

C. Role of Account Aggregator:

The AA network features financial institutions such as banks, NBFCs, NBFC-AAs, third-party services, and others. Banks act as financial data providers, lenders act as financial data seekers, NBFC-AAs act as mediums of communication between banks and lenders, and third-party service providers work with AAs.

First, an individual or business opens an account with an account aggregator. Then, they create a funnel for their financial data by linking their bank accounts, insurance policies, etc — which are accounts containing the customer's financial data.

Second, the customer can provide consent to a lender to access their financial data through the NBFC-AA. This usually happens when the customer is looking for a loan or some other financial product that requires their financial information to be collected and collated.

Third, after consent is provided, the account aggregator seeks permission from the financial data providers to access the customer's data.

And finally, the data is sent to the account aggregator, which, in turn, empowers lenders to better evaluate the customer's financial profile and risk associated with providing a loan or providing the data to facilitate marketing various financial products.

If any customer has authorised his financial data and information can be shared, then it reduces the need for such customers a) visiting physically the financial service provider, including Banks, b) use Internet banking portals, c) sharing of critical inputs off-line and also to accord permission to physical access to their financial documents. An Account Aggregator is simply a financial utility for secure flow of data from multiple sources of the data owner and user in a secured way.

Account Aggregators provide digital infrastructure to allow lenders / others to access consented data flows and verified data. This will help lenders and others to reduce transaction costs, which will enable them to offer lower ticket size loans and tailor made products and services to customers. It will also help to reduce frauds and other compliance costs.

C. Need, purpose and benefits of AA:

AA creates secure, digital access to personal data and reduces thus physical contacts. Hence, it reduces fraud associated with physical data by introducing secure digital signatures and end-to-end encryption for data sharing.

These capabilities in turn open up many possibilities. For instance, whereas physical collateral is usually required for an MSME or other loans, with secure data sharing via AA, 'information collateral' (or data on future MSME income) can be used to access MSME or other loans. Currently, HDFC Bank and Axis Bank are using AA for auto loans, Lending Kart for MSME loans, and IndusInd Bank for personal loan. Majority of the MSMEs are largely outside the scope of formal credit due to the lack of transparent and accessible financial records. The AA framework can, therefore, help regulate, digitise, and simplify the process of opening up access to financial data resulting in improved formal lending.

E. Data which can be shared by AA:

An Account Aggregator allows a customer to transfer his financial information pertaining to various accounts such as banks deposits, equity, mutual fund and pension funds and other investments etc. For sharing of such information, the FIU is required to initiate a request for consent by way of any platform/app run by the AA. Such a request is received by the individual customer through the AA, and the information is shared by the AA, after consent is obtained.

F. How secure are the data - Can an AA see or store data?

Data transmitted through the AA is encrypted. AAs are not allowed to store, process and sell the customer's data. No financial information accessed by the AA from an FIP should reside with the AA. It should not use the services of a third-party service provider for undertaking the business of account aggregation. User authentication credentials of customers relating to accounts with various FIPs shall not be accessed by the AA.

G. Duties and Responsibilities of an Account Aggregator

a) Account Aggregator shall ensure that the providing of services to a customer who has made a specific application for availing such services, would be backed by appropriate agreements/ authorisations between the Account Aggregator, the customer and the Financial Service providers.

b) Account Aggregator shall not support transactions in financial assets by customers.

c) Account Aggregator shall ensure appropriate mechanisms for proper customer identification.

d) Account Aggregator shall share information only with the customer to whom it relates or any other person authorized by the customer. The process of authentication of the authorization has to be robust.

e) Account Aggregator shall not undertake any other business other than the business of account aggregator. Deployment of investible surplus by an Account Aggregator in instruments, not for trading, shall however be permitted.

f) No financial asset related customer information pulled out by the Account Aggregator from the financial service providers should reside with the Account Aggregator.

g) Account Aggregator shall have a Citizen Charter that explicitly guarantees protection of the rights of a customer. The Account Aggregator shall not part with any information that it may come to acquire from/ on behalf of a customer.

h) In the event of any difference in position of financial assets in the statement generated from the Account Aggregator and the books of the Financial Service provider, the position as reflected in the records of the Financial Service provider shall be considered correct.

Conclusion:

The biggest beneficiary of the AA system will be the credit starved MSMEs and other small businesses. Despite having enough data on financial health of a business, house banks (one which maintains the current account of a business) insist on physical collateral or personal guarantees from business owners for credit disbursals. The challenge of consolidating the latest financial information on the business across different sources and short notice at which working capital credit is mostly needed also means it's difficult for such businesses to go to other financial institutions for availing loans. As a result, most MSMEs either end up borrowing from "private sources" at usurious rates or let go of the business opportunity.

The AA system, hence, has the potential to revolutionise lending to MSMEs and liberating them from the exploitation by such house banks. AAs will allow much faster access of a businesses' financial data to lenders, crunching the whole loan application cycle to a few minutes. Also, AAs can help businesses expeditiously share other credit-worthiness proxies like digital invoices, tax returns among others.

A slew of new-age lenders with sophisticated underwriting algorithms and greater risk appetite have already emerged in the country over the last few years and democratisation of data access through AAs is a win-win for such lenders and MSMEs. This should drive a favourable and secular move towards cash-flow based lending and move away from the currently prevalent physical collateral-based lending getting more people and businesses in the formal credit system.

As of now, Four NBFCs, namely **Finvu, OneMoney, CAMS Finserv, and NESL**, have reportedly received operational licences to function as AA, while **PhonePe, Perfios, and Yodlee** have received in-principle approval.

Blanket Extension for holding AGM for the year ended 31st March 2021

As per Section 96 of the Companies Act, 2013, every company shall hold Annual General Meeting for every financial year within 6 months from the date of closing of the financial year, i.e., 30th September (9 months in case of first financial year). The section also provides that on an application being made by the company, the Registrar may extend the period to the extent of three months. The respective Registrar of Companies have provided a blanket extension of 2 months for companies to hold the Annual General Meeting for the financial year ended 31st March 2021, i.e., the last date being 30th November 2021 instead of 30th Sept. 2021.

About Bad Bank

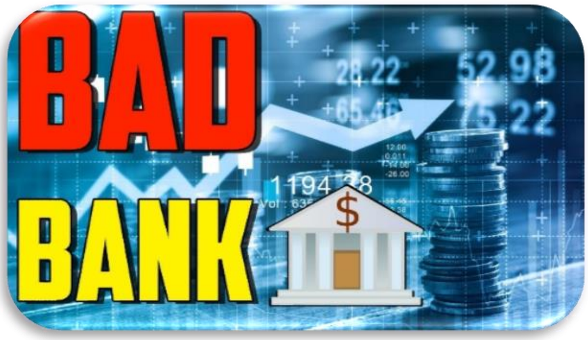
B.Mekala
Insolvency professional

The Reserve Bank of India in its Notification dated 7th June 2019 directed all the banks to follow the RBI's Prudential Framework for Resolution of Stressed Assets of Banks. In that RBI specified that the classification of assets of banks has to be on the basis of objective criteria which would ensure a uniform and consistent application of the norms. Hence, provisioning should be made on the basis of the classification of assets, which is based on the period for which the asset has remained non-performing, the availability of security and its realisability. Wherein RBI directed the bankers to set aside a percentage as provision on NPA amount. The provision stood extended from 0.25% to 100%. Even though the provisioning is a retrieval action, this has burdened the bankers, as already bankers are not able to recover the loans which they disbursed long before due to loss of business situations. Several banks avoided showing the bad loans in the balance sheet to show a healthy picture to its shareholders. Adding fuel to the fire, Covid 19 has cropped in, which has ruined the whole economy at present. Actually, throughout the world, the recession has set in due to lock downs and pandemic situation. Most of the business have come to a standstill and it has a deleterious effect on the economy. The situation is so worse that it is time for the Government to rejuvenate the cycle of economy to ride smoothly.

The main activity of a Bank is to lend monies, and this results in creation of asset in their balance sheets. If the quantity of non-performing assets to performing assets are more, then it makes it difficult for the bank to raise capital, for example through sales of bonds. In these circumstances, the bank may wish to segregate its "good" assets from its "bad" assets. As a part of its financial sector reforms to keep and attract further investors, a government may also float such a bank. Bad Bank is an entity where all the bankers can transfer their NPAs and concentrate on their operations, thereby they would be relieved of their stress from stressed assets.

ARC

Existing Asset Restructuring Companies are precisely doing well with regard to small value loans and they have given their best in Insolvency and Bankruptcy Code. But when coming to large sized loans, they are not coming forward to take over bad loans as ARCs are mostly private operators. Most of the assets of large loans belong to risky securities and in illiquid forms. These appearing in the balance sheet, it was not possible for the bankers to raise funds from the investors.



(Image source: website)

NARCL

The National Asset Reconstruction Company Limited (NARCL) is an asset reconstruction company created by the government. The NARCL known as Bad Bank, will function as an asset reconstruction company (ARC) set up by banks to resolve the issues created by stressed assets. Public sector banks will have 51% ownership in NARCL. The banks will transfer their stressed assets under a mutually agreed value to Bad Banks. The NARCL will purchase bad loans and pay 15% of the agreed price in cash and the rest 85% in Security Receipts (a receipt or other security, issued by an asset reconstruction company to any qualified buyer pursuant to a scheme, an undivided right, interest or title in the financial assets). By transferring the assets to NARCL, the bankers will get 15% cash plus they can reverse the provision to the extent of 15%, thereby getting funds for them to lend to their customers. Even if the provision is created according to RBI Norms (100%) the reversal of the provision is possible only after invoking the guarantee.

IDRCL

The India Debt Resolution Company Ltd (IDRCL) is a service company or an operational entity, which will manage and maintain stressed assets, take steps to sell these assets for a better price, find prospective buyers and market, engage professionals and experts in the field for them to market the assets that got transferred to

(NARCL). Public Sector Banks and Public Financial Institutions will hold 49% of stake in (IDRCL) and the rest by private sector. IDRCL will sell the assets and pay to NARCL. If the possibility of sale is remote or will cause loss, they will invoke the government guarantee which is extended for a period of 5 years, which will be paid from the fund allocated for this purpose by the government.

Government Guarantee

The difference between the value of the assets and the amount recovered from the sale will be met by the government guarantee. The Government have allocated Rs 30,600 crore for the same. They have planned to transfer fully provisioned assets of about Rs. 90,000 crores in phase I to NARCL, and the remaining assets with lower provisions would get transferred in phase II.

From this new structure what the bankers will gain

The capital is infused into the market as the bankers gain from apportioning the assets to the Bad Bank. Reversal of provision already made is an additional cash flow to the bankers. Now that the balance sheet is wiped off of bad loans it is possible for the bankers to raise funds from the investors. The profit will be more as they are into fresh lending and the loss due to toxic assets are not there.

As per 29th September 2021, news item, the (NARCL) expects to recover between Rs. 50,000 crore and Rs. 64,000 crore through the resolution of bad loans amounting to Rs. 2 trillion. The most likely recovery has been expected at 28 per cent or Rs 56,000 crore. The highest recovery rate is fixed at 32% or Rs.64,000 Crores.

Conclusion

Even though the Government is giving guarantee, the ultimate burden will fall on taxpayers. So a cautious attitude had to be developed among bankers while choosing the borrowers. To sum up it will be best practice to develop better and effective norms to bankers to improve the lending operations and without the intervention of the politicians. Can the Bad Bank provide us the expected result is a question mark. Will have to wait for the process to go forward.

Independent Woman Director in Listed Companies

Sonam Singhvi
Company Secretary

An Independent Woman Director is required to be appointed by a listed company if it is within the top 1000 listed entities according to SEBI (Listing Obligations & Disclosure Requirements) Regulations, 2015 (hereinafter referred as Listing Regulations). The provision quoted in the Listing Regulations under Regulation 17(1)(a) are reproduced below:

> The Board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty percent of the board of directors shall comprise of non-executive directors;
>
> *"Provided that the Board of directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019 and the Board of directors of the top 1000 listed entities shall have at least one independent woman director by April 1, 2020".*

The top 500 and 1000 listed entities are determined on the basis of market capitalization as at the end of the immediate previous financial year.

Based on the recommendation of Kotak Committee on Corporate Governance, the above said amendment were issued in SEBI Listing Regulations which initially came into effect since 1st April 2019.

The need to introduce such concept was felt when there was gradual increase of expectations of Stakeholders from the Independent Directors which came to be viewed as a solution to various corporate governance problems. Various studies, for instance a study by Peterson Institute for International Economics (USA), an independent organization, had proved that firms with women in director positions generate higher annual profit margins than those without female leaders. Between 1997 and 2017, firms with at least one female director consistently reported larger profit margins. Among profitable companies, a move from 0 to 30% women leaders was observed to have increased net revenue margin by 30 %, based on the Peterson study.

Therefore, this clearly supports a statement of Jing dong Hua, VP World bank that;

"Empowering women is not only the right thing to do. It is also the smart thing to do". It can add trillions of dollars to global GDP, boost productivity, generate higher returns on investment and promote greater organizational effectiveness."

(Image source: website)

Thus, to be at such recognized position, the Independent Woman Director is also expected to have certain set of skills & qualities which could be Leadership skills, having Industry knowledge, Knowledge on Legal and Regulatory aspects, having good command on accounting and finance, communication skills, intellectual curiosity, confidence, integrity and honesty.

Legal Maxim

"NUDUM PACTUM"- in Latin literally means 'bare promise'. It refers to a promise that is not legally enforceable for want of consideration. Under the Indian law, one of the essentials of a contract is 'consideration'. A consideration in other words maybe described as something in return ("quid pro quo"). An agreement without a consideration is a bare promise also known as 'Nudum Pactum". It is legally unenforceable agreement and therefore not binding on the parties.

Striking off Name of Company from Register of Companies by the RoC

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Introduction

When a Company is struck off from the Register of Companies maintained by the Registrar of Companies, it casts a pall of gloom on the directors who have brought the company up with laudable intentions thus far, whether the name of the company was struck off voluntarily or by the Registrar of Companies. More so when it is the latter. Striking off the name of the company does not amount to the company having been wound up. The company is in a state of animated suspension or in limbo. Nevertheless, it makes the Company inoperational unless the directors take steps to put it back on rails.

Chapter XVIII containing sections 248 to 252 of the Companies Act, 2013 and ten rules of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, govern the removal of names of companies from the Register of Companies, popularly known as "Striking Off".

For our immediate discussions we will deal only with the power of the RoC to "strike-off" and not voluntary strike off.

Analyses of the Sections and the Rules which empower the RoC to strike off

Section 248(1) empowers the Registrar of Companies to remove the name of a company from the Register of Companies maintained by him under certain circumstances with conditions as under:

1. The Registrar **must have a reasonable cause to believe** that:

Condition 1

(a) a company has failed to commence business within one year of its incorporation; **or**

Condition 2

(b) a company

(i) is **not carrying on any business or operation** for a period of two immediately preceding financial years; **and**

(ii) has not made any application within such period for obtaining the status of a dormant company under section 455;

Condition 3

(iii) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of section 10A; **or**

Condition 4

(iv) the company is not carrying on any business or operations, as revealed **after the physical verification carried out under sub-section (9) of section 12.**

We, therefore, find that the RoC must come to a conclusion that he has a reasonable cause to believe that **any of above of the above conditions** are met before he exercises his power under section 248. The conditions are all stand alones.

In the first place, u/s 248(1) of the Companies Act, 2013, the Registrar of Companies has to have a **reasonable cause to believe** that **any** of the above conditions is fulfilled.

Conditions 1 and 3:

Section 10A deals with the subject of commencement of business. S.10A(1)(a) has categorically stated that if a director of a company with a share capital has not filed a declaration with the RoC within 182 days from the date of incorporation of the company, that every subscriber to the MoA has paid the value of the shares subscribed as on the date of declaration, the company shall not commence business. Non-compliance of this section is an apt ground for the RoC to come to a conclusion that he has a reasonable cause to believe that the Company is not carrying on business or in operation as provided in the section 10(3) itself.

Condition 2:

As per Section 248(1)(c), the RoC ought to have a reasonable cause to believe that the company was not carrying on business or was not in operation for a period of two immediately preceding financial years before he choses to strike off the name of the Company and also confirm that the Company has not made any application within such period for obtaining the status of a dormant company under section 455. Both conditions co-exist.

Neither the section nor the Act or Rules define or explain the expression "*not carrying on any business or operation*". Section 248 of the Companies Act, 2013, or the *Companies Removal of Names of Companies from the Register Of Companies) Rules, 2016* **do not empower** the Registrar of Companies to lay a criterion for forming an opinion that he has a reasonable cause to believe that the company was not carrying on business or was not in operation for a period of two immediately preceding financial years such that he can strike it off if it had not filed the Annual Accounts for these two years and hence, he cannot assume that he has a ground for striking off the name of the Company. He cannot label the company as "**not in business or operations**" arbitrarily just because the company has not filed Annual Accounts for those two years. It is not farfetched to imagine that a company **can do** vigorous business inspite of not having filed the annual accounts for the two preceding financial years before strike off. This is not the only condition that the RoC should rely on. There are other conditions which the RoC has to ensure that they are complied with simultaneously before he strikes off. Therefore, it is erroneous on the part of the RoC to believe that he has a ground for striking off the name of the Company merely because the annual accounts for the company has not been filed for the two preceding financial years. Unfortunately, we have been witnessing mass strike off by RoCs **based only on this condition** for the past several years. By and large, the other conditions which are described hereunder are given the go-by by the RoC:

i) whether the RoC has complied with the requirements u/s 12(9) of the Act by conducting physical verification of the registered office of the Company;
ii) whether the RoC has served notice on the Company and its directors u/s 248(1) of the Companies Act,2013, read with Rule 3(2) and Rule 3(3) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016;
iii) whether the RoC has taken cognizance of the Directors' Reports for all the years wherein the Directors have demonstrated their intention to

continue the Company's business even as the directors encountered hardships and difficulties;

iv) whether the RoC has noticed from the Directors' Report that the company has been declared to be "going concern" or not;

v) whether the company is maintaining its bank account in order or not and whether the company maintains sufficient balance to meet its liquidity requirements or not ;

vi) whether the company files its Income Tax return, GST returns, etc., regularly or not;

vii) whether the RoC has satisfied himself that sufficient provision has been made

a) for the realization of all the amounts due to the company;
b) for the payment or discharge of its liabilities and obligations by the company within a reasonable time; and
c) if necessary, whether the RoC has obtained necessary undertakings from the managing director, director or other persons in charge of the management of the company.

(Image source: website)

The RoC should also convey to the Company and its directors how he has arrived at an opinion that he has a reasonable cause to believe that the Company was not carrying on business or was not in operation for a period of two immediately preceding financial years before he chooses to strike off the name of the Company.

A few years back, the government with an intention to get rid of shell companies and vanishing companies made a blanket diktat that the MCA should weed out such of those companies who are not in business or operations. Based on this, the MCA, has perhaps, arbitrarily evolved a yardstick that those companies which have not filed their Annual Returns for a period of two immediately preceding financial years before strike off should be the sacrificial lambs. Names of lakhs of companies were struck off in a short period of time by various RoCs.

It is the author's guess that the following provisions in the Act may have prompted the MCA to lay the condition of non-filing of Annual Accounts for these particular years as the only ground for striking off.

A combined reading of Section 248(1)(c), the Explanation to Section 455(1) of the Companies Act, 2013 and the Explanation to proviso to Rule 3 of the *Companies Removal of Names of Companies from the Register Of Companies) Rules, 2016* would lead us to believe that the MCA has assumed the right to fix the criterion of a company as not having filed its Annual Return for the last two preceding Financial Years before strike off as the only criterion.

Section 248(1)(c)

A company **not carrying on any business or operation** for a period of two immediately preceding financial years is liable to be struck off. This subsection does not talk of non-filing of Annual Accounts at all.

Section 455(1)

The RoC would have relied on the definition of the words "*Inactive Company"* appearing in the explanation to section 455 *of the Act.* 248(5) for the purpose of labelling a company "**not in business or operation**". "*Inactive Company*" has not been defined under the Companies Act,2013. However, the Explanation to section 455(1) defines an "*inactive company*" **for the purposes of that section alone** (i.e. 455) and not for the purpose section 248(1) which is reproduced as under:

Explanation. —**For the purposes of this section**, —
(i.e. for section 455)

(i) "**inactive company"** means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or **has not filed** financial statements and annual returns during the last two financial years; {**Emphasis added**}

But the RoC would err if he borrows this explanation for applying to enforce his power u/s 248(1) since the Explanation to section 455(1) is very clear that it is applicable only to Section 455.

Rule 3 of the *Companies (Removal of Names of Companies from the* <u>*Register Of Companies) Rules, 2016*</u>

The Explanation to the Proviso to Rule 3(1) is as under:

Rule 3: *Removal of name of company from the Register on suo-motu basis.*

(1) The Registrar of Companies may remove the name of a company from the register of companies in terms of sub-section (1) of section 248 of the Act:

Provided that following categories of companies shall not be removed from the register of companies under this rule and rule 4, namely: -

(i) …(ii)……

(iii) vanishing companies;

(v) …..(v)…..(vi)….(vi)……(vii)….(viii)….(ix)….(x)

Explanation. - For the purposes of clause (iii), the expression "vanishing company" means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange **which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years,** and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.

This explanation is confined only to a vanishing company which is listed and the RoC cannot borrow this explanation for enforcing his power on the unlisted public and private limited companies.

Therefore, none of the above provisions fit into the criterion which can be adopted by the RoC to label, particularly the small private limited companies, which have not filed their Annual Returns for the last two immediately preceding financial years before strike off as "not carrying on business or operations".

Conclusion

There is a need to restore the name of the Company in the Register of Companies by an appropriate application to the NCLT mainly because there is no provision in the Companies Act, 2013 for the appointment of a liquidator to carry out the exercise of dissolution. In many cases, the Companies whose names are struck off have assets to be liquidated or liabilities to be discharged. We find that the RoCs have struck off the names of these Companies without resolving this matter. It is, therefore, left to the director of the Companies to take effort and carry out the exercise of dissolution or revive the Company. In both cases the name of the Company has to be restored by involving the provisions of Sec 252 incurring heavy litigation expenses and presenting their case to NCLT. Sometimes, the Companies own immovable properties which the directors cannot afford to ignore.

Therefore, the author is of the view that a liquidator, being a Resolution Professional, be appointed such as in a case of Voluntary Liquidation to carry out the exercise of dissolution which may save lot of expenses to the directors and would also enable the creditors to get their dues back atleast partly if not fully. It is, perhaps, open to the companies whose name is struck off to challenge the action of the RoC in an appropriate court of law including claiming the cost and damages from the MCA for the mental agony on the grounds described above.

Inclusion of Cost Accountants for share reconciliation audit under SEBI (D&P) Regulations, 2018

SEBI at its Board Meeting held on 28th Sep.2021, deliberated on the existing provisions of SEBI (Depositories and Participants) Regulations, 2018, and approved the proposal to authorize practicing Cost Accountants to carry out share capital reconciliation audit of issuer companies.

Accordingly, under the Regulation 76(1) of SEBI (Depositories and Participants) Regulations, 2018, in addition to qualified Chartered Accountant or practicing Company Secretary, practicing Cost Accountants are also eligible to carry out share reconciliation audit of issuer companies.

Opening bell of Pre-packaged Insolvency Resolution Process

CGRF Bureau

The Insolvency and Bankruptcy Code, 2016 **("Code")** has constantly provided an exception to the Micro, Small and Medium Enterprises (MSMEs) from its stringent mechanism as the MSMEs are the backbone of the Indian economy and are critical to supply chains. This could be seen from the introduction of Section 240A in the Code in June 2018, which relaxes the applicability of the provisions of Section 29A which deals with the eligibility of a person for submission of resolution plan, in the case of a MSME Corporate Debtor which is undergoing CIRP.

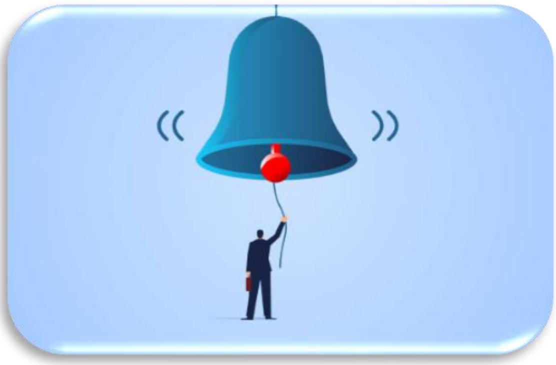
The experience from implementation of the Code including evolution of the ecosystem, stabilisation of the processes and, growing jurisprudence has prepared ground to look at new initiatives to further improve the effectiveness of the Code. The efficacy of out-of-court settlements workouts in delivering speedier resolutions provided regulators extend the same regulatory exemptions as available to settlements made under the Insolvency and Bankruptcy Code framework was considered and it was felt that Pre-packaged Insolvency Resolution Process may also be introduced under the Code with necessary checks and balances, as an option for resolving insolvency. Accordingly, Central Government constituted a sub-committee of Insolvency Law Committee to prepare a detailed scheme for implementing pre-pack and prearranged insolvency resolution process.

Based on the recommendations of the sub-committee, it was decided to amend the Code by inserting provisions relating to Pre-packaged Insolvency Resolution Process. To this effect, an Ordinance was issued on 4th April 2021, making amendments to Code inserting the provisions relating to Pre-packaged Insolvency Resolution Process which came into effect from 4th April 2021. The Ordinance was subsequently replaced by Insolvency and Bankruptcy Code (Amendment) Act, 2021 on 12th August 2021.

A pre-packaged process is an expedited reorganisation proceeding, which allows creditors and promoters to come together, identify the financial crisis, negotiate and bring in a resolution plan before approaching the National Company Law Tribunal. This hybrid mechanism (a blend of formal and informal mechanisms) is intended to facilitate resolution for MSMEs in an expeditious and cost-effective manner with minimum disruption in business continuity. In this scheme the resolution of a company's business is explored first with the debtor-in-possession even before the formal initiation of the process. After the process gets underway, in case there is impairment of operational creditors' dues in the base resolution plan, the Resolution Professional is mandated to call for resolution plans from third parties.

The following are the basic advantages of the Pre-packaged Insolvency Resolution Process:

a) hybrid model which gives due recognition to informal consultations.
b) accelerate the reformation measures in shorter time.
c) provides flexibility for consensus; and
d) cost effective.



(Image source: website)

Though Pre-packaged Insolvency Resolution Process has certain advantages to the Corporate Debtor compared to CIRP, especially as the existing management retaining their control, lenders may find it difficult to meet the shorter timelines, where forensic / transaction audit becomes more imperative. It may also be noted that debtor-in-possession mechanism could affect the invitation to prospective resolution applicants to submit resolution plans (Swiss challenge option), as the existing management may create hurdles and be a stumbling block for an external investor seeking information to potentially invest in the company.

Although the provisions introducing the prepack resolution process were made effective from April 2021, there was subdued response from MSMEs and as well as bankers, as there was no clarity on the approach as to how and when the same can be initiated, in the absence of a guidance / SOP to the banks from its regulator and lack of knowledge or complexity involved in the subject with the MSMEs. Several webinars /conferences were conducted by various professional organisation including IBBI in order to elucidate and to make understand the provisions enabling them to take advantages of the new provisions. Even in the recent Virtual Conference conducted by World Association for Small and Medium Enterprises (WASME) in collaboration with Indian Institute of Insolvency Professional of ICAI, Mr. Sudhaker Shukla, Whole Time Member, Insolvency Bankruptcy Board of India (IBBI) indicated that only a few cases have been filed so far in respect of initiation of Pre-packaged Insolvency Resolution Process.

The first Pre-packaged Insolvency Resolution Process under the provisions of Code was admitted by National Company Law Tribunal, Ahmedabad Bench on 14th September 2021 in the matter of GCCL Infrastructure Projects Limited. The total debt amount payable by the GCCL Infrastructure Projects Ltd to its various creditors is stated to be Rs.54.16 lakhs and the date of default is 31st Dec.2020. Financial Creditors have approved the decision of the directors to file prepack application as contemplated under the Code after considering the Base Resolution Plan submitted by GCCL Infrastructure Projects Ltd.

Hope that more deserving MSMEs would follow this consensus-based approach in these troubled times to take advantage of the new process.

It is also reported that discussion on having a pre-packaged resolution framework for all categories of debtors is being held at the highest level and a decision may be taken once state-owned bad bank -- National Asset Reconstruction Co. Ltd (NARCL) -- is operationalised.

Treatment of dues to workmen/ employees during CIRP

M.S. Elamathi
Legal Team

Provident Fund, Pension & Gratuity are terminal benefits that are basically employees' dues under statutory provisions which are provided through contributions to the funds created in accordance with the law. For Provident Fund, the contributions are placed *inter alia* with the Employees' Provident Fund Organisation. For Pension, Gratuity, dedicated funds are created either internally (plan funds) or with trust created for management of these funds. The amounts from these dedicated funds are later paid to the workmen / employees by the Government as per provisions of the respective laws.

The dues payable under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 are statutory dues, ultimately payable to the employees. It forms intrinsic part of their right to life. It is the rights of the employees under statutory social welfare scheme and it is to be well-protected.

In harmony with the abovesaid, the proceeds from provident funds, pension funds and gratuity funds which provide social safety net for workmen / employees, the Insolvency and Bankruptcy Code, 2016 excludes the dues payable to the workmen / employees, which may be in possession of the corporate debtor, from being the part of the liquidation estate vide Section 36(4) of IBC.

The Adjudicating Authority, in their orders during the last three years, have held that the amounts due and payable to any workmen or employee from the provident fund, pension fund and gratuity fund are the assets of the workmen/employees and hence shall not be included in the liquidation estate to be distributed pursuant to the order of priority as set out in Section 53 of the IBC.

Though, IBC does not explicitly provide the treatment of such dues to workmen / employees during the Corporate Insolvency Resolution Process, the Judiciary has come forward to interpret the law and bring a clarity on the treatment of dues to workmen / employees.

Some of the judicial pronouncements in this regard are summarized hereunder:

In ***Bhupinder Singh Vs. Unitech Ltd., Civil Appeal No(s).10856/2016,*** the Apex Court directed that the order of moratorium shall not foreclose the statutory entitlement of the EPFO to enforce the claims for the payment of EPF and other related statutory dues in accordance with law against the erstwhile management.

(Image source: website)

In ***Regional Provident Fund Commissioner, Ahmedabad vs. Ramachandra D Choudhry***, ***Company Appeal (AT) (Insolvency) No. 1001 of 2019,*** the Hon'ble NCLAT, New Delhi, held that as no provisions of the Employees Provident Funds and Miscellaneous Provision Act, 1952' is in conflict with any of the provisions of the IBC and, on the other hand, in terms of Section 36 (4) (iii), the 'provident fund', 'pension fund' and the 'gratuity fund' are not the assets of the 'Corporate Debtor', there being specific provisions, the application of Section 238 of the IBC does not arise. Therefore, the Successful Resolution Applicant was directed to pay the full PF dues along with interest thereof as per the EPF Act, 1952, as it does not include as an asset of the CD.

However, in ***Regional Provident Fund Commissioner, Warangal, Employees Provident Fund Organization Vs. Vandana Garg & Ors,*** **Company Appeal (AT) (CH) (Ins.) No. 50 of 2021,** the Hon'ble NCLAT, New Delhi held that, after approval of the Resolution Plan under Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors including the Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders. On the approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not a part of the Resolution Plan shall stand extinguished. No person will be entitled to initiate or continue any proceedings regarding a claim that is not part of the Resolution Plan. The Appellants claim about Provident Fund dues amounting to ₹1,95,01,301/-, which was earlier raised at the time of initiation of CIRP and was later admitted, stood frozen and will be binding on all the Stakeholders, including the Central Government. After approval of the Resolution Plan by the Adjudicating Authority, all additional or enhanced claims, that are not part of the Resolution Plan shall stand extinguished.

The Hon'ble NCLAT, New Delhi, in ***Regional Provident Fund Commissioner EPFO, Regional Office Chennai vs. T.V.Balasubramanian Resolution Professional Sholingur Textiles Limited, Company Appeal (AT) (Insolvency) No. 1521 of 2019,*** held that attachment of the property of the CD by the PF authorities was made much before the initiation of CIRP and that it was not affected by the moratorium under IBC.

Conclusion

Though the Courts have attempted to address the issues surrounding the benefit claims of workmen / employees, in the absence of guiding provisions / regulations in this regard, the employees or workmen will be put in a helpless and vulnerable state, which shall only make "welfare" claims, a misnomer.

A concrete provision regarding the PF dues / Gratuity dues and their treatment under CIRP is yet to be framed, and they potentially differ from case to case. The position has to be settled either by Supreme Court or by IBBI, the regulator at the earliest to bring certainty regarding the whole treatment of dues to employees / workmen.

Benefit claims of workmen / employees, in absence of any explicit provisions under the Code, is a matter of interpretation.

Determination of Assets of the Corporate Debtor during CIRP/Liquidation Processes under IBC

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Legal team

The processes under IBC may broadly be classified into determining the Assets and Liabilities, maximization of value of the assets, keeping the Corporate Debtor as a going concern or liquidate the Corporate Debtor and distributing the assets realized to the creditors.

To achieve the above results, the IRP/RP/Liquidator is entrusted with powers and duties to conduct the process without prejudice to the benefit of the stakeholders.

At the outset, the IBC specifies the details of the assets, which are to be included in the list of assets, that are liable to be transferred to the Resolution Applicant who resolve the Corporate Debtor or to be transferred to liquidation estate and realized in the case of liquidation, without violating the other`s rights in those properties that are in the possession of the CD.

The following provisions of IBC deals specifically with the assets of the Corporate Debtor

Assets as per Sec. 18 of the Code

The Interim Resolution Professional shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

i. Assets over which the corporate debtor has ownership rights which may be located in a foreign country;
ii. Assets that may or may not be in possession of the corporate debtor;
iii. Tangible assets, whether movable or immovable;
iv. Intangible assets including intellectual property;
v. Securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
vi. Assets subject to the determination of ownership by a court or authority;

Assets not included u/s 18 (explanation clause) of the Code

For the purposes of this section (18), the term “assets” shall not include the following, namely:

a) Assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
b) Assets of any Indian or foreign subsidiary of the corporate debtor; and
c) Such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Assets as per Sec. 36 of the Code

The liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor:
The liquidation estate shall comprise all liquidation estate assets which shall include the following subject to sub-section (4): -

a) Any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
b) Assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
c) Tangible assets, whether movable or immovable;
d) Intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights; (e) assets subject to the determination of ownership by the court or authority;
e) Any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

f) Any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
g) Any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
h) All proceeds of liquidation as and when they are realized.

Assets not included u/s 36 (4) of the Code

a) Assets owned by a third party which are in possession of the corporate debtor, including -
   i. assets held in trust for any third party;
   ii. bailment contracts;
   iii. all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;
   iv. other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
   v. such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(Image source: website)

b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

d) assets of any Indian or foreign subsidiary of the corporate debtor; or

e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Problems of determining the assets in connection with the statutory social welfare schemes

Section 36 (4) of IBC, expressly provides distinctions for assets which are not forming part of the Liquidation estate

Whereas, Section 18 envisages certain distinction of assets which do not form part of the assets of the Corporate Debtor but not specifically deals as in the case of section 36.

Problems faced by IRP/RP/Liquidator in determining the assets which are not to be included in the assets of the CD under Sec. 18 or Liquidation estate under sec. 36.

Most of the companies undergoing insolvency resolution process are not having proper records pertaining to the assets and financials of the Corporate Debtor. The Corporate Debtor's are non-compliant for more than two years prior to the commencement of the CIRP.

Therefore, the IRP/RP/liquidator cannot determine those assets not forming part of the assets of the CD, until and otherwise the claims submitted by the concerned person or authority.

Conclusion

Even though there is no specific provision for certain claims to be filed under the Code, the determination of assets that are not to be included in the Asset of the CD under section 18 or Liquidation estate under section 36, require claims from the concerned person so as to consolidate the assets of the CD or determine the liquidation estate respectively.

In the case of liquidation process, as per section 36 (4) (a) (iii) the amount due to provident fund, the pension fund and the gratuity fund are not included in the assets of the Liquidation estate, hence determination of the amount pertaining to provident fund, the pension fund and the gratuity fund will require the proper authority to file claim to separate the same from the liquidation estate. Whereas, in the case of CIRP, determination of assets that are not to be included in the assets of the CD, will require those who are eligible to claim their assets as per section 18 of the Code have to file their claim.

To have distinction and to ascertain the proper assets to deal under the process, both claimants and IRP/RP/Liquidators have to take proper care and due diligence in order to ensure that the interest of the stakeholders are not compromised.

Court Orders

CGRF Legal Team

Ebix Singapore Private Limited vs CoC of Educomp Solutions Limited & Anr. C.A No. 3224 of 2020
Kundan Care Products Limited vs Mr. Amit Gupta and Ors. C.A. No. 3560 of 2020
Seroco Lighting Industries Private Limited vs Ravi Kapoor RP of Arya Filaments Private Limited & Ors. C.A. No. 295 of 2021

Whether an application seeking withdrawal of resolution plan is permissible under IBC?

Common issue that arose for consideration of the Apex Court in the present appeal was whether a resolution applicant can file an application seeking withdrawal of a resolution plan approved by the CoC and pending for approval of the Adjudicating Authority and under what circumstances?

In the matter of Educomp Solutions Limited, Section 10 petition was filed under IBC seeking to initiate voluntary CIRP. Time was extended by NCLT twice for submission of resolution plans. Resolution Plan submitted by Ebix Singapore Private Limited was approved by the CoC and an application seeking the approval of the Adjudicating Authority was filed by the RP.

Pending approval of the resolution by the AA, allegation of fraud on the business and management of the corporate debtor surfaced. Based on these reports, IFC, a financial creditor of Educomp, filed an application under Section 60(5) of the IBC seeking investigation of the affairs/transactions of Educomp. Due to allegations of financial mismanagement of Educomp between 2014-2018, the MCA directed an SFIO investigation into its affairs. Ebix filed an application for withdrawal of its resolution plan which was dismissed by the AA. A similar application was filed by Ebix for the same relief which also suffered the same fate where the question of res judicata was also raised. A third withdrawal application was filed where directions were given to RP to place it before the CoC and decide. CoC resolved not to allow the withdrawal.

The AA allowed the 3rd withdrawal application and held that it was not barred by res judicata. However, it had not consciously adjudicated on whether the Resolution Plan could be withdrawn. As a consequence of its order allowing the application for withdrawal, the AA also dismissed the application seeking approval of resolution plan filed by RP as being infructuous.

On appeal, the NCLAT on the merits of the matter held that: *(i)* the AA did not have jurisdiction to permit withdrawal once a Resolution Plan was approved by the CoC,; *(ii)* the Adjudicating Authority could not enter upon the wisdom of the decision of the CoC to approve the Resolution Plan; *(iii)* the Resolution Applicant had accepted the conditions of the Resolution Plan and no change could be permitted; *(iv)* orders have already been reserved in the Approval Application; *(v)* no Special Investigation Audit had been conducted; *(vi)* Section 32A of the IBC grants full immunity to the Resolution Applicant from any offences committed before the commencement of the CIRP; and *(vii)* Ebix had participated in the process from August 2018 to January 2019 when orders had been reserved on the Approval Application, and hence it could not claim any right based on delay.

In the matter of *Kundan Care Private Limited*, the NCLAT held that an application filed by a Resolution Applicant to withdraw from the Resolution Plan approved by the CoC could not be allowed since: *(i)* there was no provision in the IBC for it; *(ii)* the Resolution Plan is enforceable as a contract against the Resolution Applicant; and *(iii)* the Resolution Applicant was estopped from withdrawing.

The correctness of this view of the NCLAT came up for determination in the present appeal. While issuing notice this Court had directed for an *ad-interim* stay on the judgment of the NCLAT, which continued till the date of passing of the order.

The Apex Court observed that a purposive interpretation of the statute cannot be evinced without examining the aims and objectives of the legislation. The Court observed that the I&B Code was introduced as "a water-shed moment for insolvency law in India that consolidated processes under several disparate statutes such as the 2013 Act, SICA, SARFAESI, Recovery of Debts Act, Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920, into a single code. A comprehensive and time-bound framework was introduced with smooth transitions between reorganization and liquidation, with an aim to *inter alia* maximize the value of assets of all persons and balance the interest of all stakeholders".

The UNCITRAL Guide and the BLRC Report was relied by the Court to clarify that the procedure for the insolvency process is critical for allocating economic coordination between the parties who take part in are bound by the process and such procedure produces substantive rights and obligations. There is an impact on the conduct of the Resolution Applicant who participates in the process and consents to be bound by the RFRP and the broader insolvency framework by the procedure laid down. An analysis of the framework of the statute and regulations provides an insight into the dynamic and comprehensive nature of the statute the Court held.

"Any claim seeking an exercise of the Adjudicating Authority's residuary powers under Section 60(5)(c) of the IBC, the NCLT's inherent powers under Rule 11 of the NCLT Rules 2016 or even the powers of this Court under Article 142 of the Constitution must be closely scrutinized for broader compliance with the insolvency framework and its underlying objective. The adjudicating mechanisms which have been specifically created by the statute, have a narrowly defined role in the process and must be circumspect in granting reliefs that may run counter to the timeliness and predictability that is central to the IBC. Any judicial creation of a procedural or substantive remedy that is not envisaged by the statute would not only violate the principle of separation of powers, but also run the risk of altering the delicate coordination that is designed by the IBC framework and have grave implications on the outcome of the CIRP" the Apex Court noted.

Before going in to determine whether withdrawals or modifications by successful Resolution Applicants are permissible under the IBC, understanding the nature of a Resolution Plan was deemed essential by the Court. Resolution Plan as defined in Section 5(26) of the IBC was analysed. Section 30 of the IBC was also analysed in detail, where Regulations 37, 38 and 39 were also discussed in detail.

After having briefly taken an overview of the process, the Court classified the issue in broadly three stages: *(i)* the first stage is prior to and ends with the approval of the Resolution Plan by the CoC; *(ii)* the second stage is the interim period between the Resolution Plan's approval by the CoC and before its confirmation by the Adjudicating Authority; and (iii) the third stage is after the approval of the Resolution Plan by the Adjudicating Authority. In the first stage, the Court held, the relationship between the parties is explicitly governed by the provisions of the IBC – such as the right of a PRA to seek the IM and RFRP upon submission of its EOI, which may have been rejected by the RP. In the third stage, the same holds true since Section 31(1) makes the Resolution Plan binding upon all the stakeholders and its violation will attract a penalty under Section 74 of the IBC. However, what was under determination in the appeal right now is the interim second stage between both of those.

The Court felt that if it were to hold CoC-approved Resolution Plans are indeed contracts, their provisions would still have to conform to the statutory provisions of the IBC. However, such an interpretation would entail that CoC-approved Resolution Plans are at the intersection of the IBC and the Contract Act. Which would in turn mean that, certain principles of contract law, would become applicable to CoC-approved Resolution Plans.

(Image source: website)

IBC does not specify whether Resolution Plans at the second stage of the process, *i.e.*, in the intervening period of submission to and approval by the Adjudicating Authority, are pure contracts. The violation of the terms of the Resolution Plan does not give rise to a claim of damages, the Court observed, rather it leads to prosecution and imposition of punishment under Section 74 of the IBC. On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal.

The Court noted that even though the above observations were made in the context of a scheme that has been sanctioned by the Court, the Resolution Plan even prior to the approval of the Adjudicating Authority is binding *inter se* the CoC and the successful Resolution Applicant. "The Resolution Plan cannot be construed purely as a 'contract' governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the Adjudicating Authority. Even at that stage, its binding effects are produced by the IBC framework. The BLRC Report mentions that 'when 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors'. The BLRC Report also mentions that, ‘the RP submits a binding agreement to the Adjudicator before the default maximum date’. We have further discussed the statutory scheme of the IBC in Sections I and J of this judgement to establish that a Resolution Plan is binding *inter se* the CoC and the successful Resolution Applicant. Thus, the ability of the Resolution Plan to bind those who have not consented to it, by way a statutory procedure, indicates that it is not a typical contract” observed the Court.

The Court thus arrived at the decision that Resolution Plans are not statutory contracts, and therefore decided that it was not required to analyze whether terms of the Resolution Plan can be given effect to, as terms of a contract, as long as they further the statutory objective.

In *Amtek Auto* the Apex Court had curbed a similar attempt by an SRA who had relied on a *force majeure* clause in its Resolution Plan to seek a direction compelling the CoC to renegotiate a modification to its Resolution Plan. It was held that there was no such scope between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the IBC, cannot be imported in the intervening period between the acceptance of the CoC and the approval by the Adjudicating Authority, the Court held. In this regard, the Court observed thus, “Principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan. However, remedies that are specific to the Contract Act cannot be applied, *de hors* the over-riding principles of the IBC.”

In *Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta*, this Court had held that the time taken in legal proceedings in relation to the CIRP must be excluded from the timeline mentioned in Section 12 and the same was reiterated by the Court. If the CIRP is not completed within the prescribed timeline, the Corporator Debtor is sent into liquidation. A PRA is required to submit an unconditional EOI within the time stipulated under the invitation for EoI, which shall not be less than fifteen days from the date of the issue.

A three- judge Bench of this Court in **Maharashtra Seamless** v. **Padmanabhan Venkatesh** while dealing with the question whether a successful Resolution Applicant can retreat through the route provided under Section 12A of the IBC, observed that, “[t]he exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code”. However, this Court left the question whether a successful Resolution Applicant “*altogether* forfeits their right to withdraw from such process [CIRP] or not”, open for subsequent judicial determination.

Essentially, the AA functions as a check on the role of the RP to ensure compliance with Section 30(2) of the IBC and satisfies itself that the plan approved by the CoC can be effectively implemented as provided under the proviso to Section 31(1) of the IBC. Once the Resolution Plan is approved by the AA, it becomes binding on all stakeholders involved in the Resolution Plan.

The analysis of the statutory framework governing the CIRP and periodic reports of the Insolvency Law Committee indicates that it is a creditor-driven process, observed the Court. Even though the statutory framework laid down under the IBC and the CIRP Regulations provide a step-by-step procedure which is to be followed from the initiation of CIRP till the approval by the AA, it is silent on whether a SRA can withdraw its Resolution Plan . The absence of any exit route being stipulated under the statute for a SRA is indicative of the IBC’s intention to prevent any attempts to withdraw. The rule of *casus omissus* is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction.

The Court further observed that in the wake of the COVID-19 pandemic, several Resolution Plans remained pending before AA due to the lockdown and significant hurdles to secure a hearing. An ordinance was thus swiftly promulgated on 5 June 2020 which imposed a temporary suspension of initiation of CIRP under Sections 7, 9 and 10 of the IBC for defaults arising for six months from 25 March 2020. However, no such legislative relief for enabling withdrawals or re-negotiations were provided, in the last eighteen months. In the absence of any provision under the IBC allowing for withdrawal of the Resolution Plan by SRA, vesting the Resolution Applicant with such a relief through a process of judicial interpretation would be impermissible, held the Court stating that such a judicial exercise would bring in the evils which the IBC sought to obviate through the back-door.

The Court further held that “Regulation 36B(4A) requires the furnishing of a performance security which will be forfeited if a Resolution Applicant fails to implement the Plan. This is collected before the Adjudicating Authority approves the Plan. Notably, the regulations also direct forfeiture of the performance security in case the Resolution Applicant “contributes to the failure of implementation”, which could potentially include any attempts at withdrawal of the Plan.” It was decided that it is best to leave it to the wisdom of the legislature, based on past experiences from the working of the enactment, to decide whether the option of modification or withdrawal at the instance of the Resolution Applicant should be permitted after submission to the Adjudicating Authority.

The Court held that the AA lacks the authority to allow the withdrawal or modification of the Resolution Plan by SRA or to give effect to any such clauses in the Resolution Plan. "The effect of allowing the AA to permit withdrawals of resolution plans that are submitted to it, would be to confer it with a power that is not envisaged by the IBC and defeat the objectives of the statute, which seeks a timely and predictable insolvency resolution of Corporate Debtors" the Court held.

It was further observed that "In the present framework, even if an impermissible understanding of equity is imported through the route of residual powers or the terms of the Resolution Plan are interpreted in a manner that enables the appellants' desired course of action, it is wholly unclear on whether a withdrawal of a CoC-approved Resolution Plan at a later stage of the process would result in the Adjudicating Authority directing mandatory liquidation of the Corporate Debtor."

Concluding that it would be sobering for the Court to recognize that whilst declaring the position in law to not enable a withdrawal or modification to SRA after its submission to the AA, long delays in approving the Resolution Plan by the AA affect the subsequent implementation of the plan. These delays, if systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation.

The Deputy Commissioner, Central GST
vs
Vicor Stainless Private Ltd
Company Appeal (AT) (Ins.) No.328 of 2021
NCLAT New Delhi Order dated 16th Sept. 2021

Resolution Professional is not duty bound to collate claims received after the last date as per Code, as CIRP is a time bound process

CIRP in the matter of M/s.Vicor Stainless Private Limited (Corporate Debtor) commended on 12th March 2020 and IRP was appointed. IRP issued a public announcement for inviting claims from the creditors and last date for submission of claims was fixed as 31st March 2020.

The Deputy Commissioner, Central GST (Applicant) came to know about the CIRP on 28th July 2020 vide email received from RP and thereafter filed claim before RP on 4th September 2020 with a delay of 19 days (including the period of 90 days from insolvency commencement date and another 68 days extension for submission of claims due to COVID lockdown). RP rejected the claim on the ground that there was delay in filing of claim.

Applicant filed a petition before NCLT Ahmedabad seeking direction to RP to accept the claim. RP explained that in this case the claim has been submitted belatedly. He informed that the claim of the Applicant was rejected taking into consideration the interest of all the creditors. He further informed that if such practice if allowed, keeping in abeyance the stipulated period and the further extended period, it would be difficult to complete the CIRP process in time bound matter, as there may be number of creditors who might have filed their claim beyond the prescribed period, and they may also approach NCLT citing example.

RP further informed that in the meantime the Resolution Plan has been received and is at the final stage of approval by CoC. The prospective resolution applicants submitted their Resolution Plan based on their financial capacity and availability of funds. There is every likelihood that if the claims of different creditors being accepted in a phase manner, that too after the stipulated time so provided for submitting claims, in that event, the Resolution Plans can never get materialised, more so when CIRP is to be completed in a time bound manner.

NCLT disallowed the petition stating that RP has allowed not only further 90 days but has also allowed another 68 days of lockdown period so as the facilitate all the creditors to file their claims. NCLT also observed that the claim was rejected by RP in due compliance of the provisions of Section 12(2)(c) of the Code, read with Regulation 6(2)(c) and Regulation 12(2) of CIRP Regulations Aggrieved by the Order of NCLT, the Applicant preferred an appeal with Hon'ble NCLAT.

Counsel appearing for the Appellant argued that the Appellant was intimated about the CIRP Proceedings only on 28th July 2020 and the Appellant filed their claim on 4th September 2020. It is the case of the Appellant that they were neither intimated nor were they aware about the fact that the last date of submission of claim has expired. Further, he stated that the departmental claims being statutory levies were reflected in their books of accounts, and RP has to prepare the list in accordance with the books of accounts and then invite claims otherwise the dues reflected in the books of accounts would be rendered completely meaningless and that the Resolution Professional did not perform his duties under law and is aiding the 'Corporate Debtor' in not paying the mandatory Government dues.

Hon'ble NCLAT observed that It is a matter of public record that in the public announcement dated 18.03.2020, the last date for submission of claims was mentioned as 31.03.2020. Additionally, the email dated 28.07.2020, kept the Appellant informed about the CIRP. *The material before us does not show any response to this email.*Hence, the delay of 19 days in filing the claim cannot be attributed to lack of knowledge. As regards administrative delays, the Hon'ble Supreme Court in a catena of Judgements has laid down that the entire time frame within which the CIRP ought to be completed is strictly mandatory in nature and cannot be extended.

In ***'Ebix Singapore Private Limited' Vs. 'Committee of Creditors of Educomp Solutions Limited & Anr.' reported in Civil Appeal No. 3224 of 2020,*** the Hon'ble Apex Court while dealing with the issue of withdrawals or modifications of the Resolution Plan, *once submitted to Adjudicating Authority*, after due compliance with procedural requirements *stressed on the importance of adhering to the prescribed timelines*, keeping in view the scope and objective of the Code.

Hon'ble NCLAT also observed that the Hon'ble Supreme Court has clarified that with respect to statutory dues owed/claims raised in relation to the period prior to amendment, the Resolution Plan shall still be binding on the statutory Creditors concerned, and the statutory dues owed to them, which are not included in the Resolution Plan, and such claims shall stand extinguished. In ***'Director General of Income Tax' Vs. Synergies Dooray Automotive Ltd.',*** this Tribunal has observed that once the Resolution Plan is approved, it shall be final and not subject to modification *even if the statutory claims are not included in the Plan.*

NCLAT dismissed the appeal and observed that in the instant case the Resolution Plan was approved by 91.02% of the Members of CoC and is pending approval before the Adjudicating Authority and was last listed for hearing on 16.06.2021. The literal language of Section 12 mandates strict adherence to the time frame it lays down. Time and again, the Hon'ble Supreme Court has noted that the model timelines provided in Regulation 40A of the CIRP Regulations should be followed *as closely as possible*. In this case, on account of lockdown and pandemic the last date was extended from 31.03.2020 to 16.08.2020 to facilitate all creditors to file their claims. In the background of this factual matrix, we hold that the delay/latches are on behalf of the Appellant and there is no dereliction of duty on behalf of the IRP/RP.

Hon'ble NCLAT reiterated that the Resolution Professional was not duty bound to collate claims which are belatedly received after the last date thereby delaying the entire CIRP which is a time bound process and further having regard to the fact that the claim of the Appellant was incorporated in the Information Memorandum which was circulated to the Prospective Resolution Applicant and the Members of the Committee of Creditors for their consideration, there is no dereliction of duty on behalf of the IRP/RP as provided for under Sections 18 and 21(1) of the Code.

SM Milkose Limited
vs
M/s Applied Electro Magnetics Pvt Ltd & Others
Company Appeal (AT) (Ins.) No.84 of 2021
NCLAT New Delhi Order dated 27th Aug. 2021

During CIRP CoC cannot take advantage of its position in apportioning any part of the receipts of the Corporate Debtor

CIRP of M/s. Applied Electro Magnetics Private Limited (Corporate Debtor) was admitted by NCLT New Delhi Bench on 26th Oct.2017. In order to keep the Corporate Debtor as going concern, the CoC approved availing interim finance from one of the financial creditors of the Corporate Debtor. Further, the CoC also agreed to earmark 25% of the receipts received during such operations of the Corporate Debtor during the CIRP towards repayment of loan of one of the Financial Creditor holding 90% voting rights in the CoC [i.e., Bank of India (Secured FC)].

SM Milkose Ltd (Resolution Applicant) submitted a resolution plan on 4th April 2018 which proposed payment of Rs.6.22 crores to Bank of India, and the same was not accepted by Bank of India. Resolution Applicant submitted a revised resolution plan on 4th May 2018 and committed that *"the amount of Rs.6.22 crores is reckoned effective 1st April 2018 (any payment made to the bank prior to 1st April 2018 shall not be deducted from this amount).* Any payment made on or after 1st April 2018 shall be deemed to be part of this offered amount of Rs. 6.22 crores." However, the revised plan was also not found satisfactory to Bank of India.

Bank of India had sought increase in Resolution Plan amount upto Rs.9 crores. Thereafter, the Resolution Applicant again submitted a revised resolution plan which provides payment of Rs.9 crores to Bank of India as full and final settlement of its total admitted claim of Rs.41.50 crores and the same was approved by the CoC on 22nd Dec.2017. Thereafter, the Resolution Plan approved by CoC was also approved by NCLT on 2nd April 2019.

(Image source: website)

Resolution Applicant sought NoC from Bank of India for satisfaction of Charge, after settlement of Rs.9 crores to Bank of India, including the amount earmarked during the moratorium period. However, Bank of India refused to provide NoC stating that the amount earmarked / received from Corporate Debtor, during moratorium was not forming part of the approved Resolution Plan. Hence, the Resolution Applicant filed and application with NCLT seeking direction to the Bank of India to abide by the approved Resolution Plan and issue certificate of satisfaction of charges and for taking appropriate penal proceedings for attempting to siphon off proceeds of Corporate Debtor in contravention of Moratorium.

NCLT after hearing the submissions made by the parties and on perusal of the conditions of the approved Resolution Plan, rejected the application and held that -

(1) the Resolution Applicant is liable to pay an amount as per the approved Resolution Plan and they cannot go beyond the approved Resolution Plan; and

(2) the amount paid prior to the approval of the Resolution Plan to the Respondent Bank during moratorium period will not be treated as an amount/part of the Resolution Plan as per the terms of the plan.

Aggrieved by the decision of the NCLT, Resolution Applicant filed an appeal with Hon'ble NCLAT.

Hon'ble NCLAT observed that Section 14 of the IBC, prohibits "transferring, encumbering, alienating or disposing of by the Corporate Debtor, any of its assets or any legal right or beneficial interest therein". The amounts received by the Corporate Debtor during the currency of the CIRP are assets of the Corporate Debtor whose transfer to chosen creditor in priority without the process of Resolution Plan would be prohibited. Therefore, such a condition as was prescribed in the first COC meeting regarding apportioning of the accruals in the separate bank account of corporate debtor to the Bank of India would not be legal and against the provision in sub-section 3 of section 14, which allows only such transactions which may be notified by the central government, in consultation with any financial regulator, to be exempted from the rigour of moratorium. The accruals in the separate bank account in the Bank of India during the CIRP are not notified by the Central Government and hence they are the assets of the Corporate Debtor.

Hon'ble NCLAT referred the judgment rendered by them in "**UCO Bank versus G. Ramachandran (CA (AT)(Ins) No. 761 of 2020 and IA No. 203 of 2020, decided on 3.11.2020)** wherein it has been held that *during CIRP no business majority in the COC can take advantage of its position in apportioning any part of the receipts to the Corporate Debtor to itself*. (emphasis added)

It also noted that Hon'ble Supreme Court in "**Kalparaj Dharmashi versus Kotak Advisories Ltd**." has made it very clear that any commercial decision of the COC of approving the Resolution Plan or rejecting the same has to be respected and the statute has not invested jurisdiction or authority, either with NCLT or NCLAT regarding same.

Thus, in this case the approval of the Resolution Plan in the 8th CoC Meeting and thereafter by NCLT assumes finality and cannot be tinkered with. Further, the Resolution Plan, which was approved by NCLT, include Bank of India's share as Rs.9 crores as full and final settlement with no conditions attached. Therefore, the condition stipulated by the CoC in its first meeting regarding the receipts by the Corporate Debtor during the CIRP period and apportioning of 25% of the accruals due to the operations of Corporate Debtor are not part of the final resolution plan and this has no legs to stand on vis a vis' the approved Resolution Plan and the share of Bank of India contained therein.

Hon'ble NCLAT quashed and set aside the NCLT order and held that that the amounts received towards interim finance during pendency of CIRP for which account was opened in the branch of Bank of India have to be held as amounts received by the Corporate Debtor during CIRP and the Resolution Professional is responsible for due utilisation of the same, strictly as per the provisions of IBC, Rules and Regulations and the Resolution Plan which was approved by the NCLT.

Our Services

Providing Services to the Investors / Bidders / Corporates:

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

Providing supporting services to IPs:

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

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.
- Advisory services under Pre-Pack Scheme for MSMEs

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