CGRF

SandBox®

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Cross Border Insolvency Resolution

The Crazy Cryptos

CGRF®

CREATE & GROW
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Thirukural: 667

We should not despise men of modest bearing or how they appear in size; may be, they are as important as a linch-pin of the wheels of a car which looks too small compared to the size of the wheel.

From the Editor's Desk

Dear Readers of CGRF SandBox

It looks like **"Mother Earth"** was just waiting to express herself no sooner the dust settled down on the Covid-19 pandemic. Widespread flooding in various countries as far as Canada, Egypt and in our own backyard in India have just shown to the world the kind of impact climate changes can bring upon the humanity.

On the financial market too, the highly successful run of IPOs of several corporates like "Fsn-E Commerce Ventures Ltd. **(Nykaa)"** came to be marred by the huge valuation for the IPO of PayTM and the consequent steep fall in the share price immediately after listing. Investors have been left poorer with several questions to regulatory authorities as to how such a valuation was approved.

Not to forget the other globe-threatening news about the new corona virus variant, viz., **"Omicron"** – forcing several countries to close their doors or tighten the rules for travel. Early but unconfirmed reports say that this variant is possibly even more transmissible than the highly infectious "Delta" variant, and that current vaccines may be less effective against it. One does not know if "Omicron" will also find its way as a fast and furious one and how far the vaccines already developed will protect us from the new variants.

Cross border insolvency resolution process

The Ministry of Corporate Affairs has come out with a discussion paper on 24th November 2021 inviting comments from public on the legal framework for cross border insolvency resolution. An insolvent company in India may have assets outside the country and similarly such company may have dues to foreign lenders. In today's rapidly changing global scenario where international transactions happen at break-neck speed, the impact of business failures is felt across several countries transcending national barriers. Example of this was seen when Jet Airways faced insolvency proceedings with several aircraft leasing companies located abroad impounding the aircrafts against their dues.

India has rightly opted to align with the global practice and adopt UNCITRAL Model Law of Cross Border Insolvency, 1997 which gives precedence to domestic proceedings and protection of public interest. It is hoped that after the implementation of the above framework, the National Company Law Tribunals will have greater role in the cross border insolvency proceedings. Domestic lenders, of course, will have to pull up their socks to protect their security interest against insolvency proceedings by foreign lenders.

Crypto currencies

It is very difficult not to notice huge full page ads in leading dailies about investment in crypto currencies which are claimed to be giving a handsome return within a very short time. Understandably, RBI and the Government are concerned given that there is no tracking of these transactions at present and the huge scope for money laundering and financing illegal activities including terrorism without leaving a trail of the transactions.

The Financial Action Task Force (FATF), the inter-governmental watch-dog to check money laundering and terror financing, has issued updated rules and guidelines for monitoring and regulation of the **"virtual assets"** (crypto currencies) and **"virtual asset service providers"** (crypto exchanges). The decision of the Union Government to introduce a Bill in the Parliament for regulating the crypto transactions has already sent the crypto prices either crashing or moderating. The investors, particularly the tech-savvy youngsters, who are lured by the quick returns and the ease to transfer the funds across the globe without the interference of banks, are likely to lose their hard-earned savings unless they exercise caution. Be safe while playing with Cryptos as they may harm you hard.

Yours truly

S. Rajendran

Crypto currencies – how safe they are?

S. Rajendran
Insolvency Professional

The Crazy Cryptos

"Currency" in a general monetary context, refers to bank-notes and coins that are in circulation as a legally accepted medium of exchange.

Differences in value of various currencies have complicated international trade as there is no uniformity in denomination of transactions. Significant commissions and back-end charges to be paid for ensuring payment and settlement of transactions are resulting in higher costs and also results in time-longer in settlement process. When the nations across the globe could not achieve a consensus on a unified currency, which would hugely benefit the whole world, individuals and private players introduced the world to "crypto currencies" or "virtual assets".

A crypto currency is a digitized currency which can be tendered, though not officially in many countries, as a monetary unit for settling payments. The Top 10* crypto currencies being traded are:

- Bitcoin
- Ethereum
- Litecoin
- Cardano
- Polkadot
- Bitcoin Cash
- Stellar
- DogeCoin
- Binance Coin
- Tether

**Source: Investopedia*

A cryptocurrency, broadly defined, is a form of digital token or "coins" that exist on a distributed and decentralized ledger called a blockchain.

The "crypto" in cryptocurrencies refers to complicated cryptography that allows for the creation and processing of digital currencies and their transactions across decentralized systems. Alongside this important "crypto" feature of these currencies is a common commitment to decentralization; cryptocurrencies are typically developed as code by teams who build in mechanisms for issuance (often, although not always, through a process called "mining") and other controls.

Crypto currencies are almost always designed to be free from government manipulation and control, although as they have grown more popular, this foundational aspect of the industry has come under fire.

About "Bitcoin"

"Bitcoin" was launched over a decade ago. Even though hundreds of crypto currencies have been launched so far, Bitcoin continues to lead the pack of cryptocurrencies in terms of market capitalization, user base, and popularity. Despite thousands of competitors that have sprung up, "Bitcoin" - the original cryptocurrency - remains the dominant player in terms of usage and economic value. Each Bitcoin was worth roughly $56,600 (Rs.42 lakhs appx) as of end November 2021, with a market cap of more than $1 trillion.

Crypto currencies and Money laundering, Terror Financing and FATF

In spite of the hype about the high degree of digital traceability of the crypto currencies through a block-chain mechanism, the inability of the governments to exercise effective surveillance over these crypto currencies led to its rampant misuse for various money laundering activities escaping the radar of the regulated transactions through international banking system.

Serious concerns were raised by the financial regulators and governments across the globe that the crypto currencies were being misused for illegal objectives like money laundering and terror financing. The Financial Action Task Force (FATF) on Money Laundering established by the G-7 Summit in 1989 has been reviewing and revising its standards. The FATF recently brought out certain updates in standards to stave off threats posed by crypto currencies, also called "virtual assets".

Crypto Currency Exchanges in India

The following are the leading crypto currency exchanges in India:

- **CoinDCX**
- **ZebPay**
- **WazirX**
- **CoinSwitch Kuber**
- **Unocoin**

In 2018, RBI issued a circular prohibiting banks and financial institutions from providing banking services to entities that deal with virtual currencies. However, on a challenge before the apex court, the circular was held to be unconstitutional by its judgment dated 4th March 2020. The huge spurt in advertisements issued by these crypto exchanges caught the attention of the gullible investors and thousands of crores were invested by scores of investors. Adding fuel to the fire, the Enforcement

Directorate reportedly found to its surprise that transactions involving transfer of huge sums in hundreds of crores had no details of beneficiaries.

The transactions involved the suspected criminals converting proceeds of crime into crypto currency "Tether" and then transferring it into Binance Wallet which is a crypto service agency registered in Cayman Islands where the illegal money was converted into Dollars. The grave potential of the crypto currencies to destabilise economies has slowly sunk into the political bosses and the central bank regulators. While the former wanted the business potential to be tapped, the latter insisted that the gullible investors should not be taken for a free ride.

Trouble started brewing as the Government wanted to take certain corrective measures to prevent a potentially big scam happening right under its nose. Facing a piquant situation, the Government has now clarified that it would not like to lag behind other countries in utilising the potentials of crypto currencies in economic development but at the same time it would like to have a proper regulatory oversight on this new phenomenon.

The Finance Minister promptly announced that the government will soon bring in a new Bill on cryptocurrency after it is approved by the Union Cabinet in the current session of Parliament. It is reliably learnt that the new Bill would seek to create a facilitative framework for the creation of the official digital currency to be issued by the Reserve Bank of India (RBI). The Bill will also seek to prohibit all private cryptocurrencies in India, while at the same time allowing for certain exceptions to promote the underlying technology of cryptocurrency and its uses.

Let us hope the new Bill will allow a controlled space for the ditigal currency to evolve and get stabilised paving way for more digital transactions without its being misused for money laundering and terror finance activities.

Non-Fungible Token (NFT)

While on this topic, the recent news about launching of NFTs by a few sections of celebrities makes an interesting reading.

What is an NFT? A NFT is a digital collectible which is unique and cannot be copied. They are stored on a digital ledger called blockchains. Most of the NFTs are stated to be part of "Ethereum" blockchain. There are platforms which deal in these types of NFTs and as on date, these exchanges are unregulated in India. Before you think of investing in an NFT, do think twice lest your investment may disappear into thin air any time.

IBC Help Line

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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.

When and under what circumstances the corporate veil can be lifted by the regulators (an examination with reference to legal pronouncements)

Prof R. Balakrishnan FCS, Pune

Lifting or piercing of the corporate veil – meaning

1. Lifting of the corporate veil means disregarding the corporate personality and looking behind the real person(s) who is / are in the control of the company.

Corporate is a separate legal personality

2. A corporate being a distinct legal personality, it is a distinct and separate personality from its shareholders. It is worth noting the judgment delivered by the Honorable Supreme Court of India in this respect in Rustom Cavasjee Cooper V. Union of India, MANU/SC/0011/1970 :(1970) 1 SCC 248. The Constitution Bench of the Supreme Court reiterated the above settled principle in the following words:

"A company registered under the Companies Act is a legal person, separate, and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the distributed profit."

In another judgment by the Hon'ble Delhi High Court in Gillette India Ltd Vs. DDA MANU/DE/1600/2019, while dealing with the issue of *c*oncept of distinct, separate and different persons i.e. its shareholders and the company as such, observed as under:

"It is trite law that an incorporated company is an entity separate from its shareholders. In Bacha F. Guzdar v. CIT MANU/SC/0072/1954, the Constitution Bench of the Supreme Court had held that income in the hands of a company was not the nature of income in the hands of its shareholders. It held that dividends in the hands of the shareholders of a company declared from agricultural income received by that company could not be considered as agricultural income of the shareholder. The said decision rested on the fundamental principle that a company is a separate juristic entity distinct from its shareholders."

Circumstances leading to lifting of corporate veil

3. There are many grounds under which corporate veil could be lifted such as, (a) ***w***here the company is a sham (fraud); protection of revenue (tax evasion); fraudulent trading; failure to pay share application money (vanishing company); to determine the true individuals who are finally interested in the company (section 216 of Companies Act 2013- by appointment of inspectors for investigation) and where statutory provisions calling for lifting of corporate veil etc. We now examine a few of the pronouncements of the Honorable Courts on this aspect.

(Image source: website)

Judgment on broad principles for invocation of corporate veil

3.1 As per the Hon'ble Supreme Court in Juggilal Kamlapat Vs, CITU.P.), MANU/SC/0091/1968, it was held that "Doctrine of lifting of corporate veil" can be applied by the court when the Corporate Entity is used for evasion of tax or for perpetrating fraud and the Honorable Supreme Court in DDA v. Skipper Construction Company (P) Ltd. MANU/SC/0497/1996 laid down broad principle for invocation of Corporate Veil.

Corporate veil lifting – when committing illegalities and defrauding people

3.2 In the case of Delhi Development Authority Vs Construction Company, the Court said that the fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent the Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

Where, therefore, we could conclude in saying that the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to render justice to the parties concerned.

The Hon'ble Supreme Court in State of Rajasthan Vs. Gotan Limestone Khanij Udyog (P) Ltd MANU/SC/0058/2016 (2016) 4 SCC 469 and Calcutta High Court in (Mohan Insurance and Financial Consultancy (P) Ltd. Vs. HDFC Bank Limited MANU/WB/1788/2019 laid down proposition of law that corporate veil can be lifted to pierce through the independence of a juristic entity in the event a fraud or illegality is sought to be committed by using such veil..

In one of the leading cases of Shri Ambica Mills Ltd., Re, the court held that the corporate veil of the company can be lifted in cases of criminal acts of fraud by officers of a company. In such cases, the courts lift the veil of the company to find out the real state of affairs of the company.

Corporate veil lifting – due to tax evasion and on protection of public interest

3.3 The Hon'ble Apex Court in the case of State of Rajasthan v. Gotan Lime Stone Khanij Udyog (P) Ltd., [MANU/SC/0058/2016] held that the principle of lifting the corporate veil as an exception to the distinct corporate personality of a company or its members is well recognised not only to unravel tax evasion but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation.

Corporate veil lifting – when used as a cloak for fraud / violation of law

3.4 The Hon'ble Supreme Court in a very recent case in S.Sukumar vs. Secretary, Institute of Chartered Accountants of India MANU/SC/0158/2018, observed that the principle of lifting the corporate veil has to apply when the law is sought to be circumvented. In expanding horizons of modern jurisprudence, it is certainly permissible. Its frontiers are unlimited. The horizon of the doctrine is expanding. While the company is a separate entity, the Court has come to recognize several exceptions to this rule. One exception is where corporate personality is used as a cloak for fraud or improper conduct or for violation of law.

Corporate veil may be lifted where statute itself requires lifting of corporate veil

3.5 The Constitution Bench of Hon'ble Supreme Court in Life Insurance Corporation of India V. Escorts Ltd.: MANU/SC/0015/1985 observed that a "Corporate Veil" may be lifted where a statute itself requires lifting of corporate veil or in cases of fraud or where a taxing statute or a beneficent statute is sought to be circumvented.

Corporate veil lifting in execution proceedings

4. The Hon'ble Delhi High Court in Formosa Plastic Corporation Ltd. vs. Ashok Chauhan & Ors. MANU/DE/0259/1999 and Punjab and Haryana High Court in Sai Sounds Pvt. Ltd. Vs. Kiran Contractors P. Ltd. MANU/PH/0154/2016 Mitsui OSK Lines Ltd. vs. Orient Ship Agency Pvt. Ltd. and Ors. (07.02.2020 - BOMHC): MANU/MH/0194/2020 held that the Court has the power to lift the Corporate Veil, in execution proceedings where to defeat the decree passed by civil court, fraud was committed by transfer of the property to a sister company or Group Company at an extremely depressed valuation.

Lifting of corporate veil – family companies (within a group)

5. The Hon'ble Supreme Court in a recent judgment of ArcelorMittal India Private Ltd. vs. Satish Kumar Gupta & Ors. MANU/SC/1123/2018: has noted the Gower's Company Law and held that, "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.

Holding & subsidiary relationship

6. The Hon'ble Delhi High Court in K.K. Modi Investment and Financial Services Pvt. Ltd. Vs. Apollo International Inc. & Ors. MANU/DE/0586/2009: to contend that every company which is incorporated under the relevant law of a country is a separate legal entity. Further, the court cannot presume that all subsidiary companies and the holding or parent company shall be considered as one legal person and a contract with one company shall be considered as contract with every other company of that group.

The Hon'ble Supreme Court in Indowind Energy Ltd. vs. Wescare (India) Ltd. & Anr. MANU/SC/0300/2010 observed that each company is a separate and distinct legal entity and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies one and the same.

The Supreme Court in Vodafone International Holdings BV Vrs. Union of India MANU /SC/0051/2012 observed that in a corporate structure, the subsidiaries of holding company are on individual, separate and distinct entities. It was held that in the context of income tax, holding company's income is different from its shareholders income.

Where corporate veil cannot be lifted

7. It has been repeatedly held by Hon'ble Supreme Court and different Hon'ble High Courts that "Corporate Veil" can be pierced only on the pleas inter alia of fraud, misrepresentation and diversion of funds, by making specific pleading to that effect, as veil piercing is not a rule but an exception which is undertaken only in certain specified circumstances. Given below are the relevant judgments.

(Image source: website)

The Hon'ble Supreme Court in Oil and Natural Gas Corporation Ltd. vs. M/s. Discovery Enterprises Pvt. Ltd further observed that merely because son and daughter-in-law of the Managing Director of JDIL were the Directors of the Discovery Enterprises Pvt. Ltd., the same cannot take ONGC's claim any further to pin down JDIL in respect of the contractual obligations between DEPL. It is clear that mere commonality of directors, shareholdings, offices and email addresses does not establish a case where the corporate veil ought to be lifted.

The Hon'ble Bombay High Court has in Siva Bulk Vs. M.V. Aaodabao & Anr. MANU/MH/0899/2016 buttressed the point that corporate veil cannot be lifted unless a compelling case is made out by the applicant, since the doctrine of piercing the corporate veil stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders.

The Hon'ble Delhi High Court in SARE Public Company Ltd. vs. Avon Infracon Pvt. Ltd.: MANU/DE/0046/2020, while dealing with the issue of relationship between holding and subsidiary company, reiterated that settled legal position is that the holding company and the wholly owned subsidiary are two distinct legal entities. The holding company does not own the assets of the subsidiary.

Further, the above has also been held in the following cases.

(i) Singer India Ltd. Vs. Chander Mohan Chand MANU/SC/0626/2004: (2004) 7 SCC 1, Elof Hansson (I) Pvt. Ltd. Vs. Shree Acids & Chemicals Ltd. MANU/DE/0285/2012

(ii) Saga Lifestyle Pvt. Ltd. Vs. Bang & Olufsen A/S MANU/DE/1504/2019, Anirban Roy Vs. Ram Kishan Gupta MANU/DE/3524/2017, V.K. Uppal Vs. Akshay International MANU/DE/0320/2010, R.K. Chaddha Vs. State of U.P. MANU/UP/2471/2014

(iii) M.V. Sea Success I Vs. Liverpool and London Steamship Protection and Indemnity Association Ltd. MANU/MH/0842/2001, Binatone Computers Pvt. Ltd. Vs. Setech Electronic Ltd. MANU/DE/1884/2009

(iv) Kimiya Shipping Inc. Vs. M.V. Western Light MANU/MH/0196/2014 and Gopi Vallabh Solutions Pvt.. Ltd. Vs. State of West Bengal MANU/WB/1704/2018

Observation by the Honourable Supreme Court

8. The Hon'ble Supreme Court in Globe Ground India Employees Union vs. Lufthansa German Airlines: MANU/SC/0586/2019 has observed as under: - :

(a) Corporate veil can be pierced, and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporal form is misused to accomplish certain wrongful purposes. In the aforesaid case, having regard to facts, it was opined that the doctrine of piercing veil cannot be applied.

(b) The principle of distinct, separate, and independent character between bodies corporate or between corporate on one hand and its promoters/director/shareholders on the other hand, cannot be lightly ignored or discarded except when principle of "Lifting of Corporate

Veil" is sought to be invoked because of grave fraud being played by persons who control.

Conclusion

By a fiction of law, a company is seen as a distinct entity separated from its members, but it is an association of persons who are in fact the beneficial owners of the company and its corporate property. A corporate veil is a legal concept that separates the acts done by the companies and organizations from the actions of the shareholders. It protects the shareholders from being liable for the actions done by the company. This is not an absolute right; the court depending on the facts of the case can take the decision whether the shareholder is liable or not.

The separate personality of a company is a statutory privilege, and it must be used for a legitimate purpose only. Whenever and wherever a fraudulent or dishonest use is made of the legal entity, the individuals will not be allowed to hide behind the curtain of corporate personality. The appropriate authority will break the shell of the company and sue the individuals who have done or committed such a crime or offence. This lifting of the curtain is called "Lifting of the corporate veil".

HURRY UP!!!

MCA has extended the due date to 31st December 2021 for filing e-forms AOC-4 (XBRL/Non-XBRL), AOC-4 CFS and MGT 7, MGT 7A (for one Person Company and Small Companies) for the Financial Year ended 31.03.2021 vide its General Circular No 17/2020 dt. 29th October 2021.

Which means the above – mentioned forms due for the FY 2020-21 can be filed by the Companies upto **31.12.2021** without payment of additional fees.

It may be noted that extension of time for holding of AGM for the FY ended 31.03.2021 **ended on 30th November 2021.**

Understanding Real Estate Investment Trust (REIT)

CGRF Bureau

Introduction

Real Estate Sector in India saw a rapid growth in the years 2005-2010 underlined by robust economic growth in the country. The growing scale of operations of the Indian corporate sector has increased the demand for commercial buildings, residential properties and spaces including virtual offices, warehouses, malls/ shopping centres, etc. This surge in demand has consequently fuelled the need to expand investment in the real estate sector. Thus, it was crucial that investment vehicles such as Real Estate Investment Trusts (REITs) evolve in the country, for such rapidly growing sector.

Traditionally, the sources of financial support for real estate sector have been the banks, financial institutions, and in some cases, private players. Regulated means of investments in real estate sector have evolved continually. It is in this scenario that a relatively modern source of investment in real estate properties, being the REIT, has been seen as the way forward.

REIT serves as an alternative for investors who are averse to investing in physical properties due to the monetary quantum involved, and the risks that may arise including unsupervised and arbitrary rent generated from such properties. Investors can buy and sell units of REIT on various stock exchanges, making investment easier as well as ensuring liquidity and transactional transparency compared to acquisition of a physical property. It pools investor money in order to invest in real estate properties, and provides time-bound, regulated and regular rental income to the investors. With the introduction of REITs in India, a person can reap benefits of such regulated and assured rent by investing in REIT units.

Globally, framework for REIT existed in several countries including USA, UK, Australia, Singapore, Japan, France, etc. In most of these countries, REITs apparently has the following features:

a) REITs are managed by professional managers having diverse skill bases in property development, redevelopment, acquisitions, leasing and management, etc.

b) In countries where REITs are available for retail investors, they provide an avenue to such

investors in properties which they otherwise would not have been able to take an exposure.

c) REITs are also a popular investment option for long term pools of capital such as pension funds and insurance companies primarily since the regular stream of income helps them in managing regular outflow to their investors.

d) Listed REITs provide liquidity for investors thus providing easy exit to the investors.

e) REITs bring in transparency and accountability in the real estate sector.

All these reasons have made REIT one of the preferred investment vehicles around the world.

[Source:Consultation paper on the draft SEBI (Real Estate Investment Trusts) Regulations, 2013]

What are REITs?

Real Estate Investment Trusts ("REITs") are companies that own, operate or finance income-producing real estate across a range of property sectors. REITs provide an investment opportunity, like a mutual fund, that makes it possible for every investor to benefit from valuable real estate, present the opportunity to access dividend-based income and total returns, and help communities grow, thrive, and revitalize.

These real estate companies must meet several requirements to qualify as REITs. A REIT is created by the sponsor(s), who transfers ownership of assets to the Trust in exchange for its units.

REAL ESTATE INVESTMENT TRUSTS IN INDIA

Regulatory Landscape

REITs in India are registered with the Securities and Exchange Board of India (SEBI) under SEBI (REITs) Regulations, 2014. It is mandatory for units of all REITs to be listed on a recognised stock exchange having nationwide trading terminals, whether publicly issued or privately placed.

Based on the global experience, SEBI introduced Regulations in India in September 2014. The developments are listed below:

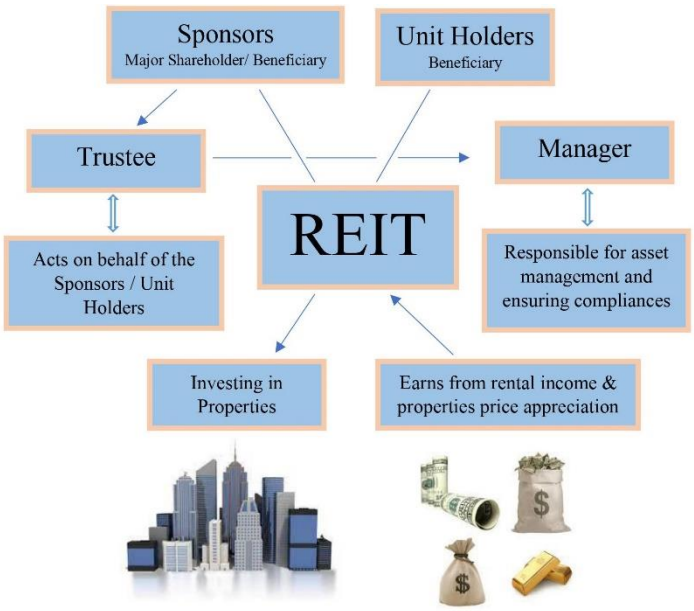
2008 - SEBI initially planned to introduce concept of REIT in India
2013 - SEBI issued draft REIT Regulations in India for public comments
2014 - SEBI successfully introduced SEBI (Real Estate Investment Trusts) Regulations, 2014
2016 - SEBI released consultation paper for amendments of REIT Regulations and issued SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2016, w.e.f. 30.11.2016
2017 - SEBI amended REIT Regulations vide SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2017, w.e.f. 15.12.2017
2018 - SEBI amended REIT Regulations vide SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2018, w.e.f. 10.04.2018.
2019 - SEBI amended REIT Regulations vide SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2019, w.e.f. 22.4.2019
2020 - SEBI amended REIT Regulations vide SEBI (Real Estate Investment Trusts) (Second Amendment) Regulations, 2020, w.e.f. 16.06.2020.
2021 - SEBI amended REIT Regulations vide SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2021, w.e.f. 30.07.2021.
2021 - SEBI issued a Master Circular dated November 29, 2021 for Real Estate Investment Trusts(REITs) consolidating various circulars issued by SEBI from time to time.

STRUCTURE AND FRAMEWORK OF REIT IN INDIA

REIT shall not operate unless it is registered with SEBI.

The pictorial representation below provides an overview of the operating structure under the REIT Regulations.

Structure of REIT



Rights & Responsibilities

Sponsor and Sponsor Group

The sponsor(s) and sponsor group(s) shall set up an REIT. In addition to establishing the REIT, the sponsor and sponsor group have been conferred upon the task of appointing the Trustee.

Further, the SEBI Regulations stipulate that the sponsor and sponsor group shall transfer or undertake to transfer their entire shareholding or interest and rights in the ownership of real estate assets to the REIT, prior to allotment of the REIT units.

The REIT Regulations do not have any restriction on the number of sponsors. After the initial offer of the units, the sponsor and sponsor group must have a minimum holding of 25 per cent of the REIT units for at least three years from the date of listing of such units. Any holding in excess of the above limit must be held for at least one year from the date of listing of such units.

Trustee

The prime responsibility of the Trustee is to hold the REIT assets in trust for the benefit of the unit holders in accordance with the Trust Deed and REIT Regulations. The Trustee must be registered with SEBI under the *SEBI (Debenture Trustees) Regulations,1993* and shall have such wherewithal with respect to infrastructure and personnel to the satisfaction of SEBI.

(Image source: website)

While the sponsor appoints the Trustee, it is the trustee who enters into an investment management agreement, on behalf of the REIT with the Manager.

Elaborate monitoring and reviewing powers have been granted to the Trustees under the REIT Regulations that ensure scrupulous functioning of the REIT. These stipulations ensure independence of the trustee and foster unit holders' confidence in the REIT as the Trustee is required to hold its assets in trust for the benefit of the unit holders in accordance with the trust deed and REIT Regulations.

Manager

REIT Regulations specify that a manager can be a Company or Limited Liability Partnership (LLP) or a body corporate, qualified with a condition that it should be incorporated in India. A manager of the REIT will be at the helm of all operations right from appointments to asset management, and from arranging for listing to ensuring accounting, and supervising the auditing of the REIT. The manager shall ensure that the investments made by the REIT are in compliance with the investment strategy of the REIT and REIT Regulations.

To qualify as a manager backed with financial competence, the REIT Regulations require a company or body corporate to have a net worth of at least Rs.10 crores or an LLP to have at least Rs. 10 crores worth of net-tangible assets. In addition, the manager or its associate must have at least five years of experience in fund management or advisory services or property management in the real estate industry or in development of real estate.

The REIT Regulations impose immense responsibilities on the manager including the responsibility to make investment decisions with regard to the REIT assets. Accordingly, if a manager does not have the requisite experience, it may also avail the benefit of using the experience of one of its associates to fulfil this eligibility requirement. This stipulation seeks to ensure a certain degree of proficiency and expertise in the management of the REIT and also provides for a range of experienced players with varied real estate experience. To further augment the competency of the manager, atleast two of its key personnel must have at least five years, each, of experience in fund management or allied services or advisory services or property management in the real estate industry or in development of real estate.

The manager, in consultation with trustee, shall appoint the valuer(s), auditor, registrar and transfer agent, merchant banker, custodian and any other intermediary or service provider or agent for managing the assets of the REIT or for offer and listing of its units or any other activity pertaining to the REIT in a timely manner and in accordance with these regulations.

Unit Holders

The unit holder shall have the rights to receive income or distributions as provided for in the Offer document or trust deed.

An annual meeting of all unit holders shall be held not less than once a year within one hundred and twenty days from the end of financial year and the time between two meetings shall not exceed fifteen months.

Investments by REIT

The REIT Regulations also lay down conditions with regard to channelising the investment of the REITs.
The investment of REIT shall only be in holding company and/or SPVs or Properties or Securities or Transferrable Development Rights (TDRs) in India in accordance with the investment strategy as detailed in the offer documents and in compliance with REIT Regulations.

Investments in vacant land or agricultural land or mortgages other than mortgage-backed securities are not permitted.

REIT may invest in properties through SPVs subject to conditions specified in REIT Regulations.

Not less than 80% of value of the REIT assets shall be invested in completed and rent and / or income generating properties and not more than 20% of the value of REIT assets shall be invested in assets other than as stated above and such investment shall only be in –

(a) Properties, which are –
   (i) under-construction shall be held by the REIT for not less than three years after completion;
   (ii) under-construction properties which are a part of the existing income generating properties owned by the REIT shall be held by the REIT for not less than three years after completion;
   (iii) completed and not rent generating properties shall be held by the REIT for not less than three years from date of purchase;
(b) listed or unlisted debt of companies or body corporate in real estate sector (other than in the debt of the holding company and/or SPVs) mortgage backed securities;
(c) equity shares of companies which are listed on a recognized stock exchange in India which derive not less than 75% of their operating income from real estate activity;
(d) unlisted equity shares of companies which derive not less than 75% of their operating income from real estate activity, subject to conditions specified in (a) above, if such investments are made in under construction properties
(e) government securities;
(f) unutilized FSI of a project where it has already made investment;
(g) TDR acquired for the purpose of utilization with respect to a project where it has already made investment;
(h) money market instruments or cash equivalents.

REITs in India are expressly barred from investing in the units of other REITs.

Advantage of investing in REITs

Competitive long-term performance: REITs provide long-term returns similar to those of shares /stocks.

Substantial, stable dividend yields: REITs' dividend yields provides a steady stream of income through a variety of market conditions.

Liquidity: Shares of publicly listed REITs are traded on the stock exchanges.

Transparency: Independent directors, analysts, auditors, as well as the business and financial media monitor listed REITs' performances and outlook. This oversight provides investors with a measure of protection and more than one barometer reflecting the REIT's financial condition.

Portfolio diversification: REITs offer access to the real estate market typically with low correlation with other stocks and bonds.

SEBI Registered REITs in India

i) Brookfield India Real Estate Trust
ii) Embassy Office Parks REIT
iii) IIFL Real Estate Investment Trust
iv) Mindspace Business Parks REIT

Conclusion

REIT is a welcome move by the Government which will help bring in liquidity, transparency, enhanced governance and more importantly an organised ecosystem which is professionally managed and protects interest of investors. SEBI is also addressing the concerns of all stakeholders from time to time, through amendments to the REIT Regulations. With further tweaking of the tax provisions, combined with imparting better clarity to the stakeholders and investors, REITs are poised for its convalesced performance in the Indian markets in the years to come.

Understanding cross border insolvency resolution evolving in India

S. Venkataraman
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Insolvency Professional

Introduction:

Five years have been completed after the introduction of Insolvency and Bankruptcy Code (IBC) in 2016. The IBC journey, so far, has been bumpy and not so smooth for all stakeholders. Huge haircuts for lenders and prolonged corporate insolvency resolution process (CIRP) periods, have led to intense deliberations and scrutiny, by all concerned, on whether the IBC has been able to deliver on its promises as compared to the earlier resolution processes. When we examine this aspect in the last 5 years, out of 4541 CIRP cases admitted (as on June 2021), a total of 2,859 cases have been closed. Thus, IBC, has delivered 14% successful resolution, 47% liquidation, 16% withdrawal under 12A and the balance 23% settlements, appeals and withdrawal which is by far the best compared with any other resolution regime.

We all know that both the Ministry of Corporate Affairs and IBBI have been proactive in analysing and revising the IBC processes whenever required, which is evidenced amply by the number of amendments to the Code, rules and regulations in the last 5 years. The introduction of pre-pack framework in April 2021, for micro, small and medium enterprises (MSMEs) is another milestone to expand the horizon of IBC. The last five years has also been marked by several landmark judgments, especially by the Supreme Court, relating to IBC. The SC has been remarkable in settling a host of contentious issues such as the commercial wisdom of creditors (*Essar Steel*), the right to proceed against personal guarantors (*Lalit Kumar Jain*), and payment to dissenting financial creditors (*Jaypee Infratech*), all of which have provided the insolvency process with much-needed predictability and stability. This has led to the alignment of thought and functioning of different stakeholders during insolvency, providing a robust foundation to address some of the contentious and operational issues like code of conduct for CoC, restriction on numbers for request for submission of resolution plans, treatment of Bank Guarantees, letter of comfort etc., It has also paved way to address the much more complex issues such as personal insolvency, group insolvency and cross-border insolvency.

In this article, we are attempting to demystify the Cross-border insolvency and also briefly providing the key recommendations made by the Expert Committee on the Rules and Regulations for Cross-border Insolvency Resolution.

We all know, with the advancement in technology, cross-border trade no longer remains the preserve of large multi-national corporations. The growing size of economies have lured companies to stretch their business beyond their home borders. Due to increasing globalization of business activities, businesses encounter a wide array of legal systems. Therefore, when multinationals become insolvent, it comes as no surprise that such insolvencies have cross-border consequences. We are all well aware of some of the prominent cases in our Country viz Jet Airways, Videocon etc., which involved cross border ramifications. In cross border insolvency, in which insolvency occurs in such a way that a single set of domestic insolvency process or particular legal system cannot be immediately or exclusively used. Hence, Cross-border insolvency rules, on a global basis, are focused on one country that provides aid for the other country to take over the assets and then dispose them off. Mutual understanding of the insolvency system of each country achieves these goals.

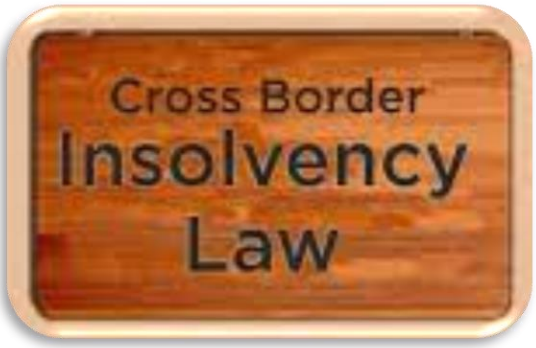
(Image source: website)

Evolution

In October 2018, the Insolvency Law Committee (ILC) submitted a report on cross-border insolvency to the MCA. The *ILC Report* recommended the adoption of the *UNCITRAL Model Law on Cross-Border Insolvency* as a

part of the *Insolvency and Bankruptcy Code*, 2016 with certain modifications. It has also submitted a draft law, referred to as "Part Z", which was to be incorporated as a separate Part of the IBC. Part Z is intended to be the cross-border framework of the IBC, which will govern all applications seeking recognition of foreign insolvency proceedings as well as applications seeking co-operation in such proceedings from the NCLT. The *ILC Report* and Part Z leave several aspects of the cross-border insolvency framework to the notifications and rules to be issued by the Central Government and regulations to be issued by the IBBI. As a follow-up measure, in January, 2020, the MCA constituted a Committee (Cross-border insolvency rules / regulations Committee) (CBIRC) to recommend a clear roadmap for introduction of the rules and regulatory framework for the cross border insolvency that would enable its implementation.

This Committee has now proposed the rules and regulatory framework by identifying the nature of cases and cross-border actions that the Indian cross-border framework would have to address. The Committee has also identified a range of issues and challenges that needed to be addressed to make the rules, regulations and notifications robust and comprehensive. The Committee has also made recommendations in respect of capacity building requirements at the NCLT and the IBBI to deal with cross-border matters.



(Image source: website)

Key issues and recommendations of Cross-border insolvency rules and regulations Committee:

a) Applicability of the cross-border insolvency framework:

The Committee has considered the applicability of Part Z to certain categories of Indian companies, namely Financial Services Providers (FSPs) and critical infrastructure and utility companies. It has recommended that unless otherwise notified by the Central Government, the provisions of Part Z must not be made applicable to FSPs, which are notified by the Central Government under Section 227 of the IBC. However, since the IBC makes no special exemptions for any other class of companies, such as critical infrastructure companies or utilities, Part Z should also not make any such exemptions.

Applicability of the IBC to foreign companies and foreign LLPs:

The Committee noted the anomalies that may arise from the non-applicability of the IBC to foreign companies and foreign LLPs. Therefore, it has recommended that:

1. The provisions of the IBC should be made applicable to entities:
   (a) incorporated with limited liability under the laws of a foreign country; and
   (b) having an establishment, as defined in Part Z, in India.
2. The MCA and the IBBI must consider evaluating the provisions of the IBC, the *Companies Act* 2013 and the *LLP Act, 2008*, which need to be amended, and the consequential delegated legislation, if any, which might need to be issued, for giving effect to the abovementioned recommendation

b) Designated benches for the adjudication of cross border matters:

The Committee has recommended that all the benches of the NCLT should be vested with the jurisdiction to deal with applications under Part Z. Thus, cross-border proceedings arising in respect of corporate debtors that are Indian companies, will be dealt with at the bench having jurisdiction over the location of the registered office of the corporate debtor. However, insolvency proceedings pertaining to any person incorporated with limited liability outside India, should be dealt with by the Principal Bench of the NCLT.

c) Framework for access to and regulations of foreign representatives:

The Committee has recommended that foreign representatives must be given access to the insolvency system and infrastructure in India for the purpose of cross-border insolvency proceedings. Further, while giving such access, no distinction should be made between foreign representatives

regulated by professional regulators and those who are not so regulated.

It has also recommended that foreign representatives acting in cross-border insolvency proceedings in India must undergo a minimalistic authorisation process with the IBBI. The IBBI must also put in place a deemed authorisation system for such foreign representatives. Such authorisation will allow the foreign representative to act in the proceeding for which such authorisation is granted.

The Committee has further recommended that a principle based, light-touch code of conduct, should be applied to foreign representatives acting in proceedings under Part Z, and has advised empowering the IBBI to undertake investigation and disciplinary actions against misconduct by foreign representatives.

d) Framework for access by Indian IPs to foreign proceedings:

The Committee has noted that neither the IBC nor the *IP Regulations* restrict an IP from applying for accessing the insolvency system of a foreign jurisdiction. Accordingly, the Committee has not recommended any consequential amendments in respect of this issue, except a requirement on the IP to report such assignments to the IBBI. The IBBI must specify the format and manner in which such reporting must be made to itself.

e) Notice of Proceedings

The Committee has recommended that when a notice is required to be given to the creditors of a corporate debtor during insolvency resolution, liquidation or in connection with any other proceeding under the IBC, such notice must be given to known foreign creditors in accordance with the provisions of the IBC, the rules and regulations issued under the IBC. However, where it is not possible to give such notice to foreign creditors, the following shall be deemed as sufficient notice to the known foreign creditors for the purposes of Clause 11 of Part Z

1. publication of the notice on the website of the corporate debtor, if any, and
2. publication of the notice on the website designated by the IBBI for this purpose.

The Committee has also recommended that where an application is made under Part Z in respect of a corporate debtor, the foreign representative making such an application must supply a copy of the same to (a) the corporate debtor; or (b) its IP, if a domestic insolvency proceeding is pending in respect of such a corporate debtor.

Similarly, where a domestic IBC proceeding is instituted in respect of a corporate debtor and a proceeding under Part Z is pending with respect to such a corporate debtor, the person instituting the IBC proceeding must supply a copy of the application to the foreign representative in the proceeding under Part Z.

f) Determinants of the corporate debtor's COMI (Centre of Main Interest):

The Committee considered two key issues in respect to COMI determination:

1. the factors to be considered in determining COMI, where the presumption *of registered office as* COMI is rebutted, and
2. the effective date of COMI determination

The Committee has noted that as per the ILC, in case the presumption of the corporate debtor's registered office as COMI is rebutted, the "identifiable place of central administration" of the corporate debtor is the key consideration for the determination of the corporate debtor's COMI. The ILC recommended that if the identifiable place of central administration of the corporate debtor cannot be ascertained, the NCLT may have regard to the other factors, to be prescribed by the Central Government, for the determination of the corporate debtor's COMI.

Based on an extensive review of the case law on COMI in multiple jurisdictions, the Committee has noted that other factors be considered only if the identifiable place of central administration is not ascertainable. Accordingly, it has recommended placing the identifiable place of central administration on the same footing as the other factors for the determination of COMI.

On the question of effective date for COMI determination, the Committee recommends that:

1. The rules to be issued by the Central Government must codify the 'date of commencement' of the foreign proceeding as the effective date for the purpose of determination of COMI.

2. The date of commencement of the foreign proceeding shall be determined as per the local law of the jurisdiction in which such proceeding is initiated.

g) Reliefs in cross border insolvency matters

The Committee has endeavored to provide an indicative list of reliefs which may be granted by the Adjudicating Authority (AA) in respect of a recognised foreign proceeding.

It also recognises that such reliefs may be codified through protocols entered into between the IP and foreign representative where there are concurrent IBC and cross-border insolvency proceedings.

h) Protocols and court-to-court co-operation across jurisdictions

The Committee has recommended that the Central Government may substantially adopt the *JIN (Judicial Insolvency Network) Guidelines* with regard to the co-operation and communication between the AA, foreign courts, foreign representatives and IPs, with suitable modifications to suit the Indian context where necessary.

Further, keeping in mind the need to balance the burdens that co-operation may impose on corporate debtors or their IPs and the co-operative spirit underlying the *UNCITRAL Model Law on Cross-Border Insolvency*, the Committee has recommended that foreign representatives could apply for co-operation under Part Z without having applied for recognition. However, the AA must, in such applications, not grant any relief that ought to be granted only in respect of recognised foreign proceedings.

In respect of a protocol for co-operation between the domestic IP and the foreign representative for a case, the Committee has recommended that the scope of such protocols will vary from case to case depending on the nature and complexities of the case. The Committee has, hence, decided not to attempt to second guess the contents of such a protocol and to leave it to the IPs and foreign representatives.

i) Format, content and fees for cross border insolvency applications in India

The Committee has recommended that the Central Government should prescribe a pre-designed form that can be filed digitally for seeking recognition of foreign proceedings under Part Z. It has enumerated an indicative list of fields that may be included in such an application form.

It has also recommended that the rules must provide for separate fees for the main application, such as an application for recognition or co-operation under Part Z, and interlocutory applications leaving the quantum of the fees to be determined by the Central Government.

The Ministry of Corporate Affairs has issued a notice on 24th Nov. 2021 inviting comments from public on Cross Border Insolvency under IBC, 2016. The last date for submission of comments is 15th Dec. 2021.

DISQUALIFIED DINs ACTIVE AGAIN!!

Ministry of Corporate Affairs had flagged the DINs of Directors found to be disqualified under sub-section 2(a) of section 164 of the Companies Act, 2013 **w.e.f. 1st November 2016** for a period of five years. All that DINs eligible to be de-flagged on expiry of the period of disqualification have now been restored according to a Public Notice issued on 10th November 2021 by MCA.

Surplus funds available in the Corporate Debtor – whether financial creditors can have a preferential right to utilize such surplus during CIRP period?

CGRF Bureau

Preamble

During the Corporate Insolvency Resolution Process (CIRP) of a corporate debtor, the Interim Resolution Professional or the Resolution Professional gets the claims collated and freezes the liabilities of the corporate debtor as on the date of commencement of the CIRP. In order to protect the interest of the stakeholders, as per Sec.14 of IBC, a moratorium is declared by the adjudicating authority by which no recovery action can be taken against the company from the date of commencement of CIRP.

The IRP or RP while keeping the company as a going concern generally will face issue of cash crunch and approach the Committee of Creditors for interim finance to meet essential expenses like security / insurance / maintenance of critical assets, etc. This is the general scenario of a company undergoing CIRP.

In a few cases of CIRP, the corporate debtor will have a running business. Take for example, in a toll road company which collects revenues from the vehicles using the road, they will be getting toll collections while the financial obligations to pay interest or principal amount will not arise. As the company is a going concern, it will have to meet the operational expenses like maintenance of road, salary to employees, electricity, and other administrative expenses. However, since the servicing of financial debt will constitute a major percentage of revenue collected and that is not being done during CIRP period, it is quite possible that the company will be left with some surplus funds in the system.

After an amendment in Sec.14 of IBC with effect from 28th Dec. 2019, it has been made very clear that there shall not be any default in payment of dues arising for use or continuation of the concession or permit or licence. Therefore, for a toll road company, the amount payable to NHAI or State Road Development Corporation shall also be payable as the company is operating the toll and collecting revenues. Even then, it is possible some more surplus cash is left with the company because the financial debts are not serviced. Now, the question arises as to whether the financial creditors who have submitted their claims to IRP / RP can seek utilisation of such surplus funds to service the interest obligations during the period of CIRP.

Settlement of Claims as on CIRP commencement date during CIRP period

It is a settled position in law that during CIRP period, no creditor's claims can be settled by the IRP / RP as it may result in preferential treatment of a creditor. The creditors will have to wait until the conclusion of the resolution process or liquidation which will take its own time.

(Image source: website)

Payment of interest during CIRP period

A question arises as to whether during CIRP period, a corporate debtor can make interest payment to a financial creditor. It may be possible if the financial creditor has given a fresh interim finance to the corporate debtor for which interest is agreed to be payable with the due consent of the committee of creditors. This stands to logic as the company may be required to support the working capital requirements to keep running the business of the company. Such an interim finance may be obtained even from an outsider – he need not be a creditor of the company.

But the question remains where a financial creditor has not given any fresh loans to the company during CIRP period by way of interim finance, but in respect of amount due to him as on CIRP commencement date, whether the interest liability can be paid?

It is a fact that the interest liability to the corporate debtor comes to a standstill after CIRP commencement date by virtue of the provisions of IBC in order to provide a calm period to the corporate debtor. Only the claims admitted as liability as on the CIRP commencement date will be

dealt with in the resolution plan. This is the mostly prevalent scenario in an IBC company. Coming to the case of a toll road, where the revenues are generated from the road which was constructed mainly with the financial debt, whether interest can be paid on the principal amount outstanding as on CIRP commencement date?

By an examination of the provisions of IBC, it appears that the liquid funds available with the company constitute the assets of the company on which there is a security interest in favour of the financial creditors. The moratorium provisions prevent recovery proceedings against the corporate debtor to realise any security interest. Therefore, recovery of the assets of the company by any of the creditors, prima facie, will be in violation of the provisions of IBC.

However, looked at an another angle, where the operations of the company are going on and revenues are generated by the business, making payments to the operational and other creditors is perfectly all-right even during CIRP period. These decisions are taken by the RP during the course of business, subject of course to a monitoring mechanism by the committee of creditors. In this scenario, whether interest can be paid for the CIRP period on a principal amount which is outstanding as on CIRP commencement date is a valid question in-as-much as the principal amount outstanding was the major ingredient for construction of the road asset which is being used to generate toll revenues.

On another perspective, such surplus funds lying unutilised may at best earn some marginal interest rate as fixed deposits whereas the financial creditors who have huge outstanding will be left high and dry while at the same time the revenue share would be paid to NHAI / State Road Development Corporation. This would surely create an anomalous situation. One objection to servicing the interest liability during CIRP period could be from operational creditors whose interest might be prejudiced if the surplus funds were to be given away to a financial creditor pending a resolution plan approval or liquidation. Also, the resolution applicant who has submitted a resolution plan or likely to submit one might bring in an argument that his interest would be compromised as he would have projected the resolution plan amount based on the assets of the company which include the liquid funds.

Conclusion

The reason for such surplus funds could be due to inordinate delay in the NCLT process for approval of a resolution plan or a spate of litigation by the promoters or other stakeholders. However, this kind of a situation is very much for real and therefore, it would be highly appropriate if the Code provides for servicing of interest on the admitted principal liability, subject to availability of funds after meeting all operational dues, if the company's operations are being carried on in the normal course. This would surely mitigate the burden on lenders who are already saddled with huge unpaid debt while and on the other hand, the liquid funds being kept idle which may eventually go to the benefit of a resolution applicant in current situation.

RBI appoints an Administrator in supersession of the Board of Directors of Reliance Capital Ltd

The Reserve Bank of India on November 29, 2021 has superseded the Board of Directors of Reliance Capital Ltd. and appointed Shri Nageswara Rao Y, ex-Executive Director, Bank of Maharashtra, as the Administrator.

Further, in exercise of powers conferred under the Reserve Bank of India Act, 1934, and the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, the Reserve Bank has also constituted a three-member Advisory Committee to assist the Administrator in discharge of his duties.

The members of the Advisory Committee are as follows:

1. Shri Sanjeev Nautiyal, ex-DMD, SBI
2. Shri Srinivasan Varadarajan, ex-DMD, Axis Bank
3. Shri Praveen P Kadle, ex-MD & CEO, Tata Capital Limited

It is also reported that the RBI will shortly initiate the process of resolution of the company under the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 and will also apply to the NCLT, Mumbai for appointing the Administrator as the Insolvency Resolution Professional.

Court Orders

CGRF Legal Team

Tata Consultancy Services Limited vs Vishal Ghishul jain, RP, SK Wheels Private Limited
Civil Appeal No. 3045 of 2020
Supreme Court
Order dated 23.11.2021

Appeal arose from a judgement of the NCLAT upholding an interim order passed by the NCLT which stayed the termination by the appellant of its facilities agreement with the corporate debtor.

The appellant and the corporate debtor are parties to a Build Phase Agreement, which was followed by a Facilities Agreement, whereby the corporate debtor was obligated to provide premises with certain specifications and facilities to the appellant for conducting examinations for educational institutions.

Agreement contains a termination clause. Appellant had issued a termination notice to the corporate debtor on the ground that there were multiple lapses by the corporate debtor in fulfilling the contractual obligations amounting to material breach of the terms of the agreement on 10.06.2019. The corporate debtor submitted that certain routine operational requirements were highlighted from time to time which were rectified by the corporate debtor within a reasonable duration. The corporate debtor was admitted into CIRP on 29.03.2019, which the appellant claims to have not been aware of until disconnection of electricity at the corporate debtor's premises.

The Resolution Professional of the corporate debtor filed an application challenging the termination by the appellant before the NCLT. NCLT vide orders dated 18.12.2019 stayed the termination by the appellant. NCLAT on appeal confirmed the order vide orders dated 24.06.2020.

The issues for consideration before the Hon'ble Supreme Court in the present appeal is as follows:

1. Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and
2. Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

Hon'ble Supreme Court while deciding the issue was of the view that the facilities agreement states that the disputes between the parties shall be a subject matter of Arbitration. Considering the overriding effect of Section 238 of the I&B code and relying on the judgement of the Hon'ble Supreme Court in Indus Biotech (P) Ltd. vs Kotak India Venture (Offshore) Fund, where it held that a reference to arbitration made under Section 8 of the Arbitration and Conciliation Act 1996 in terms of the agreement between the parties would not affect the jurisdiction of the NCLT to examine an application filed under Section 7 of the IBC, held thus,

"In that view, even if an application under Section 8 of the 1996 Act is filed, the adjudicating authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the adjudicating authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause."

(Image source: website)

In an earlier occasion in Gujarat Urja Vikas vs Amit Gupta & Ors., a two judge Bench of the Supreme Court, held that a power purchase agreement, which is a bilateral commercial contract, is an 'instrument' under Section 238, where the agreement provided that the disputes

between the parties would be entertained by Gujarat Electricity Regulatory Commission. But since Section 238 provides an overriding effect to the provisions of the IBC over any instrument having effect by law, it was held that the NCLT had jurisdiction over the dispute which arose in the context of insolvency proceedings.

The Court observed that the while Facilities Agreement provides that any dispute between the parties relating to the agreement could be the subject matter of arbitration, the agreement being an 'instrument' under Section 238 of the IBC can be overridden by the provisions of the IBC. Therefore, in terms of Section 238 and the law laid down by the Hon'ble Supreme Court, the dispute resolution clause in the agreement does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) to adjudicate disputes relating to the insolvency of the Corporate Debtor.

Judgment of the Hon'ble Supreme Court in Embassy Property Developments (Private) Limited v. State of Karnataka was relied on, where the Court held that "the duties of the RP are entirely different from the jurisdiction and powers of the NCLT. While the duty of the RP and the jurisdiction of the NCLT cannot be conflated, in Gujarat Urja (supra), this Court has clarified that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process. But when the dispute arises dehors the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority."

It was also urged on behalf of the appellant that the NCLT and NCLAT have re-written the agreement changing its nature from a determinable contract to a non-terminable contract overlooking the mandate of Section 14 of the Specific Relief Act 1963. It was argued that it is a settled position of law that IBC is a complete code and Section 238 overrides all other laws. The NCLT in its residuary jurisdiction is empowered to stay the termination of the agreement if it satisfies the criteria laid down by this Court in Gujarat Urja.

The Court held that, "the intervention by the NCLT and NCLAT cannot be characterized as the re-writing of the contract between the parties. The NCLT and NCLAT are vested with the responsibility of preserving the Corporate Debtor's survival and can intervene if an action by a third party can cut the legs out from under the CIRP. NCLT's jurisdiction is not limited by Section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under Section 60(5)(c) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process."

The Hon'ble Court, based on the facts before it, decided that thus, "it is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an *ad-interim* stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.

While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor."

The Court further went on to hold that, "the narrow exception crafted by this Court in Gujarat Urja (**supra**) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18 December 2019 does not indicate that the NCLT has applied its mind to the centrality of the Facilities Agreement to the success of the CIRP and Corporate Debtor's survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, i.e., it did not give thirty days' notice period to the Corporate Debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy." Ultimately, setting aside the judgment of the NCLAT and dismissing the proceedings initiated against the appellant.

Mr. Manmohan Singh Jain
Vs. M/s. State Bank of India
Company Appeal (AT) (CH) (INS) No. 97 of 2021
NCLAT Chennai | 22-Nov-2021

"Non-mentioning of the date of default in Col. IV is not fatal to the application and on the sole ground, the application cannot be rejected mere taking a technical impediment as held by the Hon'ble Supreme Court that 'it is only a directory'."

An Appeal was preferred by a shareholder and suspended director of the Corporate Debtor against the order of NCLT initiating CIRP against the CD in an application filed by State Bank of India under Section 7 of IBC on the ground that the Section 7 application is defective, as the date of default was not mentioned in Form 1. It was submitted by the appellants that the non-mentioning of the date of default is fatal in admitting the application under Section 7 of the Act.

The appellants submitted that the working capital facilities were availed from a consortium of banks and that the respondent herein was the leader of the consortium. Axis Bank (second leader of consortium) had declared the account of CD as NPA on 10.02.2017. Hence it was submitted that the application filed by the respondent was time barred.

(Image source: website)

The Appellant relied upon Section 137 of the Limitation Act, 1963 which states that the Limitation period starts from the date when the right to apply first accrues. In the present case, the date of Non-Performing Assets (NPA) was taken into consideration as 'date of default'. It was submitted that the first 'date of default' was 12.11.2016. Thus, the limitation for filing an application under Section 7 of IBC has already expired in the month of November 2019, whereas the application under Section 7 was filed on 19.12.2019 i.e. after the expiry of limitation period i.e. three years.

The next contention of Appellant was that there is a consortium of banks and as per the said consortium, the first date of default and date of Non-Performing Assets (NPA) is of the Axis Bank i.e. the date of NPA was 10.02.2017. As per the RBI Framework for revival and rehabilitation of Micro, Small and Medium Enterprises (MSME) dated 17th March 2016, as per Clause 2.1 the Banks while classifying a loan account of MSME as NPA, they should identify incipient stress in the account by creating three sub categories and the market with the special mention account (SMA) category. Hence, it was submitted that before declaring NPA if there is a continuous default for more than 90 days the Banks/Financial Creditors may declare the Corporate Debtor's account as NPA.

It is submitted by the respondents that the date of default in respect of Axis Bank's debt is irrelevant as the application filed by this Respondent was in respect of debt under the Working Capital Consortium i.e. for a sum of Rs.52.28 Cores, which arrangement entitles each of the banks to independently enforce its rights arising therefrom.

Findings of the Tribunal

1. The appellate Tribunal observed that there was no dispute with regard to the existence of debt and default by the CD. The only objection raised was with respect to omission to mention the date of default in Form 1 filed before the AA. However, the documents and records submitted by the respondent are evident of default as mentioned in Form 1 by the Financial Creditor and that it has shown sufficient documentary evident to establish that the date of NPA was 27.11.2018. The AA has taken note of the same in its final order and admitted the application. This omission to mention date of default in Col.2 Part IV in Form 1 is not fatal to the application.

2. The debt of Axis Bank is irrelevant as the RBI circulars/Directives provides filing of independent application by the Financial Creditor. Accordingly, the 1st Respondent herein filed application under Section 7 of the IBC for initiating the CIRP against the Corporate Debtor independently taking into the date of NPA/default and the amount of debt only with respect to debt availed from SBI. The

arrangement between the consortium members entitles each of the creditors to independently enforce its rights arising therefrom.

3. It is evident from the records that the date of NPA of the SBI was 27.11.2018 and the application was filed by the Financial Creditor on 19.12.2019. Thus, even if the 90 days period prior to NPA is taken into consideration for the purpose of deciding default as per the Judgment of the Hon'ble Supreme Court in Re Laxmi Pat Surana, the application is within the period of limitation.

4. It was noted that the CD had acknowledged its debt on 16.08.2018. Relying on the Judgment passed by the Hon'ble Supreme Court in Laxmi Pat Surana, that a subsequent acknowledgement of debt is considered to extend the limitation under Section 18 of the Limitation Act, 1963. Thus, the limitation period of three years from 16.08.2018, the application filed on 19.12.2019 is well within the period of limitation.

   Hence, the Appellate Tribunal was of the view that there was no illegality in AA admitting the Section 7 application filed by the Respondent. Accordingly, the appeal was dismissed.

Deputy Commissioner of Sales Tax
vs
Resolution Professional of Ashtavinayak Auto Pvt Ltd
Company Appeal (AT) (Insolvency) No. 929 of 2021
NCLAT New Delhi Order dated 22nd Nov. 2021

Resolution Plan cannot be said to be non-compliant, when it cannot be substantiated that the distribution proposed in the Resolution Plan is not in compliance with the provisions of the Code.

CIRP in respect of Corporate Debtor vis., Ashtavinayak Auto Pvt Ltd was admitted by NCLT, Mumbai Bench vide order dated 06.11.2018. The CoC in its 2nd Meeting held on 08.01.2018 replaced the IRP with Mr. Rajat Mukherjee as Resolution Professional (RP).

Resolution Plans were received from 3 Resolution Applicants and the CoC at its 5th Meeting held on 26.07.2019 considered the resolution plans received and approved the resolution plan submitted by M/s. Leadadroit Services Private Limited with 94.84% voting share. The Resolution Plan besides providing for the payment of the Financial Creditors, provided an amount of Rs.4 lakhs as full and final settlement towards operations creditors (other than workman & employees), which includes dues of Central Government, State Government and any other local authority, though no amount is required to be paid in terms of Section 30(2)(b) of IBC, as the liquidation value is NIL. The Resolution Plan approved by the CoC was filed with NCLT and NCLT vide its order dated 05.03.2021 approved the Resolution Plan.

Aggrieved by the decision of the NCLT, the Department of Sales Tax through Deputy Commissioner of Sales Tax filed an appeal with Hon'ble NCLAT.

Lr. Counsel for the Department of Sale Tax contented that statutory dues to the Department of Sales Tax were to the tune of more than Rs.5 crores, whereas in the Resolution Plan only an amount of Rs.4 lakhs was allocated. He submitted that due to this reason the Resolution Plan ought not to have been approved. Ld. Counsel for the RP refuted the submissions and stated that the Resolution Plan take cares of the dues of all the Creditors of the Corporate Debtor in terms of the Code.

Hon'ble NCLAT after hearing the submissions made by both the parties observed that Resolution Plan cannot to be said to be in non-compliance of any provisions of the Code or Regulations, when appellant is not able to substantiate its submission that in the Resolution Plan there cannot be amount lesser than the amount of statutory dues.
Appeal was dismissed.

Legal Maxims

ANTE LITEM MOTAM

In Latin "before controversy moved"
It denotes things written or said before litigation commenced.

Find the words !!

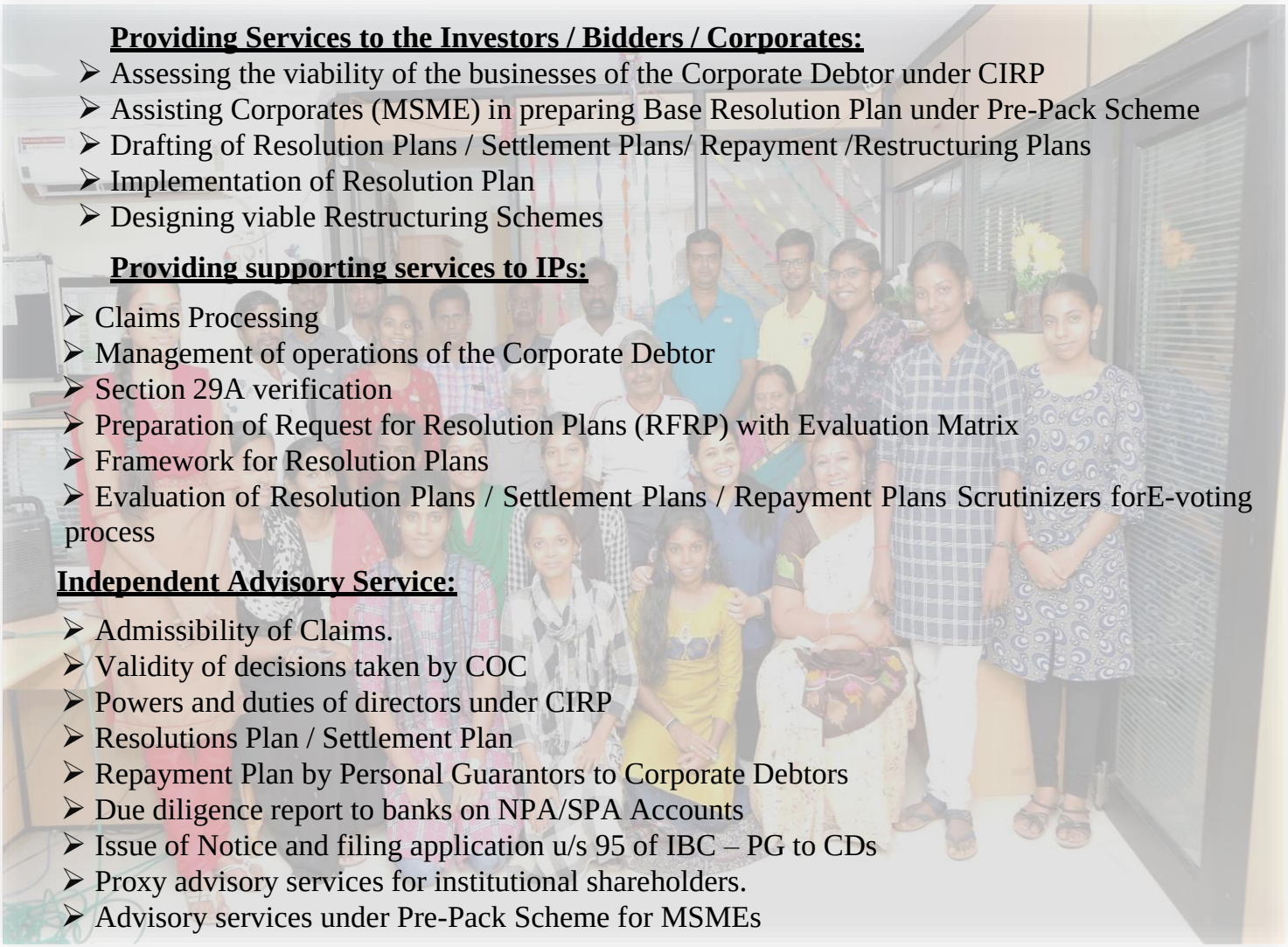
CLUES	WORDS
1. 1st Financial services provider case to be resolved under the IBC, 2016?	
2. The first case to be admitted under Prepack insolvency resolution process framework?	
3. The Judgement of Supreme Court in Lalit Kumar Jain vs. Union of India validated proceedings against whom?	
4. End stage of the Company's life cycle after completion of liquidation.	

IN	GC	ORS	AL
SON	SOL	UT	PER
ANT	ION	CL	DH
DIS	FRA	GUAR	FL

Answers

1. DHFL 2. GCCL Infra 3. Personal Guarantors 4. Dissolution

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 forE-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

Registered Office:

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