CGRF
SandBox®
February 2022
Volume 3 | Issue 2

Role of Committee of Creditors in successful resolutions under IBC

Create & Grow
Research Foundation

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கலங்காது கண்ட வினைக்கண் துளங்காது
தூக்கங் கடிந்து செயல்.

தமிழ் உரை:
செய்ய எடுத்துக்கொண்ட தொழிலைத் துணிவுடனும், தளராமலும், காலம் கடவாமலும், கலங்காமலும் செய்து முடிக்க வேண்டும்.

Explanation:
An act that has been firmly resolved to be taken up must be as firmly carried out without delay.

From the Editor's Desk

Dear Readers of CGRF SandBox

Parkinson's Law

While thinking on how to improve compliances without waiting for dead-lines, I just wondered how the time-lines always tend to expand the work until the last moment. The famous Parkinson's Law always haunts me : **"Work expands to fill the time available for its completion."** I am sure you will agree that it takes a great deal of discipline, planning and efforts to get things going beating the dead-lines.

Murphy's Law

While on this subject, another thing that baffles me is that if anything can go wrong, it does and that too at the critical moment. You remember you wanted to go for the promotion interview with a crumple-free and spotless shirt but the iron didn't work?. Murphy summed it up nicely, "**If it can go wrong, it will".**

Well, can we not overcome these laws at all? We can, as we saw earlier; but it takes a great deal of your time and energy. Someone may ask whether it's worth doing all stuff to defy these laws, or better take a chance. My take would be to say that take all guards, leave the rest to chance. Chitra Ramakrishna, the former CEO & MD of NSE would have perhaps thought that it's a quiet burial but she wouldn't have had a wild thought that her sharing of sensitive information about NSE and seeking "guidance" from an unknown "Himalayan Yogi" would haunt her after several years.

Role of Committee of Creditors in resolutions under IBC

Great deal of efforts are required for revival of a sick commercial establishment. Things become all the more critical when that establishment comes under IBC. Being at the helm, the Committee of Creditors (CoC) plays a very big role by providing an effective direction to the insolvency resolution process for reviving the company. They take critical decisions in matters concerning keeping the company as a going concern, evaluation of resolution plans, providing/raising of interim finance, liquidation of the company, etc. They also wear the hat of other creditors to see that their interests are also taken care. However, while discharging their role, they also face several challenges. CGRF SandBox wants to focus on this area and bring out a few interesting articles in the March 2022 Issue. We request bankers to share their practical experience while playing their role as CoC member(s) which we will capture suitably to serve as a guidance for others as well.

Selling of Shares of a company under IBC

A question came up recently whether the lenders of the corporate debtor, having the security of promoter shareholdings can off-load such shares in the market. Whether moratorium under Sec.14 of Insolvency and Bankruptcy Code (IBC) restrains such sale of shares pledged? The esteemed readers of SandBox, particularly senior bankers, would be interested to know what the provisions of IBC say on this aspect. An article on this issue finds a place in this Issue of SandBox.

(Image Source: Website)

Start-ups, Funding options

Having seen in the previous issue several upcoming Indian Unicorns, we are delighted to share two articles of relevance: one from a senior banker on the funding options for Start-ups and the other from a young and adventurous entrepreneur on challenges and obstacles before Start-ups.

Living with Covid-19

As the financial year end comes closer, banks and corporates would be rushing to reach various targets and start planning for another brand-new financial year. While we wish them all great success, the CGRF family fervently requests that due care be taken to avoid Covid-19 infections even as the government has realised that lockdowns are not the answer!!

Yours truly
S. Rajendran

Welcome Step to Improve Pension Structure

Hargovind Sachdev
General Manager (Retd.) SBI

The Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice has recommended the government to consider 5% of additional quantum of pension on attaining the age of 65 years, another 10% on 70 years, a further 15% on 75 years, and 20% on 80 years for the Central Government employees. The hike is commensurate with increasing medical expenses. The finance ministry is actively considering the same.

At present, government employees get an additional quantum of pension equivalent to 20% of basic pension on attaining the age of 80 years, another 30% on 85 years, 40% on 90 years, 50% on 95 years, and 100% on attaining a century in age.

Given the challenging living conditions, pollution, cost of hospitalization, and average longevity, not many employees live to trigger the pension enhancements beginning from 80 years of life. As per the last census, there are 16 crore senior citizens, above 60 years in India. The majority, 8.80 crores, are in the age group of 60 to 69. In the 70-79 year age bracket, there are 6.40 crores Indians, and above 80 years, the number is 2.80 cr. About 0.18 cr indigent elders, destitute, homeless, and deserted by families. Hardly 12% of the above draw pension from public and private enterprise. As such, an increased allowance from 80 years has remained just an ostentatious HRD provision in-service conditions so far. It does not stand out as a reasonable compensation for pensioners. The proposed enhancement from 65 years is a welcome step.

According to an estimate, people above 60 years old would increase significantly by 2050. Given such societal changes, there is a need for a robust Social Security System especially pension system for the elderly that can help them survive in this world without being a burden on anyone. The parliamentary committee report stated that the support systems should be created where pensioners live independently without becoming a burden on others, especially in a nuclear family. Older pensioners/family pensioners deserve a better deal because their needs, relating to health with their age, are increasing.

The growth of nucleus families due to geographical and social mobility the development of nucleus families has led to a rise in individualism and individualistic thinking. The new generation wants to live away from the shackles of joint families and patronage of elderly parents and grandparents. With the standard family system giving way to nuclear families, an increase in the share of the aging population, the proposal is very much mindful of social churning with the joint family system breaking down.

The committee has recommended setting up a Pension Ombudsman on the lines of a Banking Ombudsman to deal with the complaints related to pension disbursements. The panel has also recommended providing pension to people above 70 years of age at home through a Business Correspondent System. Unfortunately, the revised provisions shall apply to the retiring employees of the Central Government only. The rules shall not apply to bank staff who, ironically, will disburse enhanced pension to elders as part of their professional duty.

(Image Source: Website)

In banks, the minimum service of 20 years makes an employee eligible for the pension, but there is no variated system of enhancing the retirement benefits at advanced age milestones. Banks are liberal to the ex-servicemen employees who continue to draw Defence pension after their re-employment in the Bank. They draw Defence and Bank's pension for their service with the Bank. No separate ceiling on a pension, which they may avail, has been prescribed. Bank pensioners are eligible for commutation of pension up to 33% of their Basic Pension at the time of retirement on par with the Central government employees.

Old age is a blessing because it is denied to many. There are seven signs of aging: Fine lines and wrinkles, Dullness of skin, Uneven skin tone, Dry skin, Blotchiness and age spots, Rough skin texture, and Visible pores. Medical research suggests that age sets in because self-renewing stem cells grow old due to heritable intrinsic DNA damage. The bones shrink in size and density, weakening and becoming susceptible to fracture. The body becomes a bit shorter. Muscles lose strength, endurance, and flexibility, affecting body coordination, stability, and balance.

The environmental impurity, pollution, working stress and aging conditions for Bankers and Central Government employees are the same and equally strenuous. Both operate under pressure to meet the expectations of the aspirational Indian society on a buoyant march of growth. The Indian Banks Association (IBA) should seek a level playing pension plan for bankers. Bankers are at the forefront of the nation's drive to become a $ 5.0 trillion economy, round the clock, even during the pandemic. Bankers deserve a robust pension and also a system which ensures enhancement of pension in time with what is being proposed for retired Central Government employees.

CSR - 2
Amendment in the Companies (Accounts) Rules, 2014 - Notification dated 11th February,2022

a. These rules are called as the Companies (Accounts) Amendment Rules, 2022.

b. Every Company covered under the provisions of Section 135 (1) of the Companies Act, 2013 shall furnish a report on CSR to the Registrar in **FORM CSR-2** for the preceding Financial Year (2020-21) and onwards as an addendum to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind-AS), as the case may be.

c. For the preceding Financial Year **(2020-21), Form CSR-2 must be filed separately on or before 31st March, 2022, after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind-AS)**.

An Analysis on Start-ups and their Funding Options

S. Venkataraman
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Insolvency Professional

What is a Start-up:

Start-ups have long definition - they are young companies, in their first stages of operations, founded to develop a unique product or service, by one or more entrepreneurs, for which they believe there is demand, bring it to market and make it irresistible and irreplaceable for customers.

Start-ups rooted in innovation, aims to remedy deficiencies of existing products or create entirely new categories of goods and services, disrupting the current ways of thinking and doing business for many operations and hence better known as **"disruptors."**

Start-ups are businesses that want to disrupt industries, services etc., and change the world—and do it all at scale.

Start-up founders dream of giving society something it needs but hasn't created yet.

Start-ups are typically an online or technology-oriented businesses that can easily reach a large market.

On the other hand to operate a small business, one doesn't need a big market to grow. That business just needs a market which is able to reach and serve all needy customers in an efficient way.

The most common types of start-ups are catering to the following industries or services, of which, most are tech related

- Banking and Financial Services Industry
- Marketing and advertising
- Healthcare
- Information Technology
- Education
- Real estate
- Energy and Environmental related
- Retail and eCommerce
- Blockchain and cryptocurrencies related
- Software (SaaS) and technology related

How does a start-up Work:

Start-ups works like any other Company. What distinguishes a start-up from other businesses, is the way a start-up goes about doing the business. Generally, regular companies duplicate what is being done now or earlier. For example, a prospective restaurant owner may franchise an existing restaurant i.e., they work from an angle of an existing template of how such businesses work. Whereas, a start-up aims to create an entirely new template for the same activity. That may mean offering creative or multiple facilities, to provide the same thing as restaurants' provide with much more convenience and choice to customers, which the current format can't match. In turn, this facilitates quantum jump in reach and customer base for the same individual restaurant which otherwise wouldn't have been possible.

(Image Source: Website)

Start-ups aim for Speed and Growth:

There is another key factor that distinguishes start-ups from other companies is the speed and its immense potential growth. They aim to build on ideas very quickly. They often do this through a process called iteration in which they continuously improve products/services through feedbacks, data analysis, data mining etc., Many a time, a startup will begin with a basic skeleton of a product called a minimal variable product (MVP) that it will test and revise, multiple times, until it is ready to go and penetrate the market. While start-ups are enhancing their products, they are also generally looking to rapidly expand their customer bases. This process helps them to establish increased acceptance and enhance their market share, which in turn lets them to raise more money to grow bigger and bigger over a short period of time.

What are the types of start-ups:

a) **Small business start-ups:**
Small business start-ups are different - they are from solo businesses and partnerships to small teams. These start-ups are happy to stay as small start-ups as they sell their products and services to select customers. Though, they are interested in growth, they grow at their own pace only. Such start-ups are often bootstrapped or self-funded, meaning that there is less pressure to scale up immediately.

b) **Buyable start-ups: Businesses built to be bought out eventually**
Small teams build a business from scratch and sell it to a bigger player in the relevant industry. These types of start-ups are usually associated with software and technology related industry. We have seen, in recent times, many big players acquiring smaller businesses through the process of merger or acquisition. Plenty of independent app-makers with small teams, that spend a few years on a business, gets sold to a larger company once they reach a particular scale of acceptability and/or market share.

c) **Scalable start-ups:**
The common thread between all types of start-ups is the need to scale-up ie., whether they are a business with dozens of employees or only a few working out of a small place, they need to scale up faster. Most consumer and business apps are examples of scalable start-ups - once they built buzz and a user-base, it becomes easier to acquire new customers.

Scalable start-ups will be able to raise capital from outside investors (family and friends, angel investors, venture capitalists, business partners, etc.,). With such financial support, they can grow and win more customers which eventually lead them to grab the attention of those willing to buy them out.

d) **Offshoot start-ups: Companies that branch off from bigger corporations**
Not all types of start-ups are built from the ground. An offshoot start-up is the one that branch off from larger parent company to become a separate company. Generally, an offshoot company might be established in an effort by a bigger company to enter a new market or disrupt a smaller competitor. As these start-ups act independently of their parent companies, they have freedom to do business and experiment without drawing as much attention or scrutiny, free of parent's heavy baggage.

e) **Social start-ups: Non-profits and charitable companies**

Start-ups which are specifically designed to operate to do good to the society are known as Social start-ups. They include charities and not for profit organisations, scale up for the sake of philanthropy. They operate similarly to any other start-up, but do so with the help of grants and donations.

How are Start-ups Funded:

As a start-up founder seeking funding, begin by developing a thorough understanding of were the start-up is placed when it comes to:

- Quantum of funds required
  - Purpose for which fund is required (marketing costs, scaling up etc.,)
  - Amount of control the promoter would like to retain
  - Metrics, costs, expenses, and future growth projections
  - Type of support being sought (only financial or strategic as well as financial)
  - Short-term and long term business goals

Investor require fairly accurate and detailed study and analysis of the start-up before he is willing to take a call on investing. Hence, everything boils down to where the start-up is at present in the market, and based on which it will be able to chart its specific plans to source the funds and investors that best suit.

(Image Source: Website)

Various Funding options:

(i) Bootstrapping

One of the most common ways to get a business up and running is through “bootstrapping” which means use of one’s own funds to run the business. This money may come from personal savings, or loaning through mortgage of property etc., The promoter, of course, should know that if the business doesn’t succeed, he/she has to manage the debt effectively.

(ii) Friends and Family

Borrowing money from friends and family is another way to start a business. While it may be harder to convince investors or banks about the project and on the quality of the idea, family and friends often believe in the persons’ dream and ability in view of their long-term association/observations and hence may be more willing to help fund the company. In such an event, it is advisable to get a sound legal advice before taking the money as loan as we all know the downside viz., borrowing money is a quick way to lose friendship and sour family relationships.

(iii) Small Business Loans

Some banks specifically offer loans to small businesses. However, banks are wary about giving money to small businesses unless it is well collateralised or adequately guaranteed. There are, of course, NBFCs which is willing to lend to get the business off the ground subject to the start-up/borrower willing a pay a heavy price.

(iv) Incubator or Accelerator

Business accelerators and incubators have now sprung up all across the country who are not only willing to fund but also handhold the start-ups with necessary guidance and support as and when required. Hence a new start-up can get a great start here by partnering with some amazing people.

(v) Angel Investors:

They are high-net-worth individuals who invest in early-stage companies. Angel investors are high net worth individuals who fund entrepreneurship for an equity stake in the business. Angel investment works on the principle of high-risk, high return. Investors wish to fund start-ups with high-growth potential, so that they can pocket high returns later. Funding could be offered as a one-time investment or as and when required. Investors may get involved with the start-up’s operations or may be completely hands-off. Onboarding angel investors could mean giving up quite a bit of managerial independence also. Finally, angel investors are going to withdraw their investments with good return and hence the start-up has to be careful in executing a fair contract deal which safeguards its primary interest.

(vi) Venture Capital Funds

Venture capital (VC) is a form of private equity provided to start-ups with long-term growth potential. These are professionally managed funds that pool investors' finances and create a portfolio of promising start-ups' shares. It is becoming the go-to source for emerging businesses anticipating future success or established companies seeking expansion.

To secure venture capital investments, one must lay out a detailed business plan with information similar to what angel investors seek through a due diligence process. VCs, ask series of questions to evaluate whether the business is fit for investment. Once a legal review has been completed, venture capitalists offer a term sheet, which is the basis for the investment agreement.

Start-ups can seek venture capital funds at different stages, namely:

- Seed funding – to test the feasibility of an idea
- Start-up funding – to cover marketing and product development costs
- First round – for production and sales needs
- Second round – capital for operational requirements, for companies that are yet to become profitable
- Third round – to help a profitable company expand
- Fourth round – for when a company wants to go public

Acquiring venture capital means gaining large amounts of funding. Venture capitalists are also known for their extensive networks. Chances are high that they will connect the start-up to other investors and funders, leading to mutually beneficial business relationships. Venture capital financing can also accelerate the start-up growth process as they have a mature team guiding start-up's decision-making process to minimise risks.

(vii) Crowdfunding

Crowdfunding is a method used to help raise money to fund start-ups, projects, or any other ventures with contributions trickling in from a vast network of people. It is an effective way to help start-up to pitch their ideas to potential investors. This model is not limited to only business people and investors but can also include family, friends, customers, or shareholders. In India there are many Crowdfunders viz. Kickstarter, Indiegogo, Patreon, Fundly, SeedInvest, Wefunder, GoFundMe, Crowdcube etc., who fund start-ups and growing businesses.

Crowdfunding helps to drastically minimize time spent in growing the business, which otherwise would take long time.

There are roughly three kinds of crowdfunding options viz.

- Equity-funding
- Reward-based funding
- Donation-based crowdfunding

For each business, the requirements could be different. Starting with equity-based crowdfunding in India, the backers get a share of the business to become part-owners based on their contribution.

The reward-based funding involves backers or contributors receiving products, services etc., for their contribution.

Donation-based funders, help funding without expecting or receiving anything in return.

(Image Source: Website)

(viii) Initial Public Offering

An Initial Public Offering (IPO) is the process through which a private company offers its shares to the public. Any individual can buy a company's shares which makes it fruitful for both the company and the investors. An IPO is a final step for any start-up to mobilise funds for their operations. It is the ideal way of gaining capital to meet the long-term goals of the company by sharing the rewards with the public. Several compliances and formalities have to be fulfilled before launching an IPO, but it is highly beneficial for start-ups that have high recorded profitability and are considered reputable.

Experienced IPO experts such as consultants, bankers, and brokers can guide through intricate procedures to go for an IPO. In India, major Start-ups companies that have recently gone for IPOs and Nazara Technologies, Car Trade, Freshworks, Nykaa, Policybazaar, Paytm, MapmyIndia, Zomato Ltd etc., they had thousands of investors ready to invest in their eagerly awaited. Their IPOs were oversubscribed multiple times and some recorded all time high oversubscriptions.

How do Start-ups Succeed

While many start-ups will ultimately fail, not all do. For a start-up to succeed, many stars must align, and crucial questions to be answered.

- **Is the team obsessively passionate about their idea?** It's all in the execution. Even an outstanding concept can fail to engage its audience if the team isn't ready to do everything to support it.
- **Do the founders have domain expertise?** The founders should know everything about the space in which they operate.
- **Are they willing to put in the time?** Early start-up employees often have intense work schedules. A survey has found that start-up owners log 14/16-plus-hour workdays. If a team isn't willing to devote most of their waking hours to an idea, it may struggle to thrive.
- **Why this idea and why now?** Is this a new idea, and if so, why haven't people tried it before? If it isn't, what makes the start-up's team uniquely able to crack the code?
- **How big is the market?** The size of a start-up's market defines the scale of its opportunity. Companies that obsess over niche technology may outcompete their rivals, and grow significant in short time.

If a start-up is able to answer all of these questions, it may stand a shot at becoming part of the 10% of early-stage companies to survive.

Conclusion:

If one is planning to launch a start-up in India there can't be a better time. The start-up ecosystem is now thriving like never before, and the environment is ripe for entrepreneurs to succeed. The key to success for any start-up is a combination of planning, foresight, and finding the right set of investors. Firstly, start-ups that succeed begin with a business idea that can sustain itself for the long term. Entrepreneurship requires capital to grow, and different types of business funding as stated earlier can be used to achieve the objectives.

Before trying to get investors, it's crucial that one have a detailed understanding of their financial needs. One need to figure out the kind of investment that will help the start-up business thrive. The funding source needs to be chosen as per the nature of business, risks involved for the investors, the pressure of repayment, returns to investors, and their involvement in the decision-making process.

The Start-up India initiative of the Government of India envisages building a robust Start-up ecosystem in the country for nurturing innovation and providing opportunities to budding entrepreneurs. Government's Action Plan lays down a roadmap for the creation of a conducive ecosystem for start-ups in India. Many activities have been undertaken by the government and other stakeholders to encourage start-ups. Start-up India Seed Fund Scheme (SISFS) of the government is one such scheme which provides financial assistance to early-stage start-ups with a substantial outlay of funds for Proof of Concept, prototype development, product trials, market entry, and commercialization has been allocated. We have seen many stars shining in the start-up market in the recent past with many Unicorns being born and waiting in the wings to fly high to uphold our nation's pride.

General Circular No. 01/2022

Ministry of Corporate Affairs (MCA) vide its circular dated 14th February 2022, has extended the due date for filing the Annual Financial Statements/returns of the company with respect to **e-forms AOC-4, AOC-4 (CFS), AOC-4 XBRL, AOC-4 Non-XBRL upto 15th March, 2022** and **e-forms MGT-7/MGT-7A upto 31st March, 2022 in respect of the Financial Year ended 31.03.2021**. During the said period, only normal fees is payable for filing the above-mentioned e-forms.

The tough journey of startups: What does it take to become a Unicorn?

Shreyansh Jain, MBA (IIM Bangalore)

Introduction

India's startup ecosystem is reaching dazzling new heights every year. In CY21 alone, **44** of the country's startups became **unicorns**. That number is 50% of the total number of unicorns in the country at the time of writing - all achieved in a single calendar year[1]. The euphoria following such an achievement is immense in the country: the words "*Startup*" / "*Entrepreneurship*" are now becoming household names, thanks to these encouraging signs and wide-reaching television programmes such as *Shark Tank*.

However, not many people are aware that **16,527 Indian companies shut shop** in FY21 alone[2]. The takeaway is simple: <u>Seeing a startup flourish is extremely rare</u>. Globally, it is reported that 90% of startups fail [3]. The question then is: Why is it so difficult to even survive as a startup? How much more difficult is it to become a unicorn? Put more optimistically: *What does it really take to build a successful startup and reach unicorn status?*

This article discusses some of the most **common obstacles** [4] that startups face in their journey to become unicorns. This article only lists some of the most common pitfalls and how some startups have fallen prey to them. This article is by no means an exhaustive list of things that must go right for a company. Newer challenges keep emerging and every startup must stay nimble enough to navigate through these challenges, just like a marathon runner who must keep jumping on obstacles to win. Nevertheless, it is worthwhile to be cognizant of common reasons for previous successes or failures and learn from them.

Exhibit 1: Becoming a unicorn is much like running a marathon and an obstacle race - at the same time

(Image Source: Website)

Obstacle 1: Achieving product market fit

The fundamental reason that a startup exists and flourishes is that it **solves a key problem.** The greatest companies solve the biggest problems: Technology companies such as *Microsoft* powers computers with a classy operating system that makes it easy and fast to use, *Apple* ensures that the smartphones and computing devices are designed in a way that minimises confusion and delights users, Fin-Tech companies like *PayTM* empower users to make payments to one another digitally - anywhere, anytime. Ecommerce companies like *FlipKart* ensure that buyers and sellers of products have a quick and easy-to-use platform. Every company exists and flourishes for this one fundamental reason : they do something to solve key problems.

Exhibit 2: Fit is where the product meets the needs of the market

(Image Source: Website)

Achieving product market fit, therefore, comprises of two key elements:

1. Understanding what the customer's problem really is/ what does the customer really need
2. Building a solution that solves that problem

While this may seem simple on paper, it is anything but that. Many startups mistake the customer's problem for something else. They make assumptions that aren't really valid, and investors end up paying the price for a failed solution. Some startups understand the problem but aren't able to build a solution that solves the problem.

Case in hand: Social media platform "Frankly"[5]
Background

Frankly was a mobile application ("App") founded in 2014 in India. Using Frankly, users could connect with famous celebrities by asking them questions. The company used the system of user upvotes to bubble up the most sought-after question to the celebrity. The celebrity would select the question and answer them.

The App also allowed celebrities & users to share videos of 1.5 minutes length on the platform in order to keep engagement going.

What happened?

The company shut shop in 2016. Citing lack of product market fit, the founder believed that the video creation process was challenging. Moreover, the App was more catered to the Indian audience, at a time when other platforms were opening up with the promise of an international audience.

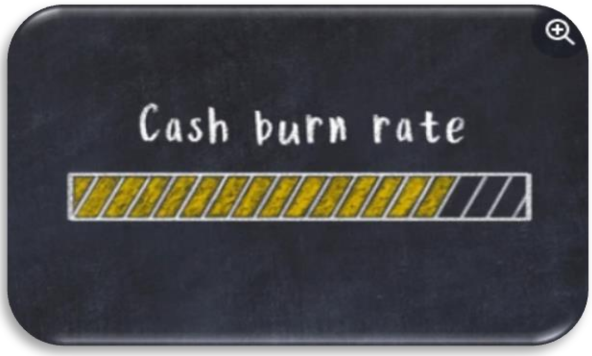
Learnings

Firstly, having celebrities commit to making 1.5 minute long videos can be really taxing on celebrities. One can look at the current crop of flourishing video share platforms like *YouTube Shorts* to find the answer to this problem - shorter videos on these platforms require a lesser investment of time from celebrities, and hence are more likely to take off. Secondly, addressing an international market could always be more beneficial for a celebrity trying to expand their reach. The key takeaway here is that any company must understand their market and their customers if they hope to succeed. The best companies know their market and their customers inside out. Knowing the users and the market is crucial for startups to quickly recognise their shortcomings and fix them.

Obstacle 2: Having enough cash

Every company partners with several different parties in order to keep its operations going. Startups are no exception - they too hire people and pay salaries to run their operations, pay their suppliers, spend on marketing and some companies even provide deep discounting so as to lure customers away from competitors. With so many expenses to be paid, it becomes important for a startup to generate enough cash/ secure funding to keep its operations going.

Exhibit 3: Startups must keep track of their cash burn rate



(Image Source: Website)

Case in hand: Food ordering platform "Bite Club" [6]
Background

Bite Club was also founded in 2014 in Gurgaon, India. Using Bite Club, people who loved home-cooked food could choose and order food from a community of chefs and at-home-cooks. The company secured funding of Rs. 1.5 Crores from investors like Powai Lake Ventures soon after starting operations.

What happened?

Just within one (1) year of securing the funding, Bite Club shut shop citing lack of money. The company was heavily discounting meals cooked by home cooks and chefs in order to stay competitive. Soon, the company ran out of cash to carry out more discounting and lost out on customers. Eventually, people moved away from the platform and Bite Club had to shut shop.

Learnings

Sure, deep pockets can help stay competitive and win over a larger customer base for a few months. But, if startups burn too much cash, even a recent funding will not help them stay afloat.

Prudent startups always keep an eye out for unwanted expenses. They try to invest their capital in **the one main problem** they think they can solve, rather than splashing on multiple different areas in the hope of staying competitive.

Obstacle 3: Competition

If a startup has found product market fit and has also secured enough cash to keep itself afloat, it is very likely to gain people's attention. And that can sometimes be a bad thing. When competitors start to emerge upon seeing a company succeed, they will try to grab a share of the market. Startups must stay alert. If the startup does not differentiate itself from the competition or if it does not have an economic "moat" (barriers to market entry), it is not likely to survive.

One can take for instance the example of *Google Search*. While many different competitors emerged in the search engine space (like Yahoo, Bing), Google continued to be the preferred search engine for most users. This is because Google was able to differentiate itself - it was able to refine the search results much better than everyone else using special computer algorithms and even learning behaviour of users (machine learning). Every successful startup has something of this sort that makes it stand apart from competition- sometimes it is a **first mover advantage**, sometimes it is **brilliant**

marketing, and other times it is **regulatory** barricades that prevent competition from entering.

Exhibit 4: Competitive advantage can be built with a strong focus on value to customers and a strong commitment towards building the best in class solution

(Image Source: Website)

Case in hand: Fintech startup "LoanMeet"[6]
Background

LoanMeet was an Indian Fintech company that was founded back in 2016 and raised its seed capital in 2017 from China-based investors. The Bangalore based company used to provide short term financing to SMEs in the country. The loan amount offered to each SME varied from Rs. 5000 all the way up to Rs. 5 lakhs.

What happened?

LoanMeet discontinued its operations in 2019 because too many competitors were entering the SME lending space at that point. Some of these competitors were *Happy Loan*, *Capital Float*, and *Loan Frame* for example. These competitors reportedly had larger loan books and were more aggressive in their pursuit of the SME segment. Unable to raise more capital to convincingly differentiate itself in this overcrowded market, LoanMeet succumbed and eventually discontinued its operations in 2019.

Learnings

It is always better to have a solid differentiating factor in order to differentiate oneself from the competition. The fundamental ability of a company to set itself apart from competition is key to its success. If that comes, success and valuation will follow.

LoanMeet is one of many such startups that had to bite the dust owing to intense competition. As is well known, a highly competitive market causes **aggressive pricing** and reduced profits. Sometimes, even after building a differentiated product, a competitor with very deep pockets can potentially offer products at lower rates and gain traction. The key takeaway is that even one obstacle is enough for a startup to fail. But success requires navigating through multiple obstacles.

Most important of all is to keep an eye out for competition. Startups should always listen to what the market is saying about the competitors. This will help in two ways:-

1. Startups can gather **positive** feedback on competitors' offerings to learn what is working in the market
2. Startups can also learn from **negative** feedback on the competitor - avoid what the competitor is doing and save some time and money that way.

The adage ***"Keep your friends close and your enemies closer"*** is wise advice for startups.

Obstacle 4: Getting to the right business model

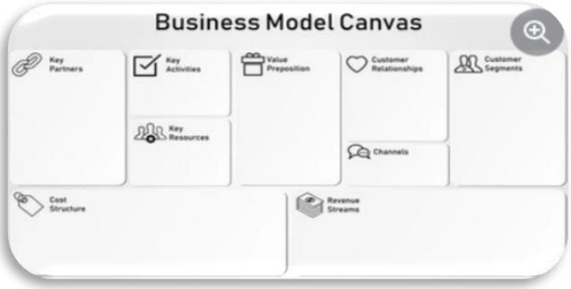
The journey of every startup is full of critical **choices/decisions** to make, and it is important to choose the right options in the journey of becoming a unicorn. Some considerations that every startup must take in order to get to the right business model are listed below. These are

1. Who are the target **customers**?
    a. Who needs to pay to use the solution?
    b. Who does not need to pay but is still a key part of the ecosystem?
    c. How does the product cater to each?
2. What are my sales **channels** and marketing channels?
    a. Online vs Offline - How is the product going to be sold?
    b. How is the solution going to be used?
    c. Which players are part of the channel? How does one incentivise them?
3. What is the **value proposition**?
    a. How is this value proposition reflecting in the customer's journey with the solution that the startup is building?
    b. Who is capturing this value?
    c. How is this value communicated to prospective customers and users?
4. What should be the **pricing** strategy?
    a. Should the startup aggressively price the product? (Competitive landscape)
    b. Should the startup use a Cost + Margin pricing strategy?
    c. How much are customers willing to realistically pay?
5. What is the path to **profitability**?
    a. How is the cost going to be reduced?

b. Are there opportunities for "*economies of scale*"?

6. How is the solution going to **scale**?
    a. Does the technology need to be upgraded?
    b. Does the operational model need to be upgraded?
    c. What would it take to service more customers with lower costs?

Exhibit 5: The Business model canvas can serve as a handy starting point to making the right business decisions



(Image Source: Website)

Case in hand: Motorbike rental startup "Tazzo Technologies" [6][7]

Background

Tazzo Technologies was an Indian bike-rental startup company that was founded in 2015. The Hyderabad based company used to provide motor bikes on rent to people who wanted to drive motorbikes by themselves. The company offered free delivery of motorbikes for people who needed them. The company also offered free pickup of motorbikes once they were used. Users were also provided with a mobile application "*Tazzo Bikes*" to check the availability of motorbikes at their nearest bike station. The company pursued the mission of improving last mile connectivity by renting bikes to people who wanted to drive them.

What happened?

Experts[8] believe that Tazzo Technologies was unable to chart out a path to profitability.

Firstly, the target **customer segment** turned out to be smaller than expected - since most residents owned bikes of their own, the actual users ended up being only those people that were travelling to a new city and needed a bike for (say) a couple of days.

Secondly, the **costs** were thought to be high: Maintaining a huge inventory of bikes, building tracking technology and providing free pickup and delivery services were creating too much overhead in comparison with the low revenue from bike rentals (when compared to revenue from cab services like Ola/Uber).

Learnings

Startups must stay vigilant about the choices they make, there is no two ways about it. The costs of wrong choices are just too high, as we can see from the example above.

Obstacle 5: Regulatory & Legal

Government regulations and laws can go a long way in defining the success and failures of startups. The Government of India, for instance, has announced a host of **PLI (production linked incentives) schemes** for companies in the recent budget announcement in fields such as electronics, 5G and solar energy. Such welcome measures go a long way in helping companies thrive, especially in areas of new and clean technology.

On the other hand, regulations can also cause the demise of startups. For example, the 2018 restrictions by the RBI on crypto-currency transactions caused the downfall of crypto exchanges such as *ZebPay*. While the move was in the interest of individuals and retail investors of the country, the startup fell prey to it and had to shut down operations.

Conclusion

The path to becoming a unicorn is filled with challenges. This article has listed only five (5) out of numerous such challenges. Getting through one challenge does not guarantee success: startups must always be on their toes and navigate each new challenge that comes their way.

Sometimes, however, one can do everything right and ***still*** fall prey to factors not in one's hands. Take the example of Covid-19. Governments across the globe have had to put restrictions in place in order to curb the spread of Covid-19. While it was in the interest of protecting the health and well being of citizens, the travel and tourism startups were hard hit by lockdowns and travel restrictions. Many startups have had to shut shops. That is the reality of the life of startups - sometimes, there is no way around challenges - one must accept the reality and move on.

It would be unwise to say that hardwork and commitment alone is enough for a startup to succeed. The "***luck factor***" also plays an important part. However, that does not mean that luck alone is enough for any company to succeed. **The best companies are those that are different, prudent, and most importantly, customer driven.**

Sale of Shares in a company under IBC

CGRF Legal Bureau

Preamble

Shares held in a public limited company are freely transferable without any restrictions. In contrast, a private company, by its articles of association, is required to restrict the right to transfer its shares. The directors of a private company may refuse to register the transfer of fully paid shares to a person whom they do not approve. In the case of transmission of shares, the directors of even a public company, or a listed company, may call for such information as to ensure that the transmission of shares happens to the legitimate legal heirs of the deceased member.

Section 58 of Companies Act, 2013 lays down that when a private company limited by shares refuses to register the transfer or transmission of shares, it shall send a notice of the refusal to the transferor and the transferee within 30 days. Section 58(2) says that without prejudice to the above, ***"the securities or other interest of any member in a public company shall be freely transferable."***

Physical or Demat form

In this context, it may be relevant to note that shares of a company may be held in physical form or in demat form. In the demat form of holding, the depository (NSDL or CDSL) shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner. The depository participant (like Geojit or Zerodha or ICICI Securities, etc.) opens a demat account for the investor and carries out the instructions of the beneficial owner. The depository as a registered owner shall not have any voting rights or any other rights in respect of securities held by it. The beneficial owner shall be entitled to all the rights and benefits and be subjected to all the liabilities in respect of his securities held by a depository.

By inserting Rule 9A into the Companies (Prospectus and Allotment of Securities) Rules, 2014 with effect from 2nd October 2018, unlisted public companies were also required to issue fresh securities only in demat form and facilitate dematerialisation of all its existing securities. Any transfer of shares in an unlisted public company, from the above date, can happen only after the shares are dematerialised.

Public company shares are freely transferable

From the above reading of the provisions, it is clear that the shares in a public company can be freely traded whereas in the case of a private company, certain restrictions are in place. The board of directors of a private company have the powers to accept or reject the transfer or transmission of shares, subject to a right of appeal conferred by Sec.58 of Companies Act, 2013.

In the case of a public company, where the shares are held in physical form or where the shares are not listed with stock exchanges, if the board of directors refuses to register the transfer or transmission without sufficient cause, the transferee may appeal to the National Company Law Tribunal. In the case of a listed company, the transfer takes place automatically through electronic mode while in the case of transmission, the Registrar and Transfer Agent (RTA) carries out the document verification and effects the change in registered ownership of the shares.

(Image Source: Website)

Situation in a company under IBC

When a company is admitted into Corporate Insolvency Resolution Process (CIRP), the adjudicating authority pronounces an order of admitting the company into IBC process and appointing an interim resolution professional (IRP). The powers of the board of directors are suspended and are vested with the interim resolution professional or resolution professional (RP) as the case may be. Therefore, any powers usually exercised by the board of directors will now be exercised by the IRP or RP. So, in the case of a private company, the power of approving or rejecting a transfer of shares should normally be exercised by the IRP or RP. However, the Insolvency and Bankruptcy Code (IBC) provides that the IRP or RP shall take prior approval of the Committee of

Creditors before disposal or permitting disposal of shares of any shareholders of the corporate debtor or their nominees to third parties.

On the face of it, the above provision seems to be in line with the provisions of Companies Act, 2013 in so far as the directors of a private company have the powers to refuse the transfer. However, in public companies, whether such provision under IBC is workable needs to be examined.

Moratorium under IBC

Readers may be aware, when the CIRP commences, moratorium is declared by the adjudicating authority. Moratorium provides a calm period to the corporate debtor. By virtue of the moratorium, no recovery action can be taken against the company.

(Image Source: Website)

However, without prejudice to the provisions in the articles of association, the moratorium in no way affects the rights of the shareholders of a public company to effect inter-se transfer of shares held by them. If the company is a listed company, the shares are compulsorily required to be in demat mode and therefore, the transactions of purchase or sale of share happens electronically without any interference from the company.

Some questions which have arisen recently relate to the rights of the shareholders of a company under CIRP, particularly financial creditors, who hold the shares as security to the credit given to the corporate debtor. It is an accepted practice that the lenders insist the promoters to pledge their shares in the company in favour of the lenders as security for prompt repayment of the loans availed by the corporate debtor. It may be noted that such shares are the assets of the promoters and are not the assets of the company. The lenders are free to invoke the pledge as per the terms of guarantee in case of default in repayment of the loans.

Let us now go to the questions:

Question-1

During CIRP or liquidation under the provisions of IBC, whether the shareholders are restrained from transferring their shares?

Response

If the company under CIRP or liquidation is a private company, then, the directors of the company may refuse to register the transfer of fully paid shares to a person of whom they do not approve. However, since the powers of the board of directors are vested in and exercised by the resolution professional, such right can be exercised by the resolution professional. But, the provisions of Sec.28 of Insolvency & Bankruptcy Code, 2016, go one step further and says that notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors, namely: - [28(1)(i)] ***dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties".***

If one reads the provisions of Sec.28 of IBC in a deeper manner, the question of disposing of the shares of any shareholder to third parties will arise only if it is an asset of the company. This is possible only when the partly paid shares are forfeited for non-payment of calls and then reissued to any other person. The other limb of the provision is "permit the disposal" of shares of any shareholder of the corporate debtor or their nominees to third parties. This could arise when one of the shareholders wants to transfer the shares to a third party. As the powers of the board being exercised by the resolution professional, with an oversight of the committee of creditors, such transfers have to be approved by the committee of creditors with a 66% voting right. This will be applicable to a private company as well as an unlisted public company.

In the case of a listed company, unless there is any other restriction like lock-in period for sale, there is no restriction on the shareholders to dispose of the shares.

Question-2

During CIRP or liquidation under the provisions of IBC, whether the financial creditors having the security of promoters' shareholdings, can sell of these shares in the market?

Response

During CIRP period, moratorium is provided to the corporate debtor during which time, the creditors cannot enforce any recovery action against the company. The assets of the corporate debtor held as security by the lenders cannot be sold or encumbered during the period of CIRP as moratorium bars such recovery proceedings. Therefore, sale or transfer of the shares held by the lenders as security is prohibited, if such shares are the assets of the corporate debtor.

However, it may be noted that shares in the company held by the promoters are per se not the assets of the corporate debtor. They are the assets / investments of the promoters or the guarantors. Therefore, there is no restriction on the part of the lenders to transfer the shares and adjust the proceeds of the share sale against the dues of the corporate debtor. Generally, the lenders make such provisions in the loan agreement covenants that in the event of transfer of shares to a new management, such transfer shall be deemed to be approved by the board of directors of the company.

If the corporate debtor is a listed entity, then, there is no restriction on the sale of such shares. If it is an unlisted public company or private company, the prior approval of the committee of creditors is required.

Situation where the shares are not encumbered

There could be a situation where the corporate debtor is a listed company and the shares have no prior encumbrances, whether the shareholder can freely transfer such shares? This is akin to a lender having pledged shares and the pledge has been invoked. Also, a promoter not having any lock-in period or covenant, can sell some of his holdings in the market. Whether intent of the Code is to restrict even such share transfers when the company is undergoing CIRP? Will it not amount to the freedom of the investors to buy and sell the shares in a stock exchange regulated by SEBI? Hope it is not the intent. The intent could be to provide a measure not to upset the shareholding pattern and management equation during CIRP. But, if the promoter has unencumbered shares and no other binding covenants and if he is well within all applicable provisions, why not he is allowed to sell the shares freely and why CoC's prior approval is required? Can we say that by virtue of Sec.238 of IBC which gives over-riding powers over other legislations, the CoC approval is needed even for transfer of shares in a listed corporate debtor? Another aspect which begs a question is the usage of the words ***"third parties"*** in Sec.28(1)(i) as given below:

> *The resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors, namely: - [28(1)(i)]* ***dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties".***

That the shareholders in a CIRP have no say is well understood. Even the approvals required from the shareholders for implementing a NCLT-approved resolution plan are deemed to have been given by the shareholders. Why in such a case there should be restriction in transfer / disposal of shares to third parties? It appears that the words "third parties" are particularly relevant in the case of a private company which restricts the rights of members to transfer its shares.

Conclusion

Therefore, it can be inferred that Sec.28(1) of IBC has listed some important actions which will have a serious impact on the status and operations of the corporate debtor shall be taken by the IRP or RP only after getting 66% voting share approval from the Committee of Creditors. One among such actions is transfer of shares of the corporate debtor by a shareholder to a third party. It may be noted that shares of many of the listed companies under CIRP are being traded in the stock exchanges. Retail investors are either off-loading the shares seeing no revival possibilities, but the buyers are betting on a short term gain. Understandably, the lenders having the pledge of shares would also like to dispose them of and get at least some recovery. At least in the case of a listed company, they can very well go about disposal of the shares. But in the case of a private company and unlisted public company, the approval of the CoC by way of 66% voting share is required before the IRP or RP permits such action. We may have to see if the above views are correct when the provisions are tested in the courts.

Court Order

CGRF Legal Team

Union Bank of India on behalf of the CoC of Dewan Housing Finance Corporation Ltd.
Vs.
Mr. Kapil Wadhawan
In the matter of Dewan Housing Finance Corp. Ltd.
Company Appeal (AT) (Insolvency) No. 370, 376-377 & 393 of 2021
27-Jan-22 NCLAT New Delhi

Issue decided:

Whether after Approval of the resolution plan by the COC and pending Approval by the Adjudicating Authority (AA), can AA direct the COC to convene a meeting and place the settlement proposal offered for consideration, decision and voting?

Brief facts

The Union Bank of India filed the appeal on behalf of the CoC of DHFL against the Order of the Adjudicating Authority in I.A. No. 2431 of 2020 under the common Company Petition No. 4258 of 2019, whereby Adjudicating Authority has directed the Administrator to place the Settlement Proposal dated December 29, 2020, sent by Respondent No. 1, i.e. Kapil Wadhwan, Promoter of DHFL before the CoC for its consideration.

While deciding the application by the promoters of DHFL Hon'ble NCLT/Mumbai bench considered the following:-

The promoters of DHFL offered the Settlement Proposals approx. Rs 91,158 crores which is Rs. 54,512 crores more than the offer by the next highest bidder who offered Rs. 37,250 Crores. Since this settlement proposal is substantially higher the same needs due consideration/ reconsideration by the Administrator/COC. …If the proposal is considered and the terms and conditions are acceptable to the members of COC in their Commercial Wisdom, ultimately, it would benefit majorly the Financial Creditors (Banks, Financial Institutions) and thousands of small investors.

In view of the above, the Adjudicating Authority issued direction granting 10 days time to the Administrator to place the 2nd Settlement Proposal of the applicant before the members of COC including the FD, NCD holders for consideration, decision, voting and to submit the outcome of the voting results.

Submission of Appellants

The Appellants inter-alia submitted as follows:-

i. Adjudicating Authority has acknowledged that there is no provision in the Code or the Regulations thereunder by which it is empowered to pass the Impugned Orders. Hence, the Adjudicating Authority has passed the Impugned Orders by exercising its inherent power under Rule 11 of the National Company Law Tribunal Rules, 2017 ("NCLT Rules") and Section 60(5) of the Code.

ii. Only a Resolution Plan compliant with the provisions of the Code or an Application under Section 12A of the IBC could be placed before the CoC. Undisputedly the Second Offer is neither a proposal under Section 12A nor a Resolution Plan. That being the case, there is no provision of law that permits the Adjudicating Authority to compel the CoC to consider an offer that is not a settlement U/S 12A nor even a proposal as per the provisions of the Code.

iii. The Adjudicating Authority could not grant any reliefs contrary to the express provisions of the Code.

(Image Source: Website)

Submission of Respondent

The Respondent i.e. promoters of DHFL inter-alia submitted as follows:-

i. The objections by the Appellant alleging lack of jurisdiction on the part of the Adjudicating Authority are misconceived. Section 60 (5) of the I&B Code defines the powers of the Adjudicating Authority in the broadest possible terms. Further, the Adjudicating Authority has the inherent power to make such Order as may be necessary to meet the ends of justice or to prevent the abuse of the Tribunal's process.

ii. The objection by the Appellant that the impugned Order will interfere with the Commercial Wisdom of the CoC is incorrect as the Adjudicating Authority had merely directed consideration of the Settlement proposal and not interfere with the commercial wisdom of CoC as it is not a case wherein the CoC rejected the Settlement Proposal, but rather a case, wherein the offer mentioned above was never even considered and hence does not fall within the ambit of "Commercial Wisdom", and there is no question of interference with the same.

NCLAT Decision

The Hon'ble NCLAT, New Delhi referring to the ratio laid down by Hon'ble Supreme Court in Ebix Singapore pvt., Ltd., Vs Educomp Solutions Ltd., (2021 Online SC 707) and M/s Pratap Technocrats (P) Ltd., Vs Monitoring Committee of Reliance Infratel Ltd., (2021 Online SC 569) inter-alia held as follows:-

i. Once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty-bound to abide by the discipline of the statutory provisions. Neither the Adjudicating Authority nor the Appellate Authority has an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.

ii. The jurisdiction of the Adjudicating Authority is confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC.

iii. There was no scope for negotiations between the parties once the CoC had approved the Resolution Plan. 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.

It was held that the said exercise of directing CoC to consider the 2nd Settlement Proposal by the promoter of DHFL after approval of Resolution Plan by CoC was found to be beyond the jurisdiction of the Adjudicating Authority, unsustainable and was ordered to be set aside.

In the matter of Dewan Housing Finance Corporation Ltd.
Vs.
Mr. Kapil Wadhawan Company Appeal (AT) (Insolvency) No. 370, 376-377 & 393 of 2021
27-Jan-22 NCLAT New Delhi

Issues decided:

Is there a difference between the 'supersession of Directors' under the RBI Act and the 'suspension of Directors' under the Code (IBC) ?

Whether a 'Superseded director', who had vacated office on supersession of Board under RBI Act, is entitled to the notice of CoC meeting and has the right to participate in the meeting of the CoC?

Brief Facts of the case

The Appellants are the superseded Directors on the Erstwhile Board of Directors of the Corporate Debtor, i.e. Dewan Housing Finance Corporation Limited ("**DHFL**"). The Appellants are also personal guarantors for various loans the Corporate Debtor availed. The Corporate Debtor is a Housing Finance Company regulated under the National Housing Bank Act, 1987(for brevity '**NHB Act**') and Reserve Bank of India Act, 1934 ('**RBI Act**'). On 15 November 2019, the Central Government made Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019 (for brevity **'FSP Rules**') that provide CIRP for Financial Service Providers such as DHFL.

On 20 November 2019, RBI exercised its power under Section 45-IE of the Reserve Bank of India Act, 1934 *and superseded* the Board of Directors of DHFL by appointing Mr R. Subramaniakumar as the Administrator. Subsequently, on 29 November 2019, RBI initiated the Insolvency Resolution Process of the Corporate Debtor by filling the CP (IB) No. 4258 of 2019.

By an order dated 03 December 2019, the AA admitted the Petition and the Administrator suggested by RBI on 20 November 2019 was appointed as the Administrator under the 'FSP Rules'.

The suspended Board of directors addressed the Administrator to send notice of COC meeting with Agenda and the Administrator replied they were not legally entitled to receive notice.

The Appellants filed a Intervention Application before NCLT seeking direction to send notice along with agenda for CoC meeting and furnish records of CoC meeting.

The AA/NCLT rejected the above-said Intervention Application filed by the Appellants and passed the Impugned Order dated 28 April 2020, which is challenged in this Appeal.

Submissions of Appellant (Promoters of DHFL)

Appellant submitted that given the context and the scheme of the Code, there is no legal difference between a "superseded" director and a "suspended" Director.

The Appellant referred to the Judgment of the Hon'ble Supreme Court Vijay Kumar Jain vs Standard Chartered Bank [(2019) SCC Online SC 103] (paragraphs 10 to 21) where the rights of the Erstwhile Directors in attending COC meeting have been elaborated and further in Arcelor Mittal India Pvt. Ltd. Vs Satish Kumar Gupta [(2019) 2 SCC 1] (in para 76.2) recognises that there is no difference between suspension and supersession in the legal effect as the erstwhile directors cannot be re-appointed on the Board of Directors in any event.

(Image Source: Website)

The Appellant further contended that in the case of Financial Service Providers such as DHFL, RBI had a choice of Resolution either by proceeding under RBI Act as amended or under FSP Rules and the Code. The Resolution under the Code and the FSP Rules is time-bound and faster. If RBI decides to proceed under I&B Code, the same will apply to the full extent except as provided in Rule 5 of FSP Rules. RBI had to elect and cannot proceed under both as they are mutually exclusive and inconsistent. Suppose RBI supersedes directors to deny them rights under the Code. In that case, it is mala fide and cannot be permitted as RBI had no power or jurisdiction to bypass provisions of the I&B Code.

Submission of Respondent/Administrator

The Respondent/Administrator submitted that on a bare reading of Section 45-IE (4) of the RBI Act, 1934, it is clear that upon exercise of the power under Section 45-IE (2), the Board of DHFL was superseded, the Directors, including the Appellant vacated their office on 20-11-2019 and consequently all powers stood vested in the Administrator appointed. The vacating of office by the Board of Directors was not temporary and has finality attached to it. RBI's action has not been disputed or challenged in any manner whatsoever, including the Appellant. In view of this, as on CIRP Commencement date there was no Board of Corporate Debtor existing and therefore, there is no question of permitting the appellants to participate in CoC meetings.

The Respondent/Administrator further stated that Appellant's reliance on Vijay Kumar Jain vs Standard Chartered Bank[5] is based on a patent misreading said judgment. In Vijay Kumar Jain (supra), the Hon'ble Supreme Court was concerned with the extent to which Directors who had been suspended on the appointment of the IRP was entitled to participate in the COC meetings. The right of the said Directors to attend CoC meetings was not under dispute (unlike the present case).

Decision of the NCLAT:

After considering the submissions of the Appellants and the Respondent NCLAT, inter-alia held as follows:-

On a bare reading of Section 24(3)(b) of the Code, it is clear that the notice of each meeting of the Committee of Creditors is required to be given to the 'suspended' Board of Directors. The word 'suspended' used in Section 24(3)(b) of the Code is clearly and directly relatable to the words 'suspended' in Section 17(1)(b) of the Code. In the present case, it is an admitted position that with effect from 20 November 2019, upon the RBI exercising powers under Section 45-IE of the RBI Act, the Board of Directors of DHFL stood superseded and had vacated office. Accordingly, at the time of appointment of the Administrator under the FSP Rules by the NCLT on 03 December 2019, there was no question of the powers of the Board of Directors of DHFL,Since they had already vacated their offices on 20 November 2019, there is no question of the said Directors of DHFL permitting them to participate in the CoC meetings in this scenario.

The NCLAT went in to the reliance placed by appellants in Vijay Kumar Jain case. The Hon'ble NCLAT held that in Vijay Kumar Jain, the Hon'ble Supreme Court did not express any view on whether persons who have already vacated their offices as Directors before the appointment of the Interim Resolution Professional are entitled to notice and participation in CoC meetings. Thus, the Appellant's reliance on Vijay Kumar Jain (supra) is misplaced. *The use of expression 'erstwhile' or 'former' Directors by the Hon'ble Supreme Court in*

Vijay Kumar Jain (supra) was not intended to (and does not) alter the clear language of Section 17(1)(b) and Section 24(3)(b) of the Code. The Appellant's contention is based on a misreading of the observations of the Hon'ble Supreme Court and is contrary to settled legal principles laid down by the Hon'ble Supreme Court.

Therefore, the Appellant, erstwhile Directors, who have vacated the offices are also not entitled to receive any document. However, the copy of the Resolution Plan after approval from the Adjudicating Authority cannot be treated as a confidential document. Therefore, after final approval of the Resolution Plan, its certified copy may be issued as per Rules.

Hon'ble NCLAT concluded unanimously that the impugned Order needs no interference, and the appeals were disposed off accordingly.

State Bank of India,
Stressed Asset Management Branch
Vs.
Mahendra Kumar Jajodia
NCLAT, New Delhi, Dt. : 27.01.2022

Personal Guarantor to Corporate Debtor

Pending Liquidation Process / Corporate Insolvency Resolution Process is not a pre-requisite to initiate Insolvency Resolution Process (IRP) against the Personal Guarantor of the Corporate Debtor.

The Appeal came to be filed by the State Bank of India, one of the Financial Creditor, against the order of the Hon'ble NCLT Kolkata Bench, which refused to entertain an application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 for initiation of IRP against the Respondent/Personal Guarantor, on the ground that the requirement of a pending CIRP / Liquidation Process is not satisfied as per Section 60(2) and dismissed the case.

The provisions under interpretation in the case is reproduced hereunder:

*"**Section 60: Adjudicating Authority for corporate persons.***

60. *(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.*

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or 1 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before the National Company Law Tribunal.

The Hon'ble NCLAT, while interpreting Sec 60(2) of the code, observed that *"The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2)."*

(Image Source: Website)

The Hon'ble NCLAT further observed that the provisions of Section 60(2) are without prejudice to Section 60(1) and are supplemental to Section 60(1) thus the substantive provision for an Adjudicating Authority is Section 60(1), therefore, when a particular case is not covered under Section 60(2) the Application as referred to in Section 60(1) can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate person is located.

And so the Application having been filed under Section 95(1) was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor is pending before the NCLT.

The order passed by the NCLT, Kolkata was set aside and the application filed by the Appellant under Section 95(1) of the Code was revived before the Hon'ble Tribunal.

Mr. Vallal RCK
Vs
Siva Industries and Holdings Ltd & another
Company Appeal(AT)(CH)(Insolvency)
Nos. 211 & 212 of 2021 NCLAT Chennai Bench
Dated 28.01.2022

The Appeals in Comp App (AT)(CH)(Ins) No. 211/2021 and 212/2021 filed against the impugned order dated 12.08.2021 in MA/43/IB/2021 and MA/837/IB/2021 in IBA/453/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench II, Chennai).

Fact of the case

1. On account of failure of Resolution plan received during the CIRP process the RP filed an application for liquidation of the CD vide MA/837/IB/2021 in IBA/453/2019.

2. In the meantime, the promoters of the CD filed an application seeking consideration of their settlement proposal.

3. Consequently, AA directed the RP to convene a meeting to consider the promoters' proposal.

4. After several round of discussions and litigations, the promoters' proposal was voted 94.23% by the COC members. Finally, the RP filed an application under section 12A of IBC read with Regulation 30A of IBBI (IRPCP), Regulation 2016 vide MA/43/IB/2021 in IBA/453/2019.

5. Whereas, the Adjudicating Authority dismissed both the applications passed the following orders respectively:

   a. *The purported Settlement Plan proposed by the promoter of the Corporate Debtor is not a Settlement simpliciter as envisaged under Section 12A of IBC, 2016 rather than it is a 'Business Restructuring Plan'.*

b. *As per the Settlement Plan, there is no final offer made by the promoter of the Corporate Debtor and also the acceptance made by the CoC in this regard. There is no finality reached between the promoter of the Corporate Debtor and the CoC as per clause 2 of Chapter VIII of the Settlement proposal; hence based on ambiguity of terms of settlement, we cannot order for withdrawal of the CIRP.*

c. *The prayer seeking for liquidation of the Corporate Debtor in case of any default in the proposed Settlement Plan transcends beyond the scope of IBC 2016.*

For the forgoing reason which have been stated supra, the MA/43/IB/2021 in IBA/453/2019 filed by the applicant under section 12A of IBC 2016 stands dismissed.

NCLT Order in MA/837/IB/2021 in IBA/453/2019

This application is filed for passing an order of liquidation in relation to the Corporate Debtor. The present order for liquidation is passed in continuation of the dismissal order passed in MA/43/IB/2021 which was filed under section 12A of IBC, 2016 seeking withdrawal of CIRP in relation to the Corporate Debtor. Also, the 330 days period of CIRP in relation to the Corporate Debtor expired and hence the Applicant/Resolution Professional has filed the present application seeking liquidation of the Corporate Debtor.

After perusal of the above appeal the Hon'ble Appellate Authority Chennai upheld both the orders with the following comments:

In view of the foregoing detailed qualitative and quantitative discussions, this Tribunal comes to the consequent conclusion that the Settlement Proposal, as projected by the Corporate Debtor and the approval of the withdrawal of the CIRP pertaining to the Corporate Debtor by the Committee of Creditors in its 17th Meeting dated 01.04.2021 was not quite in tune with the relevant provisions of the I&B Code, 2016 and to put it precisely, it is out of bounds of the Insolvency & Bankruptcy Code, 2016. Looking at from any angle, the observations and the conclusion arrived at by the 'Adjudicating Authority' to the effect that the projected settlement proposal plan of the promotor of the Corporate Debtor is not a settlement simpliciter as envisaged under Section 12-A of the Code, 2016 rather it is a 'business restructuring plan' and further that no finality was reached between the Promotor of the Corporate Debtor and Committee of Creditors as per Clause –2 of

Chapter VIII of the Settlement proposal and hence, based on ambiguity of the terms of the settlement it cannot order for withdrawal of CIRP are free from legal infirmities. Consequently, the Appeal fails.

Company Appeal (AT)(CH)(Insolvency) Nos. 212 of 2021arising out of NCLT Order in MA/837/IB/2021 in IBA/453/2019

In the instant case on hand, the Applicant/Resolution Professional of the First Respondent had filed IA/837/IB/2020 in IBA/453/2019 after the lapse of 330 days period of CIRP pertaining to the 'Corporate Debtor'. A mere cursory perusal of the contents of IA/837/IB/2020 in IBA/453/2019 shows that the Applicant/Resolution Professional had not made mention of the 'Liquidation Value' concerning the 'Corporate Debtor'.

Be that as it may, considering the fact this 'Tribunal' has dismissed the Company Appeal (AT)(CH)(Ins) No. 211 of 2021 (arising out of MA/43/CHE/2021), this 'Tribunal' comes to a resultant conclusion that the 'Adjudicating Authority' had rightly dismissed the MA/43/CHE/2021 and came to the legitimate and reasonable conclusion that the 'Corporate Debtor' was required to be ordered for Liquidation, in terms Section 33(1)(a) of the Code, 2016 and allowed the IA/837/IB/2020 in IBA/453/2019, and the same requires no interference. Viewed in that perspective, the Company Appeal fails.

(Image Source: Website)

Conclusion:

The Appellate Authority upholds the view of the Adjudicating Authority in disposal of the applications filed by the parties thereto.

While concluding the order the Appellate authority left the following views on IBC and liquidation:

On IBC

The aim of the Code is one of 'Resolution'. The next objective is 'Maximisation Of the Value of Assets of the Corporate Debtor. The other one being 'Promoting of Entrepreneurship', 'Availability of Credit' and 'Balancing the Interests'.

On liquidation

It is to be remembered that the I & B Code, 2016 is not permitting 'Liquidation of a Corporate Debtor' in a direct manner. Upon failure of the 'Corporate Insolvency Resolution Process', the Code allows liquidation.

It is pointed out that Section 33 of the I & B Code, 2016 enjoins 'Liquidation of the Corporate Debtor' if the 'Adjudicating Authority' comes to the conclusion that the Resolution Plan does not satisfy the ingredients of Section 30(2) of the Code.

If the 'Adjudicating Authority' is not in receipt of Resolution Plan on or before the expiry of the Maximum Period allowed for completion of the Insolvency Resolution Plan, then, liquidation of the 'Corporate Debtor' is to ensue. If at any time prior to the confirmation of a Resolution Plan, the 'Committee of Creditor' resolve by a 66% majority of voting shares where the 'Corporate Debtor' is to be liquidated, then, the liquidation may follow suit. If the 'Corporate Debtor' breaches the conditions of the Resolution Plan and upon an Application by individual (other than the Corporate Debtor), whose interest are prejudicially affected by such breach, the 'Adjudicating Authority' can arrive at a conclusion that the 'Corporate Debtor' had violated the condition of the Resolution Plan, in which event, the Code visualises initiation of the 'Liquidation Process' in the considered opinion of this 'Tribunal'. Suffice it for this 'Tribunal' to make a pertinent mention that if any of the aforesaid situations exist, the 'Adjudicating Authority is empowered to pass an order requiring the 'Corporate Debtor' to be liquidated as per the relevant provisions Code.

If the time period for CIRP was extended but the Resolution Plan was not accepted by the 'Adjudicating Authority' then, liquidation of the Company can be ordered under Section 33 of the I & B Code. Timely liquidation is preferred over fruitless and endless resolution proceeding.

Therefore, the commercial wisdom of the Committee of Creditors can be exercised in consistence with the IBC, 2016.

Find the words!!!

CLUES	WORDS
1. Document submitted by the interested and eligible potential resolution applicants	
2. First country to have made CSR mandatory	
3. e-Governance initiative of Ministry of Corporate Affairs (MCA)	
4. Process when a company issue shares of the public first time	
5. World Bank's Ease of Doing Business index discontinued in	
6. A year of major Tax Reform in India	

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Answers

1. Expression of Interest 2. India 3. MCA 21 4. Initial Public Offer 5. 2021 6. 2017

OUR SERVICES

Providing Services to the Investors / Bidders / Corporates:

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

Providing supporting services to IPs:

- 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 Services:

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

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