CGRF
SandBox®
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The Curious case of Interim Moratorium under IBC for Personal Guarantors to Corporate Debtor (PG to CD)

Effectiveness of Meetings

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INDEX

திருக்குறள் : 671

சூழ்ச்சி முடிவு துணிவெய்தல் அத்துணிவு
தாழ்ச்சியுள் தங்குதல் தீது.

தமிழ் உரை:

ஒரு தொழிலை ஆராய்வதன் முடிவு துணிவினை அடைதல்; துணிந்தபின் செயல்படாமல் காலம் கடத்துதல் குற்றம் ஆகும்.

Explanation:

Consultation ends in forming a resolution (to act); (but) delay in the execution of that resolve is an evil.

From the Editor's

Dear Readers of CGRF SandBox

The month of March is ending soon, but not before raising the blood pressure levels of those in the frontline to reach the targets. Now come the hopes that there is a brand new financial year unfolding, which will bring newer opportunities.

Role of Committee of Creditors in resolutions under IBC

In a few cases under IBC, it is noticed that the CIRP admission has been challenged by the promoters on the ground that they have already offered OTS but that has not been considered by the adjudicating authority while admitting the application. Allowing the formation of the Committee of Creditors and running CIRP process could assist the CoC in getting an alternate price discovery. Also, in several IBC matters, the decisions on approval of a resolution plan or an OTS under Sec.12A are required to be taken by the CoC within a short time. A proactive role by the officials who attend the CoC meetings will help them to escalate matters to their higher-ups to take informed decisions within the available time. It is true that such decisions involve hair-cut to the lenders and therefore would require approvals by competent authority which can be a committee or even the board in some cases. CoC Meetings when attended by senior executives of banks are seen to be more productive and requiring lesser time to cast their votes. An article on this subject is shared throwing more light on the effective role of CoC.

How PF Dues are dealt with in Resolution Plans under IBC?

In a recent decision in the case of Sikander Singh Jamuwal Vs. Vinay Talwar & Others, the Hon'ble NCLAT has decided that the provisions of Sec.17B of the EPF & MP Act are not in conflict with the provisions of IBC. While the general view has been that EPFO claims are also operational debts, this decision has put the ball back into play that the admitted PF dues of employees should be fully paid in the resolution plan. While it is a benevolent decision favouring the employees, its impact on resolution plan for an ailing company remains to be seen as a company with large PF dues may never find a good buyer under IBC. Otherwise, the financial creditors have to take additional haircut.

Covid tamed.. but Russia - Ukraine War raises its ugly head

Let us bury the bad memories of Covid-19 first wave in 2020-21 and the second wave in 2021-22. Economies world over have seen their plans going haywire in the last two years. There is a lurking fear that elsewhere the variants are in works to create a third or fourth wave. Be that as it may, the engines of economic growth have started cranking and India has weathered the covid-19 storms admirably and is well poised to regain and improve upon the economic indices prior to Covid-19. However, the impact of Russia – Ukraine war heading towards the tough phase is another serious threat. Rising oil prices and imbalances in international trade are already causing stress even as the Russian forces are causing heavy damages to Ukraine's economic assets, wrecking its infrastructure with relentless force. World leaders are trying to reign in Russia but to no avail.

Brand New Financial Year 2022-23

Let's hope that the new financial year 2022-23 will bring cheers on the domestic front with more startups turning unicorn, followed by several ventures waiting to break the billion-dollar valuation. A word of caution… Sustainability is more important than a rapid surge. The election results UP, Punjab, Manipur, Uttarakhand and Goa have endorsed the public view that the governments have to do much better to the people to stay in power. It is better that the government and corporates realise that rather than running fast, running steady will take them to the finishing line.

We, in CGRF, have great pleasure wishing you and your family a rewarding year ahead in 2022-23, free from the clutches of restrictions on travel and other pandemic related restrictions. Let humanity march ahead together against all odds.

Yours truly

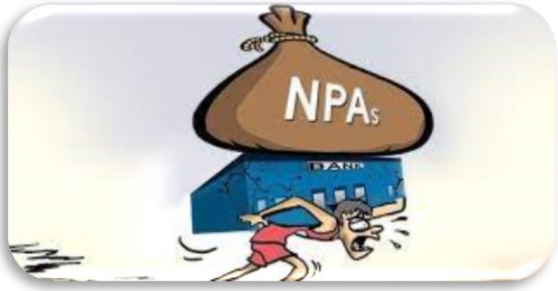
S. Rajendran

Four Golden Rules of NPA Management

Hargovind Sachdev
General Manager (Retd.) SBI

No bad loan means you are not in business. Bad Debts are an insurmountable part of business life. Despite the caution, impaired assets accrue out of subdued economic cycles. Failures are not entirely due to malafide intentions. Most stressed assets germinate out of disruptions in the financial ecosystem that impair the supply chain. **Wars, natural disasters, pandemics, delayed sanctions, and personal humiliations inflicted on borrowers also cause bad debts in banks.**

Banking is essentially a risk-prone activity conducted to earn profits by lending on trust. Infirmity in selecting a borrower makes a recovery painful. Despite setbacks, the NPAs in banks have rarely crossed 10% of the loan portfolio. **The history proves that 90% of the borrowers across all geographies comply with the ethos of banking**. They redeem debt on time to ensure the cyclicality of funds.



(Image Source: website)

Lending is the art of foreseeing the potential in borrowers' business. Take measured steps while financing. It takes two to make a deal, two to negotiate, and two to go wrong. He who is quick to borrow is indeed slow to repay. **An invoice that is 90 days overdue has about a 50% chance of being collected in full.** People never pay back with the same mood they used to borrow money. Buying on instalments makes the months shorter and years longer. Some people trust that If they are born poor, it's not their mistake, but if they die poor, it's their mistake. They over-indulge in chasing the money for overnight enrichment, right or wrong, ending up messing up their loans, defiling the credit history. They forget that it is better to go to bed hungry than wake up in debt. **They fail to comprehend that the primary difference between rich and poor is handling the debt diligently.**

The aspirational Indian market is full of players searching the pot of gold in the loan departments of banks. Getting a loan is winning a lottery for some of them. They ruminate and digest the credit funds too long, leaving virtually little to repay. The NPAs are a natural offspring of such lust for running faster before perfecting the art of walking. More than Rs. 9 lac crores worth of loans have gone sour in Indian banks as of 30.09.2021. The write-offs were of a similar level. **The need of the hour is first to firewall the banking system from fragile credit and then un-lock the treasure of stressed assets to release the capital for banks.**

Following are the four golden rules to recover the NPAs:-

1. **Repair the Deficient Features in the Account:**

   The priority should be: Follow-up and rectification of irregularities pointed out in the audit reports, including (a) RBI Inspection Report (b) Central Office Inspection Report/Credit Audit Report (c) Concurrent Audit Report (d) Stock Audit Report & (e) Statutory Audit Reports. Recover applicable charges/fees/penalties. The repair effort would ease the identification of accountability in the Account throughout its life cycle.

2. **Initiate All Legal Actions of Recovery:**

   Insist on an ongoing verification of assets charged as security to ensure the protection of the Bank's interest. Ensure continuous availability of insurance even at Bank's cost. File claims on CGTMSE/ DICGC/ECGC. Issue Lawyer's notice. Swiftly enforce SARFAESI Act to auction the security. Move to NCLT/DRT. Conduct Forensic Audit. Initiate Wilful Defaulter classifications and report for confiscation of the passports.

3. **Remain in Touch with the Recalcitrant NPA Borrowers:**

   Keep the documents/files effective and in safe custody. Maintain a stable relationship and touch with the borrower and guarantors. Never show the original documents or title deeds to avoid being stolen or destroyed connivingly. Find the new residential and business address as most defaulters migrate for obvious reasons. Visit regularly to show the sincerity of purpose. Disseminate the reasons for the default and empathise with occupying space in his mind to bring

him back to the Bank. Arrange meetings with the top visiting officials of the Bank to pull him closer. Not many people like to remain indebted at the cost of risking their credit history to ruin the future. They want the Bank to be nearer when resuscitated and have surpluses to repay. Banks' visibility is a powerful reminder for NPA borrowers to remain loyal.

4. Never Indiginify the Borrower:

Having lost business and respect from his circle of friends and relatives, the borrower becomes thick-skinned as he has nothing else to lose. Do not shout or in-dignify him when he visits the branch or you visit his business place or his house. He knows his fault; the banker has to protect the umbilical cord and confine the borrower in the network for recovery.

Recovery Branches must train the staff about the intricacies of the minds of the wounded borrowers. The knowledge inculcating the soft skills shall keep the recalcitrant borrowers in good humour. Affable ambience shall make defaulters run smilingly to the banks to reduce the NPAs.

The respect given to a defaulter is directly proportional to the amount recovered.

Framework for Geo-tagging of Payment System Touch Points

Geo-tagging refers to capturing the geographical coordinates (latitude and longitude) of payment touchpoints deployed by banks/non-banks Payment System Operators (PSOs) to receive payment from their customers.

RBI vide its Notification dated 25th March 2022, issued a framework under Section 10(2) read with Section 18 of Payment and Settlement Systems Act, 2007 for capturing the said geo-tagging information of payment system touch points deployed by banks / non-banks PSOs.

According to the framework, Banks / non-bank PSO are required to submit the contact details of their nodal officer for this activity to the designated email by 31st March 2022. RBI will communicate the timeline for commencement of reporting in Centralised Information Management System (CIMS) in due course.

Positive Pay Confirmation (PPC) to safeguard against cheque frauds

B.Mekala
Insolvency Professional

This is a system developed by NPCI (National Payments Corporation of India)to safeguard against cheque frauds. Under PPC system the drawer of the cheque has to furnish information with regard to cheques issued by him to his banker for clearing the cheque. This facility is available for cheques above Rs.50,000/-. But bankers have the discretion to make it mandatory for cheques above Rs.5,00,000/-, so that the payment is made through CTS clearing without referring to the customer. This system has come into effect from 1st September 2021.

(Image Source: website)

Cheque Truncation System (CTS) is a process of clearing cheques electronically by the presenting bank to the paying bank branch. It is a step undertaken by the Reserve Bank of India (RBI) for quicker cheque clearance. It is done without processing the physical cheque.

Details required for PPC: Mandatory information to be provided.

1. Drawer's Account Number
2. Date of Cheque
3. Amount of Cheque
4. Cheque Number
5. Transaction Code
6. MICR Code
7. Beneficiary Name

Cheque will be passed once the data matches with the actual cheque. Once the verification is done the confirmation will be passed on to NPCI before evening

around 6.00 pm for the next clearing session. NPCI, an umbrella organisation for operating retail payments and settlement systems in India, is an initiative of Reserve Bank of India (RBI) and Indian Banks' Association (IBA) under the provisions of the Payment and Settlement Systems Act, 2007. So once the details are sent to NPCI, there is no possibility of deletion or modification in the information. This confirmation is done by submitting the required form to the branches. A reference number, will be shared to the registered mobile on submission of the form. Status of cheque will be provided through net banking/mobile number/call centre, branch visit. In case of deletion or cancellation or non-receipt of reference number the customer can approach through the above said channel. In case of non-submission of PPC, the cheques will be returned to the presenting banks for want of information.

Provident Fund contribution to be taxed shortly

The Central Government has laid out a plan to impose taxes on Employees Provident Fund (EPF) contributions above Rs 2.50 lakh in a year. The same would be applicable for government employees, for whom, the limit has been set at a higher end of Rs 5 lakh. Under new Income Tax (I-T) Rules, PF accounts are likely to be divided into two parts one is taxable and the other is non-taxable contribution accounts from 1st April 2022.

It may be noted that the CBDT vide G.S.R 604 (E) dated 31st August 2021 amended the Income-tax (25th Amendment) Rules, 2022 by inserting a new "**Rule 9D. Calculation of taxable interest relating to contribution in a provident fund or recognised provident fund exceeding specified limit**" after Rule 9C, which shall be effective from 1st April 2022.

For the purpose of calculation of taxable interest, separate accounts within PF fund account shall be maintained during the previous year 2021-2022 and for all subsequent years for taxable contribution and non-taxable contribution made by a person.

EPFO may be issuing a detailed circular soon in this regard.

Meetings Make you Grow…. How to make the most out of them

CGRF Bureau

Meetings are often one of the single most important tools that one can use to advance in their career. Your future as an executive, as a manager and as a leader is going to be in direct proportion to your ability to conduct meetings well or ability to conduct yourself well in meetings.

You are invitee to a meeting

If you have been invited as a participant in a meeting, take a few minutes and apply your mind as to what are the expectations of the convener of the meeting. What is expected of you in the meeting? Is it a problem-solving meeting or a planning discussion or a review meeting? If you get prepared for the meeting and you are ready to share your thoughts and express your views clearly in the meeting, you are sure to be noticed by the convener of the meeting as well as by the other participants. Meetings offer a great opportunity to project yourself. The first five minutes of a meeting are very critical. The best way to establish that you are a valuable member of the group is not by making comments or statements, but by asking intelligent questions. Be an active participant. Potential leaders are often identified by the way they perform in meetings.

(Image Source: website)

Meetings also serve as a measuring tool for the management to assess the participants – to what extent they are expressive, whether they have understood the crux of the issues placed for discussions, what is their view on the issues discussed, are they in a position to offer some out-of-the-box thinking, etc. If you don't even utter a word in a meeting, take it for sure, you will be seen as a dumb person.

You have convened a meeting

If you happen to convene the meeting, it's all the more expected of you to allow free participation by each of the participants in the meeting. Not to forget, as a convener, you are supposed to set the context and agenda for the meeting. As a leader, you may ask one of the team members to chair the meeting and take along the proceedings. ***"Meeting leadership is a wonderful training tool that gives employees the opportunity to organise their thoughts and perform in front of a group of their peers."*** According to PF Drucker, the Management Guru, ***"The most valuable asset in a company is executive thinking time"***. Meetings should provide an atmosphere where the best of the brains identify a problem and find the best solution.

"Sign on the Bus"

Like you look at an approaching bus for its destination and the signage is at the top, the meeting leader should announce the purpose of the meeting. The purpose of a meeting is not to simply talk; the purpose of a meeting is to prepare for and taking ***action***. The greater clarity and focus the leader of the meeting has and the more she brings each discussion point to a clear conclusion, the more productive and valuable the meetings will be. People will look forward to subsequent meetings with you.

Summing up

Next time you are invited for a meeting, please grab the opportunity, prepare yourself well and make your presence felt by contributing to the discussions. If you are the leader in a meeting, mind you, you can create more leaders, propelling you to the top!!

(Thanks to Ms. Savitha for sparing the book "Meetings that Get Results" by Brian Tracy)

KIND ATTENTION!!

Articles are invited!

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

Your materials for publishing may please be sent to

createandgrowresearch@gmail.com

in 'MS Word'.

Tax Exemption

CGRF Bureau

CGRF is glad to share with its readers that CGRF has obtained necessary registration/approvals required under Section 12A and Section 80G of Income Tax Act, 1961.

Section 12A of Income Tax Act, 1961

12A registration is a **one-time registration** which is granted by the Income Tax Department to trusts and other not-for-profit organisations. The purpose of the registration is to get exempted from the payment of income tax. 12A registration is generally applied for immediately after incorporation.

(Image Source: website)

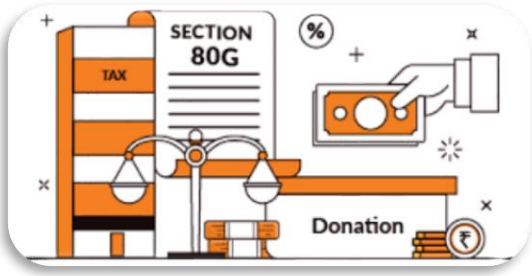
NGOs have multiple options to select the form of constitution, like trust, society and section 8 company. In order to claim exemptions under section 11 & 12 of Income Tax Act, 1961, it is mandatory for all NGOs to get registration under section 12A of the Act. "It is important to note here that notwithstanding the fact that trust, society and section 8 companies are registered as per their respective Acts, the registration under section 12A is necessary to claim exemption under Income Tax Act."

Earlier registration under 12A was given as one-time registration and once the registration is granted it will hold good till cancellation. From 1st April 2021, all new registration will be given for 5 years only and organisation has to apply for renewal after each 5 years.

Section 80G of Income Tax Act, 1961

A NGO can avail income tax exemption by getting itself registered and complying with certain other formalities, but such registration does not provide any benefit to the persons making donations. The Income Tax Act has certain provisions, which offer tax benefits to the "donors" also. All NGO's should avail the advantage of

these provisions to attract potential donors. Section 80G is one of such sections.



(Image Source: website)

If an NGO gets itself registered under section 80G then the person or the organisation making a donation to the NGO will get a deduction of 50% of the amount donated from his/its taxable income.

Earlier registration under 80G was given as one-time registration unless any specific restrictions are provided in the registration certificate itself but Finance Act 2020 has made some substantial changes in registration process and period for which approval will be given.

Shri Ravi Mital,
the new Chairperson of IBBI
(wef 9th Feb. 2022)

Shri Ravi Mital is a 1986 batch Indian Administrative Service (IAS) officer of Bihar cadre. Shri Ravi Mital holds degrees of B.E. in Mechanical Engineering and M.Phil. in Environmental Science.

Prior to joining the IBBI as Chairperson, he superannuated from the position of Secretary, Department of Sports, Ministry of Youth Affairs and Sports. He has also served as Secretary, Ministry of Information & Broadcasting and Special Secretary, Department of Financial Services, Ministry of Finance. He has also served on Boards of various organisations including State Bank of India, Punjab National Bank, GIC Re etc. During his service, he has served in varied capacities in various Ministries and Departments of the Government. *(source: IBBI Website)*

CGRF SandBox wishes Shri Ravi Mital an eventful stint in IBBI steering the insolvency resolution process in India to one among the best in global standards.

Effective Role of Committee of Creditors for the Success of Corporate Insolvency Resolution Process

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

Under the IBC process, after admission of a Corporate Debtor (CD) under Corporate Insolvency Resolution Process (CIRP), the creditors who have funded the CD, are given utmost importance, for arriving at a suitable resolution plan (generally termed as creditor in control model). The simple logic behind it is that, broadly, these creditors, especially the financial creditors, are/were with the CD for a reasonable period of time in meeting their need based financial requirements and other creditors by providing essential supplies/services, which are/were required through the thick and thin of the CD's operations.

(Image Source: website)

Once a company goes under CIRP, the interim resolution professional shall, after collecting all claims received against the Corporate debtor, collate them with proper verification and categorise them as FCs/OCs within 14 days of IRP appointment. The IRP then constitutes a Committee of Creditors (CoC), under Section 21 of the Code, and determine their voting share as per the norms (we are also aware that the process of collecting and collating the claims may go on, as per Code, during the CIRP period and the voting share may also undergo a change correspondingly). As per the decision of the Committee of Creditors, then the resolution plan of a

company is approved. Hence, in view of these critical roles played by CoC, they have become the supreme decision-making body under the CIRP, and their decisions (provided it satisfies the Code by letter and spirit) have an absolute bearing on the resolution of insolvency of the CD.

(Image Source: website)

Roles, Responsibilities and Powers of Committee of Creditors (CoC):

The CoC have multiple roles, responsibilities and powers under the CIRP as per the Code (effectively facilitated and co-ordinated by IRP/RP).

The salient features of them are:

- All major decisions about the CD's operations are taken by them to keep it as a going concern.
- They confirm the IRP as RP. If considered necessary they can recommend for change of RP.
- They decide on whether or not to restore the CD by approving a suitable resolution plan. If a proper resolution plan is not feasible, they also have the power to proceed with the liquidation of the CD.
- They conduct regular meetings wherein they discuss about the progress of resolution process of the CD and ratify various administrative decisions taken by the IRP/RP.
- They consider the feasibility and viability of various resolution plans received and approve a suitable plan or even examine if a plan is submitted by the CD under Sec-12A of the Code for its suitability.
- They while evaluating the resolution plan enter into negotiations with the prospective resolution applicants to arrive at a best possible resolution plan with the intention to maximise the value of the CD, as per Code, by taking care of not only their interests but also the interest of all other stakeholders.
- They are empowered to exercise their commercial wisdom while taking decisions for the CD which can seldom be challenged, unless it contravenes the Code.
- They have the power to approach the adjudicating authority for remedies in case of any suspicious/foul play by the CD including PUFE transactions or any other reliefs.
- They are authorized to reduce the notice period from five days to 24 hours if they feel the necessity to convene CoC meetings at short notice (in case an authorized representative is there in the CoC, a minimum notice period of 48 hours is required).

Thus, the CoC have been vested with great powers under the IBC. By handing such powers to them, this creditor-in-control model is expected to deliver better resolution for the CD under CIRP.

Supreme Court's stamp of approval on supremacy of CoC:

The Supreme Court in various decisions has clearly enunciated that judicial review in relation to decisions of the CoC, approving a resolution plan, shall be limited to the grounds stated in the IBC itself as per Sections 30(2) (in case of the NCLT) and 61(3) (in case of the NCLAT). They are like (a) payment of CIRP costs in a specified manner (b) payment of a specified minimum amount to dissenting FCs and OCs in a specified manner (c) plan provides for proper management of the affairs of the corporate debtor (d) plan provides for proper implementation and supervision (e) plan doesn't contravene any provisions of law and (f) there is no material irregularity in the exercise of powers by the RP.

The SC has consistently held that, subject to limited judicial review on the grounds stated above, courts shall leave it to the "commercial wisdom" of the CoC and not to interfere with their decision. The SC has held that negotiations between RA and the CoC come to an end after the CoC's approval of the resolution plan. The highest court has held that NCLT has limited jurisdiction to examine the legal validity of a CoC's Approved Plan in terms of Section 30(2) of the Code. If the requirements of Section 30(2) of the Code are satisfied, SC has observed that the NCLT must confirm the plan as approved by the CoC. As a corollary, the NCLAT's scope of scrutiny also gets defined as per the above ruling. Thus, the supremacy of CoC's decision is established by SC and this affirmation of the role of CoC, is playing a very significant role in making the IBC a viable mechanism for

insolvency resolution. The SC has also held that once CoC approves a resolution plan it cannot be withdrawn or modified.

Tribunal's critical observations on the functioning of CoC:

In the Videocon case, the NCLT Mumbai Bench observed that Twin Star was paying virtually nothing for Videocon's assets. The plan is approved for an amount of Rs 2,962.02 crore, which is only 4.15 per cent of the total outstanding claim amount and the haircut to all the creditors is 95.85 per cent. Then came their sarcastic and critical observation viz., "….Therefore, the successful resolution applicant is paying almost nothing and 99.28 per cent haircut has to be taken by operational creditors – is this a Hair cut or Tonsure or Total Shave." On a more serious note, the judgment also pointed out that the meagre pay out of 0.72 per cent to operational creditors — a majority of whom are micro, small and medium enterprises — may even lead to their insolvency.

Videocon's insolvency resolution is still facing many legal hurdles and fresh round of bidding process is now being contemplated. This emphasises the need on how critically CoCs have to play their role under IBC.

(Image Source: website)

The NCLT Chennai has also made a strong observation in Siva Industries and Holdings Limited case. Here, the CoC, led by IDBI Bank, had agreed to a settlement amount of Rs.328.21 crores, which translated into a whopping 93.5 per cent haircut on the total admitted claims of Rs.4,863.87 crore. The NCLT rejected the plan, in view of such a huge haircut, saying that it would go by its own "judicial wisdom" rather than CoC's "commercial wisdom" and ordered Siva Industries be liquidated. This order has been upheld by NCLAT on appeal.

Role of CoC in making insolvency resolution very effective and for timely completion:

We are all aware that there is considerable progress in the resolution of distressed assets after the introduction of IBC. Many milestones have been achieved and proven that this (IBC) process is better than the earlier stressed assets resolution processes available in the system. This IBC process is still evolving and is moving towards its betterment.

For this process, when it comes to the role of CoC, despite affirmation of its supremacy by the highest court, there are many critical observations made about their role, responsibilities and functioning by Judiciary. Consequently, there exists still enough scope for improvement in their functioning going forward.

Towards this direction, the discussion paper, on bringing out a Code of Conduct for CoCs has listed out certain glaring irregularities committed by CoCs which are in contravention of IBC, inviting the wrath of the judiciary. The most glaring amongst them was the matter pertaining to Andhra Bank vs. Sterling Biotech Limited, wherein the absconding and ineligible promoters have attempted to take over the CD in the guise of a one-time settlement which was approved by CoC with over 90 per cent voting. In that case, the NCLT had in fact raised doubts about the functioning of CoC and had adversely commented stating that it can never be treated as an act of commercial wisdom.

IBBI is now contemplating to bring a Code of Conduct for the Committee of Creditors. Even though there are multiple voices against and for such a move, it is widely expected that such a move would be more beneficial to the timely resolution process, and may be notified any time soon.

The salient features of this contemplated code of conduct for CoC are:
A member of the committee shall/must:

1. maintain integrity in performing its roles and functions under the Code.
2. not misrepresent any facts or situations and should refrain from being involved in any action that is detrimental to the objectives of the Code.
3. maintain objectivity in exercising decisions on the subject matters bestowed to the committee under the Code.
4. disclose the details of any conflict of interests to the stakeholders, whenever it comes across such conflicts of interest during the resolution process.
5. not acquire, directly or indirectly, any of the assets of the debtor, nor knowingly permit any

relative of the committee member to do so, without making a disclosure to the stakeholders.

6. not adopt any illegal or improper means to achieve any objective.
7. co-operate with the IRP/RP in discharging his/her duties under the Code.
8. not influence the decision or the working of CoC, to make undue advantage for itself or its related parties.
9. disclose promptly the existence of any pecuniary or personal relationship with any stakeholders entitled to distribution.
10. ensure that decisions are made without any bias, fear, favour, coercion, undue influence or conflict of interest.
11. maintain transparency in all its activities and decision making.
12. respect the moratorium and hence creditors who maintain the accounts of the CD shall not adjust the receipts of the CD during CIRP for past dues in violation of moratorium.
13. become fully aware of the provisions of the Code and rules/regulations. It must have complete knowledge of the role and responsibilities assigned to it by the Code.
14. nominate representative with sufficient authorization to participate in meetings and make decisions during the process.
15. participate actively, constructively and effectively in deliberations and decision making.
16. not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.
17. ensure that timelines provided in the Code and Regulations are not breached.
18. facilitate the appointment of various professionals within timelines prescribed under the Code and regulations.
19. co-operate with the insolvency professionals in seeking various approvals from Adjudicating Authority within the timeline prescribed.
20. ensure complete confidentiality of any information that they receive or come across as part of the process, at all times. It shall also not share any information with any other person who is not authorised to receive such information without the consent of the relevant parties or as required by law.
21. at all times respect the privacy of any information at its possession.
22. take necessary measures to ensure that the insolvency resolution process cost is reasonable, for a smooth and timely conduct of resolution process.
23. ensure that their costs associated with the process is not included as insolvency resolution process cost.
24. not withhold release of insolvency resolution process cost, including fee of professionals.
25. adhere to the Code and regulations in performing their roles and functions under the Code at all times.
26. bear the collective interest of all stakeholders in mind in all activities and decision making.
27. respect the demarcation of roles and responsibilities assigned by the Code to different stakeholders and shall not, either directly or indirectly interfere with the functions of the IRP/IP.
28. at all times endeavour to ensure that timelines prescribed in the Code and Regulations are adhered to.
29. not contravene any provisions, of the Code, regulations, instructions, guidelines and circulars issued by the Board from time to time.
30. endeavour to protect the CD as a going concern and protect its assets and take necessary steps to protect the value of the assets of the CD.
31. extend interim finance to the extent required for completion of the resolution process.

(Image Source: website)

Thus, the various aspects of the Code of Conduct contemplated are very exhaustive and it covers major areas which require immediate attention and expectations from CoC. The Code of Conduct is being thought about keeping in view the fact that CoCs are the only unregulated entity currently in the entire CIRP. The Code of conduct for CoC will promote its transparent working and make the participating members accountable for their actions during the insolvency process. Any attempt by members of CoC to make favourable decisions in the interest of any particular stakeholder would be avoided, thereby ensuring that the principle of fairness is met. The biggest advantage of having a code of conduct for CoCs is that it may streamline many of the processes that will facilitate the resolution process completion smoothly and in time. In fact, the regulators for various FCs and especially for banks, should bring stricter guidelines with penal provisions for the banks/other FCs for any violation of the code of conduct once it is brought out.

(Image Source: website)

On the time limit for IBC process, the SC has held that the Code was introduced as a comprehensive and timebound framework with the aim to inter alia maximize the value of assets and balance the interest of all stakeholders. In their numerous judgments, SC has impressed upon the completion of CIRP in a time-bound manner. Pursuant to the amendments brought in by the Insolvency and Bankruptcy (Amendment) Act, 2019, the second proviso to Section 12(3) provides that the CIRP is required to be completed within 330 days, which includes the time taken in legal proceedings. The Supreme Court, in its judgment on Committee of Creditors of Essar Steel India Limited held that the time period of 330 days may be extended only under exceptional circumstances. In Ebix Singapore case also SC once again emphasized that CIRP must mandatorily be completed within 330 days from the insolvency commencement date failing which the corporate debtor should be sent into liquidation. Further, the Supreme Court observed that any extensions provided to the 330 days' period must only be in cases where the CIRP is near completion and serves the objective of the Code.

Conclusion:

In many practical situations, it is observed that the resolution process is unnecessarily getting delayed even if it can be concluded much before the mandated timelines, as the approach of CoC members are divergent and unanimity is not reached in time. In many CoC meetings, it is observed that members are not able to critically examine and arrive at consensus, in respect of the case on hand, as the participants come to the meetings without proper ground work / preparations beforehand.

It is observed that the degree of participation by each and every member of the CoC is also much wanting, especially in cases where there are many FCs. In such meetings, only a few voices are heard and others remain as mute spectators only, thus the effectiveness of such meetings is lost. Consequently, if resolutions have to happen, within the prescribed time norms or much before time itself, wherever possible, the role of CoC is very critical, barring the judicial delays which is not in anyone's control. At least, CoCs on their part need not contribute for delays. Sometimes, by just keeping in mind the overall time limit available for completion of CIRP, CoC itself, unnecessarily, delay their decision making process by taking more time for completion of their respective banks' internal approval processes - sometimes e-voting completion itself is taking a few weeks even in cases of simple/routine matters. In fact, there are banks, which have proactively designed and delegated powers to various authorities in their hierarchy to enable quick decision making process especially IBC for matters.

Such kind of delegation is essential and has to be followed not only by all banks but also by other FCs who are governed by different regulators. Thus, it is established that banks and other FCs who are part of CoC should play their role and responsibilities in a professional and effective manner to facilitate timely completion of the resolution process of the distressed assets, to maximise its value, under IBC.

Interim Moratorium Vs. Moratorium in the case of insolvency resolution process against Personal Guarantors to Corporate Debtors

S. Rajendran
Insolvency Professional

Prelude

A 'personal guarantor' is defined in section 5(22) of the Code and "means an individual who is the surety in a contract of guarantee to a corporate debtor." A contract of guarantee is defined under section 126 of the Indian Contract Act, 1872 as "a contract to perform the promise, or discharge the liability, of a third person in case of his default." The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'.

Simply speaking, therefore, a personal guarantee is a promise, given by an individual to ensure that a third party fulfils its obligations and, if the third party fails to do so, then such individual will be liable to fulfil those obligations. The moratorium provisions under Sec.14 of IBC provide a calm period to a corporate debtor undergoing corporate insolvency resolution process (CIRP). By way of an amendment with effect from 6th June 2018, Sec.14(3) provide that the provisions of moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

IBC process against PG to CD

Readers may be aware that all banks and financial institutions are upping the ante against the personal guarantors (PG) to corporate debtors (CD) where during the CIRP or liquidation process, the recovery is not covering their entire dues. Sec.95 of IBC provides for an application to be filed by a creditor (can be financial creditor or operational creditor) after a 14-days notice given to the personal guarantor to pay the debt guaranteed by him in respect of a corporate debtor.

In a recent judgment by NCLAT in the matter of **SBI Vs. Mahendra Kumar Jajodia**, it has been clarified that the application under Sec.95 "can be very well filed in the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located" even where no CIRP are liquidation proceedings are pending against the Corporate Debtor.

Interim Moratorium

Unlike in a CIRP, in the case of insolvency resolution process against PG to CD, there is a provision for interim moratorium which commences once the application is filed with NCLT. Sec.96 of IBC speaks about such moratorium which actually prohibits any recovery action in respect of the debts of the personal guarantor.

Regular Moratorium

Once the said application under Sec.95 is admitted and resolution process against PG to CD is ordered under Sec.100, the interim moratorium shall cease and a regular moratorium will start as per Sec.101. At this point of time, the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein.

A quick comparison of the provisions of Sec.96 and Sec.101 is given for a better understanding:

Interim Moratorium	Regular Moratorium
Sec.96. Interim- Moratorium. (1) When an application is filed under section 94 or section 95 – (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and	**Sec.101. Moratorium.** (1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.
(b) during the interim-moratorium period - (i) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.	(2) During the moratorium period- (a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and **(c) the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein;**

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application	(3) Where an order admitting the application under section 96 *(actually it should be Sec.100 here)* has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm
(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.	(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

The curious case of interim moratorium

What would have been the need to declare an interim moratorium when the application under Sec.94 (by the guarantor) or Sec.95 (by the creditor) is filed for insolvency resolution of the PG to CD? Apparently, there has been no background for interim moratorium as per the Report on Working Group formed for the purpose of formulating the provisions under IBC for individuals, partnership firms and others.

(Image Source: website)

A moratorium is a temporary stopping of an activity by an official order; suspension of law or regulation for a particular period. Generally, it is imposed to ease short term financial hardship and allow some time to deal with the issues.

During CIRP period Sec.14 of IBC (Moratorium) provides protection to corporate debtor from others taking any recovery action against the corporate debtor. Sec. 96 and Sec.101 of IBC are not explicitly talking about protection to the personal guarantors. On the other hand, they talk about prohibition to take action **in relation to all the debts** of the personal guarantor.

Conclusion

Whereas the personal guarantor is not restricted during interim moratorium from transferring, alienating, encumbering or disposing of any of the assets or his legal right or beneficial interest therein until admission of the application is ordered under Sec.100 of IBC, the creditors are restrained from taking any recovery action in respect of his debts. Therefore, it appears that the intention of Code might be to give liberty to the personal guarantors to take steps to repay his dues by selling his assets.

Further, it is possible that the personal guarantor might have given guarantees in respect of debts of a few other corporates as well. And he might also have other business transactions where his personal assets could have been offered as security. Therefore, if the lenders of one company initiate action against the personal guarantor, it is quite possible that there could be a knee-jerk reaction from all creditors to recover whatever assets the personal guarantor has. So, there has to be a temporary ban on the recovery process by creditors in respect of all the debts of the personal guarantor.

Therefore, it is in compliance with the principles of natural justice that the guarantor need not be restrained from encumbering his assets until the application is admitted under Sec.100 of IBC. At the same time, the interim moratorium acts against the interests of the lenders. It is a set-back to lenders if the guarantor is not willing to provide the sale proceeds to the creditors. While the PG can alienate his assets during the interim period after filing the application but before its admission, the lenders could be forced to be mute spectators. If the legal process takes its own time for admission of the application, the guarantors may as well clean up their assets and do all such things to negate any further recovery by the lenders. It may also be noted that there is no such provision in the Code or Regulations to initiate action against the PG to CD for any preferential transactions carried out by him during the interregnum.

However, it is always possible for the creditors to push the personal guarantors to bankruptcy during which process the bankruptcy trustee may initiate action under the provisions of Sec.164, 165 and 167 of IBC for undervalued, preferential and extortionate transactions entered into the period of two years ending on the bankruptcy commencement date.

Court Orders

CGRF Legal Team

Bank of India
Vs
Agnipa Energo Pvt. Ltd.
IA No.10 of 2021 in C.P.(IB) No.37 /GB/2019
04-02-2022 NCLT, Guwahti

It is neither Commercial Wisdom nor a Commercial Decision of CoC to reject a Resolution Plan which offers 20 times more than the liquidation value.

Facts of the Case:

Corporate Insolvency Resolution Process (CIRP) in respect of Corporate Debtor (CD) which is a MSME Unit viz., Agnipa Energo Private Limited was initiated by Bank of India [Financial Creditor (FC)]. CD was admitted by NCLT, Guwahati Bench on 12.02.2020 into CIRP and Mr. Pradeep Kumar Goenka was appointed as the IRP.

Public Announcement for submission of claims was made and after verification and collation of claims, IRP constituted the Committee of Creditors (CoC), wherein the only FC is the sole member of the CoC having 100% voting share. CoC unanimously resolved to appoint the IRP as RP.

CIRP could not be proceeded with from 25.03.2020 due to lockdown imposed on account of COVID-19 pandemic. RP published "Form G" inviting expression of interest, after lockdown restrictions were relaxed and two resolution plans were received. Out of the two resolution plans, one resolution plan was not considered by CoC, since they have not submitted the EMD as per terms of EOI.

In the meantime, 160 days exclusion in CIRP period was granted by NCLT owing to COVID-19 pandemic and consequent lockdown. CoC rejected the resolution plan received from the only Resolution Applicant (RARE ARC) as the resolution applicant declined to revise certain term in assignment of personal / corporate guarantee given by promoters / others. Thereafter, CoC with 100% voting share, had passed a resolution recommending liquidation of CD and appointment of the RP as the Liquidator as the 180 days of CIRP was completed (including exclusion of 160 days from the CIRP period).

When the matter of Liquidation was taken up by NCLT, it was observed that the major portion of CIRP period was under lockdown restrictions and there was no clarity about the approval or rejection of the Resolution Plan. NCLT noted that since the project was yet to be completed and commencement of operation yet to start, passing an order for liquidation of an MSME Unit at this stage shall be wastage of funds already invested. The objective of the IBC is for Resolution of the Stressed Assets especially for a MSME unit and liquidation is the last resort. Hence the RP/CoC was advised to have another CoC meeting to explore a viable resolution plan and discuss in detail in the light of the recent amendment in IBC with regard to MSME Units and take a decision thereafter about the resolution passed for liquidation.

(Image Source: website)

Subsequently, the only Resolution Applicant (RARE ARC) expressed its inability to improve further its Resolution Plan. Further, the suspended Director of the CD submitted a Resolution Plan and several CoC meetings have taken place. CoC continuously negotiated with the Suspended Director for a long time on the clauses of the Resolution Plan submitted by them.

It is found that the director has submitted his final Resolution plan addressing almost all the points raised by the CoC with the stipulated amount of BG of Rs 40.00 lakhs. The amount provided in the Plan for the sole Financial Creditor is not only more than the amount provided by the earlier Resolution Applicant (RARE ARC) Plan to CoC but also more than the liquidation value of the CD. Other issues raised relating to the source of funds etc., have been clarified by the RP and the Suspended Director.

The CoC submitted that the Plan received from the Suspended Director of the CD is not acceptable as it is not viable. The bone of contention that led to the non-

approval of the Final Resolution Plan by the CoC and recommended liquidation has arisen out of the following facts:

- *It was purely a commercial decision by the CoC based on commercial interest.*
- *Forensic Audit of the account revealed serious discrepancies in term of completion of the project and also transactions.*
- *Account was declared fraud and has been reported to the RBI on 11.02.2020 based on the observations of the Forensic Audit.*
- *An FIR has been lodged and registered with the CBI on 21.01.2019 and the FC has also initiated the process of declaration of the company and directors as wilful defaulters.*
- *The suspended management is not eligible under Section 29A(b) of IBC to be Resolution Applicant.*

Findings of Hon'ble NCLT:

Though all above points were clarified by RP / suspended Director, NCLT observed that the CoC has been raising new points on the Resolution Plan.

During the hearing NCLT had sought clarifications from CoC that on what basis the Resolution was passed by the CoC for liquidation rejecting the Resolution Plan submitted by the Suspended Director of the CD which is an MSME, when the amount provided in the Resolution Plan is more than Twenty (20) times of the Liquidation Value.

Lr. Counsel for the CoC instead of clarifying the above points, *confined to only one point that the Commercial Wisdom of the CoC could not be questioned and challenged citing the judgements of the Hon'ble Supreme Court in the matter K. Sashidhar vs. Indian Overseas Bank & Ors., Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 Kalpraj Dharamshi &Anr vs. Kotak Investment Advisors Ltd. Civil Appeal No. 10673 of 2018 and Civil Appeals Nos. 2943-2944 of 2020 Kalpraj Dharamshi &Anr vs. Kotak Investment Advisors Ltd.*

NCLT observed that the objectives of the IBC are very clear and liquidation of a MSME Unit is the last resort. The Hon'ble Supreme Court of India in Civil Appeal No. 1792 of 2021- *K.N Rajakumar vs. V. Nagarajan & Ors with Civil Appeal No. 2901 OF 2021* has held that -

"It could thus be seen that one of the principal objects of the IBC is providing for revival of the Corporate Debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort."

(Image Source: website)

Conclusion:

NCLT viewed that the CoC has lost the sight of the prime objectives of the IBC. It opined that It does not show the Doctrine of Prudence to advance argument for Liquidation instead of Resolution of the Stressed Assets that it is a Commercial Wisdom/Commercial Decision to reject the amount offered to them in terms of the Resolution Plan is more than the twenty times of the Liquidation Value.

NCLT in the interest of achieving the Objectives of the IBC and the interest of all Stakeholders including the sole FC and the stalled MSME Unit, rejected the Liquidation Application and opined that *"it is neither Commercial Wisdom nor a Commercial Decision of the CoC to reject a Resolution Plan which offer them an amount of Twenty times more than the Liquidation Value."*

NCLT directed the RP/CoC to start the process of CIRP afresh.

Dekon Enterprises Private Limited
Vs
Anil Anchalia, Liquidator of Crystal Cable Industries Limited (In Liquidation)
I.A. (IB)No.73 of 2022 in C.P.(IB)No.1348/KB/2019
23-02-2022 NCLT, Kolkata

It is essential to grant appropriate concessions and waivers to the Successful Bidder in liquidation in order to pave the way for smooth transition and run the business of the Corporate Debtor as a going concern.

Facts of the Case:

Crystal Cable Industries Limited ('Corporate Debtor') was admitted into Corporate Insolvency Resolution Plan ('CIRP') on 11-02-2020 by NCLT Kolkata Bench. Subsequently, NCLT vide its Order dated 20-05-2021

passed an order of liquidation against the CD and Mr. Anil Anchalia was appointed as the Liquidator.

The Liquidator invited offers for sale of the assets of the Corporate Debtor as a going concern. Dekon Enterprises Private Limited (Applicant / Successful Bidder) participated in the E-auction process and offered a bid for Rs.18.39 Crores. Being the only bid received, Dekon Enterprises Private Limited was declared the Successful Bidder and accordingly the Liquidator handed over the possession of the entire assets of the Corporate Debtor to Successful Bidder.

Thereafter, the Successful Bidder requested the Liquidator to take steps for issuance of fresh shares and to reconstitute the Board. Further, it was intimated to the Liquidator those certain reliefs, concessions and waivers are required and essential for smooth transition and to run the business of the Corporate Debtor as a going concern. The Liquidator informed the successful bidder that as per Process Information Document, the successful bidder can approach the NCLT for any specific relief/ waiver.

The Successful Bidder filed an application with NCLT and submitted that they had acquired the CD as a going concern on a clean slate and as such reliefs and concessions as prayed for are essential.

Ld. Counsel appearing for the Successful Bidder submitted that the purchase and takeover of the Corporate Debtor as a 'going concern' as per the Liquidation Process Regulations by the Successful Bidder will not be sufficient to run the operations of the Corporate Debtor. In order to ensure smooth running of the business of the Corporate Debtor, it is imperative that the Successful Bidder is granted certain reliefs, concessions, and waivers which would be essential and necessary for smooth transition and to run the business of the Corporate Debtor as a 'going concern'. Such reliefs are only intended for the purpose of a successful running of the operations of the Corporate Debtor in the future when a new management will strive to bring it back to its feet as these are crucial to kickstart the business of the Corporate Debtor and achieve value maximisation of the Corporate Debtor.

Reliance was placed on the order passed by this Bench in CP (IB) No. 176/KB/2018 ***(In the matter of Maithan Alloys Limited v. Samir Kumar Bhattacharya, Liquidator of Impex Metal & Ferro Alloys Limited)*** wherein this Bench has granted the reliefs and concessions and waivers in the context of sale of a corporate debtor as a going concern under the Liquidation Process Regulations.

Conclusion:

NCLT after hearing the application is of the view that in case of sale of the CD as going concern by the Liquidator, it is necessary to pave the way for the smooth transition by grant of appropriate concessions and waivers.

NCLT allowed the application and granted certain reliefs and concessions as sought for.

Sikander Singh Jamuwal
Vs.
Vinay Talwar, Resolution Professional
11-Mar-2022 NCLAT, Chennai

The Successful Resolution Applicant should release full provident fund dues in terms of the provisions of the Employee's Provident Fund and Miscellaneous Provident Act, 1952

An ex-employee of Applied Electromagnetics Pvt. Ltd. ('Corporate Debtor') filed an appeal against the order of NCLT, New Delhi ('Adjudicating Authority') dated 02.04.2019, approving the resolution plan submitted by S.M. Milkose ('Resolution Applicant').

It was the case of the Appellant that the Resolution Plan did not consider the full Provident Fund ('PF') dues of the employees which corporate debtor was supposed to remit to the PF Authorities under the Employee's Provident Fund and Miscellaneous Provident Act, 1952 ('EPF Act'). It is pertinent to note that Assistant Provident Fund Commissioner, Noida vide its order dated 19th March 2019, determined that the PF dues of the corporate debtor was Rs. 1.35 Crores. However, the Resolution Plan provided only Rs. 78 Lakhs for payment towards PF dues.

(Image Source: website)

Further, the Appellant submitted that the Financial Creditors were paid 21.60 %, which is much more than the payment of 12.67 % to Operational creditors. The

Appellants had alleged that the Director of the Resolution Applicant was a related party and is disqualified as per Sec. 29A of the code.

Observations of Hon'ble NCLAT –

a) Resolution Plan fails to consider the payment of provident fund dues as computed by the Assistant Provident Fund Commissioner.
b) Payment to Financial Creditors is more than payment to Operational Creditors.
c) Upon perusal of Sections 31(1), 30(2), 36(4)(a)(iii) and 238 of the Code, it is clear that the Resolution Professional / Adjudicating Authority is to look at the compliance of the provisions of law.
d) With reference to Sec. 17B of EPF Act, the Resolution Applicant is also liable to pay the contribution and other sums due from the employer under any provisions EPF Act as the case may be in respect of the period up to the date of such transfer.
e) Explicit provisions of EPF Act needs to be complied with. This aspect is justiciable as a duty has been cast on the RP / Adjudicating Authority. It is not a commercial wisdom as compliance of law is a must.
f) No provision of EPF Act is in conflict with any of the provisions of IBC. Hence, applicability of Section 238 of IBC does not arise.

In addition to the above the Appellate Tribunal relied upon the judgments in *Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors.* and *State of Jharkhand and Ors. Vs. Jiterdra Kumar Srivastava and Anr.*

Parity for payment to FC and OC were not looked into by the Appellate Tribunal while deciding this case as it is a commercial wisdom of CoC.

Accordingly, the Appellate Tribunal directed the successful resolution applicant to release full provident fund dues in terms of the provisions of the EPF Act immediately by releasing the balance amount (Rs. 1.35 Crores minus Rs. 78 Lakhs).

It is pertinent to mention here that Appellate Tribunal in deciding *Nitin Gupta Vs. Applied Electro Magnetics Pvt. Ltd., (NCLAT Order dated 16.03.2022)* directed that payment of provident fund amounts should be in accordance with the above judgment.

It is to be noted that the Hon'ble Appellate Tribunal while relying upon *Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors.*, (Judgment dated 19th December 2019) to decide the above case, has not considered the proposition of treating PF dues laid down in *Regional Provident Commissioner Vs. Vandhana Garg and Anr.* (Judgment dated 12th May 2021). The hon'ble Appellate Court in *Vandhana Garg* case held as follows:

> "*No person will be entitled to initiate continuing any proceedings regarding a claim that is not part of the Resolution Plan. The Appellants claim about Provident Fund dues amounting to ₹1,95,01,301/-, which was earlier raised at the time of initiation of CIRP and was later admitted, stood frozen and will be binding on all the Stakeholders, including the Central Government. After approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not part of the Resolution Plan shall stand extinguished.*"

Treatment of PF dues in a resolution plan submitted during CIRP and in a liquidation process are differently dealt with by the Courts. The above decision by NCLAT is apparently different from the earlier one in Vandhana Garg matter. It is time the Apex Court puts a lid on this issue in order to bring uniformity and consistency in the judicial decisions concerning this sensitive issue.

State Bank of India
Vs.
Navjit Singh, Liquidator of G.R.S Ispat Co. Pvt. Ltd.
Company Appeal (AT) (Insolvency) No. 151 of 2022
16-03-2022 NCLAT, New Delhi

"Even if the secured creditor proceeds to realise its security interest it is liable to pay fee"

An Appeal was filed by the State Bank of India, (Secured Financial Creditor who apparently has opted not to relinquish its Security Interest as provided under Sec. 52 of the Code.) , against the Order of the Ld. NCLT, New Delhi which directed the said Appellant to comply with Regulations 2(ea) (which defines Liquidation Cost) ; Reg. 2A (Contributions to liquidation cost); Reg. 21A (Presumption of security interest); Reg. 37 (Realization of security interest by secured creditor); of the Liquidation Regulations, Sec.52 (which states the

position of Secured creditor in liquidation proceedings and Sec. 53 (waterfall mechanism for Distribution of assets in the liquidation process), of the Code.

The contention of the Appellant was that the Appellant was not liable to pay any fee to the Liquidator with regard to the securities which are outside of liquidation process since the Appellant had opted not to relinquish its Security Interest to the Liquidation Estate as per Sec. 52 of the Code.

The Ld. NCLAT, upheld the decision of the Ld. NCLT directing the Appellant to comply with the above direction and further clarified that even if the secured creditor proceeds to realise its security interest it is liable to pay fee as contemplated under Regulation 21A (2)(a).

Consolidated Construction Consortium Limited
Vs
Hitro Energy Solution Private Limited
Civil Appeal No. 2839 of 2020
04-02-2022 Supreme Court of India

CIRP commencement ordered by NCLT restored by setting aside NCLAT order, limitation applicable from the date of default, not when debt became due.

Pursuant to an application filed by Consolidated Construction Consortium Limited (CCCL) under Section 9 of the Code against Hitro Energy Solutions Private Limited (Corporate Debtor), the NCLT admitted the application, declared moratorium and appointed an IRP to commence CIRP. On appeal before the NCLAT, the order was set aside and the corporate debtor was released from the ongoing CIRP on the ground that the applicant OC was a purchaser and would not come under operational creditor as no goods or services were supplied to the corporate debtor, no evidence to show that CCCL has taken over the proprietary concern and in any case an application cannot lie as the purchase orders were issued prior to 24.06.2013.

On appeal before the Supreme Court, questions were raised as to whether CCCL is an operational creditor under IBC even though it was a 'purchaser'; whether corporate debtor took over the debt from the Proprietary Concern (PC) and whether the application under Section was barred by limitation.

Hon'ble Apex Court after analysing the facts of the Case and the Insolvency and Bankruptcy Code, 2016 Section 5(21) 'Operational Debt', Section 3(6) 'Claim', Section 8 'Insolvency Resolution by Operational Creditor', Section 9 'Application for initiation of corporate insolvency resolution process by operational creditor', Section 3(12) 'Default', IBBI (Application to Adjudicating Authority) Rules Rule 5 'Demand Notice by Operational Creditor', Rule 6 'Application by Operational Creditor', IBBI (Insolvency Resolution for Corporate Persons) Regulations 2016 Regulation 7 'Claims by Operational Creditors', Bankruptcy Law Reforms Committee Report, Joint Parliamentary Committee Report on IBC and Judicial Precedents of the Hon'ble Supreme Court in *Swiss Ribbons vs Union of India, Pioneer Urban Land and Infrastructure Ltd. vs Union of India, Innovative Industries Ltd vs ICICI Bank, Mobilox Innovations (P) Ltd vs Kirusa Software (P) Ltd., Kay Bouvet Engg. Ltd. vs Overseas Infrastructure Alliance (India) (P) Ltd.*, and delivered the following judgement.

(Image Source: website)

Undisputed facts of the case: CCCL and the PC entered into a contract for supply of light fittings since CCCL was engaged by Chennai Metro Rail Project (CMRL); CMRL on CCCL's behalf paid a sum of Rs.50 Lacs to the PC as an advance of its order; CMRL cancelled the project with CCCL; the PC encashed the cheque for Rs.50 Lacs anyway; CCCL paid the sum of Rs. 50 Lacs to CMRL.
Reading into the definition of Section 5(21) of the IBC which defines 'operational debt as a claim in respect of the provision of goods and services', the Apex Court held that the operative requirement is that the claim must bear some nexus with the provision of goods or services without specifying who is the supplier or receiver, which view was supported by the BLRC Report and Judgment of the Hon'ble Apex Court in *Pioneer Urban (supra)* where allottees in real estate projects were compared to operational creditors noting that the operational creditors do not receive any time value for their money as consideration but only provide it in exchange for goods and services. Concluding that a debt which arises out of advance payments made to the CD for supply of goods or services would be considered an operational debt and

holding that CCCL is an operational creditor under Section 5(20) of the IBC.

Taking into consideration the provisions of the Companies Act, 2013 and the fact that the Memorandum of Association (MoA) of the CD unequivocally states that one of its main objects it to take over the PC, and the CD having produced a Board Resolution resolving to not take over the PC before the NCLAT and not before the NCLT, adverse inference would be drawn on the conduct of the CD for suppressing the document earlier. However, as per Section 13 of the Companies Act, 2013 the procedure to be followed in amending the MoA is for a Special Resolution to be passed and registered with the RoC. CD in the present case has not done so and therefore the Hon'ble Court held that the purported amendment to the MoA had no legal effect.

On the final issue of limitation, judgment of the Hon'ble Apex Court in the matter of *B.K. Educational Services (P) Ltd vs Parag Gupta & Associates* was relied on where it was held that the question of limitation would apply to applications filed under Sections 7 and 9 of the IBC and limitation begins not when the debt became due but when the default occurs. Noting that the parties were in negotiation till August 2016 in relation to re-payment and relying on the letter dated 02.03.2017 when the PC finally refused to repay the advance to CCCL, the Hon'ble Supreme Court held that the application under Section 9 of IBC was not barred by limitation allowing the appeal and setting aside the order of NCLAT and with no further directions as CIRP of the CD was continuing as on date in light of directions passed by an earlier interim order of the Hon'ble Supreme Court.

Legal Maxims

"Sine Die"

'Adjourned without fixing any date for the next meeting.' The term is majorly used in parliament meetings.

More than 3.82 lakh companies struck off till financial year 2020-21 in Special Drives taken by Registrar of Companies

Under the Special Drives taken by Registrar of Companies, 3,82,875 companies were struck off under section 248 (1) of the Companies Act till the financial year 2020-21.

This was stated by Union Minister of State for Corporate Affairs Shri Rao Inderjit Singh in a written reply to a question in Rajya Sabha.

Explaining further, the Minister stated that there is no definition of the term "Shell Company" in the Companies Act, 2013 (the Act). It normally refers to a company without active business operation or significant assets, which in some cases are used for illegal purpose such as tax evasion, money laundering, obscuring ownership, benami properties etc. The Special Task Force set up by the Government to look into the issue of "Shell Companies" has, inter-alia, recommended the use of certain red flag indicators as alerts for identification of suspected Shell Companies.

The Minister stated that the Government has undertaken Special Drives for identification and strike off Companies by invoking the provisions of section 248 (1) of the Companies Act. Giving more details, the Minister stated that the Registrar of Companies (RoC) struck off those companies after following the due process of law from the Register of companies when RoC has reasonable cause to believe that those companies are not carrying on any business or operation for a period of two immediately preceding financial years. The RoC also verifies that such company has not made any application within such period for obtaining the status of a dormant company under Section 455 of the Act.

Source: PIB Delhi dt. 15 Mar 2022

More than 4,000 cases admitted for corporate insolvency resolution process since FY 2016

As per the information provided by IBBI, the following is the year-wise details of number of cases admitted into Corporate Insolvency Resolution Process (CIRP) under the IBC:

Year	No. of CIRP admitted
2016-17	37
2017-18	706
2018-19	1157
2019-20	1986
2020-21	538

Year-wise details of the number of cases resolved along with total amount of admitted claims and realisable value for creditors in such cases given below:

Year	No. of cases resolved	Total admitted claims (Rs. In crore)	Realisable value (Rs. In crore)
2016-17	0	NA	NA
2017-18	20	9,115.15	4,754.63
2018-19	79	207,082.26	111,535.33
2019-20	138	195,544.06	66,240.87
2020-21	122	163,449.21	27,783.39

Further, as per the information provided in the years 2020-21 and 2021-22 (upto 31 December 2021), 538 and 522 cases, respectively, have been admitted into the CIRP under IBC.

Details of action taken in the said cases as follows:

Year	Cases Admitted	Outcome of cases as on 31st Dec.2021				
		Appeal / Review/Settled	Withdrawn u/s.12A	Resolution	Liquidation	Ongoing
2020-21	538	49	93	9	63	324
2021-22	522	13	47	0	4	458

This was stated by Union Minister of State for Corporate Affairs Shri Rao Inderjit Singh in a written reply to a question in Rajya Sabha on 22-Mar-2022.

Further details are available in public domain on www.ibbi.gov.in, which are periodically updated.

Source: PIB Delhi dt. 22 Mar 2022

IBBI amends Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

IBBI vide Notification No. F.No. IBBI/2021-22/GN/REG/080, dated 9th Feb. 2022 amends the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) by substituting new Regulation 18 & 39A in place of the existing Regulations.

IBBI have been issuing clarifications / circulars from time to time, for issues arisen during the CIRP and for better implementation of the Code including the following:

Circular No. & Date of Issue	Amendments in CIRP Regulations
IBBI/CIRP/2021 dated 16 April, 2021 Sub: Consideration of matters / issues by the CoC on request by members of the CoC	**Prior to its substitution, Regulation 18 (Meeting of the Committee) read as under**: A resolution professional may convene a meeting of the committee as an when he considers necessary, and shall convene a meeting if a request to that effect is made by members of the committee representing 33% of the voting rights. **Amended Regulation 18. Meeting of the Committee** *(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.* *(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty three per cent of the voting rights.* *(3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty three per cent of the voting rights."*
IBBI/CIRP/38/2021 dated 6th January, 2021 Sub: Retention of records relating to CIRP	**Prior to its substitution, Regulation 39A (Preservation of records) read as under**: The interim resolution professional or the resolution professional, as the case may be, shall preserve a physical as well as an electronic copy of the records relating to corporate insolvency resolution process of the corporate debtor as per the record retention schedule as may be communicated by the Board in consultation with Insolvency Professional Agencies. **Amended Regulation 39A. Preservation of records** The amended Regulation 39A provides for – (i) details of records relating to or forming the basis of an event, to be preserved. (ii) Timeline for preservation of a minimum of 8 years for electronic copy of all records (physical and electronic); and a minimum of 3 years for physical copy of records from the date of completion of the CIRP or the conclusion of any proceeding relating to the CIRP, before the IBBI, AA, Appellate Authority, or any Court, whichever is later. (iii) The obligation to preserve the records at a secure place. (For details, please refer the amended Regulation 39A of CIRP Regulations)

Find the words!!!

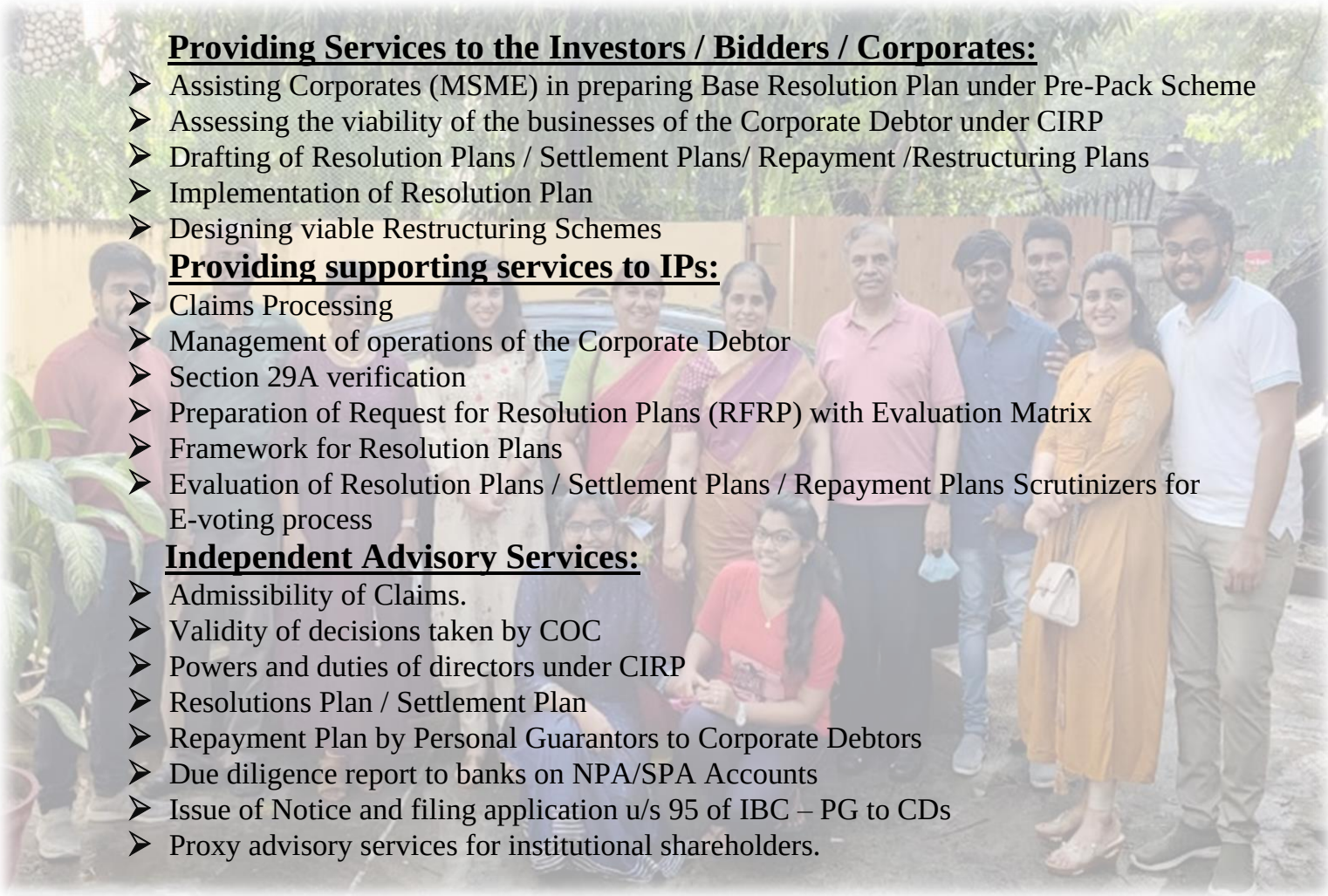
CLUES	WORDS
1. The Act is not applicable where outstanding is less than 20% of the principal Amount	
2. IBC was introduced to tackle the issues of	
3. The process through which a company offers its shares to public	
4. One of the methods used for calculating depreciation as per schedule II of Companies Act, 2013	
5. In the Pre-packaged Insolvency process there is no appointment of	
6. The Code which is used to identify the parties to financial transaction worldwide	

SAR	NP	INI	STR	I
FAE	SI	AIGHT	ER	TI
As	FIER	LEGAL	ITY	PUB
ENT	OFF	RP	LINE	ER
IDEN	TIAL	LIC	RING	ACT

Answers

1. SARFAESI ACT 2. NPAs 3. PUBLIC OFFERING 4. STRAIGHT LINE 5. IRP 6. LEGAL ENTITY IDENTIFIER

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.

Registered Office:

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