CGRF

SandBox®

April 2022

Volume 3 | Issue 4

Speeding up Voluntary Liquidation Process

Tightening of norms for incorporation of Nidhi Companies

Company Law Committee Report (2022)

Chartered Accountants, Cost Accountants and Company Secretaries Amendment Act 2022

Section 230 of Companies Act Vs. Liquidation Process Under IBC

CGRF®

Create & Grow Research Foundation

CREATE & GROW
RESEARCH FOUNDATION

CIN: U73200TN2019NPL132843
(A section 8 Company registered under Companies Act, 2013)

DISCLAIMER:
The opinions and views contained in this publication are not necessarily those of the publishers. Readers are advised to seek specialized advice before acting on information contained in this publication, which is provided for general use and may not be appropriate for the reader's particular circumstances.

INDEX

திருக்குறள் : 675
பொருள்கருவி காலம் வினையிடனொடு ஐந்தும்
இருள்தீர எண்ணிச் செயல்.

தமிழ் உரை:
ஒரு தொழிலைச் செய்யும்பொழுது அதற்குரிய பொருள், கருவி, காலம், செய்தொழில், இடம் ஆகிய ஐந்தையும் தவறாமல் சிந்தித்துச் செய்ய வேண்டும்.

Explanation:
Do an act after a due consideration of the (following) five, viz money, means, time, execution and place.

From the Editor's Desk

Dear Readers of CGRF SandBox

It gives immense pleasure to the CGRF Team to come up with yet another information-packed issue of CGRF SandBox – April 2022. A few recent and important initiatives taken by the Government have hogged the limelight. Some of them are given focus in this Issue.

(Image source: website)

Company Law Committee (2022) Report:

Far-reaching recommendations have been made by the Company Law Committee in their report which was made public recently. The Committee was formed in 2019 with eminent persons from various fields. Ease of doing business being the main objective, the recommendations go to streamline various provisions in order to enable better compliances particularly after the Covid-19 pandemic. Allowing distressed companies to issue shares at discount, replacing affidavits with self-declarations, allowing holding of AGMs in electronic or hybrid mode, maintaining statutory registers through an electronic platform, strengthening of National Financial Reporting Authority (NFRA), responsibility on resigning auditors, cooling off period before an independent director becomes key managerial personnel, etc. are some of the key issues addressed by the CLC. An article on this topic finds its place in this issue. It is hoped that not only the corporates and professionals but even banks would be interested to know about the impending changes in corporate law as corporate lending constitutes a major chunk of their loan portfolio.

CA /CMA/CS Amendment Act, 2022

The Government has taken up certain reform measures relating to the three accounting and corporate governance professions, viz., Chartered Accountants, Cost Accountant and Company Secretaries. The provisions aim to strengthen the existing disciplinary mechanism, reduce conflict of interest and allow for speedier disposal of misconduct cases even as instances of corporate accounting malfeasances are on the rise.

Introduced in Parliament in December 2021, the Bill was subsequently referred to a parliamentary committee headed by Member of Parliament Mr. Jayant Sinha. We are glad to bring out a write-up on this recent promulgation which has apparently ruffled the feathers of the professionals.

MCLR and EBLR

It has been reported that several banks have raised their Marginal Cost based Lending Rate (MCLR) in the last few days. Following State Bank of India, others like Bank of Baroda, Axis Bank and Kotak Mahindra Bank have also raised their MCLRs in a range of 5 to 10 basis points. The impact of this increase on EMI and other repayments is surely going to be felt by the borrowers. External Benchmark Lending Rate (EBLR) was introduced in 2019 to further increase transparency and faster transmission of repo rate changes. It is learnt that more than 60% of corporate borrowings are based on MCLR while EBLR is now widely used in home loans and other retail products such as education loans and personal loans.

Amendments to Voluntary Liquidation Process Regulations and Nidhi Rules, 2014

While IBBI has come out with important amendments to speed up the voluntary liquidation process with effect from 5th April 2022, the Ministry of Corporate Affairs, Government of India has amended the Nidhi Rules, 2014 to tighten the framework for registration of companies as Nidhi or Mutual Benefit Society under Sec.406 of Companies Act, 2016. A gist of the amendments are captured in this issue of SandBox.

Signing off

The CGRF team is absolutely excited about emerging opportunities in the areas of banking, insolvency resolution, restructuring and revival of corporates, etc. and is committed to bring the current developments in these fields for the benefit of the esteemed readers.

May the scorching summer soon give way for soothing showers in the next few weeks!

Yours truly

S. Rajendran

Know more about MCLR, EBLR, RLLR

CGRF Bureau

Banks offer loans to borrowers at a certain rate of interest. While lenders follow different basis for arriving at their interest rate, the need for uniformity of a base standard was felt.

The Reserve Bank of India (RBI) introduced the Bench Mark Prime Lending Rate (BPLR) system in 2010 below which the banks were not permitted to reduce their lending rate.

MCLR

RBI then moved to the Marginal Cost of Funds-Based Lending Rate (MCLR) system in 2016 which allowed the banks to set their own base lending rate based on their marginal cost of funds. This was aimed at ensuring a transparent and faster transmission of policy rate changes. Apart from the marginal cost of funds, the operating costs, current cost of complying with cash reserve ratio and tenor premium are the components which are used to calculate MCLR. It proved to be an effective rate as compared to BPLR which factored average cost rather than the actual cost. Further banks were advised to review the MCLR. It is learnt that more than 60% of corporates every month borrow based on MCLR and only fresh borrowings after mid-2020 are charged at EBLR.

(Image source: website)

EBLR

Introduced in 2019, External Benchmark Lending Rate (EBLR) was intended to plug the deficiencies in MCLR which faced the criticism of slower than expected rate of transmission. Therefore, in order to further increase transparency and transmission of interest rate changes, EBLR allowed banks to directly benchmark their loans against the Repo Rate of RBI or Govt. of India-3 months Treasury Bond yield or Govt. of India-6 months Treasury Bond yield or any other Benchmark rates. EBLR is now widely used in home loans and other products like personal loans, educational loans which were earlier based on MCLR. These rates have to be reviewed every quarter.

(Image source: website)

RLLR

When the EBLR is linked with the RBI's repo rate, it is known as **Repo Linked Lending Rate or RLLR.**

The State Bank of India has notified its EBLR in its website as follows:

External Benchmark based Lending Rate (EBLR) = External Benchmark Rate (EBR) + Credit Risk Premium (CRP)

EBR (i.e. 01-04-2022) is 6.65%;
EBLR = 6.65% + CRP
RLLR (w.ef 01.04.2022) is 6.25%.

State Bank of India has also notified its MCLR with effect from 15th April 2022 as below:

Tenor-wise MCLR effective from 15th April, 2022 is as under:

Tenor	**Existing MCLR (In %)**	**Revised MCLR (In %)**
Over night	6.65	**6.75**
One Month	6.65	**6.75**
Three Month	6.65	**6.75**
Six Month	6.95	**7.05**
One Year	7.00	**7.10**
Two Years	7.20	**7.30**
Three Years	7.30	**7.40**

Negative lien

CGRF Bureau

(Image source: website)

Lien is akin to a bailment. It is the claim or legal right to retain goods or securities that are typically used as collateral to satisfy for debt. However, there is no legal definition of the term ‘negative lien’ in any of the Indian legislative enactment. It is understood that in the normal course of business, ‘Negative Lien’ is an undertaking obtained by a banker/financer, from the borrower that his assets (e.g land, building, machinery, stocks, etc.) mentioned are free from any charge or encumbrance and he undertakes that he would not create any charge or encumbrance on any of these specified assets in favour of third parties during the period till such lien is revoked by the bank. Thus, both a lien (positive lien) and a negative lien confer a right of retention of a property to the debtor as a result of which the person to whom the property belongs is legally prohibited from disposing of the property without discharging the obligation to the other person in whose favour he has given such an undertaking excepting where the law permits such sale or where the parties have agreed to such sale.

Negative lien is an undertaking by the owner of assets to a lender not to sell these assets on which a charge or a lien has already been created in lender’s favour for repayment of debt to the lender and not to create further lien or charge or security interest in anybody else’s favour without the prior permission of the lender who has lent moneys to the owner of these assets for the purchase of these assets or otherwise. It is an undertaking of convenience and has no legal force but only a moral pressure unless properly documented. Once documented properly, like all other legally valid undertakings, on the event of default, it will attract the rigors of law and the lender has a recourse to recover their dues through a civil suit.

Typically, in project finance transactions the terms of various agreements generally include negative covenants or negative lien restricting the borrower company as well as in certain cases a promoter/sponsor company from disposing or otherwise creating any encumbrance over their assets (including shares) without the permission of the lender bank or financial institution. Since the term ‘negative lien’ is not defined under any legislation in India, we need to refer to the judicial pronouncements to consider as to how Indian courts have construed the term ‘negative lien’, and particularly, whether a negative lien is also a subset of a type of lien.

Basically, lien and pledge are forms of the right to retain goods for the same purpose i.e. both are security interest options for payment of a debt. Though they look identical; there are certain differences which this article tries to clarify.

Lien, strictly, is neither a “*jus in rem*” nor “a jus ad rem” but is simply a right to possess and retain the property until the claim attached to it is satisfied or discharged. There are some kinds of lien which are to be found in enactments such as the Companies Act, but most of the different kinds of lien, both particular and general, recognised by our law are to be found in the Indian Contract Act.

In terms of Section 2(16) of Companies Act, 2013, the term ‘Charge’ has been defined as *“an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage*”. Thus, the term ‘Charge’ under the provisions of Companies Act, 2013 would include any kind of lien. As per Section 77 of Companies Act, 2013, a company has to create a charge with the Registrar of companies (RoC) within 30 days of the creation of Charge.

If the particulars of charge are not filed within 30 days of date of creation or modification of such charge, the RoC may on an application by the Company, allow such registration to be made within the period as specified in Section 77 of the Companies Act, 2013 on payment of additional fee or *ad-valorem* fee as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.

Registering a negative lien over the assets of a company as stated above will also act as a public notice, on behalf of banks/FIs/NBFCs/in whose favour such negative lien is created, to others which can prevent a company from creating encumbrance over the assets over which it has conferred such negative lien in favour of the Banks/FIs/NBFCs and can also discourage others from registering a charge over such assets. It will thus give an additional security to the banks and/or financial institutions advancing loan to a company by giving them a right over such assets as against their loan.

Legal Entity Identifier

CGRF Bureau

RBI on 21.04.2022 extended the guidelines on Legal Entity Identifier (LEI) to Primary (Urban) Co-operative Banks (UCBs) and Non-Banking Financial Companies (NBFCs).

(Image source: website)

According to RBI's circular 'Non-individual borrowers enjoying aggregate exposure of Rs 5 crore and above from banks (excluding RRBs) and financial institutions (FIs), who fail to obtain LEI codes from an authorized Local Operating Unit (LOU) within the timeline given below shall not be sanctioned any new exposure nor shall they be granted renewal/enhancement of any existing exposure. However, departments/Agencies of Central and State Governments (not Public Sector Undertakings registered under Companies Act or established as Corporation under the relevant statute) shall be exempted from this provision, it said.

Timeline for obtaining LEI by borrowers

Total exposure	LEI to be obtained on or before
Above Rs 25 crore	April 30, 2023
Above Rs.10 Crore up to Rs.25 Crore	April 30, 2024
Rs.5 Core and above, up to Rs.10 Crore	April 30, 2025

"Exposure for this purpose shall include all fund based and non-fund based (credit as well as an investment) exposure of banks/FIs to the borrower. Aggregate sanctioned limit or outstanding balance, whichever is higher, shall be reckoned for the purpose. Lenders may ascertain the position of aggregate exposure based on information available either with them or **Central Repository of Information on Large Credits** (CRILC) database or declaration obtained from the borrower", RBI said.

The Chartered Accountants, the Cost and Works Accountants and the Company Secretaries (Amendment) Act, 2022

CGRF Bureau

The Chartered Accountants, the Cost and Works Accountants and the Company Secretaries (Amendment) Bill, 2021 was introduced in parliament in December 2021 and was subsequently referred to a parliamentary committee headed by Member of Parliament Mr. Jayant Sinha. The committee has not only endorsed all the changes in the bill, but also underscored the need for competition in the profession by allowing multiple authorities for the qualification and licensing of accountants besides setting up Institutes of Accounting, like IITs and IIMs, to raise standards of accounting education.

The Bill was passed by both the Houses of Parliament and after receiving the assent of the President, it was notified in the Gazette on 18th April 2022. The Amendment Act amends the following principal Acts:

- **The Chartered Accountants Act, 1949**
- **The Cost and Works Accountants Act, 1959 and**
- **The Company Secretaries Act, 1980**

Important changes brought in by the Amendment Act are:

a) Setting up of a Coordination Committee consisting of the President, Vice President and the Secretary of the Council of each of the three professional institutes for the development and harmonisation of the three professions

b) Establishment of Disciplinary Directorate and constitution of Boards of Discipline which will consist of person, not being member of the Institute, to be nominated by the Central Government from the panel to be provided by the institutes, to act as Presiding Officer

c) The disciplinary proceedings to be made faceless and virtual hearings also may be specified.

d) Huge increase in the penalty amounts have been specified (example: fine of rupees one thousand earlier has now been made as rupees one lakh) including providing for imprisonment for a longer term.

In addition, the amendment splits the role of the president as the head of the council and secretary, who will carry out administrative functions as its chief executive officer. Interestingly, the amendment drops the word "Works" and states "Cost Accountants" as against the earlier term of "Cost and Works Accountants".

Reasons for the resistance to the amendment

There were reports of the proposed amendments facing resistance from the professional institutes.

(Image source: website)

Apparently, the professional institutes have been enjoying unfettered powers regarding disciplinary proceedings against professional and other misconduct of their members. The Central Government has tightened the disciplinary proceedings by bringing a non-member as presiding officer of the disciplinary committee as well as board of discipline. The objection by the chartered accountants is that the presiding officer should have in-depth knowledge in the respective profession. A non-CA member in the disciplinary committee or Board of Discipline would not have "in-depth knowledge" of accounting and audit.

There are two Schedules to the respective Acts of the professional institutes which describe the instances of professional and other misconduct. The First Schedule lists the professional and other misconduct of serious nature, of members in practice, members in service and in general. The Second Schedule lists other professional instances of misconduct. The matters listed under Second Schedule are handled by the Disciplinary Committee while those listed in First Schedule will be escalated to Boards of Discipline.

In all these committees, only members of the respective institute held the presiding officer position. News reports of professionals colluding with unscrupulous borrowers to cause huge losses to the banking industry were time and again referred to the professional institutes, but the disciplinary proceedings were seen to be ineffective. Whereas the government wanted the punitive measures to be strong so as to be a deterrent for any such fraudulent activities.

Coordination Committee

Further, the respective institutes had their own agenda to pursue their objectives though there were a few overlapping areas with the other institutes. The Government has proposed to make effective coordination amongst them by inserting a new Sec.9A in the Chartered Accountants Act, 1949 the provisions of which would apply to the other institutes as well.

The meetings of the Coordination Committee shall be chaired by the Secretary of the Ministry for Corporate Affairs. The presidents, vice presidents and secretaries of the three institutes shall participate in these meetings which will be held once in every quarter of the year.

Comments by the finance minister

The Finance Minister Ms. Nirmala Sitharaman has gone on record saying that the amendment will not dilute the autonomy of the audit and accountancy bodies but will strengthen corporate governance. Regarding the need to set up a coordination committee headed by the Secretary of the Ministry of Corporate Affairs which has sparked a debate in and outside the Parliament, the FM said that while a coordination committee already existed, as pointed out by certain Opposition MPs, "it has not even taken off". "The proposed amendments are very much in line with the core principles which have been given by the independent audit regulators…" she said.

(Image source: website)

The Finance Minister who also holds the corporate affairs portfolio, said questions have been raised over transparency in auditing ever since the Satyam and the ILFS scandals broke. "We have repeatedly been questioned about the number of failings of the CAs. She also added that "If the corporate governance structure has really got to be robust to meet with the global investment expectations about our standards of audit, our standards of investment policy, about how auditing certificates are being given, we need to have greater robustness and also a level of accountability brought in".

Governance the focus

It is expected that the measures taken by the Government to bring more transparency in the disciplinary proceedings of the professional bodies will serve a strong message that professional misconduct will be viewed seriously and the culprits will be brought to book. While the corporates are made accountable for their deeds with more focus on governance, the functioning of the professional bodies also needed an overhaul. It is time that the CA / CMA / CS institutes also ensure governance with transparency in the discharge of their role in developing the profession.

MCA has issued Companies (Accounts) Second Amendment Rules, vide its notification dated 31.03.2022 which extends the time limit from 1st April 2022 to ***1st April 2023*** for every company which uses **<u>accounting software for maintaining its books of account</u>**, to mandatorily use only such accounting software which has a feature of recording audit trail of each and every transaction, creating an edit log of each change made in books of account along with the date when such changes were made and ensuring that the audit trail cannot be disabled.

The same notification also extended the due date from 31st March, 2022 to 31st May 2022 for filing e-Form CSR with Registrar of Companies for the financial year 2020-21.

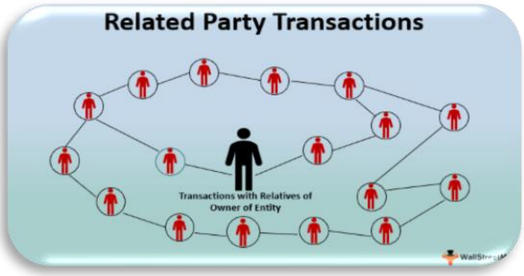
Related Party Transactions and Transactions with Related Parties (RPT & TRP)

CS Kiran Kumar Bhaskar
SR *Srinivasan & Co* LLP

Section 188 of the Companies Act, 2013 covers a list of transactions termed as RPT's which include:

a) sale, purchase or supply of any goods or materials.
b) selling or otherwise disposing of, or buying, property of any kind.
c) leasing of property of any kind.
d) availing or rendering of any services.
e) appointment of any agent for purchase or sale of goods, materials, services, or property.
f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
g) underwriting the subscription of any securities or derivatives thereof, of the company

The above shall be approved by the Board of Directors whereas Section 177(4)(iv) specifies the term "Transactions with Related Parties" which is a wider phenomenon and covers a wide range of transactions which requires approval of the Audit Committee.



(Image source: website)

As per Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 with effect from April 1, 2023, a related party transaction to which the subsidiary of a listed entity is a party but the listed entity is not a party, shall require prior approval of the audit committee of the listed entity if the value of such transaction whether entered into individually or taken together with previous transactions during a financial year, exceeds ten per cent of the annual standalone turnover, as per the last audited financial statements of the subsidiary.

After the above amendment, the following transactions have now been covered which requires approval of the Audit Committee:

1) Transaction between Listed entity and a related party of unlisted subsidiary
2) Transaction between unlisted subsidiary and its related party
3) Transaction between unlisted subsidiary and a related party of listed entity

In accordance with the revised definition of RPT the difference between the two terms RPT and TRP which earlier existed in Companies Act can now be found in SEBI LODR also.

In addition to that the definition of Material RPT has been amended to state:

"A transaction with a related party shall be considered material, if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceeds rupees one thousand crore or ten per cent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity, whichever is lower."

If we observe, the definition starts with "Transaction with a related party" which means only TRP and RPT's such as:

a) Subsidiary company and its related party where listed entity is not a party to the transaction
b) Subsidiary company and related party of listed entity wherein listed entity is not a party to the transaction

shall not be considered as material RPT as these are not transactions with a related party by listed entity.

Further, all material related party transactions as defined by the audit committee shall require prior approval of the shareholders through resolution and where the entity is a related party to the transaction or not, no related party shall vote to approve such resolutions.

The impact brought by the above amendments will require the listed entities to plan ahead in order to avoid interruptions in business.

Independent Directors and Better Corporate Governance

Jothi kamali
SR *Srinivasan & Co* LLP

The three organs of the Government namely the Legislature, Executive and Judiciary are striving hard to push the country to the forefront by improving the standards of "Corporate Governance" to project a better image of our corporates amongst various economies of the world.

Toward this, one can witness that the Corporate Governance norms are increasingly tightened and the obligations of Independent Directors increased with the hope to enhance better standards of Governance. The series of amendments notified by the SEBI and the recommendations of the Company Law Committee 2022 serves as a testimony to it.

In this article we try bring to your attention Regulation 25 of SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment), Regulations which came into effect from 1st January 2022.

As elucidated in Schedule IV – the Code for Independent Directors under the Companies Act, 2013, clarifies that 'Independent Directors shall help in bringing an independent judgement to bear on the Board's deliberations especially on issues of strategy, performance, risk management, resources, key appointments and standards of conduct'.

Consequently, attention is bestowed on their appointment, reappointment and removal which are crucial to various stakeholders.

What does the Companies Act, 2013 say in this regard?

Section 149(10) of the Company's Act 2013 requires a Company to pass a special resolution for the reappointment of Independent Director for his/her second term whereas an ordinary resolution of the members would suffice for their appointment or removal from the Board. One may take note that an independent director re-appointed for second term under sub-section (10) of Section 149 shall be removed by the company only by passing a special resolution.

With effect from 1st January 2022, a listed entity is obliged to get approval of shareholders by way of special resolution for the appointment, reappointment, or removal of an independent director. This move pushes the company to seek enhanced participation of shareholders in the appointment, reappointment, or removal of an Independent Director, thus creating an impact in the Composition of the Board.

What is the maximum period to fill the vacancy caused by the resignation/removal of an Independent Director?

With effect from 1st January 2022, a listed entity shall replace the Independent Director who has resigned or removed by a new independent director at the earliest but not later than three months from the date of vacancy.

The erstwhile provision which allowed the board to replace the resigned/removed Independent Director by not later than the immediate next meeting of the board of directors or three months whichever is later is omitted.

(Image source: website)

Therefore, the listed entities are obliged to fill the vacancy within the maximum period of 3 months.

At this juncture, it is also important to note that with effect from 1st January 2022, no independent director, who resigns from a listed entity, shall be appointed as an executive/whole time director on the board of the listed entity, its holding, subsidiary or associate company or on the board of a Company belonging to its promoter group, unless a period of one year has elapsed from the date of resignation as an independent director.

Does SEBI impose any maximum tenure of independent directors?

No, Regulation 25 says that a listed entity shall follow the Companies Act, 2013 and rules made thereunder, in this regard from time to time.

Section 149(10) of the Companies Act, 2013 reads as, "an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report and Section 149(11) says no independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director.

Provided that an independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly."

"Consecutive terms" vs. "Successive Terms"

At this point, highlighting the Company Law Committee Report, 2022 would be relevant because the committee notes that the independent directors may seek to circumvent the provisions laid down under Section 149(10) and 149(11) by resigning for a brief period and then seeking a fresh appointment for a new term.

To clarify on circumvention, it can be reiterated that Section 149(11) says an independent director shall not hold office for more than '***two consecutive terms'***. Thus, we may understand that by resigning for a short period, the term of an independent director become non-consecutive thereby claiming the next term as a fresh term of appointment.

To remedy this issue, the Company Law Committee Report, 2022 recommends that the total tenure of an independent director should be capped at five years for a single term and ten years where she is reappointed after the first term, irrespective of any resignation before the expiry of the term for which she was appointed as an independent director. No individual can be appointed for more than '***two successive terms'*** by any company under any circumstances. Therefore, it mandates the Cooling-off period of three years for the third term of appointment.

So, can an independent director be appointed as a director other than as an independent director in the consecutive third term?

Yes, Section 149(11), requires the three years of cooling off period only to get reappointed as independent director for the third term.

Apart from the above recommendation, the Company Law Committee Report, 2022 also clarifies and recommends that the period during which the independent director functioned as an additional director before regularisation cannot be excluded while computing the total tenure of the independent director.

Besides the above discussed points, a listed entity has to keep pace with many recent amendments for improving corporate governance, thus further growing the obligations of the independent director which may enhance the image of corporate citizenry.

Recommendations of Company Law Committee (2022)

CGRF Bureau

Preamble

Set up in September 2019, the Company Law Committee (CLC) consisting of eminent persons from the industry, legal, accounting and other professions was entrusted with examining various provisions of the Companies Act, 2013 from the perspective of ease of doing business and keeping pace with global changes. The tenure of the Committee got extended twice and until 16th September 2022. The Report of the Committee has been submitted to the Government on 21st March 2022.

(Image source: website)

This Report recommends various changes to the Companies Act, 2013 to recognise new concepts, expedite corporate processes, improve compliance requirements, and remove ambiguities from existing provisions. The Report also includes recommendations to enable producer organisations to incorporate under the Limited Liability Partnership Act, 2008.

Objectives

"This Report is in pursuance and continuation of the avowed objective of the Central Government to promote greater ease of doing business for law-abiding corporates in the country. During its detailed discussions and analysis, the Committee also sought to streamline the operation of certain provisions of the Companies Act, 2013 through clarificatory amendments and other drafting changes. The Report proposes amendments to bring Indian company law in tune with globally recognised best practices and improve ease of living for corporates and stakeholders."

Major Recommendations of the Company Law Committee (2022)

Some of the important recommendations of the Committee are as follows:

- **Allowing certain companies to revert to the financial year followed in India**

  The CLC proposed that companies which cease to be associated with a foreign entity, should be allowed to file a fresh application with the Central Government to allow them to revert back to the FY followed under Companies Act, 2013.

- **Facilitating certain companies to communicate with their members in only electronic form**

  The Committee recommended certain class of companies should be mandated to serve documents as prescribed that under the Act in electronic mode only. Further, the fees associated with a request for delivery of any document through a particular mode may be determined at any general meeting of the company instead of an AGM.

- **Recognising issuance and holding of fractional shares, Restricted Stock Units and Stock Appreciation Rights**

  The Committee felt that Companies Act, 2013 should be amended to insert provisions that enable issuance, holding and transfer of fractional shares for a class or classes of companies, in such manner as may be prescribed. Such shares should be issued only in dematerialised form. For listed companies, such recommendations may be made in consultation with SEBI. It is also clarified that recommendation only pertains to cases that would involve a fresh issue of fractional shares by the company and not to those where fractional shares get created for the time being on account of any corporate action.

- **Easing the requirement of raising capital in distressed companies**

  The Committee recommended that distressed companies should be allowed to issue shares at a discount to Central/State Governments or class of persons, notwithstanding the prohibition under Section 53 of Companies Act, 2013. For this purpose, distressed companies may be categorised as such class or classes of companies as prescribed by the Central Government.

- **Replacing the requirement of furnishing affidavits with the filing of self-certification/ declaration**

  The Committee recommended that the requirement of furnishing an affidavit should be replaced with filing a declaration under the provisions of Companies Act, 2013 and Rules made thereunder, except in those provisions that involve filing an affidavit in a judicial or quasi-judicial proceeding before the NCLT, the NCLAT or the RD.

- **Allowing companies to hold general meetings in virtual, physical or hybrid modes**

  The Committee recommended amending suitable provisions of Companies Act, 2013 to enable the Central Government to prescribe the manner in which companies can hold AGMs and EGMs physically, virtually and in hybrid mode. It was also stated that where the meeting is for an EGM to be conducted entirely in electronic mode,the notice period for such meetings could be reduced to such period as may be prescribed by Central Government. The Committee proposed to empower the Central Government to prescribe detailed procedures and safeguards by way of Rules.

- **Creating an electronic platform for maintenance of statutory registers by companies**

  The Committee recommended that certain class of Companies should be required to compulsorily maintain their registers on an electronic platform in such form and manners as may prescribed. For this purpose, the Committee also recommended that the Central Government may set up an electronic platform for such registers to be maintained, stored and periodically updated. Additionally, the requirement to include past records pertaining to statutory registers on the electronic platform should also be provided with adequate transition period.

- **Strengthening the National Financial Reporting Authority**

  The Committee was of the opinion that NFRA should be empowered to take appropriate action against the auditor for non-compliance with Companies Act, 2013 and requirements thereunder that do not qualify as 'professional or other misconduct'. NFRA should also be empowered to take appropriate penal action if its orders are not complied with. It proposed Suitable amendments should be made to Companies Act, 2013 for the constitution of a NFRA Fund. It was of the opinion that Section 132 of Companies Act, 2013 should be amended to provide the NFRA Chairperson with general superintendence and direction powers.

- **Reviewing and strengthening the audit framework and introducing mechanisms to ensure the independence of auditors**

  The Committee recommended Companies Act, 2013 should enable the Central Government to prescribe a differential list of prohibitions on availing non-audit services for certain classes of companies and Section 147 of Companies Act, 2013 should be amended to cover penal consequences for contravention of sub-sections of Section 143 other than sub-section (12).

  The committee was of the view that a resigning auditor should be under an explicit obligation to make detailed disclosures before resignation and should specifically mention whether such resignation is due to non-cooperation from the client company, fraud or severe noncompliance, or diversion of funds. Moreover, if such information comes to light after the resignation of an auditor but has not been disclosed in the resignation statement, suitable action may be taken against the resigning auditor. Additionally, the auditor should be mandated to provide assurance about the company's accounts and independence of her decision to resign.

(Image source: website)

Further, the committee was of the view that Companies Act, 2013 should enable the Central Government to mandate joint audits for such classes of companies as it may deem necessary and recommended Companies Act, 2013 should enable the Central Government to mandate joint audits for such classes of companies as it may deem necessary.

- **Standardising the manner for auditors to provide qualifications**

  The Committee to ensure greater clarity, disclosure and standardisation, proposed that an enabling provision be inserted in Companies Act, 2013 to allow the Central Government to introduce a format for auditors that would enable them to state the impact of every qualification or adverse remark on the financial statements of the company for circulation to the Board before the same is passed on to shareholders

- **Clarifying the tenure of independent directors**

  The committee noted that the period during which the Independent Director functioned as an additional director before her regularisation should be included while computing the total tenure of the Independent Director. It further reiterated the total tenure should not exceed the prescribed five years for a single term or ten years for two consecutive terms, as the case may be, under any circumstances.

- **Revising provisions relating to the disqualification and vacation of the office of directors**

  The Committee recommended that under section 167(1)(a) vacation of directorship should be limited to disqualifications triggered due to personal incapacity. Also, the relaxation for new directors coming into the Company should be extended to two years (from six months) from the date of appointment 164(2)(b).

- **Clarifying the procedure for the resignation of key managerial personnel(KMP)**

  In respect of certain KMPs whose appointment intimation is being filed with RoC, the resignation tendered by them should also be filed with RoC and where the Company fails to intimate such resignation, the KMPs should be allowed to file their resignation directly with RoC, on similar line of resignation by directors.

- **Easing the restoration of struck off companies by enabling the Regional Director to allow restoration of names of companies in certain instances**

  The CLC has recommended amendment to Section 252 to provide that a person aggrieved by the striking off of a company may appeal within a period of three years to the RD instead of the NCLT.

- **Recognising Special Purpose Acquisition Companies (SPACs) and allowing such companies, which are incorporated in India, to list on permitted exchanges**

  The Committee recommended that enabling provisions in the Act to recognise (SPACs) and allow entrepreneurs to list a SPAC incorporated in India on domestic and global exchanges. However, provisions on relaxing the requirement to carry out businesses before being struck off and providing exit options to the dissenting shareholders to be specified in the provisions.

- **Prohibiting the conversion of co-operative societies into a company**

  Based on the apprehension that co-operatives may also get converted into a company as per section 366, specific provision to prohibit conversion of a co operative society into a company has been recommended by the CLC.

- **Modernising enforcement and adjudication activities through electronic mode**

  The committee has recommended deletion of explanation to section 398 to enable the Central Government to make rules for electronically imposing fines, penalties and payment of fees.

- **New concept of producer LLPs**

(Image source: website)

The Committee has recommended that producer LLPs should be allowed to be incorporated under LLP Act, 2008 to take advantage of the light touch regime under the said Act. This should also be supported by a model LLP agreement for guiding the decisions of the producer LLP for smooth functioning.

Making Pre-Pack Insolvency Resolution Process (PPIRP) A Successful Resolution Process

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

MSME's role in the Economy:

The Micro, Small and Medium Enterprises (MSME) sector is a highly vibrant and dynamic sector of the Indian economy and have been contributing significantly to the expansion of entrepreneurial endeavours through business innovations. They contribute significantly to economic and social development of our country by generating large employment opportunities at comparatively lower capital cost. They contribute towards reducing regional imbalances by assuring more equitable distribution of national income and wealth. MSMEs play complementary role to large industries as ancillary units and contribute significantly to the inclusive industrial development of the country. MSME sector is widening its domain across diversified activities of the economy, produce wide range of products and render services to meet the demands of both domestic and international markets.

(Image source: website)

Government of India revised MSME definition in May 2020, from their earlier criteria of classification based on investment in plant and machinery (it was also different for manufacturing and service units). The new classification which came into effect from 1st July, 2020 defines:

(i) Micro enterprise – investment in plant and machinery or equipment does not exceed Rs. 1 crore and turnover does not exceed Rs. 5 crore;
(ii) Small enterprise - investment in plant and machinery or equipment does not exceed Rs.10 crore and turnover does not exceed Rs.50 crore; and
(iii) Medium enterprise - investment in plant and machinery or equipment does not exceed Rs.50 crore and turnover does not exceed Rs.250 crore.

Further, there will be no difference between manufacturing and service sectors. A new criterion of turnover has been added to the previous criterion of classification based only on investment in plant and machinery. The new criteria are expected to bring about many benefits that will aid MSMEs growth in India. Further, the turnover with respect to exports will also not be counted as part of turnover, for any category of MSMEs.

State Governments have the primary responsibility of promotion and development of MSMEs in their respective States. However, the Government of India, supplements their efforts through various other initiatives. Around 65 million MSME units across the country, contribute around 6.11% to the manufacturing GDP and 24.63% to the service GDP and also 33.4% to India's manufacturing output. MSME sector provides employment to more than 11 crore people of which nearly 24% are female.

(Image source: website)

Although MSMEs contribute significantly to the overall economic growth of the country, they face many challenges apart from finance related. Their challenges relate to various regulations, infrastructure issues, productivity, technical and technological issues, competition, availability of skilled manpower etc.,

MSME's Finance related Challenges and its resultant effect:

MSME's credit-related issues can be broadly classified under the following:

a) availability of adequate and timely credit;

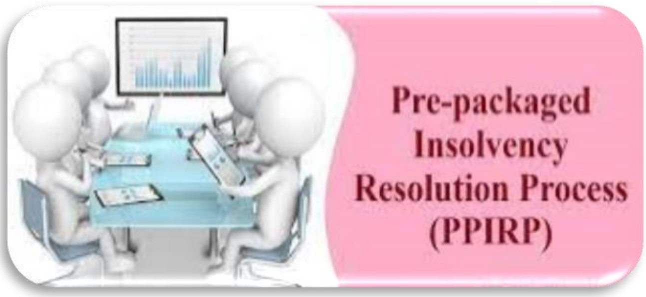
b) high cost of credit;
c) collateral requirements;
d) access to equity capital; and
e) timely support when in need/distress.

Further, MSMEs are exposed to difficulties of weathering external shocks whenever there is regulatory or macroeconomic or geopolitical events. The ongoing Covid pandemic has also put them to innumerable uncertainties. To overcome all these they lack either sophistication or knowledge to address them. Many a time they face non availability of requite skilled human resources. Combination of such challenges force MSMEs to distress and if they fail to overcome it, lead to insolvency ultimately.

To overcome such situations, especially when their major challenges are credit related, the creditors, especially the financial creditors (FC) providing timely support is essential, as it not only benefits all the stakeholders involved in the process but also the economy as a whole. Generally, when MSMEs are in distress, banks in India, especially the nationalised banks have provided or been providing support. However, the mute question is - whether such support happens timely. Many a time, it doesn't happen in time or even if the support happens ultimately, it is inadequate. Sometimes the bankers also shy away from providing the support, in view of the lurking fear of accountability post rehabilitation/restructuring failures. Such situations lead the MSMEs to suffer and drive them to failure/insolvency.

Just as there are large numbers of MSMEs, there are large numbers of MSME insolvencies too. MSME insolvencies cannot be equated with corporate insolvency resolution as time is the major factor in arriving at a resolution for MSMEs. Here came, based on best international practices, a resolution mechanism known as **Pre-pack Insolvency resolution process (PPIRP) for MSMEs (currently applicable only to Corporate MSMEs / LLPs)**. The Pre-pack resolution process – popularly known as PPIRP was promulgated through an ordinance by the GOI in April 2021. It was considered then, as a boon for many corporate MSMEs who are in distress which were also inflicted by the Covid pandemic itself. In fact, at that material time, there were many loud and clear voices from multiple stakeholders that such a pre-arranged resolution scheme is also desirable for other corporate entities as well. The thought emanated from the belief that 'debtor in Control' model is the most desirable resolution process in view of fact that there is a possibility of minimising unnecessary legal tangles, brought in by the promoters themselves, to which many of the CIRP's are currently entangled with leading to unnecessary time loss. This ultimately deteriorates the value of the CD.

Consequently, the major advantage felt under this PPIRP scheme is the possibility of timely resolution, which is worked out in complete co-ordination by all stakeholders, through the intervention and blessings of the tribunals, of course without much of their time and involvement. However, as the time passed by, the euphoria associated with it waned. Currently, there are only two cases, under PPIRP, which have finally reached the doors of NCLT awaiting approval. This is nothing to cheer about after a lapse of over a year since the introduction of PPIRP, especially when we are talking about at least couple of thousands (out of few lac, if not million), Corporate MSMEs in India, which would be under distress. The scheme which should have been a walkaway success, considering the enormity of problems faced by MSMEs, has not met the desired result so far. Hence, it is pertinent that the bankers who are definitely saddled with many such distressed assets, have to ponder over and examine in depth, the causes and remedies for making PPIRP a successful resolution process.



(Image source: website)

Non-adoption of PPIRP - The possible causes and remedies

Let's deep dive and analyse few of the possible causes and also the possible remedies to make PPIRP a successful resolution process:

Cause: Poor awareness amongst the operating officials in the banking system about the scheme.

In most of the banks distressed MSME cases are being handled by dedicated officials who are attached to branches handling stressed accounts, and they may be definitely aware about the scheme. However, the moot question is that such stressed MSME accounts gets transferred to these specialised branches only after failure of all efforts of restructuring or rehabilitation measures attempted/undertaken on them at the branch which had handled the account initially. Hence, a resolution under PPIRP, after the stage of transfer to stressed accounts branch may not be a practicable and feasible solution. Therefore, even if the officials at the stressed assets branch are fully aware of the PPIRP scheme, it may not be helpful in resolution of such MSME accounts. We should clearly understand that PPIRP is generally a revival and rehabilitation scheme, to keep the stressed MSMEs as a going concern and to bring them out of stress through a resolution mechanism eventually. Hence, PPIRP should be initiated at the branch itself which handles such active MSME accounts.

Remedy: Creating awareness amongst all the operating officials who are handling active MSME accounts. PPIRP scheme is to be initiated at the time, when signs of incipient sickness are noticed while handling such active MSME accounts. If these officials are aware of such a scheme, in detail, then, whenever they notice any distress in any of their active accounts and if they are unable to address the issues through other mechanisms, then they should think of utilising the PPIRP scheme for revival or restructuring of such active MSME account(s) [which has recently shown/developed the signs of stress]. Hence, it is most desirable to educate and familiarise about the PPIRP scheme amongst all the operating officials handling active MSME accounts.

However, another question could be that there are not many corporate MSMEs present, in many of such branches. The Banks should now proactively consider that since the definition and scope of MSMEs have been modified and the banks' everlasting desire/request of converting many MSMEs into Corporate entities to provide adequate finance, it is desirable that the officials of all MSME account handling branches are made aware of the scheme. Further, though the scheme is currently applicable only to corporate MSMEs / LLPs, there is always the likelihood of the scheme being extended to other types of MSMEs, as well based on its success and desirability. Hence, creating an awareness is essential.

Bankers should, therefore, include sessions for imparting knowledge on PPIRP under their regular training calendar itself, whenever MSME or advances training is imparted on officials. If considered necessary, banks can seek or utilise the help/support of external sources like Insolvency Professionals who are fully aware and well versed in handling IBC cases to provide effective inputs to the Bank's officials during such training programmes.

1. **Cause: Fear of delay in arriving at a suitable resolution.**

Unlike a Bank's scheme, as the PPIRP process involves external agencies like Insolvency Professionals, NCLT etc., there could be fear of delay in effecting the revival or rehabilitation programme.

Remedy: As pre-pack resolution is initially suggested by the Corporate Debtor (CD) himself and subsequently, accepted/approved by the FCs, a quick resolution plan can be worked out with the complete co-operation and co-ordination of all stakeholders. Even though, under PPIRP, preadmission process time is tentatively determined as 90 days, with the complete co-ordination of all concerned, this process time can be shortened and an application can be filed with NCLT quickly. Once admitted, after all mandatory processes and compliances, the resolution plan (accepted base resolution plan) can be submitted to NCLT for their final nod. Therefore, the overall process time can be curtailed much if there is a consensual approach, instead of the legally mandated 120 days' time excluding the pre PPIRP process time.

Further, even if an external bidder has to be invited (if the current CD's resolution plan is unacceptable), the entire process can be completed within a reasonable time frame as best bid selection process is done through Swiss challenge mechanism. Ultimately, though no one can guarantee the timelines at NCLT (even though the Act provides for a 30 days' time limit for NCLT to take a decision), there is every possibility to make NCLTs to hear the case early, if all stakeholders press for it together, as it is consensual resolution process.

2. **Cause: Preferential and other transactions:**

There could be a lurking fear in the minds of the promoters of the CD (as they have to initiate the process of PPIRP) that under the process of PPIRP any mis adventure undertaken by them, like diverting funds out of business, acquisition of unproductive assets, acquisition of land and building etc., would be brought to light and they may be penalised. Consequently, the fear of their business being taken away from them through the process of replacement of promoters under PPIRP.

Remedy: If any such event (diversion of funds) has happened, it has already happened and the truth has to come out in any case (banks may initiate forensic audit etc., when the CD fails). The silver lining under this process is that it is the CD who initiates restructuring under PPIRP. Hence, the promoters should fully disclose all their past improper / misadventures clearly to the creditors and seek pardon/remedy by accepting all their improper actions. They should also provide comfort / assurances to the creditors that the funds diverted would be brought back into the business if they get the support for revival of operations. The CD should then work out a suitable resolution plan, in consensus with FCs, which would provide for reinfusion of such diverted funds back into the business. If such a consensual and acceptable approach is adopted, the lenders may favourably examine the best way possible to take the resolution process forward, as such an approach has to be adopted in the best interest of all stakeholders. Further, if such an approach is unacceptable then also it is possible for the bankers (who are now aware of the diversion of funds) to revive the entity by substituting the promoters through invitation of Expression of Interest from third parties which not only protects the entity to perform as a going concern, but also helps the bankers in recovering their dues over a period of time.

Conclusion:

To make PPIRP successful, a few of the causes and remedies have been discussed already. Similarly, there could be many other causes which would definitely have possible remedies. However, looking at the overall reasons for the lack of interest in adopting to this way of resolution (PPIRP) process by Corporate MSMEs it is mainly the lack of awareness and understanding amongst the bankers at the operating level (handling the active MSME accounts) who should play a pivotal role in educating such MSMEs in distress to seek remedies under the scheme, as MSMEs themselves may not be aware of such a scheme. Further, there is always a fear, in the minds of promoters of the CD, of social stigma attached to the word "insolvency" if the outside world comes to know of it when their entity undergoes the IBC process.

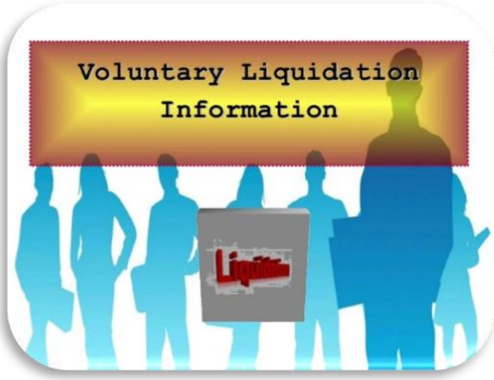
This fear can be adequately assuaged by the bankers as most of the things can be completed in confidence. Further the exercise is ultimately done in the interest to protect the CD from liquidation which eventually would not only benefit the CD but also those who are associated with it. Hence, it should be a welcome step rather than a stigma. This can be properly explained by the bankers to the promoters of the CD.

Further, a Multi-pronged approach has to be adopted to create an awareness amongst all stakeholders viz., the Corporate MSMEs, MSMEs associations, imparting requisite knowledge amongst bankers etc., which would lead towards making this scheme adoptive and successful. This would ultimately help in reviving MSMEs, which are otherwise good but under distress for the time being. This would greatly benefit the promoters, employees, lenders and all other stakeholders involved with such MSMEs. This scheme if it becomes successful would ultimately help in timely resolution of the distressed MSMEs thus benefiting the society/economy as a whole. Let's all work towards accomplishing this goal in the interest of all.

Recent Amendments in Voluntary Liquidation Process under IBC, 2016

B. Mekala
Insolvency Professional

Voluntary Liquidation is a process of liquidating a corporate person (corporate persons registered as company and other corporate persons) on its own and it is governed by Insolvency and Bankruptcy Code,2016. A corporate person who has no debt or not committed any default or has debts, but it can be paid from the realisation of sale of assets can proceed to go for voluntary liquidation. Voluntary Liquidation should not be done to defraud any creditors. The voluntary liquidation may be because of the result of expiry of the duration of period for which the entity is intended to operate or on the occurrence of a particular event.



(Image source: website)

A declaration from the majority of directors, stating that the company has no debts, or that it will be paid from the proceeds of sale of assets along with audited financial statement and operations of the company for the previous two years and a report of valuation of assets by registered valuers should be filed.

Within 4 weeks of declaration there shall be a special resolution passed by the members in a general meeting requiring the company to liquidate and to appoint the liquidator and his fees. Or a resolution of the members passed in a general meeting requiring the company to liquidate and to appoint liquidator and his fees in cases where the voluntary liquidation is because of the expiry of duration or on the occurrence of any event. In case company owns any debt, then creditors representing 2/3rd in value of debt shall approve the resolution passed by the members. A similar provision is specified in the IBBI (Voluntary Liquidation Process) Regulations, 2017 for corporate persons other than a company.

(Image source: website)

The Liquidator shall proceed to sell the assets and distribution to be made within 30 days from the date of realisation of assets. Once the liquidation process of the corporate person is completed the Liquidator shall submit a final report and Form H with AA seeking for dissolution of the corporate person.

The following amendments have been made with effect from 5th April 2022 in the IBBI (Voluntary Liquidation Process) Regulations, 2017.

1. The liquidation proceeding in respect of corporate persons shall be deemed to have commenced from the date of passing of resolution (Special resolution or ordinary Resolution) under Reg.3(1) (c) IBBI (Voluntary Liquidation Process) Regulations, 2017.
2. In Reg. 10 (2)(r) instead of “Corporate Debtor”, “Corporate Person” is substituted to include Company, Limited Liability Partnership, but not financial service provider.
3. In Reg. 30 a proviso has been inserted—In case there are no claims received till the last date of receipt of claims, the liquidator shall prepare, List of stakeholders within 15 days from the last date of receipt of claims (instead of 45 days in other cases).
4. Reg. 35 (1)–The liquidator shall distribute the proceeds within 30 days from the receipt of amount to the stakeholders.
5. Reg. 37(1) substituted as under—

The liquidator shall complete the liquidation process of the corporate person and shall submit a Final report (Reg.38) within

a) 270 days from the liquidation commencement date where the voluntary liquidation is under Se.59(3)(c) or Reg. 3(1)(c).

b) 90 days in all other cases.

6. Reg.38 (3) substituted as under
The Liquidator shall submit final report and compliance certificate in Form H along with application under Sec.59(7) with the AA for dissolution of the Corporate Person.

7. Reg.39 (7) Form I substituted for Form H
A stakeholder, who wants to claim an amount from the corporate voluntary Liquidation account may apply to the Board in Form I for withdrawal of the amount.

8. Form H Compliance Certificate inserted in schedule

Clarification with regard to NOC or NDC

A circular from IBBI dated 15th November 2021, clarifies regarding the requirement of seeking No Objection Certificate or No Dues Certificate from the Income tax Department during Voluntary Liquidation Process under the IBC, 2016.

The Voluntary Liquidation Process Regulations obligate all the financial creditors, operational creditors, government and other stakeholders to submit their claims within the stipulated time. If not submitted in time the corporate person may get dissolved without dealing with such claims which may consequently get extinguished. But still the liquidator seeks NOC or NCD from income tax department.

Through this circular it is hereby clarified that as per the provisions of the Code and the Regulations read with Section 178 of the Income tax Act,1961, an IP handling voluntary liquidation process is not required to seek any NOC or NDC from income tax department as a compliance in the said process.

Link for the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2022 dated 5th April 2022

https://ibbi.gov.in//uploads/legalframwork/2ad9199580a840daf946fca36a246dd1.pdf

Section 230 of Companies Act, 2013

N. Nageswaran
Insolvency Professional

The elephant in the room meant for IB Code

In Essar Steels, one of the landmark judgement by Hon'ble Supreme Court in 2021 the apex judicial forum in India observed that " *The IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC.*"

The above view would be further strengthened if the following observations of the Insolvency Law Committee Report (third part) dated 20th January 2020 are taken note:

"Such schemes (Compromise and Arrangements), presented as a second chance to resolve the corporate debtor, may not always be feasible, or economically viable once a decision to liquidate the corporate debtor has already been made, following the failure of the CIRP. Notwithstanding that scheme may not be well-tailored to resolve insolvency, allowing revival through schemes after the CIRP has failed, would alter the incentives of creditors and resolution applicants to resolve the insolvency of the corporate debtor during the CIRP.

(Image source: website)

Further, repeatedly attempting revival, through schemes of arrangement or otherwise, even where the business is not economically viable is likely to result in value destructive delays, and was identified as a key reason for the failure of the regime under the SICA, by the BLRC in its Interim Report. Such use of schemes is also inherently incompatible with the liquidation process under the Code, which envisages that a liquidation order is passed, will result in dissolution of the corporate debtor. Indeed, where the business of the corporate debtor is still viable, the liquidator would have recourse to a going concern sale of the business to ensure that the liquidation process remains value maximising."

May be this was the reason why the legislators did not bring into IBC the effect of the judgement by the apex court in its verdict in the matter of ***Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors. (2007)*** which emphasised that the provisions of Section 391 of 1956 Act are applicable to a company which has been ordered liquidation (equivalent of Sec 230 of Companies Act, 2013).

In the backdrop of the above, an analysis of the provisions of the Code and its regulations on the liquidation process is attempted in the remaining part of this article.

Manner of sale

The following is the metamorphosis of this important provision in the Liquidation Process Regulations :

As per the first set of regulations dated 15th Dec 2016 Regulation 32 read as

The liquidator may -

(a) sell an asset on a standalone basis; or
(b) sell (i) the assets in a slump sale, (ii) a set of assets collectively, or (iii) the assets in parcels.

After introduction of amendment dated 1.4.2018 Regulation 32 read as:

The liquidator may

(a) sell an asset on a standalone basis; or
(b) sell (i) the assets in a slump sale, (ii) a set of assets collectively, or (iii) the assets in parcels; or
(c) sell the corporate debtor as a going concern."

It should be noted here that in the landmark judgement dated 4th October 2018, the Hon'ble Supreme Court in the matter **of Arcelor Mittal vs Satish Kumar Gupta, RP of Essar Steels** while emphasising the need to keep the corporate debtor as a going concern not only during the period of resolution but also during liquidation, pointed out that IBC in Regulation 32 of the Liquidation Process Regulation provides for sale of the company as a going concern. (Refer foot note 3 in Para 83 of the order).

Wef 22.10.2018, the provisions under Regulation 32 stood as :

The liquidator may sell:

(a) an asset on a standalone basis;
(b) the assets in a slump sale;
(c) a set of assets collectively;
(d) the assets in parcels;
(e) the corporate debtor as a going concern; or
(f) the business(s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate."

Then came the most important land mark judgement dated 25th January 2019 of the Hon'ble Supreme Court in the matter **of Swiss Ribbons Pvt Ltd Vs. Union of India and ors**. By way of bringing out the importance of resolution over liquidation, the court pointed out that

" 11………*What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark.* ***Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. "***

Thereafter, Hon'ble NCLAT in its judgement dated 29th January 2019 quoting both the above judgements (Essar Steels and Swiss Ribbons Ltd) emphasised the primary goal of IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. In the same matter, NCLAT, quoting from the order of Hon'ble Supreme Court in the matter of ***Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors. (2007)*** emphasised that the provisions of Section 391 of the Companies Act 1956 (Sec 230 of 2013 Act) are applicable to a company which has been ordered liquidation. Thus it was clarified that post ordering of liquidation of the corporate debtor under Sec 33 the liquidator shall carry on the business of the 'corporate debtor' for its beneficial liquidation as required under Sec 35 (e). The Liquidator was asked to take necessary orders from the Adjudicating Authority under Section 230 of the Companies Act and only upon failure of such a revival, the liquidator was asked to resort to other modes of sale of the company.

Thus, the first case was recorded under IBC in which orders were issued to arrive at a resolution by way of

Scheme of Compromise and Arrangements under Sec 230 of the Companies Act 2013 after liquidation orders were issued.

This phenomena was repeated by NCLAT in its order dated 27th February 2019 in the matter of **Y.Shivram Prasad vs S.Dhanapal & ors**.

Post the above judgements, amendments dated 25th July 2019 by which Regulation 2B (titled Compromise or arrangement) and 32A (titled Sale as a going concern) were added to the IBBI Liquidation Process Regulations.

Stamp of finality by the Insolvency Law Committee Report of 2020

(Image source: website)

It will be interesting to note that in its report dated 20th February 2020 the committee has recorded the following recommendations:

" Recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code."

" it is being observed that Section 230 of the Companies Act, 2013 is not aligned with the liquidation process of the Code and the two processes may not be compatible. Therefore, it is being recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, a need is felt that an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code."

Also the note of caution expressed as under by the apex court in its Essat Steels need to be kept in mind by one and all who are looking for an amicable solution:

"Undoubtedly, Section 230 of the Act of 2013 is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III of the IBC. Obviously, therefore, the rigors of the IBC will not apply to proceedings under Section 230 of the Act of 2013 where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the IBC. But, when, as in the present case, the process of invoking the provisions of Section 230 of the Act of 2013 traces its origin or,as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. A harmonious construction between the two statutes would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC. As such, the company has to be protected from its management and a corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013."

In the meantime, quite a large number of schemes of Compromise & Arrangement have been received and lodged by the liquidators with concerned benches of NCLT. It is also informed that the concerned benches have been agreeing for such references and thereby issue orders to hold the meeting of creditors to consider the schemes submitted under section 230 of Companies Act, 2013. All these developments, for sure, will push back the aggressive timeline of one year suggested by the legislators to close the liquidation process of the corporate debtor.

Legal maxims

Summum Bonum

Meaning- The Supreme Good from which all others are derived

Actus curiae neminem gravabit

Meaning- The act of the Court shall hurt no man.

Court Orders

CGRF Legal Team

Sharavan Kumar Vishnoi
Vs.
Upma Jaiswal & Others
NCLAT, New Delhi, dated 05-Apr-2022

"*Resolution Professional is not to take a decision regarding the ineligibility of the Resolution Applicant*"

This Appeal was filed by Resolution Professional ('RP') challenging the order passed by NCLT, Allahabad Bench dated 02.03.2022 wherein on an application filed by one Ms. Upma Jaiswal ('Resolution Applicant') seeking a direction to the RP to place their Resolution Plan before the Committee of Creditors (CoC). The Adjudicating Authority after hearing the parties issued following directions:

"5. … the RP is a facilitator and not a gatekeeper. In these circumstances, the ends of justice would be met if we direct the RP to place all Resolution Plans along with his opinion on the contravention or otherwise of the various provisions of law before the CoC which should take a considered view in the matter, if not already done."

(Image source: website)

Hon'ble NCLAT observed that ratio of the Judgment passed by Hon'ble Supreme Court in ***Arcelor Mittal India Private Limited vs. Satish Kumar Gupta- (2019) 2 SCC 1,*** is that RP is not to take a decision regarding the ineligibility of the Resolution Applicant. RP is only to form his opinion because he has the duty to find out as to whether the Resolution Plan is in compliance of the provisions of the Code or not. The RP can give his opinion on each plan before the CoC and it is for the CoC to take a decision as to whether the plan is to be approved or not.

With regard to the direction issued by NCLT to the RP to place all the resolution plans along with his opinion on contravention or otherwise, NCLAT held that such a direction clearly indicated that the RP is free to submit his opinion with regard to contravention of provisions of law.

Finally, NCLAT held that various issues regarding ineligibility or eligibility need not be gone into in this appeal and that only after CoC's decision if any question arises regarding eligibility that can be looked into before the Adjudicating Authority in accordance with appropriate provisions of the law.

In view of the above, the Appeal was dismissed.

Mr. Mukund Choudhary and anr.
Vs.
Mr. Subhash Kumar Kundra
NCLAT, New Delhi, dated 18-Apr-2022

"Suspended directors are duty bound to sign the Financial Statements of the CD during ongoing CIRP"

This Appeal was filed by the promoter-directors of the corporate debtor against an order passed by NCLT, New Delhi, Principal Bench in which the directors of the corporate debtor were directed to cooperate and provide signed copy of financial statements.

It was the case of the Appellants that the financial statements were not signed by them as it was prepared by RP and had some objectionable entries. It was submitted that the RP acts and executes in the name and on behalf of the Corporate Debtor all deeds, receipts and other documents and hence the RP is competent to sign the Balance Sheet prepared by him and the Appellant should not be coerced to sign the Financial Statements as they are already suspended from the management of the Corporate Debtor company.

NCLAT was of the considered view that the **Court does not release the directors of the Corporate Debtor company from their duties, but only suspends their power as directors and appoints a RP for managing the company.** Keeping in view the facts and circumstances of the present case, as it is not disputed that the Appellants had signed the first three quarters of the Financial Year and were now objecting to sign the report for last quarter raising some clarifications which were already addressed by the RP and the Statutory Auditor (who is the same person who had audited the Financial Statements/Accounts for the past three years of the Corporate Debtor), NCLAT observed that the submissions of the Appellants that it is the RP who has to sign Financial Statement was untenable. It was noted that

Section 19(2) of the Code clearly specified that the personnel of the Corporate Debtor, as promotors or any other persons are required to assist the RP failing which an Application can be filed before the Adjudicating Authority seeking direction for co-operation.

It was held that the MCA circular dated 06.03.2020 relied upon by the Appellants provides only for the *procedure* of filing the Forms whereas the Companies Act, 2013 mandates signing of financial statements by directors and KMPs like CFO and Company Secretary. The circular does not anywhere specify that the Financial Statements are not to be signed by the Directors.

It was held that there was no illegality in the well-reasoned order of the Adjudicating Authority. It was observed that **it is the duty of the Appellants to cooperate and sign the Financial Statements which is in terms of the provisions of the Code as well as in compliance of the Companies Act, 2013.**

For the above reasons, the Appeal was dismissed.

Ramesh Kumar Chaudhary and anr.
Vs.
Anju Agarwal & Others
NCLAT, New Delhi, dated 15-Mar-2022

An appeal was filed against order passed by NCLT, Allahabad Bench ('Adjudicating Authority') directing the liquidator to consider the Scheme under Sec. 230 of the Companies Act, 2013 submitted by the Respondents and that in the meantime, no further steps to be taken with regard to auction of the assets of the corporate debtor.

Facts of the Case:

On 25.09.2021, the liquidator issued an e-auction notice. On 30.09.2021, shareholder (Respondent in the present appeal) of the corporate debtor proposed a Scheme of compromise or arrangement under Sec. 230 of Companies Act, 2013. It is to be noted that the corporate debtor is a MSME unit and hence the shareholder was eligible to submit a scheme under Sec. 230. The shareholder requested the liquidator to withdraw e-auction sale notice as published in the newspapers. On 04.10.2021, the respondent submitted a scheme of compromise or arrangement under Sec 230 of Companies Act, 2013 was submitted to the liquidator. However, the liquidator provisionally declared the Respondent to be ineligible to submit scheme. Challenging the decision of the liquidator the respondents herein had filed an application before Adjudicating Authority ('AA').

On 21.10.2021, the liquidator sent an e-mail to the Respondents communicating that the liquidator has changed her opinion as the Respondents are eligible under Sec. 29A and that she has called Stakeholder Committee Meeting ('SCC meeting') to discuss and deliberate on the Scheme. In the SCC meeting the scheme was not approved. It was resolved by the SCC that e-auction to be continued. The liquidator submitted that one person has given Expression of Interest ('EoI') along with interest. The present appeal is filed by the only bidder.

The AA permitted the shareholders to file the Scheme with the liquidator by placing all relevant information on record to enable the liquidator to assess the eligibility of the applicants in terms of Sec. 29A of IBC and to consider whether Application under Sec. 230 of the Companies Act, 2013 should be filed. The AA further directed that no further steps in regard to the Auction shall be taken without leave of the AA.

Observations of NCLAT:

1. The Scheme of Compromise or Arrangement was filed well before expiry of 90 days as prescribed under Regulation 2B of Liquidation Regulations.
2. Sub-regulation (9) of Regulation 31A provides that the advice of the SCC shall be taken by a vote of not less than 66% and further sub-regulation (10) states that said advice is not binding on the liquidator. The action of the liquidator in placing the scheme before SCC was uncalled for and is not in accordance with the provisions of the Code and the Regulations.
3. Section 230 of Companies Act read with Regulation 2B of the Liquidation Regulations indicates that it is the liquidator who is to take a decision as to whether scheme is to be placed before the Tribunal by an Application or not.
4. When sub-regulation (1) of Regulation 31 specifically refers to advice of Stakeholders Consultation Committee on the matters relating to sale under Section 32, the Stakeholders Consultation Committee was not any competent forum for obtaining any advice with regard to Scheme for Compromise or Arrangement submitted under Section 230.
5. In the present case, no meeting was convened under Section 230(1), hence, there is no applicability of Section 230(6). The submissions that scheme submitted by the Respondents was

not approved by Creditors in SCC meeting indicates misconception of the whole statutory procedure by the liquidator.

6. As per sub-regulation (9) of Regulation 31A, the advice of SCC is to be taken by a vote of not less than 66%. However, in the present case, the votes cast in the SCC meeting was less than 66%, hence, there was no question of following the said advice of the SCC by the liquidator. The act of liquidator in relying on the said advice amounts to abdication of her duty to consider the Scheme and shield her on misconception of law rejecting the scheme.
7. What is mandated by Regulation 31A(9) is that SCC shall advice the Liquidator by a vote of not less than 66% of the representative of the Consultation Committee, present and voting. Thus, percentage has to be computed on the members of the SCC present and voting and not from value of claims of the Financial Creditor. In the present case, the percentage of voting computed by the Liquidator is not on the basis of votes of members present in the voting rather on the value of the claim. This is wholly contrary to the statutory Scheme under Regulation 31A (9).
8. There was neither any consideration of the scheme nor there was any valid reason for rejecting the scheme by the liquidator and consequential action after rejection of the scheme to proceed with the auction is unsustainable since the decision to proceed with auction was consequent to rejection of the scheme which itself is contrary to the statutory requirements.
9. With regard to the requirement of consent by not less than 75% of the secured creditors under Section 230(2)(c), it was observed that Sub-clause (c) of sub-section (2) of Section 230 is attracted when there is a scheme of corporate debt restructuring. The expression used in sub-clause (c) is ‘corporate debt restructuring’. Hence, it is the obligation of the person who proposes the scheme to obtain the consent of 75% of the creditors. In the present case, the liquidator was required to intimate the Respondents to obtain consent by 75% of the creditors. It was the for the Respondents to present the scheme before creditors and impress them to give their consent.
10. The Liquidator in the present case, after holding Respondent to be eligible to submit the Scheme on 21st October, 2021, placed the Scheme before SCC on the next day, that is, 22nd October, 2021 and refused Respondents to present and clarify the Scheme before the SCC at the meeting.

(Image source: website)

In view of the above observations, the Appeal was disposed of with the following orders/directions:

1. The order passed by AA was upheld;
2. The Respondents were allowed one month time from the date of order to submit the revised scheme along with an affidavit indicating the consent of Financial Creditors as contemplated by Sec. 230(2)(c) of the Companies Act, 2013;
3. In case the Respondents are unable to obtain the requisite consent of the Financial Creditors, such scheme submitted before the liquidator shall be filed before the AA for taking further proceedings as per Sec. 230 of the Companies Act, 2013;
4. The AA may finally decide the Application filed before it and pass such orders as may be necessary.

M. /s Jagbasera Infratech Private Ltd
Vs.
Rawal Variety Construction Ltd,
NCLAT, New Delhi, dated 04.04.2022

Amount invested in Real Estate Project by promoter (landowner) is not financial debt under Section 5(8) of IBC

An Appeal came to be filed before the NCLAT, New Delhi, challenging the order of the NCLT, Chandigarh which dismissed a Petition filed u/s 7 of the code. The relationship between the Appellant and the Respondent is that of the land owner and the Developer. However, the Appellant claimed to be a financial creditor having paid an amount of Rs.4,21,37,850/- to the respondent ie., the corporate debtor who defaulted in returning the said sum; and contended that the same falls within the definition of ‘financial debt’ under Section 5(8) of the Code. The Appellant further contended that the project is the Real Estate Project; and that the Appellant is a Promoter and interested in forward sale of furnished studio flats in the said Project of the Respondent/Developer; that the said investment was for forward sale or purchase agreement having commercial effect of borrowing; and that the amount was disbursed against consideration for time value of money and therefore contended that the Appellant fulfils all the essential characteristics which falls within the definition of Financial Creditor u/s 5(7) of the code. According to the Appellant since the project ought to have been completed on or before 31 Dec. 2013 and the same having not been completed there is an admitted default and therefore, the Respondent Company/the Developer owes the amount lent to it by the Appellant which has become due and payable after the date of default.

(Image source: website)

Issue under consideration before the Appellate Tribunal:

Whether the Appellant who has invested in the Real Estate Joint Venture Project in the capacity of a 'Promoter', can fall within the ambit of the definition of 'Financial Creditor' as defined under Section 5(7) of the IBC?

Observation:

The Hon'ble Appellate Tribunal observed that the Memorandum of Understanding (MOU)is crystal clear that the Appellant is classified as a 'Promoter ' who seeks to develop the said plot and construct the studio apartment; and has entrusted the project to the Respondent who is arrayed as the developer in the said MOU. It was further observed that the joint-venture project in the name and style of 'Valley view Apartments Project' was to be launched and promoted in the name of the Appellant/ land owner.

Sec 5(7) & 5(8) ie., definitions of "financial creditor" and "financial debt" respectively was also analysed and observed that the relationship between the Appellant and Respondent is that of land owner and developer; and viewed from any angle the amount invested by the Appellant towards the completion of the Project cannot be termed to be a 'Financial Debt' as defined under Section 5(8).

MCA has issued notification for Companies (Incorporation) Amendment Rules, 2022 on 8th April, 2022 by inserting the following provision in Rule 12 which deals with Application for Incorporation of Companies imposes additional requirement to Nidhi Company that, "in case of a Company being incorporated as a Nidhi, the ***declaration by the Central Government*** under Section 406 of the Act shall be obtained by the Nidhi **before** commencing the business and a declaration in this behalf shall be submitted **at the stage of incorporation** by the Company."

This is in addition to the first proviso which reads as follows: "Provided that in case pursuing of any of the objects of a company requires registration or approval from sectoral regulators such as the Reserve Bank of India, the Securities and Exchange Board, registration or approval, as the case may be, from such regulator shall be obtained by the proposed company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation of the company."

While it is clear that the government has tightened the provisions for incorporation of a Nidhi or Mutual Benefit Society with amendment in Sec.406 w.e.f 15^{th} August 2019. The government has also notified the amended Nidhi Rules w.e.f 19^{th} April 2022 (The link for the same is getdocument (mca.gov.in)).

MCA vide its notification dated 04th March 2022 issued Limited Liability Partnership (Second Amendment) Rules, 2022. The crux of the notification are:

i. As per Rule 11 (1) 2 proviso, we can apply for DPIN for 2 individuals at the time of incorporation of LLP through FiLLip form. Hereafter, DPIN can be applied for ***5 individuals***, which is an increase in limit.

ii. As mentioned in Rule 11(3) the certificate of Incorporation will be issued in Form 16. Now the Form 16 will also mention the ***Permanent Account Number and Tax Deduction Account Number issued by the Income Tax Department***.

iii. If the LLP is under Corporate Insolvency Process or under Liquidation, then the Interim Resolution Professional or Resolution Professional or Liquidator or Limited liability Partnership Administrator may sign the Annual Return in Form LLP 11 (rule 25(2)) and the Statement of Account and Solvency in Form LLP 8 (rule 24 (6)).

iv. As stated in amendment any alteration is made or occurs in –

(a) the certificate of incorporation or registration of limited liability partnership incorporated or registered outside India;
(b) the name or address of any of the persons authorised to accept service on behalf of a foreign Limited Liability Partnership in India; or
(c) the principal place of business of foreign Limited Liability Partnership in India, the foreign Limited Liability Partnership shall file in ***Form 28*** (substituted for "Form 29") such alterations with the Registrar within thirty days from the date on which the alteration was made or occurred.

v. In rule 36, in sub-rule (6) any e-form or document submitted to the Registrar, found defective or incomplete on examination by the Registrar, then the re-submission can be now done in "***Form 32***". The reference to the form is inserted, in this amendment.

vi. As per rule 37 (1A) (II) the LLP to strike off ***furnish in Form 24*** (substituted for the words "enclose along with Form 24") the required documents instead of enclosing along with Form 24.

Find the words!!!

CLUES	WORDS
1. The most important document of a Company is its	
2. The Share Capital of a Company may be reduced by	
3. Which is the biggest state in America?	
4. Which is the oldest Cricket club in the world?	
5. The ten tallest buildings in Germany are all located in which city?	
6. A climate pattern that describes the unusual warming of surface waters in the eastern tropical Pacific Ocean.	

MEMO	SPE	OF	ASSO	RAN
CIA	RESO	ALA	LU	DUM
SKA	CLUB	FRANK	FURT	CRI
MARY	EI	LEB	NINO	ET
TI	CIAL	ON	ONE	CK

Answers

1. Memorandum of Association 2. Special Resolution 3. Alaska

4. Marylebone Cricket Club 5. Frankfurt 6. El Nino

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.
- **Analysis of wilful defaulters, for provisioning by Banks.**

Registered Office:

CREATE & GROW RESEARCH FOUNDATION

1st Floor, Hari Krupa, No.71/1, Mc Nicholas Road,
Chetpet, Chennai - 600 031. (Off Poonamallee High Road)
Phone: 044 2814 1604 | Mob: 94446 48589 / 98410 92661
Email: createandgrowresearch@gmail.com
Website: www.createandgrowresearch.org