CGRF

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Changing Shades of Valuation

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ஞாலம் கருதினுங் கைகூடுங் காலம்
கருதி இடத்தாற் செயின்.

தமிழ் உரை:
(செயலை முடிப்பதற்கு ஏற்ற) காலத்தை அறிந்து இடத்தோடு பொருந்துமாறு செய்தால், உலகமே வேண்டும் எனக் கருதினாலும் கைகூடும்.

Explanation:
Though a man desire to conquer the world, he may accomplish it if he acts in the right time, and at the right place.

From the Editor's Desk

Dear Readers of CGRF SandBox

Valuation

"Valuation" of a business enterprise or valuation of an asset has been a very interesting subject. Like we say "beauty is in the eyes of the beholder", valuation too takes different shades when viewed from different perspectives. Investment by way of equity or funding by way of debt happens based on valuation. Therefore, the capital market uses this term extensively while lenders depend on valuation by independent experts to bench mark their security cover.

After the advent of Insolvency and Bankruptcy Code (IBC), valuation concepts got fortified by the regulation of the profession of valuers by the Insolvency and Bankruptcy Board of India (IBBI). In spite of the internationally accepted guidelines for valuation, no two valuations are similar. In a situation where the Committee of Creditors (CoC) have a resolution plan placed before them for approval, the fair value and liquidation value of the assets of the corporate debtor serve as a reference point for them and take a prudent commercial decision.

Relevance of Valuation for Lenders

In this issue of CGRF SandBox, we are quite excited to bring before you the concepts of valuation, how it has evolved over a period of time, how the lenders use the valuation reports and how the CoC takes a call when a resolution plan is considered for approval.

Valuation and Resolution Plan approval

Many a times, the CoC is circumspect to approve a resolution plan if the amount realisable under the plan is lower than the liquidation value. The Supreme Court in March 2020 in *Maharashtra Seamless Steel Ltd. v. Padmanabhan Venkatesh & Ors*., clearly spelt out that it is not necessary that the resolution plan value should not be less than the liquidation value of the corporate debtor so long as it meets the requirement of Sec.30(2)(b) of IBC. However, there are several instances where the CoC decides to go for liquidation of the corporate debtor if the plan value is below liquidation value.

Valuation and Resolution Plan approval Sec.12A plan under IBC for withdrawal

Be that as it may, another question arises in relation to sharing of valuation reports with the CoC when only a Sec.12A plan is for consideration before them and there is no resolution plan received. All these practical aspects are brilliantly covered in some of the articles shared by eminent professionals in the field.

Rising Inflation and RBI

In an attempt to tame the alarming increase in inflation due to rise in petrol/diesel/domestic gas prices, both RBI and Central Government have taken decisive steps like increasing the repo rate by 40 basis points from 4% to 4.40% with effect from 4th May 2022, slashing the duty on petrol/diesel and increasing the subsidy on domestic gas supply to households. The last few days have seen the industry and trade associations bringing out huge newspaper ads thanking the Prime Minister.

Amendments regarding use of PAN

The Government has come out with some amendments for providing the PAN details for increased monitoring of economic activity in the country. Cash deposits or withdrawals exceeding Rs.20 lakhs in one or more bank account (including cooperative banks) or post office in a financial year would require the PAN of the person concerned.

RBI directive on Inter-operable Card-less Cash Withdrawal (ICCW) at ATMs

While a few banks already offer card-less cash withdrawal from ATMs, RBI has issued a directive on 19th May 2022 that all banks, ATM networks and White Label ATM Operators (WLAOs) may provide the option of card-less cash withdrawal from ATMs. These updates are also covered in this issue of CGRF SandBox.

On the weather front, the good news is that monsoon showers have kept up their schedule and hit Kerala on 29th May, three days ahead of normal onset date of 1st June. Hopefully, the heat waves across the country shall give way for good showers in the next couple of months. A lot of economic activities in our country depend on rains during this season and therefore, let's hope and pray for good rains.

Yours truly

S. Rajendran

Understanding Valuation

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

In general parlance *'**Valuation'*** is an estimation of the worth or value of something for which the value is determined. We often come across the term '***Price or Value'*** when someone spend some money for acquiring certain item/product from the market. Often others questions the purchaser of such item/product on few counts viz., a) whether is it worth the value what you have paid b) how did you ascertain its value c) did you compare its value with that of similar items/product in the market etc. Ultimately, we always hear people telling the purchaser that he had paid higher price for the item and many a time we also hear the phrase that 'you have been taken for a ride'.

Of course all of us know that similar items command different value based on its origin, manufacturer, brand, reputation, location etc., However, when such item's values are determined professionally by a qualified ***'Valuer'*** then the acceptability of such '***Valuation'*** is very high. The role of Valuer comes when valuing high value transactions are concerned, in business, especially when it involves physical assets like land, building, machinery etc., as well as stocks and securities or when valuing the whole enterprise.

When it comes to Business or Company valuation, the often asked the question is ***"Why do I need a valuation, especially if I have no intention of selling the business or Company any time soon?".*** In a real sense, it is always preferable to know the baseline value of any business or company. It is the starting point for owners/promoters who want to effectively build a business/company with transferable value by accomplishing its objectives over a period of time. A business valuation is a general process of determining the economic value of a whole business or company. Business valuation can be used to determine the fair value of a business for a variety of reasons, like for sale as a going concern, ascertaining partner's ownership value, taxation purposes etc.,

Reasons why valuations are essential for a business to continue as a going concern are:

a) Valuations provide a baseline value for the business and also serve as a measure for progress: Valuation of a business is like getting an annual health check-up to know how healthy we are? Which guides us to undertake proactive measures to improve our health to lead a healthy life. Likewise periodical valuation of a business provide an indicative baseline value of that business. They serve as an indicator on whether things are moving in the right direction as per the business plan or else guide the business to undertake remedial measures to improve its performance. However, one should always remember that while valuing, in some years the value may go up, and in some other years it may be go down [as there are multiple factors (internal/external) which influences/affects the business and eventually its valuation].

(Image Source: website)

b) Valuations help to identify the gaps and help to carry out course corrections for a bright future: Valuations can help the business to determine ways to improve and guide whether there is a need for any changes to be brought in. A comprehensive valuation will utilize key performance indicators (KPIs) to look at various value drivers such as the business structure, client profile, technology usage, and firm infrastructure including human resources and its competencies etc. KPIs are instrumental in identifying areas of potential improvement for the business to ultimately improve and create more value. These measures help to take a holistic look at the business and help to make decisions that are highly impactful (to improve the performance and ultimately the bottom line). It not only helps to understand the dynamics of business but also to take steps to avoid/counter unforeseen consequences.

c) Valuations provide a benchmark and perspective on price: Knowing baseline value helps to benchmark vis-à-vis the best market practices and also facilitate to compete with peers. When the times of transition comes, historical valuations and periodical valuations provide a starting point. The transition can be either an outright sale or internal transfer (to next-generation). Valuation provide a very good idea on what the business is worth to a prospective buyer or anyone for that matter.

The Major Seven Factors which influence Business Valuation are:

- Strength & Depth of the Core Management Team.
- Customer Profile/Concentration.
- Industry Concentration/Competitiveness.
- Business unique Competitive Advantages.
- EBITDA margin.
- Revenue Trends.
- Profit Margins.

APPROACH TO VALUATION IN BANKS:

Valuation is required, in Banks, to ascertain the correct and realistic value of fixed/other assets owned by the banks and also that is accepted by them as collateral security for a sizable portion of their advances. In Banks, Valuation assumes significance in view of its implications for correct measurement of ***capital adequacy requirement position of banks.***

As a lender, Bankers utilise valuation for multiple purposes. However, in this article let's confine our views only to the valuation of business and its assets. Generally, Banks at the time of assessing and providing credit facilities, initially, see the strength/potential of the promoters, the business in which they are engaged and also on all the other seven major influencing factors stated above. For fixed assets valuation etc., they are generally taken, as it is, from the balance sheet of the business. If the project is a green field one, the acquisition costs of various fixed assets, including machinery are taken as per the project report with supporting evidences for arriving at the valuation to facilitate evaluating the loan quantum.

However, when the business is showing the signs of stress/sickness, the bankers go deeper into the valuation of the business, especially the tangible assets which are given to them as security to secure their advance.

There are internally laid down policies which each Bank follows for the valuation process. Valuations are done by empanelled valuers and they have to comply and abide by the standards and procedures laid down by the respective banks. Banks are guided by their regulator viz RBI to follow certain procedures while formulating a policy on valuation of properties and appointment of valuers etc., They are:

Policy for valuation of properties

i) Banks should have a Board approved policy in place for valuation of properties including collaterals accepted for their loans.

ii) The valuation should be done by professionally qualified independent valuers i.e. the valuer should not have a direct or indirect interest in the asset being valued.

iii) The banks should obtain minimum two Independent Valuation Reports for properties valued at Rs.50 crore or above.

Policy for Empanelment of Independent valuers

i) Banks should have a procedure for empanelment of professional valuers and maintain a register of 'approved list of valuers'.

ii) Banks may prescribe a minimum qualification for empanelment of valuers. Different qualifications may be prescribed for different classes of assets (e.g. land and building, plant and machinery, agricultural land, etc.). While prescribing the qualification, banks may take into consideration the qualifications prescribed under Section 34AB (Rule 8A) of the Wealth Tax Act, 1957.

iii) Banks may also be guided by the relevant Accounting Standard issued by the Institute of Chartered Accountants of India.

While conducting a valuation, valuers have to comply with Internationally Accepted Valuation Standards (IVS) as applicable to the respective class of asset and respective method of valuation as required. The International Valuation Standards (IVS) are standards for undertaking valuation using generally recognised concepts and principles that promote transparency and consistency in valuation practice. The International Valuation Standards Council (IVSC) is an independent, not-for-profit organization committed to advancing quality in the valuation profession and formation of IVS.

Their primary objective is to build confidence and public trust in valuation by producing standards and securing their universal adoption and implementation for the valuation of assets across the world.

VALUATION APPROACHES AND METHODS

The three main approaches used in valuation as per IVS

are a) Market Approach, b) Income Approach, and c) Cost Approach. These are all based on the economic principles of price equilibrium, anticipation of benefits or substitution.

METHODS OF VALUATION

There are numerous ways a company can be valued. A Few of them are as under:

I. **Market Capitalization:** It is the simplest method of business valuation. It is calculated by multiplying the company's share price by its total number of shares outstanding.

II. **Times Revenue Method :** Under this method, a stream of revenues generated over a certain period of time is applied to a multiplier which depends on the industry and economic environment. For example, a tech company may be valued at 4x (times) revenue, while a service firm may be valued at 1x (one time) revenue.

III. **Earnings Multiplier :** This method is used to get a more accurate picture of the real value of a company, since a company's profits are a more reliable indicator of its financial success than sales revenue is. The earnings multiplier adjusts future profits against cash flow that could be invested at the current interest rate over the same period of time. In other words, it adjusts the current P/E ratio to account for current interest rates.

IV. **Discounted Cash Flow (DCF) Method:** Business valuation under this method is similar to the earnings multiplier. This method is based on projections of future cash flows, which are adjusted to get the current market value of the company. The main difference between the discounted cash flow method and the profit multiplier method is that DCF method takes inflation into consideration to calculate the present value.

V. **Book Value:** This is the value of shareholders' equity of a business as shown on the balance sheet. The book value is derived by subtracting the total liabilities of a company from its total assets.

VI. **Liquidation Value:** Liquidation value is the net cash that a business will receive if its assets were liquidated, and liabilities were paid off today.

Other methods used include replacement value, breakup value, asset-based valuation etc.,

VALUATION UNDER IBC:

IBC requires valuation of assets of the corporate debtor to be done during the CIRP period and shared with the COC under confidentiality when a resolution plan is before them for approval.

IBC, classifies valuation as **"Fair value"** or **"Liquidation Value"**. Fair Value is the estimated realizable value of the assets, if same were to be exchanged between a willing buyer and willing seller on an arm's length basis, as on the insolvency commencement date. Whereas, Liquidation Value is the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.

Obtaining professional Valuation of the assets of an entity is absolutely essential for taking an "informed decision" for any acquisitions under the Insolvency and Bankruptcy Code (IBC). As per the Companies (Registered Valuers and Valuation) Rules, 2017, every valuation under the IBC is to be conducted by a Valuer registered with the IBBI. The key objective is that it should be independent and transparent and have fair determination of value of the assets to facilitate comparison and taking informed decision by the committee of creditors.

The assets of a company can be classified in three category of asset classes and a Valuer to enable to carry out valuation of specified asset class needs to be registered as valuer in the said asset class i.e. : –

- Land and Building
- Plant and Machinery,
- Securities or Financial Assets

FAIR VALUE AS PER IBC

(Image Source: website)

As per Reg. 2(1) (hb) of IBBI (CIRP) Regulations, "Fair value" is the estimated realizable value if the assets were

to be exchanged between a willing buyer and seller on an arm's length basis, as on the insolvency commencement date.

FAIR VALUE AS PER OTHER STANDARDS

According to the International Valuation Standards, "Fair Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion".

As per International Valuation Standards, to estimate the fair value of fixed assets, it is mandatory to check the existence of economic obsolescence (EO), and suitably adjust the estimated Depreciated Replacement Cost of the fixed assets with applicable EO (if any) to arrive at the fair value. To estimate economic obsolescence, enterprise value of Company on the standalone basis is estimated using Income Approach through discounted cash flow method only if projected financial information is made available for the analysis.

According to International Financial Reporting Standards, "Fair Value as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date".

It is the estimated amount, expressed in terms of money, that may reasonably be expected for a property in an exchange between a willing buyer and a willing seller, with equity to both, neither under any compulsion to buy or sell, and both fully aware of all relevant facts, as of a specific date, and assuming that the earnings support the value reported.

LIQUIDATION VALUE AS PER IBC

As per reg. 2(1) (k) of IBBI(CIRP) Regulations, "Liquidation Value is the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date". Further, Reg. 35(1) requires the valuer to determine liquidation value using internationally accepted valuation standards.

LIQUIDATION VALUE AS PER OTHER STANDARDS

According to the International Valuation Standards, "Liquidation Value is the amount that would be realized when an asset or group of assets are sold on a piecemeal basis, that is without consideration of benefits associated with a going-concern business".

(Image Source: website)

According to the Indian Banks' Association, "Liquidation Value describes the situation where a group of assets employed together in a business are offered for sale separately, usually following a closure of the business".

WHAT IS ORDERLY LIQUIDATION:

An orderly liquidation-based value is the one that could be realized in a liquidation sale, given a reasonable period of time to find a purchaser, with the seller being compelled to sell on an "as-is, where-is basis"; The reasonable period of time to find a purchaser depends upon asset type and market conditions.

WHAT IS FORCED SALE:

Forced sale describes a premise where a seller is under compulsion to sell and that, as consequence, a proper marketing period is not possible. The price that could be obtained in these circumstances will depend upon a number of factors such as available time for disposal, market depth, etc. It may also reflect the consequences for the seller on failing to sell within the period available.

CONCLUSION:

Valuation is a very critical component of any business/company, when we look at them from different perspectives. In today's context, we have seen many companies which have accessed funds from multiple external sources, for their growth and survival, are being valued differently, many a time making us to raise our eyebrows. Even many entities which are struggling to make good inroads into their stated goals of formation/existence are being valued exorbitantly. In recent times such companies who have been valued substantially above their intrinsic value have raised sizeable funds through initial public offering (IPO)but have listed at abysmally lower price than the share issue price resulting in gullible general public to lose heavily on / after listing.

In the case of Banks, as stated earlier, valuation of assets of a borrower entity happens generally when the lender

sees red in the conduct and operations of the account, and want to secure their exposure fully or to a large extent before the situation gets out of control. In many cases, even though on paper the value of the security(ies) are higher than the lender's exposure, in real sense, at the time of realisation they find that the value of these assets have depreciated substantially resulting in them suffering huge losses. Even though, the value deterioration could be on account of multiple factors, it defeats the very purpose of obtaining security. Hence, it would be prudent on the part of banks, especially, to initiate the process of valuation at multiple points during the currency of the loan. This process should be done in the case of entities to which they have substantial exposure. The valuation, if done periodically not only protects the interest of the Banks but also provides an avenue for the business to value themselves periodically to determine whether the purpose of establishing that business is broadly served or not. This would also facilitate them to carry out some corrective actions/measures, in time, to stem the rot, if necessary.

Did you know?

The English word with the most set of definitions is **"set"**.

According to Guinness World Records, "set" has the largest number of meanings of any word in the English language, with 430 different senses listed in the 1989 edition of Second Edition of the Oxford English Dictionary. The word "sets" the record with an entry running 60,000 words, or 326,000 characters, and no other English word has come close since.

Monetary Policy Statement 2022-23, dated May 4, 2022

CGRF Bureau

Reserve Bank of India (RBI) raised repo rate by 40 basis points to 4.40% with immediate effect.

Current Repo Rate & Reserve Repo Rate – May 2022
Current repo rate is at 4.40%
Current reserve repo rate is at 3.35%

Repo rate is the rate at which the Central Bank viz RBI lends money to commercial Banks in the event of shortfall of funds. Repo rate is one of the tools deployed by the monetary authority to control inflation.

Banks borrow money to meet their short term fund requirements from RBI on which they are required to pay interest to the Central Bank. This interest rate is called the repo rate.

Reserve repo rate is the rate at which RBI borrows money from banks, basically to regulate (or) to seek the excess fund in the system.

Technically, repo stands for 'Repurchasing Option' or 'Repurchase Agreement'. It is an agreement in which banks offer eligible securities such as Treasury Bills or Government bonds to the RBI while availing overnight / short term loans with an agreement to repurchase them at a predetermined price will also be in place. Thus, the bank gets the cash and the central bank the security.

The following table shows the most recent repo rates maintained by the Reserve Bank of India:

Date of update	Rate
4th May 2022	4.40%
4th December 2020	4.00%
9th October 2020	4.00%
6th August 2020	4.00%
22nd May 2020	4.00%
27th March 2020	4.40%
6th February 2020	5.15%
5th December 2019	5.15%
4th October 2019	5.15%
7th August 2019	5.40%
6th June 2019	5.75%
4th April 2019	6.00%
7th February 2019	6.25%

https://www.rbi.org.in › scripts › FS_Notification
Source: RBI

Interoperable Card-less Cash Withdrawal (ICCW) at ATMs

CGRF Bureau

Card-less cash withdrawal through ATMs is a permitted mode of transaction offered by a few banks in the country on an on-us basis (for their customers at their own ATMs). The absence of need for a card to initiate cash withdrawal transactions would help in containing frauds like skimming, card cloning, device tampering, etc. To encourage card-less cash withdrawal facility across all banks and all ATM networks / operators, it is proposed to enable customer authorisation through the use of Unified Payments Interface (UPI) while settlement of such transactions would happen through the ATM networks.

All banks, ATM networks and WLAOs (White Label ATM Operators) may provide the option of ICCW (Interoperable Card-less Cash Withdrawal) at their ATMs. NPCI (National Payments Corporation of India) has been advised to facilitate UPI integration with all banks and ATM networks. While UPI would be used for customer authorisation in such transactions, settlement would be through the National Financial Switch (NFS) / ATM networks. The on-us / off-us (ICCW) transactions shall be processed without levy of any charges other than those prescribed under the circular on Interchange Fee and Customer Charges.

Withdrawal limits for ICCW transactions shall be in-line with the limits for regular on-us / off-us ATM withdrawals. All other instructions related to harmonisation of Turn Around Time (TAT) and customer compensation for failed transactions shall continue to be applicable.

This directive is issued under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (Act 51 of 2007).

Source : RBI Notification dt. 19.05.2022 RBI/2022-23/54
https://www.rbi.org.in/scripts/NotificationUser.aspx

MINISTRY OF FINANCE

(Department of Revenue)

(CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS)

NOTIFICATION

New Delhi, the 26th May, 2022

No. 07/2022–Central Tax

G.S.R. 397(E).—In exercise of the powers conferred by section 128 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India, Ministry of Finance (Department of Revenue), No. 73/2017–Central Tax, dated the 29th December, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R. 1600(E), dated the 29th December, 2017, namely :–

In the said notification, after the fifth proviso, the following proviso shall be inserted, namely: –

Provided also that the late fee payable for delay in furnishing of **FORM GSTR-4** for the Financial Year 2021-22 under section 47 of the said Act shall stand waived for the period from the 1st day of May, 2022 tillthe 30th day of June, 2022.‖.

[F. No. CBIC-20006/8/2022-GST]

RAJEEV RANJAN, Under Secy.

Note : The principal notification No. 73/2017-Central Tax, dated 29th December, 2017 was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R. 1600(E), dated the 29th December, 2017 and was last amended *vide* notification number 21/2021 – Central Tax, dated the 1st June, 2021, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R 365 (E), dated the 1st June, 2021.

Delisting of equity shares in a listed company undergoing corporate insolvency resolution process as per the provisions of IBC

CGRF Bureau

Backdrop

In respect of a listed company undergoing corporate insolvency resolution process (CIRP) under the provisions of Insolvency and Bankruptcy Code (IBC), a question arises as to how the delisting can happen. In this regard, it would be relevant to take note of the amendments made in the SEBI (Delisting of Equity Shares) Regulations, 2021 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Amended Provisions of SEBI Delisting Regulations

After an amendment made with effect from 03rd August 2021, SEBI has clearly spelt out that the delisting regulations shall not apply to a delisting of equity shares of a listed entity pursuant to a resolution plan under IBC 2016 approved by NCLT. Reg.3(2) of the SEBI (Delisting of Equity Shares) Regulations, 2021 states as follows:

"Nothing contained in these regulations shall apply to the delisting of equity shares of a listed company—

a) that have been listed and traded on the innovators growth platform of a recognised stock exchange without making a public issue;

b) made pursuant to a resolution plan approved under section 31 of the Insolvency Code, if such plan provides for:

i) delisting of such shares; or

ii) an exit opportunity to the existing public shareholders at a specified price: Provided that the existing public shareholders shall be provided the exit opportunity at a price which shall not be less than the price, by whatever name called, at which a promoter or any entity belonging to the promoter group or any other shareholder, directly or indirectly, is provided an exit opportunity

Provided further that the details of delisting of such shares along with the justification for the exit price in respect of the proposed delisting shall be disclosed to the recognized stock exchange(s) where the shares are listed within one day of approval of the resolution plan under section 31 of the Insolvency Code "

From Ceylon to Republic of Sri Lanka

At the auspicious hour of 12.43pm on 22nd May 1972 Ceylon became the Republic of Sri Lanka, severing its 157-year old link with the British Crown and 2500-year-old Monarchical system-one of the world's oldest. This transition from a Dominion to a Republic took place at the Navaranghalala Hall, where the historic resolution, moved by the Prime Minister, Mrs.Sirimavo Bandaranaike, to set up the Republic was adopted. Although Sri Lanka has cut its ties with the British Crown, it will continue to be in the Commonwealth. Mrs Bandaranaike, and the last Governor-General, Mr.William Gopallawa, took oaths of allegiance to the new Constitution and assumed the office of the republic's first Prime Minister and the President respectively.

(Source: The Hindu dated- May 23,2022)

Corporate Law updates

- **SEBI simplifies procedure and formats for issuance of duplicate securities certificates**

  SEBI based on the feedback from investors, recent regulatory changes and with a view to make issuance of duplicate securities more efficient and investor friendly, issued a Circular dated 25th May 2022 (Circular No. SEBI/HO/MIRSD/MIRSD_RTAMB/P/CIR/2022/70) simplifying the procedure and format of documents for issuance of duplicate securities certificates.

  The provisions of this Circular shall come into force with immediate effect in supersession of RTI Circular No.1 (2000-2001) dated 9th May 2001.

  The RTAs/ listed company shall strictly adhere to the formats and documentation specified through this Circular for all service requests related to issuance of duplicate securities.

- **Clarification on passing of Ordinary and Special resolutions under Companies Act 2013 on account of COVID-19 – Extension of timeline-reg.**

  Ministry of Corporate Affairs (MCA) vide General Circular No.3/2022 dated 5th May 2022 has informed their decision to allow companies to conduct EGMs through Video Conference or Other Audio-Visual Means or transact items through postal ballot upto 31st December 2022, in accordance with framework already provided in earlier Circulars issued by MCA.

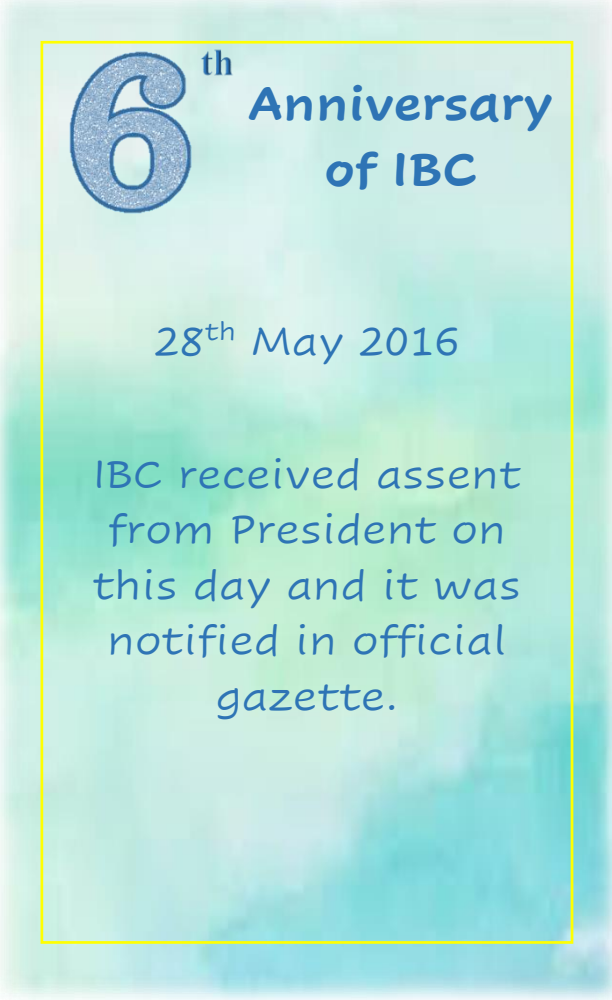
- **Clarification on holding of AGM through Video Conference or Other Audio-Visual Means**

  Ministry of Corporate Affairs (MCA) vide General Circular No.2/2022 dated 5th May 2022 has informed their decision to allow companies to conduct AGMs on or before 31st December 2022, in accordance with the requirements laid down in Para 3 and Para 4 of the General Circular No.20/2020 dated 5th May 2020.

  It is clarified that this Circular shall not be construed as conferring any extension of time for holding of AGMs by the companies under the Companies Act 2013.

- **Relaxation in paying additional fees in case of delay in filing Annual Return by LLP**

  MCA vide Circular No.4/2022 dated 27th May 2022 has decided to allow LLPs to file e-Form 11 (Annual Return of Limited Liability Partnership) for the financial year 2021-22 without paying additional fees up to 30th June, 2022.



Withdrawal under Section 12A of IBC – A few practical questions before the CoC

S. Rajendran, Insolvency Professional

Introduction

With effect from 6th June 2018, the provisions of Insolvency and Bankruptcy Code (IBC) were amended by inserting Sec.12A into IBC, to enable withdrawal of an application made by an financial creditor or operational creditor or the corporate debtor itself under Sec.7, 9 or 10 of IBC respectively after the commencement of the corporate insolvency resolution process (CIRP).

The above amendment was felt necessary as in several cases of corporate debtors after having been admitted into CIRP, the parties were getting into a settlement and therefore, there is no further need for the corporate debtor to go through the rigours of the insolvency resolution process. Sec.12A of IBC provides that such withdrawal can be approved by the committee of creditors, if formed already, with a 90% voting share.

Sec.12A of IBC is reproduced for a quicker reading:

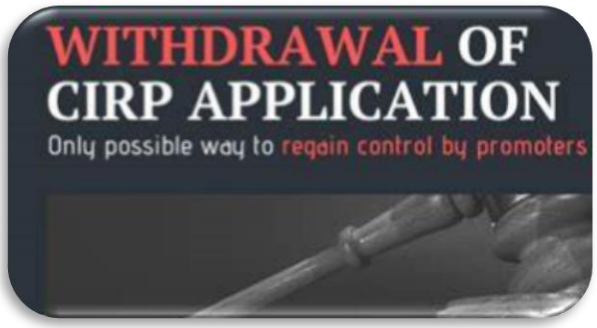
> ***Withdrawal of application admitted under Sec.7, 9 or 10.***
>
> *12A. The Adjudicating Authority may allow the withdrawal of application admitted under Sec.7 or Sec.9 or Sec.10 on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.*

Reg.30A of IBBI (IRPCP) Regulation provide for procedural compliances when the application is withdrawn by a creditor. "Form FA" prescribed by the Regulations has to be given by the applicant creditor to the IRP / RP who will submit it to the adjudicating authority if committee of creditors (CoC) has not been formed; where the CoC has already been formed, the "Form FA" will be placed by the IRP / RP before the CoC which may consider approving the withdrawal with 90% voting share.

Is there any plan to be submitted under Sec.12A ?

It may be relevant to mention here that neither Sec.12A nor Reg.30A speaks about any "***plan***" to be submitted under Sec.12A. Simply a "Form FA" to be signed by the applicant creditor stating that he is withdrawing his application. However, when the Committee takes a decision on the withdrawal which requires 90% voting share, the financial creditors in the CoC would surely like to weigh the pros and cons of the proposal vis-à-vis a resolution plan, if any, that might have been received by the RP at that point of time. Also, the CoC may weigh the pros and cons of the Sec.12A proposal vis-à-vis the liquidation of the corporate debtor. It is relevant to note here that the approval threshold under Sec.12A has been set at a high 90% while the voting share required for approval of a resolution plan is only 66% signifying the intent of the law makers that a larger majority of the CoC should agree on the Sec.12A proposal before the corporate debtor is made free from the rigours of the CIRP proceedings. Therefore, the creditors may like to examine the efficacy of the withdrawal before they give their stamp of approval.

In most of the cases where Sec.12A proposal comes up before the CoC, the lenders collectively examine whether the proposal gives them a better recovery than that is likely under any other options available before them. In this context, the valuation of the assets of the corporate debtor also assumes significance.



(Image Source: website)

Questions before the Committee of Creditors

Following questions arise when a Sec.12A proposal is placed before the Committee of Creditors for its approval:

a) Whether the CoC should consider the interest of all the claimants other than financial creditors – like employees, suppliers, statutory authorities, etc. while approving the Sec.12A withdrawal application?

b) Whether the Sec.12A proposal has to provide for a onetime payment or it can provide for payment to various creditors on a deferred time frame?

c) Whether the Sec.12A proposal can seek reliefs and concessions from the Adjudicating Authority?

d) Whether the CoC is required to take into account the fair value and liquidation value which is

mandatorily required to be done by two sets of registered valuers?

e) Where there is no resolution plan before the CoC, can the CoC require the RP to share the fair value and liquidation value available with the RP?

f) Whether payment in settlement under Sec.12A proposal should be from the promoters or the corporate debtor itself?

g) Whether the CoC enjoys the unbridled domain of "commercial wisdom" while it approves a Sec.12A proposal?

(Image Source: website)

Rationale for approval by the Committee of Creditors

While there is no clear answer provided in the Code for the above questions, the following rationale can be thought of which should be applied by the Committee of Creditors while approving a Sec.12A proposal:

a) Whether the CoC should consider the interest of all the claimants other than financial creditors – like employees, suppliers, statutory authorities, etc. while approving the Sec.12A withdrawal application?

The CoC is expected to wear the hat of all the stakeholders and see whether the proposal takes care of the interest of all of them. In other words, it is not that the Sec.12A proposal just takes care of financial creditors alone, but it addresses the interest of all other stakeholders. In this regard, it may be relevant to state that the promoters who would like to regain control of the corporate debtor would propose continuity in the business and therefore excepting the financial creditors, all other creditors' interest should not generally be compromised. However, once the company comes out of the CIRP proceedings, any aggrieved claimant can initiate fresh legal proceedings again under Sec.7 or 9 of IBC if their interests are not taken care of through Sec.12A settlement.

b) Whether the Sec.12A proposal has to provide for a onetime payment or it can provide for payment to various creditors on a deferred time frame?

It is noticed that in several proposals of Sec.12A which get the final approval by the Adjudicating Authority, the settlement is on a deferred time-scale, stretching payment to various stakeholders over a period of time. It may be recollected here that there is no specific requirement in "Form FA" to state the basis for withdrawal by the applicant creditor. However, in the interest of the applicant creditor and the larger set of lenders in the CoC, an upfront payment would be generally preferred to avoid further litigation should the settlement fail.

c) Whether the Sec.12A proposal can seek reliefs and concessions from the Adjudicating Authority?

A Section 12A proposal is not a resolution plan as per the provisions of Sec.30 of IBC read with Regulations 37, 38 and 39 of IBBI (IRPCP) Regulations. Therefore, generally a proposal under Sec.12A cannot seek any reliefs and concessions other than reduction in payment to creditors. A 12A proposal addresses the interest of applicant creditor. However, it also has to address the interests of the other creditors as well to muster the requisite CoC voting share of 90%. Hence major concession are not expected as the company has to protect the interest of all other stakeholders to avoid unnecessary litigations.

d) Whether the CoC is required to take into account the fair value and liquidation value which is mandatorily required to be done by two sets of registered valuers?

No, there is no such requirement under the provisions of IBC. If the CoC is privy to such information, they can take an informed decision while considering the Sec.12A proposal. Comparison of the Sec.12A proposal comes into picture when the Adjudicating Authority or Appellate Authority gives a direction to the CoC to consider the Sec.12A proposal while the CoC has already approved a resolution plan under

Sec.30 or it is in the process of approving a resolution plan under Sec.30.

e) Where there is no resolution plan before the CoC, can the CoC require the RP to share the fair value and liquidation value available with the RP?

No. Regulation 35(2) clearly says that the RP shall provide the fair value and liquidation value to every member of the CoC, under confidentiality, after the receipt of resolution plans in accordance with the Code and the Regulations. A resolution plan under IBC is not the same as a Sec.12A proposal. Therefore, the CoC members have no authority to request the RP to share the valuation details for considering a Sec.12A proposal, when no resolution plan has been received by the RP.

Another view could be that the valuation exercise is mandated under the Code to provide a bench-mark to the CoC while considering resolution plans for approval. Even for examining a Sec.12A proposal in the form of a plan consisting of payments to various creditors under a settlement, the valuation figures would be relevant for the CoC members. What is the rationale in denying such valuation details to the CoC members who are expected to take into account all the stakeholders' interest? That too, when there is no other resolution plan on the table for consideration by the CoC. It makes no sense for the valuation to be done and kept safe. Therefore, it is felt that IBBI should think of amending the provisions of Reg.35(2) to share the valuation details with CoC members irrespective of any resolution plan being received or not.

One more dimension on this question could be that the lenders do undertake valuation of the security interests they have from the corporate debtor and independent of the valuation under IBC, they would have done the valuation exercise some time in the recent past. They can consider those numbers while taking the decision on the Sec.12A proposal.

However, in some cases where there are several lenders under a multiple banking arrangement and the corporate debtor has given different assets as security interest to various lenders, a consolidated picture might not be available before the individual lenders. A valuation report for the corporate debtor as a whole would be an ideal answer in that situation.

Relevance of Reg.39B of IBBI (IRPCP) Regulations

It may also be pertinent to mention here that the CoC is expected to make a best estimate of the amount required to meet the liquidation costs in consultation with the RP in the event an order is passed for liquidation under Sec.33. Reg.39B mandates the CoC, while approving a resolution plan or recommending liquidation of a corporate debtor, has to make an estimate for liquidation costs and also make a best estimate of the value of the liquid assets available with the corporate debtor and that if the liquid funds available are less than the estimated liquidation costs, the CoC shall approve a plan providing for contribution from the members. Therefore, in order to prepare the estimated liquidation costs, the valuation is essential. It is all the more a good reason for the RP to share the valuation reports with CoC under confidentiality, even if there is no resolution plan received by the RP.

f) Whether payment in settlement under Sec.12A proposal should come from the promoters or the corporate debtor itself?

The moment the corporate debtor is admitted into the CIRP, the IRP takes over the management and the powers of the board of directors are suspended. Therefore, all payments to be made by the corporate debtor will be approved by the IRP / RP. When the claims have been filed by the creditors, the corporate debtor making any payment as per the proposed settlement under Sec.12A would amount to preferential transaction which RP cannot approve when the corporate debtor continues to be under CIRP. However, when the Sec.12A proposal is approved by the CoC and finally approved by the Adjudicating Authority, the corporate debtor is relieved from the rigours of CIRP. Thereafter, payments under the scheme approved by NCLT may be from the corporate debtor or from any other source as specified in the Sec.12A proposal.

g) Whether the CoC enjoys the unbridled domain of "commercial wisdom" while it approves a Sec.12A proposal?

Various courts have upheld the commercial wisdom of the CoC while approving a resolution

plan which is in compliance with the provisions of IBC. However, there is no such provisions prescribed for a Sec.12A proposal. If the Adjudicating Authority is not convinced of the Sec.12A proposal, it can reject the application as well.

The wordings used in Sec.31 and Sec.12A are very different. In Sec.31, the Code says that if the Adjudicating Authority is satisfied that the resolution plan as approved by the CoC meets the requirements under IBC, it ***shall*** by order approve the resolution plan. Whereas in Sec.12A, it states that the Adjudicating Authority ***may*** allow the withdrawal of the application admitted under Sec.7 or 9 or 10.

Therefore, the Adjudicating Authority may examine the circumstances and the settlement terms as well before approving a Sec.12A application. NCLT Chennai, in Siva Industries & Holdings Private Ltd. case, rejected the settlement plan approved by the CoC and observed that the commercial wisdom of CoC does not come into picture while approving a Sec.12A proposal rather it is the judicial wisdom which needs to be satisfied. NCLAT upheld the above order of NCLT but on an appeal filed by the promoters, the NCLAT order has been stayed by the Supreme Court.

Public Announcement by IRP prior to constitution of CoC

Yet another issue in this context is that after the corporate debtor is admitted into CIRP, the IRP is mandated under Reg.6 to go for a public announcement within three days of NCLT order, calling for submission of claims against the corporate debtor. It is quite possible, the corporate debtor hurries to settle the dues of the applicant creditor even before the three days of CIRP admission and gets a "Form FA" submitted to the IRP. Whether IRP can withhold the public announcement in the wake of the abovesaid development or he should still proceed with the public announcement as the order of Adjudicating Authority allowing the withdrawal under Sec.12A might take some time since the application has to be listed and heard?

The very fact the corporate debtor rushes to settle with the applicant creditor is to prevent any further damage to its reputation and therefore, the moment a settlement has been arrived at and Form FA is delivered to the IRP, it is reasonable to think that the public announcement exercise should be put on hold. True, the corporate debtor still continues to be under CIRP until an order of NCLT is issued relieving it from the rigours of CIRP. But, the purpose of calling for claims is to ascertain the liabilities of the corporate debtor and to form the CoC. It would be imprudent to proceed with the CIRP proceedings when an application is already submitted by the IRP to the adjudicating authority under Sec.12A.

Therefore, the IRP is justified to put on hold causing the public announcement. However, the provisions of IBC do not specifically speak of such a situation. A suitable amendment to Reg.6 would be a welcome relief to the IRP to make things clear.

Withdrawal of CIRP proceedings pursuant to Settlement - Insolvency Law Committee (ILC) Report dated 26th March 2018

It may be relevant to highlight the discussions made in the Insolvency Law Committee Report issued in the month of March 2018 which formed the basis for inserting Sec.12A in IBC. The ILC would deliberate on the objective of the Code as encapsulated in the BLRC Report was deliberated that the design of the Code is based on ensuring that "all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution." The ILC would then agree that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors. The consistent pattern that emerged was that a settlement may be reached amongst *all* creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor.

The above remarks and the subsequent suggestion by the ILC paved the way for the amendment made in IBC by way of insertion of

Sec.12A with effect from 6th June 2018 which calls for a larger voting share of 90% for approving the withdrawal application as against a 66% voting share required for approval of a resolution plan under IBC.

Conclusion

Seen from the above context, it will only be proper to say that the CoC has to take into account the interest of all the creditors and not just the applicant creditor when considering a Sec.12A application. While an exit option has been provided in the Code for corporate debtors to wriggle themselves out from CIRP proceedings, more specific provisions would be essential in order to avoid ambiguities in the discharge of responsibilities by the IRP, RP and the CoC. It may be noted that as on 31st March 2022, 586 cases have been closed by withdrawal out of the total 5,258 admitted CIRP cases (source: IBBI Newsletter 31.3.2022). Therefore, it would be prudent to clearly spell out the role of the CoC to examine the kind of settlement happening and the viability thereof in order to prevent the same corporate debtor being dragged into CIRP again by some other creditor who also has the right to proceed against the corporate debtor under Sec.7 or 9 of IBC. Similarly, the role of IRP or RP in respect of Sec.12A withdrawal application could be laid down clearly which will minimise discretionary action which will make them vulnerable to disciplinary proceedings by the IPA or IBBI.

Did you know?

The world wastes about 1 billion metric tons of food each year.

Food waste is a huge problem. How big? About 931 million metric tons. That's how much food that researchers with the United Nations estimate was wasted in 2019, according to the Food Waste Index Report 2021, which surveyed 54 countries, finding that the majority of wasted food (61%) comes from homes while restaurants and other food services produce 26% of wasted food. Grocery stores make up just 13% of food waste.

Application of provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ["SEBI (SAST)"] to a listed company undergoing Corporate Insolvency Resolution Process.

The provisions of SEBI SAST Regulations are applicable to acquisition of shares or voting rights of a Ccompany, whose shares are listed on a stock exchange.

Pursuant to the provisions of the Regulation 3(2), no person shall acquire shares or voting rights in a listed company, 25% or more of the voting rights in such listed company unless the person makes a public announcement of an open offer for acquiring shares of such listed company in accordance with the provisions of SEBI SAST Regulations.

However, general exemption under Regulation 10 is given to an acquisition pursuant to a resolution plan approved under the provisions of Insolvency and Bankruptcy Code, 2016. Further, the restriction for acquisition above the maximum permissible non-public shareholding also has been exempted [Proviso to Regulation 3(2)], if the same is pursuant to a resolution plan as stated above.

Court Orders

CGRF Legal Team

STATE BANK OF INDIA
Vs
MAHENDRA KUMAR JAJODIA
Civil Appeal No(s). 1871-1872 of 2022
Supreme Court of India - dated06.05.2022

Facts of the case

This is an application filed by the petitioner/Financial Creditor u/s. 95(1) of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Insolvency Resolution Process against the Personal Guarantor before NCLT Kolkata Bench. No CIRP or Liquidation process was pending against the Corporate Debtor because of approval of the Resolution Plan by the CoC. NCLT declared that Section 60(2) of the Code requires for initiating an Insolvency Resolution Process against the guarantor there must be CIRP or Liquidation process pending against the principal borrower/Corporate Debtor. Hence, this Application was rejected by NCLT on 05.10.2021.

(Image Source: website)

NCLAT, New Delhi

An Appeal was filed against the NCLT, Kolkata order dated-05.10.2021. Learned Counsel of Appellant is of the view that NCLT has not correctly interpreted Section 60(2) of Insolvency and Bankruptcy Code, 2016. It is submitted that Application was fully maintainable under Section 60(1) of the Code despite there being no pendency of any Corporate Insolvency Resolution Process in National Company Law Tribunal.

Learned Counsel for the Respondent refuting the above submissions brought out that Section 60(2) of the Code clearly provides that Corporate Insolvency Resolution Process and Liquidation Process if pending before the NCLT, an Application relating to the Corporate Insolvency Resolution Process of the Corporate Guarantor and Personal Guarantor can be filed before the NCLT.

Section 60 (1) & (2) which falls for consideration in the present case is as follows:

Section 60: Adjudicating Authority for corporate persons

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

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

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

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

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

Supreme Court

The apex court has dismissed the appeal against the NCLAT order and reaffirmed the right of lenders to decide their recourse against borrowers/obligors independently, without linking the exercise of rights in insolvency against the guarantor to initiation of insolvency against the borrower.

The apex court has ruled that it does not want to interfere in the NCLAT order, implying that banks can initiate insolvency proceedings against personal guarantors even when no IBC proceeding exists against the corporate debtor.

The Appeal was dismissed.

MR. NITIN BHARAL & ORS.
Vs.
STOCKFLOW EXPRESS PVT. LTD.
Company Appeal (AT)(INS) 454 of 2022
NCLAT, New Delhi – dated 04.05.2022

On an application filed by Interim Resolution Professional ('IRP') seeking directions against the promoters and directors of the corporate debtor to make good the losses caused on account of the fraudulent transactions entered into by them, the Hon'ble National Company Law Tribunal, New Delhi allowed the Application and concluded that the alleged transactions come under the category of fraudulent transactions. It was observed that suspended board of directors / promoters were having financial control in the affairs of the corporate debtor when the transaction took place. Therefore, the adjudicating authority directed the promoters to contribute the amount which was misused/misappropriated by them to the account of corporate debtor within 3 months from the date of order. Apart from the above direction, NCLT directed the IRP to institute proceedings under Section 69 of IBC against the suspended board of directors / promoters.

Against the above order of NCLT, New Delhi, the suspended board of directors / promoters have filed an appeal before National Company Law Appellate Tribunal.

Facts of the Case:

1. Mr. Nitin Bharal, Mr. Narendra Bisht, Mr. Rajeev Sharma, Mr. Yashpal Arora (Appellants 1 to 4) are the promoters of corporate debtor who collectively held 100% shareholding. Apart from the promoters, Mr. Sujeet Kumar Chaudhary was also a director of the company
2. On 27.12.2018, Mr. Shiv Kumar Chaturvedi was appointed as director of the company
3. On 31.12.2018, Appellants 1 to 4 resigned from their posts.
4. In the month of August 2019, Mr. Sujeet Kumar Chaudhary passed away leaving behind only one director viz., Shiv Kumar Chaturvedi.
5. Corporate Insolvency Resolution Process was initiated against the corporate debtor by NCLT on 26.11.2019.
6. On an application filed by IRP against the ex-directors / promoters under Section 66 of IBC, it was submitted that transaction auditor was not able to submit his report due to non-cooperation from the promoters in sharing important documents and information. Further, IRP stated that in view of such non-cooperation, no supporting report from the transaction auditor was annexed with the Application under Section 66.

(Image Source: website)

Nature of Transaction:

1. IRP stated that balance sheet of the corporate debtor as on 31.03.2017 showed that the receivables were to the sum of Rs. 2,53,62,176/- and the bad debts written off was Rs. 1,25,37,262/-. IRP contended that Appellants 1 to 4 were directors of the corporate debtor when these accounts were finalized.
2. IRP confirmed that the shares held by the promoters were sold to a related concern on 20.10.2017, when the Appellants were the directors of the corporate debtor. It was noted that subsequent to the resignation by directors, the related party company sold a part of its shareholding in the corporate debtor back to the promoters.
3. IRP submitted that two debtors of the CD owed a sum of Rs. 42,33,304/-. However, it is stated that those debtors paid a sum of Rs. 3 Lakhs in cash as full and final settlement to the corporate debtor.
4. A sum of Rs. 10,71,250/- was due from an entity to the corporate debtor. This amount was written off.
5. IRP averred that the promoters have received cash from debtors, issued large amount of credit notes and their debts were written off with an intention to harm the interests of the creditors.
6. IRP wrote to various banks in which CD has its account and confirmed that the signatures in the cheques matched with that of the directors of the company. All these cheques were issued after the Appellants resigned as directors from the corporate debtor.

(Image Source: website)

Appellants contended that NCLT has erroneously allowed the application in the absence of any transaction audit report as no audit was conducted. Further, Appellants stated that the Application under Section 66 of the Code was made by the IRP only upon his own analysis. Appellants submitted that the transactions took place after their resignation from the company.

IRP submitted that there was no report from the transaction auditor due to the non-cooperation by the promoters / appellants in providing information.

Decision of NCLAT:

1. NCLAT observed that Section 18(a) clearly specifies that the IRP shall collect all information relating to the assets, finances and operations of the 'Corporate Debtor'. As per the provisions under the Code, in the event of suspicion of any fraudulent transaction, it cannot be said that the IRP did not have the power to collect information and furnish a detailed analysis to the Adjudicating Authority.
2. NCLAT noted that in the absence of relevant grounds, the promoters failed to explain the objective of making share transactions with the related party company where they were all common directors.
3. NCLAT held that the bank transactions were made by the Appellants post their resignation squarely falls within the ambit of Section 66(1).
4. It was observed that there were no reasons on how the money owed by debtors for Rs. 44,33,304/- was settled for a mere payment of Rs. 3 Lakhs to the corporate debtor.

In view of the above NCLAT held that if IRP / RP has prima facie suspicion of any fraudulent transactions, as defined under the code, he has a recourse to approach the Adjudicating Authority for necessary action.

Further, NCLAT reiterated that the contention of appellants that NCLT has decided the Application under Section 66 in the absence of audit report is not sustainable.

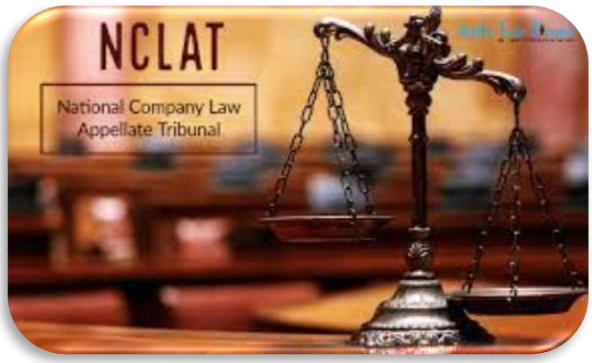
For the aforesaid reasons, NCLAT upheld the decision of NCLT and dismissed the appeal.

INDIAN BANK
Vs.
CHARU DESAI (RP) & ANOTHER
Company appeal (AT) (Insolvency) no. 644 of 2021
& I.A. No. 2940 of 2021 & I.A. No. 193 of 2022
National Company Law Appellate Tribunal,
Principal Bench, New Delhi -dated 06.05.2022

This Appeal had been filed by Indian Bank, a dissenting financial creditor, challenging the order dated 19.05.2021 passed by the NCLT Mumbai Bench approving the Resolution Plan submitted by the Resolution Applicant- 'Dev Land & Housing Private Limited'.

THE BRIEF FACTS OF THE CASE AND SEQUENCE OF THE EVENTS: -

Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor- 'GB Global Limited' (formerly Mandhana Industries Limited) was initiated by order dated 29.09.2017. Liquidation value on date of CIRP was found to be INR 307.08 Crores. On 30.11.2018, the Resolution Plan of one 'Formation Textiles LLC' ("FTL") in respect of the Corporate Debtor was approved. FTL took over the management and control of the affairs of the Corporate Debtor on 31.01.2019. However, after running the affairs of the Corporate Debtor for several months, it could not implement the Resolution Plan. On 05.12.2019, the Adjudicating Authority passed an order directing handing over of possession of the Corporate Debtor to the Committee of Creditors (CoC) which in turn will be handed over to the Resolution Professional of the Corporate Debtor. On 08.01.2020, FTL handed over the possession of the Corporate Debtor to the CoC and Resolution Professional.



(Image Source: website)

On 05.02.2020, the Adjudicating Authority allowed Resolution Professional to invite fresh Resolution Plans from Prospective Resolution Applicants. During the 32nd CoC meeting held on 27.08.2020, CoC members unanimously agreed that a more recent valuation report should be obtained by the Resolution Professional and would be used for all purposes in connection with the CIRP of the Corporate Debtor. The Resolution Professional obtained a fresh valuation report as on 31.07.2020 which liquidation valuation came as INR 184.93 Crores.

The Resolution Plan dated 10.09.2020 was received from the Respondent No.2. In the 38th CoC meeting held on 07.12.2020, discussion on the revised Resolution Plan was held and decided that final revised plan and distribution mechanism shall be put for voting. Pursuant to the above Resolution Plan of Respondent No.2 was put to e-voting from 09.12.2020 to 31.12.2020 and was approved by 67.01% voting share of the CoC. The Appellant- Indian Bank having 11.11% voting share in the CoC had cast a dissenting vote on the Resolution Plan of Respondent No.2. Pursuant to the CoC's approval, the Resolution Plan was placed before the Adjudicating Authority by the Resolution Professional by I.A No. 19 of 2021. On 04.01.2021, the Appellant raised certain queries regarding the plan value calculated by the Respondent No.1 in the 39th CoC meeting held on 01.01.2021. The Respondent No.1 by e-mail dated 08.01.2021 informed the Appellant that the value payable to the Dissenting Financial Creditors will be calculated on the assumption of the liquidation cost and the same will be in accordance to Section 53(1) of the Code. On 19.05.2021, the Adjudicating Authority approved the Resolution Plan. Aggrieved by the value assigned to the Appellant in the Resolution Plan, this Appeal has been filed.

From the submissions of the counsels the court raised the following questions which arise for consideration in this Appeal:

(i) Whether the decision of the CoC taken in 32nd CoC meeting held on 27.08.2020 to obtain a more recent valuation report and reliance on such valuation report as on 31.07.2020 is contrary to the provisions of the Code and Regulations framed thereunder?

(ii) Whether the liquidation value ascribed by Resolution Professional and CoC to the Appellant as per Section 53 of the Code violates any provisions of the Code or Regulations?

(iii) Whether the allocation of the amount to the Appellant, a Dissenting Financial Creditor is not in accordance with Section 30(2)(b) of the Code?

The Tribunal, after hearing the parties, clarified the questions as under:

Question no. 1: Whether the decision of the CoC taken in 32nd CoC meeting held on 27.08.2020 to obtain a more recent valuation report and reliance on such valuation report as on 31.07.2020 is contrary to the provisions of the Code and Regulations framed thereunder:

Clarification of the Tribunal:

We note that under the CIRP Regulations, no power has been given to CoC to call for any valuation of fair and liquidation value though we don't think that there is any bar under IBC provisions for the CoC to call for a fresh valuation report. We, thus, do not find any substance in the submission of the Counsel for the Appellant that fresh liquidation value could not have been obtained by CoC and we further do not accept the submission of the Counsel for the Appellant that distribution consequent to liquidation value as on 31.07.2020 is not in accordance with the Law.

Question no. 2:

Whether the liquidation value ascribed by Resolution Professional and CoC to the Appellant as per Section 53 of the Code violates any provisions of the Code or Regulations:

Clarification of the Tribunal:

With regard to the above submission, suffice to note that distribution to dissenting Financial Creditors and other Financial Creditors have been discussed, deliberated and approved by the CoC. What the Financial Creditors shall be paid was the query raised and discussed and in the meeting of the joint lenders held on 07.12.2020, the revised distribution after considering increase of Rs.6 Crores by Resolution Applicant was noticed. In the joint lenders' forum meeting, Indian Bank expressed its agreement to distribution as per revised scenario-1 under which the Indian Bank was proposed INR 40.39 Crores. In the CoC meeting held on same date i.e. 07.12.2020, Agenda Item No.6 which was to finalize the Resolution Plan for distribution where details of allocation as per each lenders liquidation value was placed.

Question no. 3:

Whether the allocation of the amount to the Appellant, a Dissenting Financial Creditor is not in accordance with Section 30(2)(b) of the Code:

Clarification of the Tribunal

When the distribution is ultimately approved by e-voting by the CoC, the approved distribution value to each lender including the dissenting Financial Creditors, is taken by the CoC in its commercial wisdom, which cannot be interfered with by the Adjudicating Authority or by this Appellate Tribunal since it has not been placed before us that the approval of the Resolution Plan by the CoC and the Adjudicating Authority violates any statutory provision. We are satisfied that the allocation to the Appellant, a dissenting Financial Creditor, is not in contravention of Section 30(2)(b) (ii) r/w Section 23.

Final judgement

All dissenting creditors have been allotted amount of 19% of their admitted amount without there being any discrimination in the dissenting creditors. It is relevant to notice that the Appellant is not the only dissenting creditor. The Appellant himself has brought on the record minutes of 39th meeting of CoC held on 01.01.2021 which indicate that apart from Indian Bank, Bank of India, Union Bank of India, Punjab National Bank, Karur Vyasa Bank and Canara Bank were also dissenting creditors. All dissenting creditors have been provided same percentage as against the admitted claim. In the 39th CoC meeting held on 01.01.2021, where the voting result of the Agenda on 38th meeting of the CoC came for consideration. The final indicative lender wise distribution presented were noticed in minutes. The proposed plan value distribution to the Appellant was INR 40.39 Crores whereas indictive plan value distribution was INR 42 Crores.

In M/s. Amit Metaliks Limited, the Hon'ble Supreme Court has dismissed the Appeal by a dissenting financial creditor questioning the allocation to a dissenting financial creditor. NCLAT took rule of the above law laid down by the Hon'ble Supreme Court where the apex Court has categorically held that what amount is to be paid to different classes or subclasses of creditors in accordance with the provisions of the Code and to a dissenting secured creditor is essentially the commercial wisdom of the CoC. Following law laid down by the Hon'ble Supreme Court, as noted above, NCLAT did not find any good ground to interfere with the order of the Adjudicating Authority approving the Resolution Plan and Appeal was dismissed.

SUBODH KUMAR AGARWAL
THE LIQUIDATOR OF NIPPON ALLOY LTD
(FORMERLY NARAYANI ISPAT LIMITED)
VS
SOUTH INDIAN BANK LIMITED (RESPONDENT NO. 1) &
UNION BANK OF INDIA (RESPONDENT NO. 2)
NCLT , Kolkata – dated 09.05.2022

(AA directs the Secured Creditor to handover the possession of the assets as they are forming part of the security interest)

An Application was filed by the Liquidator seeking a direction be issued to the Respondents (Secured Financial Creditors) for handing over the possession of assets of the Corporate Debtor and for contributing to the liquidation cost on proportionate basis incurred till date.

The facts of the case are that two Secured Financial Creditors of the Corporate debtor, named South Indian Bank (being Respondent No. 1) and Union Bank of India (being Respondent No. 2) filed the Claim in Form D before the Applicant, and chose not to relinquish their security interest. The Liquidator had communicated to Respondents No. 1 & 2 via several mails to handover the assets as the 180 days had elapsed and that as per regulation 21A of the IBBI (Liquidation Process) Regulations 2016, the Respondents were required to pay the liquidation process cost and also handover the possession of the property given to them as security to the Liquidator. The period of one year expired on 7th December 2021.

However, due to non-cooperation by the Respondents and non- compliance of Regulations by the Respondents, the liquidation process was getting delayed.

The Hon'ble Tribunal had observed that there were two Respondents having charge over two different sets of assets of the Corporate Debtor. Respondent No. 1, after submitting Form D on 29th December 2020, took symbolic possession of the assets under its charge on 14 June 2021 and sold the said assets by public auction. Respondent No. 1 invited bids by issuing an auction sale notice dated 28th September 2021 and declared the successful bidder on 6th November 2021. Meanwhile on 30th September 2021, the Applicant filed the present application. In this case, the Respondent No. 1 failed to realise the security interest within 180 days. However, due to an order of attachment dated 20th February 2015 having been issued by the Government of Andhra Pradesh on the said assets, a writ petition being W.P. No. 27270 of 2021 has been instituted by the Respondent No. 1, on 17th November 2021, before the Hon'ble High Court of Andhra Pradesh. In light of the said writ petition being sub judice, no action can be taken by the Adjudicating Authority in this regard till the disposal of the said writ petition. Also, that Respondent No. 2, in spite of having been given ample opportunity to file a reply- affidavit, has failed to do so. However, the communication that took place between the Applicant and Respondent No. 2 on 28th June 2021 indicates that Respondent No. 2 sold one of the four properties of the Corporate Debtor but failed to sell the rest even after six months from commencement of liquidation. As such, the rest of the assets under the charge of the Respondent No. 2 should become a part of the liquidation estate.

The Hon'ble Tribunal took note of the Reg. 21A of the Liquidation Process Regulation which provides that where a secured creditor does not relinquish security interest and proceeds to realise its security interest, it shall, within ninety days from the liquidation commencement date, pay to the liquidator, (a) Insolvency resolution process costs and liquidation costs in full; (b) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date, as it would have shared in case it had relinquished the security interest. And therefore observed that, both Respondents No. 1 & 2 are bound to pay to the liquidator the abovementioned sums.

(Image Source: website)

Further, Regulation 21A also provides that where a secured creditor proceeds to realise its security interest, it shall pay the excess of the realized value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date. This indicates that the realization of assets needs to be completed within 180 days. In the instant application, wherein the liquidation commencement date was 8 December 2020, the realization of assets was to be completed within 6 June 2021.

Thus inter alia, the Respondent No. 2 was directed to handover the possession of the Asset to the Liquidator, and also was directed to pay to the Liquidator the excess of the realised Value of the said Asset.

Relaxation from compliance with certain provisions of the SEBI (Listing Obligations and disclosure Requirements) Regulations, 2015 with the effect from 13th May 2022-

The following amendments have been made by the SEBI with effect from 13th May 2022 in the Listing Obligation and Disclosure Requirements Regulations, 2015-

1.MCA vide Circular dated May 05,2022 has extended the relaxations from dispatching of physical copies of financial statements for the year 2022 (i.e. till December31, 2022). In view of the same, SEBI has also been receiving multiple representations from listed companies, seeking dispensation from requirements of sending hard copy of annual reports to shareholders.

2.Considering the above, it has been decided to provide relaxation upto December 31, 2022, from Regulation 36(1)(b) of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 ("LODR Regulations") which requires sending hard copy of annual report containing salient features of all the documents prescribed in Section 136 of the Companies Act, 2013 to the shareholders who have not registered their email addresses. Further, the notice of Annual General Meeting published by advertisement in terms of Regulation 47 of the LODR Regulations, shall contain a link to the annual report, so as to enable shareholders to have full access to the full annual report.

3.It is however emphasized that in terms of Regulation 36(1)(c) of LODR Regulations, listed entities are required to send hard copy of full annual report to those shareholders who request for the same.

4.Further, the requirement of sending proxy forms under Regulation 44(4) of the LODR Regulations is dispensed with upto December 31, 2022, in case of general meetings held through electronic mode only.

5.This Circular shall come into force with immediate effect. The Stock Exchanges are advised to bring the provisions of this circular to the notice of all listed entities and also disseminate on their websites.

6. The Circular is issued in exercise of the powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 read with regulation 101 of the LODR Regulations.

PAN made compulsory for more transactions

Insertion of new Rules 114BA and 114BB

Opening of a current account or cash credit account by a person with a bank or post office needs to quote PAN. The Central Board of Direct Taxes (CBDT) has expanded the requirement of Permanent Account Number (PAN), the identification number issued by the tax authority, to more transactions as part of efforts at closer monitoring of economic activity. As per this, cash deposits or withdrawals exceeding Rs.20 lakh in one or more bank account or post office in a financial year would need to quote the PAN or Aadhaar number. The Rs.20 lakh threshold is for the aggregate of all deposits or aggregate of all withdrawals in a year. This requirement also covers deposits and withdrawals from cooperative banks.

In addition, opening of a current account or cash credit account by a person with a bank or post office needs to quote PAN, according to Income–tax (Fifteenth Amendment) Rules notified on 10.05.2022. The notification also says that any person who intends to make these transactions should apply for a PAN at least seven days before the date on which the transaction is intended to be made.

Already, there is a requirement for quoting PAN on bank deposits of over Rs.50,000 made in one day and on a host of other transactions like payment of over Rs.50,000 for purchase of mutual funds, debentures, foreign exchange and for settling hotel bills at any one time. The annual threshold of Rs.20 lakh deposit or withdrawal suggests that one cannot breach this threshold without quoting PAN by making too many smaller deposits below the daily threshold of Rs.50,000 without PAN. The expansion of the use of PAN signals the income tax department's increased monitoring of economic activity in the country. This enables the authorities to assess whether the spending pattern of individuals and entities as well as their assets match with their reported income.

Already, the tax department makes available to the taxpayer a list of transactions reported to it by third parties so that assesses do not miss out any income while filing their tax returns. According to Mitesh Jain, partner at law firm Economic Laws Practice, the new rules will provide additional data points to the tax authorities and such transactions may be reflected in the 'Insights' portal. Project Insights is the income tax department's integrated data warehousing and business intelligence platform meant to encourage voluntary compliance and deter non-compliance. "This notification has widened the reporting and compliance framework for taxpayers and increased the information monitoring by the tax authorities," said Jain. The new rules also put the onus of ensuring compliance on both the persons who make deposits as well as on the recipient—banks, cooperative banks and the Postmaster General.

These changes in the Income Tax Rule, 1962 shall come into effect after the expiry of 15 days from the date of notification in the Gazette.

https://incometaxindia.gov.in/pages/communications/index.aspx

Source: CBDT Notification dt. 10.05.2022

Insolvency Bankruptcy Board of India (Liquidation Process) Regulations, 2016-- Recent Amendments in the Regulations

The following amendments have been made with effect from 28th April 2022 [in IBBI (Liquidation Process) Regulations,2016]

As per the amendments the following explanation were inserted after the regulations 2A, 21A, 31A of the IBBI (Liquidation Process) Regulation 2016.

"Explanation- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendments) Regulations 2019".

A brief note on Regulations which have been amended are as follows: -

Regulation 2A of IBBI of IBBI (Liquidation Process) Regulation 2016. Contribution to Liquidation Costs

Reg. 39B of CIRP states that while approving the resolution plan, the CoC shall make an estimate with regard to liquidation costs in case the company goes into liquidation. In case where the estimated value of the assets of CD is lesser than the estimated liquidation cost, the CoC shall approve a plan which provides for the meeting the difference. If the CoC did not approve the plan in the above case, Reg. 2A comes to rescue. Reg 2A provides that the liquidator can approach Financial Creditors for the difference in the Liquidation cost over the liquid asset of the CD in the ratio of their claims (debts owned). Reg 2A requires the contribution shall be deposited in an escrow account in a scheduled bank account within 7 days of the Liquidation Commencement date.

Regulation 21A of IBBI (Liquidation Process) Regulation 2016. Presumption of Security Interest

A Secured Creditor shall specify his decision to relinquish its security in the form while submitting his claim to the liquidator. If he relinquishes the security, the asset will form part of liquidation estate or else the secured creditor can realise the asset on his own. If the creditor has not conveyed his decision in relation with relinquishment within 30 days from the date of commencement, the assets will automatically form part of liquidation estate. If the secured creditor proceeds to realise on his own then the FC shall have to pay the Insolvency Resolution Process costs, Liquidation cost and workmen's due for the period of twenty-four months preceding the liquidation commencement date to the liquidator within 90 days from the liquidation commencement date. The surplus amount (in excess of admitted claim amount) realised from date of sale of security interest shall be paid to the liquidator. If the FC fails to comply with the above regulation, the security interest shall become part of Liquidation estate.

Regulation 31A of IBBI (Liquidation Process) Regulation 2016.Stakeholder's Consultation Committee

The Liquidation shall constitute a consultation committee within 60 days from the liquidation commencement date to advise him on matters relating to sale of asset. The composition of consultation committee shall be formed according to the regulation. The stakeholder shall nominate their representative in each class. If they fail to nominate their representative then it should be done by the class of stakeholder, who are present by majority of voting in the meeting. The representatives shall have access to records and information for them to advise on matters. The liquidator shall convene a consultation committee if he considers it necessary or if there a request from the representatives forming at least 51% of representatives of consultation committee. The liquidator shall chair the meeting and record the minutes of the meeting. The liquidator shall place the recommendations of the CoC in the consultation committee. The committee shall express their willingness or advice by 66% present and voting. These recommendations are not binding on the liquidator. If the liquidator decides otherwise he can do accordingly by keeping in writing the reasons for such deviation.

Regulation 44 of IBBI (Liquidation Process) Regulation 2016. Completion of Liquidation

The Liquidator shall complete the process within one year from the liquidation commencement date, irrespective of pendency of application on avoidance transaction before AA. Except for sale as a going concern wherein there are additional 90 days for the process to get completed. If the liquidator fails to liquidate within one year, he shall submit a report in this regard and seek additional period for him to complete the process.

After Regulation 44, the following explanation is inserted by this Amendment

"Explanation- In relation to the liquidation processes commenced prior to the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendments) Regulations 2019, the requirements of this regulation as existing before such commencement, shall apply".

The link for the same- IBC Laws - IBBI amends Liquidation Process Regulations clarifying applicability of Regulation 2A, 21A, 31A and 44 of the Liquidation Process Regulations, 2016 - N. No. IBBI/2022-23/GN/REG082 dated 28.04.2022

Recoveries by Financial Creditors under IBC shrink to 33%,

Period	Realisation by Financial Creditors as a % of their claims admitted	Realisation by Financial Creditors as a % of their liquidation
Up to March 2020	45.96	183.37
Up to June 2020	44.70	183.59
Up to September 2020	43.56	185.15
Up to December 2020	39.80	181.70
Up to March 2021	39.30	179.90
Up to June 2021	36.00	167.95
Up to September 2021	35.89	166.57
Up to December 2021	33.10	165.79
Up to March 2022	**32.90**	**171.40**

As of March 31, 2022

Number of CIRPs Admitted	CIRPs Closed & Ongoing		LIQUIDATION U/S 33 OF IBC
5258	Closed on Appeal or settled	731	**1609**
	Withdrawn	586	
	Rescued through resolution plan	480	
	Ordered for commencement of Liquidation	1609	
	Total CIRP closed	**3406**	
	On going	**1852**	

As of March 31, 2022

PG TO CD	APPLICATIONS FILED UNDER PG TO CD U/S 94 & 95 OF IBC		APPLICATIONS FILED UNDER VOLUNTARY LIQUIDATION U/S 59 OF IBC	Admitted/ Withdrawn/ In process		PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS U/S 54A OF IBC
926	Debtors u/s 94	82	**1223**	Admitted	644	**2**
	Creditors u/s 95	844		Withdrawn	12	
	Total	**926**		In process	567	
				Total	**1223**	

Source : IBBI

Find the words!!!

CLUES	WORDS
1. _____ is a benefit to be given by the employer to the employee in consideration of his past services for a period of not less than 5 years.	
2. The Committee of Creditors in a corporate insolvency resolution process of a corporate debtor with no financial creditors comprises of _____ operational creditors.	
3. Information Utility preserves information up to____ years from the date of closure of loan.	
4. In CIRP, matters of law are adjudicated by the adjudicating authority, while commercial matters are left to the wisdom of____.	
5. What kind of food is Penne?	
6. Who is a person engaged in the study or professional of archaeology	

TOP PAS GRA 18 8

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Answers

1. GRATUITY 2. TOP 18 3. 8 4. COMMITTEE OF CREDITORS 5. PASTA 6. ARCHAEOLOGIST

OUR SERVICES

Providing Services to the Investors / Bidders / Corporates:

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

Providing supporting services to IPs:

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

Independent Advisory Services:

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

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