THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT
PROFESSIONAL PROGRAMME

(NEW SYLLABUS)

for

INSOLVENCY - LAWS AND PRACTICE

MODULE 3

PAPER 9.8

(Relevant for students appearing in June 2022, Examination)

(Students are advised to refer the latest study material for Insolvency-Law and Practice. The same is available at ICSI website weblink:
https://www.icsi.edu/media/webmodules/151120221_Module_3_Paper_9_8_ILP_Book_11_11_2021_1.pdf)

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Lesson 2-Introduction to Insolvency and Bankruptcy Code

1. Insolvency and Bankruptcy Board of India (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020 validity extended till 31st March, 2022

In exercise of powers under section 196(1)(aa) of the Code read with regulation 5(b) and clause (ba) of sub-regulation (2) of regulation 7 of the IBBI (Insolvency Professionals) Regulations, 2016 and clauses (a) and (e) of sub-rule (2) of rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017, the Insolvency and Bankruptcy Board of India extended the validity of the Insolvency and Bankruptcy Board of India (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020 till 31st March, 2022.

For more details visit:
https://ibbi.gov.in/uploads/legalframwork/58782cc53126e4e8cfc18103d7d5798d.pdf

2. Case laws on Insolvency and Bankruptcy Code

a) Constitutionality of the Code

In the matter of ***Innoventive Industries Ltd. v. ICICI Bank,*** *t*he Supreme Court for the first time explained the paradigm shift in law by virtue of the newly enacted Insolvency and Bankruptcy Code, 2016 which consolidates and amends all the laws relating to the insolvency and bankruptcy process in India.

Facts of the case

ICICI Bank had taken Innoventive Industries Ltd. to NCLT for the recovery of its due as the company had defaulted on loan repayment. The NCLT had given a verdict in favour of the ICICI Bank, which Innoventive Industries challenged in the National Company Law Appellate Tribunal (NCLAT), where it received yet another setback. The company later filed an appeal in the Supreme Court seeking relief under the Maharashtra Act, which states that if a company is facing bankruptcy, protection needs to be provided for the employees.

With respect to the Code, being acknowledged as an exhaustive law on the point is definitely a very progressive step. It also, now brings in more clarity that the provisions of the Code will have supremacy over every other law, whenever and wherever any conflict arises On a bare reading of the judgement, it seems that the case involved more adjudication on grounds related to Constitutional Law than on the Code. This case related to the first-ever application filed for initiating insolvency proceedings under the new Code. The Court was cognizant of the fact and hence wanted to settle the law so that all 'Courts and Tribunals take notice of the paradigm shift in the law'.

The case involved contradictory provisions in the Code and a state law of Maharashtra state, Maharashtra relief undertakings (Special Provisions) Act, 1958. This state law provided for overtaking of industries by the state by declaring them 'relief undertakings'. Such overtaking can be done through government notifications to that effect under the Act. This is done to protect employment of the people who are working in such an undertaking.

The Code instead provides for overtaking of an undertaking's business by an 'Insolvency Professional' through a committee of creditors. In the instant case, insolvency application was filed against Innoventive Industries which later claimed to be a relief undertaking under the Maharashtra Act. This brought the two legislations on a collision course, for the simple reason that enforcement of one will hinder the enforcement of the other.

Supreme Court dealt with the constitutional law doctrine of repugnancy. This doctrine stems from the operation of Article 254 of the Constitution. As per this doctrine, whenever central and state laws are framed on the same subject and are contradictory to each other, it is the central law which prevails and the state law is rendered void.

The appeal to the Supreme Court, hence involved two major questions. One was, whether the petitioner can seek relief under the Maharashtra Act at the cost of the Code. The second was, whether both the laws are repugnant to each other.

Invoking a lot of international cases, especially of the Commonwealth countries and previous judgments of the Supreme Court, the bench ruled that there is indeed repugnancy between the two laws. The court held that even if the two legislations are framed on different entries of the concurrent list, the Central law will always prevail if it comes in conflict with the State law. The State law, therefore was held inoperable to the extent that it was in contradiction to the Code.

The court delved into great detail of the provisions of the Code and held it to be intended as an 'exhaustive legislation' by the Parliament, to cover the whole field of its operation. In such instances involving an exhaustive law, even though the State law may not be in strict violation of the Code, it will even then be rendered inoperative to give way to implement the exhaustive law on the point. With respect to the Code, being acknowledged as an exhaustive law on the point is definitely a very progressive step. It also, now brings in more clarity that the provisions of the Code will have supremacy over every other law, whenever and wherever any conflict arises.

Lesson 3-Corporate Insolvency Resolution Process

1. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021

According to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021, the committee and members of the committee in discharge of its functions and exercise powers under the Code and regulations in respect of corporate insolvency resolution process, shall be in compliance with the guidelines as may be issued by the Board.

The amendment seeks to address delays in CIRP such as repeated issue of expression of interest, numerous modifications in request for resolution plans and iterations of modifications in the resolution plan and even consideration of unsolicited resolution plans.

1. Sub-regulation (1A) under regulation 17 is inserted:

"(1A) The committee and members of the committee shall discharge functions and exercise powers under the Code and these regulations in respect of corporate insolvency resolution process in compliance with the guidelines as may be issued by the Board."

2. Sub-regulation (4A) is inserted under regulation 36A(4):

"(4A) Any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made:

Provided that such modification shall not be made more than once."

3. Proviso to regulation 36B(5) is inserted: *"Provided that such modifications shall not be made more than once."*

4. Substitution of sub regulation (1A) under regulation 39:

"(1A) The resolution professional may, if envisaged in the request for resolution plan-
(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or
(b) use a challenge mechanism to enable resolution applicants to improve their plans.

(1B) The committee shall not consider any resolution plan-
(a) received after the time as specified by the committee under regulation 36B; or
(b) received from a person who does not appear in the final list of prospective resolution applicants; or
(c) does not comply with the provisions of sub-section (2) of section 30 and sub-regulation (1)."

One of the cardinal objectives of the Code is 'value maximisation'. To achieve such an objective and to arrive at resolution of a firm it is understood that sufficient freedom to choose an option must be provided to the stakeholders wherever required. The challenge mechanism can be an additional option available with the stakeholders under the CIRP and will improve transparency and drive maximization of value.

For more details visit:
https://ibbi.gov.in/uploads/legalframwork/57c7722e3ebb1364eac924f213111814.pdf

2. Final Panel of IPs prepared in accordance with 'Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (second) Guidelines, 2021

Insolvency and Bankruptcy Board of India (IBBI) prepared panel of IPs for appointment as: Interim Resolution Professional (IRP) in a corporate insolvency resolution process under section 16(4); Liquidator in a liquidation process under section 34(6); Resolution Professional (RP) in an individual insolvency resolution process under section 97(4) or 98(3); and Bankruptcy Trustee (BT) in a bankruptcy process under section 125(4), 146(3) or 147(3), for the period of January 01, 2022 - June 30, 2022. The Panel has been prepared in accordance with the 'Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2021'.

At the time of reference/ directions received from the AA, the Board does not have information about the volume, nature and complexity of an insolvency or bankruptcy process and the resources available at the disposal of an IP. In such a situation, the Board is unlikely to add much value by recommending an IP for the process. Further, it takes some time for a reference or a direction from the AA to reach the Board. The Board may take up to ten days to identify an IP for the purpose. It also takes some time for the recommendation of the Board to reach the AA, after which the AA could appoint the recommended IP. The process of appointment may entail 2-3 weeks, which could be saved if the AA has a ready Panel of IPs recommended by the Board and it can pick up any name from the Panel for appointment while issuing the Order itself.

For more details visit:
https://www.ibbi.gov.in/uploads/legalframwork/f812a9b138081ae0760bc224a478fdc4.pdf

3. Case laws on Insolvency and Bankruptcy Code

a) Whether the relatedness of the related party could merely have existed in the past or whether they must continue in present i.e. at the present time?

The Supreme Court in the matter of ***'Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.'***, clarified that while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in present would be debarred from the Committee, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Thus, relatedness of related parties at the present time would be considered for exclusion from the Committee, in addition, any parties that were related in the past and cease to be related parties at present in order to become a member of the Committee must also be considered for exclusion from the Committee.

b) In the ***Swiss Ribbons Pvt. ltd. & anr. vs. Union of India judgement***, Hon'ble Supreme Court upheld the constitutional validity of a number of provisions of IBC, 2016 including the following:-
(i) Section 53: Is based on an intelligible differentia between FCs and OCs – not discriminatory or arbitrary (ii) Section 29A(j) read with definition of related party as laid down in Section 5(24) and 5(24A) – Validity upheld – In order to be disqualified u/s 29A(J), the related parties must be

connected with the business activity of an applicant (the persons who act jointly or in consult with others are connected with the business activity of the RA)
(iii) Section 29A(c) not restricted to malfeasance – various clauses of Section 29A show that a person need not be a criminal in order to be kept out of the resolution process
(iv) Section 12A is not violative of article 14 – regulation 30a(1) is directory and not mandatory – withdrawal may be allowed even after issuance of invitation for EOI – Where CoC is not constituted, a party can approach NCLT for withdrawal of an application on settlement where CoC is constituted, 90% of CoC to agree for withdrawal and then NCLT to pass suitable order.
(v) Section 21 & 24 – Operational Creditors have no vote in the CoC – Held constitutionally valid – Banks and FIs best equipped to assess viability and feasibility of business – OCs involved in recovering amounts that are paid for goods and services supplied – OCs unable to assess viability.
(vi) Equitable treatment to OCs – Held constitutionally valid – OCs to get minimum payment not less than (vii) liquidation value – Get priority in payment over financial creditors.

c) Lawyer can issue demand notice on behalf of Operational creditor

In the matter of ***Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.,*** the Supreme Court settled the legal proposition under the Insolvency and Bankruptcy Code, 2016 to hold that:
(i) Section 9(3)(c) of the Code is directory and not mandatory in nature
(ii) Demand notice under the Code can be issued by the lawyer on behalf of the operational creditor
The two issues that were raised in this case pertained to Insolvency and Bankruptcy Code, 2016. Firstly, whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

With reference to the aforesaid issues, two-Judge Bench of the Supreme Court made the following observations:
(i) Under section 9(3)(c) of the Code a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is certainly not a condition precedent to triggering the insolvency process under the Code. The expression "confirmed" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Therefore, section 9(3)(c) of the Code would have to be construed as being directory in nature.
(ii) Supreme Court observed that Section 8 of the Code speaks of an operational creditor delivering a demand notice and if the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent.

d) Corporate debtor cannot maintain appeal

In the matter of ***Radius Infratel Pvt. Ltd. ...Appellant v. Union Bank of India,*** the National Company law appellate tribunal (NCLAT) has reiterated Supreme Court's decision in the landmark case Innoventive Industries Ltd. v. ICICI Bank and Ors., whereby the Supreme Court had held that once

an insolvency professional is appointed to manage the Company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the Company.

In the instant case, the Company being the Corporate debtor had preferred appeal against order passed by National Company Law Tribunal, whereby the Tribunal had admitted Financial Creditor's i.e. Union Bank of India application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for appointment of the Interim Resolution Professional.

In that view of the matter, the appellant sought to substitute the 'Corporate debtor' with a shareholder of the Corporate debtor and to transpose 'Radius Infratel Private Limited' through 'Resolution Professional' as a Respondent. Since no such application for substitution was filed when matter was taken-up, the Appellate tribunal dismissed the appeal as not maintainable, following the SC precedent. However, liberty was granted to shareholder or director of the corporate debtor to file appropriate application, if not barred by limitation.

e) Flat buyers can initiate insolvency proceedings against builders under the code

In the matter of ***Nikhil Mehta & Sons (HUF) & Ors. v. AMR Infrastructures Ltd.,*** the NCLAT has ruled that a purchaser of real estate, under an 'assured-return' plan, would be considered as a 'Financial Creditor' for the purposes of Code and is, therefore, entitled to initiate corporate insolvency process against the builder, in case of non-payment of such 'assured/Committed return' and non-delivery of unit. NCLAT further went on to rule that the 'debt' in this case was disbursed against the consideration for the 'time value of money' which is the primary ingredient that is required to be satisfied in order for an arrangement to qualify as 'Financial Debt' and for the lender to qualify as a 'Financial Creditor', under the scheme of Code.

The Insolvency and Bankruptcy Code (Second Amendment) Act of 2018 has however, added an explanation to sub-clause (f) of Section 5(8) of IBC clarifying that for the purposes of sub-clause (f), any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing in the matter of Pioneer Urban Land and Infrastructure Ltd. & ans vs. UOI, Hon'ble Supreme Court has held that amounts raised from allottees under a real estate project would be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the amendment act. As such, all the allottees under real estate projects, whether under assured return plan or not, shall fall under the definition of "Financial Creditor".

f) Time-limit for accepting or rejecting a petition under the code is directory or mandatory

The Supreme Court in the matter of ***Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Others*** *held* that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory. It was further held that provision of removing the defects in an application within seven days is directory and not mandatory in nature. The court clarified that while interpreting the provisions to be directory in nature, if the objections are not removed within seven days, the applicant while refiling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days.

g) Time-limit for completion of insolvency resolution process

The Supreme Court, in the matter of ***Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors***. while interpreting Section 29a(c) of the Insolvency and Bankruptcy Code, 2016, has observed the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant and not at any anterior stage. The bench further held that the time limit for completion of the insolvency resolution process as laid down under Section 12 of the Code is mandatory and it cannot be extended beyond 270 days.

h) Role of committee of creditors in Corporate Insolvency Resolution Process (CIRP)

The Hon'ble Supreme Court of India in the matter of ***'Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & ors.'***, while upholding the constitutional validity of the Code made, inter alia, important ruling with regard to the role of the Committee of Creditor in the CIR process. It had emphasized the primacy of the commercial wisdom of the CoC in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility and viability" of the resolution plan, which takes into account "all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case to case basis.

Lesson 4- Insolvency Resolution of Corporate Persons

1. Case laws on Insolvency and Bankruptcy Code

a) Ineligibility during the resolution process and liquidation (as laid down in the matter of ***'Arun Kumar Jagatramka. Vs. Jindal Steel and Power Ltd. & Anr'***)

• The birth of section 29A is an event attributable to the experience which was gained from the actual working of the provisions of the statute since it was published in the Gazette of India on 28 May 2016.

• Section 29A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new avatar of resolution applicants.

• The values which animate Section 29A continue to provide sustenance to the rationale underlying the exclusion of the same category of persons from the process of liquidation involving the sale of assets, by virtue of the provisions of section 35(1)(f).

• The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution.

b) Can insolvency proceedings be withdrawn even after invitation of Resolution Plan?

In the matter of '***Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors.',*** the Supreme Court held that Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has to be read subject to Section 12A of the Insolvency and Bankruptcy code, 2016 which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest. Thus, the Apex Court upheld withdrawal of CIRP even after the Resolution Professional issued invitation for expression of interest from resolution applicants to submit resolution plans under Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

c) Principles for a resolution Plan

The National Company Law Appellate Tribunal (NCLAT), in the matter ***of Binani Industries Limited v. Bank of Baroda & Anr.*** while approving the revised resolution plan submitted by Ultratech Cement Limited in the insolvency resolution process initiated against the corporate debtor - Binani Cement Limited, laid down certain principles that a resolution plan should comply with. These include, inter alia that:

(a) Functionally, the resolution plan shall resolve insolvency, maximise the value of assets of the corporate debtor, and promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders. the resolution plan is not a sale, or auction, or recovery or liquidation but a resolution of the Corporate debtor as a going concern.

(b) A resolution process under IBC is not an auction. Feasibility and viability of a 'resolution Plan' are not amenable to bidding or auction. it requires application of mind by the 'Financial Creditors' who understand the business well.

(c) A resolution process under IBC is not recovery. Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. the 'I&B Code' prohibits and discourages recovery.

(d) A resolution process is not a liquidation. The IBC does not allow liquidation of a Corporate debtor directly and permits liquidation only on failure of the resolution process.

(e) The IBC aims to balance the interests of all stakeholders and does not maximise value for financial creditors. Therefore, the dues of operational creditors must get at least similar treatment as compared to the due of financial creditors.

(f) Any resolution plan if shown to be discriminatory against one or other financial creditor or the operational creditor, can be held to be against the provisions of IBC.

The Supreme Court, dismissed an appeal against the NCLAT order. The NCLAT order is significant since it clarifies the underlying principles that a resolution plan should comply with.

d) Former directors of corporate debtor are entitled to receive Resolution Plan

In the matter of ***Vijay Kumar Jain v. Standard Chartered Bank and others***, an appeal was filed with Supreme Court against orders rejecting the prayer of an erstwhile director for getting copy of the resolution plans from the RP. Both the NCLT and NCLAT ruled that appellant had no right to receive the resolution plans.

The Resolution Professional (RP) has contended that only the members of CoC are entitled to have resolution plans, as per Section 30(3) IBC read with regulation 39(2) CIRP regulations. Relying on the Notes on Clauses to Section 24 of the Code, they argued that the members of suspended Board of directors are permitted to participate in CoC meetings only for the purpose of giving information regarding the financial status of the debtor.

The Supreme Court expressly rejected the argument based on Notes on Clauses to Section 24 of the Code and noted that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide regulation 21(3)(iii). Court said the expression "documents" is a wide expression which would certainly include resolution plans.

The judgment also clarified that the RP can take an undertaking from the erstwhile director to maintain confidentiality of the information.

e) Personal guarantor's right to subrogation against a corporate debtor under IBC

In the matter of ***Lalit Mishra & Others v. Sharon Bio Medicine Limited & Others***, the NCLAT has ruled that a personal guarantor's right to subrogation against a corporate debtor can be taken away in a resolution plan under the Insolvency and Bankruptcy Code. In simple terms, a personal guarantor has no right to step into the shoes of a creditor against the 'corporate debtor' in case of a resolution plan under the IBC.

In the present case, the appellants, the promoters of Sharon Bio Medicine Limited (Corporate Debtor) had challenged the approval of a resolution plan on the grounds that the appellants,

promoters were the shareholders and for them no amount has been provided under the 'Resolution Plan; and some promoters, also 'personal guarantors' have been discriminated as the personal guarantees of the appellants have been reduced to 'nil'.

The appellants alleged that such a resolution plan was in contravention with the provisions of the Section 133 and Section 140 of the Indian Contract Act, 1872 ("Contract Act") since it deprived the personal guarantors of their subrogation rights against the corporate debtor.

The NCLAT held that resolution under the IBC is not a recovery suit. It is aimed at maximization of the value of the assets of the Corporate debtor and then to balance all the creditors. The IBC prohibits the promoters from benefiting from the 'Corporate Insolvency Resolution Process' or its outcome. Admittedly, the shareholders and promoters are not the creditors and thereby the resolution Plan cannot balance the maximization of the value of the assets of the Corporate debtor at par with the 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditors' or 'unsecured Creditors'. Therefore, the appellant cannot claim to have been discriminated. Further, the court observed that on approval of the resolution plan claim of all the stakeholders are cleared and that the resolution applicant can provide in the plan that there will be no liability on the company or the resolution applicant in case the personal guarantees are invoked.

f) Committee of creditors to have ultimate say in approval of resolution plan

In the matter of Committee of Creditors of ***Essar Steel (India) Limited v. Satish Kumar Gupta & Ors.,*** Hon'ble Supreme Court held that:

(i) it is the commercial wisdom of the CoC to decide as to whether or not to rehabilitate the Cd by accepting a particular resolution plan. The rationale for only FCs handling the affairs of the CD and resolving them have been deliberated upon by the BLRC, which formed the basis for the enactment of the insolvency Code;
(ii) the insolvency resolution is ultimately in the hands of the majority vote of the CoC. it may approve a resolution plan by a vote of not less than 66% of the voting share of the FCs, after considering its feasibility and viability, and various other requirements as may be prescribed by the regulations;
(iii) the role of a resolution Professional under IBC is not adjudicatory but administrative (reiteration of the view expressed by Hon'ble Supreme Court in Arcelor Mittal India matter).
(iv) NCLT /NCLAT have been endowed with limited jurisdiction as specified in the IBC and not to act as a Court of equity or exercise plenary powers. They have not been given the jurisdiction to reverse the commercial wisdom of the dissenting financial creditor and that too on the ground that it is only an opinion of the minority financial creditors.
(v) NCLT/NCLAT are not empowered to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting.
(vi) Hon'ble Supreme Court set aside the judgement of NCLAT in which the latter had applied the equality principle stating that the secured or unsecured creditors should be treated as one group of creditors and that no difference can be made in terms of the amount of debt to be repaid to them on whether they are secured or unsecured.
(vii) All creditor need not be treated identically but in a manner that reflects the different bargains they have
(viii) struck with the debtors.

Lesson 5-Resolution Strategies

1. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021

According to the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021, the amendment expands the scope of consultation to cover all aspects related to sale of assets and appointment of professionals. The amendment regulations also provide for manner of selection of representatives of stakeholders in stakeholders consultation committee.

The amendment regulations provide that Liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction. It also provides that the earnest money deposit shall not exceed ten percent of the reserve price in an auction, the Board has also made available an electronic platform at www.ibbi.gov.in for hosting public notices of auctions of liquidation assets of ongoing liquidation processes.

To enhance the transparency and accountability, the amendment regulations provide for the Liquidator to intimate the reasons for rejection of the highest bid to the highest bidder and report the same in the next progress report.

For more details visit:
https://ibbi.gov.in/uploads/legalframwork/dd230e9f5c38a981e646a3eba1354713.pdf

2. IBBI's Electronic Platform for hosting Public Notices of Auctions of Liquidation Assets under the IBBI (Liquidation Process) Regulations, 2016

Vide circular no. No. IBBI/LIQ/44/2021 dated September, 2021, A liquidator is required to issue public notice of auctions on the website designated by IBBI, in addition to other specified modes of publication, under sub-regulation (3) of regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) read with clause (5) of paragraph 1 of its Schedule I.

Liquidators are directed to upload the public notice of every auction of any liquidation asset, with effect from 1st October, 2021, at www.ibbi.gov.in on the day of its publication in newspapers, through their designated login page.

For more details visit:
https://ibbi.gov.in/uploads/legalframwork/2021-09-30-233009-xotyz-7c4b58c1affd6a9e028a8348cc2f91be.pdf

3. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021

In exercise of the powers conferred under section 30 of the Securities and Exchange Board of India Act, 1992, SEBI amended the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021 inter-alia provides that in the event the acquirer makes a

public announcement of an open offer for acquiring shares or voting rights or control of a target company, the acquirer may seek the delisting of the target company by making a delisting offer in accordance with this regulation.

The acquirer shall have declared his intention to so delist the target company at the time of making such public announcement of an open offer as well as at the time of making the detailed public statement.

For more details visit:
https://egazette.nic.in/WriteReadData/2021/231637.pdf

4. Case Laws on Insolvency and Bankruptcy Code

a) In the matter of ***Y. Shivram Prasad & Ors. v. S. Dhanapal & Ors***, the NCLAT passed the impugned order of liquidation as Committee of Creditors did not find any resolution plan viable and feasible. The promoters submitted that they should have been given an opportunity to settle the dues. While rejecting the said submission, the NCLAT clarified that settlement can be made only at three stages, i.e., before admission, before constitution of CoC and in terms of section 12A of the Code and such stages were over in this instant matter. It, however, observed that during the liquidation process, it is necessary to take steps for revival and continuance of the Corporate debtor by protecting it from its management and from a death by liquidation.

Wherein this appellate tribunal having noticed the decision of the Hon'ble Supreme Court in "Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra) and "Meghal Homes Pvt. Ltd." observed and referring to the matter of "Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra) where Hon'ble Supreme Court observed that "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" and NCLAT in its matter further held that "in view of the provision of Section 230 and the decision of the Hon'ble Supreme Court in 'Meghal Homes Pvt. ltd.' and 'Swiss Ribbons Pvt. Ltd.', we direct the 'liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation, etc. as prescribed under Section 35 of the Code. If the members or the 'Corporate debtor' or the 'creditors' or a class of creditors like 'Financial Creditor' or 'Operational Creditor' approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the adjudicating authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the 'Corporate debtor' so as to enable the employees to continue".

b) In the matter of ***Edelweiss Asset Reconstruction Company Ltd. v. Bharati Defence and Infrastructure Ltd.,*** the Resolution Professional (RP) filed an application seeking approval of the resolution plan submitted by an resolution applicant, who is a Financial Creditor with 82.7% voting share in the CoC. The plan provided that the resolution applicant will sell the Corporate debtor in two years. NCLT, Mumbai Bench noted that the plan does not give due consideration to the interest of all stakeholders, seeks several exemptions, and contains a lot of uncertainties and speculations. It provides for generation of income from ongoing operations and no upfront money is brought in by the resolution applicant. The NCLT Bench also noted that the resolution applicant has proposed to hold majority equity in the Corporate debtor, run its operations, enhance its value and over a period endeavour to find a suitable investor/buyer for the same.

Relying on the judgment in the matter of Binani Industries Limited, the NCLT Bench observed: "…..resolution plan is for insolvency resolution of the Corporate Debtor as a going concern and not for the addition of value and intended to sale the corporate debtor". It observed that resolution applicant is essentially extending the CIRP period to find an investor, which is not the intention of the legislature. It further observed: "if the ultimate object in the resolution plan is to sell the company, then it can be achieved by sale as a going concern during the liquidation process". Accordingly, it rejected the resolution plan and ordered for liquidation.

Lesson 6- Fast Track Corporate Insolvency Resolution Process

Case Law on Insolvency and Bankruptcy Code

a) In the matter of ***Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr.*** (Company Appeal (AT) (Insolvency) No. 560 of 2018) dated: 03.01.2019 appeal was filed before the National Company Law Appellate Tribunal (NCLAT) against the order dated 25th July, 2018 passed by the National Company Law Tribunal Mumbai Bench, Mumbai.

NCLT extended the period of resolution process in exercise of power conferred under Section 55 of the Code treating the matter as 'Fast Track CIRP' also determining the 'CIRP fee' and the 'cost' incurred and payable to Appellant.

NCLAT noted that Corporate Debtor does not fall under any of the category of clauses (a), (b) or (c) of subsection (2) of Section 55 of the Code as it neither has its assets and income below a level nor having class of creditors or amount of debt as notified by the Central Government.

In the present case, the application was not filed under Section 55 but filed under Section 9 of the Code. It is clear that the 'Fast Track Corporate Insolvency Resolution Process' is different from 'Corporate Insolvency Resolution Process' against such Corporate Debtors(s) as may be notified by the Central Government in terms of clauses (a), (b) & (c) of Section 55(2).

It was held that the NCLT had no jurisdiction to proceed with the 'Corporate Insolvency Resolution Process' beyond the period of 270 days and it cannot exercise its power under sub-section (2) of Section 55 of the Code, which was not applicable, and therefore the Adjudicating Authority has no power to convert the 'Corporate Insolvency Resolution Process' into a 'Fast Track Corporate Insolvency Resolution Process' under Section 55 of the Code.

Lesson 7- Liquidation of Corporate Person

Case Laws on Insolvency and Bankruptcy Code

a) In the matter of '***Vedikat Nut Crafts Pvt. Ltd.'***, after perusing records, the Adjudicating Authority could not see any reason for not inviting resolution plan despite the fact that even a period of one month as balance period of 180 days was still available. NCLT observed that there was no reason for the Committee of Creditors to jump to the conclusion of seeking liquidation of the company without seeking extension of time of 90 days, without inviting expression of interest by the prospective resolution plan applicant as it falls foul of legal provisions and fair play. It presents a telltale story of the irregularity committed by the Committee of Creditors. To say the least such a decision is arbitrary and should not be sustained.

b) In the matter of ***Small Industries Development Bank of India v. Tirupati Jute Industries Limited***, the Adjudicating Authority noted that the resolution plan, which has been submitted for its approval, was subject to extinguishment of all claims (except criminal proceedings) against the Corporate Debtor, exemption of all taxes/dues by the Government/ local authorities, and closure of all proceedings pending against the Corporate Debtor relating to such dues. The Adjudicating Authority rejected the plan and ordered for liquidation. It observed that such a plan should not have been approved by the CoC, as it was not consistent with the provisions of section 30(2)(e) of the Code. It also observed that the Resolution Professional did not give correct advice when he submitted the plan for approval of CoC and therefore, it would not be proper to appoint him as the Liquidator.

c) The matter of replacing the Resolution Professional (RP) was considered by the National Company Law Appellate Tribunal (NCLAT) in the matter of '***Devendra Padamchand Jain v. State Bank of India'.*** This case dealt with an appeal by the then RP of VNR Infrastructures, against the order of the National Company Law Tribunal (NCLT), Hyderabad bench, removing him and appointing another liquidator. The NCLAT held that apart from the committee of creditors, the NCLT is also empowered to remove the RP, but it should be for the reasons and in the manner provided under the relevant section. In this case, RP had failed to properly examine the resolution plan and had not stated that the plan he submitted met all the requirements of section 30(2) of the Code. The NCLAT held that the NCLT has jurisdiction to remove the RP if it is not satisfied with its functioning, which amounts to non-compliance with section 30(2) of the Code.

d) In the matter of ***Sharad Sanghi v. Ms. Vandana Garg & Ors.,*** the resolution plan initially received approval of 62.66% voting share. Subsequently, some creditors who had not voted, voted later or who had dissented, later assented, resulting in 81.31% of voting share in favour of resolution plan. The resolution Professional submitted the resolution plan before adjudicating authority for approval and requested to exclude certain period. the adjudicating authority rejected the prayer and passed order of liquidation on the ground that total period of 270 days had expired on the day when the last voting took place and before expiry of period only 62.66% voting was in favour of resolution plan, which was less than the required 66% of voting share. Regulation 26(2), which has been repealed, prohibited change of vote once it was cast.

The NCLAT held "... as we have already held that the 'Resolution Process' took place within 270 days and the 'Committee of Creditors' had the jurisdiction to change its opinion in favour of the

'Resolution Plan' to make it a success and regulation 26(2) being directory which also stands deleted, we set aside the impugned order and hold that the 'Resolution Plan' being in conformity with Section 30(2) warranted approval by the adjudicating authority."

e) In the matter of ***S. C. Sekaran v. Amit Gupta & Ors.*** appeals were filed by the management of the corporate debtor against the liquidation order passed by the adjudicating authority, following the failure of resolution plan. It was stated that the liquidator is supposed to keep the corporate debtor as a 'going concern' even during the period of liquidation and can take steps under section 230 of the Companies Act, 2013.

The NCLAT directed ".. we direct the 'liquidator' to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property. effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the Code.... Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the liquidator will take steps in terms of Section 230 of the Companies act, 2013. The adjudicating authority if so required, will pass appropriate order. Only on failure of revival, the adjudicating authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law... the 'liquidator' if initiates the process, will complete it under Section 230 of the Companies act within 90 days...".

f) In the matter of ***Corporation Bank v. Amtek Auto Ltd. & Ors.,*** the Financial Creditors filed an Application for a declaration that the resolution applicant, Liberty House Group Pte Ltd. and its promoters have knowingly contravened the terms of the resolution plan, having failed to implement the same and for the reinstatement of the Committee of Creditors (CoC) to run the Corporate debtor, as a going concern.

The NCLT held that the resolution applicant is not capable of implementation of resolution plan. It allowed the application and excluded the time from the date when Decan Valuers Investors lP, the only other resolution applicant, submitted its plan upto the date of the receipt of this order from the CIRP period. It observed: "No matter if the corporate debtor ultimately has to face liquidation, but the permission to restart the process, make advertisement and invite fresh plans etc., would defeat the very mandate of Section 12 of the Code. The Committee of Creditors can only discuss the Resolution Plan which was submitted by DVI (Decan Valuers Investors lP) only by exclusion of certain period of time while calculating 270 days." It, however, granted liberty to any member of the CoC or the Resolution Professional to file a complaint before the IBBI or the Central Government with a request to file a criminal complaint.

Lesson 8 -Voluntary Liquidation

1. Circular - Clarification regarding requirement of seeking No Objection Certificate (NOC) or No Dues Certificate (NDC) from the Income Tax Department during Voluntary Liquidation Process under the Insolvency and Bankruptcy Code, 2016 (Code)

The Insolvency and Bankruptcy Board of India pursuant to exercising the powers mentioned under section 196 of the Code, issued circular no. No. IBBI/LIQ/45/2021 dated November 15, 2021 *inter-alia* clarified that as per the provisions of the Code and the Regulations read with Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income Tax Department as part of compliance in the said process.

The process of applying and obtaining of such NOC/NDC from the Income Tax Department consumes substantial time and thus militates against the express provisions of the Code, and also defeats the objective of time-bound completion of process under the Code.
For more details visit:
https://www.ibbi.gov.in/uploads/legalframwork/cc881169aad7ee239aea7954505a76ab.pdf

2. Filing of list of stakeholders under clause (d) of sub-regulation (5) of regulation 31 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

Insolvency and Bankruptcy Board of India issued circular no. : IBBI/LIQ/46/2021 dated November 24, 2021. In pursuance of clause (d) of sub-regulation (5) of regulation 31 of the IBBI (Liquidation Process) Regulations, 2016 ('Liquidation Process Regulations') requiring the liquidator to file list of stakeholders on the electronic platform of the Board for dissemination on its website, the Board directed the liquidators to file the list of stakeholders and modification thereof, in the stipulated format, on the electronic platform. In the said format, the particular / column "Identification No." for seeking identification details of stakeholders is mentioned. Such information being sensitive personal information is prone to misuse and not to be revealed on public platforms.

To address this problem, this Circular in partial modification removes the column "Identification No." from the particulars of the format stipulated therein. The insolvency professionals are directed to file the list of stakeholders of the respective corporate debtor under liquidation and modification thereof, in the revised format placed in Annexure, within three days of the preparation of the list or modification thereof, as the case may be. The rest of the contents of the above said Circular shall remain same.
For more details visit:
https://ibbi.gov.in/uploads/legalframwork/3ab0d547d310b77cb5716f57f45f1e9d.pdf

3. Case law on Insolvency and Bankruptcy Code

NIPPEI TOYOMA INDIA PRIVATE LIMITED

The petition was filed by Nippei Toyoma India Private limited to initiate voluntary liquidation proceedings under Section 59 of Insolvency and Bankruptcy Code, 2016 (IBC) before NCLT, Mumbai Bench.

Facts of the case

The Company was incorporated under the provisions of Companies Act, 1956 on 27.04.2007. It was engaged in the business of providing engineering services and trading of automotive components for automotive industries. The Company does not have any operations as not carrying on any business activities. Considering the cost and time involved in ensuring compliances regarding the Company, the members of the Company in their Extra Ordinary General Meeting held on 28.09.2017 resolved to voluntary liquidate the Company.

Judgement

The directors of the Company declared on affidavit dated 27.09.2017 that they have made full inquiry into the affairs of the Company, and are of the opinion that the Company has no debts/will be able to pay its debt in full from the proceeds of assets to be sold in the voluntary liquidation and that it is not being wound-up to defraud any person. The directors have appended to the aforesaid affidavit, audited financial statements and record of business operations of the company of previous two financial years viz. year ending on 31.03.2016 and 31.03.2017.

The statement of payment to stakeholders, annexed to the petition, detailed the payment made to various stakeholders and Dividend Distribution Tax. Post the aforementioned payment, the accumulated profit of Rs.53,06,973/- as dividend and investment in share capital of Rs.1,00,00,000/- were paid to the members of the company thereby the assets of the company were fully liquidated.

The Independent Auditor certified that during the liquidation period 28.09.2017 to 23.07.2018 the proper books of accounts were kept and the said financial statements comply with the accounting standards under section 133 of Companies Act 2013. Further, it certified that there is no pending litigation involving the Company, there are no long term contracts with the Company for which there may be any foreseeable losses and there is no amount which is to be transferred to the Investor Education and Protection Fund by the Company.

The copy of the final report of the Liquidator dated 12.09.2018 was annexed to the petition, stating how the liquidation process has been conducted from 28.09.2017 to 12.09.2018, that all the assets of the Company have been discharged to the satisfaction of the creditors and that no litigation is pending against the company. the said Final report of the liquidator was submitted with the registrar of Companies vide Form GNL-2 dated 13.09.2018. The Liquidator had filed this petition before the Tribunal under section 59(7) of The Code seeking order of dissolution of the Company.

NCLT noted that on examining the submission made by the counsel appearing for the petitioner and the documents annexed to the petition, it appears that the affairs of the company have been completely wound-up, and its assets completely liquidated.

NCLT in view of the above facts and circumstances and Final report of the liquidator directed that the Company shall be dissolved from the date of its order. The Petitioner was further directed to serve a copy of the order upon the registrar of Companies, with which the Company is registered, within fourteen days of receipt of the order.

Lesson 9- Adjudication and Appeals for Corporate Persons

Case Laws on Insolvency and Bankruptcy Code

a) In the case of ***M/s. Fortune Plastech v/s. M/s. Avni Energy Solutions Private Limited***, the matter was filed before NCLT, Bengaluru Bench, under Section 9 of the Insolvency and Bankruptcy Code, 2016 dealing with the initiation of corporate insolvency process by Operational Creditor. The application was dismissed by NCLT on the grounds that the petition was filed by the Petitioner with the wrong Bench. Since the Respondent Company is registered in Andhra Pradesh, so as per the jurisdiction, the case is to be filed at NCLT, Hyderabad Bench rather than NCLT, Bengaluru Bench. Therefore, learned counsel of the Petitioner withdrew the petition with the liberty to file the same before NCLT, Hyderabad Bench.

b) In the case of ***State Bank of India v/s. D.S Rajendra Kumar***, it is observed that if corporate insolvency resolution process of corporate debtor has been initiated before NCLT, then insolvency resolution process of personal guarantor of the corporate debtor can be initiated before same NCLT Bench instead of Debt Recovery Tribunal ("DRT").Further, it was also held in this case that order of moratorium is applicable only to the proceedings against corporate debtor and the personal guarantor but not applicable for filing application for initiating corporate insolvency resolution process against the guarantor or personal guarantor (NCLAT order dated 18th April, 2018).

c) Fraudulent Or Malicious Initiation Of Proceedings

M/s. Unigreen Global Private limited v. Punjab National Bank and others

Corporate debtor filed an application under section 10 of the Code for initiation of CIRP on the ground that it had failed to pay debt due to financial creditors and other creditors. Bank alleged suppression of facts on the ground that the corporate debtor had not disclosed full facts and had not furnished full particulars in relation to assets mortgaged or securities furnished to the financial creditors. Therefore, Adjudicating Authority rejected the application and imposed penalty on the corporate debtor. Corporate debtor filed an appeal with NCLAT against the order.

NCLAT held that Section 10 of the Code does not empower the adjudicating authority to go beyond the records as prescribed under Section 10 and the information as required to be submitted by a corporate debtor in Form 6 of the NCLT Rules, 2016 subject to ineligibility, if any, as prescribed under Section 11 of the Code. Section 11 of the Code prescribes conditions which make an applicant ineligible/disqualified to make an application under the Code to initiate corporate insolvency resolution process. as per the judgment of NCLAT an applicant does not require to disclose or plead any fact which is unrelated or beyond the requirements of the Code or forms prescribed under the NCLT Rules, 2016 and thus non-disclosure of such facts cannot be termed as suppression of facts by a corporate debtor.

Lesson 10- Debt Recovery & Securitization

Case Law on Insolvency and Bankruptcy Code

a) In ***Mardia Chemicals Ltd. v. UOI [2004] 59 CLA 380 (SC)***, it was urged by the petitioner that:

(i) there was no occasion to enact such a draconian legislation to find a short-cut to realise non-performing assets ('NPAs') without their ascertainment when there already existed the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('Recovery of Debt Act') for doing so;

(ii) no provision had been made to take into account lenders liability;

(iii) that the mechanism for recovery under Section 13 does not provide for an adjudicatory forum of inter se disputes between lender and borrower; and

(iv) that the appeal provisions were illusory because the appeal would be maintainable after possession of the property or management of the property was taken over or the property sold and the appeal is not entertainable unless 75 per cent of the amount claimed is deposited with the Debts Recovery Tribunal ('DRT').

Lesson 12-Cross Border Insolvency

1. Report of the Cross Border Insolvency Rules and Regulations Committee

MCA vide Office Order dated 21st February, 2020, the included the study of the UNCITRAL Model Law for Enterprise Group Insolvency in the mandate to Cross Border Insolvency Rules/Regulations Committee (CBIRC), and requested it to make recommendations on cross-border resolution and insolvency of enterprises as well.

The CBIRC submitted report to Ministry of Corporate Affairs. The key issues considered by the CBIRC and the recommendations are: Applicability of cross border insolvency framework, Applicability of the IBC to foreign companies and foreign LLPs, Designated benches for the adjudication of cross border matters, Framework for access by Indian IPs to foreign proceedings, Reliefs in cross border insolvency matters, Protocols and court-to-court co-operation across jurisdictions, Format, content and fees for cross border insolvency applications in India etc.

For more details visit:
https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf

2. Case Laws on Insolvency and Bankruptcy Code

a) *Jet Airways (India) Ltd. v. state Bank of India & Anr. Company Appeal (AT) (Insolvency) no. 707 of 2019*

This is the first case touching the realm of cross border insolvency in India. In the instant case Jet Airways (India) limited, ('Company') was subjected to parallel insolvency proceedings in India as well as in the Netherlands. in India, the Company has been admitted into a corporate insolvency resolution process under the insolvency and Bankruptcy Code, 2016 (the "Indian Proceedings"). Pursuant to the order of the NCLT and resolutions duly passed at the meeting of the committee of creditors of the Company ("CoC") dated 16 July 2019, the Resolution Professional (RP) had been appointed, resulting in the powers of the board of directors of the Company being vested with the RP.

In the Netherlands, the Company has been declared bankrupt and the Dutch trustee had been appointed to manage the estate of the Company (the "Dutch Proceedings").

On an application made by the Dutch trustee, appealing the 20 June 2019 order of the NCLT before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT"), the NCLAT, by its orders dated 12 July 2019 and 21 august 2019 ("NCLAT Order"), inter alia, directed the RP, in consultation with the CoC, to consider the prospect of cooperating with the Dutch trustee so as to have joint "corporate insolvency resolution process of the Company" and further vide its order dated 04 September 2019 directed the RP under the Indian proceedings to reach an arrangement/agreement with the Dutch trustee to extend such cooperation to each other, further allowing the CoC to guide the RP to enable him to prepare an agreement in reaching the terms of arrangement of cooperation with the Dutch trustee in the best interest of the Company and all its stakeholders ("Proposed Cooperation").

The NCLAT set aside the order dated 20th June, 2019 passed by the National Company law Tribunal, Mumbai Bench in so far it related to the observations that the 'Dutch Court' has no jurisdiction in the matter of 'corporate insolvency resolution process' of 'Jet Airways (India) Limited, (Offshore Regional Hub) and the consequential directions as given to the 'Resolution Professional' in respect of 'Offshore proceedings'. However, NCLAT did not interfered with the order of admission of application under Section 7 of the Code filed by the 'State Bank of India' against 'Jet Airways (India) Limited', therefore, joint 'Corporate Insolvency Resolution Process' will continue in accordance with Insolvency and Bankruptcy Code, 2016.

The Parties facilitated the Proposed Cooperation with formulation of a 'Cross Border insolvency Protocol'. The key agreements under the said Protocol was as follows:

(i) this Protocol represents a statement of intentions and guidelines designed to minimize the costs and maximize value of assets/recoveries for all creditors of the Proceedings, by promoting the sharing of relevant information among the Parties and the international coordination of related activities in the Proceedings, while respecting the separate interests of creditors and other interested parties to the Proceeding, and the independence, sovereignty, and authority of the NCLT/NCLAT and Dutch Bankruptcy Court.

(ii) in recognition of the substantive differences among the Proceedings in both jurisdictions, this Protocol shall not impose on the RP or the Dutch trustee any duties or obligations (i) that may be inconsistent with or that may conflict with the duties or obligations to which the Parties are subject under applicable law, or (ii) that are not in the interests of the Company's estate represented by the Parties and/or its creditors. Furthermore, nothing in this Protocol should be interpreted in any way so as to interfere with (i) the proper discharge of any duty, obligation or function of the Parties, or (ii) the exercise of statutory or other powers otherwise available to a Party under applicable law.

(iii) the Parties should coordinate with each other and cooperate in all aspects of the Proceedings in terms of this Protocol. in doing so, the Parties acknowledge and agree that the Parties shall deal in good faith with each other in the interests of maximizing value of assets/recovery for all of the Company's creditors.

(iv) the Dutch trustee shall seek inputs, notify the RP and consult the RP, and will be mindful of the Indian Proceedings prior to any material decision being taken in the Dutch Proceedings.

(v) The 'Committee of Creditors' have no role to play as the agreement reached between the 'Dutch administrator' and the 'Resolution Professional' of India is on the basis of the direction of this appellate tribunal. In spite of the same, unfortunately the 'Committee of Creditors' interfered with the matter and put its view to the 'Resolution Professional' resulting into difference of the suggestions.

(vi) The NCLAT clarified that the 'Dutch Trustee (Administrator) will work in co-operation with the 'Resolution Professional of India' and, if any, suggestion is required to be given, he may give it to the 'Resolution Professional'. The draft of 'Cross Border Insolvency Protocol' clause is made final and should be treated as a direction of this appellate tribunal and it would be mandatory to comply with the order of this appellate tribunal subject to the other procedures which are to be followed in terms of the 'Insolvency and Bankruptcy Code, 2016'.

Lesson 13-Insolvency Resolution of Individual and Partnership Firm

1. Filing of list of creditors under clause (ca) of sub-regulation (2) of regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Insolvency and Bankruptcy Board of India issued circular no. : IBBI/LIQ/47/2021 dated November 24, 2021. In pursuance of clause (ca) of sub-regulation (2) of regulation 13 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP Regulations') requiring the insolvency professional (IP) to file list of creditors on the electronic platform of the Board for dissemination on its website, the Board directed the IP to file the list of creditors and modification thereof in the stipulated format on electronic platform. In the said format, the particular "Identification No." for seeking identification details of creditors is mentioned. Such information being sensitive personal information is prone to misuse and hence is not to be revealed on public platforms.

To address this concern, this circular in partial modification of the Circular under reference, removes the column "Identification No." from the particulars of the format stipulated therein. The insolvency professionals are directed to file the list of creditors of the respective corporate debtor and modification thereof, in the revised format placed in Annexure, within three days of the preparation of the list or modification thereof, as the case may be. The rest of the contents of the above said Circular shall remain same.

For more details visit:
https://ibbi.gov.in/uploads/legalframwork/3b47d76baab766da0d800edb4b2199e6.pdf

Lesson 17- Professional and Ethical Practices for Insolvency Practitioners

Case Laws on Insolvency and Bankruptcy Code

a) In the matter of ***'Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd.'***, the IRP prayed for protection for all acts done by him in good faith and to save him from the frivolous allegations made against him in a FIR filed by a former director of corporate debtor.

The NCLT observed: if, there is any complaint against the insolvency Professional then IBBI is competent to constitute a disciplinary committee and have the same investigated from an investigating authority as per the provision of Section 220 of the Code. If, after investigation IBBI finds that a criminal case has been made out against the Insolvency Resolution Professional then the IBBI has to file a complaint in respect of the offence committed by him. It is with the aforesaid objective that protection to action taken by the IRP in good faith has been accorded by section 233 of the Code. There is also complete bar of trial of offences in the absence of filing of a complaint by the IBBI as is evident from a perusal of section 236(1) (2) of the Code.

Therefore, a complaint by a former director with the SHO, Police Station would not be maintainable and competent as the complaint is not lodged by the IBBI...the jurisdiction would vest with Investigation Officer only when a complaint is filed by 'IBBI'.

b) In the matter of ***'Dhinal Shah (Appellant) v. Bharati Defence Infrastructure Ltd. & Anr.'*** (respondents) appeal was preferred by Dhinal Shah, ex-Resolution Professional against impugned order dated 14th January, 2019 passed by the National Company Law Tribunal, Mumbai Bench, in so far it related to adverse observations made against him.

The matter relates to Dhinal Shah, an RP in the bankruptcy proceedings against shipbuilder Bharati Defence and Infrastructure, which defaulted repayments. The Tribunal ordered liquidation of the company.

NCLT's Mumbai bench made adverse remarks against Dhinal Shah citing various lapses. Allegations ranged from charging high monthly fees, modes of soliciting expressions of interest (EoIs) to the RP's employment links with the resolution applicant. Bench said that the RP and CoC (Committee of Creditors) have failed to ensure appropriate checks and balances and failed to implement the "Chinese wall" concept during the entire corporate insolvency resolution process. The NCLT had removed Dhinal Shah citing conflict of interest and appointed another person to oversee the liquidation process.

NCLAT found NCLT's adverse observations against Dhinal Shah were made without issuing an individual notice to him.

Lesson 18- Pre-Packaged Insolvency Resolution Process

INTRODUCTION

It appears that 'pre-pack' has no statutory definition. It is probably because it has evolved over the time, differently in different jurisdictions and every jurisdiction has a unique variant(s) of pre-pack, which allows the stakeholders to modify it further to an extent to suit their needs. It has different nomenclature such as pre-packaged insolvency resolution, pre-arranged insolvency resolution and pre-plan sale in the USA, pre-pack sale in the UK, scheme of arrangement in Singapore, etc. As nomenclature suggests, pre-pack is a restructuring plan which is agreed to by the debtor and its creditors prior to the insolvency filing, and then sanctioned by the court on an expedited basis. In the UK context, it generally refers to a pre-agreed business sale by an insolvency practitioner which does not require prior court and/or creditor sanction.

With the background of the formal process in India being afflicted with high costs, pre-pack allows for a cost-effective and speedy resolution process. Pre-pack also identifies and alienates the role of the Insolvency/Resolution professional as an expert in the process.

Benefits of pre-pack insolvency resolution process

- ❖ It consolidates the benefit of both formal and informal proceedings of resolution, thus broadening the options for stakeholders
- ❖ It enables faster resolution as the corporate debtor can prepare a settlement plan or resolution plan with the creditors before going to NCLT
- ❖ Reduced burden on NCLT due to out of court settlements
- ❖ With the suspension of CIRP until March 2021, pre-pack has come as a relief to promoters and corporate debtors
- ❖ It allows the corporate debtor retain control till a settlement is reached with the creditors

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

Section 54A to 54P of the Insolvency and Bankruptcy Code, 2016 ('Code') read with the Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations,2021 lays down the provisions of a pre-packaged insolvency resolution process with respect to its initiation, manner of carrying out the process, appointment of resolution professional, termination etc.

Corporate debtors eligible for pre-packaged insolvency resolution process (Section 54A)

(1) An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.

(2) Without prejudice to sub-section (1), an application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, who commits a default referred to in section 4, subject to the following conditions, that--

MSME Threshold

Class	Capital Investment in Plant and Machinery or Equipment (Crore)	Cap in Turnover (Crore)	Applicability of Pre-pack
Micro Enterprise	1 crore	5 crores	✓
Small Enterprise	10 crores	50 crores	✓
Medium Enterprise	50 crores	250 crores	✓

(a) it has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date;

(b) it is not undergoing a corporate insolvency resolution process;

(c) no order requiring it to be liquidated is passed under section 33;

(d) it is eligible to submit a resolution plan under section 29A;

(e) the financial creditors of the corporate debtor, not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as resolution professional for conducting the pre-packaged insolvency resolution process of the corporate debtor, and the financial creditors of the corporate debtor, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, have approved such proposal in such form as may be specified:

Provided that where a corporate debtor does not have any financial creditors, not being its related parties, the proposal and approval under this clause shall be provided by such persons as may be specified;

What is the minimum default amount for pre-pack cases?

The Ministry of Corporate Affairs vide its notification dated April 09, 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor.

(f) the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia -

(i) that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

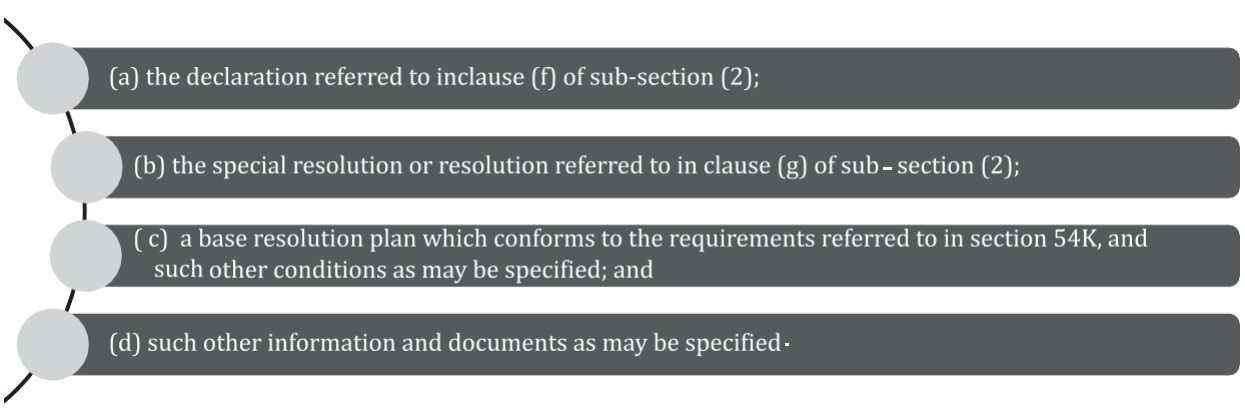
(ii) that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and

(iii) the name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e);

(g) the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution, approving the filing of an application for initiating prepackaged insolvency resolution process.

(3) The corporate debtor shall obtain an approval from its financial creditors, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, for the filing of an application for initiating pre-packaged insolvency resolution process, in such form as may be specified: Provided that where a corporate debtor does not have any financial creditors, not being its related parties, the approval under this sub-section shall be provided by such persons as may be specified.

(4) Prior to seeking approval from financial creditors under sub section (3), the corporate debtor shall provide such financial creditors with -



Duties of resolution professional before initiation of pre-packaged insolvency resolution process (Section 54B)

As per Section 54B(1), the insolvency professional, proposed to be appointed as the resolution professional, shall have the following duties commencing from the date of the approval under clause (e) of sub-section (2) of section 54A, namely:-

(a) prepare a report in such form as may be specified, confirming whether the corporate debtor meets the requirements of section 54A, and the base resolution plan conforms to the requirements referred to in clause (c) of sub-section (4) of section 54A;

(b) file such reports and other documents, with the Board, as may be specified; and

(c) perform such other duties as may be specified.

Section 54B (3) provides that the fees payable to the insolvency professional in relation to the duties performed under sub- section (1) shall be determined and borne in such manner as may be specified and such fees shall form part of the pre-packaged insolvency resolution process costs, if the application for initiation of pre-packaged insolvency resolution process is admitted.

When will the duties of insolvency professional under Section 54B (1) of the Code cease?

Section 54B(2) provides the following circumstances:

(a) If the corporate debtor fails to file an application for initiating pre-packaged insolvency resolution process within the time period as stated under the declaration referred to in clause (f) of sub- section (2) of section 54A; or

(b) the application for initiating pre-packaged insolvency resolution process is admitted or rejected by the Adjudicating Authority, as the case may be.

Application to initiate pre-packaged insolvency resolution process (Section 54C)

(1) Where a corporate debtor meets the requirements of section 54A, a corporate applicant thereof may file an application with the Adjudicating Authority for initiating prepackaged insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars, in such manner and accompanied with such fee as may be prescribed.

Applicant: As per Regulation 2(1) (a) of IBBI (PIRP) Regulations, 2021, 'applicant' means the corporate applicant, filing an application for initiation of pre-packaged insolvency resolution process under section 54C;

(3) The corporate applicant shall, along with the application, furnish-

a) the declaration, special resolution or resolution, as the case may be, and the approval of financial creditors for initiating pre-packaged insolvency resolution process in terms of section 54A;

b) the name and written consent, in such form as may be specified, of the insolvency professional proposed to be appointed as resolution professional, as approved under clause (e) of sub-section (2) of section 54A, and his report as referred to in clause (a) of sub-section (1) of section 54B;

(c) a declaration regarding the existence of any transactions of the corporate debtor that may be within the scope of provisions in respect of avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, in such form as may be specified;

(d) information relating to books of account of the corporate debtor and such other documents relating to such period as may be specified.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order,--

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete.

Provided that the Adjudicating Authority shall, before rejecting an application, give notice to the applicant to rectify the defect in the application within seven days from the date of receipt of such notice from the Adjudicating Authority.

Time limit for completion of pre-packaged insolvency resolution process (Section 54D)

(1) The pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.

(2) Without prejudice to sub-section (1), the resolution professional shall submit the resolution plan, as approved by the committee of creditors, to the Adjudicating Authority under sub-section (4) or sub-section (12), as the case may be, of section 54K, within a period of ninety days from the pre-packaged insolvency commencement date.

(3) Where no resolution plan is approved by the committee of creditors within the time period referred to in sub-section (2), the resolution professional shall, on the day after the expiry of such time period, file an application with the Adjudicating Authority for termination of the pre-packaged insolvency resolution process in such form and manner as may be specified.

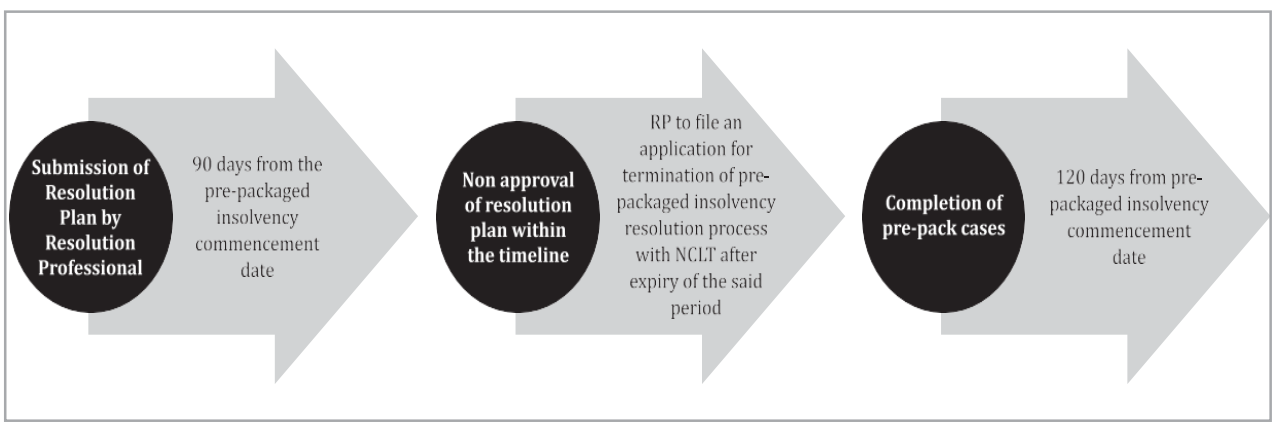


Fig. Timeline of pre-packaged insolvency resolution process

Declaration of moratorium and public announcement during pre-packaged insolvency resolution process (Section 54E)

(1) The Adjudicating Authority shall, on the pre-packaged insolvency commencement date, along with the order of admission under section 54C -

(a) declare a moratorium for the purposes referred to in sub-section (1) read with sub-section (3) of section 14, which shall, *mutatis mutandis* apply, to the proceedings under this Chapter;

(b) appoint a resolution professional -

(i) as named in the application, if no disciplinary proceeding is pending against him; or

(ii) based on the recommendation made by the Board, if any disciplinary proceeding is pending against the insolvency professional named in the application.

Timeline for public announcement:

The RP shall make a public announcement within two days of the commencement of the process.

(c) cause a public announcement of the initiation of the pre-packaged insolvency resolution process to be made by the resolution professional, in such form and manner as may be specified, immediately after his appointment.

(2) The order of moratorium shall have effect from the date of such order till the date on which the pre-packaged insolvency resolution process period comes to an end.

Duties and powers of resolution professional during pre-packaged insolvency resolution process (Section 54F)

(1) The resolution professional shall conduct the pre-packaged insolvency resolution process of a corporate debtor during the pre-packaged insolvency resolution process period.

Duties of resolution professional [Section 54F(2)]

(a) confirm the list of claims submitted by the corporate debtor under section 54G, in such manner as may be specified;

(b) inform creditors regarding their claims as confirmed under clause (a), in such manner as may be specified;

(c) maintain an updated list of claims, in such manner as may be specified;

(d) monitor management of the affairs of the corporate debtor;

(e) inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this chapter and the rules and regulations made thereunder;

(f) constitute the committee of creditors and convene and attend all its meetings;

(g) prepare the information memorandum on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information, in such form and manner as may be specified;

(h) file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any; and

(i) such other duties as may be specified.

Powers of resolution professional [Section 54F(3)]

(a) access all books of accounts, records and information available with the corporate debtor;

(b) access the electronic records of the corporate debtor from an information utility having financial information of the corporate debtor;

(c) access the books of accounts, records and other relevant documents of the corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified;

(d) attend meetings of members, Board of Directors and committee of directors, or partners, as the case may be, of the corporate debtor;

(e) appoint accountants, legal or other professionals in such manner as may be specified;

(f) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor and the existence of any transactions that may be within the scope of provisions relating to avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, including information relating to:

  (i) business operations for the previous two years from the date of pre-packaged insolvency commencement date;

  (ii) financial and operational payments for the previous two years from the date of pre-packaged insolvency commencement date;

  (iii) list of assets and liabilities as on the initiation date; and (iv) such other matters as may be specified;

(g) take such other actions in such manner as may be specified.

(4) From the date of appointment of the resolution professional, the financial institutions maintaining accounts of the corporate debtor shall furnish all information relating to the corporate debtor available with them to the resolution professional, as and when required by him.

(5) The personnel of the corporate debtor, its promoters and any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the resolution professional as may be required by him to perform his duties and exercise his powers, and for such purposes, the provisions of sub-sections (2) and (3) of section 19 shall, mutatis mutandis apply, in relation to the proceedings under this chapter.

(6) The fees of the resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process shall be determined in such manner as may be specified:

Provided that the committee of creditors may impose limits and conditions on such fees and expenses: Provided further that the fees and expenses for the period prior to the constitution of the committee of creditors shall be subject to ratification by it.

(7) The fees and expenses referred to in sub-section (6) shall be borne in such manner as may be specified.

Who shall bear the fee of RP where the corporate debtor fails to file an application or the application for initiation of the process is rejected?

In such a case, the fee payable to the resolution professional for performing duties under sub-section (3) of section 54B shall be borne by the corporate debtor.

List of claims and preliminary information memorandum (Section 54G)

(1) The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolution professional the following information, updated as on that date, in such form and manner as may be specified, namely:-

(a) a list of claims, along with details of the respective creditors, their security interests and guarantees, if any; and

(b) a preliminary information memorandum containing information relevant for formulating a resolution plan.

Preliminary information memorandum

Section 5(23A) of the Code states that "preliminary information memorandum" means a memorandum submitted by the corporate debtor under clause

(b) of sub-section (1) of section 54G.

(2) Where any person has sustained any loss or damage as a consequence of the omission of any material information or inclusion of any misleading information in the list of claims or the preliminary information memorandum submitted by the corporate debtor, every person who -

(a) is a promoter or director or partner of the corporate debtor, as the case may be, at the time of submission of the list of claims or the preliminary information memorandum by the corporate debtor; or

(b) has authorised the submission of the list of claims or the preliminary information memorandum by the corporate debtor, shall, without prejudice to section 77A, be liable to pay compensation to every person who has sustained such loss or damage.

(3) No person shall be liable under sub-section (2), if the list of claims or the preliminary information memorandum was submitted by the corporate debtor without his knowledge or consent.

(4) Subject to section 54E, any person, who sustained any loss or damage as a consequence of omission of material information or inclusion of any misleading information in the list of claims or the preliminary information memorandum shall be entitled to move a court having jurisdiction for seeking compensation for such loss or damage.

Management of affairs of corporate debtor (Section 54H)

During the pre-packaged insolvency resolution process period,-

(a) the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor, subject to such conditions as may be specified;

(b) the Board of Directors or the partners, as the case may be, of the corporate debtor, shall make every endeavour to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern; and

(c) the promoters, members, personnel and partners, as the case may be, of the corporate debtor, shall exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of this chapter and such other conditions and restrictions as may be prescribed.

Committee of Creditors (Section 54I)

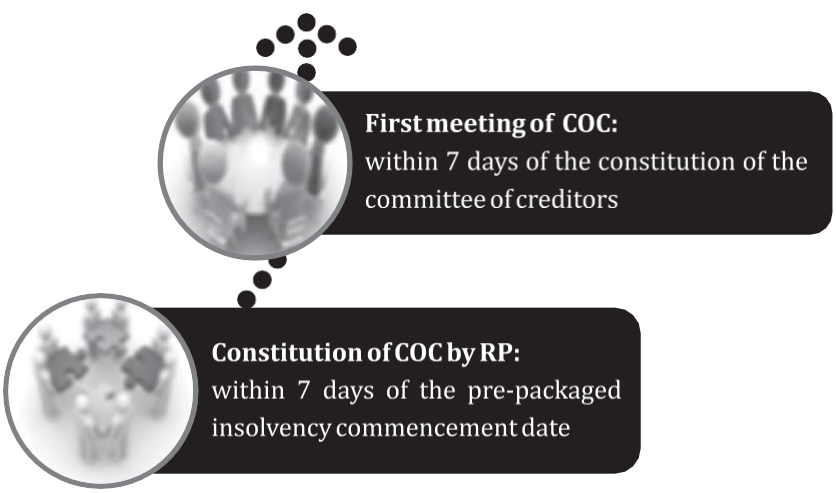
(1) The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed under clause (a) of sub-section (2) of section 54F:

Provided that the composition of the committee of creditors shall be altered on the basis of the updated list of claims, in such manner as may be specified, and any such alteration shall not affect the validity of any past decision of the committee of creditors.

(2) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(3) Provisions of section 21, except sub-section (1) thereof, shall, *mutatis mutandis* apply, in relation to the committee of creditors under this Chapter:

Provided that for the purposes of this sub-section, references to the "resolution professional" under sub-sections (9) and (10) of section 21, shall be construed as references to "corporate debtor or the resolution professional".



Vesting management of corporate debtor with resolution professional (Section 54J)

Section 54J(1) provides that where the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional, the resolution professional shall make an application for this purpose to the Adjudicating Authority, in such form and manner as may be specified.

Section 54J(3) provides that notwithstanding anything to the contrary contained in this chapter, the provisions of:

(a) sub-sections (2) and (2A) of section 14 (moratorium)

(b) section 17 (Management of affairs of corporate debtor by IRP)

(c) clauses (e) to (g) of section 18 (Duties of IRP)

(d) sections 19 and 20 (Personnel to extend co-operation to IRP and management of operations of corporate debtor as going concern)

(e) sub-section (1) of section 25 (Duty of RP to preserve and protect the assets of corporate debtor)

Section 54J(2) of the Code provides that on an application made under sub-section (1), if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process —

(a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or

(b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the resolution professional.

(f) clauses (a) to (c) and clause (k) of sub-section (2) of section 25 (duties of RP) and

(g) section 28 (Approval of COC for certain actions)

shall, mutatis mutandis apply, to the proceedings under this chapter, from the date of the order under sub-section (2), until the pre-packaged insolvency resolution process period comes to an end.

Consideration and approval of resolution plan (Section 54K)

(1) The corporate debtor shall submit the base resolution plan, referred to in clause (c) of sub-section (4) of section 54A, to the resolution professional within two days of the prepackaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.

(2) The committee of creditors may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval under sub-section (4) or invitation of prospective resolution applicants under sub-section (5), as the case maybe.

Explanation I – For the removal of doubts, it is hereby clarified that, the corporate debtor being a resolution applicant under clause (25) of section 5, may submit the base resolution plan either individually or jointly with any other person.

Explanation II – For the purposes of subsections (4) and (14), claims shall be considered to be impaired where the resolution plan does not provide for the full payment of the confirmed claims as per the updated list of claims maintained by the resolution professional.

(3) The resolution plans and the base resolution plan, submitted under this section shall conform to the requirements referred to in sub-sections (1) and (2) of section 30, and the provisions of sub-sections (1), (2) and (5) of section 30 shall, mutatis mutandis apply, to the proceedings under this Chapter.

Requirements of resolution plan

A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-

  (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

  (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) The implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) confirms to such other requirements as may be specified by the Board.

(4) The committee of creditors may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors.

(5) Where -

(a) the committee of creditors does not approve the base resolution plan under sub-section (4); or

(b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors, the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan, in such manner as may be specified.

(6) The resolution applicants submitting resolution plans pursuant to invitation under sub-section (5), shall fulfil such criteria as may be laid down by the resolution professional with the approval of the committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified.

(7) The resolution professional shall provide to the resolution applicants -

(a) the basis for evaluation of resolution plans for the purposes of sub-section (9), as approved by the committee of creditors subject to such conditions as may be specified; and

(b) the relevant information referred to in section 29, which shall, mutatis mutandis apply, to the proceedings under this chapter, in such manner as may be specified.

(8) The resolution professional shall present to the committee of creditors, for its evaluation, resolution plans which conform to the requirements referred to in sub-section (2) of section 30.

(9) The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select a resolution plan from amongst them.

(10) Where, on the basis of such criteria as may be laid down by it, the committee of creditors decides that the resolution plan selected under sub-section (9) is significantly better than the base resolution plan, such resolution plan may be selected for approval under sub-section (12):

Provided that the criteria laid down by the committee of creditors under this sub-section shall be subject to such conditions as may be specified.

(11) Where the resolution plan selected under sub-section (9) is not considered for approval or does not fulfil the requirements of sub-section (10), it shall compete with the base resolution plan, in such manner and subject to such conditions as may be specified, and one of them shall be selected for approval under sub-section (12).

(12) The resolution plan selected for approval under sub-section (10) or sub-section (11), as the case may be, may be approved by the committee of creditors for submission to the Adjudicating Authority:

Provided that where the resolution plan selected for approval under sub-section (11) is not approved by the committee of creditors, the resolution professional shall file an application for termination of the pre-packaged insolvency resolution process in such form and manner as may be specified.

(13) The approval of the resolution plan under sub-section (4) or sub-section (12), as the case may be, by the committee of creditors, shall be by a vote of not less than sixty-six per cent. of the voting shares, after considering its feasibility and viability, the manner of distribution proposed, taking into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified.

(14) While considering the feasibility and viability of a resolution plan, where the resolution plan submitted by the corporate debtor provides for impairment of any claims owed by the corporate debtor, the committee of creditors may require the promoters of the corporate debtor to dilute their shareholding or voting or control rights in the corporate debtor:

Provided that where the resolution plan does not provide for such dilution, the committee of creditors shall, prior to the approval of such resolution plan under sub-section (4) or sub-section (12), as the case may be, record reasons for its approval.

(15) The resolution professional shall submit the resolution plan as approved by the committee of creditors under sub-section (4) or sub-section (12), as the case may be, to the Adjudicating Authority.

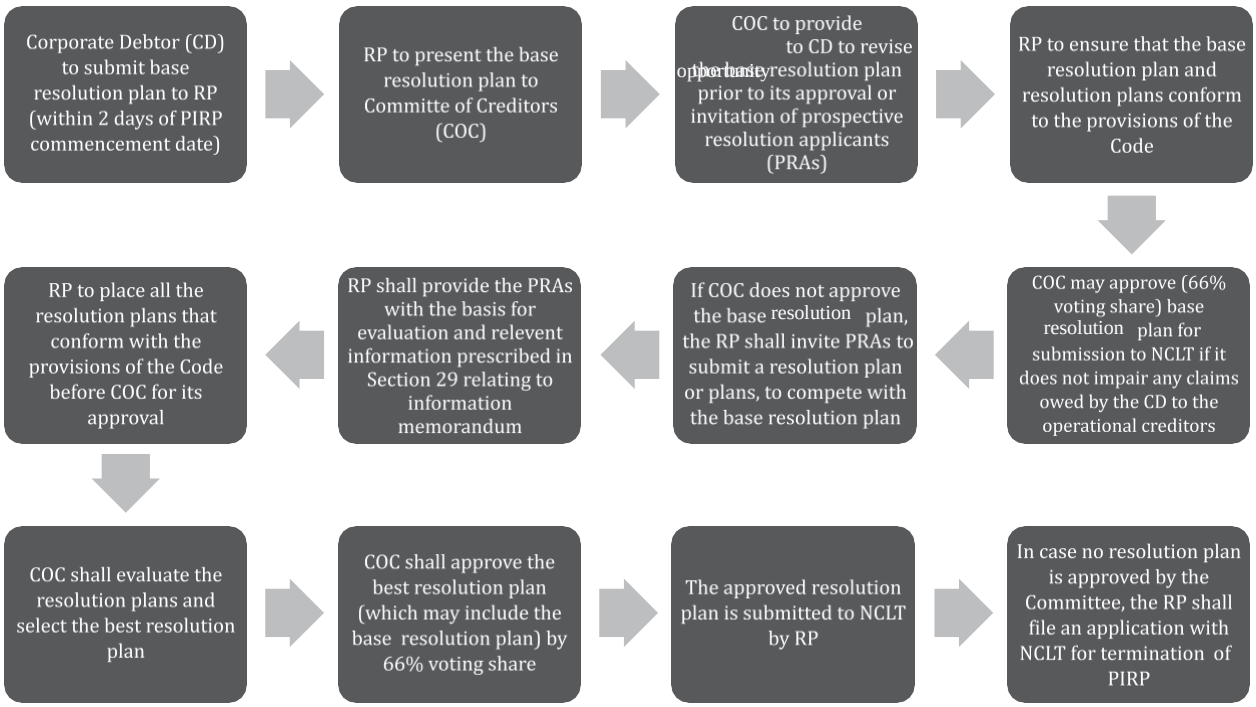


Fig: Consideration and approval of Resolution Plan

Approval of resolution plan (Section 54L)

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) or sub-section (12) of section 54K, as the case may be, subject to the conditions provided therein, meets the requirements as referred to in sub-section (2) of section 30, it shall, within thirty days of the receipt of such resolution plan, by order approve the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of a resolution plan under this sub-section, satisfy itself that the resolution plan has provisions for its effective implementation.

(2) The order of approval under sub-section (1) shall have such effect as provided under sub-sections (1), (3) and (4) of section 31, which shall, mutatis mutandis apply, to the proceedings under this Chapter.

(3) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, within thirty days of the receipt of such resolution plan, by an order, reject the resolution plan and pass an order under section 54N.

(4) Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J and the resolution plan approved by the committee of creditors under sub-section (4) or sub-section (12), as the case may be, of section 54K, does not result in the change in the management or control of the corporate debtor to a person who was not a promoter or in the management or control of the corporate debtor, the Adjudicating Authority shall pass an order -

(a) rejecting such resolution plan;

(b) terminating the pre-packaged insolvency resolution process and passing a liquidation order in respect of the corporate debtor as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of section 33; and

(c) declaring that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Termination of pre-packaged insolvency resolution process (Section 54N)

(1) Where the resolution professional files an application with the Adjudicating Authority, -

(a) under the proviso to sub-section (12) of section 54K; or

(b) under sub-section (3) of section 54D,

the Adjudicating Authority shall, within thirty days of the date of such application, by an order, -

(i) terminate the pre-packaged insolvency resolution process; and

(ii) provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.

What happens when the Adjudicating Authority has passed an order

for termination of pre-packaged insolvency resolution process pursuant to the decision of COC?

As per Section 54N(4) of the Code, the Adjudicating Authority shall further pass an order —

(a) of liquidation of corporate debtor

(b) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of

(2) Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).

Any appeal from an order approving the resolution plan under sub-section (1) of section 54L, shall be on the grounds laid down in sub-section (3) of section 61 (Section 54M)

(3) Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.

Initiation of corporate insolvency resolution process (Section 54 O)

(1) The committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, by a vote of sixty-six per cent. of the voting shares, may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.

(2) Notwithstanding anything to the contrary contained in Chapter II, where the resolution professional intimates the Adjudicating Authority of the decision of the committee of creditors under sub-section (1), the Adjudicating Authority shall, within thirty days of the date of such intimation, pass an order to -

(a) terminate the pre-packaged insolvency resolution process and initiate corporate insolvency resolution process under Chapter II in respect of the corporate debtor;

(b) appoint the resolution professional referred to in clause (b) of sub-section (1) of section 54E as the interim resolution professional, subject to submission of written consent by such resolution professional to the Adjudicatory Authority in such form as may be specified; and

(c) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of insolvency resolution process costs for the purposes of the corporate insolvency resolution process of the corporate debtor.

(3) Where the resolution professional fails to submit written consent under clause (b) of sub-section (2), the Adjudicating Authority shall appoint an interim resolution professional by making a reference to the Board for recommendation, in the manner as provided under section 16.

Section 54O(4) of the Code provides that where the Adjudicating Authority passes an order under sub- section (2):				
(a) such order shall be deemed to be an order of admission of an application under section 7 and shall have the same effect;	(b) the corporate insolvency resolution process shall commence from the date of such order;	(c) the proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any, shall continue during the corporate insolvency resolution process;	(d) for the purposes of sections 43, 46 and 50, references to "insolvency commencement date" shall mean "pre-packaged insolvency commencement date"; and	(e) in computing the relevant time or the period for avoidable transactions, the time period for the duration of the pre-packaged insolvency resolution process shall also be included, notwithstanding anything to the contrary contained in sections 43, 46 and 50.

Application of provisions of Chapters II, III, VI and VII to this Chapter (Section 54P)

(1) Save as provided under this Chapter, the provisions of sections 24, 25A, 26, 27, 28, 29A, 32A, 43 to 51, and the provisions of Chapters VI and VII of this Part shall, *mutatis mutandis* apply, to the pre-packaged insolvency resolution process, subject to the following, namely:

(a) reference to "members of the suspended Board of Directors or the partners" under clause (b) of sub-section (3) of section 24 shall be construed as reference to "members of the Board of Directors or the partners, unless an order has been passed by the Adjudicating Authority under section 54J";

(b) reference to "clause (j) of sub-section (2) of section 25" under section 26 shall be construed as reference to "clause (h) of sub-section (2) of section 54F";

(c) reference to "section 16" under section 27 shall be construed as reference to "section 54E";

(d) reference to "resolution professional" in sub-sections (1) and (4) of section 28 shall be construed as "corporate debtor";

(e) reference to "section 31" under sub-section (3) of section 61 shall be construed as reference to "sub-section (1) of section 54L";

(f) reference to "section 14" in sub-sections (1) and (2) of section 74 shall be construed as reference to "clause (a) of sub-section (1) of section 54E";

(g) reference to "section 31" in sub-section (3) of section 74 shall be construed as" reference to "sub-section (1) of section 54L".

(2) Without prejudice to the provisions of this Chapter and unless the context otherwise requires, where the provisions of Chapters II, III, VI and VII are applied to the proceedings under this Chapter, references to -

(a) "insolvency commencement date" shall be construed as references to "prepackaged insolvency commencement date";

(b) "resolution professional" or "interim resolution professional", as the case may be, shall be construed as references to the resolution professional appointed under this Chapter;

(c) "corporate insolvency resolution process" shall be construed as references to "pre-packaged insolvency resolution process"; and

(d) "insolvency resolution process period" shall be construed as references to "prepackaged insolvency resolution process period.