MAY 2024

# THE INSOLVENCY PROFESSIONAL

## Your Insight Journal

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

# OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA-ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee. We are established with a vision of providing quality services and adhering to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletter namely “IBC Au courant” which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy domain.

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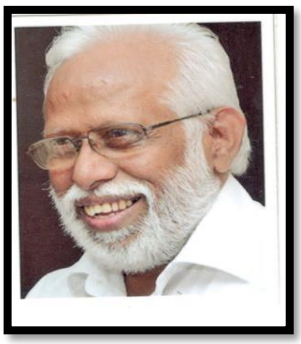

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# MESSAGE FROM THE DESK OF MANAGING DIRECTOR

***Dear Reader,***

***This issue of 'Your Insight Journal' comes to you in the fag-end of a spirited election season, a five – yearly exercise of adult franchise we are justifiably proud of. This is also at a time when the heat wave conditions across the swathe of North Indian plains have become scorching driving may to the cooler locations in the Himalayas, which themselves are groaning under the pressure of large tourist influx.***

***Professional development happens through continuous professional education including updates on changes in code and relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow IPs. As our ancestors said, teaching and articulation is the highest level of learning. I invite more and more members to contribute articles and opinions to the E-Journal on all aspects that IBC ecosystem and related domains that will enrich the knowledge base of the readers.***

***At IPA-ICAI, we strive to make our publications relevant, informative, interesting and lucid. This issue of the 'Insolvency Professional – Your Insight Journal' has three interesting articles-***

***A well-researched article of CMA Savinder Singh Chug on the actual process of closure of a company, one that would be very useful to IPs handling liquidation assignments, particularly voluntary liquidation.***

***The second article by CMA Sumit Shukla, IP, deals claims management, a tricky part of CIRP and liquidation that render many an RP and liquidator facing several legal challenges, Implications of climate change is the subject of the next article, a very important topic that everyone, including IPs, should be abreast, though a slight deviation from the normal opinions in this journal that have always considered matters pertaining to IBC ecosystem,***

***Third is a critique on Sec 29A of the IBC, 2016, by CA Pankaj Gupta, IP, that deals with eligibility of resolution applicants and its implementation, an aspect that carries significant weight in integrity and credibility of corporate insolvency process.***

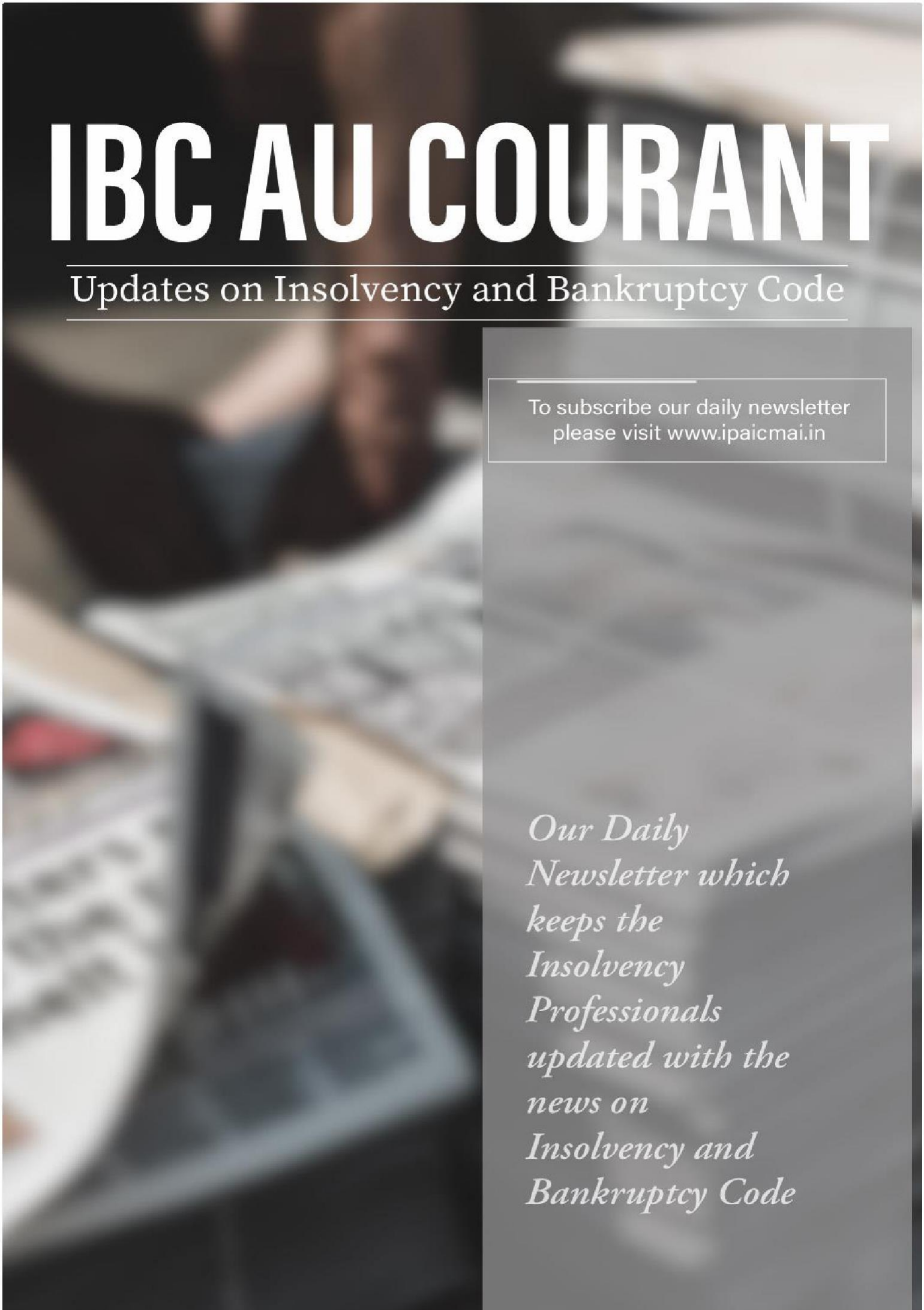
***I am sure you will find both the articles interesting and useful. We welcome your responses to the published articles in this journal. You are welcome to write to publication@ipaicmai.in.***

***Wish you all happy reading***.

Managing Director
Mr. G.S. Narasimha Prasad

# PROFESSIONAL DEVELOPMENT INTIATIVES

| MAY 2024 | |
|---|---|
| **Date** | **Events** |
| 05th -May-2024 | **Workshop on "Judicial Pronouncements under IBC, 2016"** was conducted on 05th May 2024, May 2024, with content like, Landmark Judgements of NCLT, Landmark Judgements of High Court(s), Landmark Judgements of Supreme Court, Other Important Judgements, etc. |
| 10th – 12th May 2024 | **Master Class on Art of Handling a Resolution Plan** was held from 10th May – 12th May 2024 and content included topics such as Mandatory Content of Resolution Plan, Contravention and compliances of other Laws, Dues of Stakeholders, Case Laws, Approval by COC, filing before Adjudicating Authority, etc. |
| 13th - 19th May 2024 | The **64th Batch of Pre-Registration Educational Course ("Online Course")** was conducted from 13th May - 19th May 2024 the course enhanced the knowledgebase, sharpen the management skill with efficiency in advocacy, code of conduct, and handling insolvency effectively. |
| 18th - May 2024 | **The workshop on Disciplinary Aspects & Governance under IBC, 2016** was conducted on 18th May 2024 which received an overwhelming response from participants who benefitted from the knowledge sharing workshop. There were several takeaways for the benefit of participants. |
| 26th - May 2024 | **Workshop on Not Readily Realisable Assets"** was conducted on 26th May 2024, with content like, Concept and scope of NRRA, Powers of Liquidators, Issue faced during liquidation regarding claims & interest, Checks and Balances, Options of Assignment, Treatment of NRRA during liquidation, International Best Practices. |
| 31st -04th June | **Executive Development Program Mastering the Art of Liquidation**" is scheduled from 31st to 04th June 2024 which includes contents such as Concept of Liquidation, Initiation & Appointment of Liquidator, Liquidation Regulations and Its Amendments, Collection & Verification of Claims, Mode of Sale & Valuation of Assets intended to be sold, Distribution of Proceeds, Stakeholder Consultation Committee, etc. |



# IBC AU COURANT

## Updates on Insolvency and Bankruptcy Code

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*Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code*

# ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
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# CLOSURE OF COMPANY – VARIOUS OPTIONS

**CMA Sawinder Singh Chug**
**Insolvency Professional**

## INTRODUCTION

There are tremendous changes in the system for doing business with ease during the last few years. Where financial stakeholders found it difficult to clear backlog of NPA cases, entrepreneurs also got it tough to come out of the business in loss and trauma. Now with the invent of Insolvency & Bankruptcy Code 2016 and changes in Companies Act 2013, it has been made somewhat easy to deal with such cases. Entrepreneurs now get lease of fresh life to exit from previous mistakes done and start new business with more success rate as per their vast experience. Financial institutions also feel better to cope with such cases under new provisions. So, ease of doing business also makes it possible the ease with which companies can shut operations and exit the marketplace in a country and re-enter the market.

Under Indian law, companies (or limited liability partnerships ("LLP") have various options to wind down operations voluntarily, either under the Companies Act, 2013 ("**Companies Act**"), (or the Limited Liability Act, 2008, for an LLP) or the Insolvency and Bankruptcy Code, 2016 ("**IBC**").
This article aims to give bird view of the various options through which a company may be able to close/wind up its operations in India, along with the practical considerations that may be applicable while exercising these options.

## VARIOUS COURSE OF ACTION FOR VOLUNTARY CLOSURE OF AN ENTITY IN INDIA

The mode that may be adopted for voluntary closure of a company mainly depends on the size of the company and whether it is a going concern or not. Summarily, the options that are available under the law include:

I. Striking off of a defunct company under Section 248 of the Companies Act.

II. Winding up under the supervision of the National Company Law Tribunal ("**NCLT**") under Section 271(a) of the Companies Act, read with the Companies (Winding Up) Rules, 2020 ("**Winding Up Rules**").

III. Summary winding up under the supervision of the Regional Director under Section 361 of the Companies Act, read with the Winding Up Rules; and

IV. Voluntary Liquidation under Section 59 of the IBC, read with the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Proceedings) Regulations, 2017 ("Voluntary Liquidation Regulations").

V. The IBC also provides for voluntarily commencing corporate insolvency resolution by the corporate person, which has committed a default (as defined under the IBC) under Section 10 thereof, though not covered in this article.

Similarly, a Limited Liability Partnership may also opt for striking off under the Limited Liability Partnership Act, 2008 ("**LLP Act**") (Section 75 of the LLP Act); or voluntary winding up by the NCLT under the LLP (Winding up and Dissolution Rules) 2012; or voluntary liquidation under IBC.

## PROCEDURE UNDER THE AVAILABLE OPTIONS

### (a) Striking off

A company can be closed by the prescribed Rules and Regulations mentioned under Companies Act 2013 because Company is a created under Companies Act 2013. The owners and directors of the Company can decide various options to close the business of its Company but in this era of Ease of doing business, as introduced by the Government, the easiest way to close the Company is by filing an application to Registrar of Companies (ROC) when a company is inoperative for a certain period of time. Section 248 to 252 of the Companies Act 2013 read with Companies (Removal of Names of Companies from the Registrar of Companies) Rules, 2016 deals with the procedural requirements in order to remove the name of the Company from the Registrar of Companies (ROC).

**GROUNDS ON WHICH A COMPANY CAN STRIKE OFF THE NAME BY ROC:**

Section 248 (1) of the Companies Act 2013 and rules made thereunder states various grounds on which the business of the Company can be strike off by the Registrar of Companies, as discussed below:

1. A company has failed to commence its business within one year of its incorporation.
2. A company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made an application within such period for obtaining the status of a Dormant Company under section 455 of the Act.
3. The subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has

not been filed within 180 days of its incorporation under subsection (1) of section 10A of the Act.

4. The company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.

**PROCEDURAL REQUIREMENTS FOR REMOVING THE NAME OF THE COMPANY:**

1. Company will hold a board meeting for

- to consider and approve filing of application for removal of name.
- To authorize any director to file an application to ROC for removal of name and to obtain consent of minimum 75% of the members of the Company.
- To fix the date, day, place and time for the general meeting of the Company for passing a Special resolution.
- To approve the draft notice of the general meeting along with the explanatory statement. To authorize any officer to issue notice of the general meeting.

2. Company will hold a general meeting to pass the special resolution for removal of name of the Company from the ROC.

3. Company will file a copy of special resolution in form MGT-14 within 30 days of passing the resolution.

4. Company will file an application to ROC for removal of name of company in Form STK-2 along with the required following documents:

   ✓ Indemnity bond duly notarised by every director in Form STK-3. A statement of accounts in Form STK-8 containing the assets and liabilities of the Company made up to a day not more than 30 days before the date of the application and duly certified by CA.
   ✓ An affidavit in Form STK-4 by every director of the Company.
   ✓ A statement regarding pending litigations, if any, involving the Company.

5. ROC shall on receipt of an application:

- Place notice on the official website of MCA in Form STK-6.
- Publish in official gazette. Publish in English language in a leading English newspaper and at least once in a vernacular language where the registered office of the Company is situated.

6. ROC shall simultaneously intimate the concerned regulatory authorities regulating the Company, i.e., Income tax authority, central excise and GST Authorities about the proposed action of closure of the company in order to seek their objections, if any, to be furnished within 30 days of issue of letter of intimation and if no objection/response is received by ROC, it shall be presumed to propose the action of striking off the Company.

7. After compliance of all the process, ROC shall strike off the name and dissolve the company by sending notice in the official gazette in Form STK-7.

**KEY POINTS TO CONSIDER:**

Before making an application for removal of the name of a company, following points are to be considered:

1. A company needs to extinguish all its liabilities in order to close the Company.

2. Application for removal of a company cannot be made by a company, if it has not filed overdue returns in Form AOC-4/ AOC-4 XBRL and Form MGT-7 up to the end of the financial year in which the company ceased to carry on its operations.

3. Application for removal of the Company cannot be made if, at any time in the previous 3 months, the Company:

- Has changed its name or its registered office from one state to another.
- Has made a disposal for value of property or rights held by it, immediately before Cesar of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business.
- Has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement.
- Has made an application to the Tribunal for the sanctioning of a Compromise or Arrangement and the matter has not been finally concluded.
- or is being wound up under Chapter XX, whether voluntarily or by the Tribunal or under the IBC, 2016.

**(b) Summary winding up**

A more recent addition to the Companies Act, a summary procedure for liquidation by the Regional Director of the Ministry of Corporate Affairs has been introduced by virtue of the Winding Up Rules, read along with Section 361 of the Companies Act.

Intended as a streamlined mechanism to help small companies wind-down expeditiously, this process does not require the intervention of the NCLT at all, instead envisages applying for winding-up before the concerned Regional Director of the Ministry of Corporate Affairs, who is in charge of the region where the Company is located, subject to the company meeting certain specified threshold. The concerned Regional Director, based on a petition filed by the company which meets the specified thresholds, appoints a liquidator for liquidating the assets of the company. After completing the liquidation process, the Regional Director is empowered to pass the final order of dissolution.

For a company intending to adopt the summary winding up process, it must meet the thresholds prescribed under the Companies Act and the Winding Up Rules, *viz*:

(a) the company should have assets of book value not exceeding one crore rupees; and

(b) Based on the latest audited balance sheet:

(i) The company which has taken deposits does not have total outstanding deposits exceeding twenty-five lakh rupees: or

(ii) The Company does not have total outstanding loan (including secured loan) exceeding fifty lakh rupees: or

(iii) The Company has a turnover up to fifty crore rupees: or

(iv) The Company has paid up capital not exceeding one crore rupees.

If the aforementioned thresholds are met, the company can file a petition in the prescribed form before the Regional Director, along with a statement of affairs. The Regional Director is required to assess whether the thresholds for commencing summary liquidation have been met, following which an order may be passed appointing the official liquidator of the company.

It is prescribed that the official liquidator disposes of the assets of the company within 60 days as prescribed under the Winding Up Rules and submit a final report to the Regional Director, who upon receipt of such report can order that the company be dissolved.

In theory, the summary winding up process is more streamlined, with timelines being prescribed for liquidation and more importantly it does not involve the requirement of adjudication by the NCLT. However, its applicability is restricted to entities that have smaller scales of operations, and there is presently little data available in the public domain on its practical efficacy.

**(c) Winding up by the NCLT**

The winding up provision under the present Companies Act is a vestige of the erstwhile Companies Act, 1956, which provided for winding up by the High Court, including for failure to pay any debt. With the introduction of the Companies Act and more importantly the IBC, the scope of winding up under Section 271 of the Companies Act has become narrower. Under the present scheme, the NCLT has the jurisdiction to entertain a petition presented either by the company, any contributory of the company, the Registrar; or any other person authorised by the Central Government or State Government. A company may opt to wind up under the supervision of the NCLT by passing a special resolution to this effect or when the Registrar or the Central Government is of the opinion that the affairs of the company have been conducted in a fraudulent manner or if the company was formed for fraudulent and unlawful purpose. This was recently seen in *Devas Multimedia Private Ltd V. Antrix Corporation Ltd.* ("**Devas Multimedia Case**"), where the Hon'ble Supreme Court upheld an order of winding up passed by the NCLT under Section 271(c) of the Companies Act. Further, Section 271 allows for winding up of a company that has acted against the interest of the sovereignty and integrity of India; or if the Company has made a default in filing its financial statements for five consecutive years; or if the NCLT is of the opinion that it is just and equitable that the Company be wound up.

If the winding up petition is admitted by the NCLT, a liquidator would then be appointed by an order of the NCLT who shall constitute a winding up committee and submit a report within 60 days of the order of the NCLT after which the NCLT may fix a time within which the liquidation shall be completed or order the sale of the company as a going concern. After the affairs of the company are wound up, an application would be made to the NCLT for the dissolution of the company.

While the process as laid out under the Winding Up Rules is detailed and relatively well-established owing to past precedents, the exercise of option Section 271 of the Companies Act as it presently stands, can be restricted to a few specific circumstances and can be considered as a more time-consuming process, which requires the intervention of the NCLT at every stage of the process. Various other stakeholders will also be involved in this process – the Company Liquidator, the Winding up Committee, and the Registrar.

**(d) Voluntary liquidation under the IBC**

Voluntary liquidation is a process wherein a solvent company, i.e., a company with sufficient assets to cover its debts, chooses to wind up its operations and distribute its assets among its stakeholders in a systematic manner. The primary objective of voluntary liquidation is to ensure that the assets

of the company are distributed fairly among its creditors and shareholders, while also promoting a swift and efficient exit from the business. Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the Code. The IBBI (Voluntary Liquidation Process) Regulations, 2017 govern the process of Voluntary Liquidation in India.

The enactment of the IBC in 2016 introduced a separate voluntary liquidation process, which is more commonly adopted for winding down a corporate person (which includes both a company and an LLP) these days. Prior to the IBC, a company could initiate voluntary liquidation under Section 304 of the Companies Act, which was subsequently omitted by the IBC. The process of Voluntary Liquidation has become more streamlined under Section 59 of the IBC, read along with Voluntary Liquidation Regulations, since it does not envisage the intervention of the NCLT for commencing voluntary liquidation process.

In terms of process, prior to initiating voluntary liquidation, the company is required to prepare a valuation report and a statement of assets and liabilities of the company as on the liquidation commencement date (i.e. the date from when the company has no liabilities, employees and assets, except cash and bank balance required to make payments if any claim is filed and to cover the liquidation expenses). Thereafter, the company may initiate the process by passing a director's declaration, stating that the company is not in debt and is not being liquidated to defraud any person. After issuing the declaration of solvency, the company is required to pass a special resolution appointing a liquidator, following which the company shall cease all business operations except as far as required for the winding up of the business. The role of government regulators is restricted since the company is merely required to notify the Registrar and the Insolvency and Bankruptcy Board of India ("IBBI") regarding its resolution to liquidate the company. This ensures that there is no delay in commencing the liquidation process. Liquidation is also required to be conducted as mandated under the Voluntary Liquidation Regulations by the liquidator within 270 days (if the company has creditors who have approved the special resolution) or 90 days in certain specified cases.

The process does not involve the courts or the NCLT until the final stage, wherein after completion of the liquidation process, the liquidator submits the final report to the NCLT, along with an application for dissolution of the Company. The NCLT is therefore merely required to ascertain whether the company has fulfilled all the compliances and procedural requirements as mandated under the IBC and the Voluntary Liquidation Regulations, before passing an order of dissolution.

## CLOSING COMMENTS

As set out above, various modes to voluntarily wind down the operations of a company exist in India. It may be noted however that while exercising any of the above options, the company would be required to ensure certain minimum compliances such as requirement of a minimum of two (for a private company) or three (for a public company) directors and the maintenance of a registered office as required under the Companies Act.

While considering the most viable method to wind down a company, it is therefore important for a company to consider various aspects such as its size (in terms of revenue and the scale of business operations), the timelines within which it wants to complete the process, the level of intervention that is required by the relevant regulators/ the NCLT, the level of control that may be exercised by the company in conducting the winding down process and the relative cost and effort required to wind down the company.

# CLAIM MANAGEMENT: BACKBONE OF IBC

**CMA Sumit Shukla**
**Advocate and Insolvency Professional**

- **CIRP is a creditor driven process wherein the COC is empowered to take decision for revival / liquidation of an ailing company.**
- **Inclusion of belated claims leads to the dilution of the voting share and the realization of debt, hence there may be conflict within the COC on inclusion of belated claims.**
- **Operational creditors especially Government dues are another area of concern. They involve huge amounts of public money, hierarchical process of approval for claim determination and filing. Their inclusion at later stages mostly derails the resolution process.**

## BACKGROUND

Corporate Insolvency Resolution Process is a creditor driven process therefore handling / management of the claims is one of the most critical processes and serves as backbone of stakeholder management and operational efficiency of the process. In recent times the approved resolution plan/s has been set aside / remanded back to the Committee wherein the court/s found that the claims were not handled by the IRP/RP properly. It is needless to mention that in few such cases the resolution plans were approved long back, and implementation was underway. Further, several claim related matters are still pending at various stages before the Adjudicating Authority / Appellate Authority or before the Hon'ble Supreme Court of India for the sole reason i.e. issues with the collation / verification of claim. Consequently, it is not only delaying the process and adds cost to the entire IBC machinery

## MANAGEMENT CLAIM DURING THE CIRP

The initiation of a claim typically starts with the orders of the adjudicating authority for the commencement of the Corporate Insolvency resolution process ("CIR Process") of the application. Under section 13 of the IBC, upon admission of the application filed u/s 7 or u/s 9 or u/s 10, the Adjudicating Authority shall by order direct to cause a public announcement for intimation of the CIR Process and call for the submission of the claim by the Creditors in the specified forms. CIRP being a time bound process, the creditors are required to submit their claims within specified timelines.

Soon after the release of the Public Announcement, claimants approach IRP / RP for filing of the claims. Claimants being tied up with their daily chorus and the fact that they are dealing with the process first time, they engage professionals for filing up the forms. The ability of the professional to comprehend the issues, availability of the supporting documents, bank statements, completeness of the documentation, litigation one has gone during the process pose another problem.

Once the verification is complete, the collation begins followed by the confirmation / intimation to the claimant. This overall process involves a thorough examination of the claims, the records of the Corporate Debtor, and the supporting documents provided by the claimant including the application of law of limitation. Trained and experienced IRP/RP are responsible for this task, applying their knowledge and investigative skills while adhering to the regulatory guidelines. They scrutinize the evidence, raise queries, and utilize analytical skills to determine the claim while admitting or rejecting the same. Following this, the RP / IRP is required to upload the claims in the public domain and if application constitute &/or reconstitute the COC by way of filing with the Adjudicating Authority. It is important to note here that it is the Committee who decides various matters including but not limited to the Resolution Plan.

Claim management process is vital for all the stakeholders within the CIR Process such as Claimants, Committee of the Creditors, Resolution Applicant, as it involves the collation, verification and constitution / reconstitution of the Committee of Creditors therefore the IRP / RP must ensure that all the claimants are duly and fairly treated in order to see the viable and sustainable resolution of a sick concern.

**OBSERVATIONS OF HON'BLE SUPREME COURT1**

On 12.02.2024 the Hon'ble Supreme Court of India in *Greater Noida Industrial Development Authority versus Prabhjit Singh Soni and Anr. in Civil Appeal Nos.7590-7591 of 2023* set aside the orders of the Adjudicating Authority approving the Resolution Plan and directed *"The resolution plan shall be sent back to the COC for re-submission after satisfying the parameters set out by the Code as exposited above."* In the paragraph 55 of the said orders the Hon'ble Supreme Court of India observed as follows

As we have found that neither NCLT nor NCLAT while deciding the application /appeal of the appellant took note of the fact that,- (a) the appellant had not been served notice of the meeting of the COC; (b) the entire proceedings up to the stage of approval of the resolution plan were ex parte to the appellant; (c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and (d) the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016, we are of the considered view

that the appeals of the appellant are entitled to be allowed and are accordingly allowed. The impugned order dated 24.11.2022 is set aside. The order dated 04.08.2020 passed by the NCLT approving the resolution plan is set aside. The resolution plan shall be sent back to the COC for re-submission after satisfying the parameters set out by the Code as exposited above. There shall be no order as to costs.

It is important to take note of the fact that the key issue here was that the CIR proceedings did not consider the claim filed by the Appellant as a consequence of which the Resolution Plan approved by the COC as well as by the Adjudicating Authority could not comply with the provisions under section 30(2) of the IBC. It would be relevant highlight here that the impugned order was passed on 04.08.2020 i.e. more than three years back and there would have been several steps would have been taken by the resolution applicant as well as by the stakeholders after the 04.08.2020 orders

**CHALLENGES FOR THE IRP / RP**

The challenges in claim management are multifaceted, ranging from the need for transparency and speed in handling claims to the complexities introduced by fraudulent activities. The IRP / RP must balance the need for thorough investigation against the expectation for quick admission / rejection in a mechanical manner on some or other pretext. Moreover, the evolving landscape of the IBC framework due to amendments, judicial pronouncements, adds another layer of complexity to claims management which calls for the defect free and transparent claim management process

In terms of the provisions of the IBC, the IRP / RP is duty bound to collate the claims submitted by the claimants. The Code also empowers the IRP/RP to seek further information, details, documents and clarifications as may be necessary for the collation of claim. The IRP / RP is also authorized to make the best estimates of the claim based upon the documents / information available with him/her. However, there are endless challenges being faced by the IRP/RP in the collation of the claims such as unavailability of the information / records of the Corporate Debtor due to non-cooperation on the part of the ex-management etc. On the other hand, the IRP/RP continue to face issues from the claimants to name few such issues are incorrect claim forms, claims submitted without proper supporting documentation, delays and so on.

One important area of IRP/RP role on determination of the claims is where a claim is already determined by another court / tribunal e.g. RERA, Consumer Court, Hight Court. Sometimes, those who approached courts get a relief or higher compensation. In a nutshell, success in the role of IRP/RP is more an art than science. While staying on the right side of the law need no mention, success lies in the ability and extent of managing the stakeholders.

**RECENT INITIATIVE FROM THE BOARD**

Taking note of the challenges being posed by such claims the IBBI initiated several steps with the intent to not only address the belated claims but also to reduce to burden of the stakeholders as well as for the adjudication authority who are burdened with so many applications arising due to delay in the submission of claim by the claimant. It is important to point out here that such applications several times not only cause delays for one particular CIRP but also the Court find it difficult to take up other important matters. And therefore, rightly so, with the recent modifications in the CIRP Regulations, the RP is required to provide the reasons for not collating the claim after verification. Moreover, the delayed claims are not received within the specified timelines are required to be verified and collated by the RP categorizing as acceptable or non-acceptable and place before the COC for their recommendation for inclusion in the list of creditors and treatment in the Resolution Plan followed by the application before the adjudicating authority seeking condonation of delays. This measure will not only reduce the repetitive applications thus reducing the burden of the Adjudicating Authority but also provide improved visibility to the COC as well as treatment in the Resolution Plan to the delayed claims. These amendments definitely pave the way for smoother revival process while reducing the time and efforts of the Adjudicating Authority.

**WAY FORWARD**

In today's dynamic IBC ecosystem, a well-designed and adaptive set of claims management processes is more important than ever. It not only ensures that claims are recorded efficiently but also plays a pivotal role in providing the treatment in the Resolution Plan submitted by the Resolution Applicant before the Committee of the creditors for the revival of the sick Company. As the industry continues to evolve, the focus on improving claims management systems will undoubtedly intensify, with a greater emphasis on digital transformation and stakeholder-centric approaches.

In light of recent orders of hon’ble Supreme Court several resolution plans have been sent back directing the COC to approve the compliant resolution plan as well as taking into consideration the recent amendment by the Board, the IRP / RP must take all such measures preventing the litigations and delays arising due to claim management. The IRP / RP being the experts equipped with the professional knowledge, therefore it is expected from them to apply their mind while rejecting any claim since such rejection will not end the matter there and the claims which are not admitted due to any reasons whatsoever shall continue to pose difficulties for the CIR Process, its stakeholders as well as for the ailing Company.

As we move forward the latest CIRP amendments shall certainly have positive impact on the ongoing and future CIR Process since sustainability of the Resolution Plan is the essence of the overall IBC framework and its success.

## CONCLUSION

Continuous improvement in the claim management process by the Resolution Professional (RP) or Interim Resolution Professional (IRP) can significantly streamline the Corporate Insolvency Resolution Process (CIRP). One way to enhance this process is by leveraging technology to create a centralized digital platform where claims can be filed, processed, and tracked. This would improve transparency and efficiency, allowing for real-time updates and easier access to information for all stakeholders which would reflect upon the credibility of the IBC framework. Additionally, implementing standardized templates and guidelines for claim submission can minimize errors and inconsistencies. Regular training and workshops for RPs/IRPs on the latest legal developments and best practices in claim management can also ensure that they are well-equipped to handle the complexities of the process. Furthermore, establishing a robust communication channel between the RP/IRP and the creditors can facilitate better understanding and cooperation, leading to a more streamlined claim verification and admission process. Lastly, periodic audits of the claim management process can help identify areas for improvement and ensure compliance with of Law.

# UNDERSTANDING THE SIGNIFICANCE OF SECTION 29A IN THE INSOLVENCY & BANKRUPTCY CODE, 2016

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**The synopsis encapsulates the pivotal role of Section 29A in the Insolvency & Bankruptcy Code, 2016 (IBC), emphasizing its significance in maintaining the integrity and credibility of the insolvency resolution process. This section imposes stringent eligibility criteria on prospective resolution applicants to prevent entities with questionable backgrounds from participating. By disqualifying willful defaulters, disqualified directors, and connected persons, Section 29A ensures fair treatment of creditors, promotes genuine resolution efforts, and mitigates conflicts of interest. Despite criticisms, its enforcement remains crucial for fostering transparency, bolstering investor confidence, and facilitating the revival of financially distressed companies within India's economic framework.**

## INTRODUCTION:

The Insolvency & Bankruptcy Code, 2016 (IBC) stands as a landmark legislation revolutionizing India's insolvency landscape. Among its many provisions, Section 29A holds a pivotal position, albeit often overshadowed by other sections. This article delves deep into the significance of Section 29A within the IBC framework, elucidating its objectives, implications, and impact on the insolvency resolution process.

One underrated yet important section of the Insolvency & Bankruptcy Code, 2016 (IBC) is Section 29A. This provision imposes eligibility criteria for prospective resolution applicants, aiming to ensure the integrity and credibility of the insolvency resolution process. Despite its significance, Section 29A often receives less attention compared to other sections of the IBC.

Enacted with the aim of consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals, the IBC ushered in a new era of efficiency and transparency in insolvency proceedings. However, to ensure the integrity and credibility of the resolution process, Section 29A was incorporated into the IBC.

## UNDERSTANDING SECTION 29A:

Section 29A delineates eligibility criteria for prospective resolution applicants, prohibiting certain entities from submitting resolution plans for distressed companies. The section aims to prevent individuals or entities with a questionable track record from participating in the resolution process,

thereby safeguarding the interests of creditors and promoting the revival of financially distressed companies.

**KEY PROVISIONS OF SECTION 29A:**

1. Willful Defaulters: Individuals or entities who have willfully defaulted on payment obligations to creditors are deemed ineligible to submit a resolution plan. This provision aims to hold accountable those responsible for deliberate defaulting and prevent them from benefiting from the insolvency resolution process.

2. Disqualified Directors: Directors of companies that have been disqualified under the Companies Act, 2013, are barred from participating in the resolution process. This provision prevents disqualified directors from circumventing their disqualification and maintains the integrity of the insolvency framework.

3. Undischarged Insolvents: Individuals declared as insolvent and whose insolvency proceedings are ongoing are ineligible to submit resolution plans. This ensures that individuals undergoing insolvency proceedings do not exploit the resolution process for personal gain.

4. Connected Persons: Section 29A also prohibits individuals or entities connected to disqualified persons, such as relatives or associates, from participating in the resolution process. This prevents potential conflicts of interest and ensures fairness and transparency in the resolution process.

5. Specified Defaults: Entities that are in default of specified financial obligations, as prescribed under the IBC, are ineligible to submit resolution plans. This provision aims to disqualify entities with a history of financial mismanagement or non-compliance from participating in the resolution process.

**SIGNIFICANCE OF SECTION 29A:**

1. Integrity and Credibility: Section 29A upholds the integrity and credibility of the insolvency resolution process by preventing individuals or entities with a dubious track record from participating. This instills confidence among creditors and stakeholders, thereby facilitating the smooth functioning of the resolution process.

2. Fair Treatment of Creditors: By disqualifying willful defaulters and disqualified directors, Section 29A ensures fair treatment of creditors and prevents defaulters from evading their liabilities. This promotes accountability and enhances the recovery prospects for creditors.

3. Promotion of Genuine Resolution: By prohibiting connected persons and entities with specified defaults from participating, Section 29A aims to promote genuine resolution efforts aimed at

reviving financially distressed companies. This prevents potential abuse of the resolution process and ensures that resolution plans are in the best interests of all stakeholders.

4. Prevention of Conflicts of Interest: Section 29A prevents conflicts of interest by prohibiting individuals or entities connected to disqualified persons from participating in the resolution process. This ensures transparency and fairness in the resolution process and mitigates the risk of undue influence or favoritism.

5. Enhanced Investor Confidence: The stringent eligibility criteria outlined in Section 29A enhance investor confidence in the insolvency resolution process. Investors are assured that their interests will be protected, and that the resolution process will be conducted in a transparent and equitable manner, thereby encouraging greater participation in distressed asset acquisitions.

**CHALLENGES AND CRITICISMS:**

While Section 29A serves a crucial role in maintaining the integrity of the insolvency resolution process, it has also faced criticisms and challenges. One of the primary criticisms is regarding the strictness of the eligibility criteria, which some argue may inadvertently disqualify potential resolution applicants who could contribute to the revival of distressed companies. Additionally, the interpretation and application of Section 29A have led to legal uncertainties and disputes, further complicating the resolution process.

**Frequently Asked Questions (FAQs) About Section 29A of the Insolvency & Bankruptcy Code, 2016:**

**1. What is Section 29A of the Insolvency & Bankruptcy Code, 2016?**

Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) specifies certain criteria that disqualify individuals or entities from submitting a resolution plan for a distressed company undergoing insolvency proceedings. The section aims to prevent unscrupulous promoters or related parties from regaining control of their company without fulfilling their prior obligations.

**2. Who can't apply under Section 29A?**

People or companies who have not paid back loans on purpose, directors who have been banned from running companies, people who owe a lot of money and haven't paid it back, family members or friends of banned people, and those who haven't paid money they owe as per the law.

**Disqualification of Willful Defaulters:** Any person or entity that is classified as a willful defaulter by any bank or financial institution is not eligible to submit a resolution plan.

**Convicted Offenders:** Individuals or entities convicted of any offense punishable with imprisonment for two years or more are disqualified.

**Undischarged Insolvents:** Persons who are undischarged insolvents cannot participate in the resolution process.

**NPA Classification:** Promoters or entities managing or controlling companies that have been classified as non-performing assets (NPAs) for more than a year are ineligible unless they clear all overdue amounts before submitting a resolution plan.

**Disqualified Directors:** Any person who has been disqualified from acting as a director under the Companies Act, 2013 is also barred.

**Connected Persons:** The section also includes disqualification for connected persons, which means those who are promoters or in management control of the resolution applicant or have control over the business of the corporate debtor.

**3. Why was Section 29A made?**

Section 29A was introduced in the Insolvency and Bankruptcy Code, 2016, to address concerns about the misuse of the insolvency resolution process. The primary reasons for its introduction are:

**Preventing Abuse by Promoters:** Before Section 29A, there were instances where defaulting promoters could regain control of their companies through the resolution process without clearing their previous dues. Section 29A was introduced to prevent such promoters from regaining control of their companies without fulfilling their obligations to creditors.

**Ensuring Accountability:** The section ensures that individuals or entities responsible for the company's financial distress are held accountable and are not allowed to participate in the resolution process unless they have cleared their dues.

**Maintaining Integrity of the Resolution Process:** By disqualifying willful defaulters, convicted offenders, undischarged insolvents, and other ineligible parties, Section 29A aims to maintain the integrity of the insolvency resolution process. It ensures that only credible and responsible parties can submit resolution plans.

**Protecting Creditor Interests:** The provision protects the interests of creditors by ensuring that only those capable of genuinely turning around the distressed company can participate in the resolution process. This increases the likelihood of successful resolution and maximizes the value for creditors.

**Promoting Fair Competition:** Section 29A promotes a level playing field by preventing entities with a history of default or mismanagement from gaining an unfair advantage in the resolution process. This fosters fair competition and encourages genuine bidders to participate.

**4. Are there any problems with Section 29A?**

While Section 29A aims to maintain the integrity of the resolution process, several issues and criticisms have been raised regarding its implementation:

**Too Strict:** Section 29A has very strict rules that can stop many potential buyers from bidding on bankrupt companies, even if they have the skills to turn them around.

**Fewer Bidders:** Because of these strict rules, fewer people or companies can bid, which means less competition and possibly lower prices for the bankrupt company's assets.

**Confusing Rules:** The rules in Section 29A can be confusing and hard to interpret, leading to legal battles and delays in resolving bankruptcy cases.

**Unfair to Some:** Sometimes, good buyers who could help the bankrupt company recover are blocked because they have past connections to bad loans, even if those problems weren't their fault.

**Court Delays:** Courts often have to step in to clarify the rules, which slows down the whole process of resolving bankruptcies.

**Less Attractive to Global Investors:** Other countries don't have such tough rules, so global investors might be less interested in investing in Indian bankruptcies.

**5. How can an Insolvency Professional ensure about 29A compliance of the prospective resolution applicant?**

Due diligence for Section 29A involves thoroughly checking whether a potential resolution applicant is eligible under the specific criteria laid out by the section. Insolvency Professional can follow the following steps to perform due diligence for Section 29A:

**Identify Disqualification Criteria:** Understand the disqualification criteria under Section 29A. These include:

- Willful defaulters
- Those associated with non-performing assets (NPAs)

- Convicted for any offense punishable with imprisonment for two years or more
- Disqualified directors under the Companies Act, 2013
- Prohibited by the Securities and Exchange Board of India (SEBI) from trading in securities or accessing the securities market
- Related parties of the above-mentioned categories

**Collect Information:** Gather necessary information and documents about the resolution applicant, such as:

- Financial statements
- Credit history and reports
- Criminal background checks
- Regulatory compliance records
- Corporate filings and disclosures
- Information on related parties and their financial and regulatory status

**Verify Financial Status:** Check the applicant's financial history for:

- Involvement with NPAs
- History of willful defaults
- Any adverse financial actions or penalties

**Legal and Regulatory Checks:** Conduct legal and regulatory checks to ensure:

- No criminal convictions for offenses punishable with imprisonment of two years or more
- No disqualifications under the Companies Act
- No prohibitions by SEBI or other regulatory bodies

**Check Related Parties:** Ensure that none of the applicant's related parties fall under any of the disqualification criteria.

**Public Records Search:** Search public records, databases, and news sources for any adverse information about the applicant and their related parties.

**Seek Professional Assistance:** Engage legal, financial, and compliance professionals to assist with the due diligence process and ensure thorough checks.

**Documentation and Reporting:** Document all findings and prepare a detailed report on the eligibility of the applicant under Section 29A. This report should include:

- Summary of findings

- Any potential disqualifications
- Supporting documents and evidence

**Review and Approval:** Present the due diligence report to the relevant decision-making body, such as the committee of creditors, for review and approval.

**Continuous Monitoring:** Continue to monitor the resolution applicant's compliance with Section 29A criteria throughout the resolution process.

By following these steps, Insolvency Professional can ensure thorough due diligence is performed, helping to maintain the integrity of the insolvency resolution process.

## CONCLUSION:

In conclusion, Section 29A of the Insolvency & Bankruptcy Code, 2016, is a cornerstone provision that plays a vital role in upholding the integrity, credibility, and fairness of the insolvency resolution process. By imposing stringent eligibility criteria for prospective resolution applicants, Section 29A aims to prevent abuse of the resolution process, promote genuine resolution efforts, and safeguard the interests of creditors and stakeholders. While challenges and criticisms persist, the overarching objective of Section 29A remains paramount: to facilitate the efficient and transparent resolution of distressed assets, thereby contributing to the stability and growth of India's economy.

# CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

## SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

**Giriraj Enterprises v. Regen Powertech (P.) Ltd. [2024] 160 taxmann.com 68 (NCLAT - Chennai)**

*Consolidation is based on principle that holding and subsidiary units would be regarded as a 'single unit' owing to nature of business activity and this cannot be construed as a principle in 'equity' but a 'legal principle'; where parameters set for consolidation with respect to common control, common directors, common liabilities, interdependence and intricate links between holding and subsidiary company were satisfactorily met, both companies were to be treated as a single economic unit and consolidation of CIRPs in relation to both companies was to be allowed.*

RPPL was a holding company and RISPL was a subsidiary company providing operation and maintenance services to wind energy turbines/wind energy generators monitored and held by holding company RPPL to its customers. Admittedly, RPPL had supplied three wind turbines to the applicant/appellant, pursuant to which delivery, the appellant had entered into an agreement for operation and maintenance (O & M) of said wind turbines with RISPL for a period of 10 years. RPPL and RISPL were admitted to CIRP. The appellant sought consolidation of CIRPs in relation to both companies contending that RISPL was only an extended arm of RPPL and without support and existence of RPPL, contract entered into with RISPL for operation and maintenance services would be rendered futile and impossible. NCLT dismissed application holding that the appellant having not 'rendered' services to the corporate debtor but having received services from the corporate debtor could not be termed as an operational creditor and, thus, they had no locus standi to maintain said application for consolidation.

Held that definition of an 'operational debt' as defined under section 5(21) is broad enough to include all forms of contract for supply of goods and services between the operational creditor and the corporate debtor, including ones where the operational creditor may have been receiver/purchaser of goods or services from the corporate debtor, hence, appellants had locus in their capacity as 'operational creditors' and being 'aggrieved parties' to file application seeking consolidation of CIRPs. Consolidation is based on principle that holding and subsidiary units would be regarded as a 'single unit' owing to nature of business activity and this cannot be construed as a principle in 'equity' but a 'legal principle'. Since parameters set out in Radico Khaitan Ltd. v. BT & FC (P.) Ltd. [Company Appeal (AT) (Ins.) No. 919 of 2020, dated 26-3-2021] and Oase Asia Pacific Pte Ltd. v. Axis Bank Ltd. [2021] 129 taxmann.com 287 (NCL-AT) 'for consolidation' with respect to common control, common directors, common liabilities, interdependence and intricate links between companies were largely and satisfactorily met, RPPL and RISPL could be treated as a single

economic unit and, therefore, consolidation of CIRPs was to be allowed.

**Case Review**: TVH Energy Resources (P.) Ltd. v. Ebenezar Iribaraj (RP) of Regen Powerkon (P.) Ltd. [2024] 160 taxmann.com 67 (NCLT - Chennai), affirmed.

## SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

- **Bhavesh Harkishandas Mehta v. Kookmin Bank [2024] 160 taxmann.com 73 (NCLAT- New Delhi)**

*Where CIRP application against corporate debtor was pending before Court V of NCLT of Mumbai Bench and application filed under section 95 against personal guarantor of corporate debtor was heard by Court III of NCLT of Mumbai Bench, when an insolvency proceeding of corporate debtor is pending in different Court room of a particular Bench of NCLT, insolvency proceedings against guarantor of corporate debtor can be entertained by another Court of same Bench, and, therefore, order passed by Court III admitting such application was well within its jurisdiction.*

The financial creditor extended credit facility to the corporate debtor. The appellants / personal guarantors of the corporate debtor executed a deed of personal guarantee to the financial creditor in respect of said credit facility. The financial creditor filed an application under section 7 seeking initiation of CIRP against the corporate debtor before Court V of NCLT of Mumbai. The financial creditor issued demand notice under section 8 to appellants and filed an application under section 95 against appellants which was heard by Court III of NCLT of Mumbai. Court III passed impugned order in application filed under section 95, appointing RP and directing RP to submit a report under section 99. On appeal, appellants submitted that as per section 60(2) application filed under section 95 was required to be heard by same bench i.e. Court V where proceedings under section 7 against the corporate debtor were pending and impugned order was passed without jurisdiction.

Held that when an insolvency proceeding of the corporate debtor is pending in different court room of a particular Bench of NCLT, proceedings under section 95 can be entertained by another court of same Bench as per general or special order of President under Rule 16 and order passed under section 95 application by Court different from Court where insolvency proceeding is pending, shall not be without jurisdiction. Section 60(2) contemplates filing of application for personal guarantor before NCLT or its benches and not to a particular courtroom of NCLT or its benches, therefore, impugned order passed by Court III of NCLT, Mumbai Bench was well within its jurisdiction and

instant appeals were to be dismissed.

**Case Review**: Kookmin Bank v. Bhavesh Harkishandas Mehta [2024] 160 taxmann.com 72 (NCLT - Mum.), affirmed.

## SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

- **E.M. Najeeb Ellias Mohammed Promoter of Air Travel Enterprises India Ltd. v. Union Bank of India [2024] 160 taxmann.com 137 (NCLAT - Chennai)**

*Where financial creditor gave loan to principal borrower for which appellant/corporate guarantor furnished guarantee, principal borrower committed default had admitted/acknowledged its liability to repay said loan, liability of corporate guarantor being co-extensive with that of principal borrower, conclusion arrived at by NCLT admitting a CIRP application against corporate guarantor was free from any legal flaws.*

The financial creditor granted a term facility to the corporate debtor/principal borrower. The appellant/corporate guarantor executed a corporate guarantee in favour of the financial creditor undertaking repayment of entire term loan amount and interest in event of default. Since the corporate debtor committed default in repayment of said facility, the financial creditor issued notice to it and the appellant to pay the amount. The financial creditor filed CIRP application against the corporate debtor before NCLT and same was admitted. The corporate debtor proposed OTS, but the financial creditor rejected same. The financial creditor invoking said guarantee also filed an application under section 7 against the appellant and NCLT vide impugned order admitted same by holding that debt was not paid by the appellant under said guarantee. The appellant filed instant appeal against impugned order. It was noted that in various communications the corporate debtor admitted its liability and sought time to settle it but there was no constructive effort to clear outstanding liability.

Held that as per decision of Supreme Court in Laxmi Pat Surana v. Union Bank of India [2021] 125 taxmann.com 394/166 SCL 318, liability of guarantor being co-extensive with principal borrower, triggers moment principal borrower commits default in paying acknowledged debt and in instant case the corporate debtor clearly admitted/acknowledged its liability, which squarely bounded appellant, thus, conclusion arrived at by NCLT was free from any legal flaws and instant appeal was to be dismissed.

**Case Review**: Union Bank of India v. Air Travel Enterprises Indian Ltd. [2024] 160 taxmann.com 136 (NCLT - Kochi), affirmed.

## SECTION 66 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - FRAUDULENT OR WRONGFUL TRADING

**ICOAT Projects (P.) Ltd. v. Smt. Devulapalli Pranitha [2024] 160 taxmann.com 138 (NCLT - Hyd.)**

*Where RP filed instant application on basis of transaction audit report, in which respondent Nos. 1 and 2, suspended directors of corporate debtor, had transferred assets of corporate debtor worth Rs. 13.74 lakhs to a third person after initiation of CIRP, said transaction was a fraudulent transaction intended to defraud creditors and, therefore, said application was to be allowed and suspended directors were directed to contribute Rs. 13.74 lakhs to assets of corporate debtor under section 66(2)(b).*

The corporate debtor was admitted into CIRP, and the applicant was appointed as RP. Thereafter, RP issued a public announcement. On verification of claims, RP had constituted CoC and appointed Transaction Auditor and after reviewing company's account, Transaction Auditor had furnished its report. RP, on basis of transaction audit report had observed that one Car worth Rs. 13.74 lakhs were transferred to a third person, viz. post commencement of CIRP. RP filed instant application seeking recovery of amounts of motor vehicles and direction to respondent Nos. 1 and 2, suspended directors of the corporate debtor to contribute funds to extent of Rs.13.74 lakhs.

Held that transfer of car ownership to a third person after initiation of CIRP was a fraudulent transaction intended to defraud creditors, therefore, instant Tribunal allowed said application and directed suspended director to contribute of Rs. 13.74 lakhs to assets of the corporate debtor under section66(2)(b).

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## SECTION 5(21) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

**Laxmi Trading Corporation v. Hindustan Construction Company Ltd. [2024] 160 taxmann.com 173 (NCLAT- New Delhi)**

*Where operational creditor raised a claim against a corporate debtor, in which out of 234 invoices, 224 invoices were ex-facie time barred and total amount for remaining 10 invoices did not exceed threshold of Rs. one crore, claim of operational creditor could not be accepted and impugned order passed by NCLT rejecting section 9 application was justified.*

The respondent-corporate debtor had bought hardware goods from the appellant-operational creditor by various purchase orders between period of 2010 to 2019. The operational creditor issued various invoices. Since the corporate debtor had only made partial payment, the operational

creditor issued a demand notice and filed an application under section 9. NCLT vide impugned order dismissed said application on ground that claims made by the operational creditor were beyond period of limitation. It was noted that most of invoices pertained to period of 2012 to 2014 and default dates varied from year 2012 to 2014 in majority of cases.

Held that the three-year limitation period, even for last invoice out of 224 invoices had lapsed in September 2018, while petition was filed on 25-2-2021 and, therefore, argument of the petitioner that limitation stood extended was not tenable. Since out of 234 invoices, 224 invoices were ex-facie time barred and remaining 10 invoices did not make it more than threshold of Rs. one crore, claim of operational creditor could not be accepted.

**Case Review:** Laxmi Trading Corpn. v. Hindustan Construction Co. Ltd. [2024] 160 taxmann.com 172 (NCLT-Mumbai), affirmed.

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## SECTION 32A - CORPORATE INSOLVENCY RESOLUTION PROCESS - PRIOR OFFENCES, ETC. - LIABILITY FOR

**Shiv Charan v. Adjudicating Authority [2024] 160 taxmann.com 176 (Bombay)**

*Sections 32A and 60(5) of IBC are non obstante provisions that operate notwithstanding anything contained in any other law, including PMLA, 2002 and, thus, once a resolution plan in respect of corporate debtor is approved, no action can be taken against properties of corporate debtor in relation to an offence committed prior to commencement of CIRP.*

An ECIR was registered against the corporate debtor alleging cheating and criminal breach of trust leading to attachment proceedings, amongst others, against assets of the corporate debtor. Subsequently, CIRP application in respect of the corporate debtor was admitted by NCLT. Resolution plan submitted by successful resolution applicant was also approved by NCLT. Further, by relying upon section 32A, NCLT explicitly directed ED to release attached properties. ED filed instant writ challenging authority and legal capacity of NCLT to pass order invoking section 32A of IBC in a manner that rendered nugatory PMLA and its legislative objectives. It was noted that section 60(5) clearly empowers NCLT to decide question of whether statutory immunity under section 32A has accrued to the corporate debtor.

Held that section 32A and section 60(5) are non obstante provisions that operate notwithstanding

anything contained in any other law, including PMLA. When a resolution plan with ingredients that qualify for immunity to assets of the corporate debtor from further prosecution proceedings under section 32A comes to be approved, quasi-judicial authorities including the Adjudicating Authority under PMLA must take judicial notice of development and release their attachment on their own. NCLT was well within its jurisdiction and power to rule that prior attachment of property of a corporate debtor that was subject matter of an approved resolution plan, must be released. Thus, instant writ was to be dismissed.

## SECTION 33 - CORPORATE LIQUIDATION PROCESS - INITIATION OF

**Mayank Goyal v. G. Madhusudhan Rao Resolution Professional of the Corporate Debtor [2024] 160 taxmann.com 211 (NCLAT- New Delhi)**

*Where a corporate debtor had not been functioning as a going concern for three years prior to admission into CIRP and, continuation of CIRP would only have enhanced CIRP cost without corresponding advantage since, corporate debtor was not capable of revival and, therefore, NCLT had not committed any error in approving CoC's recommendation to liquidate corporate debtor under such circumstances.*

CIRP was initiated against the corporate debtor and RP was appointed. RP constituted CoC and received three (EoI) from PRAs but CoC in its 5th meeting took view that PRAs will not be able to submit any effective resolution plan and decided to initiate liquidation process of the corporate debtor. RP filed an application seeking approval of liquidation of the corporate debtor. NCLT vide impugned order allowed said application. Aggrieved by NCLT's order, the appellant-resolution applicant filed instant appeal. It was noted that RP had sent several mails to suspended management to be present and assist in handover of assets of the corporate debtor, but no such assistance was given in handing over assets of the corporate debtor, thus, CoC in exercise of its powers endowed upon it by section 33(2) was entitled to liquidate the corporate debtor.

Held that statutory provisions of IBC allow CoC to consider approval of liquidation of the corporate debtor before inviting resolution plans, however, it depends on facts of each case as to whether decision to liquidate is in conformity with provisions of IBC and to that extent open to judicial review by NCLT and NCLAT. Where the corporate debtor had not been functioning as a going concern for three years prior to admission into CIRP, continuation of CIRP would only have enhanced CIRP cost without corresponding advantage. Decision of CoC to liquidate the corporate

debtor was approved by NCLT, same was not open to judicial review when no grounds had been made out as provided under section 61(4) of material irregularity or fraud committed in relation to such an order. NCLT had not committed any error in approving recommendation of CoC to liquidate the corporate debtor in such circumstances and thus, there was no ground to interfere with impugned order.

**Case Review**: Mayank Goyal v. G. Madusudhan Rao [2024] 160 taxmann.com 210 (NCLT - Mum.), affirmed. 313 (NCLT - New Delhi) (SB), reversed.

## SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

**G Balasubramaniam v. CA Mahalingam Suresh Kumar, Resolution Professional for GBJ Hotels (P.) Ltd. [2024] 160 taxmann.com 247 (NCLAT - Chennai)**

*Where resolution plan of SRA was approved by CoC with 100 per cent voting share and was further approved by NCLT, since appellants-suspended director of corporate debtor had actively participated in CoC meeting, appellant could not at this point of time challenge approved resolution plan.*

CIRP against the corporate debtor was admitted by NCLT and resolution professional (RP) was appointed. RP issued a public announcement inviting claim and four resolution plans were received by RP. CoC approved a resolution plan of respondent No. 3-SRA with 98.34 per cent majority vote and, same was approved by NCLT. The appellant-suspended directors of the corporate debtor filed an application before NCLT challenging approved resolution plan on ground that CoC was not entitled to approve a resolution plan that was far less than fair value as well as liquidation value, just because it offered 100 per cent recovery to the financial creditor. NCLT by impugned order dismissed said application on ground that appellant having participated in CoC meeting could not at this point of time challenge resolution plan. NCLT further held that the appellant was classified as wilful defaulter by RBI, and he could not submit a resolution plan, since he was ineligible under section 29A and, therefore, the appellant had failed to make out a case to interdict resolution plan. It was noted that after quantitative and qualitative discussions, CoC had approved resolution plan of SRA with 100 per cent voting rights.

Held that nowhere in IBC or in Regulations, there is a specification that resolution application is to match Liquidation value of the corporate debtor. There was no material irregularity or patent illegality in regard to approval of resolution plan and, thus, impugned order passed by NCLT in

dismissing application of the appellant was free from all legal flaws.

**Case Review:** G. Balasubramaniam v. CA Mahalingam Suresh Kumar, Resolution Professional for GBJ Hotels (P.) Ltd. [2024] 160 taxmann.com 246 (para 122) and C.A. Mahalingam Suresh Kumar, Resolution Professional of GBJ Hotels (P.) Ltd. In re [2024] 160 taxmann.com 245 (NCLT - Chennai), affirmed.

## SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

**CL Sharma v. Bank of Maharashtra - [2024] 160 taxmann.com 250 (NCLAT- New Delhi)**

*RP acting as a facilitator, is not precluded in any manner from giving any recommendation as to whether debt was time barred or not or whether any other jurisdictional fact was lacking in application filed under section 95 or all jurisdictional facts had been fulfilled by applicant.*

Respondent No. 1- the financial creditor extended loan facility to the corporate debtor. In pursuance of said loan, the appellant stood as a personal guarantor. However, the corporate debtor defaulted in making repayment of loan amount and the financial creditor filed an application under section 95 before NCLT against the appellant. NCLT vide impugned order admitted said application and directed RP to submit a report and matter was directed to be listed on 23-2-2024. The appellant challenged NCLT's order on ground that account of the corporate debtor was declared NPA on 27-7-2016 and application under section 95 was filed only on 16-2-2023 and, thus, application was barred by time and NCLT committed error in appointing a RP in said application.

Held that role of RP is only of a facilitator, and he does not perform any adjudicatory function, nor even can take an administrative decision. RP was not precluded in any manner from giving any recommendation as to whether debt was time barred or not or whether any other jurisdictional fact was lacking in application, or all jurisdictional facts had been fulfilled by the applicant. When right had been given to personal guarantor to submit its objection or to report, it is open for personal guarantor to give all necessary information and objection to report of RP. It was always open for the appellant to take pleas as permissible at time of adjudication of issue, including any defect in application under section 95 and said question also did not require any consideration at stage when RP was appointed and, thus, NCLT did not commit any error in appointing RP.

**Case Review:** Bank of Maharashtra v. C.L. Sharma [2024] 160 taxmann.com 249 (NCLT - New Delhi), affirmed.

## SECTION 25 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - DUTIES OF

**Amit Tyagi v. Indirapuram Habitat Centre (P.) Ltd. [2024] 160 taxmann.com 283 (NCLAT- New Delhi)**

*Where corporate debtor allotted its property to appellant, who was also made entitled to rent arising therefrom, subsequent to CIRP initiated against corporate debtor, RP running business of corporate debtor, is best person to take a decision as to what part of business of corporate debtor can be carried out and how, therefore, NCLT had not committed any error in not releasing pending monthly rent payable to appellant which was kept in fixed deposit and would be disbursed in accordance with law by RP.*

Allottees including the appellant was allotted different commercial units in project developed by the corporate debtor and a Memorandum of Understanding (MoU) was entered between the corporate debtor and appellant, by which the appellant was offered different shops. As per MoU, lease rent for said shops was to be paid to the appellant. NCLT initiated CIRP against the corporate debtor and RP was appointed. Another application was filed by the appellant praying a direction to RP to execute conveyance deed in its favour qua units allotted to the appellant, also, to release pending monthly rent due and payable to the appellant and RP filed reply to said application that after verifying titles of allottees, steps would be taken and NCLT by impugned order rejected application filed by the appellant. It was noted that statement of RP stating that rent received in respect of units allotted to the appellant was kept in fixed deposit and would be disbursed in accordance with law by RP, was recorded in impugned order.

Held that RP, who is running business of the corporate debtor is best person to take a decision as to what part of business of the corporate debtor can be carried out. Since, during currency of CIRP, NCLT had not committed any error, in not granting prayer of the appellant and impugned order protected interest of allottees and, thus, instant appeal was to be dismissed.

**Case Review**: Diamond Traexim (P.) Ltd. v. Indirapuram Bahitat Centre (P.) Ltd. [2024] 160 taxmann.com 282 (NCLT -New Delhi), affirmed.

# Analysis of Honourable Supreme Court Judgement in the case of Global Credit Capital Ltd Vs Sach Marketing Pvt. Ltd. (Civil Appeal No 1143 of 2022) vide order dated 25.04.2024

**Financial vs Operational Debt**
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## A) PREAMBLE

**1.** The classification of debt as Financial or operational is highly significant under IBC 2016 as it has different priorities of payment u/s 53. Most of the time, the creditor in upper priority is able to get something & creditor in lower priority gets liquidation value only which many a times is either naught or negligible.

**2. Sec 5(8) defines financial debt as follows.**

"Financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes–

a. money borrowed against the payment of interest.

b. any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

c. any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.

d. the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed.

e. receivables sold or discounted other than any receivables sold on non-recourse basis.

f. any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

*[1][Explanation. -For the purposes of this sub-clause, -*

*(i) 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; and*

*(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (n) of section 2 of the Real Estate*

*(Regulation and Development) Act, 2016 (16 of 2016);*

g. any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

h. any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

*(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

1 Ins. by Act No. 26 of 2018, sec. 3 (w.e.f. 6-6-2018).

**3. Similarly sec 5(21) also defines financial debt as follows;**

"Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the [2][payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

[2]Subs. By Act No. 26 of 2018, sec. 3 for the word 'repayment' (w.e.f. 6-6-2018).

**4.** The above definitions especially of sec 5(8) wrt Financial Debt are quite exhaustive but practically making a decision based on a written agreement or other related circumstances becomes very difficult as under the disguise of operational work some financial loans are given. This is most probably done to override section 179,180,185,186 under the Companies Act 2013 which isn't applicable for business advances. Although business advances are also imbedded with some restrictions, but companies can override them with some innovative methods.

**5.** Honourable SC settled this issue in the famous judgment of **Global Credit Capital Ltd Vs Sach Marketing Pvt. Ltd. (Civil Appeal No 1143 of 2022)** as on 25.04.2024.

**B) FACTUAL MATRIX**

1. Sach Marketing Pvt. Ltd. and M/s Mount Shivalik Industries Ltd. **(Corporate Debtor)** entered into two agreements. These agreements were in the form of letters addressed by the Corporate Debtor to Sach Marketing Pvt. Ltd. Sach Marketing Pvt, Ltd. was appointed as sales promotors vide these letters.

a. *First Agreement provided that Sach Marketing will be paid Rs. 4,000/- per month for working as a sales promotor. It also provided that Sach marketing will deposit a minimum security of Rs. 53,15,000/- which will carry interest of @21% per annum.*

b. *The second agreement also had identical terms with the difference that Sach marketing had to deposit a minimum security of Rs. 38,50,285/- which was to carry interest of 21%.*

2. Insolvency proceedings were initiated against the Corporate Debtor under Section 7 of the Insolvency and Bankruptcy Code, 2016 vide order dated 12th June 2018 passed by NCLT on an application filed by Oriental Bank of Commerce. After the initiation of insolvency proceedings,

Sach Marketing filed a claim as Financial Creditor which was rejected by the Resolution Professional. Sach Marketing filed an Application before the NCLT for directing the Resolution Professional to treat its debt as Financial Debt, which was rejected by the NCLT. An appeal was filed before the NCLAT which was allowed, and First Respondent was held to be a Financial Creditor. Against the same several appeals were filed before the Honourable Supreme Court.

**C) FINDINGS OF THE HONOURABLE SUPREME COURT**

1) In a batch of civil appeals against separate judgments and orders of the National Company Law Appellate Tribunal ('the NCLAT'), the Division Bench of Abhay S. Oka* and Pankaj Mithal, JJ., dealt with the question that, when a debt is considered as financial debt and operational debt under the Insolvency and Bankruptcy Code, 2016 ('the IBC').

2) The Honourable Supreme Court delivered judgments dealing with the classification of creditors as Financial Creditors and Operational Creditors after analysing the earlier judgments in the following famous cases;

a. *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd Vs Axis Bank Ltd (2020) 8 SCC 401,*
b. *Phoenix ARC Pvt Ltd Vs Spade Financial Services (2021) 3 SCC 475,*
c. *Pioneer Urban Land and Infrastructure Ltd. Vs Union of India & Ors (2019)8 SCC 416,*

3) The Honourable Supreme Court observed that a written agreement cannot be taken at face value. It is necessary to examine the real nature of the transaction on a plain reading of agreements.

4) In the instant case agreement was provided for payment of a paltry sum of Rs. 4,000/- per month for acting as sales promotor of the beer manufactured by the Corporate Debtor. There is no provision for commission.

5) There is provision for payment of a security deposit of a huge sum. There is no clause for forfeiture of the security deposit as such Corporate Debtor is liable to refund the security deposit. Thus, the security deposit clause has no nexus with any other clause in the agreement.

6) The security deposit cannot fall under the definition of operational debt under Section 5 (21) of the Code. In the case of a contract of service, there must be a correlation between the service to be provided and the claim. If both the agreements are treated as genuine only a claim of 4,000/- per month can be treated as operational debt as only this amount is related to the provision of service.

## D) KEY TAKEAWAYS

**The ruling in the Global Credit Capital case elucidates several key principles:**

a. A debt shall be treated as operational debt when there is a clear nexus between operations & related debt i.e. debt shall be forfeited on non-performance etc.
b. If the time value of money is predominant nature as per agreement, then it shall be financial debt.
c. Substance of agreement be given more importance than the form to ascertain the true nature of agreement for classification as Financial or Operational debt.
d. Any hidden aspect whereas Loan is given under disguise of operations should be classified as financial debt exceeding underlying agreements as substance of transaction is more important than its form.
e. Similarly, a loan given for operations should be treated as operational debt exceeding underlying agreements as substance of transaction is more important than its form.

## E) CONCLUSION

a. We are practicing IPs now shall be required to interpret each proof of claim as submitted under Chapter IV of CIRP regulation, especially Regulation 10 read with regulations 13 & 14 for all the CIRP cases.
b. Similarly in the case of Liquidation cases, where responsibility is more because instead of collating IPs are required to verify the claim under chapter V of Liquidation Regulation especially regulation 30 read with regulation 25.
c. The interpretation is always subjective & subject to scrutiny by the judiciary & regulator later. Let legal opinion be taken for any interpretational issue to save against any future pitfalls or contrary interpretation as IBC law is not only involving but sometimes revolving also.

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