

**REPORT  
OF  
THE INSOLVENCY  
LAW COMMITTEE**

**FEBRUARY, 2020**



**Ministry of Corporate Affairs  
Government of India**

**THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY**

## REPORT OF THE INSOLVENCY LAW COMMITTEE

New Delhi, the 20<sup>th</sup> February, 2020

To,  
Honourable Union Minister of Finance and Corporate Affairs  
Madam,

We have the privilege and honour to present this third part of the report of the Insolvency Law Committee, set up on 16<sup>th</sup> November, 2017 (reconstituted on 6<sup>th</sup> March, 2019 as Standing Committee), to make recommendations to the Government on issues arising from the implementation of the Insolvency and Bankruptcy Code, 2016, as well as on the recommendations received from various stakeholders.

2. The Committee had the benefit of participation by various institutes, industry chambers and experts in various disciplines. It has tried to take a comprehensive view while suggesting changes in the Code keeping in mind the difficulties being faced by different stakeholders. It has endeavored to reconcile conflicting interests, maximizing value of stressed assets, insolvency and bankruptcy of individuals and fresh start process. It also facilitates ease of 'revolving insolvency' in India.

3. We thank you for providing us an opportunity to present our views on the issues arising from implementation of the Insolvency and Bankruptcy Code, 2016 and related matters.

Yours sincerely,

(Shri Injeti Srinivas)  
Chairman

*M. S. Sahoo*

(Dr. M.S. Sahoo)  
Member

(Amit Agarwal)  
Member Rep.

*Vishwanathan*  
(Sh.T.K.Vishwanathan)  
Member

*U.K. Sinha*

(Sh. U.K.Sinha)  
Member

*Lily Vadera*

(Ms. Lily Vadera)  
Member Rep.

*S.S. Mallikarjuna Rao*

(S.S.Mallikarjuna Rao)  
Member

*Uday*

(Shri Uday Kotak)  
Member

*Shardul Shroff*

(Shri. Shardul Shroff)  
Member

*Bahram Vakil*

(Shri Bahram Vakil)  
Member

*Rafiqul*

(President ICAI)  
Member

*Balwinder Singh*

(CMA Balwinder Singh)  
Member

*Ashish Garg*

(Ashish Garg)  
Member

Sh. Gyaneshwar Kr. Singh, Member Secretary

**THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY**

## PREFACE

The Insolvency and Bankruptcy regime in India has come a long way from its inception in 2016. The law has been constantly tested and has evolved with due course of time. Its results could be directly seen as India has earned a place among the world's top ten improvers for the third consecutive year, released by World Bank. India has ranked 63<sup>rd</sup> position as per the World Bank's Ease of Doing Business Report 2020. This feat is being achieved due to sustained business reforms over the past several years and is directly on account of significant improvement in resolving insolvency framework. However, there is a long road ahead for India to develop a robust insolvency regime and for that constant efforts are being made by the Government in order to address the challenges that are being faced with the implementation of the Insolvency and Bankruptcy Code. Keeping these in mind certain changes are being sought to be made for smoother functioning of the Code. The Insolvency Law Committee constituted by the Ministry of Corporate Affairs is submitting its 3<sup>rd</sup> Report which provides for recommendations in respect of CIRP and Liquidation based on experience gained from implementation of the Code. The key recommendations in this Report are as follows:

- i. *Threshold for calculating default-* due to the low threshold of default of INR 1 lakh that is currently required under the Code for initiation of CIRP, a large number of applications were being filed for initiation of CIRP. This has led to an increased burden on the AA. Therefore, a need to review the minimum default threshold for admitting a case under Section 4 of the Code was felt, and in this respect, it is recommended that it would be appropriate to notify a higher default threshold of INR 50 lakhs. However, it was considered necessary to provide certain exemptions to the MSME sector and accordingly, modified threshold limits have been specifically recommended for MSMEs.
- ii. *Application for Initiation CIRP by Class of Creditors-* As CIRP can be initiated by a single financial creditor, such as a homebuyer or a deposit holder, that belongs to a certain class of creditors following a minor dispute, it might exert undue pressure on the corporate debtor and might jeopardize the interests of the other creditors in the class who are not in favor of such initiation. It is being recommended that there should be a requirement for a minimum threshold number of certain financial creditors in a class for initiation of the CIRP. So, an amendment to section 7(1) to provide that for a class of creditors falling within clause (a) or (b) of Section 21(6A), the CIRP may only be initiated by at least a

hundred such creditors or 10 percent of the total number of such creditors in a class.

- iii. *Continuation of Licenses, etc. granted by Government authorities during the Moratorium period-* The moratorium period is critical for running the corporate debtor as a going concern during CIRP. The licenses, permits and quotas, concessions, registrations, or other rights that the corporate debtor enjoys, form the basis of its business, without which it will not be possible to resolve the corporate debtor as a going concern. For this reason, the legislative intent behind introducing the provision for moratorium was to bar termination or suspension of such grants by Government authorities. As a result, the termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, in order to avoid any scope for ambiguity, it has been recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1) regarding termination or suspension of grants on account of non-insolvency reasons.
- iv. *Continuation of Critical Supplies during the Moratorium period:* in order to enable the corporate debtor to continue as a going concern while undergoing CIRP, it has been recommended that a new sub-section should be introduced in section 14 to ensure the continuation of supplies that are considered critical by the resolution professional to run the corporate debtor as a going concern and would contribute to the preservation of the corporate debtor's value and success of the resolution plan.
- v. *Liability of corporate debtor for offences committed prior to initiation of CIRP-* in order to address the issue of liability that fall upon the resolution applicant for offences committed prior to commencement of CIRP, it has been recommended that a new section should be inserted which provides that when the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise.

The newly inserted section as mentioned above shall also include protection of property from enforcement action when taken by successful resolution applicant. Also, it was recommended that cooperation and assistance to

authorities investigating the offences committed prior to commencement of CIRP shall be continued by any person who is required to provide such assistance under the applicable law

- vi. *Appointment of The Official Liquidator as a Liquidator under the Code:* it is being recommended that Section 34 of the Code, may be amended to enable appointment of the Official Liquidator for the liquidation of corporate debtors, having a minimum value as prescribed by the Central Government (such value may initially be prescribed as INR 2000 Crore). The Official Liquidator, if appointed, will carry out the functions of the liquidator, as provided in Chapter III of Part II of the Code read with the Liquidation Regulations. However, the official liquidators shall not be appointed as interim resolution professionals or resolution professionals as they may not have the requisite training and experience to conduct the CIRP.
- vii. *Schemes of Arrangement in Liquidation:* it is being observed that Section 230 of the Companies Act, 2013 is not aligned with the liquidation process of the Code and the two processes may not be compatible. Therefore, it is being recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, a need is felt that an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code.
- viii. *Investigation of Avoidable Transactions and Improper Trading:* with regard to the person who should be responsible for investigation of avoidable transactions and improper trading under the Code, it is agreed that, it may not be appropriate for the IBBI to undertake such investigation. It is concluded that the present provisions of the Code need not be amended as only the insolvency professional would be in a position to investigate avoidable transactions and improper trading during CIRP or liquidation process. Therefore, it is agreed that the status quo be maintained and the primary responsibility for investigation of these transactions should be on the insolvency professional.
- ix. *Fresh Start Process:* DRTs, which are envisaged as the AA for the fresh start process under the Code, are available in limited places in the country and therefore, they may not be accessible to all the debtors. Further, DRTs are already overburdened with the existing cases under the RDDBFI Act and the SARFAESI Act and thus, it may not be possible to ensure a timely disposal of the fresh start process. Considering all these aspects a need to reassess the appropriate AA for the fresh start process was felt and thereby it is recommended that it may be appropriate to

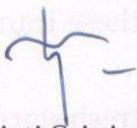


designate the IBBI as the supervising authority for fresh start process. Also, need to develop a broad cadre of insolvency advisors was felt to implement an effective and accessible regime for the fresh start process.

- x. *Out of Court Settlement Mechanisms:* The Committee opined that for effectively rehabilitating the debtors it was necessary that the court-led formal processes be supplemented with informal processes. Hence, agreed that regulatory authorities under the Code may undertake steps to develop infrastructure that aid debtors in effectively utilizing mechanisms such as debt settlement, mediation, and debt counseling
- xi. Regarding Personal Insolvency Resolution and Bankruptcy process, it is recommended that the meaning of the term 'personal guarantor to corporate debtor' in Section 2(e) of the Code may require to be clarified. An explanation be provided in Section 2(e) of the Code to state that a personal guarantor to a corporate debtor shall be an individual, who is a surety in a contract of guarantee to a corporate debtor, in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or in part.

Further, the provisions related to personal insolvency is being applied only to insolvency and bankruptcy proceedings of personal guarantors to corporate debtors and shall be extended to partnership firms and other individuals in the due course of time.

The recommendations of the Committee will further provide clarity and strengthen the insolvency resolution framework in India. The implementation of the Code shall have to be monitored closely so as to develop and evolve a robust insolvency framework in India.



Injeti Srinivas  
Secretary, Ministry of Corporate Affairs &  
Chairman, Insolvency Law Committee  
New Delhi, February 20, 2020



## ACKNOWLEDGMENTS

The Insolvency Law Committee takes this opportunity to submit the third part of its Report after deliberations on various issues to streamline the process of Corporate Insolvency Resolution Process and strengthen the stressed asset market. The Committee would like to thank the industry chambers, professional institutes, law firms, academicians and other experts who made valuable suggestions for review of the Code.

The committee expresses its gratitude to the members of Insolvency Law Committee, for their valuable contribution in the review process, and for their participation, deliberations particularly including with respect to simplification of Fresh Start Process and introduction of Out-of-Court settlement mechanism for personal insolvency.

The Committee acknowledges the research support provided by the team from Vidhi Centre for Legal Policy comprising of Ms. Shreya Prakash, Ms. Aishwarya Satija, Ms. Manmayi Sharma and Mr. Oitihya Sen.

The Committee is grateful to Ministry of Corporate Affairs for providing logistical support and would like to make a special mention of the dedicated efforts put in by the team of officers of the Insolvency Division at the MCA comprising Sh. Rakesh Tyagi, Director, Ms. Yogini D. Chauhan, then Deputy Director, Sh. Saurabh Gautam, Assistant Director and Ms. Sunidhi Misra, Assistant Director for collating suggestions, facilitating discussions and providing administrative and technical support for the functioning of the Committee.

\*\*\*\*\*

## TABLE OF CONTENTS

List of Defined Terms.....	14
Background.....	16
1. Introduction .....	16
2. Working Process .....	17
3. Structure of the Report.....	17
Chapter 1: Recommendations regarding the Corporate Insolvency Resolution Process .....	19
1. Definitions.....	19
<i>Third-Party Security Providers as Debtors.....</i>	<i>19</i>
2. Threshold for Calculating Default.....	21
4. Application for Initiation of CIRP by Classes of Creditors.....	24
5. Interim Moratorium prior to Commencement of CIRP .....	26
<i>Need for an Interim Moratorium.....</i>	<i>26</i>
<i>Application and Scope of the Interim Moratorium .....</i>	<i>27</i>
6. Eligibility of a Corporate Debtor to Initiate CIRP against Other Persons .....	29
7. Issues Related to Guarantors.....	30
<i>Initiation of Concurrent Proceedings against the Principal Borrower &amp; the Guarantor .....</i>	<i>31</i>
<i>Filing of Claims by a Creditor in Proceedings of the Principal Borrower &amp; the Guarantor....</i>	<i>32</i>
8. The Moratorium Under Section 14.....	34
<i>Continuation of Licenses, etc. granted by Government authorities during the Moratorium period .....</i>	<i>34</i>
<i>Continuation of Critical Supplies during the Moratorium period.....</i>	<i>38</i>
9. Time for Appointment of an Interim Resolution Professional.....	40
10. Conferring Voting Rights on Operational Creditors .....	41
11. Issues related to Related Party Financial Creditors .....	45
<i>Eligibility of certain Financial Institutional Creditors to Participate in the CoC .....</i>	<i>45</i>

	<i>Eligibility of certain Foreign Financial Creditors to Participate in the CoC</i> .....	46
	<i>Eligibility of Assignees of Related Party Financial Creditors to Participate in the CoC</i> .....	47
12.	Role and Responsibilities of Members of the CoC.....	48
13.	Continuation of Resolution Professional after the Expiry of CIRP .....	50
14.	Resolution Plans Requiring Approvals for Implementation.....	51
	<i>Government Approvals</i> .....	51
15.	Treatment of Profit and Loss Accrued During the CIRP .....	55
16.	Super Priority to Interim Finance .....	57
17.	Liability of Corporate Debtor for Offences Committed Prior to Initiation of CIRP.....	59
	<i>Liability where a Resolution Plan has been Approved</i> .....	59
	<i>Actions against the Property of the Corporate Debtor</i> .....	61
	<i>Cooperation in Investigation</i> .....	62
Chapter 2: Recommendations regarding the Liquidation Process.....		63
1.	Stay on Continuation of Proceedings.....	63
2.	Appointment of the Official Liquidator as a Liquidator under the Code .....	64
3.	Provision of information and Cooperation between the Liquidator, Personnel and Resolution Professional of the Corporate Debtor .....	66
	<i>Provision of information</i> .....	66
	<i>Cooperation between the liquidator and personnel, etc.</i> .....	67
4.	Schemes of Arrangement in Liquidation.....	68
5.	Going Concern Sales during Liquidation.....	71
	<i>Mandating a Going Concern Sale</i> .....	72
	<i>Going Concern Sale of Corporate Debtor</i> .....	73
6.	Stakeholders' Consultation Committee.....	74
7.	Realisation or Relinquishment of Security Interest by a Secured Creditor .....	76
	<i>Repayment to Secured Creditors Covers Value of Security Interest Relinquished</i> .....	76
	<i>Secured Creditors' Contribution to Liquidation Expenses and Workmen's Dues</i> .....	77
	<i>Presumption as to Relinquishment of Security Interest</i> .....	79

8.	Subordination Agreements within the Liquidation Waterfall .....	79
Chapter 3: Recommendations regarding Actions Against Avoidable Transactions and Improper Trading in the Corporate Insolvency Resolution and Liquidation Processes .....		
1.	Investigation of Avoidable Transactions and Improper Trading.....	81
	<i>Person Responsible for Investigation.....</i>	<i>81</i>
	<i>Ensuring Cooperation.....</i>	<i>83</i>
2.	Filing of Applications to Avoid Transactions, Etc. ....	84
3.	Distribution of Recoveries .....	85
4.	Timelines .....	86
	<i>Time Limit for Filing .....</i>	<i>86</i>
	<i>Effect on the CIRP and Liquidation Timelines.....</i>	<i>87</i>
5.	Funding for Actions against Avoidable Transactions and Improper Trading.....	87
Chapter 4: Recommendations regarding the Fresh Start Process .....		
1.	Need to Review the Fresh Start Process .....	90
2.	IBBI as Supervising Authority .....	91
	<i>Supervision by the IBBI.....</i>	<i>91</i>
	<i>Appointment of AOs .....</i>	<i>95</i>
3.	Appointment of Insolvency Advisors.....	95
	<i>Role of the Insolvency Advisor .....</i>	<i>97</i>
	<i>New Cadre of Office Holders .....</i>	<i>99</i>
	<i>Remuneration of the Insolvency Advisor .....</i>	<i>100</i>
4.	Conducting the Fresh Start Process Digitally .....	101
5.	Non-Application to Partnership Firms.....	104
6.	Eligibility .....	104
	<i>Resource Based Thresholds.....</i>	<i>104</i>
	<i>Debtor's History Based Thresholds .....</i>	<i>106</i>
7.	Verification of Eligibility.....	107
	<i>Documents Required for Verification.....</i>	<i>107</i>

<i>Provision for Affidavits</i> .....	109
8. Preventing Misuse of the Fresh Start Process .....	109
9. Moratorium Applicable Only to Qualifying Debts.....	110
10. Revocation of the Fresh Start Order .....	111
11. Enabling Display on Credit History.....	112
12. Offences .....	113
Chapter 5: Recommendations Regarding the Personal Insolvency Resolution and Bankruptcy Processes .....	116
1. Out-of-Court Mechanisms for Personal Insolvency .....	116
2. Definition of 'Proprietorship Firms' .....	117
3. Definition of 'Personal Guarantor' .....	118
4. Definition of 'Bankrupt' .....	119
5. Application of Interim Moratorium to Debtor's Actions .....	120
6. Scope of Moratorium.....	122
7. Consent of Insolvency Professional for Appointment .....	124
8. Avoidance Actions under Part III of the Code .....	125
<i>Authority to File</i> .....	125
<i>Criteria for Avoidance Actions</i> .....	126
Annexure I .....	129
Annexure II.....	131

## LIST OF DEFINED TERMS

<b>AO</b>	Adjudicating Officers
<b>BHIM/Bharat QR Code</b>	Bharat Interface for Money
<b>BIFR</b>	Board of Industrial & Financial Reconstruction
<b>BLRC</b>	Bankruptcy Law Reforms Committee
<b>BLRC Report</b>	Report of the Bankruptcy Law Reforms Committee, Volume I (2015)
<b>CCI</b>	Competition Commission of India
<b>CIC Act</b>	Credit Information Companies (Regulation) Act, 2005
<b>CICs</b>	Credit Information Companies
<b>CIRP</b>	Corporate Insolvency Resolution Process
<b>CIRP Regulations</b>	Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
<b>CoC</b>	Committee of Creditors
<b>Code</b>	Insolvency & Bankruptcy Code, 2016
<b>Committee</b>	The Insolvency Law Committee
<b>DRAT</b>	Debt Recovery Appellate Tribunal
<b>DRO</b>	Debt Relief Order
<b>DRT</b>	Debt Recovery Tribunal
<b>First ILC Report</b>	Report of the Insolvency Law Committee (2018)
<b>GDP</b>	Gross Domestic Product
<b>IBA</b>	Indian Banks' Association
<b>IBBI</b>	Insolvency & Bankruptcy Board of India
<b>INR</b>	Indian National Rupee
<b>Interim Report</b>	Interim Report of The Bankruptcy Law Reforms Committee (2015)
<b>IP Regulations</b>	Insolvency & Bankruptcy Board of India (Insolvency Professional) Regulations, 2016
<b>Liquidation Regulations</b>	Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016
<b>MSME</b>	Miscro, Small & Medium Enterprises
<b>NABARD</b>	National Bank for Agriculture and Rural Development
<b>NCLAT</b>	National Company Law Appellate Tribunal
<b>NCLT</b>	National Company Law Tribunal
<b>NPA</b>	Non-Performing Asset



<b>OECD</b>	The Organisation for Economic Co-operation & Development
<b>PIRP</b>	Personal Insolvency Resolution Process as under Part III, Chapter III of the Code
<b>RERA</b>	Real Estate (Regulation & Development) Act, 2016
<b>SICA</b>	Sick Industrial Companies Act, 1985
<b>Report</b>	Report of the Committee
<b>UK</b>	United Kingdom
<b>UNCITRAL Guide</b>	United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law (2005)
<b>UPI</b>	Unified Payment Interface
<b>US</b>	United States of America
<b>UTs</b>	Union Territories

# BACKGROUND

## 1. INTRODUCTION

- 1.1. The Code was enacted in December, 2016 to consolidate the laws related to reorganisation and insolvency resolution in India and to ensure a time-bound resolution of insolvency, resulting in maximisation of value of the assets of concerned stakeholders, promotion of entrepreneurship, and ensuring greater availability of credit and balancing the interests of all stakeholders concerned.
- 1.2. In order to ensure effective implementation of the Code, it was necessary to periodically evaluate the functioning of the Code. Therefore, within one year of implementation of the provisions of the Code relating to corporate insolvency, the Government constituted the Committee to take stock of the functioning of the newly enacted Code and to make suitable recommendations to ensure effective implementation of the CIRP and liquidation framework. Accordingly, the Committee came out with the First ILC Report, recommending suggestions and solutions to certain key issues that were being faced in the implementation of the CIRP and liquidation process. Thereafter, the Committee submitted a report in October 2018, recommending a comprehensive framework for cross-border insolvency under the Code, based on the UNCITRAL Model Law on Cross-border Insolvency, 1997.
- 1.3. Keeping in mind the dynamic nature of issues involved in the implementation of the CIRP and liquidation process, and to address new issues regarding personal insolvency, including the scheme for fresh start process, and proceedings against avoidable transactions and improper trading, the MCA re-constituted the Committee as a Standing Committee under the Chairmanship of Shri Injeti Srinivas, Secretary MCA vide an office order dated 6 March, 2019. The Committee consists of Sh. M.S. Sahoo, Chairperson of the IBBI, Additional Secretary (Banking), Department of Financial Services, Sh. T. K. Vishwanathan, Former Secretary General of the Lok Sabha and Chairman of the BLRC, Sh. U.K. Sinha, Ex SEBI Chairperson, Executive Director, RBI, Sh. Sunil Mehta, MD & CEO, Punjab National Bank, Sh. Uday Kotak, President Designate, CII and MD and CEO, Kotak Mahindra Bank, Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co., Sh. Bahram Vakil, Partner, AZB & Partners, President, Institute of Chartered Accountants of India, President, Institute of Cost Accountants of India, President, Institute of Company Secretaries of India, and Sh. Gyaneshwar,

Joint Secretary (Insolvency), MCA. The Order of re-constitution of the Committee, along with a list of its members, has been provided in *Annexure I*.

## **2. WORKING PROCESS**

- 2.1. The Committee had its first meeting on 12<sup>th</sup> June, 2019. It had two more meetings on 29<sup>th</sup> August, 2019 and 15<sup>th</sup> October, 2019.
- 2.2. The MCA had invited comments from the public through an online facility available on the websites of the MCA and the IBBI during the period between 16<sup>th</sup> April, 2019 to 7<sup>th</sup> May, 2019. Further, the MCA consulted with stakeholders through various other platforms and engaged with other regulators and ministries, such as Department of Financial Services (DFS), Department of Revenue (DOR), Department of Expenditure (DOE), Department of Economic Affairs (DEA), Ministry of Housing and Urban Affairs (MoHUA) and Ministry of Law & Justice. During the course of its deliberations, the Committee considered the suggestions received in the public comments and through the stakeholder consultations conducted by the MCA. The Committee also noted the enactment of Insolvency and Bankruptcy (Amendment) Act, 2019 and the promulgation of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, through which the Government accepted some of the recommendations made by this.
- 2.3. The MCA engaged the Vidhi Centre for Legal Policy to assist the Committee by providing research on the relevant legal principles and international jurisprudence, and to assist the Committee in drafting this Report.

## **3. STRUCTURE OF THE REPORT**

- 3.1. The Report is divided into five chapters. Chapter I deals with recommendations regarding the CIRP<sup>1</sup>, Chapter II deals with recommendations regarding the liquidation process and Chapter III deals with recommendations regarding avoidance transactions and improper trading in the CIRP and liquidation process. Chapter IV deals with recommendations regarding the fresh start process, and Chapter V deals with recommendations regarding the PIRP and bankruptcy processes.

---

<sup>1</sup> This Report does not include the deliberations of the Committee on some issues that have been addressed by the Insolvency and Bankruptcy (Amendment) Act, 2019, and have been interpreted by the Hon'ble Supreme Court subsequently.

3.2. The Report also contains two annexures: **Annexure I** comprises the Order of re-constitution of the Committee dated 6 March, 2019 and **Annexure II** comprises a summary of the recommendations made by the Committee.

# CHAPTER 1: RECOMMENDATIONS REGARDING THE CORPORATE INSOLVENCY RESOLUTION PROCESS

## 1. DEFINITIONS

### *Third-Party Security Providers as Debtors*

- 1.1. Sections 3(11), 5(8) and 5(21) of the Code define 'debt', 'financial debt' and 'operational debt'. While these are broad definitions, they do not explicitly provide whether a debt will be created where a person provides the collateral for securing a debt disbursed to another person. It was represented before the Committee that there was confusion whether the provision of such security would constitute a 'debt' under the Code, and if the person to whom security is provided would be considered a financial creditor or an operational creditor.
- 1.2. On a review of various judgments of the Adjudicating Authority, the Committee noted that the question of whether a person who has received security from a third party will be considered a financial creditor has been the subject-matter of litigation. Two approaches have emerged in this regard. According to the first approach, a creditor should be treated as a financial creditor of the third-party security provider because it would be contrary to the objectives of the Code to exclude such a creditor from the CoC of the security provider and since, by way of providing a security, the security provider had made itself liable to the creditor for repaying the underlying debt.<sup>2</sup> As per the second approach, such a creditor should not be considered as a financial creditor *vis-à-vis* the third-party security provider on the ground that the provision of security does not amount to a 'financial debt' under Section 5(8) of the Code.<sup>3</sup> This issue has also been addressed by the NCLAT, which is the Appellate Authority under the Code, in *Phoenix ARC Pvt. Ltd. v Ketulbhai Ramubhai Patel*,<sup>4</sup> where the creditor was denied the status of a financial creditor *vis-à-vis* the third-party security provider as "*the 'pledge of shares' in question do not amount to "disbursement of any amount against the consideration for*

---

<sup>2</sup> *SREI Infrastructure Finance Limited v Sterling International Enterprises Limited* C.P. No. 402/2018, NCLT (Mumbai). Decision date – 13 March 2019

<sup>3</sup> *ICICI Bank v Anuj Jain*, C.P. No. (IB)77/ALD/2017, NCLT (Allahabad). Decision date – 9 May 2018; *ICICI Bank Limited v Varun Corporation Limited*, CP No. 725/IBC/NCLT/MB/MAH/2017, NCLT (Mumbai). Decision date – 6 May 2019

<sup>4</sup> Company Appeal (AT) (Insolvency) No. 325 of 2019, NCLAT. Decision date – 9 April 2019

*the time value of money” and it do not fall within subclause (f) of sub-section (8) of Section 5”.*<sup>5</sup>

- 1.3. However, the Committee noted that as the definition of security interest is based on the “*payment or performance of any obligation of any person*”,<sup>6</sup> regardless of whether such obligation falls within the definition of a ‘financial debt’ or an ‘operational debt’, a person receiving a collateral would be considered as a ‘secured creditor’ of the security provider. Further, the Committee noted that as a ‘security interest’ is provided for *securing* the due performance or payment of such obligation, it is inextricably linked to the underlying debt or obligation.<sup>7</sup> Highlighting this in the context of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Delhi High Court has held:

*“It is, therefore, clear that debt is an essential ingredient of a mortgage. There may be a debt without a mortgage but there can be no mortgage without a debt. Properties are offered as security only for securing recovery of debt. If debt is repaid the mortgage ceases to be a mortgage. Even if the term debt would not have been defined in Act No. 51 of 1993 the mortgage would have been included within the meaning of debt. This is the general law and settled trend of judicial opinion.”*<sup>8</sup>

- 1.4. Therefore, debt is an essential element of a security interest and it subsists within a security interest.<sup>9</sup> In other words, by creating a security interest in favour of the creditor, the security provider undertakes to repay the debt owed to the creditor to the extent of the security interest, in the event that the borrower fails to do so. Therefore, just like the borrower, the security provider should also be considered as a debtor of the creditor.
- 1.5. As a corollary to this, the status of the creditor *vis-à-vis* the security provider (and the borrower) should be determined on the basis of the underlying debt that is secured by the security provider. Therefore, where the underlying debt falls under

---

<sup>5</sup> Company Appeal (AT) (Insolvency) No. 325/2019, NCLAT. Decision date – 9 April 2019, para 10

<sup>6</sup> Insolvency and Bankruptcy Code, 2016, Section 3(31)

<sup>7</sup> Brian A. Blum, Samir D. Parikh, *Examples & Explanations for Bankruptcy and Debtor/Creditor*, (7<sup>th</sup> edn, Wolters Kluwer 2018), section 1.4.3

<sup>8</sup> *State Bank of India v Samneel Engineering Company & Ors.* 1995 (35) DRJ 485 : 1995 SCC OnLine Del 824

<sup>9</sup> *Jasbir Singh Chadha v U.P. Financial Corporation* (2008) ILR 2 Delhi 1321 : 2008 SCC OnLine Del 848



the definition of a 'financial debt', the creditor should be regarded as a financial creditor of both the borrower and the security-provider. Similarly, where the security provider secures an operational debt, the creditor would have the rights of an operational creditor with respect to both the borrower and the security-provider.

- 1.6. Therefore, the Committee felt that it is clear that third-party security provider and a borrower are similarly liable to the creditor *vis-à-vis* the underlying debt under the Code. **Relevant provisions of the Code should be accordingly interpreted such that creditors holding third-party security interests are considered as financial creditors where the security interest was provided to secure a financial debt, and operational creditors where the security interest was provided to secure an operational debt. Therefore, no legal changes may be necessary in this regard.**

## 2. THRESHOLD FOR CALCULATING DEFAULT

- 2.1. Section 4 along with Sections 7 to 10 of the Code enable a financial creditor, an operational creditor or a corporate applicant to initiate a CIRP under the Code on a single-day default of at least INR 1 lakh only. However, the Central Government is empowered to notify "*the minimum amount of default of higher value which shall not be more than one crore rupees.*"<sup>10</sup> Till date, the Central Government has not exercised its power to notify a higher value.
- 2.2. The Committee noted that due to the low threshold of default, a large number of applications were being filed for initiation of CIRP. This large number of applications is adding pressure on judicial infrastructure, which is causing delays both at the stage of admission and during litigation in the CIRP. These delays cause uncertainty for investors and have the potential to hinder a value maximizing insolvency resolution. Further, due to the low threshold for default, there is a chance that solvent debtor companies would be pushed into the CIRP. This may entail significant costs, especially since "*it will usually be far less costly to provide mechanisms outside corporate insolvency law for the resolution of disputes over debts and for the enforcement of undisputed debts on default*"<sup>11</sup> for solvent debtor

---

<sup>10</sup> Insolvency and Bankruptcy Code, 2016, Section 4

<sup>11</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 6 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLR00.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLR00.pdf)> accessed 26 November 2019

companies. Thus, in such cases, the initiation of CIRP may result in sub-optimal outcomes.

2.3. The Committee agreed that the success of the Code should be measured in terms of its ability to resolve distress in a value-maximizing manner for all stakeholders. This will be adversely affected if the system remains burdened, and value destructive delays ensue. The Committee also felt that if the mechanism under the Code results in sub-optimal outcomes, it is likely to lose credibility amongst investors, which would be further value destructive for the assets under the Code. **Given this, the Committee agreed that there is a need to review the minimum default threshold for admitting a case under Section 4 of the Code.**

2.4. **In this respect, the Committee recommended that it would be appropriate to notify a higher default threshold of INR 50 lakhs.** This would significantly ease the burden on the Adjudicating Authorities while ensuring that cases that require recourse to the Code continue to have access to it.

2.5. MSMEs have special position in the Indian economy, as key drivers of employment, growth & financial inclusion and forms major part of operational creditors alongwith employees and trade creditors. For creation of a robust and inclusive economy and special needs of operational creditors, the Committee considered whether the threshold should be revised in a modified manner in cases where operational creditors file applications under the Code. The Committee was conscious that one of the successes of the Code has been that it has made debt enforcement more credible, especially for operational creditors that are empowered to initiate CIRP under the Code. In the shadow of this mechanism, operational creditors have the bargaining power to reach out-of-court settlements with large corporate debtors. **Given this, the Committee agreed that operational creditors should be allowed to have recourse to CIRP on a minimum default of INR 5 lakh only, and appropriate actions may be taken to revise the threshold accordingly.**

### 3. INCREASING RELIANCE ON INFORMATION UTILITIES AT THE STAGE OF ADMISSION

3.1. An application for initiating a CIRP filed under Sections 7, 9 or 10 of the Code depends largely on the evidence of default committed by a corporate debtor on payment of the threshold amount as provided under the Code. In order for the Adjudicating Authority to quickly verify the existence of such default, the BLRC Report had envisaged that the CIRP application should rely on information on

default as is filed in a registered information utility since this will allow for the speedy commencement of insolvency proceedings, owing to the undisputed information that is made available by the information utility.<sup>12</sup>

- 3.2. As there are numerous delays in the admission of insolvency proceedings filed before the Adjudicating Authority, the Committee agreed that increasing reliance on information utilities would help in addressing the delays at the admission stage that arise from information asymmetry and the need to verify the occurrence of default. However, the Committee noted that in many cases, creditors are not providing financial information to the information utility, and consequently, such pre-verified information is not being submitted to support an application to initiate CIRP.
- 3.3. The Committee noted that Section 215 already provides that financial creditors must mandatorily submit financial information and information relating to assets in relation to which any security interest has been created, to an information utility. Further, operational creditors or any other person may also submit financial information to an information utility.
- 3.4. **Based on this, the Committee agreed that there is no lacuna in the law. Thus, it recommended that steps should be taken to enforce compliance with Section 215 and incentivise provision of information to information utilities. This will aid in making it a regular practice to furnish information verified and authenticated by information utilities at the time of filing applications to initiate CIRP. In due course of time, with the evolution of a more robust framework of information utilities, amendments may be made to Section 215 to require creditors other than financial creditors to also provide financial information to information utilities. At such time, requisite amendments may also be made to Sections 7, 9 and 10 to phase out reliance on records that are not stored with information utilities while filing applications for initiation of CIRP. This will substantially reduce the time taken to admit an application to initiate CIRP by avoiding delays in verifying the existence of the debt and default.**

---

<sup>12</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) Summary and para 4.3.2, 6.3.2 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

#### 4. APPLICATION FOR INITIATION OF CIRP BY CLASSES OF CREDITORS\*

- 4.1. Section 7 of the Code allows a financial creditor to initiate a CIRP against a corporate debtor upon the occurrence of default, either by itself, or jointly with other financial creditors.
- 4.2. It was brought to the Committee that for classes of financial creditors referred to in sub-clauses (a) and (b) of Section 21(6A) of the Code - such as deposit holders, bondholders and homebuyers - there was a concern that the CIRP can be initiated by only one or few such financial creditors following minor disputes. This may exert undue pressure on the corporate debtor, and has the potential to jeopardise the interests of the other creditors in the class who are not in favour of the initiation of CIRP. This may also impose additional burden upon the Adjudicating Authority to hear objections to heavily disputed applications. The Committee noted that this may be antithetical to the value of a time-bound resolution process, as the already over-burdened Adjudicating Authorities are unable to list and admit all such cases filed before them.
- 4.3. The Committee discussed that classes of creditors such as homebuyers and deposit holders have every right as financial creditors to initiate CIRP against a corporate debtor that has defaulted in the repayment of its dues. However, it was acknowledged that initiation of CIRP by classes of similarly situated creditors should be done in a manner that represents their collective interests. It was felt that a CIRP should be initiated only where there is enough number of such creditors in a class forming a critical mass that indicates that there is in fact large-scale agreement that the issues against a corporate entity need to be resolved by way of a CIRP under the Code. This may well be a more streamlined way of allowing a well-defined class of creditors to agree upon initiating what is a collective process of resolution under the Code.
- 4.4. In this regard, and specific to the interests of homebuyers, the Committee also noted that in cases where a homebuyer cannot file an application for initiation of CIRP for having failed to reach the aforesaid critical mass, she would still have access to alternative fora under the RERA and under consumer protection laws. For instance, as recognised by the Supreme Court in the case of *Pioneer Urban Land*

---

\* Recommendations contained herein have been implemented pursuant to Section 3 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

*and Infrastructure Limited and Ors. v Union of India*,<sup>13</sup> the remedies under the Code and under the RERA operate in completely different spheres. The Code deals with proceedings *in rem*, under which homebuyers may want the corporate debtor's management to be removed and replaced so that the corporate debtor can be rehabilitated. On the other hand, the RERA protects the interests of the individual investor in real estate projects by ensuring that homebuyers are not left in the lurch, and get either compensation or delivery of their homes. Thus, if there is a failure to reach a critical mass for initiation of CIRP, it may indicate that in such cases another remedy may be more suitable.

- 4.5. **Accordingly, it was agreed that there should be a requirement to have the support of a threshold number of financial creditors in a class for initiation of CIRP.**
- 4.6. In this regard, the Committee considered if a cue may be taken from the requirements for filing of class actions suits as provided under the Companies Act, 2013. Class action suits may *inter alia* be filed by a hundred members or depositors or by at least 5 per cent of the total number of members or depositors of the company.<sup>14</sup> Similar to this requirement, and keeping with the extant situation of classes of creditors under the Code, it was suggested that Section 7 of the Code could be amended in respect of such classes of creditors to allow initiation by a collective number of at least a hundred such creditors or at least ten percent of the total number of such creditors forming part of the same class. **Thus, the Committee agreed that Section 7(1) of the Code may be amended to provide that for classes of creditors falling within clauses (a) and (b) of Section 21(6A), the CIRP may only be initiated by at least a hundred such creditors, or ten percent of the total number of such creditors in a class.**
- 4.7. The Committee also noted that the collective number of homebuyers that form the threshold amount for initiation of a CIRP, should belong to the same real estate project. This would allow homebuyers that have commonality of interests, i.e. allottees under the same real estate project, to come together to take action for initiating CIRP against a real estate developer. **Thus, in such cases, the CIRP may be initiated by at least a hundred such allottees or ten percent of the total**

---

<sup>13</sup> (2019) 8 SCC 416

<sup>14</sup> Companies Act, 2013, Section 245 read with National Company Law Tribunal Rules, 2016, Rule 84

number of such allottees belonging to the same real estate project.

- 4.8. **However, to ensure that there is no prejudice to the interests of any such creditor in a class whose application has already been filed but not admitted by the Adjudicating Authority, the Committee agreed that a certain grace period may be provided within which such creditor in a class may modify and file its application in accordance with the above-stated threshold requirements. However, if the creditor is unable to fulfil the threshold requirements to file such modified application within the grace period provided, the application filed by such creditor would be deemed withdrawn.**

## 5. INTERIM MORATORIUM PRIOR TO COMMENCEMENT OF CIRP

- 5.1. Sections 7, 9 and 10 of the Code allow a financial creditor, an operational creditor or a corporate applicant to apply for the initiation of a CIRP against a corporate debtor, if an undisputed default of at least INR 1 lakh can be demonstrated. While the Code provides that an application for initiation of a CIRP must be admitted within fourteen days of the receipt of the application, this timeline has been held to be directory.<sup>15</sup> On a review of cases, it appears that in practice, Adjudicating Authorities are taking longer than fourteen days to admit applications under the Code. Anecdotal evidence brought before the Committee suggests that in some cases Adjudicating Authorities have taken up to six months to admit applications.

### *Need for an Interim Moratorium*

- 5.2. The Committee agreed that early identification of distress, and timely resolution of insolvency is a key objective of the Code. It lent support to recent amendments to the Code that require Adjudicating Authorities to provide reasons for not admitting an application made by financial creditors, regarding which the possibility of disputes is lower, within fourteen days.
- 5.3. However, in those cases where the application is not admitted within fourteen days, there is a concern that the management of the corporate debtor, whose powers will vest with the interim resolution professional, and thereafter the resolution professional once the CIRP commences, may have an incentive to siphon off the assets of the corporate debtor in the period leading to the commencement of the CIRP. On the other hand, there is a concern that the

---

<sup>15</sup> *M/s Surendra Trading Company v M/s Juggilal Kamalpat Jute Mills Co. Ltd. & Ors.* (2017) 16 SCC 143



creditors of the corporate debtor may race to enforce their debts in the period leading up to the commencement of the CIRP, which may undermine a collective and value maximizing insolvency resolution. Given this, in some cases, Adjudicating Authorities have passed orders for an ‘*interim moratorium*’ to be put in place, restraining certain actions by stakeholders *before* the commencement of the CIRP.<sup>16</sup> Internationally too, jurisdictions such as the UK and the US have provisions for the application of a moratorium from the filing of the application itself.<sup>17</sup>

- 5.4. **In this background, the Committee recommended that requisite amendments should be made to introduce a provision allowing for an ‘interim moratorium’ to be put in place after an application for initiation of CIRP has been filed, but before it has been admitted, in the interests of having a collective insolvency resolution process that is value-maximising in the interests of all stakeholders (such as in circumstances discussed in paragraph 5.3 above)**

*Application and Scope of the Interim Moratorium*

- 5.5. Thereafter, the Committee considered whether such an interim moratorium should be applied automatically, or should be applied on the discretion of the Adjudicating Authority. In this regard, the Committee noted the recommendations of the UNCITRAL Guide that warn against the automatic application of a stay “*at a time when a number of factual matters are not necessarily clear, in particular whether the debtor will satisfy the commencement criteria.*”<sup>18</sup> **The Committee felt that allowing the Adjudicating Authority to grant an interim moratorium would give it an opportunity to assess the urgency of requiring such a moratorium, evaluate the necessity of such a moratorium in those cases where it is not established that the corporate debtor meets the commencement standard, and balance the harm such a moratorium would cause to the interests of the relevant stakeholders. Given this discussion, the Committee agreed that the Adjudicating Authorities should be empowered to pass an order declaring**

---

<sup>16</sup> *NUI Pulp and Paper Industries Pvt. Ltd. v Roxcel Trading GmbH*, Company Appeal (AT) (Insolvency) No. 664/2019, NCLAT. Decision date – 17 July 2019; *In Re F.M. Hammerle Textiles Ltd.*, CP (IB) No. 30/CHD/PB/2017 with CA No. 74/2017, NCLT (Chandigarh). Decision date – 9 June 2017

<sup>17</sup> See Insolvency Act, 1986, Schedule B1, Para 44; 11 U.S. Code, Section 362(a)

<sup>18</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) p. 90 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

an 'interim moratorium'. The Committee also noted that the provisions of Part III of the Code, provide for automatic application of the interim moratorium.<sup>19</sup> However, the Committee felt that the circumstances of debtors and creditors in corporate insolvency and personal insolvency cases would not be alike, and consequently felt that the provision for interim moratorium in Part II need not mirror the provision in Part III.

- 5.6. While some members expressed the need for specific grounds on the basis of which the interim moratorium may apply, **the Committee agreed that the Adjudicating Authority should be empowered to grant an interim moratorium where, having regard to the facts and circumstances of the case, it concludes that it is urgent and necessary keeping in mind the objectives of having a collective insolvency resolution process that is value-maximising in the interests of all stakeholders, and the need for imposing such a moratorium would outweigh the harms, as discussed above.**
- 5.7. **As to the scope of the interim moratorium, the Committee agreed that it may be prudent to allow the Adjudicating Authority to pass orders covering any or all of the situations envisaged under Section 14 of the Code, based on the facts and circumstances of the cases before them. The relevant exemptions provided in sub-section (3) of Section 14 would apply to these orders where necessary.** This would also enable a smooth transition to the moratorium under Section 14 on admission of an application to initiate CIRP.
- 5.8. However, the Committee also discussed concerns that an interim moratorium may be susceptible to abuse, and some stakeholders may attempt to take its protection while causing delay in the commencement of the CIRP.<sup>20</sup> It also noted that this moratorium may harm the interests of certain creditors unduly in some cases. In this regard, the Committee noted that the discretion granted to the Adjudicating Authority to determine the need and scope of the interim moratorium, as discussed above, would act as an in-built safeguard from abuse. Inherent in this power, would be the power to modify or withdraw the order of interim moratorium where it is shown that an unjustifiable harm is being caused to a creditor, where the objective of putting in place the interim moratorium is no more

---

<sup>19</sup> Insolvency and Bankruptcy Code, 2016, Sections 96, and 124

<sup>20</sup> See Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 13 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLR00.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLR00.pdf)> accessed 26 November 2019

relevant, etc. For instance, an order imposing an interim moratorium may be withdrawn where it impedes settlements between debtors and creditors. However, the Committee recognized the need for an additional safeguard to reduce the possibility of abuse by causing a delay in the initiation of proceedings. **Accordingly, the Committee recommended that the order declaring an interim moratorium should specify the time for which it will continue, which may not exceed sixty days from the date of the order. The Committee also agreed that this period should not be extended any further.**

## 6. ELIGIBILITY OF A CORPORATE DEBTOR TO INITIATE CIRP AGAINST OTHER PERSONS\*

6.1. Under Section 11(a) and (d) of the Code, corporate debtors “*undergoing a corporate insolvency resolution process*” and “*in respect of whom a liquidation order has been made*” are not permitted to file an application to initiate CIRP. It was brought to the Committee that this has created confusion over whether a corporate debtor which is undergoing CIRP or liquidation process, may file an application to initiate CIRP against other corporate persons who are its debtors.

6.2. The Committee noted that different Adjudicating Authorities had taken different approaches regarding the right of a resolution professional to initiate CIRP against other corporate debtors. On the one hand, the right of the resolution professional to initiate CIRP against other corporate debtors was upheld by relying on the statutory duty of the resolution professional to recover outstanding dues of the corporate debtor under Section 25(2)(b).<sup>21</sup> On the other hand, the resolution professional had been prevented from doing so, on the basis of a literal interpretation of Section 11(a).<sup>22</sup> While the Appellate Authority had dismissed the appeals filed against some of these orders without endorsing either of these

---

\* Recommendations contained herein have been implemented pursuant to Section 4 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

<sup>21</sup> *Jai Ambe Enterprise v S.N. Plumbing Private Limited*, CP. No. 1268/I&BC/NCLT/MB/MAH/2017, NCLT (Mumbai). Decision date – 6 February 2018

<sup>22</sup> *M/s Mandhana Industries Limited v M/s Instyle Exports Private Limited*, C.P. No. (IB)-301(ND)/2018, NCLT (New Delhi). Decision date – 30 August 2018; *S.N. Plumbing Private Limited v IL&FS Engineering & Construction Company Ltd*, C.P. No. 20/9/HDB/2018, NCLT (Hyderabad). Decision date – 24 April, 2018

approaches,<sup>23</sup> in *Abhay N. Manudhane v Gupta Coal India Pvt. Ltd.*<sup>24</sup> it had taken the latter approach and denied the liquidator the right to file an application to initiate CIRP against other corporate debtors (in the context of Section 11(d)).

- 6.3. However, according to the Notes on Clauses to Section 11, the section was enacted to prevent “repeated recourse to the corporate insolvency resolution process in order to delay repayment of debts due or to keep assets out of the reach of creditors” and to “ensure finality of the liquidation order” by preventing a corporate debtor to initiate CIRP after a liquidation order is passed.<sup>25</sup> Thus, it is clear that Section 11 aims at preventing a corporate debtor from abusing the statutory process under Chapter II of Part II of the Code by repeatedly initiating CIRP against itself or by initiating CIRP even after a liquidation order is passed against it. The Committee discussed that if Section 11 were instead, interpreted to prevent the resolution professional or the liquidator of a corporate debtor from initiating CIRP against other defaulting entities, it would cause serious detriment to the ability of a corporate debtor to recover its dues from its debtors.
- 6.4. **Given this, the Committee recommended that an Explanation be provided under Section 11 to clarify that the provisions of this section should not prevent a corporate debtor from initiating CIRP against any other corporate debtor.**

## 7. ISSUES RELATED TO GUARANTORS

- 7.1. Under Section 128 of the Indian Contract Act, 1872, the liability of a surety towards a creditor is coextensive with that of the principal borrower. When a default is committed, the principal borrower and the surety are jointly and severally liable to the creditor, and the creditor has the right to recover its dues from either of them or from both of them simultaneously.<sup>26</sup> The Committee discussed whether in light of this rule of co-extensive liability of the surety and the principal borrower, a creditor should be permitted to initiate CIRP against both the principal borrower

---

<sup>23</sup> *S. N. Plumbing Pvt. Ltd., (Through RP- Sanjay Kumar Ruia) v IL&FS Engineering & Construction Co. Ltd.*, Company Appeal (AT) (Insolvency) No. 283/2018, NCLAT. Decision date – 7 December 2018

<sup>24</sup> Company Appeal (AT) (Insolvency) No. 786/2019, NCLAT. Decision date – 1 October 2018

<sup>25</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 117, <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>26</sup> Pollock and Mulla, *Indian Contract and Specific Relief Acts* vol. II (12th edn., LexisNexis Butterworks 2006) p. 1814-1816

and its surety and whether it should be permitted to file its claims in the CIRPs of both the principal borrower and its surety.

*Initiation of Concurrent Proceedings against the Principal Borrower & the Guarantor*

- 7.2. The Committee noted that the Appellate Authority, in *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd.*,<sup>27</sup> has prevented admission of multiple CIRP applications which were filed by the same creditor for the same set of claims against different corporate debtors by holding that: “*However, once for same set of claim application under Section 7 filed by the ‘Financial Creditor’ is admitted against one of the ‘Corporate Debtor’ (‘Principal Borrower’ or ‘Corporate Guarantor(s)’), second application by the same ‘Financial Creditor’ for same set of claim and default cannot be admitted against the other ‘Corporate Debtor’ (the ‘Corporate Guarantor(s)’ or the ‘Principal Borrower’).*”<sup>28</sup>
- 7.3. The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower.<sup>29</sup> Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety.<sup>30</sup> Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them.
- 7.4. Further, Section 60(2) of the Code provides that when a CIRP or liquidation process against a corporate debtor is pending before an Adjudicating Authority, any insolvency resolution, liquidation or bankruptcy proceeding against any guarantor of that corporate debtor should also be initiated before the same Adjudicating Authority. Similarly, Section 60(3) requires transfer of any such proceeding which may be pending before any court or tribunal to the Adjudicating

---

<sup>27</sup> Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision Date - 8 January 2019

<sup>28</sup> *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd*, Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision Date - 8 January 2019

<sup>29</sup> *Bank of Bihar Ltd v Damodar Prasad & Another* AIR 1969 SC 297

<sup>30</sup> *State Bank of India v Indexport Registered and Ors.* AIR 1992 SC 1740; *Jagannath Ganeshram Agarwala v Shivnarayan Bhagirath* AIR 1940 Bom 247

Authority dealing with the CIRP or liquidation process of the corporate debtor. Therefore, as the Code does require proceedings against a corporate debtor and its guarantors to be simultaneously heard by the same Adjudicating Authority, the Committee was of the view that the Code in fact, envisages initiation of concurrent proceedings against both a corporate debtor and its sureties. **Given this, the Committee recommended that a creditor should not be prevented from proceeding against both the corporate debtor and its sureties under the Code.**

- 7.5. However, the Committee noted that the Appellate Authority has, in certain cases, taken a view contrary to its decision taken in the *Piramal Enterprises Ltd.*<sup>31</sup> case. For example, in *Edelweiss Asset Reconstruction Company Limited v Sachet Infrastructure Pvt. Ltd. & Ors.*,<sup>32</sup> the Appellate Authority has permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantors. Further, the Appellate Authority has also admitted a petition to review its aforesaid judgement in the *Piramal Enterprises Ltd.* case.<sup>33</sup> **Given this, the Committee decided that no legal changes may be required at the moment, and this issue may be left to judicial determination.**
- 7.6. It was also represented before the Committee that in certain cases creditors extend loans to a debtor solely by relying on the contract of guarantee provided by a third-party surety, and without considering the commercial viability of the debtor and its ability to repay the debt. The Committee deprecated this practice, and agreed that creditors should necessarily carry out adequate due diligence regarding the debtor's financial position and should not extend a loan solely by relying on a contract of guarantee without assessing the financial and technical feasibility of the respective project.

*Filing of Claims by a Creditor in Proceedings of the Principal Borrower & the Guarantor*

- 7.7. The Committee further discussed whether, in cases where CIRP has already been initiated against the principal borrower and the surety, a creditor should be allowed to file claims (with respect to the same set of debts) in the CIRP of both the corporate debtors. The Appellate Authority, in *Dr. Vishnu Kumar Agarwal v*

---

<sup>31</sup> *Dr. Vishnu Kumar Agarwal v M/s. Piramal Enterprises Ltd.*, Company Appeal (AT) (Insolvency) No. 346/2018, NCLAT. Decision date – 8 January 2019

<sup>32</sup> Company Appeal (AT) (Insolvency) No. 377/2019, NCLAT. Decision date – 20 September 2019

<sup>33</sup> *TUF Metallurgical Pvt. Ltd. v Wadhwa Glass Processors Pvt. Ltd.*, Company Appeal (AT) (Insolvency) No. 611/2019, NCLAT. Decision date – 31 May 2019



*M/s. Piramal Enterprises Ltd.*,<sup>34</sup> had opined that “for same set of debt, claim cannot be filed by same ‘Financial Creditor’ in two separate ‘Corporate Insolvency Resolution Processes’”.

- 7.8. However, as discussed above, the principal borrower and the surety being jointly and severally liable to the creditor is a key feature of a contract of guarantee. Therefore, the very object of a contract of guarantee would be prejudiced if the creditor is prohibited from filing claims in the CIRP of both the principal borrower and the surety.<sup>35</sup> Even in the First ILC Report, this Committee, while discussing the scope of moratorium under Section 14 *vis-à-vis* the assets of a surety of the corporate debtor, had observed that the “characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended.”<sup>36</sup> If a creditor is denied the contractual right to proceed simultaneously against the corporate debtor and the surety, the ability of the creditor to recover its debt may be seriously impaired.
- 7.9. **As the right to simultaneous remedy is central to a contract of guarantee, the Committee suggested that in cases where both the principal borrower and the surety are undergoing CIRP, the creditor should be permitted to file claims in the CIRP of both of them. Since, as the Code does not prevent this, the Committee recommended that no amendments were necessary in this regard.**
- 7.10. It was brought to the Committee that this right may be misused by a creditor to unjustly enrich herself by recovering an amount greater than what is owed to her. However, the right to simultaneous remedy under a contract of guarantee does not entitle a creditor to recover more than what is due to her, and **the Committee agreed that upon recovery of any portion of the claims of a creditor in one of the proceedings, there should be a corresponding revision of the claim amount recoverable by that creditor from the other proceedings.**

---

<sup>34</sup> *ibid*

<sup>35</sup> *Bank of Bihar Ltd v Damodar Prasad & Another* AIR 1969 SC 297

<sup>36</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 5.9, <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

## 8. THE MORATORIUM UNDER SECTION 14\*

*Continuation of Licenses, etc. granted by Government authorities during the Moratorium period*

### Prohibition on Termination on Grounds of Insolvency

- 8.1. Section 14 of the Code provides for a moratorium to be put in place on the admission of an application for initiation of the CIRP. This moratorium prohibits *inter alia*, the institution of suits or continuation of proceedings, the transfer of its assets by the corporate debtor, the enforcement of a security interest and the recovery of property by an owner or lessor of the property.<sup>37</sup>
- 8.2. The moratorium under Section 14 is intended to keep “*the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.*”<sup>38</sup> Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings.<sup>39</sup> The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it “*facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate.*”<sup>40</sup>

---

\* Recommendations contained herein have been implemented pursuant to Section 5 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

<sup>37</sup> Insolvency and Bankruptcy Code, 2016, Section 14(1)

<sup>38</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 118, <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>39</sup> See Catherine Balmond and Katharina Crinson (ed.), *Restructuring & Insolvency 2019* (12th edn, Law Business Research Ltd., 2018) <<https://gettingthedealthrough.com/download/area/35/restructuring-insolvency>> accessed 26 November 2019

<sup>40</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) p. 84 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

- 8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as “**grants**”) to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: *one*, by relying on *ipso facto* clauses, by virtue of which these grants may be terminated on the advent of insolvency proceedings themselves, and *second*, by initiating termination on account of non-payment of dues.
- 8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. Consequently, their termination during the CIRP by relying on *ipso facto* clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. **Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.**
- 8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the “property” of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes “*money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.*” This definition is substantially the same as the definition of “property” under Section 436 of the Insolvency Act, 1986 (UK), which has been considered the widest possible definition of property.<sup>41</sup> In India too, it is accepted that certain licenses and concessions can convey permission to use property,<sup>42</sup> or may embody a lease, permit, etc. granting rights in the property.<sup>43</sup> Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any

---

<sup>41</sup> *Bristol Airport plc v Powdrill* [1990] Ch 744

<sup>42</sup> See Mulla, *The Transfer of Property Act* (11<sup>th</sup> edn., LexisNexis 2013) p. 794-804

<sup>43</sup> See Shah & Singh, *Commentary on Law of Mines & Minerals* (Whytes & Co. 2016) para 1.5.9.C

person.<sup>44</sup>

- 8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents “*the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.” (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing recovery by stock exchanges and regulators,<sup>45</sup> as well as the de-registration of aircrafts.<sup>46</sup>*
- 8.7. **Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1).**
- 8.8. The Committee also agreed that the moratorium on termination or suspension of such grants during the CIRP period should not be taken to mean that the corporate debtor is not liable for payments of dues arising out of the continuation or use of such grants. **As such, the corporate debtor must continue to be liable for such dues, which may either be paid during the CIRP or dealt with in the resolution plan. Since these dues would be attributable to the running of the corporate debtor as a going concern, they would be considered to be ‘insolvency resolution process costs’. However, the dues that arose for such grants *prior* to the commencement of the CIRP would not be required to be paid during the moratorium period and claims may be filed for such dues during the CIRP.**

---

<sup>44</sup> See *Punit Garg & Ors v Ericsson India Pvt. Ltd. & Anr.*, Company Appeal (AT) (Insolvency) Nos.255-260/2018, NCLAT. Decision date – 26 March 2019

<sup>45</sup> *Bohar Singh Dhillon v Rohit Sehgal and Ors.*, Company Appeal (AT) (Insolvency) No. 665/2018, NCLAT. Decision date – 9 May 2019; *Anju Agarwal v Bombay Stock Exchange and Ors.*, Company Appeal (AT) (Insolvency) No. 734/2018, NCLAT. Decision date – 23 April 2019

<sup>46</sup> *State of Bank India v Jet Airways (India) Ltd.*, MA 2360/2019 & Ors. in CP(IB) 2205(MB)/2019, NCLT (Mumbai). Decision date – 5 July 2019

## Termination on non-insolvency related grounds

- 8.9. In this context, the Committee also discussed if such grants may be terminated during the CIRP for reasons other than those related to the insolvency of the corporate debtor (for example, the initiation of insolvency, non-payment of dues, capital adequacy); such as, for violation of health and safety standards, non-compliance with environmental norms, etc.
- 8.10. The Committee discussed that even under the Code the resolution professional is responsible for keeping the corporate debtor running as a going concern and “*complying with the requirements under any law for the time being in force on behalf of the corporate debtor.*”<sup>47</sup> As such, the moratorium under Section 14 is not intended to dispense with obligations to comply with non-pecuniary requirements during the moratorium period.
- 8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute “*money claims or recovery*” proceedings.<sup>48</sup> In this regard, the Committee also noted that in some jurisdictions, laws allow “*regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety*” to be continued during the moratorium period.<sup>49</sup>
- 8.12. **Given this, the Committee was of the view that termination of grants for non-compliance with requirements that are not related to the insolvency of the debtor would not be hit by the moratorium under Section 14. However, the Committee agreed that for abundant caution, the Explanation referred to in**

---

<sup>47</sup> Insolvency and Bankruptcy Code, 2016, Section 17(2)(e). See also Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 8, <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

<sup>48</sup> See *Shah Brothers Ispat Pvt. Ltd. v P. Mohanraj & Ors.*, Company Appeal (AT) (Insolvency) No. 306/2018 (NCLAT). Decision date- 31 July 2018

<sup>49</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) p. 86 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

**paragraph 8.7 should also clarify that termination or suspension of grants on account of insolvency would be prohibited by the moratorium. However, termination or suspension of such grants on account of non-insolvency reasons would not be barred by the moratorium.**

*Continuation of Critical Supplies during the Moratorium period*

- 8.13. Section 14(2) of the Code previously only provided that the supply of ‘essential goods and services’ shall not be terminated, suspended or interrupted during the moratorium period. The term ‘essential goods and services’ is defined in Regulation 32 of the CIRP Regulations to mean “*electricity, water, telecommunication services and information technology services to the extent these are not a direct input to the output produced or supplied by the corporate debtor.*” These are basic supplies that are necessary for “*ensuring orderly completion of the proceedings*”.<sup>50</sup>
- 8.14. However, the Committee noted that these supplies would not be sufficient to run the corporate debtor as a going concern. Other ‘critical supplies’ required to run the corporate debtor as a going concern, such as input supplies, would have to be procured by mutual agreement between the insolvency professional and the supplier, sometimes with the approval of the CoC. It was brought to the Committee that the procurement of these supplies by negotiation was proving to be difficult in some cases, and Adjudicating Authorities under the Code were being approached on a case-by-case basis for the continuation of critical supplies other than those defined as essential goods and services under the CIRP Regulations.<sup>51</sup>
- 8.15. The Committee had made recommendations on this issue in the First ILC Report as well,<sup>52</sup> and agreed once again that there is a need to facilitate the procurement of critical supplies that are essential to running the corporate debtor as a going concern. This would be especially necessary in cases where the critical supplies are not easily and efficiently replaceable, since there is a high possibility that these

---

<sup>50</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 118, <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>51</sup> *Canara Bank v Deccan Chronicle Holdings Ltd.*, CP No. IB/41/7/HDB/2017, NCLT (Hyderabad). Decision date – 19 July 2017

<sup>52</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) paras 5.14, 5.15 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

suppliers would demand 'ransom payments' which would prejudice the insolvency resolution of the corporate debtor. However, the Committee re-considered its previous recommendation that Adjudicating Authorities should be approached on a case-by-case basis for continuation of critical supplies other than those defined as essential goods and services under the CIRP Regulations at present. In practice, the Committee felt that approaching the Adjudicating Authority in every case for continuation of critical supplies may constrain the use of precious judicial time further, and may result in the incurrence of significant litigation expenses.

- 8.16. **Given this, the Committee recommended that a new sub-section be introduced in Section 14 to ensure that supplies that are critical to running the corporate debtor as a going concern, and would contribute to the preservation of the corporate debtor's value and success of the resolution plan should not be terminated, suspended or interrupted, except in certain specific circumstances.**
- 8.17. **The supplies that would be considered critical should be identified by the resolution professional, who is entrusted with the responsibility of running the corporate debtor as a going concern.** In identifying critical supplies, the resolution professional should consider factors such as whether the supplies have a significant and direct relationship with keeping the corporate debtor running as a going concern, and whether the supplies may be replaced easily or efficiently.
- 8.18. However, the Committee was also conscious that mandating such supplies throughout the period of the moratorium, without payment, has a risk of resulting in counter-party distress if suppliers are not paid during this period. **Given this, the Committee agreed that such critical suppliers should be paid for supplies made during the moratorium period on an on-going basis, generally on the same terms as those that existed pre-insolvency or on a reasonable commercial basis. Consequently, the Committee recommended that if such payments are not made, suppliers should be permitted to terminate, suspend or interrupt these critical supplies. Further, in exercise of abundant caution, the Committee also recommended that the CIRP Regulations should specify that payments for these critical supplies would constitute insolvency resolution process costs.** However, the Committee was also conscious that these suppliers should not be given an undue preference over other stakeholders of the corporate debtor. **Consequently, the Committee agreed that they need not be paid for pre-CIRP dues at this stage Claims may be submitted by suppliers in respect of the dues owed to them for supplies not compelled by the moratorium.**

8.19. Further, the Committee was of the view that on implementation of this provision, additional circumstances may be identified in which it may be desirable to enable counter-parties to terminate the supply of such critical supplies. **Given this, the Committee recommended that flexibility be retained to allow termination, suspension or interruption in the circumstances as may be specified in subordinate legislation.**

## 9. TIME FOR APPOINTMENT OF AN INTERIM RESOLUTION PROFESSIONAL\*

9.1. Under Section 5(12) of the Code, 'insolvency commencement date' was initially defined as the date of admission of an application for initiation of CIRP by the Adjudicating Authority. However, under Section 16(1), the Adjudicating Authority was provided a time-period of fourteen days from the insolvency commencement date to appoint an interim resolution professional. As a result, valuable time would be lost after commencement of CIRP, as the steps to initiate CIRP could not be taken till an interim resolution professional was appointed.

9.2. In order to resolve this issue, a proviso was inserted under Section 5(12) to provide that in cases where an interim resolution professional is not appointed by the order of admission, the insolvency commencement date should be the date on which the interim resolution professional is appointed by the Adjudicating Authority. However, it was brought to the Committee that certain inconsistencies had arisen as a result of insertion of the aforesaid proviso to Section 5(12). For instance, under Section 12, the timeline for completion of CIRP would be calculated from the date of admission of the application for initiation of CIRP, and not the date of commencement of CIRP. In other words, Section 12 did not take into account the date when the interim resolution professional is appointed, as was provided under the proviso to Section 5(12).

9.3. While discussing a solution to resolve these inconsistencies, the Committee expressed its view that an order of admission should be passed only after the name of an insolvency professional is finalised for appointment as an interim resolution professional. In this regard, it was noted that, in cases where the Adjudicating Authority is required to make a reference to the IBBI for recommending the name of an interim resolution professional,<sup>53</sup> the Adjudicating Authority may first

---

\* Recommendations contained herein have been implemented pursuant to Sections 2(i) and 6 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

<sup>53</sup> Insolvency and Bankruptcy Code, 2016, Section 16 (3) and (4)



choose an interim resolution professional, based on the recommendation made by the IBBI, before passing an order of admission.. The Committee also noted that this would not unduly stretch the time taken for admission since the IBBI has constituted a common panel of insolvency professionals for each bench of the Adjudicating Authority, to enable the Adjudicating Authority to appoint an interim resolution professional in a timely manner. The Adjudicating Authority can select any insolvency professional from the common panel of insolvency professionals as an interim resolution professional for any case where no interim resolution professional is proposed in the application to commence a CIRP.<sup>54</sup>

- 9.4. **Given this, the Committee recommended that the time-period of 14 days granted to the Adjudicating Authority under Section 16(1) for appointment of the interim resolution professional should be removed from the Code as the interim resolution professional can now be appointed by the order of admission itself. Further, the ‘insolvency commencement date’ under Section 5(12) should be calculated from the date of passing of the admission order itself.**

## 10. CONFERRING VOTING RIGHTS ON OPERATIONAL CREDITORS

- 10.1. Section 21 of the Code provides that the CoC shall comprise all the financial creditors of the corporate debtor. Further, operational creditors are permitted to attend the meetings of the CoC “if the amount of their aggregate dues is not less than ten per cent of the debt”.<sup>55</sup> The CoC has to assess the viability of the corporate debtor and take key commercial decisions regarding the corporate debtor during the CIRP “taking into account all available information as well as to evaluate all alternative investment”.<sup>56</sup> The Supreme Court, while relying on the BLRC Report, noted that financial creditors are “in the business of money lending” and “are best equipped to

---

<sup>54</sup> Insolvency and Bankruptcy Board of India, *Insolvency Professionals to act as Interim Resolution Professionals and Liquidators (Recommendation) Guidelines, 2019*, (14 May 2019) <[https://ibbi.gov.in/webadmin/pdf/legalframwork/2019/May/IPs%20to%20act%20as%20IRPs%20and%20Liquidators%20\(Recommendation\)%20Guidelines%202019\\_2019-05-14%2020:09:47.pdf](https://ibbi.gov.in/webadmin/pdf/legalframwork/2019/May/IPs%20to%20act%20as%20IRPs%20and%20Liquidators%20(Recommendation)%20Guidelines%202019_2019-05-14%2020:09:47.pdf)> accessed 26 November 2019

<sup>55</sup> Insolvency and Bankruptcy Code, 2016, Section 24(3)(c)

<sup>56</sup> *Swiss Ribbons Pvt. Ltd. v Union of India* Writ Petition (Civil) No. 99 of 2018. Decision date - 25.01.2019, para 43

assess viability and feasibility of the business of the corporate debtor”.<sup>57</sup> Therefore, only they are given voting rights in the CoC.<sup>58</sup>

- 10.2. The Committee noted that the purpose of insolvency law is to provide a collective process for resolving insolvency of a financially distressed debtor. As highlighted by the BLRC Report *“a collective mechanism for resolving insolvency within a framework of equity and fairness to all stakeholders”* is one of the hallmarks of a well-developed insolvency resolution regime.<sup>59</sup> In fact, the degree of creditor participation is considered a key factor in determining the effectiveness of an insolvency regime.<sup>60</sup> For instance, the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes recommend that *“creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings to ensure fairness and integrity.”*<sup>61</sup> However, the BLRC recommended that only financial creditors be permitted to vote in the CoC due to the reasons discussed above.
- 10.3. Further, Section 31 provides that a resolution plan, which can alter rights of an operational creditor, shall be binding on every creditor of the corporate debtor. In this regard, the Committee noted that the UNCITRAL Guide recommends that an *“insolvency law should specify that a creditor or equity holder whose rights are modified or affected by the plan should not be bound to the terms of the plan unless that creditor or equity holder has been the given the opportunity to vote on approval of the plan”*.<sup>62</sup> The Committee discussed that if the Code does not provide operational creditors with an opportunity to express their dissent against a resolution plan which materially

---

<sup>57</sup> *Swiss Ribbons Pvt. Ltd. v Union of India* Writ Petition (Civil) No. 99 of 2018. Decision date - 25.01.2019, para 44

<sup>58</sup> *Swiss Ribbons Pvt. Ltd. v Union of India* Writ Petition (Civil) No. 99 of 2018. Decision date - 25.01.2019, para 43

<sup>59</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 3.3.1 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

<sup>60</sup> See World Bank, 'Doing Business 2019 Training for Reform' (2019) p. 120-122 <[https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf)> accessed 27 November 2019

<sup>61</sup> The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', (2015) Principle C 7.1 <<pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>> accessed 27 November 2019

<sup>62</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) Recommendation 146 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

modifies their existing contractual rights, it may result in a deficit of trust and confidence among operational creditors in the final outcome of CIRP. The Committee noted that in order to ensure that the CIRP is regarded as a fair and just process by operational creditors, they should be permitted to meaningfully participate in its decision-making process.

- 10.4. The Committee noted that the insolvency regimes of various other jurisdictions also allow participation of all affected creditors in a reorganisation proceeding. In certain jurisdictions, creditors vote in separate classes, with each class comprising creditors having common or similar interests.<sup>63</sup> For example, in the USA, a reorganisation plan would not be confirmed by a Bankruptcy Court unless it is accepted by every class of creditors and shareholders whose rights are impaired by it, and certain additional conditions are met.<sup>64</sup> In certain other jurisdictions, creditors are not divided into separate classes and every creditor votes on a reorganisation plan in a single meeting. For example, in a company voluntary arrangement under the Insolvency Act, 1986 of the UK, a voluntary arrangement proposed on behalf of a corporate debtor involving “*a composition in satisfaction of its debts or a scheme of arrangement of its affairs*” must be accepted by three-fourths in value of *all the creditors* of the debtor and a majority in value of the members voting in a meeting.<sup>65</sup>
- 10.5. In light of the above, the Committee agreed that it would be beneficial to provide operational creditors with voting powers in meetings of the CoC, in order to ensure that the provisions of the Code are aligned with global best practices. However, the Committee noted that the implementation of and practice under the Code are still at a nascent stage. Operational creditors do not currently have the requisite technical and financial capacity to assess and monitor the viability of the corporate debtor and restructure their contracts for the purposes of resolving

---

<sup>63</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part II. ch. IV paras 26-51 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>64</sup> 11 US Code, Section 1122

<sup>65</sup> Insolvency Act, 1986, Sections 1-7B. However, a company voluntary arrangement cannot affect the right of a secured creditor to enforce its security or the priority of a preferential creditor or its entitlement to the same proportional payment as any other preferential creditor, except with the concurrence of the creditor concerned. *See* Insolvency Act, 1986, Section 4(3)

insolvency of the corporate debtor.<sup>66</sup> This capacity would have to be developed further to enable them to effectively exercise voting rights in the CoC. Further, the Committee noted that significant delays and increased costs have plagued the decision-making process in a CoC with a large number of creditors, which has been discussed extensively in the First ILC Report.<sup>67</sup> Therefore, institutional capacity would need to be built under the Code to facilitate large CoCs to take decisions in an efficient and timely manner.

- 10.6. Further, the Committee noted that while operational creditors are currently not conferred voting rights in the CoC, efforts have been taken to protect their rights during CIRP. In this regard, the Committee noted that the Insolvency and Bankruptcy Code (Amendment) Act, 2019 has enhanced the minimum protection accorded to operational creditors under a resolution plan and the Supreme Court has held that the CoC should consider, *inter alia*, “that the interests of all stakeholders including operational creditors has been taken care of” while approving a resolution plan.<sup>68</sup>
- 10.7. **In light of this, the Committee agreed that operational creditors may not be provided with voting rights at present. However, the Committee agreed that in due course of time, it may be assessed whether institutional capacities are sufficiently developed under the Code, and if operational creditors are well-equipped to take key decisions for resolving insolvency, without undermining the efficiency of the processes under the Code. Based on such assessment, operational creditors may be conferred voting rights in the future.**
- 10.8. **Even when operational creditors are conferred voting rights, the Committee suggested that in order to maintain the efficiency of the CoC, they should be represented by an authorised representative in the same manner as provided under Section 21(6A) for security holders, deposit holders, and other classes of creditors.** However, the Committee discussed that operational creditors to whom a substantial portion of the debtor’s total outstanding debts are owed, should be

---

<sup>66</sup> *Swiss Ribbons Pvt. Ltd. v Union of India* Writ Petition (Civil) No. 99 of 2018. Decision date - 25.01.2019, para 44

<sup>67</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) paras 10.1-10.3 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

<sup>68</sup> *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v Satish Kumar Gupta & Ors.*, Civil Appeal No. 8766-67 of 2019. Decision date- 15 November 2019 para 46

permitted to attend and vote in a meeting of the CoC on their own behalf. **Therefore, the Committee suggested that operational creditors, to whom at least ten per cent of the total debt of the corporate debtor is owed, need not be represented by an authorised representative and may participate and vote on their own in a meeting of the CoC.**

## 11. ISSUES RELATED TO RELATED PARTY FINANCIAL CREDITORS

11.1. Section 21(2) of the Code provides that the CoC shall comprise all the financial creditors of the corporate debtor. However, in order to prevent abuse of the CIRP, the first proviso to Section 21(2) prohibits any related party financial creditor from exercising any right of representation, participation or voting in a meeting of the CoC. The Committee noted that certain issues have emerged in light of this ineligibility, as discussed below.

### *Eligibility of certain Financial Institutional Creditors to Participate in the CoC\**

11.2. While the first proviso to Section 21(2) prevents a related party financial creditor from exercising any right of representation, participation or voting in the CoC, the second proviso to Section 21(2) provided an exemption from this rule to “*a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date*”. The First ILC Report had recommended this exemption with a view to prevent regulated institutional creditors from being deemed as related parties solely “*on account of equity held by them pursuant to debt restructuring schemes implemented in the past*”.<sup>69</sup>

11.3. Despite this facilitation, it was represented before the Committee that the aforesaid exemption did not cover all situations in which a financial creditor regulated by a financial sector regulator may be deemed to be a related party of an otherwise unrelated corporate debtor. For instance, certain transactions such as debt asset swaps and invocation of pledges of shares—by virtue of which a pure-play

---

\* Recommendations contained herein have been implemented pursuant to Sections 7 and 9 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

<sup>69</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 1.24 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

financial creditor may come to hold equity or preference shares of a corporate debtor – would not have been exempted under the second proviso to Section 21(2).

- 11.4. **Given this, the Committee agreed that the scope of the aforesaid proviso should be broadened by enabling the Central Government to prescribe additional transactions solely by completion of which a financial creditor which, is regulated by a financial sector regulator and not otherwise related to the corporate debtor, should not be considered as a ‘related party’ of the corporate debtor under this definition.**
- 11.5. In this regard, the Committee also noted that similar exemptions have been provided under Section 29A to regulated financial entities, which are regulated by a financial sector regulator. For example, under Explanation I to the second proviso to clause (c) of Section 29A regulated financial entities, who may become a related party of the corporate debtor solely “*on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date*”, were permitted to submit a resolution plan. Like the exemption provided under the second proviso to Section 21(2), this exemption also did not cover all kinds of transactions solely on completion of which a regulated financial entity, which is otherwise unrelated to the corporate debtor, may be disqualified from submitting a resolution plan. **Therefore, the Committee decided that requisite amendments be carried out under Section 29A as well.**

*Eligibility of certain Foreign Financial Creditors to Participate in the CoC*

- 11.6. The exemption provided under the second proviso to Section 21(2) applies to financial creditors that are regulated by financial sector regulators. However, it was brought to the Committee that in certain jurisdictions, while the managers or advisors of financial creditors are regulated, the financial creditors themselves may not fall under the regulatory ambit of a financial sector regulator. This has led to confusion regarding whether such financial creditors would fall under the scope of the second proviso to Section 21(2). The Committee noted that as the office-bearers of such financial creditors are regulated entities, the transactions and operations undertaken by such financial creditors would fall under the domain of appropriate regulatory authorities in their respective jurisdiction. Given this, **the Committee was of the view that the second proviso to Section 21(2) should be interpreted broadly to also apply to such foreign financial creditors and no legislative change may be required. Section 29A should also be interpreted**

**similarly, as similar exemptions are provided to regulated financial entities thereunder.**

*Eligibility of Assignees of Related Party Financial Creditors to Participate in the CoC*

- 11.7. Although the first proviso to Section 21(2) prohibits a related party financial creditor from participating in the CoC, the Code is silent on the status of a third-party assignee of such a financial creditor. It was brought to the Committee that this was creating uncertainty regarding the right of a third-party assignee of a related party financial creditor to participate, vote or be represented in the CoC.
- 11.8. On a review of relevant judgements, the Committee noted that different Adjudicating Authorities have taken different approaches to determine the eligibility of assignees of related party financial creditors to participate in the CoC. One approach has been to look at the legal validity of the assignment deed and the underlying intention of the parties to the assignment to determine whether the assignee had a legitimate right to participate in the CoC.<sup>70</sup> The other approach has been to hold the assignees of related party financial creditors ineligible under the first proviso to Section 21(2), on the ground that an assignee of a debt cannot have a better title than the assignor itself.<sup>71</sup> The Appellate Authority has taken the latter approach in *Pankaj Yadav v State Bank of India Ltd.*,<sup>72</sup> where the promoter of the corporate debtor had assigned his debt in favour of the appellant, after an application for initiation of CIRP was filed under Section 10. The Appellate Authority held that as the assignee steps into the shoes of the assignor, the rights of the assignee cannot be better than those of the assignor. Therefore, the appellant, being an assignee of the promoter of the corporate debtor, was held to be ineligible under the first proviso to Section 21(2).
- 11.9. The Committee was of the view that the disability under the first proviso to Section 21(2) is aimed at removing any conflict of interest within the CoC, to prevent erstwhile promoters and other related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may

---

<sup>70</sup> See *Edelweiss Asset Reconstruction Company Limited v Mamta Binani and Ors*, CP. No. 01/IBC/HDB/2017, NCLT (Hyderabad). Decision date – 2 August 2017; *In the matter of Fortune Pharma Private Limited*, C.P. No. 1148/IB&C/NCLT/MB/MAH/2017, NCLT (Mumbai). Decision date – 13 November 2017

<sup>71</sup> See: *In the matter of Fortune Pharma Private Limited (Consenting Order)*, C.P. No. 1148/IB&C/NCLT/MB/MAH/2017, NCLT (Mumbai). Decision date – 13 November 2017

<sup>72</sup> Company Appeal (AT) (Insolvency) No. 28/2018, NCLAT. Decision date – 7 August 2018

have been provided by them. As a third-party assignee, who by itself is not a related party, would not have any such conflict of interest, it should not be disabled from participating in the CoC. Further, the aforesaid disability is not related to the debt itself but is based on the relationship existing between a related party creditor and the corporate debtor. **Therefore, as the disability imposed under the first proviso to Section 21(2) pertains to the related party financial creditor and not to the debt it is owed, the Committee agreed that it is clear that when a related party financial creditor assigns her debt to a third party in good faith, such third party should not be disqualified from participating, voting or being represented in a meeting of the CoC.**

- 11.10. However, the Committee discussed that in certain cases, a related party creditor may assign its debts with the intention of circumventing the disability imposed under the first proviso to Section 21(2) by indirectly participating in the CoC through the assignee. As a related party is expressly prohibited from participating in the CoC, it cannot do so indirectly by assigning its debt to a third-party assignee for the purposes of circumventing this restriction. **Therefore, in order to prevent any misuse, the Committee recommended that prior to including an assignee of a related party financial creditor within the CoC, the resolution professional should verify that the assignee is not a related party of the corporate debtor. In cases where it may be proved that a related party financial creditor had assigned or transferred its debts to a third party in bad faith or with a fraudulent intent to vitiate the proceedings under the Code, the assignee should be treated akin to a related party financial creditor under the first proviso to Section 21(2).**

## **12. ROLE AND RESPONSIBILITIES OF MEMBERS OF THE COC**

- 12.1. The CoC is entrusted with critical commercial decision-making powers and functions under the Code. Most importantly, the CoC is vested with the responsibility to assess the viability of the corporate debtor, and determine the manner in which its distress is to be resolved. It was brought to the Committee that in some cases, representatives sent by members of CoCs are neither adequately apprised of their role, nor adequately empowered to take decisions. This *“causes delay and allows depletion of value”*<sup>73</sup> which the Code seeks to contain.

---

<sup>73</sup> *Jindal Saxena Financial Services Pvt. Ltd. v Mayfair Capital Pvt. Ltd.*, C.P. No. (IB)-84(PB)/2017, NCLT (Principal Bench). Decision date - 4 July 2018



- 12.2. In this respect, the Committee noted that the IBBI has issued a circular pursuant to which the resolution professional, *“in every notice of meeting of the CoC and any other communication addressed to the financial creditors...require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors.”*<sup>74</sup>
- 12.3. **However, given the importance of the CoC in the scheme of the CIRP, the Committee agreed that institutional financial creditors should take necessary steps to ensure that their representatives are capable of discharging their duties in a timely and efficient manner. In this regard, the Committee took the view that:**
- **Financial institutions should build strong verticals for stressed asset management, with personnel that has adequate training and expertise. Mechanisms for the periodic review of the performance of these verticals should also be put in place.**
  - **The personnel that represents financial creditors in meetings of the CoC should be sufficiently empowered to take decisions on the spot, and discharge their duties consistent with the letter and spirit of the Code.**
  - **There is a need to develop guidance to help members of CoCs discharge their duties consistent with the letter and spirit of the Code. This may be developed in the form of Best Practices, by industry bodies such as the IBA.**
- 12.4. **The Committee also agreed that any training delivered or guidance developed per paragraph 12.3 above should ensure that members of the CoC are duly cognizant of their role vis-à-vis insolvency professionals. The resolution professional is accountable to all stakeholders of the corporate debtor, including the CoC which is responsible for proposing her appointment,<sup>75</sup> fixing the terms of**

---

<sup>74</sup> Insolvency and Bankruptcy Board of India, *Notice for Meetings of the Committee of Creditors under section 24 (3) (a) of the Insolvency and Bankruptcy Code, 2016 read with regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* (Circular No. IBBI/CIRP/016/2018, 10 August 2018) <[https://ibbi.gov.in//webadmin/pdf/legalframework/2018/Aug/coc%20circular-1\\_2018-08-10%2019:39:07.pdf](https://ibbi.gov.in//webadmin/pdf/legalframework/2018/Aug/coc%20circular-1_2018-08-10%2019:39:07.pdf)> accessed 10 January 2020

<sup>75</sup> Insolvency and Bankruptcy Code, 2016, Section 22

her remuneration<sup>76</sup> and giving approvals before she can take certain actions.<sup>77</sup> The Committee agreed that the resolution professional on “*which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process,*”<sup>78</sup> should be accountable for effective discharge of their functions to these stakeholders, including the CoC. The CoC is also uniquely placed to assist and facilitate the resolution professional’s discharge of her duties. Members of the CoC should assist the resolution professional in maximising the value of the corporate debtor’s assets by discharging their own duties with alacrity. They should also cooperate with the resolution professional at all times, by providing requisite information and assistance as sought by the resolution professional.

- 12.5. At the same time, the CoC should be vigilant to see that the credibility of and confidence in the insolvency profession is maintained. Insolvency professionals are duty-bound to act in the interests of all the stakeholders of the corporate debtor, for which they must stay independent of specific stakeholders, including specific members of the CoC.<sup>79</sup> Through their own actions, members of the CoC must ensure that any conflict of interest is avoided, and where required they should take recourse to the “*standardised and structured*”<sup>80</sup> disciplinary and grievance redressal mechanisms set up by insolvency professional agencies and IBBI, to pursue any relief against insolvency professionals.

### **13. CONTINUATION OF RESOLUTION PROFESSIONAL AFTER THE EXPIRY OF CIRP\***

- 13.1. The proviso to Section 23(1) of the Code provided that when a resolution plan is filed before the Adjudicating Authority under Section 30(6), the resolution professional is required to continue to manage the affairs of the corporate debtor

---

<sup>76</sup> See: Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 34

<sup>77</sup> Insolvency and Bankruptcy Code, 2016, Section 28

<sup>78</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 4.4 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

<sup>79</sup> Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, paras 5 - 9

<sup>80</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 4.4.4 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

\* Recommendations contained herein have been implemented pursuant to Section 8 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

after the expiry of CIRP until an order is passed under Section 31, either approving or rejecting a resolution plan. However, where liquidation is ordered, the Adjudicating Authority may take up additional time after the expiry of CIRP to appoint a liquidator under Section 34. Given this, it was brought to the Committee that there was no provision for an office holder to manage the operations of the corporate debtor during the period between the expiry of CIRP till the appointment of the liquidator under Section 34.

- 13.2. **The Committee recommended that this anomaly may be corrected. It was agreed that the proviso to Section 23(1) may be appropriately amended to provide that, after the expiry of CIRP, the resolution professional should continue to manage the operations of the corporate debtor till either the resolution plan is approved by the Adjudicating Authority under Section 31 or a liquidator is appointed by the Adjudicating Authority under Section 34.**

#### **14. RESOLUTION PLANS REQUIRING APPROVALS FOR IMPLEMENTATION**

- 14.1. Section 30(2) of the Code, which provides the basic minimum requirements that a resolution plan must conform to, requires that a resolution plan should provide for its implementation and supervision, and should not be in contravention of a law in force. Consequently, even after a resolution plan is approved by the Adjudicating Authority, it may require the approval of other persons and authorities for its successful implementation.
- 14.2. The need for these approvals may arise both where the resolution plan envisages actions that require approvals of -
- (a) government or regulatory agencies pursuant to provisions of law, or conditions of licenses, concessions, etc. granted by them that are essential for the business of the corporate debtor, (collectively referred to as “**government approvals**”); and
  - (b) counter-parties to certain contracts that are essential for the business of the corporate debtors (collectively referred to as “**counter-party approvals**”).

##### *Government Approvals*

- 14.3. Regulation 37(1) of the CIRP Regulations provides that the resolution plan is required to provide for “*obtaining necessary approvals from the Central and State*

*Governments and other authorities.*"<sup>81</sup> This suggests that the resolution plan itself should envisage the manner in which relevant approvals would be obtained. Keeping this in mind, the First ILC Report, which had dealt with the issue of statutory approvals, had discussed that the mechanism in the Code does not envisage a single-window approval of resolution plans. It had suggested that while the onus to obtain the final approval would be on the successful resolution applicant after the resolution plan has been approved by the Adjudicating Authority, a timeline should be provided for obtaining these approvals. However, following discussions with the CCI, the First ILC Report had also recommended that the "CCI will have a period of 30 working days for approval of combinations arising out of the Code, from the date of filing of the combination notice to the CCI."<sup>82</sup> Following this, a new sub-section (4) was inserted in Section 31 of the Code to provide that

*"The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:*

*Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."*

- 14.4. It was brought to the notice of the Committee that despite this facilitation, market participants were facing certain challenges. *First*, the Committee was told that the current mechanism of availing such approvals *after* the approval of the resolution plan, has created uncertainty regarding the successful implementation of the resolution plan. This uncertainty may deter resolution applicants from coming forward, and may stall or frustrate the very resolution of the corporate debtor.

---

<sup>81</sup> Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 37(l)

<sup>82</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 16 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

*Secondly*, the Committee was informed that there is a lack of clarity regarding procurement of government approvals other than statutory approvals. For instance, approvals are often required from government authorities for continuation of licenses, concessions, etc. Requirements for approvals in connection to them are often not part of statute, but may be contained in the licenses, concessions, etc. themselves. These would not be covered by Section 31(4). The Committee was informed that there is also a lack of clarity regarding procurement of counter-party approvals for continuation of critical contracts on change of control, in cases where the counter-party is not a government authority. However, the Committee agreed that it may be prudent to allow practice in this regard to develop further, and agreed that it may not be necessary to make any recommendations in this regard at this stage. However, the Committee decided to revisit the manner of availing government approvals for the implementation of a resolution plan.

- 14.5. The Committee deliberated on how different government approvals should be dealt with. In this regard, the Committee was informed that although statutory approvals and other government approvals (such as approvals on licenses) may be distinct, many of these government approvals may be core to the continued functioning and viability of the corporate debtor. Consequently, gaining such approvals may also become a necessary pre-condition to the successful implementation of a resolution plan, similar to the receipt of necessary statutory approvals. **Thus, the Committee agreed that other government approvals that are core to the continued running of the business of the corporate debtor should be treated as statutory approvals would. The onus of identifying which of these other government approvals are core to the business would be on the resolution applicant proposing the resolution plan.**
- 14.6. The Committee then considered mechanisms through which comfort may be given regarding receipt of necessary government approvals before the approval of the resolution plan. In this regard, the Committee examined Section 230 of the Companies Act, 2013. Sub-section (5) of Section 230 provides that -

*“A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India*

*established under sub-section (1) of section 7 of the Competition Act, 2002 (12 of 2003), if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.*" (Emphasis supplied)

In substance, this gives a thirty-day window to government and regulatory authorities to provide their representations, if any, to a scheme of arrangement. If no objections are received in this period, it is presumed that there are no representations to the scheme of arrangement.<sup>83</sup>

- 14.7. **The Committee agreed that inspiration should be taken from this to provide a procedure for taking approvals, or seeking objections during the CIRP itself since this provides certainty on the resolution plan's implementation upfront. This will increase market appetite for proposing resolution plans and enhance the possibility of a value maximising resolution.**
- 14.8. **To enable approvals or no-objections to be taken within the scheme of the Code, the Committee decided that amendments should be made to the Code such that once a resolution plan is approved by the CoC, it should be sent to all concerned government and regulatory authorities whose approvals are core to the continued running of the business of the corporate debtor, for their approvals or objections. If they do not raise their objections within forty-five days, they will be deemed to have no objections. This plan would then be placed before the Adjudicating Authority for its approval. If the government and regulatory agencies raise any objections or grant conditional approvals, the resolution applicant can attempt to clear the objections or meet the conditions for approval before placing the plan for the approval of the Adjudicating Authority, where this can be done within the time limit provided under Section 12. However, where this is not possible, the plan may still be placed before the Adjudicating Authority for its approval, and the successful resolution applicant should clear the objections or comply with the conditions for approval within a period of one year from the approval of the resolution plan.**

---

<sup>83</sup> See also: Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 8

- 14.9. **To ensure that this aligns with the time-line for resolution provided in the Code, the Committee recommended that the window of forty-five days given to government and regulatory agencies should be excluded from the computation of the time limit under Section 12 of the Code.** Although some members of the Committee were of the view that this time-line should ideally run concurrently with the CIRP period, the Committee felt that this exclusion would be justified since it would streamline the process of gaining government approvals considerably, which would lead to more value maximising resolutions, offsetting value lost, if any, in this forty-five day period in which the corporate debtor will be run as a going concern.
- 14.10. To streamline this further, the Committee also recommended that the Central Government or the IBBI should endeavour to set up an online portal that may be used as a single-window for sending plans to relevant agencies as well as for receiving their objections, conditions or approvals within the specified time.

## **15. TREATMENT OF PROFIT AND LOSS ACCRUED DURING THE CIRP**

- 15.1. Section 20 of the Code provides that the business of the corporate debtor is to be run as a going concern during the CIRP.<sup>84</sup> During this period, if the business of the corporate debtor is viable, the corporate debtor may generate some operating profits, which accrue to the corporate debtor.
- 15.2. It was brought to the Committee that there was a lack of clarity on who should be the beneficiary of such profits. The profits or losses accrue to the corporate debtor, which is acquired by a resolution applicant. However, the corporate debtor's primary stakeholders during the CIRP are its creditors. In this regard, the Committee noted two primary views that are generally advanced in relation to the distribution of operating profits generated by a corporate debtor during its CIRP – *First* that the creditors of the corporate debtor should, generally take up any profit that may have accrued or any loss that the corporate debtor may have suffered during the CIRP. This is because payments due towards interest accruing for creditors' debts are not paid during the insolvency resolution process period and losses, if any, suffered due to a fall in valuation of the company are borne by the creditors by taking haircuts. *Second*, there is another view that the operating profits that accrue during the CIRP are an asset to the company and stay within the company. Thus, when a resolution applicant takes over the company, it factors in

---

<sup>84</sup> Insolvency and Bankruptcy Code, 2016, Section 20

such operating profits, which are reflected in the value of a resolution plan, and hence these are also acquired by the resolution applicant.

- 15.3. Upon consideration of this issue, the Committee felt that claims to the operating profits would need to be evaluated on the basis of various factors that may be specific to each case - such as the contribution of creditors; the manner in which distribution to creditors are being made in the resolution plan; the treatment of profits in the accounting and valuation of the corporate debtor; and on whether they are accounted for in the terms of acquisition or repayment contained in a resolution plan. The Committee noted that there cannot be a one-size-fits-all approach to resolve the above issue of distributing operating profits. **Given this, the Committee recommended that the law should remain flexible on whether the creditors or the resolution applicant should enjoy the benefits of the operating profits.**
- 15.4. However, the Committee agreed that any such claims on profits and the value of a corporate debtor should be taken into account at the stage of consideration of the resolution plan. This way, if the creditors should want to lay claim on the profits, the CoC can negotiate for such terms at the time of acceptance of the resolution plan. By the same logic, the Committee agreed that the resolution applicant may also be able to retain such operating profits that may be accrued during the CIRP by factoring it in the terms of its resolution plan, which is made binding on all stakeholders involved, if approved.<sup>85</sup>
- 15.5. **In accordance with the above discussion, the Committee agreed that the best course of action would be for the resolution plan to provide how the operating profits or losses are to be applied and distributed- whether in favour of the resolution applicant or the creditors, or apportioned between the two, or any other stakeholders laying claim to the same.** This will ensure that the resolution plan that is finally approved by the Adjudicating Authority, will contain within its terms, a binding solution and decision on the manner of distribution of operating profits or losses of the corporate debtor between the stakeholders involved in the resolution of the corporate debtor. **Therefore, the Committee recommended that a resolution plan should mandatorily include a proposal on the manner in which such operating profits are to be borne, and requisite amendments to the CIRP Regulations may be made accordingly.**

---

<sup>85</sup> Insolvency and Bankruptcy Code, 2016, Section 31



## 16. SUPER PRIORITY TO INTERIM FINANCE

- 16.1. Section 20 of the Code allows the resolution professional to raise interim finance during the CIRP to supplement working capital needs where the corporate debtor's own assets are illiquid. However, "*once a company enters the insolvency resolution proceedings, it may find it extremely difficult to obtain credit, as few lenders would be willing to lend to a troubled debtor.*"<sup>86</sup> To overcome this, Section 5(13) includes interim finance within insolvency resolution process costs, which is accorded the highest priority under a resolution plan and in the liquidation waterfall under Section 53.<sup>87</sup> However, despite this, it was suggested before the Committee that resolution professionals often fail to raise adequate finance during the CIRP.
- 16.2. In light of this, the Committee discussed if, in order to further encourage provision of additional finance during CIRP, interim finance should be provided the highest priority even within insolvency resolution process costs. It was brought to the Committee that in certain other jurisdictions interim finance is provided super-priority over the claims of certain other creditors. For example, in the UK, any finance provided during administration, along with the dues payable under other post-administration contracts, is provided a priority over the administrator's expenses and remuneration, preferential claims and the claims of a floating charge holder.<sup>88</sup> However, the claims of an interim financier do not enjoy priority over the claims of secured creditors having a fixed charge over the assets of the debtor.<sup>89</sup> In the US, the Bankruptcy Court may provide interim finance (known as a "*debtor-in-possession finance*") a super-priority over other administrative expenses (which are paid out in priority over general unsecured creditors) or even permit the raising of interim finance in the form of a secured loan carrying a lien equal or senior to

---

<sup>86</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 120 <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>87</sup> Insolvency and Bankruptcy Code, 2016, Sections 30 and 53

<sup>88</sup> Insolvency Rules, 2016, Rule 3.51; Insolvency Act, 1986, Schedule B1, Para 99. See Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5<sup>th</sup> edn, Sweet and Maxwell 2018) p. 545, 546

<sup>89</sup> Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5<sup>th</sup> edn, Sweet and Maxwell 2018) p. 546

that of existing secured creditors.<sup>90</sup> However, these special inducements are not provided as a matter of right as the Bankruptcy Court needs to be satisfied that the debtor cannot obtain financing without such inducements and that certain additional safeguards, aimed at protecting the interests of existing creditors, are met.<sup>91</sup>

- 16.3. The Committee discussed that the Code already includes interim finance in 'insolvency resolution process costs', which are paid in priority over all other claims, including the claims of secured creditors, without requiring the approval of the Adjudicating Authority. While interim finance does not have priority over other insolvency resolution process costs, which must be paid *pari passu* with interim finance, the Committee felt that if super-priority is provided to interim finance, other claims falling under insolvency resolution process costs can only be paid (both under a resolution plan and in liquidation) after the dues towards an interim finance are repaid. This could adversely impact the interests of other claimants that are equally crucial for running the operations of the corporate debtor during CIRP, such as suppliers of essential goods and services.<sup>92</sup>
- 16.4. Additionally, in order to encourage interim finance, the First ILC Report had recommended calculation of interest on interim finance as part of insolvency resolution process costs for a period of one year from the liquidation commencement date or until repayment, whichever is earlier. To this effect Regulation 2(1)(ea) of the Liquidation Regulations was amended to include "*interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower*" under the definition of 'liquidation cost'.
- 16.5. **Therefore, as interim finance is accorded the highest priority along with other costs of CIRP both under a resolution plan and in the liquidation waterfall and as the interest accruing on interim finance is also provided the same priority for a period of up-to one year from the liquidation commencement date, the**

---

<sup>90</sup> 11 US Code, Section 364; Sandeep Dahiya, 'A Theoretical Framework for Evaluating Debtor-in-Possession Financing' (2014) <<https://ssrn.com/abstract=2447868>> accessed 18 November 2019

<sup>91</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 71 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLRC\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf)> accessed 26 November 2019

<sup>92</sup> Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 31

**Committee agreed that sufficient protection is already provided to the claims of a creditor providing interim finance and no change may be required to give interim finance priority over other insolvency resolution process costs.**

**17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP\***

17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

*Liability where a Resolution Plan has been Approved*

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the

---

\* Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

resolution plan it had submitted for approval of the Adjudicating Authority.<sup>93</sup> Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower *on an average*, even where the corporate debtor did not commit any offence and was not subject to investigation, due to *adverse selection* by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on *bona fide* persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

- 17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.
- 17.5. The Committee noted that the proceedings under the Code, which are designed to ensure maximization of value, generally require transfer of the corporate debtor to *bona fide* persons. In fact, Section 29A casts a wide net that disallows any undesirable person, related party or defaulting entity from acquiring a corporate debtor. Further, the Code provides for an open process, in which transfers either require approval of the Adjudicating Authority, or can be challenged before it. Thus, the CIRP typically culminates in a change of control to resolution applicants who are unrelated to the old management of the corporate debtor and step in to resolve the insolvency of the corporate debtor following the approval of a resolution plan by the Adjudicating Authority.
- 17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and

---

<sup>93</sup> *State Bank of India v Bhushan Steel Ltd.*, C.P. No. (IB)-201(PB)/2017, NCLT (Principal Bench, New Delhi). Decision date - 15 May 2018, para 83(i)

penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29A.<sup>94</sup>

- 17.7. **Thus, the Committee agreed that a new Section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.**
- 17.8. **Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased.**

*Actions against the Property of the Corporate Debtor*

- 17.9. The Committee also noted that in furtherance of a criminal investigation and prosecution, the property of a company, which continues to exist after the resolution or liquidation of a corporate debtor, may have been liable to be attached, seized or confiscated. For instance, the property of a corporate debtor may have been at risk of attachment, seizure or confiscation where there was any suspicion that such property was derived out of proceeds of crime in an offence of money laundering.<sup>95</sup> It was felt that taking actions against such property, after it is acquired by a resolution applicant, or a bidder in liquidation, could be contrary to the interest of value-maximisation of the corporate debtor's assets, by

---

<sup>94</sup> For example, where the exemption under Section 240A is applicable

<sup>95</sup> Prevention of Money Laundering Act, 2002, Sections 5, 8, 17, 18, and 20

substantially reducing the chances of finding a willing resolution applicant or bidder in liquidation, or lowering the price of bids, as discussed above.

- 17.10. **Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a *bona fide* bidder in liquidation under the Code, should be protected from such enforcement action, and the new Section discussed in paragraph 17.7 should provide for the same. Here too, the Committee agreed that the protection given to the corporate debtor's assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, that may have been involved in the commission of such criminal offence.**
- 17.11. **By way of abundant caution, the Committee also recognised and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor's assets would *have* to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence, and was not involved in the commission of such criminal offence along with the corporate debtor.**

*Cooperation in Investigation*

- 17.12. While the Committee felt that the corporate debtor and *bona fide* purchasers of the corporate debtor or its property should not be held liable for offences committed prior to the commencement of insolvency, **the Committee agreed that the corporate debtor and any person who may be required to provide assistance under the applicable law should continue to provide assistance and cooperation to the authorities investigating an offence committed prior to the commencement of the CIRP. Consequently, the Committee recommended the new Section should provide for such continued cooperation and assistance.**

## CHAPTER 2: RECOMMENDATIONS REGARDING THE LIQUIDATION PROCESS

### 1. STAY ON CONTINUATION OF PROCEEDINGS

- 1.1. Section 33(5) of the Code bars the institution of suits or legal proceedings by or against the corporate debtor without the leave of the Adjudicating Authority during the liquidation process. However, it does not bar the resumption of any such pending suit or legal proceeding. It was brought to the Committee that this was causing hindrance to the liquidator's ability to conduct the liquidation process in an orderly manner.
- 1.2. In this regard, the Committee noted that the Notes on Clauses for Section 33(5) state that the legislative intent behind the section was to provide for "*a moratorium on the initiation or continuation of any suit or legal proceeding by or against the corporate debtor except proceedings pending in appeal before the Supreme Court or the High Court*".<sup>96</sup>Therefore, the omission of pending suits and legal proceedings of the corporate debtor from the scope of the bar provided under Section 33(5) seems to be an error. The Committee noted that even under the corresponding provision of the Companies Act, 2013, both the commencement of new suits and legal proceedings and the continuation of pending suits and legal proceedings by or against a company, is prevented once a winding up order is passed or a provisional liquidator is appointed against it, except with the leave of the Tribunal.<sup>97</sup>
- 1.3. **Given this, the Committee agreed that this should be suitably addressed by making requisite amendments to sub-section (5) of Section 33 so that, apart from proceedings under Section 52, the leave of the Adjudicating Authority is also required for continuing any suit or legal proceeding by or against a corporate debtor undergoing liquidation.**

---

<sup>96</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 123, <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>97</sup> Companies Act, 2013, Section 279

## 2. APPOINTMENT OF THE OFFICIAL LIQUIDATOR AS A LIQUIDATOR UNDER THE CODE

- 2.1. Section 206 read with Section 208 of the Code provides that only those persons who are registered as insolvency professionals can be appointed as liquidators for the liquidation process under the Code. The IP Regulations require that an insolvency professional cannot be in employment,<sup>98</sup> and therefore preclude the appointment of Official Liquidators under the Code.
- 2.2. The BLRC had envisaged that a cadre of regulated professionals who have the necessary “*competence, skill and integrity*” should manage the processes under the Code. This was *inter alia* aimed at ensuring that the problems of delay in the winding up proceedings under the Companies Act, 1956 that were attributable to the capacity constraints of Official Liquidators were overcome by allowing private, qualified insolvency professionals to conduct processes under the Code.<sup>99</sup>
- 2.3. The Committee noted that under the Code as of September, 2019, out of the 2542 cases admitted to the CIRP, as many as 587 cases have proceeded to liquidation, while resolution plans have been approved in 120 cases.<sup>100</sup> It is reported by the IBBI that a large number of these cases under liquidation are those transferred from the erstwhile regime for rehabilitation and winding up under the SICA and the Companies Act, 1956.<sup>101</sup> Given the existing experience and resource of the Official Liquidator’s office, the Committee discussed the possible merits of allowing it to conduct the liquidation process under the Code.
- 2.4. The Committee noted that the office of the Official Liquidator, with its long-standing experience in conducting liquidations under company law, may be utilised to conduct liquidation of corporate debtors especially in large and complex cases that involve public interest. The Committee felt that one of the ways

---

<sup>98</sup> Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, Para 23

<sup>99</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 114 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLR0\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLR0_0.pdf)> accessed 26 November 2019

<sup>100</sup> Insolvency and Bankruptcy Board of India, ‘*Insolvency & Bankruptcy News*’, (April - June, 2019) Quarterly Newsletter of the IBBI <[https://ibbi.gov.in/uploads/publication/FINAL\\_FINAL\\_NewsLeter\\_April - June, 2019-Rev.pdf](https://ibbi.gov.in/uploads/publication/FINAL_FINAL_NewsLeter_April - June, 2019-Rev.pdf)> accessed 23 September 2019. The remaining cases have either been closed on appeal, settled, or withdrawn.

<sup>101</sup> *ibid*



in which Official Liquidators could be brought in to conduct the liquidation process of corporate debtors is by identifying a threshold value of the corporate debtor, exceeding which, the option to appoint the Official Liquidator may be made available in the Code. Such threshold value may be prescribed by the Central Government. To begin with, it was felt that the Code could enable the appointment of an Official Liquidator in cases where the value of the corporate debtor is, or exceeds INR 2000 Crore, and an element of public interest is involved. The Committee agreed that the option to have recourse to the office of the Official Liquidator in such high value liquidations would also help build capacity and stronger institutions for conduct of liquidations under the Code.

- 2.5. **Based on this, the Committee recommended that Section 34 may be amended to enable appointment of the Official Liquidator for the liquidation of corporate debtors, having a minimum value as prescribed by the Central Government (such value may initially be prescribed as INR 2000 Crore), and in whose liquidation a public interest element is involved. In such cases, the Official Liquidator, if appointed, will carry out the functions of the liquidator, as provided in Chapter III of Part II of the Code read with the Liquidation Regulations.** However, given that Official Liquidators primarily have experience in conducting liquidation and may not have the requisite training and experience to conduct the CIRP, they would not be appointed as interim resolution professionals or resolution professionals under the Code.
- 2.6. Some members of the Committee expressed their differing view that allowing Official Liquidators, in addition to private professionals, to be appointed as liquidators under the Code, may result in the creation of two separate, disjointed dispensations for conducting the liquidation process under the Code. **However, the Committee was of the view that there remains the need to give the Adjudicating Authority the *option* to appoint the Official Liquidator in cases involving high-value and public interest, especially given that the experience of private professionals in liquidation is still in the early stages of evolution.** The Committee also noted that in jurisdictions such as the United Kingdom as well, both the Official Receiver's office as well as private liquidators may function as liquidators.
- 2.7. **The Committee was also of the view that specific to the liquidation process under the Code, the office of the Official Liquidator should be subject to regulation and supervision of the IBBI. However, it was agreed that Official Liquidators, being public servants, would not be required to register with and**

be supervised by IPAs. Further, given the practical experience of liquidators, it was agreed that there may not be a need for Official Liquidators to write the examinations envisaged in the Code and the IP Regulations. Consequently, requisite amendments may be made to the Code and IP regulations to allow Official Liquidators to discharge their functions and duties as liquidators under the Code.

### 3. PROVISION OF INFORMATION AND COOPERATION BETWEEN THE LIQUIDATOR, PERSONNEL AND RESOLUTION PROFESSIONAL OF THE CORPORATE DEBTOR

3.1 Section 35 of the Code entrusts the liquidator with the responsibility of conducting the liquidation process. To efficiently conduct the liquidation process, the liquidator should have access to the records and other relevant information of the corporate debtor, and should enjoy the cooperation of every officer, promoter and other personnel (collectively referred to as “**personnel**”) of the corporate debtor and the erstwhile resolution professional of the corporate debtor, if any.

#### *Provision of information*

3.2 Section 37 gives the liquidator the power to access information regarding the “*admission and proof of claims and identification of the liquidation estate asset*” of the corporate debtor. Since the Code had originally envisaged that the resolution professional, who would be “*well acquainted with the financial position and affairs of the corporate debtor*”<sup>102</sup> would ordinarily continue as the liquidator, there is no provision which mandates the handover of information from the resolution professional to liquidator. However, in many cases, a new insolvency professional is appointed as a liquidator. Therefore, a need was felt for an efficient mechanism to enable the newly appointed liquidator to be apprised of the information relating to the corporate debtor speedily.

3.3 In this regard, the Committee noted that the Companies Act, 1956 provided for the preparation of a statement of affairs to “*facilitate the speedy administration in winding up and enable the liquidator to get himself apprised without delay of all the relevant facts relating to the affairs of the company.*”<sup>103</sup> Given this, the Committee agreed that a

---

<sup>102</sup> Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 123, <[https://www.prsindia.org/sites/default/files/bill\\_files/Insolvency\\_and\\_Bankruptcy\\_code%2C\\_2015.pdf](https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf)> accessed 26 November 2019

<sup>103</sup> Ramaiya, *Guide to the Companies Act* part 3 (17th edn, LexisNexis 2010) p. 5008; Companies Act, 1956, Section 454

similar mechanism should be prescribed under the Code, in order to assist a newly appointed liquidator in the effective conduct of the liquidation process. **Therefore, the Committee recommended that the Liquidation Regulations should be amended to require the erstwhile resolution professional to prepare a handover report, akin to a statement of affairs under the Companies Act, 1956, providing a detailed overview of the assets and liabilities of the corporate debtor, including details regarding the names and addresses of its existing claimants, location of its assets etc. Further, to prevent delays in the handover process, Liquidation Regulations should prescribe a timeline within which the handover report should be prepared and the information and records of the corporate debtor be transferred to the newly appointed liquidator by the outgoing resolution professional.**

*Cooperation between the liquidator and personnel, etc.*

- 3.4 To ensure the cooperation of personnel and erstwhile resolution professional of a corporate debtor, the Committee noted that Section 34(3) of the Code (read with Regulation 9 of the Liquidation Regulations) requires the personnel of the corporate debtor and the erstwhile resolution professional to assist and cooperate with the liquidator (failing which, the liquidator may apply to the Adjudicating Authority to direct any such personnel or the erstwhile resolution professional to comply with her instructions and cooperate with her). However, it was represented before the Committee that unlike Section 70, which prescribes punishment for misconduct, including failure to disclose relevant information, by any officer of the corporate debtor in the course of the CIRP, there is no specific provision imposing any penalty on the personnel or the erstwhile resolution professional of a corporate debtor for failing to cooperate or provide assistance to the liquidator.
- 3.5 It was represented before the Committee that any person failing to cooperate with the liquidator may be punished under Section 235A, which provides for punishment for contravention of any provision of the Code for which no penalty or punishment is specifically provided. However, in the absence of any specific penalty, the Committee felt that there was a lack of sufficient deterrence against any personnel or an erstwhile resolution professional of a corporate debtor who fails to cooperate with or provide assistance to the liquidator. **In order to ensure that the liquidator receives requisite cooperation and assistance for conducting the liquidation process of a corporate debtor, the Committee decided that Section 70 should be amended to prescribe specific penalties against the**

**erstwhile resolution professional of the corporate debtor or any personnel who refuses to cooperate with or provide assistance to the liquidator.**

#### **4. SCHEMES OF ARRANGEMENT IN LIQUIDATION**

4.1 Section 230 of the Companies Act, 2013, as amended by the Eleventh Schedule of the Code allows for a scheme of arrangement to be proposed during the liquidation process under the Code.

4.2 It was brought to the Committee that there were several issues involved in implementing schemes during the liquidation of the corporate debtor.

4.3 It was brought to the Committee that, *prima facie*, Section 230 of the Companies Act, 2013 is not aligned with the processes of the Code, and concerns have been raised by stakeholders that the two processes may be incompatible. For instance:

- Section 230 requires meeting of creditors and members and also envisages an elaborate voting process for approval of a scheme that requires agreement by majority of persons representing three-fourths in value of the creditors or members, or class of such creditors or members. Such requirements of creditor and shareholder participation and approval are at odds with the liquidation process of the Code since the Code does not envisage such an elaborate voting process for approvals that involves creditors and shareholders of the corporate debtor.
- The approval and implementation of schemes under Section 230 of the Companies Act, 2013 during a liquidation process under the Code requires the NCLT to play a dual role – as an Adjudicating Authority for the liquidation process under the Code, and as a Tribunal for sanctioning the scheme as per the Companies Act, 2013. However, the role of the NCLT, and the considerations that have to be taken into account in both cases would be vastly different. Schemes are broadly Tribunal-led processes, in which the NCLT has vast powers to pass any directions, and supervise the implementation of schemes.<sup>104</sup> On the other hand, the liquidation process under the Code is led by the liquidator under the supervision of the Adjudicating Authority.

---

<sup>104</sup>A Ramaiyya, *Guide to the Companies Act* vol. 2 (18<sup>th</sup> edn, LexisNexis 2015) p. 3723

- Schemes are not time-bound processes, whereas the focus of the Code is to create time-bound processes. Indeed, even the liquidation process is sought to be completed within a year,<sup>105</sup> to prevent value destruction and increase recovery for creditors of such companies.
- Section 29A read with the proviso to Section 35(1)(f) of the Code prevents promoters and certain related parties from acquiring the property of a corporate debtor in liquidation. However, no such bar is imposed by the language of Section 230 of the Companies Act, 2013.

4.4 At the same time, the Committee noted that through various judicial innovations and efforts of the IBBI, there has been a move to align the two regimes. For instance,

- The Appellate Authority has interpreted that class approvals may not be required for schemes in liquidation under the Code, but has held that the liquidator must constitute a creditors' committee to assess if, "*arrangement of Scheme is viable, feasible and having appropriate financial matrix*".<sup>106</sup> However, such a process is also patently at odds with the original scheme of the Code, which does not envisage the creation of such creditors' committee in liquidation.
- As the promoters and ex-management were presenting schemes in liquidation on the basis of Section 230 of the Companies Act, 2013, this resulted in prolonged litigation under the Code. Only recently did the Appellate Authority express a clear view that promoters who are ineligible under Section 29A read with the proviso to Section 35(1)(f) of the Code are not entitled to file an application for compromise and arrangement under Sections 230 to 232 of the Companies Act, 2013.<sup>107</sup> Thereafter, the Liquidation Regulations were also amended in January 2020, to unequivocally provide

---

<sup>105</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 44

<sup>106</sup> *Jindal Steel & Power Ltd. v Arun Kumar Jagatramka and Gujarat NRE Coke Ltd.*, Company Appeal (AT) No.221/2018, NCLAT. Decision date – 24 October 2019; *J.M. Financial Asset Reconstruction Company Limited v G. Madhusudhan Rao, R.P. of Bheema Cements Ltd*, Company Appeal (AT) (Insolvency) No. 663/2019, NCLAT. Decision date – 18 July 2019; *Y. Shivram Prasad v S. Dhanapal & Ors.*, Company Appeal (AT) (Insolvency) No. 224/2018, NCLAT. Decision date – 27 February 2019

<sup>107</sup> *Jindal Steel & Power Ltd. v Arun Kumar Jagatramka & Gujarat NRE Coke Ltd.* Company Appeal (AT) No. 221 of 2018, NCLAT. Decision date – 24 October 2019

that those ineligible to submit a resolution plan shall in no way be party to any such compromise or arrangement under the Code.<sup>108</sup>

- While the Liquidation Regulations clearly provide a timeline for completion of the scheme, it is unclear how the schemes process can be completed within this period since the design of the process for schemes under the Companies Act, 2013 does not envisage this. Further, it is unclear how the failure of or premature termination of a scheme would be dealt with in practice.

Thus, despite alignments, difficulties in the implementation of schemes continue to persist.

4.5 Given this, the Committee examined the *raison d'être* of schemes in liquidation. In this regard, the Committee noted that schemes are being mandated and used as an option to revive the corporate debtor before proceeding with sale of the assets of the corporate debtor.<sup>109</sup> Such schemes, presented as a second chance to resolve the corporate debtor, may not always be feasible, or economically viable once a decision to liquidate the corporate debtor has already been made, following the failure of the CIRP. Notwithstanding that schemes may not be well-tailored to resolve insolvency,<sup>110</sup> allowing revival through schemes after the CIRP has failed, would alter the incentives of creditors and resolution applicants to resolve the insolvency of the corporate debtor during the CIRP. Further, repeatedly attempting revival, through schemes of arrangement or otherwise, even where the business is not economically viable is likely to result in value destructive delays, and was identified as a key reason for the failure of the regime under the SICA,<sup>111</sup> by the BLRC in its Interim Report. Such use of schemes is also inherently incompatible with the liquidation process under the Code, which envisages that a liquidation order is passed, will result in dissolution of the corporate debtor.

---

<sup>108</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 2B

<sup>109</sup> *Y. Shivram Prasad v S. Dhanapal*, Company Appeal (AT) (Insolvency) No. 224/2018, NCLAT. Decision date – 27 February 2019; *S.C. Sekaran v Amit Gupta* Company Appeal (AT) (Insolvency) Nos.495 & 496 of 2019, NCLAT. Decision date – 29 January 2019

<sup>110</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 45 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLRC\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf)> accessed 26 November 2019

<sup>111</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 42-43 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLRC\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf)> accessed 26 November 2019

Indeed, where the business of the corporate debtor is still viable, the liquidator would have recourse to a going concern sale of the business to ensure that the liquidation process remains value maximising.<sup>112</sup>

4.6 However, the Committee noted that schemes may have utility in liquidation proceedings. In the UK, for example, schemes are employed as creditors may find it useful to avoid certain mandatory requirements of the liquidation process – such as to enable settlement of outstanding, contingent claims, or where such compromises may be used to avoid certain mandatory set-offs, or modify rights vis-à-vis third parties.<sup>113</sup> However, the Committee was of the view that such a process for compromise or settlement need not be effected only through the schemes mechanism under the Companies Act, 2013, and felt that the liquidator could be given the power to effect a compromise or settlement with specific creditors with respect to their claims against the corporate debtor under the Code.

4.7 **Given the incompatibility of schemes of arrangement and the liquidation process, the Committee recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, the Committee felt that an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code.**

## 5. GOING CONCERN SALES DURING LIQUIDATION

5.1 Regulation 32 of the Liquidation Regulations permits a liquidator to sell a corporate debtor or its business as a going concern.<sup>114</sup> The Committee deliberated whether the liquidator should be mandated to conduct a going concern sale by order of the Adjudicating Authority. Further, it was also discussed whether a going concern sale of the corporate debtor itself should be permissible during liquidation.

---

<sup>112</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 32(f)

<sup>113</sup> Payne J., *Schemes of Arrangement. Theory, Structure and Operation*, (Cambridge University Press 2014) p. 280-282

<sup>114</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 32

## *Mandating a Going Concern Sale*

- 5.2 As discussed above, the liquidator may choose to liquidate a corporate debtor by selling its business on a going concern basis. Regulation 39C of the CIRP Regulations also permits the CoC to recommend such a sale during CIRP.<sup>115</sup> In addition to this, the Appellate Authority has, in certain cases, ordered that:

*“...during the liquidation process, step required to be taken for its revival and continuance of the ‘Corporate Debtor’ by protecting the ‘Corporate Debtor’ from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows:*

*i. By compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of Section 230 of the Companies Act, 2013.*

*ii. On failure, the liquidator is required to take step to sell the business of the ‘Corporate Debtor’ as going concern in its totality along with the employees.*

*14. The last stage will be death of the ‘Corporate Debtor’ by liquidation, which should be avoided.”<sup>116</sup>*

Thus, in many cases, the liquidator has been mandated to attempt a going-concern sale of the business of the corporate debtor prior to disposing the assets of the corporate debtor in any other manner. This has given rise to a concern that valuable time may be lost in attempting such a sale in cases where it would be commercially prudent to expeditiously liquidate the corporate debtor on a piecemeal basis.

- 5.3 While noting that a going concern sale of the business of the corporate debtor has certain advantages over other modes of liquidation, such as preservation of employment, the Committee agreed that it may not be a feasible option for every corporate debtor undergoing liquidation. For example, where the business of the corporate debtor is found to be economically unviable, attempting a going concern

---

<sup>115</sup> Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39C; Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 32A

<sup>116</sup> *Y. Shivram Prasad v S. Dhanapal & Ors*, Company Appeal (AT) (Insolvency) No. 224/2018, NCLAT. Decision date – 27 February 2019. See *S.C. Sekaran v Amit Gupta & Ors.*, Company Appeal (AT) (Insolvency) No. 495 & 496/2018, NCLAT. Decision date – 29 January 2019



sale would be value-destructive. Further, in cases where there is a lack of adequate finance to run the operations of the corporate debtor during the liquidation process, a going concern sale may not be feasible.

- 5.4 The Committee noted that the liquidator is best placed to decide whether a going concern sale should be attempted, after assessing relevant factors such as the commercial viability of the business of the corporate debtor, and consulting the relevant stakeholders of the corporate debtor in order to ensure that it would generate a greater value than the other modes of liquidation. While taking this decision, the liquidator may consult the Stakeholders' Consultation Committee which, being a representative body of stakeholders, may assist the liquidator in evaluating the commercial feasibility of a going concern sale. Further, if the CoC is of the opinion that a going concern sale would be the most value maximizing option during liquidation, it may recommend that the liquidator should attempt a going concern sale. Additionally, as the fee of the liquidator, in some cases, is linked to the total amount realized and distributed during liquidation,<sup>117</sup> the liquidator is incentivized to choose the most value maximizing mode of liquidation.
- 5.5 **Given this, the Committee agreed that going concern sales should not be mandated during liquidation and that the liquidator, in consultation with the relevant stakeholders of the corporate debtor, should be permitted to decide if a going concern sale should be attempted.**

*Going Concern Sale of Corporate Debtor*

- 5.6 Regulation 32 of the Liquidation Regulations permits the liquidator to attempt a going concern sale of the *corporate debtor* as well as the business of the corporate debtor. This implies that the corporate entity may also be revived (and not be dissolved) as an outcome of liquidation. In light of this, the Committee discussed whether the liquidator should be permitted to sell the corporate debtor itself during liquidation.
- 5.7 The Code provides a linear process for resolving the insolvency of the corporate debtor. First, a CIRP is commenced, during which the CoC assesses the viability of the corporate debtor and invites resolution plans. Only where the CIRP fails, the Code provides for an entry to liquidation. Thus, liquidation has been

---

<sup>117</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 4

envisaged as the “state the entity enters at the end of an IRP, where neither creditors nor debtors can find a commonly agreeable solution by which to keep the entity as a going concern”.<sup>118</sup> Therefore, entry into liquidation itself implies the inability of the corporate debtor to be continued as a going concern. Accordingly, the Code prescribes dissolution of the corporate debtor as the final outcome of the liquidation process.<sup>119</sup>

5.8 The Committee also noted that attempts to revive a company after an opinion for liquidation was issued by the BIFR or winding up was ordered under the Companies Act, 1956 was considered a source of value destructive delays.<sup>120</sup> The Committee noted that if attempts for reviving the corporate debtor are undertaken after a liquidation order is passed, it may lead to delays and may also undermine the efficacy of CIRP, which provides a time-bound period for reviving the corporate debtor. For this purpose, Section 11(d) of the Code prohibits a corporate debtor undergoing liquidation from re-initiating CIRP.

5.9 **In light of the above, the Committee agreed that it would be contrary to the scheme of the Code to allow a corporate debtor to be sold as a going concern after the conclusion of its liquidation process, which envisages a dissolution of the corporate entity. However, where the business of the corporate debtor can be sold as a going concern, the liquidator may attempt the same. Accordingly, the Liquidation Regulations should be appropriately amended to prevent a going concern sale of the corporate debtor.**

## 6. STAKEHOLDERS’ CONSULTATION COMMITTEE

6.1. Section 35(2) of the Code enables the liquidator to consult “any of the stakeholders entitled to a distribution of proceeds under Section 53 of the Code” subject to the proviso that such consultation shall not be binding on the liquidator. Further, Section 37(2) requires the liquidator to provide financial information to any creditor who

---

<sup>118</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 5.5.7 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

<sup>119</sup> Insolvency and Bankruptcy Code, 2016, Section 54. See Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 5.5.10 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019

<sup>120</sup> Ministry of Finance, *Interim Report of The Bankruptcy Law Reforms Committee* (2015) p. 42, 111-113 <[https://www.finmin.nic.in/sites/default/files/Interim\\_Report\\_BLRC\\_0.pdf](https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf)> accessed 26 November 2019. See van Zwieten, Kristin, ‘The Demise of Corporate Insolvency Law in India’, (DPhil thesis, University of Oxford 2012)

requests for the same. To provide a formal structure for consultation and information provision to stakeholders, Regulation 31A of the Liquidation Regulations, introduced a Stakeholders' Consultation Committee comprising of representatives of each class entitled to distribution under Section 53 along with shareholders that are not ineligible under Section 29A. The Stakeholders' Consultation Committee may advise the liquidator regarding the sale of assets of the corporate debtor, and must be given all information to enable it to provide such advice. Though the advice tendered by the Stakeholders' Consultation Committee is not binding on the liquidator, the liquidator must provide reasons in writing for acting against such advise.<sup>121</sup>

- 6.2. In this regard, the Committee discussed the utility of the Stakeholders' Consultation Committee during the liquidation process. The Committee noted that the Stakeholders' Consultation Committee was included so that the liquidator could benefit from a support structure or advisory mechanism to oversee and guide her actions, especially in complex liquidations.<sup>122</sup> It would also give creditors and other stakeholders a say in the liquidation process, as it affects their interests directly.<sup>123</sup> The Committee also noted that under the Companies Acts of 1956 and 2013,<sup>124</sup> as well as in the insolvency laws of other jurisdictions such as the UK and US<sup>125</sup> committees with representatives of creditors are established to support the liquidation process. **Given this, the Committee agreed that the Stakeholders' Consultation Committee, as an advisory body, had utility within the liquidation framework under the Code.**
- 6.3. **The Committee also considered if the composition and functions of the Stakeholders' Consultation Committee should be reviewed. However, given that the Stakeholders' Consultation Committee was only introduced recently, the Committee agreed that the functioning of such Stakeholders' Consultation**

---

<sup>121</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 31A(10)

<sup>122</sup> Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* (27 April 2019) para 4.3.2 <<https://ibbi.gov.in/Discussion%20paper%20LIQUIDATION.pdf>> accessed 29 October 2019

<sup>123</sup> *ibid*

<sup>124</sup> The Committee of Inspection under Section 464 of the Companies Act, 1956 and the Advisory Committee, the Winding up Committee and the Sale Committee under Sections 287, 277 and 282 respectively of the Companies Act, 2013

<sup>125</sup> Insolvency Act, 1986, Section 141; 11 U.S.C., Section 1102

**Committees should be tracked closely, and that any recommendations or changes should only be made upon a review of the functioning of Stakeholders' Consultation Committees in practice.**

**7. REALISATION OR RELINQUISHMENT OF SECURITY INTEREST BY A SECURED CREDITOR**

*Repayment to Secured Creditors Covers Value of Security Interest Relinquished*

- 7.1. Section 52 of the Code provides that in the liquidation proceedings of a corporate debtor, secured creditors may choose to recover their dues either by realising their security interest outside of the liquidation proceedings or by relinquishing their security interest to the liquidation estate.
- 7.2. Under the Code, secured creditors that have relinquished their security interest to the liquidation estate stand second highest in priority under the liquidation waterfall, and recover their dues at par with workmen, that is, under Section 53(1)(b) of the Code. This priority is given to “*debts owed to a secured creditor in the event such secured creditor has relinquished security*”. Since this does not specify whether such debts owed are limited only to the value of the secured portion of the creditors’ debt, it was brought to the Committee that stakeholders had some confusion as to whether secured creditors who have relinquished their security interest should recover to the extent of the underlying value of the security interest relinquished by them, or to the extent of the entire debt of such secured creditor under Section 53(1)(b)(ii).
- 7.3. The Committee noted that the Code aims to promote a collective liquidation process, and towards this end, it encourages secured creditors to relinquish their security interest, by providing them second-highest priority in the recovery of their dues, as under Section 53(1)(b). Thus, they are not treated as ordinary unsecured creditors under the Code, as they would have been under the Companies Act, 1956.<sup>126</sup> It was noted that, to some extent, this provision intends to replicate the benefits of security even where it has been relinquished, in order to promote overall value maximisation. However, even if secured creditors realise their security interest, they would only recover to the extent of their security interest, and would claim any excess dues remaining unpaid under Section 53(1)(e) of the liquidation waterfall. Thus, the Committee was of the view that this provision could not have been intended to provide secured creditors who

---

<sup>126</sup> *Jitendra Nath Singh v Official Liquidator* (2013) 1 SCC 462, para 11

relinquish their security interest, priority of repayment over their entire debt regardless of the extent of their security interest, as it would tantamount to respecting a right that has never existed. Further, if the “*debts owed to a secured creditor*” is not restricted to the extent of the security, there would be broad scope for misuse of the priority granted under Section 52(1)(b), as even creditors who are not secured to the full extent of their debt would rely on the mere fact of holding any form of security, to recover the entire amount of their unpaid dues in priority to all other stakeholders.

- 7.4. **On the basis of the above discussion, the Committee agreed that the priority for recovery to secured creditors under Section 53(1)(b)(ii) should be applicable only to the extent of the value of the security interest that is relinquished by the secured creditor. The Committee was of the opinion that this issue stands clarified in terms of the reasoning provided above and does not necessitate any further amendment to the provisions of the Code.**

*Secured Creditors' Contribution to Liquidation Expenses and Workmen's Dues*

- 7.5. Section 52(8) of the Code provides that secured creditors who choose to realise their security interest, instead of relinquishing it, must pay for the insolvency resolution process costs due from them. Regulation 21A of the Liquidation Regulations requires that a secured creditor, who opts to realise its security interest as per Section 52 of the Code, has to pay towards liquidation costs and workmen's dues in the same manner as it would have paid had it relinquished its security interest to the liquidation estate.

Payment of Liquidation Expenses

- 7.6. The Committee discussed whether a secured creditor that opts to stand outside the liquidation process under Section 52 should be mandated to bear a share of the liquidation costs as well, as is currently provided for in the Liquidation Regulations.<sup>127</sup>
- 7.7. It was brought to the Committee that in cases where a secured creditors choose to realise their security interest instead of relinquishing it to the liquidation estate, they opt to stand out of the collective process of liquidation, and they should not

---

<sup>127</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 21A(2)(a)

be required to bear the costs of liquidation as they do not participate in the collective process of liquidation.

- 7.8. However, the Committee noted that the requirement of having secured creditors contribute to liquidation costs arose since

*“if a CD has only secured assets and all security holders decide to realise their security interests outside the liquidation assets, there will be no liquidation proceeds and hence there will be no resource to meet the liquidation costs. It is necessary to provide that the liquidation costs must be met out of proceeds from sale of secured assets whether these are sold as part of liquidation asset or security interests are realised outside”*.<sup>128</sup>

**Noting this rationale, the Committee agreed that at present, no legal changes are required.**

#### Payment of Workmen’s dues

- 7.9. The Committee also discussed whether secured creditors who realise their security interest should contribute towards the payment of dues of workmen. As discussed above, Regulation 21A(2) of the Liquidation Regulations presently requires that secured creditors who realise their security interest contribute towards the payment of dues of workmen in the same way as they would have if they had relinquished their security interest to the liquidation estate.
- 7.10. Thus, at present, workmen are entitled to distribution of proceeds *pari passu* with the recovery of dues to secured creditors who have relinquished their security interest. However, if the majority of such secured creditors that realise their security interest outside the liquidation process are not required to deposit any portion towards workmen’s dues, such workmen would receive much lower amounts in a liquidation process.<sup>129</sup> Thus, the requirement to contribute to workmen’s dues, as provided in Regulation 21A, recognises that workmen are key stakeholders of the corporate debtor and form the backbone of efforts to preserve

---

<sup>128</sup> Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* (27 April 2019) para 5.1.6 <<https://ibbi.gov.in/Discussion%20paper%20LIQUIDATION.pdf>> accessed 29 October 2019

<sup>129</sup> Insolvency and Bankruptcy Board of India, ‘Discussion Paper on Corporate Liquidation Process along with Draft Regulations’, (27 April 2019) para 5.1.5 <<https://ibbi.gov.in/Discussion%20paper%20LIQUIDATION.pdf>> accessed 29 October 2019

the business of the corporate debtor, not just prior to insolvency commencement, but also during insolvency proceedings.

**Given the strong policy justification for protecting the interests of workmen, the Committee agreed that at present, no legal changes are required, and the position of law requiring secured creditors who realise their security outside the liquidation process to contribute to workmen's dues, may be retained as it is.**

*Presumption as to Relinquishment of Security Interest*

- 7.11. Section 52 of the Code does not provide a time-limit within which secured creditors should intimate their decision to either enforce or relinquish their security interest.
- 7.12. It was brought to the Committee that in some cases secured creditors do not inform the liquidator about their decision to relinquish or realise their security interest. The delay in intimating such decision to the liquidator makes it difficult to proceed with the liquidation process. The liquidator may not be able to determine how the assets should be sold (especially in case of going concern sales), nor proceed to sell the assets of the corporate debtor. Further, the liquidator may not have sufficient clarity on the total claims to be processed and considered as part of the liquidation process.
- 7.13. To address this issue, the Committee noted that the Liquidation Regulations as amended in July 2019 have introduced a presumption as per which if the secured creditor does not intimate its decision to the liquidator within thirty days from the commencement of the liquidation process, the security interest shall be presumed to be part of the liquidation estate.<sup>130</sup> **The Committee agreed that this serves as an appropriate solution and hence, decided that no legal changes to the Code are required at this stage.**

**8. SUBORDINATION AGREEMENTS WITHIN THE LIQUIDATION WATERFALL**

- 8.1. Section 53(2) of the Code provides that any contractual agreement between parties having an equal ranking in the liquidation waterfall, which disrupts the order of priority laid down under Section 53(1), should be disregarded by the liquidator.

---

<sup>130</sup> Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 21A

In this regard, it was represented before the Committee that there is a degree of uncertainty regarding the correct interpretation of this provision.

- 8.2. The First ILC Report had clarified the application of this provision on inter-creditor or subordination contracts between secured creditors by stating the following:

*“the Committee was of the opinion that it is sufficiently clear from a plain reading of section 53(1)(b) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(b) does not talk about priority inter-se secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship. Further sub-section (2) of section 53 must also be interpreted accordingly. For instance, applying section 53(2) in the context of section 53(1)(b), any agreements between workmen and secured creditors which disrupts their pari passu rights will be disregarded by the liquidator. However, agreements inter-se secured creditors do not disturb the equal ranking sought to be provided by section 53(1)(b) and therefore do not fall within the ambit of section 53(2).”<sup>131</sup>*

- 8.3. Despite this clarification, it was represented before the Committee that the confusion regarding the applicability of Section 53(2) on inter-creditor or subordination agreements among secured creditors have persisted among various stakeholders. **Therefore, in order to clarify the correct interpretation of Section 53(2), the Committee decided that necessary clarification may be provided by inserting an Explanation under Section 53(2) to clarify the correct interpretation of the Section, as explained in the First ILC Report.**

---

<sup>131</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 21.6 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019



# CHAPTER 3: RECOMMENDATIONS REGARDING ACTIONS AGAINST AVOIDABLE TRANSACTIONS AND IMPROPER TRADING IN THE CORPORATE INSOLVENCY RESOLUTION AND LIQUIDATION PROCESSES

## 1. INVESTIGATION OF AVOIDABLE TRANSACTIONS AND IMPROPER TRADING

### *Person Responsible for Investigation*

- 1.1. Sections 43-51, 66, and 67 of the Code provide the various transactions that may be avoided by the resolution professional or liquidator (collectively referred to as “**avoidable transactions**”), and the actions that can be taken against erstwhile management for fraudulently or wrongfully trading in insolvency (referred to as “**improper trading**”). The Code permits only the resolution professional or the liquidator to file applications (or initiate proceedings) against avoidable transactions and improper trading (except undervalued transactions in Section 47).
- 1.2. It was brought to the Committee that the current scheme of the Code does not provide the resolution professional or liquidator enough time to investigate and file applications for such actions with the Adjudicating Authority. While the CIRP period is capped at 330 days, and the liquidation process has to be completed within 1 year, during which the insolvency professional has multiple onerous responsibilities, including management of the corporate debtor and administration of the insolvency process itself. This may not give the insolvency professional sufficient time to complete investigation, detect improper transactions and file applications against avoidable transactions or improper trading. Therefore, the Committee reviewed the process of investigation of such actions.
- 1.3. The Committee considered whether the responsibility to carry on investigations (and file proceedings) in relation to avoidable transactions and improper trading should be shifted to persons other than the insolvency professional. In this regard, it was suggested that the Committee may consider whether the IBBI would be the appropriate body to carry out such functions.

- 1.4. The Committee first analysed the purpose of avoiding transactions and penalising improper trading actions. It was highlighted that though they may often be linked to preservation of commercial morality, they are primarily aimed at swelling the asset pool available for distribution to creditors.<sup>132</sup> The underlying policy of such proceedings is to prevent unjust enrichment of one party at the expense of other creditors.<sup>133</sup>
- 1.5. Therefore, these actions are taken to serve the interests of the person receiving the recoveries. Due to this, many jurisdictions such as US<sup>134</sup> and UK<sup>135</sup> do not impose any obligation on the regulatory or other State bodies to undertake avoidance actions. State authorities in such jurisdictions utilise powers in relation to civil and criminal offences to carry on investigations of any wrongdoings by the corporate debtor instead. **Based on this, the Committee agreed that it may not be appropriate for the IBBI to undertake investigation of avoidable transactions and improper trading under the Code. The Committee concluded that only the insolvency professional would be in a position to investigate these during a CIRP or liquidation process, and thus the present provisions of the Code need not be amended in this regard. Therefore, the Committee agreed that the *status quo* be maintained and the primary responsibility for investigation of these transactions should be on the insolvency professional. However, IBBI may continue to exercise its powers under Section 236 to file criminal complaints to prevent misconduct.**
- 1.6. Further, the Committee noted that appropriate provisions of the Code may be amended to clarify this duty of the insolvency professional where it appears that avoidable transaction or improper trading has occurred. For instance, though Section 35(1)(l) casts a duty on the liquidator to investigate the affairs of the corporate debtor for preference and undervalued transactions, no such provision is present in relation to the resolution professional in CIRP. Though the CIRP Regulations provide that the resolution professional has to form an opinion on the

---

<sup>132</sup> Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet and Maxwell 2018) p. 616

<sup>133</sup> Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet and Maxwell 2018) p. 616

<sup>134</sup> 11 US Code, Sections 544, 545, 547, and 548

<sup>135</sup> Insolvency Act, 1986, Sections 238-246

existence of avoidable transactions,<sup>136</sup> the duty of the resolution professional in relation to investigation has not been clearly stated in the Code.

- 1.7. **Therefore, it was decided that Section 25(2) should be amended to explicitly provide that the resolution professional will be responsible for investigating the affairs of the corporate debtor for transactions falling within Sections 43, 45, 49, 50 or 66. Further, while Section 35(1)(l) mentions preference and undervalued transactions, it does not cover other avoidable transactions falling under Sections 49, 50 and 66. The Committee noted that this is a clerical error and may be rectified through amendment of Section 35(1)(l). Moreover, some of these investigations might reveal the possibility of fraudulent activities committed by the corporate debtor. Accordingly, the insolvency professional should be mandated to report any suspicion of fraudulent activity to the Central Government or to the IBBI.**

#### *Ensuring Cooperation*

- 1.8. Additionally, the provisions of the Code may also be tweaked to ensure cooperation of relevant stakeholders with the insolvency professional to enable investigation. Section 19 provides that personnel of the corporate debtor, its promoters or other persons associated with the management of the corporate debtor shall cooperate with the interim resolution professional as may be required by her “*in managing the affairs of the corporate debtor*”. An application may be made to the Adjudicating Authority by the interim resolution professional on failure to achieve cooperation by such personnel or any other person. These provisions will extend to the resolution professional as well, as per Section 23(2) of the Code.
- 1.9. The Committee discussed that Section 19(1) should be amended to broaden the avenues for cooperation. Currently, such cooperation is only required for the management of the corporate debtor. **For the sake of clarification, cooperation under this provision should be explicitly extended for ‘collection of information for the conduct of the CIRP and filing of applications against avoidable transactions and improper trading. Further, the categories of persons who are required to cooperate under Section 19 may also include ‘any other person**

---

<sup>136</sup> Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 35A

deemed necessary by the interim resolution professional'. Per Section 34(3), similar cooperation would also be extended to the liquidator.

## 2. FILING OF APPLICATIONS TO AVOID TRANSACTIONS, ETC.

- 2.1. The Code currently allows only the insolvency professional to file applications against improper trading or to avoid transactions, other than in the case of undervalued transactions, in which case applications may also be filed by a creditor, member or partner of the corporate debtor if the resolution professional or liquidator fails to do so.<sup>137</sup> There may be scenarios where the insolvency professional fails to file these applications actions due to reasons like lack of time, lack of funding, etc.
- 2.2. Various jurisdictions adopt distinct approaches regarding the right to file such applications. For instance, some jurisdictions solely allow the insolvency practitioner to file such actions whereas other jurisdictions also allow creditors to file.<sup>138</sup> This is evident from the discussion in the UNCITRAL Guide captured below:

*"Where the insolvency representative has the sole power to commence avoidance proceedings and, based on the balance of the considerations discussed above (i.e. for reasons other than negligence, bad faith or omission), decides not to commence proceedings in respect of certain transactions, insolvency laws adopt different approaches to the conduct and funding of those proceedings... As to the conduct of those proceedings, some laws permit a creditor or the creditor committee to require the insolvency representative to initiate an avoidance proceeding where it appears to be beneficial to the estate to do so or also permit a creditor itself or the creditor committee to commence proceedings to avoid these transactions, where other creditors agree."<sup>139</sup>(Emphasis Supplied)*

---

<sup>137</sup> Insolvency and Bankruptcy Code, 2016, Section 47

<sup>138</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, paras 192-195 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>139</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, para 194 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

- 2.3. **In light of the above, the Committee discussed that it may be beneficial to allow creditors (individual or in groups) and the CoC to file applications in case the insolvency professional fails to do so. In this regard, creditors should first approach the resolution professional or the liquidator to file an application. After this, if the resolution professional or liquidator then fails to file an application, then the creditor or the CoC may file the application itself.**
- 2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the resolution applicant being entitled to a return that was not factored in at the time of submitting their bid. **Therefore, the Committee decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions.**
- 2.5. In line with the above discussion, the Committee also noted that consistency should be maintained in the parties that are allowed to file applications to avoid different transactions. Section 47 allows a member or partner of the corporate debtor to file an application to avoid an undervalued transaction if the insolvency professional fails to do so. However, such persons are not permitted to file other to avoid other transactions like preference transactions, extortionate transactions, etc. **Accordingly, the Committee decided that Section 47 should be amended to disallow members or partners of the corporate debtor from filing under this provision.**
- 2.6. It was also highlighted that Section 66 only allows the resolution professional to file applications against improper trading. Though the scope of this provision also envisages such actions to be filed during liquidation, the liquidator has not been given the power to file under this provision. **The Committee noted that this may be a clerical error, and the liquidator should also be allowed to file applications under Section 66 of the Code.**

### **3. DISTRIBUTION OF RECOVERIES**

- 3.1. The Committee also reviewed the provisions related to orders that the Adjudicating Authority may pass after the existence of an avoidable transaction or improper trading has been proven. These orders include various actions that may help restore *status quo* prior to the occurrence of such transaction or trading. Therefore, provisions under the Code allow the Adjudicating Authority to restore the position prior to such transaction or trading by *inter alia* vesting the recoveries

with the corporate debtor. It was brought to the Committee that when the Adjudicating Authority passes an order to vest recoveries with the corporate debtor, it is not clear whether these recoveries are enjoyed by the successful resolution applicant or distributed amongst creditors.

- 3.2. **The Committee discussed that the resolution applicant has usually not factored in these recoveries in her proposed resolution plan. Further, the key aim of avoiding certain transactions is to avoid unjust enrichment of some parties in insolvency at the cost of all creditors (see paragraph 1.4 above). Thus, in most cases it may be better suited to distribute recoveries amongst the creditors of the corporate debtor. While the Committee agreed on this principle, it noted that factual factors such as - the kind of transaction being avoided, party funding the action, assignment of claims (if any), creditors affected by the transaction or trading, etc. - may need to be taken into account when arriving at a decision regarding distribution of recoveries. Thus, it was recommended that instead of providing anything prescriptive in this regard, the decision on treatment of recoveries may be left the Adjudicating Authority.**
- 3.3. **Accordingly, the Adjudicating Authority should decide whether the recoveries that vest with the corporate debtor should be applied for the benefit of the creditors of the corporate debtor, the successful resolution applicant or other stakeholders. In arriving at this decision, the Adjudicating Authority may take note of the facts and circumstances of the case, along with the above listed factors. Additionally, the Committee agreed that if the recoveries are to be vested with the creditors, they may usually be distributed per the order of priorities provided in Section 53(1) of the Code, unless an alternate manner of distribution is deemed appropriate by the Adjudicating Authority.**

#### **4. TIMELINES**

##### *Time Limit for Filing*

- 4.1. Regulation 35A of the CIRP Regulations provides that the resolution professional shall determine if the corporate debtor has entered into any avoidable transactions by the 115<sup>th</sup> day from the insolvency commencement date and intimate the IBBI of the same. It also mandates that, by the 135<sup>th</sup> day from the insolvency commencement date, the resolution professional shall apply to the Adjudicating Authority for appropriate relief in relation to this. However, timelines for initiating or completion of proceedings on avoidable transactions or improper trading has not been stated in the Code. The Committee considered if strict

timelines for initiation and completion of such proceedings should be introduced in the Code. **The Committee agreed that prescriptive timelines for initiating proceedings against avoidable transactions and improper trading during the CIRP or liquidation proceedings may not be necessary. As a general rule, these proceedings would have to be initiated by the resolution professional during the CIRP or liquidation process, within the timelines provided in the respective regulations. Nevertheless, the resolution plan in a CIRP may provide for preservation of claims and manner of pursuing these proceedings after the resolution plan is operational.**

*Effect on the CIRP and Liquidation Timelines*

- 4.2. Further, as stated in Section 26 of the Code, the filing of an application for avoidance of transactions (excluding improper trading) by the resolution professional shall not affect the CIRP of the corporate debtor. Thus, if an application is filed during the CIRP period, it may continue beyond the timeline for CIRP. The Committee noted that a similar provision has not been provided for filing of an application during liquidation in the Code or the subordinate legislation. **It was also noted that for ease of implementation of any order in relation to such proceedings, these proceedings should be concluded prior to dissolution of the corporate debtor in liquidation. However, if the Adjudicating Authority comes to the conclusion that these proceedings may not be concluded prior to dissolution of the corporate debtor, due to any countervailing factors, it should also provide the manner of continuation of the proceeding after such dissolution.**
- 4.3. Additionally, the Committee noted that Section 26 does not apply to applications against improper trading. **It was agreed that, in the interests of maintaining consistency and clarity, and Section 26 should be extended to apply to actions in relation to improper trading.**
5. **FUNDING FOR ACTIONS AGAINST AVOIDABLE TRANSACTIONS AND IMPROPER TRADING**
- 5.1. One of the significant hurdles insolvency professionals across the globe face in carrying on asset recovery proceedings is the lack of money available to cover the

costs of the litigation.<sup>140</sup> This has been noted to be a disincentive for insolvency professionals to initiate proceedings regarding avoidable transactions and improper trading, even in countries with developed insolvency regimes.

5.2. The Committee noted that issues regarding lack of funding for expenses related to such proceedings have also cropped up in India. Therefore, it analysed some of the ways of funding that are prevalent globally. These have been briefly discussed below:

- *Debtor's estate*: Many jurisdictions leave the funding of actions against avoidable transactions and improper trading to the estate of the debtor since the recoveries of such actions are typically enjoyed by the corporate debtor. **Accordingly, it was discussed that the funding of such actions should usually come out of the estate of the debtor. To facilitate having a dedicated fund for such proceedings, provisions in resolution plans are also made for such purpose in jurisdictions, like the US.<sup>141</sup> The Committee recommended that the CoC may choose to provide a dedicated fund for funding litigation, including avoidance actions, in relation to the corporate debtor where such funds are available.**
- *State Funding*: Some countries provide State funding for some such action but this is entirely dependent upon the amount of public resources available.<sup>142</sup> However, **The Committee agreed that it may not be appropriate to fund such litigation through public resources in India.**
- *Appointment of contingency counsel*: Office holders hire counsel for such actions on the agreement that such counsel would only be paid if the proceeding were decided in their favour. **However, it was agreed that this may not be feasible in the Indian context due to bar on contingency fee for advocates.<sup>143</sup>**

---

<sup>140</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, para 196 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>141</sup> 11 US Code, Section 1123(b)(3)

<sup>142</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, para 196 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>143</sup> Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 20



- *Funding by creditors and third parties:* In some instances, insolvency practitioners may be able to either convince certain creditors from the CoC, prior to or post finalisation of the resolution plan to fund the litigation for such proceedings. However, creditors may not want to put good money after bad money given the uncertainty of recovery. Creditors may also not be incentivised to fund the litigation if they do not expect a commensurate return from it, and arriving at a funding framework acceptable to all creditors may be challenging. Further, insolvency practitioners also approach third parties for funding such litigation. The Committee also noted that recent judgment of the Supreme Court in *Bar Council of India v AK Balaji*<sup>144</sup> suggests that there is no legal bar to third party litigation funding in India. It was noted that funding of litigation by creditors or third parties is a commercial decision. Therefore, provision of this funding may be left to the market.

**The Committee discussed that funding for such actions may be left to the market. It was, thus, concluded that no legal change is necessary in this regard.**

---

<sup>144</sup> (2018) 2 SCC (LS) 39

## CHAPTER 4: RECOMMENDATIONS REGARDING THE FRESH START PROCESS

### 1. NEED TO REVIEW THE FRESH START PROCESS

- 1.1. Chapter II of Part III of the Code lays down a fresh start process that allows debtors falling within certain debt, asset and income thresholds,<sup>145</sup> to avail a discharge in relation to some of their debts.<sup>146</sup> This process is supervised by the DRT - the designated Adjudicating Authority for Part III of the Code.<sup>147</sup> Further, a resolution professional is appointed to assist the debtor from the stage of filing of an application until the fresh start proceedings conclude. Notably, the provisions related to the fresh start process under the Code have not yet been operationalised and are pending notification.
- 1.2. The aim of the fresh start process is to provide a low-cost, objective and quick solution for discharging debts of low-income debtors who are unable to repay their debts. Therefore, it is essential that - (i) the design of the process ensures that it is accessible to debtors across the country; (ii) the process is not overly burdensome on the debtor and the costs of the process are low; and (iii) the process provides timely remedy to debtors from being unable to repay their debts. It was brought to the notice of the Committee that the current design of the fresh start process may not achieve these objectives. In light of this, the Committee discussed if certain aspects of the design of the fresh start process may require review.
- 1.3. For instance, the Adjudicating Authority, i.e. the DRT, for the fresh start process may not be accessible to all debtors due to limited physical presence of such DRTs. Further, it was noted that DRTs are over-burdened with their present caseload, and thus timely disposal of fresh start cases by DRTs may be challenging. Therefore, it was agreed that the appropriate Adjudicating Authority for the fresh start process may be reassessed.
- 1.4. Another key aspect that was chalked out by the Committee for review in the fresh start process is the role of insolvency professionals. As per the current design of

---

<sup>145</sup> Insolvency and Bankruptcy Code, 2016, Section 80(2)

<sup>146</sup> Insolvency and Bankruptcy Code, 2016, Section 79(19)

<sup>147</sup> Insolvency and Bankruptcy Code, 2016, Section 179

the fresh start process, insolvency professionals play an expansive role throughout the course of the fresh start process. While insolvency professionals are required to assist the debtor, their presence throughout such process may in turn increase the costs of going through the process for the debtor since insolvency professionals are highly qualified individuals, and may expect a significant fee for their services provided in the fresh start process. Thus, the Committee agreed that the role of insolvency professionals in the fresh start process may need to be reconsidered.

- 1.5. In light of the above, the Committee discussed that the design of the fresh start process may be reviewed. Details of deliberations on the Committee in this regard have been captured in this Chapter below. Along with reviewing the design of the fresh start process, the Committee also recommended certain structural changes, such as the scope of the moratorium, manner of verification of thresholds, increasing deterrence, etc. to smoothen implementation of the fresh start process.

## **2. IBBI AS SUPERVISING AUTHORITY**

### *Supervision by the IBBI*

- 2.1. As discussed above, the Code envisages the DRT as the Adjudicating Authority for the fresh start process.<sup>148</sup> The Committee noted that currently, DRTs are available in limited places - there are a total of 39 DRTs that are present in 18 states and 2 UTs.<sup>149</sup> As DRTs do not extend throughout the country, they may not be accessible for debtors who are already unable to afford the repayment of their debts. Further, DRTs have a significant case load and pendency, on account of recovery proceedings filed under the RDDBFI Act and the SARFAESI Act. Thus, DRTs may be overburdened by the additional mandate of taking up applications for the whole of Part III of the Code. Consequently, the Committee discussed that it may be beneficial to reconsider another supervising authority for the fresh start process. In this regard, the Committee noted that other jurisdictions, such as the UK<sup>150</sup> and New Zealand<sup>151</sup>, make use of 'administrative officers' to oversee processes similar to the fresh start process. Therefore, the Committee considered

---

<sup>148</sup> Insolvency and Bankruptcy Code, 2016, Section 179

<sup>149</sup> Debt Recovery Tribunals, 'About Us' <<https://drt.gov.in/front/composition.php>> accessed 27 November 2019

<sup>150</sup> Insolvency Act, 1986, Section 251B(1)

<sup>151</sup> Insolvency Act, 2006, Section 343 read with Section 399

whether it would be appropriate to appoint an administrative authority to serve as the supervising authority for the fresh start process.

- 2.2. The Committee first analysed the global position in relation to supervising authorities for personal insolvency matters. While some jurisdictions choose to provide court-based systems for personal insolvency, many others rely on administrative authorities to supervise processes that deal with over-indebtedness of natural persons.<sup>152</sup> Courts provide multiple institutional advantages, like being independent from the executive, utilising discretion to address disputes that may arise exceptionally or to fill gaps in the law, etc. However, court-based processes may also be inaccessible and intimidating for debtors, along with being slower and costlier than administrative processes.
- 2.3. Thus, the Committee agreed that there is merit in considering an administrative authority to be the supervising authority for the fresh start process. However, it was felt that the suitability of an administrative body to discharge the functions envisaged in the fresh start process may need to be tested based on administrative law principles. Therefore, the Committee analysed the nature of the functions carried on by the Adjudicating Authority in the fresh start process to ensure that they do not involve decisions based on discretion in relation to any adversarial dispute.
- 2.4. On a perusal of the provisions related to the fresh start process, the Committee noted that the role of the Adjudicating Authority does not involve utilisation of discretion or any extensive legal adjudication. The Adjudicating Authority performs various functions in the fresh start process, including-
  - (a) Assessing the application and report of the resolution professional to determine whether the application for the fresh start process should be admitted (chiefly includes analysing whether the debtor is eligible to avail a fresh start process);<sup>153</sup>

---

<sup>152</sup> World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) para 161-165, 171-177  
<<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

<sup>153</sup> Insolvency and Bankruptcy Code, 2016, Section 84

- (b) Evaluating applications, made by the debtor or creditors, against the decision of the resolution professional in relation to objections filed by creditors and the list of qualifying debts (chiefly includes analysing the issues that creditors or the debtor may have with the decision of the resolution professional, like - if the resolution professional does not give the debtor or creditor an opportunity to make a representation, if the resolution professional colludes with any party in arriving at a decision regarding objections of creditors, or if the resolution professional fails to comply with obligations under the Code);<sup>154</sup>
- (c) Contemplating if an order admitting the application for the fresh start process should be revoked, if an application to this effect is filed by the resolution professional (chiefly includes analysing if there is any change in the financial circumstances of the debtor, or if the debtor fails to comply with restrictions imposed by Section 85(3), or if the debtor has acted in a *mala fide* manner and has wilfully failed to comply with the provisions of the Code);<sup>155</sup>
- (d) Passing a discharge order based on the final list of qualifying debts prepared by the resolution professional (chiefly includes analysing the final list of qualifying debts as prepared by the resolution professional and passing an order discharging these debts);<sup>156</sup> and
- (e) Making other process related decisions like determining whether the resolution professional needs to be replaced,<sup>157</sup> and providing directions to the debtor for compliance with restrictions and duties.<sup>158</sup>

2.5. Notably, when compared to the PIRP and bankruptcy processes under Part III of the Code, the functions performed by the Adjudicating Authority under the fresh start process are simpler and more objective. Out of the decisions listed above, there are two key decisions that are to be undertaken by the Adjudicating Authority.

---

<sup>154</sup> Insolvency and Bankruptcy Code, 2016, Section 87

<sup>155</sup> Insolvency and Bankruptcy Code, 2016, Section 91

<sup>156</sup> Insolvency and Bankruptcy Code, 2016, Section 92(2)

<sup>157</sup> Insolvency and Bankruptcy Code, 2016, Section 89

<sup>158</sup> Insolvency and Bankruptcy Code, 2016, Section 90

- 2.6. *First*, the Adjudicating Authority has to determine if the debtor is eligible to apply for the fresh start process as per the criteria laid down in Section 80(2) of the Code. The criteria laid down in Section 80(2) is based on factual criteria of the debtor's financial information and history of availing various insolvency related processes. *Second*, the Adjudicating Authority approves the debts being discharged in the fresh start process and passes a discharge order, based on the list of qualifying debts submitted by the resolution professional. The resolution professional makes this determination based on the particulars of debts owed by the debtor and objections filed by creditors. While creditors may choose to make objections against discharge of their debt to the resolution professional, these objections are limited to inclusion of the debt as a 'qualifying debt', which is defined in the Code and to the details of such debt (e.g. amount of debt).<sup>159</sup> Thus, determination of the list of qualifying debts is based on objective criteria laid down in the Code, and does not involve exercise of extensive discretion by the resolution professional and the Adjudicating Authority.
- 2.7. After evaluating the above-mentioned functions of the Adjudicating Authority in the fresh start process under the Code, the Committee noted that exercise of these functions is based on making objective determinations and does not involve an extensive exercise of discretion. Instead, it chiefly includes determining eligibility of the debtor and the qualifying debts for availing discharge. In fact, some commentators have even noted that globally, "*adversarial legal disputes between creditors and debtors are rare in individual insolvency cases so that personal insolvency adjudication is primarily an administrative process even in those systems where lawyers and courts are central actors.*"<sup>160</sup> **Therefore, the Committee agreed that it may be appropriate to provide an administrative body as the supervising authority in the fresh start process, instead of DRTs, subject to the requirements of constitutional law.**
- 2.8. **It was noted that the IBBI is the regulator for matters related to insolvency and bankruptcy under the Code. Thus, the Committee decided that it may be appropriate to designate the IBBI as the supervising authority for the fresh start process. In this regard, it was agreed that dedicated officers should be appointed**

---

<sup>159</sup> Insolvency and Bankruptcy Code, 2016, Section 86

<sup>160</sup> World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) para 163 <<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

to discharge the functions in relation to supervision of the fresh start process. Accordingly, the Committee decided that the Code should be amended to allow appointment of AOs in the IBBI. Such AOs should supervise the fresh start process instead of DRTs, and the Code should be amended accordingly. The AO will then be in charge of overseeing the fresh start process, including deciding if applications should be admitted, and deciding the final list of qualifying debts (to be discharged). Further, orders of the AO may be appealed to the DRAT.

#### *Appointment of AOs*

- 2.9. While functions to be performed by the AO in the fresh start process are limited to the determinations discussed above, some questions of fact and law may arise depending on the circumstances of debtors and creditors. Therefore, AOs should be appropriately qualified to deal with such issues. To facilitate entertaining any questions of law that may arise during the process, the AO should have some knowledge and experience in law. Further, the AO should also have requisite experience and qualifications in fields like insolvency, bankruptcy, finance, economics, or accountancy, etc. **The Committee agreed that the Code may provide such qualifications for AOs to be appointed in the IBBI.**
- 2.10. Moreover, the AOs should be familiar with the framework of rural finance and issues faced by debtors in India like stigma, lack of awareness, inaccessibility, coercion from creditors, etc. AOs should be made aware of the impact of the fresh start process on various stakeholders, especially on creditors facilitating credit to low-income debtors like microfinance institutions, NABARD, etc. **To ensure this, AOs may be given appropriate training to be able to balance concerns of debtors and creditors who are likely to be stakeholders in the fresh start process.**
- 2.11. Additionally, some internal separation between the functions related to the administration of the Fresh Start Process (i.e. functions performed by the AO) and those related to making subordinate legislation (i.e. those performed by the Chairperson and members) for the fresh start process should be maintained within the IBBI. For instance, the member supervising the functioning of the AOs should not be in charge of framing regulations for the fresh start process. **Though such requirements may not be prescribed in the Code, the IBBI may maintain such separations in practice.**

### 3. APPOINTMENT OF INSOLVENCY ADVISORS

- 3.1. As noted above, one of the key aims of the fresh start process is to provide a low-cost and accessible solution for low-income debtors who are unable to repay their debts. Due to the administrative costs involved in obtaining relief from insolvency procedures, a sizeable number of debtors are often unable to access any form of debt relief.<sup>161</sup> Due to this, some jurisdictions try to develop low-cost alternatives, compared to traditional insolvency procedures, to make relief available to low or no-income debtors.<sup>162</sup>
- 3.2. Currently, the fresh start process provides for the appointment of an insolvency professional as a resolution professional during the process.<sup>163</sup> As per the current provisions of the Code, a debtor may choose to apply through the proposed resolution professional, or an insolvency professional is to be appointed as the resolution professional after an application for the fresh start process has been filed. If the application is admitted, the resolution professional is in charge of various tasks, such as – considering any objections by creditors; making a final list of the qualifying debts; applying to the DRT for directions when required; or for filing an application for revocation of the fresh start process. Thus, the resolution professional assists the debtor during the whole fresh start process, until discharge of debts by the DRT. However, such an expansive role of the resolution professional through the course of the fresh start process may deter its effective implementation due to various issues.
- 3.3. *First*, insolvency professionals currently also provide their services for other insolvency processes under Parts II and III of the Code. Insolvency professionals may be more inclined to undertake such cases in Parts II and III of the Code, as they involve high(er) remuneration, which is unlikely to be earned for cases in the fresh start process. *Second*, due to the amount of time an insolvency professional is expected to spend in discharge of her duties in the fresh start process, the fee charged and expected by such insolvency professionals may increase the costs of the process substantially. This may in turn be burdensome for debtors. *Third*, there

---

<sup>161</sup> World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) para 300 <<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

<sup>162</sup> World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) para 300 <<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

<sup>163</sup> Insolvency and Bankruptcy Code, 2016, Section 82



may not be enough insolvency professionals, with reach up to the district level, who can be easily accessed by low-income debtors for availing the fresh start process. Low-income debtors will require aid from a wide cadre of office holders who can aid them in understanding the scope and need for debt relief, as well as in administering the fresh start process.

- 3.4. Therefore, the Committee agreed that the appointment of insolvency professionals as officeholders in the fresh start process requires reconsideration. Further, the role and remuneration of an office holder in the fresh start process may also merit review. The discussions of the Committee on these issues has been captured below.

*Role of the Insolvency Advisor*

- 3.5. The aim of revamping the implementation of the fresh start process is to make it easily accessible to marginalized debtors. The Committee noted that the extensive involvement of office holders would imply high fee for such office holders. This would effectively raise the costs of the fresh start process, hindering its utilization by distressed debtors.
- 3.6. Therefore, the Committee discussed limiting the role of the office holder. The functions performed by the debt advisor under the DRO are distinct from the functions charted out for a resolution professional under the fresh start process. Debt advisers are required to verify eligibility of the debtor, and receive a part of the application fee as fee for their assistance in filing the application. Unlike the role of the resolution professional under the current fresh start process, the role of the debt advisor is restricted to assistance at the application stage. The remainder of the process for a DRO has been designed to be as automated as possible. The debt advisor receives a part of the application fee as compensation for her assistance. As a result, costs of accessing the DRO process are nominal and consequently, the DRO process is made more affordable and accessible to the debtors.<sup>164</sup>
- 3.7. **Based on the above, the Committee agreed that the role of the office holder under the fresh start process may be reviewed. While the Code currently makes**

---

<sup>164</sup> The Insolvency Service, *Intermediary Guidance Notes*, (V.16, October, 2016) p. 3 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/790399/Intermediary\\_Guidance\\_Notes\\_v16.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790399/Intermediary_Guidance_Notes_v16.pdf)> accessed 26 November 2019

it optional for debtors to apply through a resolution professional, appointment of a resolution professional after filing of the application seems to be mandatory from the present provisions on the fresh start process.

- 3.8. **The Committee discussed that the functions of an office holder under the fresh start process at the application stage are vital. At this stage, the office holder assists the debtor in filing the application, verifies eligibility of the debtor and prepares a list of qualifying debts. The Committee agreed that these functions of the office holder should be kept intact and may not be diluted. To ensure adequate facilitation for debtors, it was decided that the insolvency advisor *should be* required to file an application for the fresh start process on behalf of a debtor. Such an insolvency advisor would inform the debtor about the implications and effects of undertaking the fresh start process. For instance, the insolvency advisor should inform the debtor that the fresh start process would reflect in her credit history, and the implications this would have on her undertaking credit in the future. Further, the insolvency advisor should also verify if the debtor meets the eligibility criteria for the fresh start process and has adequate documentation to establish so.**
- 3.9. Moreover, currently, a report is to be prepared by a resolution professional under Section 83 of the Code, after examination of an application that has been submitted, but before the admission or rejection of such application. The Committee discussed that such a report may significantly aid the AO in deciding whether to accept or reject an application, and in coming up with a list of qualifying debts. However, the Committee was of the view that such a report should be prepared by an insolvency advisor and submitted *along with* the application, and not after the application has been submitted. **Therefore, the Committee decided that the insolvency advisor would also be required to submit a report to the AO, with details as mentioned in Section 83(2) of the Code, along with the debtor's application.**
- 3.10. However, it was discussed that, in line with the DRO model, the role of the office holder after the application stage may be dispensed with. **Accordingly, the Committee decided that after the application stage, the insolvency advisor would not be functioning on the debtor's case for the rest of the fresh start process. Consequently, it was also agreed that tasks like analysing creditors' objections and finalizing the list of qualifying debts should be undertaken by the AO instead.**

### *New Cadre of Office Holders*

- 3.11. As discussed above in paragraphs 3.2-3.4, the appointment of insolvency professionals as officeholders in the fresh start process may raise issues in implementation. This includes the fact that the cadre performing the role of the officeholder in the fresh start process is the same as the cadre of office holders for other insolvency processes under the Code. Thus, the Committee looked at international practices to consider if these may be emulated to come up with alternatives in the Code.
- 3.12. In the UK, the DRO mechanism is available for low-income debtors to discharge their debts. The office holder acting under the DRO process is known as a 'debt advisor'. In terms of the office holder under the DRO process, there are two key distinctions when compared to the fresh start process.
- 3.13. *First*, the role of the officeholder is more restricted. This has been discussed above in paragraphs 3.5-3.8. *Second*, the cadre appointed as an office holder under the DRO process in the UK is distinct from the cadre appointed for other insolvency processes. Under the DRO process, 'debt advisors' act as office holders and facilitate low-income debtors in availing discharge. The Insolvency Act, 1986 (UK) refers to debt advisors as 'approved intermediaries' that assist debtors in making their application for a DRO.<sup>165</sup> Notably, the cadre of professionals acting as debt advisors under the DRO process is distinct from the cadre of insolvency practitioners that may be appointed for other insolvency processes. Further, the threshold of qualifications of debt advisors is much more relaxed compared to the qualifications required for insolvency practitioners.
- 3.14. **Based on the above, it was discussed that in order to implement an effective and accessible regime for the fresh start process, there is a need to develop a broad cadre of insolvency advisors that can ably assist and guide low-income debtors. Such a cadre of insolvency advisors will require presence up to the district-level across the country. Accordingly, it was agreed that a new cadre of office holders, known as 'insolvency advisors' be appointed to the fresh start process. The Committee agreed that such insolvency advisors will not require the same level of qualification as an insolvency professional. They will however need to fulfill**

---

<sup>165</sup> Insolvency Act, 1986, Section 251U

certain minimum, standard qualifications and requirements that render them capable enough to provide aid and advice to debtors on the fresh start process.

- 3.15. Thus, it was agreed that the Code be amended to allow 'insolvency advisors' to be appointed under the fresh start process. Further, the following persons may be eligible to be insolvency advisors, -
- (a) persons who are presently registered with the IBBI as insolvency professionals;
  - (b) registered cost accountants;
  - (c) registered chartered accountants;
  - (d) registered company secretaries; and
  - (e) such other persons as notified by the Central Government.
- 3.16. While insolvency professionals mentioned in point (i) above need not register with the IBBI again, other professionals mentioned in points (ii)-(v) above should be required to register with the IBBI to act as insolvency advisors. In this regard, it was also highlighted that it may be important to ensure that these insolvency advisors are regulated by the IBBI, and the Code should be amended to provide for the mechanism to regulate such insolvency advisors.
- 3.17. It was added that if there are any issues faced after implementation in this regard, the Central Government may consider allowing other persons who have a national footprint to act as insolvency advisors. For this purpose, a few options highlighted during the discussions of the Committee were postmasters, and persons working in self-help groups.

*Remuneration of the Insolvency Advisor*

- 3.18. The Code does not provide the manner of payment or quantum of the fee of an office holder in the fresh start process. In other processes under the Code, fee charged by office holders is proposed by such office holder based on market-driven practices, and is approved by creditors. While a market driven mechanism for determination of remuneration of professionals increases competition and efficiency in the market, such a mechanism may not be suitable for the fresh start process.

3.19. Since the fresh start process is meant for debtors with low (or no) income and low (or no) assets, the costs of undertaking the process should be low. Managing the payment of administrative costs in such cases has been a noted struggle for policymakers globally.<sup>166</sup> In the DRO model in the UK, the debt advisor is paid a portion of the application fee, as remuneration for her services for assisting the debtor in filing the application. **The Committee agreed that insolvency advisors in India should be paid a part of the application fee, as their remuneration, for the fresh start process. In this regard, the Central Government may prescribe details through rules through a fixed fee chart (that may be regularly revised). It should be noted that the fee should be kept low enough to ensure that it does not discourage utilization of the fresh start process.**

#### 4. CONDUCTING THE FRESH START PROCESS DIGITALLY

4.1. The Committee considered the possibility of rolling out a fully online process for fresh start. This would be beneficial as it would help bring down the costs of accessing the fresh start process, and ensure that debtors in all parts of the country are able to file for a fresh start by utilising digital resources available in their vicinity. Currently, there are 39 DRTs functioning across the country.<sup>167</sup> Accessing these DRTs would place an additional burden on the already debt-stressed and marginalized debtors from availing the fresh start process. In this regard, even if the AO in the IBBI is made the supervising authority for the fresh start process, physically accessing the AO will impose costs of travel on the debtor and thus, be a hindrance to accessibility. Therefore, the Committee felt that an online process for fresh start, coupled with AOs as the supervising authority for the discharge of debts, might enable smoother access and recourse to the fresh start process.

4.2. In the last few years, the Government has undertaken several reforms in law and policy to promote the use of technology and promote a Digital India. For instance - the introduction of the *Pradhan Mantri Jan-Dhan Yojana*; rapid ramp-up of *Aadhaar*; establishment of a suite of open application programming interfaces for

---

<sup>166</sup> See Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) para 13.3.1. See also Thomas Kadner Graziano, *A Guide to Consumer Insolvency Proceedings in Europe* (Edward Elgar Publishing 2019) para 4.6

<sup>167</sup> Department of Financial Services, 'Debt Recovery Laws' <<https://financialservices.gov.in/debt-recovery-laws>> accessed 23 October 2019

payments - such as the UPI and BHIM/Bharat QR code - are some examples of initiatives undertaken by the Government to promote digitization.

- 4.3. **In line with the objective of the Government to promote digitisation and to increase accessibility to the fresh start process, the Committee decided that the fresh start process should be conducted through a digital platform. Such a platform will allow conduct of the whole fresh start process digitally, including-**
- (a) Finding an insolvency advisor digitally;**
  - (b) Filing online application for the fresh start process;**
  - (c) Submitting objections and responses digitally;**
  - (d) Communication of orders and other directions by the AO digitally; and**
  - (e) Allowing for electronic communication and hearings, including through video-conferencing, between debtors, creditors and the AO.**
- 4.4. **The Committee noted that digitizing the fresh start process in the above manner would ensure that debtors are able to access the process effortlessly. It was also discussed that such a digital platform should be created in accordance with principles of privacy and data protection, and should also aim to include effective assistance measures like grievance redressal mechanisms. Further, this platform should be user friendly and employ minimal use of jargon, for legal or financial terms, in order to enable debtors to seamlessly operate the platform.**
- 4.5. It was also brought to the notice of the Committee that a key factor in the success of digital services is the degree of internet penetration in the country. Notably, due to a boost from both government action and market forces, India has experienced large-scale digital adoption between 2013 and 2018. A study conducted this year by the Ministry of Electronics and Information Technology, Government of India, assesses 17 countries using 30 metrics across three pillars of the digital economy,

i.e. digital foundation, digital reach, and digital value.<sup>168</sup> As per their findings, while mature jurisdictions like the UK, Singapore, Australia, the US, etc. rank above India in terms of their total score on the metrics, India has shown second-highest rate of growth amongst all the 17 countries. In this regard, the report notes,

*“...India has the second-highest momentum, or rate of growth, among all countries over the past four years. According to Exhibit 3, its digital score rose by 90 percent, from 17 in 2014 to 32 in 2017... Digital penetration and GDP per capita or affluence are strongly correlated... State-level analysis reveals that all states have grown their internet subscriber basis by a minimum of 12 percent annually between 2014 and 2018, while states with relatively lower internet penetration rates to begin with, such as Uttar Pradesh, Madhya Pradesh, and Bihar, have grown their subscriber base distinctly faster, at 24 to 26 percent over the same period.”<sup>169</sup>*  
(Emphasis supplied)

- 4.6. Based on this, the Committee discussed that internet penetration in India has been on the rise. While this penetration is higher in urban areas, growth has been increasing rapidly in many rural areas as well. It was agreed that alongside the progress in internet penetration, provisions may also be made to account for the population which is still unable to access the internet. **Thus, it was suggested that the Government may consider installing booths in various districts where debtors can receive aid and assistance for electronically filing a fresh start application. Further, an enabling provision to empower the AO to allow physical meetings, on request with reasons in writing by the debtor, may be inserted in the Code. However, the Committee cautioned that such power to allow physical meetings should only be utilized in exceptional circumstances.**

---

<sup>168</sup> Ministry of Electronics and Information Technology, *India's Trillion Dollar Digital Opportunity* (20 February 2019) <[https://meity.gov.in/writereaddata/files/india\\_trillion-dollar\\_digital\\_opportunity.pdf](https://meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf)> accessed 24 October 2019. As per the report, “Digital foundation” refers to the public platforms and infrastructure comprising of digital applications and services such as UPI and the electronic Know Your Customer database for storing all updated customer identities. “Digital reach” refers to the penetration of digital devices, data, and content such as the size of the mobile and internet user bases. “Digital value” refers to the adoption of various digital use cases and includes the utilisation levels of use cases across e-government services, digital media, e-commerce, and digital payments.

<sup>169</sup> Ministry of Electronics and Information Technology, *India's Trillion Dollar Digital Opportunity* (20 February 2019) <[https://meity.gov.in/writereaddata/files/india\\_trillion-dollar\\_digital\\_opportunity.pdf](https://meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf)> accessed 24, October 2019

## 5. NON-APPLICATION TO PARTNERSHIP FIRMS

- 5.1. Section 78 of the Code provides that Part III of the Code shall apply to individuals and partnership firms when a default of INR one thousand is committed by the debtor. The Committee discussed that this may be interpreted to mean that a fresh start process under Part III of the Code is available for both individual debtors and partnership firms, and not just for individuals. It was noted that this is contrary to the intention of the Code.
- 5.2. **The Committee discussed that the fresh start process is an entitlement that has been made available for low-income individuals and is not suitable for partnership firms. Therefore, for the sake of providing clarity, the Committee agreed that Section 78 may be amended to clarify that unlike other Chapters under Part III of the Code, the fresh start process under Chapter II of Part III applies only to individuals and not partnership firms.**

## 6. ELIGIBILITY

- 6.1. Section 80(2) of the Code provides the eligibility criteria for debtors to be able to avail the fresh start process. Since the fresh start process is an entitlement that is reserved for only a section of the population, the reasonability of the eligibility thresholds is an intrinsic part of making the fresh start process workable. Currently, Section 80(2) provides two kinds of eligibility criteria - *first*, based on determination of the resources of the debtor (debt, asset, income, and dwelling house thresholds provided in clauses (a)-(c) and (e)); and *second*, based on debtor's history of availing various insolvency related processes (provided in clauses (d), (f) and (g)).

### *Resource Based Thresholds*

- 6.2. Clauses (a)-(c) and (e) of Section 80(2) of the Code provide eligibility thresholds based on the resources of the debtor. The Committee perused the above-mentioned resource-based eligibility criteria. In relation to these eligibility criteria, the BLRC Report notes "*The proposed thresholds in the Code have been provided taking into account the relevant data and the Central Government shall have the power to revise the relevant assets and income test from time to time.*"<sup>170</sup> **The Committee discussed that quantum of the present asset, income and debt based eligibility**

---

<sup>170</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 6.3.1 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019



criteria may not require alteration. Since these provisions have not been operationalised yet, the Government may consider if the quantum of these thresholds need to be amended based on experience gathered after implementation of the fresh start process. However, the Committee also agreed that the debt, asset and income thresholds to determine eligibility for the fresh start process should be regularly reviewed. **Per the suggestions of the BLRC Report, the Government should monitor changes required in these thresholds based on fluctuations in the inflation, etc. Accordingly, the Committee agreed that an enabling provision to allow the Government to notify modified debt, asset and income thresholds for the fresh start process should be provided in the Code. Further, to ensure that debtors and insolvency advisors have clarity on the manner of accurately determining eligibility for the fresh start process, it may be necessary to provide guidance on the ascertainment of resource based thresholds. Thus, it was agreed that while the quantum of resource based thresholds should be provided in the Code, subordinate legislation may provide guidance on the ascertainment and manner of calculation of the same.**

- 6.3. It was also highlighted that the present income, asset and debt thresholds are based on the resources of the debtor individually, and do not account for her family's financial conditions. This is distinct from various other welfare schemes and entitlements initiated by the Government. For example, determination of 'economically weaker sections' for the purposes of reservation in higher education and employment,<sup>171</sup> for priority sector lending targeting,<sup>172</sup> and for schemes like the *Ayushman Bharat Yojana*<sup>173</sup> – all rely on family income and not individual income. In fact, there may be instances where the dependent members of the

---

<sup>171</sup> Ministry of Human Resource Development, *Reservation for Economically Weaker Sections (EWSs) for admission in Central Educational Institutions* (Office Memorandum No. 12-4/2019-U1, 17 January 2019) <[https://www.ugc.ac.in/pdfnews/8174449\\_Letter---Reservation-for-EWS.pdf](https://www.ugc.ac.in/pdfnews/8174449_Letter---Reservation-for-EWS.pdf)> accessed 26 November 2019; Ministry of Personnel Public Grievances & Pensions, *Reservation for Economically Weaker Sections (EWSs) in Direct Recruitment in Civil Posts and Services in the Government of India* (Office Memorandum No, 36039/1/2019-Estt(Res), 31 January 2019) <<https://dopt.gov.in/sites/default/files/ewsf28ft.PDF>> accessed 26 November 2019

<sup>172</sup> Reserve Bank of India, *Master Direction – Priority Sector Lending – Small Finance Banks – Targets and Classification*, (Master Direction RBI/FIDD/2019-20/70, 29 July 2019) para 10.4 <<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11644&Mode=0>> accessed 26 November 2019

<sup>173</sup> See National Health Authority, 'Ayushman Bharat Pradhan Mantri Jan Arogya Yojana' <<https://www.pmjay.gov.in/about-pmjay>> accessed 20 November 2019. See also National Health Authority, 'FAQs', <<https://pmjay.gov.in/faqs>> accessed 20 November 2019

family who have a low income themselves apply for the fresh start process, even though the head of the family has significant income. **The Committee noted that current eligibility criteria under the fresh start process may not provide an effective check against such misuse. Therefore, the Committee recommended that additional eligibility criteria should be added to the Code as per which a debtor whose gross annual income of immediate family is above Rs. 3 lakhs will not be eligible for the fresh start process.**

- 6.4. Additionally, the Committee noted that one of the resource based criteria provided in Section 80(2)(e) of the Code is that the debtor should not own a dwelling unit. **In this regard, the Committee clarified that such 'dwelling unit' for the purposes of the fresh start process will only include a *pucca* house. While this may not need to be stated in the law, AOs and insolvency advisors should ensure that debtors with *kucha* houses are not denied admission in the fresh start process due to the requirements provided in Section 80(2)(e). Further, it was also agreed that a carve out should be made from the criteria in Section 80(2)(e) to the effect that this disqualification should not take into account houses allotted by schemes initiated by the Government of India.**

*Debtor's History Based Thresholds*

- 6.5. Clauses (d), (f) and (g) of Section 80(2) of the Code provide certain eligibility criteria that are based on history of availing various insolvency processes by the debtor. The Committee perused through these criteria and noted that as per Section 80(2)(g), a person who has availed the fresh start process in the preceding 12 months from the date of application will not be eligible for the fresh start process. The Committee felt that while there should be a bar on repeatedly availing the fresh start process, a bar of merely 12 months is too liberal. Availability of the option to undertake a fresh start process every year may encourage risky borrowing and may adversely affect creditors in the long term. Thus, the Committee agreed that this cooling off period should be reviewed. Notably, debtors may only access the DRO process in the UK once in six years<sup>174</sup>, which is much more restrictive than the current cooling off period mentioned in Section 80(2)(g). **Therefore, the Committee agreed that the cooling off period mentioned in Section 80(2)(g) should be amended and increased to 5 years instead of 12 months.**

---

<sup>174</sup> The Insolvency (England and Wales) Rules 2016, Rule 9.3(2)(a)(vii)

## 7. VERIFICATION OF ELIGIBILITY

### *Documents Required for Verification*

- 7.1. In order to assess whether the debtor in fact qualifies for availing the fresh start process in accordance with the various debt, income and asset-based eligibility thresholds in Section 80(2) of the Code, it is necessary to contemplate the manner of verification of such eligibility thresholds. At present, Section 81(4) requires an applicant to provide an affidavit to support the veracity of information that is submitted along with the fresh start application, including the eligibility of the debtor.
- 7.2. The Committee discussed that though an affidavit places appropriate liability on the debtor, it only enables a *post facto* determination of such liability instead of enabling proper verification of the eligibility of the debtor for the fresh start process at the application stage. This may increase the number of frivolous applications and increase the burden on the IBBI to take action against errant debtors. Thus, the Committee agreed that it may be beneficial to supplement the requirement of providing an affidavit with the requirement of providing appropriate documentation to establish the eligibility of the debtor for the fresh start process. It was noted that presently there is no single repository of information, which comprehensively lists the assets, income or debts of individuals in the country. Thus, the Committee agreed that it may be prudent to provide an illustrative list of documents that debtors may rely upon to establish their eligibility for the fresh start process.
- 7.3. **On a perusal of the manner of verification of eligibility adopted by various welfare schemes and entitlements,<sup>175</sup> the Committee agreed that the following documents may be suitable to establish the debtor's eligibility for the fresh start process-**
- (a) Income certificates - These are issued by the village administrative officer, i.e., the *Tehsildar*. They calculate income from various sources such as from salary, business, property and rented buildings, and are generally produced**

---

<sup>175</sup> These include Below Poverty Line certificates; Income and Asset Certificates for Economically Weaker Sections; Income Certificates; credit verification through CICs; and self-declaration as used by Non-Banking Financial Companies & Micro-Finance Institutions and also under the Pradhan Mantri Awaas Yojana; as well as the recommendations for establishing a Public Credit Registry.

before State Governments for availing various subsidies.<sup>176</sup> Such a certificate may be availed by the debtor and submitted along with her application.

- (b) **Income and asset certificates** - These are provided to persons from economically weaker sections for availing certain benefit distribution schemes. They are issued by authorities such as the district magistrate, the revenue officer or *tehsildar* or the sub-divisional officer of the area where the candidate and her family reside.<sup>177</sup> Applicants for the fresh start process can approach these authorities to obtain such income and asset certificates for verification of their eligibility.
- (c) **Credit Information Companies** - Information recorded by CICs may be availed by the debtor in accordance with the requirements and framework of the CIC Act,<sup>178</sup> and submitted along with her application.

7.4. Therefore, the Committee agreed that the Code may be suitably amended to provide that the debtor may submit documents, from an illustrative list provided in the Code, to establish that she is eligible for the fresh start process. This list should mention the above-mentioned documents and the Central Government should have the power to prescribe certain additional documents. Additionally, the Committee decided that the insolvency advisor would be required to check and advise the debtor of the best means that may be used to prove her eligibility by suggesting the supporting documents that the debtor may provide with her application, the manner in which she can avail such documents, etc.

---

<sup>176</sup> These include subsidies on interest payments for education loans and for affordable housing for the urban poor. See for example Directorate of Institutional Finance, *Guidelines for providing relief on interest outstanding component as on 31.12.13 for all Educational Loans sanctioned/availed up to 31.03.2009 & outstanding as on 31.12.2013* <[http://www.dif.mp.gov.in/HigherEdu/NEW\\_InterestSubsidySchemeGol.pdf](http://www.dif.mp.gov.in/HigherEdu/NEW_InterestSubsidySchemeGol.pdf)> accessed 22 November 2019

<sup>177</sup> Ministry of Personnel Public Grievances & Pensions, *Reservation for Economically Weaker Sections (EWSs) in Direct Recruitment in Civil Posts and Services in the Government of India* (Office Memorandum No, 36039/1/2019-Estt(Res), 31 January 2019) <<https://dopt.gov.in/sites/default/files/ewsf28ft.PDF>> accessed 26 November 2019

<sup>178</sup> Credit Information Companies (Regulation) Act, 2005, Section 17(3). This Section allows 'specified users' that are registered with Credit Information Companies to collect information with Credit Information Companies in accordance with the Credit Information Companies (Regulation) Act, 2005 and regulations as issued by the Reserve Bank of India from time to time.

### *Provision for Affidavits*

7.5. As noted above, at present, Section 81(4) of the Code requires an applicant to provide an affidavit to support the veracity of information that is submitted along with the fresh start application, including the eligibility of the debtor. While affidavits aid in ensuring veracity of information by placing liability on the applicant, availing affidavits may be cumbersome for the purposes of the fresh start process since they to be verified by notaries. Further, affidavits involve costs of stamp paper, typing, etc. which may be burdensome for debtors seeking the fresh start process. **Based on this, the Committee agreed that the debtor should prove the veracity of the contents mentioned in Section 81(4) through a self-declaration, instead of an affidavit.**

## **8. PREVENTING MISUSE OF THE FRESH START PROCESS**

8.1. It was brought to the Committee that rampant use of the fresh start process may have an adverse impact on credit institutions that deal with small and micro finance. This may lead to large-scale discharge of loans through the fresh start process, which may weaken credit institutions that specifically deal with small value loans.

8.2. The Committee noted that this concern had merit. Small and micro-finance institutions specifically provide loans to economically weaker sections of the society. Since a significant portion of the customers of such institutions may be eligible for the fresh start process, concerns were raised that a high number of fresh start applications in the same region may hinder sustenance of such small and micro finance institutions. The Committee discussed that such a situation may cause distress to small and micro finance institutions, which may also lead to an increase in the cost of credit.

8.3. Notably, small and micro-finance institutions play a significant role in the Indian credit landscape. By catering to low-income individuals, such institutions ensure low-cost financial access for the poor, marginalised and minority sections of the society. Thereby, such institutions promote financial inclusion in the country. Therefore, striking a balance between the concerns of such institutions with the goal of rehabilitation of debtors is necessary.

8.4. Moreover, the experience gained from implementation of schemes related to waiver or discharge of loans in India, evidences that such schemes are susceptible

to being misused for political gains. Such misuse of the fresh start process for partisan interests may lead to filing of excessive applications, many of which may be frivolous. This may further exacerbate the effect of mass utilisation of the fresh start process on small and micro-finance institutions.

- 8.5. Based on the above, the Committee agreed that provisions to balance the interests of such institutions in the fresh start process may be considered and suggestions in this regard were received from representative bodies of such institutions. One of the suggestions received by the Committee, in this regard, was that creditors should be allowed to file an objection to a fresh start application before it is admitted. Such objections may be permitted on limited grounds, like if - (i) it significantly affects large-scale public interest; or (ii) excessive applications have been filed from the same defined region (a threshold of percentage borrowers may be prescribed for this). Based on analysis of such objections, the AO may accept or reject the fresh start application. Alternatively, the AO may modify the interim moratorium (if required) if a decision on admission or rejection cannot be taken immediately.
- 8.6. The Committee considered this suggestion, and discussed that such a provision enables nuanced consideration of the fresh start application before its admission. It thus, may be effective in countering possible ill effects on small and micro finance institutions. However, it was also discussed that such a provision may lead to delay in admission due to the increased scope in adjudication. Further, adjudication on whether admission of an application significantly affects large-scale public interest or on whether excessive applications have been filed from the same defined region, may involve exercise of significant discretion. Such exercise of discretion may not be suitable for an administratively supervised process.
- 8.7. **Based on the above, the Committee agreed that a provision to protect small and micro finance institutions from the possible ill effects of mass utilisation of the fresh start process may be important. The Committee did however, not arrive at consensus on the formulation of such a provision. It was agreed that further consultations and research may be undertaken in this regard and requisite changes to the law may be finalised at a later stage.**

## 9. MORATORIUM APPLICABLE ONLY TO QUALIFYING DEBTS

- 9.1. Section 80(1) of the Code allows debtors who are unable to pay their debts and who fulfil certain eligibility requirements, to apply for a fresh start process for

discharge of their qualifying debts. 'Qualifying debt' is defined under Section 79(19) of the Code as a debt that does not include any secured debts; debts incurred three months prior to the application for a fresh start; and excluded debts of the debtor.<sup>179</sup> Reading these provisions with Section 92(1), a discharge of debts availed through a fresh start process is limited to the qualifying debts of the debtor.

- 9.2. While the scope of the discharge under the fresh start process is limited to qualifying debts, the moratorium provisions<sup>180</sup> in the fresh start process apply to all debts of the debtor. The Committee discussed that such a wide ambit of the moratorium provisions under the fresh start process may be disproportionate and may unnecessarily restrict creditors who are unaffected by the fresh start process. For instance, even though qualifying debts do not include secured debts, secured creditors would be prohibited from taking any action in respect of their secured debt for the time-period during which the interim-moratorium and moratorium under the fresh start process are in operation. Notably, even under the DRO process in the UK, the scope of the moratorium is limited to the debts that may be discharged under the DRO process.<sup>181</sup>
- 9.3. **Owing to the above, the Committee recommended that the interim moratorium under Section 81(2) and the moratorium under Section 85(2) should only cover qualified debts as listed in the report of the insolvency advisor that is filed along with the application for the fresh start process (see paragraph 3.9 above). Suitable amendments may be made to the Code in this regard.**

## 10. REVOCATION OF THE FRESH START ORDER

- 10.1. Section 91(1) of the Code allows the resolution professional to apply to the Adjudicating Authority for revoking its order admitting the fresh start application if - (i) there has been a change in the financial circumstances of the debtor and the debtor is now ineligible for the fresh start process; (ii) the debtor does not comply with restrictions under Section 85(3); or (iii) the debtor acts in a *mala fide* manner.
- 10.2. It was brought to the notice of the Committee that per suggestions made by it in paragraph 3.10 above, the insolvency advisor shall only function until the

---

<sup>179</sup> Insolvency and Bankruptcy Code, 2016, Section 79(15)

<sup>180</sup> Insolvency and Bankruptcy Code, 2016, Sections 81(2) and 85(2)

<sup>181</sup> Insolvency Act, 1986, Section 251G

application stage and not after that. Consequently, an insolvency advisor will not be in a position to apply to the AO for revocation of an order of admission. **The Committee was of the view that this would leave a lacuna in the law. It was noted that the power of revocation of the fresh start order was an important tool to ensure that the entitlement under the fresh start order is not misused. Therefore, the Committee agreed that Section 91 be amended to allow creditors to file an application to the AO for revocation of order admitting the fresh start application on the grounds mentioned therein.**

## 11. ENABLING DISPLAY ON CREDIT HISTORY

- 11.1. Section 92(5) of the Code provides that a discharge order from a fresh start process shall be forwarded to the IBBI, for the purpose of keeping record in the register referred to in Section 196 of the Code. This provision has been envisaged in the Code to ensure that records are maintained of debtors who avail the fresh start process. It was discussed that the significance of accurate record keeping for the fresh start process is heightened since one of the eligibility criteria for applying to the fresh start process is the cooling off period from the last time the debtor undertook the process.
- 11.2. Recognising this, the BLRC Report had recommended that both the default and the fresh start order should be recorded in the credit history of the debtor after she has undergone the process.<sup>182</sup> While the Code does not mention any linkages to recording information in credit history of the debtor, Section 92(5) refers to a register under Section 196 for the purpose of keeping record. However, Section 196 only refers to registering information pertaining to insolvency professionals, insolvency professional agencies and information utilities. Thus, this creates a lack of clarity on the manner of record-keeping of an individual's history of accessing the fresh start process.
- 11.3. **In order to clarify the anomaly, the Committee recommended that Section 196 be amended to specifically mention a register of discharge orders under the fresh start process, to be maintained by the IBBI.**
- 11.4. In addition to the register under Section 196 of the Code, the Committee agreed that other information collecting and credit information systems, such as CICs

---

<sup>182</sup> Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design* (2015) para 6.2 <[http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)> accessed 26 November 2019



under the CIC Act, should also record the relevant details of debtors availing the fresh start process. To enable this, appropriate linkages may be developed between the register under Section 196 and such credit information systems. **Accordingly, the Committee agreed that requisite amendments should be made, or relevant directions should be issued by appropriate regulators to require such credit information systems to record and display debtors' history of availing the fresh start process, and other relevant information.**

## 12. OFFENCES

- 12.1. Currently, the Code does not provide for any offences in respect of the fresh start process. Certain offences have however been prescribed specifically for the PIRP and Bankruptcy processes, under Chapter VII of Part III of the Code. The offences that are prescribed for the PIRP and Bankruptcy processes include offences pertaining to furnishing of false information; the making of false representations; concealment of property; destruction of documents and records; failure to account for loss of property before filing a bankruptcy application; failure to comply with restrictions on bankrupt and so on. Offences and punishments are also prescribed in respect of an insolvency professional and a bankruptcy trustee.
- 12.2. It was pointed out to the Committee that the lack of any offences for the fresh start process might be a gap in the Code. This is more so the case as there are several restrictions and duties placed on the debtor by the fresh start process – such as restrictions under Section 85(3) during the moratorium process and general duties of the debtor as prescribed under Section 88 of the Code. While there is a general provision<sup>183</sup> under the Code to penalize non-compliances where no specific punishment is provided, to ensure that wrongful actions under the fresh start process are deterred, the Committee felt that some specific offences in relation to the fresh start process may be provided in the Code.
- 12.3. In this regard, the Committee also noted the kinds of offences prescribed under the DRO process of the UK. The Insolvency Act 1986 (UK) lays down various offences, including offences in relation to the making of false representations and omissions in an application for a DRO;<sup>184</sup> concealment, falsification or destruction

---

<sup>183</sup> Insolvency and Bankruptcy Code, 2016, Section 235A

<sup>184</sup> Insolvency Act, 1986, Section 251O

of documents or records during the moratorium;<sup>185</sup> and fraudulent disposal of property and fraudulent dealing.<sup>186</sup> Punishment is also prescribed for obtaining credit or engaging in business without disclosing the state of the debtor's affairs.<sup>187</sup>

- 12.4. **On the basis of the above discussion, the Committee agreed that it may be prudent to introduce a few offences in relation to the fresh start process, to ensure that the process is not misused and its provisions are implemented in their true spirit. Towards this end, the Committee agreed that suitable offences may be prescribed in respect of the fresh start process, including -**
- (a) Furnishing of false, incorrect or incomplete information by the debtor to the insolvency advisor and the AO in the application for fresh start;**
  - (b) Deliberately making a false representation or any wilful omission by the debtor to the insolvency advisor and the AO, such as on the inability to pay debts, or on a change in financial circumstances of the debtor, and in respect of the documents or information submitted by the debtor to the insolvency advisor while making the fresh start application;**
  - (c) Concealment or disposal of property and destruction of documents and records twelve months before filing the application for the fresh start process;**
  - (d) Concealment of property and destruction of documents and records during the fresh start process so as to keep them out of the reach of the AO;**
  - (e) Where the debtor has acted in a *mala fide* manner and has wilfully failed to comply with the provisions of the fresh start process.**
- 12.5. **In addition to the debtor, the Committee agreed that suitable punishments may also be prescribed in respect of misconduct by the insolvency advisor, like where an insolvency advisor is shown to have discharged her role in bad faith, or in a manner that subverts the efficacy of the fresh start process.**
- 12.6. Having identified the offences that may be prescribed in relation to the fresh start process, the Committee also considered the scope and quantum of punishment

---

<sup>185</sup> Insolvency Act, 1986, Section 251P

<sup>186</sup> Insolvency Act, 1986, Sections 251 Q and 251 R

<sup>187</sup> Insolvency Act, 1986, Section 251 S

that may be levied for the offences under the fresh start process. It was noted that the UK prescribes a combination of imprisonment (ranging from two–seven years) as well as imposition of fines for its offences.<sup>188</sup> However, the Committee discussed that most modern approaches to insolvency and debtor discharge, rather than seeking punishment of the debtor, are leaning towards taking steps to reduce the stigma associated with business failure of the debtor.<sup>189</sup> Further, there has also been a definite shift away from the practice of imprisonment and recourse to debtor prisons, most notably in the US and in Europe.<sup>190</sup>

- 12.7. **Taking the above into consideration, the Committee agreed that no imprisonment may be prescribed for debtors, and only fines may be imposed for the offences pertaining to the fresh start process. Furthermore, since the fresh start process is to be made available to very low-income debtors, the fines that may be prescribed for any offence pertaining to fresh start should not be too burdensome. It was agreed that suitable amendments to the Code in this regard may be undertaken.**

---

<sup>188</sup> Insolvency Act, 1986, Section 430 read with Schedule 10

<sup>189</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. VI, para 1 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>190</sup> Neil L. Sobol, 'Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons' (2016) Md. L. Rev <<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3701&context=mlr>; <https://harvardlawreview.org/2016/02/state-bans-on-debtors-prisons-and-criminal-justice-debt/>> accessed 20 November 2019

# CHAPTER 5: RECOMMENDATIONS REGARDING THE PERSONAL INSOLVENCY RESOLUTION AND BANKRUPTCY PROCESSES

## 1. OUT-OF-COURT MECHANISMS FOR PERSONAL INSOLVENCY

- 1.1. Part III of the Code envisages insolvency and bankruptcy processes for unincorporated entities and natural person debtors that are supervised by the DRT. While the DRT is not a 'court', it is a quasi-judicial body that has powers and procedures similar to those vested in a court of law or judge. Thus, insolvency processes under Part III of the Code are largely akin to court-led processes.
- 1.2. The Committee discussed that due to the formalistic nature of, and the costs involved in court-led processes, they may not be suitable for all kinds of distressed debtors. For example, some debtors may be apprehensive to approach courts due to issues such as facing the stigma of insolvency, being unable to afford the administrative costs of a formal insolvency process, concerns of impact on credit history, etc. Further, personal insolvency involves debtors who may be in significantly distinct circumstances. Consequently, different kinds of processes may be suitable to different kinds of debtors, and a one-size fits all approach may not be suitable for personal insolvency. Additionally, while court-led formal insolvency processes aid distressed debtors in either managing repayment to creditors or in availing discharge, such processes in isolation may not sufficiently achieve the social insurance aim of personal insolvency, i.e. rehabilitating the debtor.<sup>191</sup>
- 1.3. Notably, such issues are not unique to India, and policy-makers in various jurisdictions have grappled with finding suitable mechanisms that may aid in rehabilitating all kinds of debtors. In this regard, many jurisdictions encourage debtors to opt for informal (or less formal) mechanisms like settlement and mediation.<sup>192</sup> Such mechanisms enable debtors to engage in informal out-of-court negotiations with their creditors to either avoid formal insolvency processes or

---

<sup>191</sup> See Adam Feibelman, 'Defining the Social Insurance Function of Consumer Bankruptcy' (2005) *American Bankruptcy Institute Law Review*, Vol. 13, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=708583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=708583)> accessed 25 November 2019

<sup>192</sup> For instance, in jurisdictions like Spain, US, Canada, Italy, etc. mediation is utilised as one of the tools to resolve personal insolvency.

supplement them. An impartial third party often assists the debtor and creditors reach a consensus through this process of negotiations. Thus, debtors are able to retain control over their assets and properties, while also finding a solution to their over-indebtedness.

- 1.4. Further, the Committee also noted that multiple jurisdictions fold debt counselling of debtors within formal insolvency mechanisms to promote rehabilitation of debtors.<sup>193</sup> Debt counseling is a process by which professionals help those under debt, or severe financial crises to determine how they can proceed to regain financial health.<sup>194</sup> Debt counseling, also referred to as credit counseling or debt-advice, is generally employed by various bankruptcy regimes to boost financial literacy and awareness of the various alternatives that are available for dealing with financial distress.
- 1.5. **The Committee recommended that effectively rehabilitating debtors and avoiding repeated insolvency is an important objective of personal insolvency laws. While court-led formal processes aid in achieving this objective, their success may be boosted by supplementary informal processes. Therefore, the Committee agreed that regulatory authorities under the Code may undertake steps to develop infrastructure that aid debtors in effectively utilizing mechanisms such as debt settlement, mediation, and debt counselling. Further, efforts should be made at making debtors aware of various options available to them to resolve their over-indebtedness through both formal and informal mechanisms, by undertaking awareness campaigns and advocacy measures. In this regard, the Committee added that though there may not be any changes necessary to the law in books, steps to boost effective enforcement of the law in action should be undertaken.**

## 2. DEFINITION OF 'PROPRIETORSHIP FIRMS'

- 2.1. Part III of the Code is applicable to debtors who are individuals or partnership firms. Section 2 of the Code was recently amended to clarify the different

---

<sup>193</sup> For instance, jurisdictions like the US, Canada, South Africa, etc. utilise counselling to promote rehabilitation of debtors.

<sup>194</sup> Johanna Niemi- Kiesilainen, 'The Role of Consumer Counseling as part of the Bankruptcy Process in Europe' (1999) 37 Osgoode Hall Law Journal <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1543&context=ohlj>> accessed 20 November 2019

categories of debtors falling within Part III of the Code- (i) personal guarantors to corporate debtors, (ii) partnership firms and proprietorship firms, and (iii) other individuals.<sup>195</sup> Though Section 2(f) of the Code now includes the words “*proprietorship firms*”, this term has not been defined in another legislation.

2.2. Proprietorship firms are businesses that are owned, managed and controlled by one person. They are the most common form of businesses in India and are based in unlimited liability of the owner. Legally, a proprietorship is not a separate legal entity and is merely the name under which a proprietor carries on business.<sup>196</sup> Due to this, proprietorships are usually not defined in statutes. Though some statutes define proprietorships, such definition is limited to the context of the statute. For example, Section 2(haa) of the Chartered Accountants Act, 1949 defined a ‘sole proprietorship’ as “*an individual who engages himself in practice of accountancy or engages in services...*” Notably, ‘proprietorship firms’ have also not been statutorily defined in many other jurisdictions.<sup>197</sup>

2.3. **The Committee considered if there is a need to define the term ‘proprietorship firms’ in Section 2(f) of the Code. It was noted that the term ‘sole proprietorship’ or ‘proprietorship firm’ is often used in common parlance and is a well-recognised form of business. It is also often used in judgments and other legal documents. The Committee, therefore, concluded that it is not necessary to define ‘proprietorship firms’ in the Code.**

### 3. DEFINITION OF ‘PERSONAL GUARANTOR’

3.1. Section 5(22) of the Code lays down the definition of a personal guarantor for the purposes of Part II of the Code. As per this provision, a personal guarantor is “*an individual who is the surety in a contract of guarantee to a corporate debtor.*” Though the words ‘personal guarantor’ only appeared in Part II of the Code earlier, the recent

---

<sup>195</sup> Insolvency and Bankruptcy (Amendment) Act, 2017, Section 2

<sup>196</sup> *Raghu Lakshminarayan v Fine Tubes* (2007) 5 SCC 103

<sup>197</sup> For instance, the Committee did not find statutory definitions of proprietorships in the UK and Australia. However, Article 2 of the Sole Proprietorship Enterprise Law of the People’s Republic of China, 2000 defines a sole proprietorship enterprise as “*a business entity established within China with its capital contributed by one individual and its assets owned personally by the sole proprietor, who assumes unlimited liability to the extent of his personal assets.*”

amendment to Section 2(e) of the Code also inserts the words ‘personal guarantor to corporate debtor’ in this provision.<sup>198</sup>

- 3.2. It was pointed out that Section 5 of the Code only applies to Part II and not the rest of the parts of the Code. Therefore, the definition provided in Section 5(22) will not be applicable to ‘personal guarantors’ in Section 2(e). Additionally, the current definition in Section 5(22) does not mention whether the guarantee in question should have been invoked and unpaid (in full or in part).
- 3.3. Since Section 2(e) relates to applicability of Part III of the Code, the Committee noted that the meaning of ‘personal guarantors’ in Section 2(e) should be consistent with the personal guarantors to whom Part III of the Code is intended to apply. It was discussed that the liability of a guarantor under a contract of guarantee does not arise until the creditor has invoked the guarantee. Accordingly, a personal guarantor should only be considered a ‘debtor’ for the purposes of Part III of the Code, when the liability of such personal guarantor has arisen in law.
- 3.4. **Based on the above, the Committee agreed that, for abundant caution, the meaning of the term ‘personal guarantor to corporate debtor’ in Section 2(e) of the Code may require to be clarified. The intended meaning of a personal guarantor to a corporate debtor in Section 2(e) is distinct from the definition provided in Section 5(22) of the Code. While this has been clarified through the rules regarding insolvency<sup>199</sup> and bankruptcy<sup>200</sup> of personal guarantors to corporate debtors, recently notified by the Central Government, the Committee agreed that an explanation be provided in Section 2(e) of the Code to state that a personal guarantor to a corporate debtor shall be an individual, who is a surety in a contract of guarantee to a corporate debtor, in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or in part.**

#### 4. DEFINITION OF ‘BANKRUPT’

- 4.1. Section 79(3)(c) of the Code uses the words ‘undischarged insolvent’ in order to define a ‘bankrupt’ under Section 79(3)(c) of the Code. The Committee noted that

---

<sup>198</sup> Insolvency and Bankruptcy (Amendment) Act, 2017, Section 2

<sup>199</sup> Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, Rule 3(1)(e)

<sup>200</sup> Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019, Rule 3(1)(f)

the reference to an 'undischarged insolvent' in the definition of 'bankrupt' may be inconsistent with terminology used in the different processes provided under Part III of the Code. The words 'insolvency' and 'bankruptcy' are used in relation to distinct processes under the Code. The term 'insolvency' is used only in relation to an insolvency resolution process under Chapter III Part III of the Code, dealing with PIRP. On the other hand, 'bankruptcy' refers to the process of administration and distribution of a debtor's estate under Chapters IV and V of Part III of the Code. Thus, the terms 'insolvency' or an 'insolvent' are not used for the same purposes as 'bankruptcy' or a 'bankrupt' within Part III of the Code. Consequently, the definition in Section 79(3)(c) may be interpreted to mean that an undischarged insolvent under the Code, i.e. a person who is undergoing PIRP, will fall within the definition of a 'bankrupt'. This is, however, contrary to the intent of the definition of 'bankrupt' under the Code.

- 4.2. The Committee noted that this might be a legacy error flowing from the use of the term 'insolvent' in the Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909. Another indicator of this legacy error is apparent in that while the Code defines an 'undischarged bankrupt' in Section 79(22), there is no such incorporation of any definition for an 'undischarged insolvent' in Part III of the Code.
- 4.3. **The Committee agreed that the use of the term 'undischarged insolvent' in the context of bankruptcy, i.e., when defining a 'bankrupt' may cause confusion as regards the scope and identification of a 'bankrupt' for the purposes of Part III. Therefore, it was agreed that Section 79(3)(c) may be deleted.**
- 4.4. It was also noted that reference to an 'undischarged insolvent' has also been made in various legislations. Due to the legacy change from Provincial Insolvency Act, 1920 and the Presidency Towns Insolvency Act, 1909, the terminology used in the Code is distinct. A person going through bankruptcy process under the Code will be an 'undischarged bankrupt' and not an 'undischarged insolvent'. **The Committee agreed that disqualifications in other legislations for an 'undischarged insolvent' should be read purposively to mean an 'undischarged bankrupt', when reading it in relation to the Code. No legal amendments, in this regard, were deemed necessary.**
5. **APPLICATION OF INTERIM MORATORIUM TO DEBTOR'S ACTIONS**



- 5.1. Sections 96 and 124 of the Code provide for the commencement of an interim moratorium on the date of filing of the application for PIRP and bankruptcy proceedings, respectively. At present, these provisions for interim moratorium impose restrictions only upon creditors, barring them from the initiation or continuation of legal proceedings against the debtor. However, the interim-moratoria under Sections 96 and 124 do not impose any restrictions on the debtor, such as to prevent or stay the transfer, alienation or disposal of assets by the debtor.
- 5.2. The absence of such restriction on the debtor becomes even more apparent as the moratorium applicable to the PIRP under Section 101 of the Code, *does* restrain the debtor from transferring, alienating, encumbering or disposing of her assets during the moratorium. Even in the case of bankruptcy, on account of vesting of the bankrupt's estate with a bankruptcy trustee,<sup>201</sup> the debtor is restrained from trying to siphon off her assets or from keeping the assets out of reach from her creditors.
- 5.3. It was brought to the Committee that the interim-moratoria, in both the PIRP and bankruptcy processes, could be misused by debtors to siphon off their assets in the period between the filing of a PIRP or bankruptcy application, up to the declaration of moratorium or vesting of property in the bankruptcy trustee. The Committee noted that the absence of any restrictions on the debtor during the interim moratoria under Sections 96 and 124 could, hence, be perceived as a gap in the law. The Committee, thus, considered whether Sections 96 and 124 should be amended to restrain and guard against debtors' possible actions to siphon off property and misuse the calm period put in place by the interim-moratorium.
- 5.4. The Committee noted that one of the key challenges that need to be tackled in personal insolvency laws is avoiding moral hazard by debtors in misusing the protection given by such laws from creditor action and destroying or disposing off their assets so as to keep them out of the reach of creditors.<sup>202</sup>

---

<sup>201</sup> Insolvency and Bankruptcy Code, 2016, Section 128

<sup>202</sup> World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) paras 113-116 <<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WPOP120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

- 5.5. In this regard, the Committee noted that in the UK – which has been noted to have a debtor-friendly personal insolvency regime<sup>203</sup> – the bankrupt is restrained from any disposition of property from the date of filing of the bankruptcy application and up until vesting of the bankrupt’s estate in a trustee.<sup>204</sup> Further, any such disposition of property by the bankrupt after the date of the bankruptcy petition is void, unless approved by the court at the time or subsequently.<sup>205</sup> Such protections against moral hazard aid in adding legitimacy to the system of individual insolvency by increasing participation by creditors.<sup>206</sup>
- 5.6. **Thus, the Committee agreed to introduce restrictions to prevent the alienation of assets by the debtor during the interim moratorium. Accordingly, it was decided that the interim moratoria under Sections 96 and 124 of the Code should be amended to cover the actions of the debtor and provide a stay against the disposition of assets upon the filing of an application for PIRP or bankruptcy process, as the case may be.**

## 6. SCOPE OF MORATORIUM

- 6.1. The provisions for a moratorium and interim moratorium under Part III of the Code are currently worded to apply in relation to all the ‘debts’ and not just in respect of the ‘debtor’. Section 96 and Section 101, which respectively provide for an interim moratorium and a moratorium in respect of a PIRP, state that it shall apply *“in relation to all the debts”*. As regards the bankruptcy process as well, Section 124 provides for an interim moratorium *“against the properties of the debtor in respect of any of his debts”* and Section 128 of the Code bars creditors of the bankrupt, in respect of a bankruptcy debt, from initiating *“any action against the property of the bankrupt in respect of such debt.”* Accordingly, these provisions stay

---

<sup>203</sup> Müge Adalet McGowan and Dan Andrews, ‘Insolvency Regimes and Productivity Growth: A Framework for Analysis’ (2016) OECD Economics Department Working Papers No. 1309, para 73 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2016\)33&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2016)33&docLanguage=En)> accessed 23 November 2019

<sup>204</sup> Insolvency Act, 1986, Section 284

<sup>205</sup> *ibid*

<sup>206</sup> World Bank, ‘Report on the Treatment of the Insolvency of Natural Persons’ (2013) para 419 <<https://openknowledge.worldbank.org/bitstream/handle/10986/17606/ACS68180WFP0P120Box0382094B00PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 26 November 2019

legal actions in respect of any 'debt' of the debtor or the bankrupt, as the case may be.

- 6.2. The Committee noted that a moratorium "*in relation to all the debts*" or "*in respect of any debt*" will have very wide application as it will apply to all third parties that bear any relation to such debt. This would result in a stay on a variety of proceedings and recovery actions that involve third parties in respect of such 'debt'. The Hon'ble Supreme Court, in *State Bank of India v Ramakrishnan*,<sup>207</sup> also noted the wide scope of the moratorium provisions under Part III of the Code. In this case, the Supreme Court observed that the word 'debt' in the moratorium provisions under Part III of the Code made the scope of these provision broader than the moratorium provisions under Part II of the Code, which the use of the word 'debtor'.<sup>208</sup>
- 6.3. The Committee contrasted the scope of such stay under Part III of the Code with the moratorium as it applies under Section 14 of the Code. The moratorium under Section 14 only applies in relation to the assets of the corporate debtor itself, and not in relation to its 'debt'. Further, there is a specific exclusion of proceedings against a surety in a contract of guarantee to a corporate debtor.<sup>209</sup> This specific exclusion of proceedings against guarantors was discussed and proposed in the First ILC Report.<sup>210</sup> The First ILC Report explained that Section 14 of the Code does not envisage a bar on proceedings or actions against the assets of third parties. It also clarified that the moratorium under Section 14 should not affect enforcement in relation to a surety of the corporate debtor.
- 6.4. **The Committee noted the wide ambit of the interim moratorium and moratorium under Part III of the Code and its potential to impact proceedings against third parties such as guarantors and co-borrowers in relation to such debt. It was discussed that this is contrary to the intention of the moratorium provisions under Part III of the Code, which were not meant to stay actions against the corporate debtor or other third parties involved in the debt. Such**

---

<sup>207</sup> (2018) 17 SCC 394

<sup>208</sup> *ibid*, para 26

<sup>209</sup> Insolvency and Bankruptcy Code, 2016, Section 14(3)(b)

<sup>210</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) paras 5.5-5.11 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

intention may also be gathered by a combined reading of Sections 2(e) and 60(2) and (3), that envisage concurrent proceedings of a guarantor and a corporate debtor. In light of this intent, the Committee agreed that the moratorium and interim moratorium under Part III should be interpreted only to be limited to the 'debtor' and its assets.

- 6.5. However, for abundant caution and avoidance of doubt, it was concluded that reference to 'debt' should be appropriately substituted with the word 'debtor' in Sections 96, 101, 124 and 128 of the Code. Finally, it was added that it may be necessary to clarify that the moratorium will not apply to proceedings against a party to a contract of guarantee with the debtor. In this regard, a clarification may be inserted in these moratorium provisions that is similar to Section 14(3)(b) of the Code.

## 7. CONSENT OF INSOLVENCY PROFESSIONAL FOR APPOINTMENT

- 7.1. The requirement of consent of an insolvency professional, prior to her appointment is good practice as it allows the insolvency professional to indicate whether she can take on a specific matter or not. The need for such consent was also felt in Part II of the Code, and was reflected in the discussion of the First ILC Report, which advocated express provision for obtaining consent, in order to give autonomy to insolvency professionals and to keep a check on them from being overburdened.<sup>211</sup> In line with the decision in the First ILC Report, the Committee felt that consent of the insolvency professionals should be obtained prior to their appointment in any process under Part III of the Code.
- 7.2. Based on the above, the Committee agreed that the consent of the resolution professional/interim resolution professional as well as of the bankruptcy trustee should be taken prior to her appointment under Part III of the Code. In this regard, appropriate provisions of the Code should be amended to mandate obtaining of consent of the insolvency professional. For instance, consent of an insolvency professional should be mandated for appointment under Sections 97, 98, 125, 145, 146, and 147 of the Code. Further, in cases where debtors may propose insolvency professionals through applications for PIRP and

---

<sup>211</sup> Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) para 12.2 <[www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf)> accessed 26 November 2019

**bankruptcy, the application should also provide consent of such insolvency professional.**

## **8. AVOIDANCE ACTIONS UNDER PART III OF THE CODE**

### *Authority to File*

- 8.1. Sections 164 to 167 of the Code lay down the transactions that may be avoided in Part III of the Code (collectively referred to as “**avoidance actions**” or “**avoidance proceedings**”). These are transactions undertaken by the debtor in the time leading up to bankruptcy that may be set aside by the Adjudicating Authority to swell the asset pool available to creditors. The Committee noted that since Sections 164 to 167 do not mention resolution professional and only refer to bankruptcy trustee, applications for avoidance actions under Part III of the Code may be filed only during bankruptcy and not during PIRP.
- 8.2. The Committee noted that, in contrast, similar avoidance actions in Part II of the Code in relation to corporate debtors are available during both the CIRP and the liquidation process. The intent behind this distinction seems unclear. Even the BLRC report does not discuss why avoidance actions are limited to bankruptcy in Part III of the Code.
- 8.3. It was pointed out that some other jurisdictions like the UK<sup>212</sup> and Australia<sup>213</sup> also limit the applicability of avoidance actions in personal insolvency to bankruptcy proceedings. However, unlike the framework under the Code, the restructuring and bankruptcy proceedings are not linear in these jurisdictions. Accordingly, a restructuring process would not always be a precursor to a bankruptcy proceeding in these jurisdictions. On the other hand, a debtor will have to go through the PIRP in most cases before being eligible for bankruptcy.
- 8.4. The Committee noted that since the PIRP will precede the bankruptcy process in most cases, the look-back periods in relation to the avoidance actions may overlap with the PIRP. Since a moratorium is applicable during the PIRP, the current look-back period may not actually be able to sufficiently capture transactions that the debtor may have undertaken prior to the PIRP. Further, the Committee noted that it may be prudent to maintain consistency in the approach in Part II and III where

---

<sup>212</sup> Insolvency Act, 1986, Sections 339-349A

<sup>213</sup> Bankruptcy Act, 1966, Sections 120-122

the divergence in treatment is not backed by legitimate rationale. **Therefore, the Committee recommended that filing of avoidance actions should be permitted during both the PIRP and bankruptcy process under Part III of the Code. Accordingly, Sections 164 to 167 should be amended to allow both the resolution professional and the bankruptcy trustee to file such proceedings.**

- 8.5. The Committee's attention was also brought to its recommendations in relation to filing of avoidance actions by creditors under Part II of the Code, as discussed in paragraphs 2.1-2.3 in Chapter 3 of this Report. While deliberating on whether creditors should also be allowed to file avoidance actions under Part III of the Code, the Committee discussed that avoidance actions are usually filed by insolvency practitioners.<sup>214</sup> In relation to avoidance actions under Part II of the Code, this Committee has recommended enlarging the scope of persons who are allowed to file such actions due to issues faced in implementation of these provisions. Accordingly, the Committee agreed that since provisions of Part III of the Code have not been operationalised yet, deliberating extension of authority to file avoidance actions to creditors may be premature. **Thus, the Committee decided that this issue, in relation to avoidance actions under Part III of the Code, may be revisited at a later stage based on experience on implementation.**

#### *Criteria for Avoidance Actions*

- 8.6. Sections 164 and 165 of the Code refer to certain transactions undertaken by the debtor that may be reversed by the Adjudicating Authority if they amount to undervalued or preference transactions. To determine which transactions will be considered undervalued or preference transactions, the Code provides various criteria such as the nature of the transaction, the relationship between the parties to the transaction, and the relevant time-period of such transaction. Similar criteria has also been given for establishing undervalued and preference transactions in Part II of the Code, pertaining to corporate insolvency.<sup>215</sup>

---

<sup>214</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, paras 192-195 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019. However, creditors are also allowed to file such actions in some jurisdictions, see United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, para 194 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>215</sup> Insolvency and Bankruptcy Code, 2016, Sections 43 and 45

- 8.7. However, Sections 164(2)(b) and 165(4) of the Code provide for an additional criterion – in order to be avoidable, an undervalued transaction and a preference transaction should have “*caused the bankruptcy process to be triggered.*” Notably, the respective provisions on undervalued and preference transactions in Part II of the Code do not envisage any such criteria in relation to corporates.
- 8.8. The Committee discussed that as opposed to the other objective criteria for establishing such transactions, the criterion given in Sections 164(2)(b) and 165(4) of the Code is subjective. As per the UNCITRAL Guide, various jurisdictions choose to put a combination of objective and subjective criteria for avoidance actions.<sup>216</sup> While having only objective criteria may make the net of avoidance actions too broad, having subjective criteria may increase discretion exercised by courts and increase litigation. Further, the UNCITRAL Guide also notes that criteria requiring proof of a number of elements for a successful avoidance action require court proceedings to be commenced by the insolvency representative for every transaction it wishes to overturn, potentially representing a major expense for the estate with no guarantee of a return.<sup>217</sup> While discussing the issues with broad subjective criteria and defences in this regard, the UNCITRAL Guide notes-

*“These potential difficulties underscore the desirability of an insolvency law adopting clear and predictable avoidance criteria and defences that will enable all parties to assess potential risks and avoid disputes, for example objective criteria focusing on the effect or result of transactions rather than on the intent of the parties.”<sup>218</sup>*

- 8.9. Further, as noted in Chapter 3 above, successfully proving avoidance actions has been considerably difficult in corporate insolvency in practice. Until now, it has been squarely upon the resolution professional or liquidator, as the case may be, to go after such transactions and that too within the strict timelines imposed by

---

<sup>216</sup> United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2005) part two, ch. II, paras 156-163 <[https://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 26 November 2019

<sup>217</sup> *ibid*, part two, ch. II, para 162

<sup>218</sup> *ibid*, part two, ch. II, para 169



the Code.<sup>219</sup> Furthermore, the insolvency professionals generally have to rely on forensic reports, most of which are usually inconclusive. Similar difficulties may also arise in capturing avoidance actions in personal insolvency under Part III of the Code.

- 8.10. **Given this, the Committee agreed that the requirement to show that the preference or undervalued transactions should have “*caused the bankruptcy process to be triggered*” is quite onerous and it would be very difficult to establish that such transactions indeed led to the state of bankruptcy. The Committee also noted that such requirement is not present in the provisions related to undervalued and preference transactions in Part II of the Code. Though different approaches may exist in corporate and personal insolvency, the Committee agreed that the scope of avoidance actions need not be distinct in both. Hence, it was decided that the requirement that such transactions should have “*caused the bankruptcy process to be triggered*” should be deleted.**

---

<sup>219</sup> See for example, Associated Chambers of Commerce and Industry of India (ASSOCHAM) and Ernst & Young, ‘Experiencing the Code: Corporate Insolvency in India’ (August 2017) p. 25 <[https://www.ey.com/Publication/vwLUAssets/ey-IBC-experiencing-the-code/\\$FILE/ey-ibc-experiencing-the-code.pdf](https://www.ey.com/Publication/vwLUAssets/ey-IBC-experiencing-the-code/$FILE/ey-ibc-experiencing-the-code.pdf)> accessed 26 September 2019. See also Vidhi Centre for Legal Policy and Ernst & Young, ‘Insolvency & Bankruptcy Code: The Journey So Far and the Road Ahead’ (December 2018) p. 39 <[https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC\\_Thejourneyssofarandtheroadahead\\_Dec18.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2019/05/IBC_Thejourneyssofarandtheroadahead_Dec18.pdf)> accessed 26 September 2019



# ANNEXURE I

No. 30/3/2019-Insolvency Section  
Government of India  
Ministry of Corporate Affairs

5<sup>th</sup> Floor, A wing  
Shastri Bhawan, New Delhi  
Dated: 06.03.2019

## ORDER

**Subject: - Re-Constitution of Insolvency Law Committee as Standing Committee for review of implementation of Insolvency & Bankruptcy Code, 2016**

The provisions relating to insolvency resolution for corporate persons (Part II of the Insolvency and Bankruptcy Code, 2016), regulation of insolvency professionals, agencies, information utilities and establishment of the Insolvency and Bankruptcy Board of India (the Board) (Part IV of the Code) and Miscellaneous provisions (Part V of the Code) have been brought into force, in phases. Part III of the Code, which deals with insolvency resolution and bankruptcy for individuals and partnership firms is yet to be commenced. Two amendments in the code has been done so far based on the stakeholder's consultation and Insolvency Law Committee (ILC) recommendations. Further ILC has submitted its report on Cross-Border Insolvency.

2. The provisions of the Code are evolving as a result of various judicial pronouncements and amendments made in the Code. Keeping in view the dynamic nature of the issues involved in the implementation of the Code pertaining to the corporate insolvency resolution process, the corporate liquidation process and to address new issues viz cross border insolvency, individual insolvency, group insolvency, avoidance action, Boards investigation powers & regulatory functions etc, it was considered prudent to have an advisory body for guidance & stakeholders consultations on the issues of implementation of code on continuous basis.

3.. Accordingly, in supersession of the Order No 35/14/2017 dated 16.11.2017, the Government hereby re-constitutes the Insolvency Law Committee as Standing Committee for review of implementation of Insolvency & Bankruptcy Code, 2016 consisting of following members:-

1.	Secretary, Ministry of Corporate Affairs	Chairperson
2.	Chairperson, IBBI	Member
3.	Additional Secretary (Banking), Department of Financial Services	Member
4.	Sh. T.K. Vishwanathan, Former Secretary General, Lok Sabha and Chairman BLRC	Member
5.	Sh. U.K Sinha, Ex SEBI Chairman	Member
6.	Nominee of RBI not below the rank of Executive Director	Member
7.	Sh. Sunil Mehta, MD & CEO Punjab National Bank	Member

8.	Sh. Uday Kotak, President Designate, CII and MD&CEO Kotak Mahindra Bank	Member
9.	Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.	Member
10.	Sh. Bahram Vakil, Partner, AZB & Partners	Member
11.	President, Institute of Chartered Accountants of India (Vice-President in his/her absence)	Member
12.	President, Institute of Cost Accountants of India (Vice-President in his/her absence)	Member
13.	President, Institute of Company Secretaries of India (Vice-President in his/her absence)	Member
14.	Joint Secretary (Insolvency), Ministry of Corporate Affairs	Member Secretary

3. The Committee will analyze the functioning & implementation of the Code identifying issues impacting the efficiency and effectiveness of the corporate insolvency resolution and liquidation framework prescribed under the Code and make suitable recommendations to address such issues. The Committee will also study the insolvency resolution and bankruptcy framework for individuals and partnership firms and make recommendations for its successful implementation. The Committee may also make any other relevant recommendation as it may deem necessary.

4. The Chairperson of the Standing Committee may also invite or co-opt practitioners, experts (subject specific) who have knowledge or experience of insolvency framework, law and economics and representatives from other regulators or Ministries. The Committee may also consult other stakeholders as part of its deliberations.

5. The non-official members of the Committee shall be eligible for travelling, conveyance and other allowances as per extant government instructions, to be decided by Chairperson of the Committee. Secretarial/technical support to the Committee will be arranged by Ministry of Corporate Affairs or Insolvency and Bankruptcy Board of India.

6. The Committee shall submit its recommendation to Ministry from time to time as directed by Chairperson of the Committee.

7. This issues with the approval of Competent Authority.

  
(Rakesh Tyagi)  
Director

To

All members

Copy to:- PS to CAM

PS to MoS, CA

PPS to Secretary, MCA

Governor, RBI with the request to nominate a member

Secretary, DFS

PS to AS, CA

## ANNEXURE II

S. No.	Topic / Provision	Summary of Recommendations
<b>Chapter 1 - Recommendations regarding the CIRP</b>		
1.	Definitions - <i>Third-Party Security Providers as Debtors</i>	In cases where the collateral for securing a debt is provided by a third party, the creditor holding such a third-party security interest should be considered as a financial creditor where the security interest is provided to secure a financial debt, and an operational creditor where the security interest is provided to secure an operational debt. The provisions of the Code should be interpreted accordingly, and no legal changes may be required at present.
2.	Threshold for Calculating Default	The minimum default threshold for initiating CIRP under Section 4 of the Code should be enhanced to INR 50 lakhs through notification by Central Government. However, the default threshold for initiation of CIRP by operational creditors should be revised to INR 5 lakhs, and appropriate actions may be taken to enable this.
3.	Increasing Reliance on Information Utilities at the Stage of Admission	Steps should be taken to enforce compliance with Section 215 and incentivise provision of information to information utilities. Further, in due course of time, with the evolution of a more robust framework of information utilities, Section 215 may be amended to require every creditor, apart from financial creditors, to also provide financial information to information utilities. Further, Sections 7, 9 and 10 may be amended to phase out reliance on records that are not stored with information utilities while filing applications for initiation of CIRP.
4.	Application for Initiation of	<ul style="list-style-type: none"> <li>• Section 7(1) of the Code should be amended to provide that for classes of creditors falling within clauses (a) and</li> </ul>

	CIRP by Classes of Creditors	<p>(b) of Section 21(6A), the CIRP may only be initiated by at least 10 percent of the total number of such creditors in a class or at least one hundred such creditors together. For financial creditors who are allottees under a real estate project, the CIRP should be initiated by at least a hundred such allottees or 10 per cent of the total number of allottees belonging to the same real estate project.</p> <ul style="list-style-type: none"> <li>• To prevent prejudice to the interests of any such creditor in a class whose application has already been filed but not admitted by the Adjudicating Authority, Section 7(1) should be amended to provide a grace period during which any such creditor may modify and file its application in the manner provided in point (a) above, failing which such application will be deemed to have been withdrawn.</li> </ul>
5.	Interim Moratorium Prior to Commencement of CIRP	<p><i>a. Need for an Interim Moratorium:</i></p> <p>Requisite amendments to the Code should be made to allow the imposition of an ‘interim moratorium’ after an application for initiation of CIRP has been filed but before it has been admitted to have a collective insolvency resolution process, that is value-maximising in the interests of all stakeholders.</p> <p><i>b. Application and Scope of the Interim Moratorium:</i></p> <ul style="list-style-type: none"> <li>• The Adjudicating Authority should be given the power to order the imposition of the interim moratorium, where keeping in mind the facts and circumstances of the case concludes that it is urgent and necessary keeping in mind the objectives of having a collective insolvency resolution process that is value-maximising in the interests of all stakeholders, and the need for imposing such a moratorium would outweigh the harms.</li> </ul>

		<ul style="list-style-type: none"> <li>• Requisite amendments in relation to interim-moratorium mentioned in point (a) above, should: <ul style="list-style-type: none"> <li>❖ permit the Adjudicating Authority, to pass orders covering any or all of the situations envisaged under Section 14 of the Code, based on the facts and circumstances of each case and other factors;</li> <li>❖ provide that the relevant exemptions provided in Section 14(3) would apply to an order of interim moratorium, where necessary; and</li> <li>❖ mandate that the order of interim moratorium should specify the time for which it will continue, which should not exceed sixty days from the date of such order and which should not be extended any further.</li> </ul> </li> </ul>
6.	Eligibility of a Corporate Debtor to initiate CIRP against other Persons	An Explanation should be inserted under Section 11 to clarify that the provisions of this section should not prevent a corporate debtor from initiating CIRP against any other corporate debtor.
7.	Issues related to Guarantors	<p><i>a. Initiation of Concurrent Proceedings against the Principal Borrower &amp; the Guarantor:</i></p> <p>A creditor should not be prevented from initiating CIRP against both the corporate debtor and its sureties under the Code. However, no legal changes may be required at the moment, and the issue may be left to judicial determination.</p> <p><i>b. Filing of Claims by a Creditor in proceedings of the Principal Borrower &amp; the Guarantor:</i></p> <p>In cases where both the principal borrower and the surety are undergoing CIRP, the creditor should be permitted to file claims in the CIRP of both of them. Since the Code does not prevent such filing of claims by the creditor, no amendments may be required in this regard. Further, to prevent misuse,</p>

		<p>upon recovery of any portion of the claims of a creditor in one of the proceedings, there should be a corresponding revision of the claim amount recoverable by that creditor from the other proceedings.</p>
8.	The Moratorium under Section 14	<p><i>a. Continuation of Licenses, etc. granted by Government authorities during the Moratorium period</i></p> <ul style="list-style-type: none"> <li>• Prohibition on termination on grounds of Insolvency: An explanation should be introduced to Section 14(1) in order to make explicit the legislative intent of the section to bar the termination or suspension of licenses, permits and quotas, concessions, registrations, and other rights (“grants”), during the moratorium period, subject to the payment of current dues. The payment of these current dues should be considered insolvency resolution process costs.</li> <li>• Termination on non-insolvency related grounds: The termination of grants for non-compliance with requirements that are not related to the insolvency of the debtor should not be prevented by the moratorium under Section 14. The Explanation referred in (i) above, should also clarify that termination or suspension of such grants on account of non-insolvency reasons would not be barred by the moratorium.</li> </ul> <p><i>b. Continuation of Critical Supplies during the Moratorium Period:</i></p> <ul style="list-style-type: none"> <li>• A new sub-section should be inserted in Section 14 to ensure that supplies that the resolution professional considers critical to running the corporate debtor as a going concern and would contribute to the preservation of the corporate debtor’s value should not be terminated, suspended or interrupted during CIRP, except in certain specific circumstances.</li> </ul>

		<ul style="list-style-type: none"> <li>• Suppliers of such critical supplies should be paid for supplies made during the moratorium period on an on-going basis, failing which they should be permitted to terminate, suspend or interrupt their critical supplies. CIRP Regulations should specify that payments for these critical supplies would constitute insolvency resolution process costs. However, the corporate debtor should not be compelled to pay for pre-CIRP dues of such suppliers during the moratorium period.</li> <li>• In light of any additional circumstance that may be identified in which it may be desirable to enable counterparties to terminate the supply of such critical supplies, flexibility should be retained to allow termination, suspension or interruption in the circumstances as may be specified in subordinate legislation.</li> </ul>
9.	Time for Appointment of an Interim Resolution Professional	The time-period of 14 days granted to the Adjudicating Authority under Section 16(1) for appointment of the interim resolution professional should be omitted from the Code. The interim resolution professional should be appointed by the order admitting the CIRP application itself. Further, the 'insolvency commencement date' under Section 5(12) should be calculated from the date of the order admitting the CIRP application.
10.	Operational Creditors in the CoC	<ul style="list-style-type: none"> <li>• At present, operational creditors may not be provided with voting rights in the CoC. However, in due course of time, based on an assessment of the institutional capacities under the Code and the ability of operational creditors to efficiently take key decisions to resolve insolvency, they may be conferred with voting rights.</li> <li>• When operational creditors are conferred voting rights, they should be represented by an authorised representative, in the same manner as provided under Section 21(6A). However, operational creditors, to whom at least ten per cent of the total debt of the corporate</li> </ul>

		debtor is owed, need not be represented by such an authorised representative.
11.	Issues related to Related Party Financial Creditors	<p><i>a. Eligibility of certain Financial Institutional Creditors to Participate in the CoC:</i></p> <p>The scope of the second proviso to Section 21(2), should be broadened to enable the Central Government to prescribe additional transactions solely by completion of which a financial creditor which is regulated by a financial sector regulator and is not otherwise related to the corporate debtor, should not be considered a ‘related party’ of the corporate debtor. Requisite amendments in this regard be made to Section 29A, as similar exemptions are provided in that section as well.</p> <p><i>b. Eligibility of certain Foreign Financial Creditors to Participate in the CoC:</i></p> <p>The second proviso to Section 21(2) should be interpreted to also apply to foreign financial creditors whose managers or advisors are regulated. A similar interpretation may be extended to the relevant provisions in Section 29A.</p> <p><i>c. Eligibility of Assignees of Related Party Financial Creditors to Participate in the CoC:</i></p> <p>When a related party financial creditor assigns her debt to an unrelated third party, such third party should not be disqualified from participating, voting or being represented in a meeting of the CoC, unless the assignment is made in bad faith, or with the intent of vitiating proceedings.</p>
12.	Role and Responsibilities of Members of the CoC	<ul style="list-style-type: none"> <li>• Institutional financial creditors should take necessary steps to ensure that their representatives are capable of discharging their duties in a timely and efficient manner. Such steps would include building strong verticals for stressed asset management, adequately empowering representatives to the meetings of the CoC to promptly</li> </ul>



		<p>take decisions, and developing guidance to help members of CoCs discharge their duties consistently with the letter and spirit of the Code.</p> <ul style="list-style-type: none"> <li>• Any training delivered or guidance developed, pursuant to the aforesaid recommendation, should ensure that members of the CoC are duly cognizant of their role vis-à-vis insolvency professionals.</li> </ul>
13.	Continuation of Resolution Professional after the Expiry of CIRP	Section 23(1) should be appropriately amended to provide that, after the expiry of CIRP, the resolution professional should continue to manage the operations of the corporate debtor till either the resolution plan is approved by the Adjudicating Authority under Section 31 or a liquidator is appointed by the Adjudicating Authority under Section 34.
14.	Resolution Plans requiring approvals for Implementation	<ul style="list-style-type: none"> <li>• To enable government approvals or no-objections to be taken within the scheme of the Code, necessary amendments should be made to the Code such that once a resolution plan is approved by the CoC, it should be sent to all concerned government and regulatory authorities whose approvals are core to the continued running of the business of the corporate debtor, for their approvals or objections. If they do not raise their objections within forty-five days, they should be deemed to have no objections. Subsequently, the plan should be placed before the Adjudicating Authority for its approval.</li> <li>• If the government and regulatory agencies raise any objections or grant conditional approvals, the resolution applicant should attempt to clear the objections or meet the conditions for approval before placing the plan for the approval of the Adjudicating Authority, where this can be done within the time limit provided under Section 12. However, if it is not possible to do so, the plan may still be placed before the Adjudicating Authority for its approval, and the successful resolution applicant should</li> </ul>

		<p>clear the objections or comply with the conditions for approval within a period of one year from the approval of the resolution plan by the Adjudicating Authority.</p> <ul style="list-style-type: none"> <li>The window of forty-five days given to government and regulatory agencies should be excluded from the computation of the time limit under Section 12 of the Code, in order to ensure that it aligns with the time-line for resolution provided in the Code.</li> </ul>
15.	Treatment of Profit and Loss Accrued during CIRP	The resolution plan should provide how the operating profits or losses are to be applied and distributed- whether in favour of the resolution applicant or the creditors, or apportioned between the two, or any other stakeholders laying claim to the same. CIRP Regulations should be amended to provide that a resolution plan should mandatorily include a proposal on the manner in which such operational profits are to be borne.
16.	Super Priority to Interim Finance	Sufficient protection is already provided to the claims of a creditor providing interim finance, and interim finance need not be given priority over other insolvency resolution process costs.
17.	Liability of Corporate Debtor for Offences Committed Prior to Initiation of CIRP	<p><i>a. Liability where a Resolution Plan has been Approved:</i></p> <ul style="list-style-type: none"> <li>A new section should be inserted in the Code to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.</li> <li>Notwithstanding this, those persons who were responsible for the conduct of the business of the corporate debtor at the time of the commission of such an</li> </ul>

		<p>offence should continue to be liable for it, vicariously or otherwise.</p> <p><i>b. Actions against the Property of the Corporate Debtor:</i></p> <ul style="list-style-type: none"> <li>• The new section referred above should provide that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bidder in liquidation who is not related to the corporate debtor nor involved in the commission of the offence under the Code, should be protected from enforcement action.</li> <li>• The protection given to the corporate debtor’s assets should not prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, who may have been involved in the commission of such criminal offence.</li> </ul> <p><i>c. Cooperation in Investigation:</i></p> <p>The new section referred above should provide for continued assistance and cooperation by the corporate debtor and any person, who may be required to provide assistance under the applicable law, to the authorities investigating an offence committed prior to the commencement of the CIRP.</p>
<b>Chapter 2 - Recommendations Regarding the Liquidation Process</b>		
1.	Stay on Continuation of Proceedings	Section 33(5) should be amended to ensure that, apart from proceedings under Section 52, the leave of the Adjudicating Authority is also required for continuing any suit or legal proceeding by or against a corporate debtor undergoing liquidation.
2.	Appointment of Official Liquidator as	<ul style="list-style-type: none"> <li>• Section 34 should be amended to give the Adjudicating Authority the option to appoint the Official Liquidator to carry out the functions of a liquidator under Chapter III, Part II of the Code, in cases where the value of the</li> </ul>

	Liquidator under the Code	<p>corporate debtor is, or exceeds an amount prescribed by the Central Government (which may initially be prescribed as INR 2000 Crore), and an element of public interest is involved.</p> <ul style="list-style-type: none"> <li>• Requisite amendments may be made to the Code and the IP Regulations, such that specific to the liquidation process under the Code, the office of the Official Liquidator is subject to regulation and supervision of the IBBI. However, since they are public servants and have expertise in carrying out winding up proceedings under the company law regime, they need not be registered or supervised by IPAs or write the examinations envisaged in the Code and IP Regulations.</li> </ul>
3.	Provision of Information and Cooperation between the Liquidator, Personnel and Resolution Professional of the Corporate Debtor	<p><i>a. Provision of information:</i></p> <p>The Liquidation Regulations should be amended to require the erstwhile resolution professional of the corporate debtor undergoing liquidation process to prepare a handover report, akin to a statement of affairs under the Companies Act, 1956 within a prescribed timeline. Further, the Liquidation Regulations should prescribe a timeline within which the handover report should be prepared and the information and records of the corporate debtor be transferred to the newly appointed liquidator by the outgoing resolution professional</p> <p><i>b. Cooperation between the Liquidator and Personnel, etc.:</i></p> <p>Section 70 should be amended to prescribe penalties against the erstwhile resolution professional of the corporate debtor or any personnel who refuses to cooperate with or provide assistance to the liquidator, in order to ensure that the liquidator receives requisite cooperation and assistance for conducting the liquidation process.</p>

4.	Schemes of Arrangement in Liquidation	Recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code.
5.	Going Concern Sales during Liquidation	<p><i>a. Mandating a Going Concern Sale:</i></p> <p>Going concern sales should not be mandated during liquidation and the liquidator, in consultation with the relevant stakeholders of the corporate debtor, should be permitted to decide if a going concern sale should be attempted. Since this requirement does not flow from the Code, no amendments were deemed necessary in this regard.</p> <p><i>b. Going Concern Sale of Corporate Debtor:</i></p> <p>Liquidation Regulations should be amended to prevent a going concern sale of the corporate debtor during its liquidation process. However, where the business of the corporate debtor can be sold as a going concern, the liquidator should be permitted to attempt the same.</p>
6.	Stakeholders' Consultation Committee	The Stakeholders' Consultation Committee as an advisory body, has utility within the liquidation framework under the Code. At present, no legal changes have been considered necessary in this regard, however, its functioning should be tracked closely.
7.	Realisation or Relinquishment of Security Interest by a Secured Creditor	<p><i>a. Repayment to Secured Creditors Covers Value of Security Interest Relinquished:</i></p> <p>The priority for recovery to secured creditors under Section 53(1)(b)(ii), which aims at replicating the benefits of security interest that is relinquished by a secured creditor, should be applicable only to the extent of the value of the security interest so relinquished by the secured creditor. No</p>

		<p>amendment was considered necessary in this regard as the correct interpretation of this issue is adequately clear from the aforesaid reasoning.</p> <p><i>b. Secured Creditors' Contribution to Liquidation Expenses and Workmen's Dues:</i></p> <p>The requirement to contribute towards liquidation costs and workmen's dues by secured creditors that opt to realise their security interest outside the liquidation process, as is currently provided under Regulation 21A(2) of the Liquidation Regulations, should be retained as it is.</p> <p><i>c. Presumption as to Relinquishment of Security Interest:</i></p> <p>Since, as per Regulation 21A of the Liquidation Regulations, secured creditors that fail to intimate their decision regarding whether to relinquish or realise their security interest within thirty days from the liquidation commencement date, are presumed to have relinquished their security interest, no further legal change was deemed necessary to prevent delays in the intimation of such decision.</p>
8.	Subordination Agreements within the Liquidation Waterfall	An Explanation should be inserted in Section 53(2) to clarify that inter-creditor or subordination agreements among secured creditors do not disturb the equal ranking provided in Section 53(1)(b) and thus, do not fall within the ambit of Section 52(2) (as explained in the First ILC Report).
<b>Chapter 3 – Recommendations Regarding Actions against Avoidable Transactions and Improper Trading in the CIRP and Liquidation Process</b>		
1.	Investigation of Avoidable Transactions and Improper Trading	<p><i>a. Person Responsible for Investigation</i></p> <ul style="list-style-type: none"> <li>The IBBI should not undertake investigation of avoidable transactions and improper trading under the Code. Accordingly, the provisions of the Code need not be amended in this regard. However, IBBI may continue to</li> </ul>

		<p>exercise its powers under Section 236 to file criminal complaints to prevent misconduct.</p> <ul style="list-style-type: none"> <li>• The primary responsibility for investigation of avoidable transactions or improper trading should continue to be on the insolvency professional. Requisite amendments may be made to the Code to clarify this.</li> <li>• During the course of investigation of such avoidable transactions and improper trading, the insolvency professional should be mandated to report details about fraudulent activities committed by the corporate debtor, if any, to the Central Government or the IBBI</li> </ul> <p><i>b. Ensuring Cooperation</i></p> <p>Section 19(1) should be amended to ensure that the cooperation to be extended to the interim resolution professional (or the resolution professional) under this provision is explicitly extended for collection of information for the conduct of the CIRP and filing of applications against avoidable transactions and improper trading. Further, the categories of persons who are required to cooperate under Section 19 should also include any other person deemed necessary by the interim resolution professional. Per Section 34(3), similar cooperation should also be extended to the liquidator.</p>
2.	Filing of Applications to Avoid Transactions, etc.	<ul style="list-style-type: none"> <li>• Regarding filing applications against improper trading or to avoid transactions, creditors should first approach the resolution professional or the liquidator to file such an application. If the resolution professional or liquidator fails to file the application, the creditors (individually or in groups) or the CoC may do so itself.</li> <li>• The resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions.</li> </ul>

		<ul style="list-style-type: none"> <li>• Section 47 should be amended to disallow members or partners of the corporate debtor from filing applications to avoid an undervalued transaction.</li> <li>• Section 66 should be amended to also allow the liquidator to file applications under this section.</li> </ul>
3.	Distribution of Recoveries	The Adjudicating Authority should decide whether the recoveries from actions filed against improper trading or to avoid transactions should be applied for the benefit of the creditors of the corporate debtor, the successful resolution applicant or other stakeholders. In arriving at this decision, the Adjudicating Authority should take note of the facts and circumstances of the case. Additionally, if the recoveries are to be vested with the creditors, they should usually be distributed per the order of priorities provided in Section 53(1) of the Code, unless the Adjudicating Authority deems an alternate manner of distribution appropriate.
4.	Timelines	<p><i>a. Time Limit for Filing</i></p> <p>Generally, proceedings against avoidable transactions and improper trading should be initiated by the resolution professional during the CIRP or liquidation process. However, prescriptive timelines for initiating these proceedings may not be necessary. Nevertheless, the resolution plan in a CIRP may provide for preservation of claims and manner of pursuing these proceedings after the resolution plan is operational.</p> <p><i>b. Effect on the CIRP and Liquidation Timelines</i></p> <ul style="list-style-type: none"> <li>• Proceedings against avoidable transactions and improper trading should generally be concluded prior to dissolution of the corporate debtor in liquidation. However, if the Adjudicating Authority is of the opinion that these proceedings may not be concluded prior to dissolution of the corporate debtor, due to any countervailing factors, it should provide the manner of</li> </ul>



		<p>continuation of the proceeding after such dissolution. These should not affect the dissolution of the corporate debtor.</p> <ul style="list-style-type: none"> <li>• Section 26 should be amended to ensure that it covers actions in relation to improper trading in addition to avoidable transactions.</li> </ul>
5.	Funding for Actions Against Avoidable Transactions and Improper Trading	<ul style="list-style-type: none"> <li>• The funding of actions against avoidable transactions and improper trading should usually come out of the estate of the debtor. The CoC may also choose to provide a dedicated fund, for funding litigation, including avoidance actions in relation to the corporate debtor, where such funds are available. No amendments would be necessary in this regard.</li> <li>• Development of mechanisms to provide funding for such actions by creditors and third parties should be left to the market. Therefore, no legal change would be necessary in this regard.</li> <li>• Other options for funding avoidable transactions and improper trading like utilisation of State funding and contingency counsel were not considered feasible in the Indian context.</li> </ul>
<b>Chapter 4 - Recommendations Regarding the Fresh Start Process</b>		
1.	IBBI as Supervising Authority	<p><i>a. Supervision by the IBBI:</i></p> <p>IBBI should be appointed as the supervising authority for the fresh start process instead of DRTs. In this regard, the Code should be amended to allow the appointment of Adjudicating Officers in the IBBI to serve as dedicated officers who will discharge functions in relation to the fresh start process. The AO should be in charge of overseeing the fresh start process, including deciding if applications should be admitted, and deciding the final list of qualifying debts (to</p>

		<p>be discharged). Further, orders of the AO should be appealable before the DRAT.</p> <p><i>b. Manner of Appointment of AO:</i></p> <ul style="list-style-type: none"> <li>• The Code may provide the requisite qualifications for appointing AOs in the IBBI.</li> <li>• AOs should be given appropriate training to be able to balance concerns of debtors and creditors who are likely to be stakeholders in the fresh start process.</li> <li>• The IBBI may maintain internal separation between the functions related to the administration of the Fresh Start Process (i.e. functions performed by the AO) and those related to making subordinate legislation (i.e. those performed by the Chairperson and members) for the fresh start process, though such requirements need not be prescribed in the Code.</li> </ul>
2.	Appointment of Insolvency Advisor	<p><i>a. New Cadre of Office Holders:</i></p> <ul style="list-style-type: none"> <li>• The Code should be amended to allow a new cadre of office holders, known as ‘insolvency advisors’, to be appointed to assist with the fresh start process. These insolvency advisors should have presence up to the district-level across the country, in order to ably assist and guide low-income debtors. Such insolvency advisors should not require the same level of qualification as an insolvency professional, but should fulfil certain minimum, standard qualifications and requirements that would render them capable enough to provide aid and advice to debtors on the fresh start process.</li> <li>• The following persons may be eligible to be insolvency advisors: <ul style="list-style-type: none"> <li>❖ persons who are presently registered with the IBBI as insolvency professionals;</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>❖ registered cost accountants;</li> <li>❖ registered chartered accountants;</li> <li>❖ registered company secretaries; and</li> <li>❖ such other persons as notified by the Central Government.</li> </ul> <ul style="list-style-type: none"> <li>• The professionals listed above, apart from insolvency professionals already registered with the IBBI, should be required to register with the IBBI to act as insolvency advisors. The Code should be amended to provide for a mechanism for the IBBI to regulate such insolvency advisors.</li> </ul> <p>b. <i>Role of the Insolvency Advisor:</i></p> <ul style="list-style-type: none"> <li>• The insolvency advisor should assist the debtor only at the application stage and mandatorily file the fresh start application on behalf of eligible debtors.</li> <li>• The insolvency advisor should also verify if the debtor meets the eligibility criteria for the fresh start process and has adequate documentation to establish so.</li> <li>• The insolvency advisor should also submit a report to the AO, along with the debtor’s application, with details as mentioned in Section 83(2) of the Code.</li> <li>• Later tasks like analysing creditors’ objections and finalizing the list of qualifying debts should be undertaken by the AO instead.</li> </ul> <p>c. <i>Remuneration of Insolvency Advisor:</i></p> <p>Insolvency advisors should be paid a part of the application fee as their remuneration for the fresh start process and the Central Government may prescribe a fixed fee chart (that may be regularly revised) in this regard. The fee should be</p>
--	--	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

		kept low enough to ensure that it does not discourage utilization of the fresh start process.
3.	Conducting the Fresh Start Process Digitally	<ul style="list-style-type: none"> <li>• The fresh start process should be conducted through a digital platform, which should allow conduct of the whole fresh start process digitally, including - <ul style="list-style-type: none"> <li>❖ Finding an insolvency advisor digitally;</li> <li>❖ Filing an online application for the fresh start process;</li> <li>❖ Submitting objections and responses digitally;</li> <li>❖ Communication of orders and other directions by the AO digitally;</li> <li>❖ Allowing for electronic communication and hearings, including through video-conferencing between debtors and the AO</li> </ul> </li> <li>• Such digital platform should be created in accordance with principles of privacy and data protection, and should aim to include assistance measures like grievance-redressal mechanisms. This platform should be user friendly and employ minimal use of jargon, for legal or financial terms, in order to enable debtors to seamlessly operate the platform.</li> <li>• The Government should consider installing booths in various districts where debtors can receive aid and assistance for electronically filing a fresh start application.</li> <li>• Further, an enabling provision empowering the AO to allow physical meetings, on the request by the debtor with reasons in writing, should be inserted in the Code. However, such power to allow physical meetings should only be utilized in exceptional circumstances.</li> </ul>

4.	Non-Application to Partnership Firms	Section 78 should be amended to clarify that unlike other Chapters under Part III of the Code, the fresh start process under Chapter II of Part III applies only to individuals and not partnership firms.
5.	Eligibility	<p><i>a. Resource Based Thresholds:</i></p> <ul style="list-style-type: none"> <li>• An enabling provision should be provided in the Code in order to allow the Government to notify a modified quantum of the income, asset and debt based eligibility criteria, presently laid down under clauses (a) to (c) of Section 80(2). Per the suggestions of the BLRC Report, the Government should monitor changes required in these thresholds based on fluctuations in the inflation, etc. Further, to ensure that debtors and insolvency advisors have clarity on the manner of accurately determining eligibility for the fresh start process, it may be necessary to provide guidance on the ascertainment of resource based thresholds in subordinate legislation.</li> <li>• Additional eligibility criteria for the fresh start process should be added to the Code as per which a debtor whose gross annual income of immediate family is above INR 3 lakhs shall not be eligible to avail the fresh start process.</li> <li>• A 'dwelling unit' for the purposes of eligibility for the fresh start process should be interpreted to include only a <i>pucca</i> house and AOs and insolvency advisors should ensure that debtors with <i>kucha</i> houses are not denied admission in the fresh start process due to the requirements provided in Section 80(2)(e).</li> <li>• A carve-out should be made from the criteria provided in Section 80(2)(e) such that the disqualification in relation to dwelling unit provided therein, should not take into account houses allotted by schemes initiated by the Government of India.</li> </ul>

		<p><i>b. Debtor's History Based Thresholds:</i></p> <p>The cooling off period for eligibility for the fresh start process, as mentioned in Section 80(2)(g), should be amended and increased to 5 years instead of 12 months.</p>
6.	Verification of Eligibility	<ul style="list-style-type: none"> <li>• The Code should be suitably amended to provide that the debtor may submit documents, from an illustrative list provided in the Code, to establish that she is eligible for the fresh start process. This list should mention the following documents: <ul style="list-style-type: none"> <li>❖ Income certificates;</li> <li>❖ Income and asset certificates;</li> <li>❖ Information recorded by CICs; and</li> <li>❖ Such other documents as may be prescribed by the Central Government.</li> </ul> </li> <li>• The insolvency advisor should be required to check and advise the debtor of the best means to prove her eligibility by suggesting the supporting documents that the debtor may provide with her application, the manner in which she can avail such documents, etc.</li> <li>• Further, Section 81(4) should be amended to state that the information contained in the fresh start application shall be supported by a self-declaration, instead of by an affidavit, as is currently provided.</li> </ul>
7.	Moratorium Applicable only to Qualifying Debts	<p>The Code should be suitably amended to ensure that the interim moratorium under Section 81(2) and the moratorium under Section 85(2) only cover qualified debts as listed in the report of the insolvency advisor that is filed along with the application for the fresh start process.</p>

8.	Revocation of the Fresh Start Order	Section 91 should be amended to allow creditors to file an application to the AO for revocation of an order admitting a fresh start application on the grounds mentioned therein.
9.	Enabling Display on Credit History	Section 196 should be amended to specifically mention that a register of discharge orders passed under the fresh start process is to be maintained by the IBBI. Further, requisite amendments should be made, or relevant directions should be issued by appropriate regulators to require credit information systems to record and display debtors' history of availing the fresh start process, and other relevant information relating to the fresh start process.
10.	Offences	<ul style="list-style-type: none"> <li>• To prevent misuse of the fresh start process, suitable offences should be prescribed in respect of the fresh start process, including: <ul style="list-style-type: none"> <li>❖ Furnishing of false, incorrect or incomplete information by the debtor to the insolvency advisor and the AO in the application for fresh start;</li> <li>❖ Deliberately making a false representation or any wilful omission by the debtor to the insolvency advisor and the AO, such as on the inability to pay debts, or on a change in financial circumstances of the debtor, and in respect of the documents or information submitted by the debtor to the insolvency advisor while making the fresh start application;</li> <li>❖ Concealment or disposal of property and destruction of documents and records twelve months before filing the application for the fresh start process;</li> <li>❖ Concealment of property and destruction of documents and records during the fresh start process so as to keep them out of the reach of the AO;</li> </ul> </li> </ul>

		<ul style="list-style-type: none"> <li>❖ Where the debtor has acted in a <i>mala fide</i> manner and has wilfully failed to comply with the provisions of the fresh start process.</li> <li>• Suitable punishments should be prescribed in respect of misconduct by the insolvency advisor, such as where an insolvency advisor is shown to have discharged her role in bad faith, or in a manner that subverts the efficacy of the fresh start process.</li> <li>• No imprisonment should be prescribed for debtors, and only fines, that are not unduly burdensome for the low-income debtors, should be imposed for the offences pertaining to the fresh start process. Suitable amendments should be made to the Code in this regard.</li> </ul>
--	--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**Chapter 5 – Recommendations Regarding the Personal Insolvency Resolution and Bankruptcy Processes**

1.	Out-of-court Mechanisms for Personal Insolvency	Regulatory authorities under the Code may undertake steps to develop infrastructure that aids debtors in utilizing mechanisms such as debt settlement, mediation, and debt counselling. Efforts should be made at making debtors aware of various options available to them to resolve their over-indebtedness through both formal and informal mechanisms, by undertaking awareness campaigns and advocacy measures. In this regard, changes in law were not deemed necessary.
2.	Definition of ‘Proprietorship Firms’	The term ‘proprietorship firms’ referred to in Section 2(f) need not be defined in the Code as the term ‘sole proprietorship’ or ‘proprietorship firm’ is often used in common parlance and is a well-recognised form of business.
3.	Definition of ‘Personal Guarantor’	An Explanation should be provided in Section 2(e) of the Code to clarify that a personal guarantor to a corporate debtor shall be an individual guarantor in respect of whom



		guarantee has been invoked by the creditor and remains unpaid in full or in part.
4.	Definition of 'Bankrupt'	To prevent confusion regarding the scope and identification of a 'bankrupt', Section 79(3)(c), which includes an 'undischarged insolvent' under the definition of a 'bankrupt', should be deleted.
5.	Application of Interim Moratorium to Debtor's Actions	Sections 96 and 124 of the Code, which provide for interim moratoria, should be amended to provide for a stay against the debtor's disposition of assets, upon the filing of an application for PIRP or the bankruptcy process, as the case may be.
6.	Scope of Moratorium	<ul style="list-style-type: none"> <li>• The moratorium and interim moratorium under Part III should be interpreted to apply only to legal action or proceedings against the debt <i>qua</i> the 'debtor' and its assets, and not to third parties to the debt, such as guarantors and co-borrowers. However, for abundant caution, references to 'debt' should be appropriately substituted with the word 'debtor' in Sections 96, 101, 124 and 128 of the Code.</li> <li>• A clarification similar to Section 14(3)(b) should be inserted to the effect that the moratorium will not apply to proceedings against a party to a contract of guarantee with the debtor.</li> </ul>
7.	Consent of Insolvency Professional for Appointment	Appropriate provisions of the Code should be amended to mandate that the consent of the resolution professional/interim resolution professional as well as of the bankruptcy trustee prior to her appointment under Part III of the Code should be obtained. In cases where debtors propose insolvency professionals through applications for PIRP and bankruptcy, the application should also provide consent of such insolvency professional.

8.	Avoidance Actions under Part III of the Code	<p><i>a. Authority to File:</i></p> <p>Amendments may be made to allow avoidance actions to be filed both during the PIRP and bankruptcy process under Part III of the Code. Accordingly, Sections 164 to 167 should be amended to allow both the resolution professional and the bankruptcy trustee to file such proceedings.</p> <p><i>b. Criteria for Avoidance Actions:</i></p> <p>The requirement to show that preference or undervalued transactions should have “<i>caused the bankruptcy process to be triggered</i>” should be deleted from Sections 164(2)(b) and 165(4), as it is onerous and it would be difficult to establish that such transactions indeed led to the state of bankruptcy.</p>
----	----------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------