Insolvency and Bankruptcy Code: Till Now and Beyond

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Insolvency and Bankruptcy Code: Till Now and Beyond

The Indian Parliament enacted the landmark Insolvency and Bankruptcy Code, 2016 (**Code**) on May 28, 2016. The Code was introduced in the midst of alarming rise in non-performing loans (**NPLs**) in the Indian banking industry and to address a highly fragmented and delay-prone legal regime relating to insolvency and stressed debt resolution. The data disclosed by the Reserve Bank of India (**RBI**) demonstrated that the aggregate gross NPLs on the books of Government-owned banks had increased from INR 279,016 crore (approximately USD 39 billion) as on March 31, 2015, to approximately INR 895,601 crore (approximately USD 123 billion) as on March 31, 2018. The out-of court restructuring mechanisms prescribed by RBI hitherto had met with very limited success in resolution of stressed accounts.

Corporate insolvency resolution under the Code: A brief overview

The Code is a comprehensive and rules-based legislation for insolvency resolution of Indian companies and limited liability partnerships[1] (together **Corporate Debtor(s)**) (other than entities engaged in providing financial services), partnership firms, and bankruptcy of individuals[2]. Part II of the Code along with the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) govern the conduct of the insolvency resolution process of Corporate Debtors.

The Code also governs the liquidation of the Corporate Debtor and provides for a time-bound and streamlined process for liquidation with Insolvency Professionals acting as the liquidator (as opposed to liquidators in the earlier regime who were employees of the Central Government).

Institutional Infrastructure

The framework of the Code is supported by four 'key pillars', being: (i) a judicial / quasi-judicial framework comprising of an adjudicating authority (National Company Law Tribunal (**NCLT**)) and an appellate tribunal (National Company Law Appellate Tribunal (**NCLAT**)) with a further right to appeal to the Supreme Court of India (**Supreme Court**); (ii) the Insolvency and Bankruptcy Board of India (**IBBI**), being the regulatory body with rule-making and supervisory powers; (iii) IBBI-registered insolvency professionals (acting as interim resolution professional, resolution professional or liquidators) (**Insolvency Professionals**), a new body of professionals who play a central role in the insolvency resolution process and liquidation under the Code; and (iv) information utilities, who store all financial information in relation to Corporate Debtors, thereby ensuring symmetry of information under the new insolvency regime.

The Code categorizes creditors of a Corporate Debtor as either a 'financial creditor' or an 'operational creditor' depending on the nature of debt i.e. 'financial debt' or 'operational debt'. The Code defines 'financial debt' as that which has been disbursed against the consideration of time value of money (along with interest, if any); while 'operational debt' is defined as a claim in respect of the provision of goods and services, and includes employee claims and statutory/ Government dues and taxes. The IBBI had amended the CIRP Regulations (with effect from August 16, 2017) to recognize 'other creditors' (which do no fall within the definition of 'financial creditor' or an 'operational creditor').

Initiation of insolvency proceedings

Insolvency resolution process in respect of a Corporate Debtor under the Code can be initiated in case of payment default of at least INR 100,000 (approx. USD 1500) to any creditor. Upon such default, the relevant creditor or the Corporate Debtor itself (after obtaining a special resolution passed by its shareholders or a resolution passed by at least three-quarters of its partners, as the case may be) can make an application to the NCLT for initiation of the insolvency resolution process.

Upon the admission of the application by the NCLT, the NCLT orders institution of a moratorium from the date of admission of the application, up until the conclusion of the insolvency resolution process. The NCLT also appoints an Insolvency Professional to take control of the Corporate Debtor as the interim resolution professional (resolution professional once confirmed by the creditors) and to operate it as a going concern. Amongst others, the Insolvency Professional invites claims from the creditors of the Corporate Debtor and upon verification, constitutes a committee of creditors comprising of unaffiliated financial creditors (**Creditors Committee**) which is entrusted with the task of overseeing the insolvency resolution process.

[1] The provisions relating to corporate insolvency resolution in the Code were brought into force on December 01, 2016.

[2] The parts of the Code relating to individuals and partnership firms have not yet been made effective.

Rescue based Time-bound regime

One of the significant aspects of the Code is time-bound[3] resolution of a Corporate Debtor. During the period, the Insolvency Professional is required to invite resolution plans in relation to the Corporate Debtor, where, subject to eligibility requirements, any person is permitted to present a resolution plan. Once resolution plans are received, the Insolvency Professional examines the plans and compliant plans are placed before the Creditors Committee. The Creditors Committee can approve a resolution plan (by a majority vote of 66% by value) or to send the Corporate Debtor into liquidation. In case a resolution plan is approved by the Creditors Committee, such resolution plan is submitted to the NCLT for its approval. Once approved by the NCLT, the resolution plan is binding on the Corporate Debtor, its creditors (including dissenting creditors) and all the stakeholders involved in the resolution plan. If no resolution plan has been approved within the 270 day period, the Corporate Debtor is sent into liquidation.

The Code emphasizes on '*rescue*' or '*resolution'* of a Corporate Debtor. In a recent case, the NCLAT set out the objectives of the Code in the following order of priority: (i) resolution, (ii) maximization of value of assets of the Corporate Debtor, and (iii) promoting entrepreneurship and availability of credit, and balancing the interests of stakeholders[4]. In *Essar Steel*[5], the Supreme Court of India also observed that if resolution is possible, every effort must be made to try and see that it is made possible.

In fact, in a few recent judgements, the NCLAT directed the liquidators of companies, whose insolvency resolution process did not yield a resolution, to first consider a scheme of arrangement under the Companies Act to rescue the company and failing which, consider a sale of the business as a 'going concern'. If both such efforts fail, the liquidators could liquidate the company by selling assets.

Other Key Recent Changes to the Restructuring regime in India

Enhanced role of RBI

Post the enactment of Code, the Banking Regulation Act, 1949 (which governs most of the commercial banks in India) was amended (with effect from May 4, 2017) to enable the RBI to issue directions to Indian banks for mandatorily initiating formal insolvency resolution process against any Corporate Debtor upon the occurrence of a default in the repayment of debt. It was pursuant to this amendment, that in June 2017, the RBI issued directions to certain Indian banks to initiate insolvency proceedings against 12 identified Corporate Debtors, having debt value in excess of INR 50 billion (approximately USD 720 million) each; commonly referred to as the '*Dirty Dozen*'. The total debt of these 12 debtors comprised more than 25% of the gross NPLs of the Indian banking system. Following the referral of these cases to proceedings under the Code, the RBI issued further directions to banks to initiate insolvency proceedings under the Code against another set of 28 borrowers, in respect of whom out-of-court resolution had not been possible up until December 13, 2017.

Overhaul of out-of court restructuring regime

In February 2018, the RBI revoked all of its earlier out-of court restructuring schemes and gave complete flexibility to Indian banks to restructure their exposure in whatever manner they deemed fit. However, the RBI prescribed a timeline for such restructuring for larger cases. For exposures above INR 20 billion, the clock starts ticking from the day of default, and if a resolution plan to restructure the debtor is not implemented within six months of the default, the lenders are required to mandatorily apply for the initiation of corporate insolvency resolution process under the Code[6].

The Code in Practice: Taking Stock

Amendments to the Code and Constitutional Validity

Since its introduction, the Code has undergone two rounds of amendments with the Government of India introducing ordinances followed by legislative amendments in November 2017 and June 2018, in light of the judicial pronouncements and industry experience. Significantly, Section 29A was included in the Code in November 2017, to curb the attempts by the recalcitrant promoters of insolvent companies to regain control of the company leaving creditors with a massive haircut. Section 29A provides extensive disqualifications criteria for resolution applicants. For instance, if the resolution applicant (or its

[3] The Code requires completion of the insolvency resolution process within a period of 180 days that may be extended once, with the total period not exceeding 270 days.
[4] *Rajuptana Properties Private Limited* v. *Binani Industries Ltd and Ors*, (NCLAT, order dated November 14, 2018).
[5] *ArcelorMittal India Private Limited* v. *Satish Kumar Gupta & Ors.* (2018 SCC OnLine SC 1733) (***Essar Steel***).
[6] The constitutional validity of the RBI circular dated February 12, 2018 has been challenged and is pending adjudication before the Supreme Court of India. Meanwhile, the Supreme Court has directed that *status quo* to be maintained in these cases.

connected person) has (anywhere in the world) been classified as a willful defaulter by lenders / banks; or has been prohibited from participating in or accessing the securities market; or controls or manages a company whose loans have been classified as NPL in the books of the lenders for more than one year, etc., such resolution applicant would be disqualified from submitting a resolution plan in relation to a Corporate Debtor.

The Code also successfully passed the muster of constitutional validity with the Supreme Court of India upholding the constitutional validity of the provisions of the Code in January 2019.[7]

Numbers speak

The empirical data released by the IBBI underscores the importance of the Code as a tool for insolvency resolution. Until the end of December 2018, 1484 companies were admitted into the insolvency resolution process, of which 79 had been resolved, 302 had been ordered to be liquidated, 142 cases were closed on appeal or review or settlement and 63 cases have been withdrawn. 898 companies had their insolvency resolution under way. With the erstwhile remedy (under the Companies law) of winding-up on grounds of 'inability to pay debt' having been discontinued, a large number of operational (trade) creditors have also presented insolvency applications. Financial creditors (primarily Indian banks, including state owned banks) have initiated insolvency proceedings against companies with large NPLs. In a few cases, foreign lenders / bondholders have also approached the NCLT to initiate insolvency proceedings under the Code.

The implementation of the Code in the past two years coupled with the other legislative, regulatory and judicial developments have led to improvement in India's global ranking in World Banks Ease of Doing Business by 23 ranks. For the year 2018, India stood at 77th position, earning the credentials of being a top global improver for a second consecutive year. Specifically, on the parameter of resolving insolvency, the India has improved by 33 ranks from 136th rank to 103rd rank.

Some of the key developments provide a brief insight into the legislative and judicial evolution of the Code and have been discussed below.

Evolving Scope of 'Financial Debt'

Owing to the inclusive definition of 'financial debt' in the Code and the comparative advantage associated with being classified as financial creditor, the scope and ambit of 'financial debt' has been subjected to judicial and legislative scrutiny, as discussed below.

Homebuyers: The new financial creditors on the block

As originally enacted, the Code was ambiguous on the characterization of amounts raised by real estate companies from prospective homebuyers as such amounts did not fall within the ambit of "*financial debt*" or "*operational debt*" given that they were not goods and services supplier.

This issue came to the fore in the case of *Jaypee Infratech,*[8] one of the "*Dirty Dozen*" cases, where the debt of the construction financiers was roughly equal to the amounts raised by the company as booking advances from the homebuyers. When this issue was argued before the Supreme Court in early 2018, the Supreme Court devised an ad-hoc arrangement to give a limited representation to the homebuyers in Creditors Committee through a court appointed counsel who would participate in the Creditors Committee meetings to represent the interests of the homebuyers. The IBBI identifying the issue, amended the CIRP Regulations in August, 2017 to allow homebuyers to prove their debts as 'other creditors'.

In June 2018 this issue was finally resolved through an amendment to the Code,[9] wherein amounts raised from homebuyers[10] were deemed to have the '*commercial effect of borrowing*' and therefore brought within the purview of '*financial debt*'. The homebuyers (as class of creditors) are now entitled to a seat on the Creditors Committee and will be represented at the Creditors Committee by an authorized representative with all the attendant rights.

Guarantee-holders

Another aspect of the scope and ambit of financial debt pertains to the classification of the debt owed by Corporate Debtors undergoing insolvency, as corporate guarantors for the debt extended to another entity. The NCLAT in the matter of *JEKPL Private Limited*[11] held that maturity of a

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[7] *Swiss Ribbons Pvt. Ltd. & Anr.* v. *Union of India & Ors* (2019 SCC OnLine SC 73) (***Swiss Ribbons***).
[8] *Chitra Sharma* v. *Union of India* (Supreme Court, order dated August 9, 2018).
[9] Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (with effect from June 06, 2018).
[10] "Allottees" of projects registered under Real Estate Regulation Act, 2016.
[11] *Export Import Bank of India v. Resolution Professional JEKPL Private Limited* (NCLAT Order dated August 14, 2018).

claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim, and that such claims would be valid and construed as 'financial debt'.

Contractual comforts as 'financial debt'

In *Era Infra Engineering*[12] the NCLT held that a debt obligation arising out of a put option, a non-disposal undertaking, a promoter's undertaking, and a deed of pledge would qualify as a 'contract of guarantee' and would be construed as 'financial debt' under the Code.

In *Ruchi Soya Industries*[13] the NCLT dealt with a scenario wherein the applicant bank had advanced certain monies to an intermediary which in turn lent it to the Corporate Debtor (i.e. producer) to finance its working capital requirements for supplying goods to the intermediary. The corporate debtor had also consented to the assignment of all rights title, benefits of the intermediary (arising under the contract entered between the intermediary and the Corporate Debtor) to the applicant bank. The issue that arose for consideration was whether the amount advanced by the applicant bank to the intermediary which in turn was utilized by the Corporate Debtor can be classified as 'financial debt'. The NCLT observed that the advance given through the intermediary was not for immediate supply of goods but were given as finance to cater to the working capital requirements of the Corporate Debtor and upon failure to supply as per the delivery schedule, interest was to be charged. Therefore, the transaction was classified as debt with commercial effect of borrowing and was classified as 'financial debt'.

Expansion of the Scope of Moratorium

The moratorium ordered by the NCLT at the time of admission of an insolvency application extends to the initiation or continuation of any proceedings against the Corporate Debtor, the transfer by the Corporate Debtor of any of its assets, any action by any creditor to enforce any security interest over the assets of the Corporate Debtor, and recovery of any property by lessors. However, scope of the moratorium has given rise to some important questions as discussed below.

Proceedings against guarantors

Clarifying the differing legal positions on application of moratorium to guarantors of the debt owed by the Corporate Debtor, the Supreme Court in the case of *V. Ramakrishnan*[14] held that the period of moratorium under the Code would not apply to the personal guarantors of a Corporate Debtor. This position was also clarified pursuant to an amendment to the Code (with effect from June 6, 2018), wherein a specific carve out was created from the applicability of moratorium provisions under the Code with respect to a surety in a contract of guarantee to a Corporate Debtor.

Supply of essential goods

The provisions of moratorium also extend to continuous supply of certain 'essential goods and services' (viz. electricity, water, telecommunication services and information technology services) and the same cannot be terminated. The CIRP Regulations also clarify that essential supplies does not include goods and services to the extent they are a direct input to the output produced or supplied by the Corporate Debtor.

Appropriation from accounts of a Corporate Debtor

Any appropriation of amounts lying with a creditor of a Corporate Debtor during the insolvency resolution process period is considered a breach of the moratorium under the Code.

The NCLAT in *Amtek Auto*[15] held that once moratorium is imposed under the provisions of the Code, it is not open to any person including financial creditors to recover any amount from the account of the Corporate Debtor, nor it can appropriate any amount towards its own dues. Further, in the case of *Debashish Nanda*[16] NCLAT held that a bank cannot debit any amount from the Corporate Debtor's account after the order of moratorium, as it amounts to recovery of amount after the order of moratorium.

"A defaulter's paradise no more"- promoters in the post Code world

29A(c): A Conundrum of Eligibility

The most vigorously debated and litigated provision under

[12] *Union Bank of India* v. *Era Infra Engineering* (NCLT Principal bench, Order dated December 6, 2018).
[13] *Australia & New Zealand Banking Group Ltd.* v. *Mr. Shailendra Ajmera, Resolution Professional of Ruchi Soya Industries Limited* (NCLT Mumbai Bench, Order dated August 27, 2018).
[14] *State of Bank of India v. V. Ramakrishnan & Anr.* (2018 SCC Online SC 963).
[15] *Indian Overseas Bank v. Mr. Dinkar T. Venkatsubramanian. Resolution Professional for Amtek Auto Ltd.* (Order dated November 15, 2017).
[16] *State Bank of India v. Debashish Nanda* (NCLAT Order dated March 21, 2018).

the Code has been Section 29A[17] which restricts a person from submitting a resolution plan for an insolvent company, if such person or its 'connected person' suffers from any of the disqualifications set out in clauses (a) through (j) of Section 29A (**Disqualification Criteria**). Amongst the Disqualification Criteria, the most often debated has been the disqualification criteria under sub-section (c), which renders a resolution applicant ineligible if it has been the 'promoter' or in 'control' or 'management' of a company which has been classified as an NPL as per the guidelines of Indian regulators for more than one year (**NPL Disqualification Criteria**) as on the insolvency commencement date of the Corporate Debtor. However, such ineligibility can be cured if the resolution applicant makes payment of overdue amount with interest thereon and charges relating to such NPL, prior to the submission of the resolution plan.

Since the introduction of the Section 29A and the amendments to the Disqualification Criteria pursuant an Ordinance in 2018 (whereby the scope of Section 29A was clarified, and banks and financial institutions were exempt from parts of the Disqualification Criteria), the resolution applicants, including the major conglomerates of the country, have been subjected to intensive scrutiny in terms of the Disqualification Criteria, leading to prolonged courtroom battles. The controversy surrounding Section 29A was substantially resolved by the Supreme Court, vide its judgment dated October 4, 2018 in *Essar Steel*.

The Supreme Court laid down the following key principles:

1. Section 29A of Code is a "*see through provision*", ignoring the corporate veil so as to arrive at persons who are actually in '*control*', whether jointly, or in concert, with other persons.
2. The expression '*management*' refers to the *de jure* management of a Corporate Debtor, which would ordinarily vest in a Board of Directors, and would include, in accord with the definitions of manager, managing director and officer as specified under the provisions of Companies Act, 2013.
3. It was held that the expression '*control*', suggests positive or proactive control, as opposed to mere negative or reactive control, under the provisions of Sections 29A(c) and 29A(g).
4. For assessing the eligibility of a resolution applicant under Section 29A(c) of the Code antecedent facts reasonably proximate to the time of submission of the resolution plan can always be seen.

Withdrawal of the insolvency proceedings

When the Code came into effect, it did not provide for withdrawal of insolvency resolution process once admitted by the NCLT. However, the Supreme Court, in a handful of cases, exercised its powers under Articles 141 and 142 of the Constitution of India and permitted withdrawal on the basis of a compromise reached between the Corporate Debtor and the applicant creditor.

The Code was subsequently amended in June 2018[18] and withdrawal of insolvency proceedings is now permitted by the applicant with the approval of ninety per cent voting share of the Creditors Committee. This however has to be read with Regulation 30A of the CIRP Regulations which provides that an application for withdrawal may only be submitted to the insolvency professional, prior to issue of invitation for expression of interest for the Corporate Debtor (which is roughly 75 days from the insolvency commencement date).

In *Brilliant Alloys*[19] however, the Supreme Court disagreed with this timelines and held that this may be deviated in certain exceptional circumstances and therefore, a withdrawal may be possible at any stage.

Rights of suspended Board of Directors

Upon commencement of the resolution process under the Code, the Board of Directors of the company stands immediately suspended and its powers and rights are vested in and exercised by the Insolvency Professional. Also, while the directors are entitled to attend the meetings of the Creditors Committee, such directors have no voting rights and neither are their recommendations binding on either the resolution professional or on any member of the Creditors Committee.

A question arose over whether the suspended directors are to be given copies of the resolution plans and other confidential documents which are considered by the Creditors Committee during its meetings. Sharing of such documents could be seen as in direct conflict of interest as well as with the obligations of the Insolvency Professional

[17] Introduced on 23 November 2017 pursuant to the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 as further amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 and Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

[18] The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

[19] *Brilliant Alloys Private Limited* v. *Mr. S. Rajagopal & Ors.*, (Supreme Court, order dated December 19, 2018).

to maintain confidentiality under the regulations and circulars issued under the Code, including the CIRP Regulations. More importantly, it could create a conflict of interest between the suspended Board, who often submit resolution plans or are applicants under Section 12A for withdrawal of insolvency proceedings and the other participants of the meetings of the Creditors Committee.

The Supreme Court in the case of *Ruchi Soya Industries*[20] held that the scheme of the Code makes it clear that the directors, though not members of the Creditors Committee, have a right to participate in every meeting of the Creditors Committee. In addition, it was also held that for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the Creditors Committee. Any concerns over breach of confidentiality may be alleviated by the Insolvency Professional obtaining a confidentiality undertaking from the directors, which may also contain an indemnity to the Insolvency Professional against any breach.

Role of Creditors Committee

The Creditors Committee is the decision-making body during the entire insolvency resolution process under the Code of a Corporate Debtor starting from appointment of an Insolvency Professional till the approval or rejection of a resolution plan in relation to a Corporate Debtor. Courts in India have time and again emphasized the crucial role of the Creditors Committee as the primary decision-making body. The Supreme Court in *Swiss Ribbons* held that an Insolvency Professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Creditors Committee and by the NCLT.

In terms of assessing the eligibility of a resolution applicant, the Supreme Court in *Essar Steel* ordered that the Insolvency Professional is merely required to give a *prima facie* view while the final decision in respect of the resolution plan being compliant is vested with the Creditors Committee.

In *K. Sashidhar,*[21] the paramountcy of decision of the Creditors Committee on resolution of a Corporate Debtor was confirmed by the Supreme Court. It was held that the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the NCLT and therefore the courts should not interfere with the same.

Resolution Plans: Scope and Limitations

Nature of Resolution Plan

The resolution plan once approved by the NCLT, becomes binding on all the stakeholders of the company (including dissenting financial creditors and operational creditors) and assumes the nature of a binding contract framed under a statute.

Section 74 of the Code provides for stringent penalties for non-implementation of the resolution plan, including a jail term. Once a resolution plan has been approved by the NCLT, if the Corporate Debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding violates any of terms of the resolution plan, they can be subjected to a monetary fine and also a jail term. In a recent case, the Creditors Committee has filed an application against the successful resolution applicant for non-compliance with the terms of the approved resolution plan. Keeping such errant resolution applicants in mind, the requirement to provide a performance bank guarantee along with the resolution plan has been made mandatory *vide* the recent amendment dated January 24, 2019 to the CIRP Regulations.

Challenges to the Resolution Process

During the early days of the Code, the resolution process was challenged at various stages starting from invitation of expression of interest, approval of a resolution plan by the Creditors Committee and the NCLT. For instance, in the case of *Bhushan Power,*[22] the NCLAT allowed one of the resolution applicants to submit its bid subsequent to the last date specified in the process document and the Creditors Committee was directed to consider the same. Another aspect was Section 29A, the wide sweep of the disqualifications led to myriad litigations and resultant delays in the resolution process in a time-bound manner, primarily due to cross-allegations by the rival resolution applicants in relation to the ineligibility of the other resolution applicant.

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[20] *Vijay Kumar Jain* v. *Standard Chartered Bank and Others* (Supreme Court, order dated January 31, 2019).

[21] *K. Sashidhar v. Indian Overseas Bank & Ors.* (Judgment dated February 5, 2019) (***K. Sashidhar***).

[22] *Punjab National Bank* v. *Bhushan Power & Steel Limited* (Order dated April 23, 2018).

The Supreme Court in *Essar Steel* held that a resolution applicant has no vested right that his resolution plan be considered by the Creditors Committee, in light of which, no challenge can be preferred before the NCLT by a resolution applicant, at a stage where (a) the resolution plan has been turned down by the Insolvency Professional for non-compliance of Section 30(2) of the Code; or (b) a resolution plan (as presented by the Insolvency Professional) is not approved by the requisite majority of the Creditors Committee after considering the feasibility and viability of the resolution plan. A challenge can only be preferred once a resolution plan is approved by the NCLT, before the NCLAT and thereafter the Supreme Court.

What you can and can't get- relief and waivers

Other than what is mandatorily prescribed under the law, and what is deemed commercially necessary for purposes of the bidding process, resolution applicants commonly seek various reliefs, exemptions, and waivers under resolution plans submitted under the Code.

The NCLT in cases such as *Monnet Ispat*,[23] *Bharati Defence*[24] and *Essar Steel*[25] did not grant the reliefs and waivers sought by the resolution applicants stating that there is no express provision conferring powers on the NCLT to give reliefs and waivers sought, such as stamp duty exemption, exemption from regulatory approvals, etc.

Looking ahead - The next generation of Insolvency Reforms

Group Insolvency

Presently, the Code does not provide for simultaneous insolvency of group companies. An entity-wise approach with different members of an interconnected group undergoing separate proceedings is bound to be value destructive on account of information asymmetry and lack of coordination among different creditors and NCLT benches and also prone to delays.

The IBBI has, on January 17, 2019 constituted a working group to recommend a comprehensive regulatory framework to facilitate insolvency resolution and liquidation of debtors in a corporate group under the provisions of the Code.

Introduction of pre-packaged insolvency resolution

Currently, under the Code, running a 'bid-like' process is mandatory to get any resolution plan approved in respect of the Corporate Debtor. Although under Regulation 29 of the CIRP Regulations, the Insolvency Professional may sell unencumbered asset(s) of the Corporate Debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realization of value under the facts and circumstances of the case. However, the book value of all assets sold during the insolvency resolution process period in aggregate cannot exceed 10% of the total claims admitted by the Insolvency Professional. Further, such sale requires approval of the 66% members of the Creditors Committee. Accordingly, there is a need to propose an insolvency resolution process where groundwork for resolution can be conducted confidentially prior to the commencement of the insolvency resolution process but which becomes binding on all stakeholders through a quick court approval akin to a 'pre-pack' process common in many other jurisdictions.

Cross Border Insolvency

The Code currently has provisions relating to cross border insolvency but these are not adequate to effectively deal with cases where the corporate debtor has a global footprint. The Ministry of Corporate Affairs in India had set up an Insolvency Law Committee on November 16, 2017 to make recommendations to the Government of India in relation to adoption of the UNCITRAL Model Law on Cross Border Insolvency, 1997. The committee submitted its Report in October 2018. The committee decided to attempt to provide a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, which will require legislative amendments to the statue. The Government of India proposes to bring about the changes by amending the Code and adding a chapter on cross-border insolvency, a report said. The amended law is aimed at giving comfort to foreign investors in India and efficient handling of assets situated in India and outside India.

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[23] *State Bank of India* v. *Monnet Ispat Limited,* (NCLT Mumbai Bench, order dated July 24, 2017).

[24] *Mr Dhinal Shah, Resolution Professional*, in the matter of *Edelweiss Asset Reconstruction Company Ltd.* v. *Bharati Defence and Infrastructure Ltd.* (NCLT, Mumbai Bench, order dated January 14, 2019).

[25] *The Resolution Professional of Essar Steel India Limited* (Order dated March 8, 2019).

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Disclaimer: This article is not intended to serve as legal advice and the position of law expressed in the article is only valid as on 20th March 2019.

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