

# Insolvency – Lessons and Way Forward

Organized

by

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# AGENDA

- Evolution, Current Status of Code
- Lessons Learnt and Challenges Faced
- Looking Forward....
- Advantage MSME
- A few line on Valuation

# Whether Insolvency is BAD

**"Capitalism without financial failure is not capitalism at all, but a kind of socialism for the rich!"**

**Mr Uday Kotak**



**“Insolvency is about financial death and ...financial rebirth.”**

**: Elizabeth Warren**

**“Insolvency & Bankruptcy Code is success story of India’s economic reforms: Vice President”**

**: Vice President of India**

# IBC is Different ???

Resolution or Liquidation

Comprehensive Code

Pro active

Creditor in Control

Time Bound

Balance Interest of all Stakeholder

Crown Dues Least Priority



# Achievements

Behavioral Changes - > 50% cases – settled before admission.

Ranking in the World Bank's Ease of Doing Business from 136 to 77 to 63.

## Economic Survey 2018-2019

As per Economic Survey 2018-2019:

(i) The Gross Non-Performing Advances (GNPA) ratio of SCBs (Scheduled Commercial Banks) decreased from 11.5 per cent to 10.1 per cent between March 2018 and December 2018.

(Note: As per RBI Financial Stability Report, June 2019, the GNPA ratio of SCBs has further decreased to 9.3% in March 2019.)

# Infrastructures

IP Registered - 2791				Bench			
	IP	(%)		Place	Bench	Member	
North	1066	38.19		5	9	18	
West	782	28.01		2	7	14	
South	659	23.62		5	7	13	
East	284	10.18		3	4	8	
Total	2791	100		15	27	53	
Cancelled	4	2787					



# Amendment in Code & Regulation

## Amendment in Code

Effective 23-11-2017 ; Effective 6-6-2018 ; Effective 16-8-2019

## Amendment in the Regulation

- 1) on 16th August, 2017;
- 2) on 5th October, 2017;
- 3) on 7th November, 2017;
- 4) on 1st January, 2018;
- 5) on 6th February, 2018;
- (6) on 28th March, 2018;
- 7) on 4th July, 2018;
- 8) on 5th October, 2018;
- 9) on 24th January, 2019; and
- 10) on 25th July, 2019.
- 11) on 30<sup>th</sup> November, 2019

# Lesson Learnt and Challenges Faced



# Laurels by Judiciary

- Innoventive Industries Limited v. ICICI Bank SC has held that the **IBC is an exhaustive code** on the subject matter of insolvency in relation to corporate entities and **is complete in itself**.
- To borrow the golden words of **Justice Rohinton F. Nariman** in *Swiss Ribbons Pvt. Ltd.....* . **Defaulter's paradise is lost**. In its place, the economy's rightful position has been regained and **Constitutional validity has been upheld**



# Operational Challenges

In some of the cases wherein the **successful bidder has not complied with its payment obligations** under the approved resolution plan, such as failure by (i) Ingen Capital to infuse funds for Orchid Pharma or failure to meet payment deadlines by (ii) Liberty House in case of Adhunik Metals and Amtek Auto.<sup>5</sup>

## Today's News : NCLAT sets aside conditions imposed on JSW Steel

NCLAT held that a **successful resolution applicant cannot suddenly be faced with undecided claims** in case of **Vardhaman Industries Ltd.** It was ordered “... This would amount to a **hydra head popping up** which would throw into uncertainty”



# MCA to be party in all Insolvency petition

In **OBC vs Sikka Papers** the Honble PB, Delhi has ordered **MCA to be party in all petition** and ordered to get it implemented all across Country.

**MCA has moved a petition with Honble NCLAT** against the above order.



# Repugnancy of State Laws with the Code

The scheme of various laws **enacted by Parliament** as well as **by State Legislatures** may be found to be inconsistent with other laws.

An inconsistency between a State Law and a Central Law is dealt with pursuant to the principles in **Article 254** of the Constitution which provides that :

Otherwise it is superboss Sec 238

# Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd.

Upholding an order of the Delhi High Court, the Hon'ble Supreme Court held that in view of section 238 of the Code, the provisions in the Code will override anything inconsistent contained in any other enactment, including Income-Tax Act.



# Swiss Ribbons & Anr. Vs Union of India

- Difference between FC and OC
- **RP has no adjudicatory powers.** He has administrative powers as opposed to quasi-judicial powers.
- A person, **who is unable to service its own debt beyond the grace period, is unfit to be eligible to become a resolution applicant.** This policy cannot be found fault with.
- The expression “**related party**”, and “**relative**” under 29A(j) **must be read *noscitur a sociis*** and so read, would include only persons who are “**connected**” with the **business activity of the resolution applicant**, including during the implementation of a resolution plan. It does not exclude every “relative” of an ineligible person who might be otherwise qualified.



If CoC approves the resolution plan, the NCLT is required to satisfy itself that the plan approved by CoC meets the requirements specified in Section 30(2). No more no less.

If the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable, is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT).

## Essar Steel Judgement Nov 15, 2019

- Re-emphasized the primacy of the commercial wisdom of the CoC
- CoC does not act in any fiduciary capacity to any group of creditors
- There is no residual equity jurisdiction in NCLT/NCLAT to interfere in the merits of a business decision taken by the requisite majority of CoC,
- The NCLT may send the resolution plan back to the CoC to re-submit such plan after satisfying the said parameters
- CoC would be required to provide a detailed commercial reasoning for accepting the proposal and distributing proceeds in a particular
- The Supreme Court held that a bankruptcy code "should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law



## Essar Steel Judgement Nov 15, 2019

"A successful resolution applicant *cannot suddenly be faced with "undecided" claims* after the resolution plan submitted by him has been accepted as this *would amount to a hydra head popping up* which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. *A prospective resolution applicant knows exactly what has to be paid* in order that it may then take over and run the business of the corporate debtor. *This the successful resolution applicant does on a fresh slate*, as has been pointed out by us hereinabove." This reasoning applies to claims not filed during the corporate insolvency resolution process too.

The NCLAT decision *that the guarantor would be relieved from any payment, once the debt payable by the corporate debtor is cleared in view of the approval of the plan, has been set-aside by the Supreme Court, as contrary to Section 31(1) of the IBC*



# Financial Service Provider

- Section 3(7), which defines a ‘corporate person’, excludes from its definition any ‘financial service provider’. The ‘financial services’ are defined in Section 3(16) which as per order of NCLAT is non exhaustive list and is an inclusive list.
- ‘NCLAT in its order dated 18<sup>th</sup> September 2018 in case of *Randhiraj Thakur v. M/s Jindal Saxena Financial Services, (CD Mayfair Capital Pvt Ltd)* has pronounced that the code does not apply to FSP.
- The NCLAT also considered the definition of ‘financial institutions’ in Section 45-I(c) of the Reserve Bank of India Act, 1934 (“RBI Act”), which includes in its ambit any non-banking institution. the NCLAT held that RHC Holdings qualifies as a ‘financial institution’ under the RBI Act and would therefore also qualify as a ‘financial service provider’ under the IBC.

# Financial Service Provider

- 15<sup>th</sup> Nov, 2019 IB (Insolvency and Liquidation Proceedings of FSP and Application to Adjudicating Authority ) Rules 2019 notified
- 18<sup>th</sup> Nov, 2019 MCA notified under Rule 2, NBFC with asset size of 500 crores and above as per last audited BS shall be covered.
- 20<sup>th</sup> Nov, 2019, RBI suspended BOD of Dewan Housing Finance Corporation Limited and appointed administrator in exercise of power conferred under Section 45-IE (I) of the Reserve Bank of India Act, 1934,



## Limitation to apply to IBC

Gaurav Hargovindbhai Dave Vs ARC (India) Ltd (SC)”...  
What is apparent is that Article 62 (limitation of 12 year) will only **apply to suits**.

The petition under IBC being application would fall under **residuary article 137** of Limitation Act reiterated in **Sagar Sharma Vs Phoenix ARC Pvt Ltd(SC)** and also in the case of **Jignesh Shah Vs Union of India**





Looking Forward.....

# Amended Sec 30(2) Dissenting FC share

Effective 16<sup>th</sup> August, 2019 , RP is required to **confirm conditions of Sec 30(2)** “The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan”..... “ and **provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board**”

That is the LV?

It will be known only after approval of Resolution Plan



## Resolution Plan Below Liquidation Value Sec 30(2)

Whether it is Resolution or Recovery :

A financial creditor shall be tempted to become a dissenting creditor if his proposed share in the resolution plan is lower than the liquidation value of the underlying assets.

### Resolution Plan below LV

NCLAT order (CD United Seamless Tubular Pvt Ltd) dt 8<sup>th</sup> April, 2019 in Maharashtra Seamless Ltd; The LV first taken was Rs. 681 crores and Rs. 513 crores and thereby average being Rs. 597.54 crores against which resolution plan offered Rs. 477 crores. The third valuation was only Rs. 352 crores.

Honble NCLAT order dt 13<sup>th</sup> November, 2019 in the case of Orchid Pharma Ltd, the same was not allowed being below LV.



## Resolution Plan Below Liquidation Value Sec 30(2)

Reg 35, LV and FV : (1)(b) : if in the opinion of the RP, the two **ESTIMATES** of a value are significantly different.....”

**Definition of ‘Liquidation Value’** as provided in Regulation 2(k) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which means the **estimated realizable value** of the assets of the ‘Corporate Debtor’, if the ‘Corporate Debtor’ were to be liquidated on the insolvency commencement date

# Cross Border Insolvency

On 20<sup>th</sup> June, 2018, the Government of India released a draft chapter on cross-border insolvency. Adoption of the UNCITRAL Model with certain modifications also Sec 234/235

The Proposed Amendment seeks to incorporate the **four major tenets** from the **UNCITRAL Model Law**, namely,

- (a) **direct access to foreign insolvency professionals and foreign creditors** to participate in or commence domestic insolvency proceedings against a defaulting debtor;
- (b) **recognition of foreign proceedings** & provision of remedies;
- (c) **cooperation between domestic and foreign courts** & domestic and foreign insolvency practitioners; and
- (d) **coordination between two or more concurrent insolvency proceedings** in different countries.

NCLAT vide order dt **26.9.2019**, **Indian proceedings are main proceeding**. The Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote.



# Group Insolvency

Report on Group Insolvency in October, 2019

The facets of the framework,

*a) first, elements* that enable communication, coordination and cooperation among stakeholders;

*b) second, elements* that enable the assets of companies in a group to be consolidated in limited circumstances;

*c) third, rules* to deal with the perverse behaviour of companies;

*d) fourth,* interconnection among the companies that would make them part of a group.

**In addition** to cooperation, communication and information sharing, other elements of procedural coordination may be enabled as under:

- Joint Application for resolution
- Single IP and Single AA
- Group COC

Videocon Group of 13 Companies



# Prepack

Development of a robust bankruptcy procedure, **where a restructure plan is agreed upon in advance** (also known as pre-pack insolvency) of a **company declaring insolvency**. Such plans are quite common the UK and the USA.

- i) in the case of a pre-pack the **costs of trade and administration can be avoided**;
- ii) In the case of a pre-pack- the **company itself may come up with the resolution plan that can be implemented provided that it is approved by 2/3<sup>rd</sup> of the** creditors of the company.

## Concerns:

- i) with **unsecured creditors often remaining in the dark** about a large part of the process;
- ii) there exist concerns that this process **does not allow for the best realisation** of the value of the business on account of the fact that **there is no 'open marketing'**;
- iii) pre-packs allow for the **earlier management (and promoters) to continue** to have control over the enterprise.

# Section 11 of IBC

**Sec 11:** The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:—

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or
- (d) a corporate debtor in respect of whom a liquidation order has been made

In *M/s. Prowess International Private Limited v. M/s. Jai Balaji Industries Limited* (decided on 09.08.2018), the Kolkata Bench of the **NCLT** petition filed was not maintainable.

01.10.2019 in its order by **NCLAT** preferred by **Mr. Abhay N. Manudhane, Liquidator of Gupta Coal India Pvt. Ltd.** Where adjudicating Authority has refused to grant permission to file application under Section 9 of the I&B Code, **it did not interfere with the impugned order** of 30th May, 2019



## Section 12A of IBC

Withdrawal of Application U/s 12A, whether admitted under section 7 or 9 or 10.

Whether is proceeding for settlement with individual or it is proceeding in REM.

Whether after admission, settlement with Individual creditor can allow the petition to be withdrawn.

## Ringfencing the CD and RA under IBC

From prosecution for financial crimes committed by erstwhile promoters.

Bhushan Power and Steel Ltd (BPSL) : Last month, the Enforcement Directorate (ED) had attached BPSL's land, buildings, plant and machinery in Odisha worth more than Rs 4,000 crore in a case related to alleged diversion of bank funds, delaying the resolution process under which JSW Steel was set to take over the company.

ArcelorMittal has sought immunity from any future investigations into Essar Steel and its former promoters,



# No Objection Certificate from Income-tax Department ???

Section 281 of the ITA, requires a taxpayer to obtain permission of the income tax officer prior to creating a charge on or transfer of specified assets.

Even the transfer of stressed assets would require prior permission from the income tax officer.

This is certainly to cause hardship to the companies undergoing insolvency proceedings.

*To ease the process under IBC for such transfer, it is expected that the finance minister may do away with no-objection certificates required for asset transfers during insolvency proceedings in Budget 2018.*

# Advantage MSME.....



# MSME have certain advantages

Saravana Global Holdings Ltd Vs Bafna Pharmaceuticals Ltd (SC) :

The promoters are not ineligible in terms of Sec 29A, and it was held that in exceptional circumstances, it is not necessary for the promoters to compete with other, Resolution Applicants to regain control of the CD.

Also Sec 240A for Sec 29A

# A line on Valuation.....



# Valuation

- With effect st from 1 February, 2019, every valuation required under the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016 needs to be conducted by valuers registered with the authority.
- The MCA has set up an expert panel to examine the need for an institutional framework for regulation and development of valuation professionals. To strengthen the practice of valuation and set a common standard for valuation professionals in the country.
- One standard, one regulation for the valuation industry will go a long way in achieving the goals that the expert committee has set.



# Thank Q!!

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