INSOL INTERNATIONAL

# FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

## Module 8D Guidance Text

## India

## 2022 / 2023

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IN INTERNATIONAL INSOLVENCY LAW



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## 1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN INDIA

Welcome to **Module 8D**, dealing with the insolvency system of **India**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of India's insolvency laws;
- a relatively detailed overview of India's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of India.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

## 2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in India:

- the background and historical development of Indian insolvency law;
- the various pieces of primary and secondary legislation governing Indian insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in India;
- the rules relating to the recognition of foreign judgments in India.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Indian insolvency law; and
- be able to answer questions based on a set of facts relating to Indian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

## 3. AN INTRODUCTION TO INDIA

India, located in South Asia, is the seventh largest country by area and the second most populous country in the world (and is expected to become the most populous country in the world by 2023). India has a rich history ranging from the Indus Valley civilization, its Hindu and Muslim rulers (especially Mughal rulers who ruled India for more than three centuries starting from early 16$^{th}$ century) and British and other European rulers, who ruled in pockets of the country. Largely a British colony, India achieved independence in 1947.

A large country, India has also been the world's fastest growing major economy over the past few years. Currently, India is the sixth largest economy in the world with agriculture, services and industries being largest contributors.

India is a democratic republic and follows the Westminster parliamentary system. The President is the head of State and the Prime Minister is the head of Government. The Government has three arms, the legislature, the executive and the judiciary. India has 28 states and eight union territories. The States also have their own legislature and government whereas the Union territories are governed by the President through an administrator appointed by him. India has a written constitution which defines the roles of the organs of Government. The constitution also defines the sphere of law-making for the Union and the State Governments, with the Union Government having precedence over State Governments for matters available to both Union and State Governments.

Indian courts are tiered with the Supreme Court of India being the highest court of the land. The courts administer a common law system which follows statutes, precedents and customs. There are also specialist tribunals which are under the supervision of the High Courts and the Supreme Court.

## 4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

### 4.1 Legal system

India, a common law country, inherited its court system and quite a few statutes from its British rulers. The laws have been adapted to include local traditions. For example, the succession and marriage laws in India are based on customs of the religions in which the laws apply.

The Indian legal regime to deal with personal insolvency can be said to have started with the setting-up of the "Court for the Relief of Insolvency Debtors" in 1828 which set up special courts in the cities of Calcutta (now Kolkata), Madras (now Chennai) and Bombay (now Mumbai) for relief against insolvent debtors. These arrangements were replaced with the passing of the Indian Insolvency Act in 1848 and which provided for the insolvency of traders. The laws were further revised with the Presidency-Towns Insolvency Act of 1909 and the Provincial Insolvency Act of 1920, which continue to govern personal insolvency to this day.

From independence from British rule, corporate insolvency was governed by the Companies Acts of 1913 and then of 1956 which provided for the winding-up and liquidation of companies but did not deal with the rescue / insolvent restructuring of companies. Rising "industrial sickness" in the 1980s led the Indian Government to promulgate the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), which was roughly modelled on Chapter 11 of the United States' Bankruptcy Code. Under SICA, a "sick company" (defined as an industrial company with five years of history and with its net worth zero or negative and having 50 or more workers) could make reference to a *quasi*-judicial forum called the Board of Industrial and Financial Reconstruction for an inquiry into sickness of the company and procure the formulation of a scheme for revival. In the meanwhile, no creditor could take any enforcement action against the company or its guarantor(s). The SICA process was mired with delays and successful resolutions were few and far between, leading to substantial delays in recovery by creditors.

In 1993, to facilitate the speedy recovery by Indian banks and financial institutions of their debt, the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act) (known earlier as the Recovery of Debts due to Banks and Financial Institutions Act, 1993) was promulgated. This Act constituted special debts recovery tribunals (DRT) to deal with such cases and which had exclusive jurisdiction over such cases. The RDB Act was enacted purely for recovery actions and not for the rehabilitation or liquidation of debtors. The administrative capacity of DRTs to deal with the large number of cases and overlapping jurisdiction with SICA meant that the RDB Act was not able to fulfil its objectives. To aid the Indian banks further in dealing with their non-performing loans, the Government promulgated the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act in 2002 (SARFAESI). The SARFAESI provided a legal mechanism for the speedy enforcement of security without the intervention of the courts. However, again this was not aimed at the rehabilitation of companies and was only available for secured assets. Further, disputes relating to the SARFAESI were to be resolved by the DRTs, which added to the inefficiency of SARFAESI.

The Reserve Bank of India (RBI), the Indian central bank, introduced various out-of-court debt restructuring schemes to help the Indian banks resolve their stressed loans, starting with the

corporate debt restructuring scheme in 2001. The delays experienced in the courts disincentivised the proper implementation of such schemes and did not provide a comprehensive framework to deal with the debts of a stressed company (debt owed to foreign creditors and trade creditors were not covered within such schemes due to lack of RBI's jurisdiction over such creditors). Finally, in early 2018, the RBI revoked all such schemes. However, the 2018 effort failed the test of constitutional validity in April 2019 and the RBI had to re-issue another circular in June 2019, once again revoking all previous schemes.

In 2014 the Government set up a committee under the leadership of Mr T K Viswanathan to suggest a new legislative framework to deal with insolvency. This committee drafted the Insolvency and Bankruptcy Bill in 2015 which was, with some modifications, presented to the Indian Parliament in late 2015. The Bill was passed in May 2016 as the Insolvency and Bankruptcy Code, 2016 (the Code) and the provisions dealing with the insolvency of companies and limited liability partnerships (LLPs) were brought into effect on 1 December 2016 and the provisions dealing with insolvency and bankruptcy of personal guarantors to corporate debtors were brought into effect on 1 December 2019. While the Code contains comprehensive legislation for dealing with the insolvency of companies, LLPs, partnership firms and individuals, currently only the provisions relating to companies and LLPs and personal guarantors to corporate debtors are in operation; the provisions relating to other individuals and partnerships will come into operation on some date in the future.

## 4.2 Institutional framework

### *4.2.1 Introduction*

India has a complex and multi-tiered judicial system comprising of courts and tribunals. The highest court of the land is the Supreme Court of India and decisions handed down by the Supreme Court are binding on all courts in India. All States have their own High Courts which exercise multiple jurisdictions. There are various specialised tribunals dealing with specialist matters, such as electricity, airports, securities laws and competition. The tribunals are subject to the supervision of the High Courts and, in certain matters, the Supreme Court. The courts in India are considered very slow and the final disposal of cases take many years, or, in some cases, decades. This position is, however, improving substantially in respect of insolvency resolution and winding up cases, after the coming into operation of the Code. As noted above, DRTs were set up to deal with recovery proceedings by Indian banks and financial institutions. However, the experience with DRTs has been dismal and thousands of cases are languishing at various stages within the DRT.

The courts for the purposes of insolvency matters are as follows:

(1) The insolvency or bankruptcy of individuals and partnership firms: Currently the provisions of the Code dealing with insolvency resolution and bankruptcy of only the individuals who are personal guarantors to corporate debtors are in operation and the Presidency-Towns Insolvency Act of 1909 (the Presidency-Towns Act) and the Provincial Insolvency Act of 1920 (the Provincial Act) continue to govern the bankruptcy of other individuals and partnership firms. Bankruptcy jurisdiction under the Presidency-Towns Act is exercised by the High

Courts of the cities where the Act applies (being Kolkata, Chennai and Mumbai). Bankruptcy jurisdiction under the Provincial Act is exercised by the District Courts or subordinate civil courts having territorial jurisdiction.

To the extent already effective and once the other relevant provisions of the Code are brought into effect, the DRTs having jurisdiction over individuals will exercise insolvency and bankruptcy jurisdiction. Orders of the DRT can be appealed against before the Debts Recovery Appellate Tribunal within 30 days of the issue of the order by the DRT. The orders of the Debts Recovery Appellate Tribunal can be appealed against before the Supreme Court of India, on a question of law, within 45 days of the order of the Debt Recovery Appellate Tribunal.

Under the Code, if an individual or a partnership firm is a guarantor to a company or LLP (being the primary borrower) and such primary borrower being subject to proceedings for insolvency resolution or liquidation under the Code,[1] the National Company Law Tribunal dealing with the primary borrower's insolvency or liquidation has the jurisdiction to deal with the insolvency resolution and bankruptcy of the guarantor as well.

(2) Insolvency of companies and LLPs: After the coming into effect of the Code, National Company Law Tribunals exercise jurisdiction relating to the insolvency of companies and LLPs. The National Company Law Tribunal currently has 15 benches spread across various States in India. The relevant National Company Law Tribunal bench will be the one in whose jurisdiction the registered office of the entity is located. However, if a borrower is in insolvency before one bench, the same bench will exercise jurisdiction over the corporate guarantors of such borrower. Orders of the National Company Law Tribunal can be appealed against before the National Company Law Appellate Tribunal (NCLAT) within 30 days of the passing of the order of the National Company Law Tribunal. The orders of the NCLAT can be appealed against before the Supreme Court of India, on a question of law, within 45 days of the NCLAT order.

It is also relevant to note that the Supreme Court and the High Courts exercise constitutional jurisdiction over all courts and tribunals in India and have the power to supervise the courts and tribunals if any constitutional matters (such as a breach of fundamental rights granted by the Constitution) are involved.

### *4.2.2 Enforcement of creditor rights outside insolvency*

India has different rules for enforcement of security and creditor rights by Indian and foreign creditors. For a description of the various forms of security available, please see paragraph 5 below.

[1] In May 2022, the Supreme Court of India, in a summary judgement, opined that National Company Law Tribunals can have jurisdiction over insolvency or bankruptcy of personal guarantors even if no insolvency or liquidation proceedings are pending in respect of the relevant corporate debtor.

*4.2.2.1 Enforcement of creditor rights by Indian creditors outside insolvency*

Indian creditors have the right to seek recovery of their loans by initiating proceedings before the DRTs under the RDB Act. The proceedings culminate in the issuance of a recovery certificate from the DRT against the debtor or the guarantor. The DRTs have a recovery officer who has the power to attach and sell the debtor's assets to recover the debts specified in a recovery certificate.

*4.2.2.2 Enforcement of creditor rights by other creditors outside insolvency*

Non-Indian creditors have the right to approach civil courts to seek recovery of their debts. Aside from the normal procedure, civil courts have a summary procedure for the recovery of debts. The precondition for the use of such summary procedure is an undisputed debt, usually supported by a negotiable instrument. It is relevant to note that the High Courts in Mumbai, Delhi, Kolkata and Chennai exercise the jurisdiction of first instance courts which usually means that unlike first instance courts in other places in India, the High Courts offer better infrastructure for the disposal of such cases.

### *4.2.3 Insolvency regulator*

Under the Code, the Insolvency and Bankruptcy Board of India is the body that performs the regulatory functions of an insolvency regulator. It is also relevant to note that certain rule-making powers under the Code are retained by the Government of India, which are exercised through the Ministry of Corporate Affairs (MCA).

*4.2.3.1 Structure of the Insolvency and Bankruptcy Board of India*

The Insolvency and Bankruptcy Board of India has been set up by the Government of India under the Code to perform regulatory functions relating to the Code. The Insolvency and Bankruptcy Board of India has a Chairperson, being a person of capability and expertise in insolvency and bankruptcy and in the field of law, economics, finance, accountancy or administration. The Insolvency and Bankruptcy Board of India has nine other members:

(1) three *ex officio* members: an officer of the rank of Joint Secretary or equivalent, each from the Ministry of Law and Justice, the MCA and the Ministry of Finance;

(2) one member nominated by the Reserve Bank of India; and

(3) five other members nominated by the Government of India, of which at least three must be full-time members.

The selection of the Chairperson and the other members (not being *ex officio* members) is made by a high-powered selection committee.

*4.2.3.2 Role of the Insolvency and Bankruptcy Board of India*

Under the Code, the Insolvency and Bankruptcy Board of India performs extensive functions of regulating the insolvency process, insolvency professionals and the insolvency professional

agencies (IPAs). The major functions performed by the Insolvency and Bankruptcy Board of India are as follows:[2]

(a) promoting the development and regulation of insolvency professionals, IPAs and information utilities (IUs), including by laying down regulations determining minimum standards for the functioning of insolvency professionals, the IPAs and the IUs and by providing model by-laws for such entities;

(b) registration of insolvency professionals and IPAs and specifying the eligibility criteria (including the minimum curriculum for the examination of insolvency professionals with a view to their enrolment) and other terms and conditions for the registration, renewal and continuation of their registration (including the levying of fees and other charges);

(c) carrying out inspections and investigations of insolvency professionals, the IPAs and the IUs in ensuring compliance with the Code and the regulations thereunder; monitoring the performance of insolvency professionals, IPAs and the IUs; passing directions to such entities to ensure compliance with the Code and the rules and regulations thereunder; and to call for information and records from such entities;

(d) conducting periodic studies, researching and auditing the performance of the functioning of insolvency professionals, IPAs and the IUs and specifying mechanisms for addressing grievances against such entities; and

(e) maintaining websites and such other universally accessible repositories of information as may be necessary, collecting and maintaining records relating to insolvency and bankruptcy cases and disseminating information relating to such cases.

The Insolvency and Bankruptcy Board of India operates under the general supervision of the Government of India, especially on questions of policy. The Government of India also has the right to supersede the Insolvency and Bankruptcy Board of India in emergencies or in the public interest and vest another person or persons with the powers of the Insolvency and Bankruptcy Board of India.

**Self-Assessment Exercise 1**

Briefly explain the basis of jurisdiction of the National Company Law Tribunals under the Indian insolvency regime for corporate and individual debtors.

**For commentary and feedback on self-assessment exercise 1, please see APPENDIX A**

[2] Insolvency and Bankruptcy Code, s 196.

## 5. SECURITY

### 5.1 Generally

Indian law provides for various forms of security interest and the type of security package varies according to the industry of the borrower and the nature of the loan. For example, most syndicated term loan lenders prefer senior ranking security over fixed assets of the company, whereas working capital lenders may prefer security over the current assets (receivables and stock-in-trade, etc) of the company. The most prevalent forms of security interests are as follows:

#### *5.1.1 Mortgage*

Under Indian law, mortgage has been defined as a transfer of an interest in immovable property to secure a debt or liability. While six forms of mortgages are provided for under Indian law, in practice the most prevalent forms are mortgage in the English form (which can create security over both the immovable property and the movable property associated with it) and mortgage by the deposit of title deeds (which covers only the immovable property). In a mortgage in the English form the mortgagor binds himself to repay the secured debt and transfers the property to the creditor subject to a condition that the property will be re-transferred once the secured debt is paid.

A mortgage in English form is considered the most robust form of security as in this form of mortgage a complete transfer of property to the creditor is made, subject to the right of redemption of the mortgagor. This is also considered the most robust due to the ease of enforcement – with a mortgage in English form, private remedies such as the appointment of a Receiver are available to the creditor. An equitable mortgage (mortgage by deposit of title deeds) entails deposit by the borrower of the original title deeds of the assets with the creditor or its trustee to secure the debt.

#### *5.1.2 Pledge*

A pledge is another popular form of security interest in India, particularly for shares in a company. A pledge is essentially delivery of possession of the charged assets to the creditor or its trustee or agent to secure a debt and the creditor has the right to sell the asset (without any court intervention) in the case of default after due notice to the pledgor and the proceeds are applied to discharge the debt. As a pledge requires actual possession, it is not an often-used form of security for operating assets of the company and is used more regularly for shares and similar financial assets. Notably, rights under the SARFAESI (described above) do not apply to the enforcement of a pledge.

#### *5.1.3 Charge (including in the form of hypothecation)*

A charge under Indian law gives the chargee the right to take possession, sell the charged asset and recover the debt secured. A charge can be created over movable or immovable property and is typically created under a hypothecation agreement. The person creating the charge continues to retain the right to use the charged asset.

Indian law also recognises retention of title clauses and provides for security in the form of a lien to unpaid sellers. In addition, in public-private partnership or Government concession projects, there is usually a contractual right given to the lenders to substitute the borrower (being the operator of the project) upon default with another operator of similar financial and operational strength. In some public-private partnership projects, the Government authority also assures the repayment of the debt (usually at 90% value of the debt pre-approved by the authority) taken by the operator for development of the project in case the concession from the Government is terminated due to a default by the borrower.

## 5.2 Security during insolvency

It is well established in Indian law that during the liquidation of a company, secured creditors can stay outside the process and enforce their security. Under the Code, however, while the company is in CIRP (that is, restructuring mode) the secured creditors are not permitted to enforce their security. Once the company enters liquidation after a failed CIRP (including upon failure of an approved resolution plan), secured creditors can realise their security outside the liquidation process and appropriate the proceeds net of their share of the CIRP costs that they may be required to bear, and their *pro rata* share of the workmen's dues which may rank at par with such secured creditor.

Having said that, during a liquidation under the Code, in cases where the secured creditor chooses to realise its security outside the liquidation process (which choice is required to be made within 30 days of commencement of liquidation, failing which the creditor is presumed to have relinquished its security to the liquidator), such creditor must, unless the proposed sale outside the liquidation process is pursuant to the SARFAESI or the RDB Act, inform the liquidator of the price at which such sale is proposed to take place. Within 21 days of such intimation, the liquidator may inform the secured creditor that another person is willing to buy such asset at a price higher than that intimated by the secured creditor. Upon such intimation by the liquidator, the secured creditor is required to sell the asset to such person. If the liquidator does not inform the secured creditor of such third person, or such third person does not buy the asset, the secured creditor will be free to sell the asset in any manner deemed fit but not below the price first intimated to the liquidator and not to a person disqualified under section 29A of the Code (see below).

In the insolvency resolution or bankruptcy of an individual under the Code, a secured creditor can participate only for the unsecured portion of its debt, or the creditor forfeits its right to enforce the security.

**Self-Assessment Exercise 2**

**Question 1**

Briefly explain the difference in right of a creditor under a mortgage in the English form and a pledge.

**Question 2**

Briefly explain the possibility of the enforcement of a security interest during the CIRP and after a failed CIRP.

**For commentary and feedback on self-assessment exercise 2, please see APPENDIX A**

## 6. INSOLVENCY SYSTEM

### 6.1 General

For the insolvency of companies and LLPs, the primary legislation is the Code which is stated to be a law consolidating all laws relating in corporate and personal insolvency in India. However, as the parts relating to the bankruptcy of individuals are not yet in operation other than for personal guarantors of the corporate debtors, the law relating to the bankruptcy of individuals and partnership firms other than such guarantors continues to be governed by the Presidency-Towns Act and the Provincial Act.

Furthermore, a dual regime operates in India for the insolvency of companies – one in the Code and another in the Companies Act, 2013 (the Companies Act). Before the Code, the Companies Act provided for the winding-up of all companies. When the Code came into effect, "inability to pay debts" as a ground for winding-up and the ability of creditors to file a winding up petition was omitted from the Companies Act and companies could be placed into CIRP in case of a payment default of INR 10,000,000 or above by the company. However, the Companies Act continues to provide for the winding-up of companies on various grounds, including non-compliance with mandatory laws, acting against the interest of the sovereignty and integrity of India or the security of the State and the "just and equitable" grounds.

The financial sector entities have their own winding-up process and general winding-up provisions do not apply to such companies. For example:

(a) commercial banks are governed by a separate statute being the Banking Regulation Act, 1949 which governs their winding-up;

(b) for some of the Government-owned banks, no provision for winding-up exists and the Government of India has been given special power to place them in winding-up in a manner deemed fit by the Government;

(c) for sector-specific banks such as National Housing Bank and National Bank for Agricultural and Rural Development, statutes regulating those institutions govern the winding-up of such banks in broad terms;

(d) the winding-up of non-banking financial companies is governed by Reserve Bank of India Act, 1934 and the RBI has the power to supervise the winding-up. It is relevant to note that

under section 227 of the Code, the Government has the power to designate certain financial sector entities whose insolvency resolution and liquidation will be governed by the Code. In exercising such power, on 18 November 2019 the Government notified that insolvency resolution and liquidation of all non-banking financial companies with an asset size of INR 5 billion and above will be governed by the Code in accordance with the procedure set out in Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules 2019 and the Code; and

(e) the winding-up of insurance companies is within the powers of the Government of India (for Government owned insurance companies) or as per the Insurance Act, 1938.

The insolvency system in India is generally considered to be creditor-friendly. However, the courts / tribunals exercising insolvency jurisdiction have also been supportive of wider stakeholders such as employees and workmen. For more details of the CIRP process in the Code, see below.

Companies and LLPs classified as micro, small and medium enterprises (MSME)[3] can also be resolved through a pre-pack insolvency resolution process. See paragraph 6.5.3.15 for further details.

## 6.2 Personal / consumer bankruptcy

As mentioned above, personal bankruptcy in India is governed by the Presidency-Towns Act and the Provincial Act (collectively referred to as the Bankruptcy Acts) other than in respect of personal guarantors to corporate debtors (personal guarantors) whose insolvency resolution and bankruptcy is governed by the Code.

Both the Bankruptcy Acts are substantially similar with minor differences and their jurisdiction is geographically divided. For debtors in the cities of Kolkata, Chennai and Mumbai, the Presidency-Towns Act applies and for debtors elsewhere within India, the Provincial Act applies. One important difference is that the Presidency-Towns Act requires that the debtor must ordinarily have resided or conducted business within the jurisdiction of the court within a year before the presentation of the bankruptcy petition, whereas the Provincial Act only requires that the debtor be "ordinarily resident" or must have conducted business within the jurisdiction of the court.

### *6.2.1 Who is a "debtor" under the Bankruptcy Acts?*

The Bankruptcy Acts only provide a bare definition of the term debtor to include a judgement debtor.[4] However, a "debtor" for the purposes of the Bankruptcy Acts means an individual or person (other than a company or corporation registered under any enactment) who is subject

[3] MSMEs are classified based on investment and annual turnover: (a) micro enterprise: INR 1,00,00,000 for investment and INR 5,00,00,000 for annual turnover, (b) small enterprise: INR 10,00,00,000 for investment and INR 50,00,00,000 for annual turnover, and (c) medium enterprise: INR 50,00,00,000 for investment and INR 250,00,00,000 for annual turnover.

[4] Presidency-Towns Act, s 2(b); Provincial Act, s 2(a).

to the laws of India, either by birth or natural allegiance, or by temporary residence.[5] Therefore, this definition can be said to include individuals and partnership firms in addition to other forms of associations. Accordingly, this definition does not include a foreigner and neither does it include a minor or a person otherwise incapable to entering into contracts.

### *6.2.2 Entering into bankruptcy*

Under the Bankruptcy Acts, a bankruptcy petition can be presented against a debtor if he or his agent (acting properly on behalf of the debtor) commits an "act of insolvency".[6] Upon commission of an "act of insolvency", the debtor himself or a creditor of the debtor may immediately make a petition to the relevant court for adjudication of the debtor as a bankrupt. It is relevant to note that an act of insolvency, once committed, cannot be purged by subsequent circumstances.

### *6.2.3 Acts of insolvency*

The acts of insolvency lie at the very foundation of the bankruptcy jurisdiction of courts in India. Both the Bankruptcy Acts provide for the same "acts of insolvency". The following have been specified as "acts of insolvency":[7]

(1) Transfer by the debtor, in India or elsewhere, of all or substantially all his property for the benefit of his creditors: Transfer by the debtor of all his assets for the benefit of all his creditors (and not some) is considered an act by the debtor of depriving himself of the power to carry on his trade and making the property available for distribution to the creditors. This may include a transfer executed by the debtor outside India as well. Additionally, if a creditor has consented to such a transfer, unless such consent was on the basis of a misrepresentation or was fraudulently obtained, such creditor cannot then take advantage of the act of insolvency by filing a bankruptcy petition.

(2) Transfer by the debtor of its property or any part thereof with intent to defeat or delay his creditors: As is evident, in this case, the transfer is not necessarily of all the assets of the debtor and the transfer is not for the benefit of the creditors generally, but may be for one creditor or any other third person, made with the intent to defraud or delay the creditors of the debtor. This clause will not be applicable if the intent was to delay a single creditor and not all creditors. Further, this clause is applicable only when the property or the proceeds from the sale of the property are not generally available to all the creditors.

(3) Transfer by the debtor of its property or any part thereof which would be void under any other enactment as a fraudulent conveyance: There are two conditions for this act of insolvency: (i) there should have been a transfer of property and (ii) such transfer would be void as a fraudulent conveyance under any other bankruptcy law applicable to the debtor providing for fraudulent conveyances.

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5 *Idem*, s 11; s 11.
6 *Idem*, s 12; s 7.
7 *Idem*, s 9; s 6.

(4) Departure or seclusion of the debtor**:** if the debtor, with an intent to defeat or delay his creditors, departs or remains out of the territories to which the Bankruptcy Acts apply, or otherwise absents himself from his usual place of residence, or secludes himself so as to deprive his creditors from communicating with him, such an act will be considered an act of insolvency.

(5) Sale or attachment of property in execution: the debtor also commits an act of insolvency if any of his property is sold, or, in the case of a petition under the Presidency-Towns Act, sold or attached for a period of at least 21 days in execution of a decree of any court for the payment of money by the debtor. However, if such sale or attachment has later been set aside for being bad in law, a bankruptcy petition cannot flow from such an act of insolvency.

(6) Petition by the debtor to be adjudged an insolvent: The presentation of a petition by the debtor to be adjudged insolvent, is considered to be an act of insolvency and continues to be so even if the petition is ultimately dismissed or withdrawn.

(7) Notice of suspension of payments: If the debtor gives a notice to any of his creditors that he has suspended or is about to suspend the payments of his debts, the debtor commits an act of insolvency. A notice under this provision need not be a written notice and must evidence a general intention to stop payments to each creditor.

(8) Imprisonment in execution of a money decree: Similar to (5) above, if the debtor is imprisoned in the execution of a money decree by a court, he commits an act of insolvency during the period of imprisonment (and not after release from prison).

(9) Non-compliance of an insolvency notice issued by a creditor: Under the Bankruptcy Acts, a debtor also commits an act of insolvency if he has not complied with a notice from any of its creditors (including its assignee), who has obtained a decree or order against the debtor for payment of money which decree or order has become final and execution has not been stayed. Such a notice will have to be prepared and served in a prescribed form and has to set out the amount due under the decree or order as well as the time for compliance, with the notice being not less than 30 days from the date of service. Usually compliance with such a notice will require the debtor to repay the debt claimed or provide security for the payment to the satisfaction of the creditor. However, the debtor also has the right to apply to the court for the setting aside of the insolvency notice received, on the grounds that: (a) he has a counter-claim or a set-off right against the creditor which is equal to or greater than the amount claimed in the insolvency notice; or (b) he is entitled under law to have the decree or order set aside by a competent court and that he has made such an application or the time to make such an application has not expired; or (c) the decree or order mentioned in the insolvency notice is not executable under law as on the date of the application.

### *6.2.4 Who can petition for bankruptcy?*

As mentioned above, upon commission of an act of insolvency, any creditor of the debtor or the debtor himself may petition the relevant court for adjudication as an insolvent.[8]

*6.2.4.1 Creditor's petition*[9]

A creditor (or two or more creditors jointly) can present an insolvency petition if:

(a) the debt (existing before the act of insolvency) owing by the debtor to the petitioning creditor(s) is equal to or greater than INR 500; and

(b) the debt is a liquidated sum payable either immediately or at some certain future time; and

(c) the act of insolvency on which the petition is based has occurred within 3 months before the presentation of the petition.

The petition has to be in writing in the prescribed form and must contain the details of the creditor's claim, the residential or business address of the debtor and the act of insolvency that has been committed. A secured creditor can present a petition only if he agrees to relinquish its security, or the petition only relates to the unsecured portion of the claim.

*6.2.4.2 Debtor's petition*[10]

A debtor can present a bankruptcy petition if:

(a) his debts amount of a minimum of INR 500; or

(b) the debtor is under arrest or imprisoned in execution of a decree or order for the payment of money; or

(c) an order of attachment in execution of such a decree has been made and is continuing.

It is relevant to note that an inability to pay debts is a condition precedent to a debtor's petition under the Provincial Act but not under the Presidency-Towns Act, which therefore requires a prima facie enquiry by the court that the debtor is unable to pay his debts. A debtor in respect of whom an earlier order of adjudication as a bankrupt was passed but no discharge was granted due to the failure of the debtor to apply for one, will need the court's leave to present another petition.

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8 *Idem*, s 10; s 7.
9 *Idem*, s 12; s 9.
10 *Idem*, s 14; s 10.

*6.2.4.3 Procedure at the hearing of the petition under the Presidency-Towns Act*

In respect of a creditor's petition,[11] at the hearing the creditor must provide proof of its debt and of the act of insolvency committed by the debtor. If these facts are proved, the court makes an order adjudging the debtor as insolvent (Order of Adjudication). However, if the debtor satisfies the court that he is able to pay his debts, or that he has not committed an act of insolvency, or for other sufficient cause (such as there being no prospect of any assets existing or coming into the hands of the debtor, which will depend on the facts of the case) no Order of Adjudication will be made and the court may dismiss the petition.

If the debtor denies that he is indebted to the petitioning creditor, the court may, on providing such security as the court may require, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for conducting a trial on the question relating to the debt.

In respect of a debtor's petition,[12] the debtor must allege that he is unable to pay his debts and if he satisfies the court of such inability, the court will issue an Order of Adjudication unless it is seen to be an abuse of process. If the debtor fails to satisfy the court, the petition must be dismissed.

*6.2.4.4 Procedure at the hearing of the Petition under the Provincial Act*

An insolvency petition under the Provincial Act, if properly presented, is admitted by the court and then a date is fixed for the hearing of the petition. Notice of such hearing is given to the debtor and other creditors.[13]

At the hearing:

(a) the applicant will have to prove that it is entitled to present the petition;

(b) the applicant creditor, if the debtor does not appear at the hearing, will have to prove that the debtor has been served with the notice of order admitting the petition; and

(c) the applicant will have to prove that the debtor has committed an act of insolvency.

If the court is satisfied regarding the above issues, the court must make an Order of Adjudication. If not, the court will dismiss the petition. The court also has the power to order examination of the debtor at this stage.

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11 Presidency-Towns Act, s 13.
12 *Idem*, s 15.
13 Provincial Act, s 18.

*6.2.4.5 Interim proceedings*

Under the Presidency-Towns Act, the court may at its discretion appoint the Official Assignee to be the interim receiver of the debtor's property. The property does not vest in the interim receiver but is placed in the custody of the interim receiver for preservation.[14]

Interim powers under the Provincial Act are wider.[15] At the time of admission of the petition but before the Order of Adjudication, the court may, at its discretion, appoint an interim receiver to take immediate possession of the debtor's assets or a part thereof. The court also has the power to order attachment of the assets of the debtor for the purpose of preserving the assets. Further, if the debtor is imprisoned in respect of the execution of a decree or order for the payment of money, at the time of making the Order of Adjudication the court may order his release on such terms and security as it deems fit.

### *6.2.5 Effect of an Order of Adjudication*

*6.2.5.1 Vesting of the property of the debtor*

Upon the making of an Order of Adjudication, all the property of the insolvent, wherever situated, vests automatically in (i) under the Presidency-towns Act, the Official Assignee[16] from the date of the relevant act of insolvency,[17] and (ii) under the Provincial Act, the court or the Receiver[18] from the date of presentation of insolvency petition, and becomes divisible among the creditors of the insolvent.[19] It is relevant to note that the Order of Adjudication and vesting of property is stated to operate against all assets of the debtor, wherever situate. However, vesting of the property of a debtor situated in a country other than India, will be subject to the rules of private international law and cross-border insolvency rules prevalent in that country.

A consequence of such vesting is that after the Order of Adjudication, the debtor is not entitled to deal with or enter into transactions in respect of his property and all such transactions will be void as against the Official Assignee or the Receiver.

*6.2.5.2 Property of the debtor*

Property of the debtor means the property that is divisible amongst his creditors. Under both the Bankruptcy Acts, property held by the insolvent in trust for the benefit of another person is not divisible amongst his own creditors.[20] Further, tools of trade and the necessary wearing apparel, bedding, cooking vessels and furniture required for himself, his wife and his children, not exceeding a total amount of INR 300 in value, is not divisible amongst creditors.[21] The Provincial Act also provides for a wider category of property which is not divisible amongst

[14] Presidency-Towns Act, s 16.
[15] Provincial Act, ss 20 and 21.
[16] A Government-appointed official acting in relation to the Presidency-Towns Act.
[17] Presidency-Towns Act, s 17.
[18] Appointed by the court and, until appointed, the court performs these functions.
[19] Provincial Act, s 28.
[20] Presidency-Towns Act, s 52; Provincial Act, s 28.
[21] Presidency-Towns Act, s 52.

creditors, namely personal ornaments of the wife which cannot be parted with due to religious usage, the house of an agriculturist which is occupied for the purpose of agriculture and books of account. [22]

Other than excluded property, all the property that belongs to the debtor at the time of the presentation of the petition for insolvency, or acquired before his discharge, vests in the Official Assignee or the Receiver, as the case may be. It should be noted that the vesting of after-acquired property (that is, property acquired between the Order of Adjudication and the order of discharge, including personal earnings) in the Official Assignee is not automatic under the Presidency-towns Act and the Official Assignee will need to seek a court order in order to ensure that such property vests in him.[23] This includes unexecuted contracts, the benefit or burden of which falls on the Official Assignee or the Receiver. However, contracts that require the personal skills of the debtor (for example, a contract requiring the debtor to paint a picture) are not assigned. It is also relevant to note that goods in possession of the debtor at the time of the commencement of insolvency, whether or not such property is owned by the debtor but which he claims to own, will be treated the same as any other property of the debtor.

Also, where a court has ordered the sale of some of debtor's assets in execution of a decree but receives notice that the debtor has been adjudged insolvent (in cases governed by the Presidency-towns Act) or an insolvency petition has been admitted against the debtor (in cases governed by the Provincial Act), the court must order the property to be delivered to the Official Assignee or the Receiver, as the case may be. The costs of such execution or the law suit will then have a first charge on the proceeds of the property if sold by the Official Assignee or the Receiver.[24]

*6.2.5.3 Bar on commencement and continuance of suits and other proceedings*

Upon issuance of an Order of Adjudication, no suits or proceedings for recovery of a provable debt can be instituted by a creditor against the debtor during the insolvency proceedings, except with the leave of the court. However, this moratorium does not apply to realisations by a secured creditor of its security.[25] Further, the moratorium relates back to the date of presentation of the petition. The granting of such leave, which is required prior to institution of such suit or proceeding, is at the discretion of the court. Also, in the event any suit or proceeding is pending in any court against the debtor against whom an Order of Adjudication has been passed, such court is required to either stay the suit / proceeding or permit it to continue on terms and conditions specified by the court. This moratorium covers both the suits and proceedings against the debtor himself and against his property.

*6.2.5.4 Disqualifications of the insolvent*

Upon adjudication as an insolvent, the debtor is, until discharged or passing of an order annulling the Order of Adjudication, disqualified from being appointed or acting as a

22 Provincial Act, s 28.
23 Presidency-Towns Act, s 52(2).
24 Presidency-Towns Act, s 54; Provincial Act, s 52.
25 *Idem*, s 17; s 28(2) and (6).

Magistrate, or being elected to any office of a local authority which is an elected post or to which no salary is attached, or being elected or sitting or voting as a member of any local authority. These disqualifications cease once the debtor is discharged or the Order of Adjudication is annulled by a competent court (see below). [26]

### *6.2.6 Proceedings after the Order of Adjudication*

#### *6.2.6.1 Publication of the Order of Adjudication*

A notice of the Order of Adjudication made under the Bankruptcy Acts is published in the Official Gazette stating the name, address and description of the debtor along with the date of the petition and the date of adjudication.[27]

#### *6.2.6.2 Assistance to the officeholder*

The Presidency-Towns Act requires that the debtor shall provide to the Official Assignee a schedule of his affairs in the form provided for in the rules.[28] Under the Provincial Act, the scope of the assistance required to be provided to the Receiver is wider and the debtor is required to provide assistance in the fullest sense in the realisation of his property and the distribution of the proceeds to the creditors.[29]

#### *6.2.6.3 Protection orders*

Under both the Bankruptcy Acts (subject to compliance with his obligations) an insolvent is entitled to seek a protection order against any arrest in execution of a money decree or in the recovery of debts, which can be granted by the court at its discretion.[30]

#### *6.2.6.4 Proof of debts*

Both the Bankruptcy Acts provide for proving of debts after the Order of Adjudication.

Schedule II of the Presidency-Towns Act provides detailed rules as to proving debts. A creditor is permitted to prove its debt with the Official Assignee as soon as possible after the Order of Adjudication. The Official Assignee, in his administrative capacity, admits or rejects the claim filed by the creditor. The decision of the Official Assignee can be challenged by the creditor before the relevant bankruptcy court.

Under the Provincial Act, the creditors prove their debts by sending their proof of claims to the court along with the statement of account and other documents to substantiate the debt and the court, by an order, makes a schedule / list of creditors on this basis. A creditor who has not

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[26] *Idem*, s 103A; s 73.
[27] *Idem*, s 20; s 30.
[28] Presidency-Towns Act, s 24.
[29] Provincial Act, s 28(1).
[30] Presidency-Towns Act, s 25; Provincial Act, s 31.

proved its debt at the time of framing of the schedule, may prove its debt at any time until the debtor is discharged.[31]

Both the Official Assignee and the court have the right to expunge or reduce a claim if any additional information has been found that justifies such an action. Under the Provincial Act, an application for revising the debt claim may also be made by the Receiver and the court may expunge or reduce the claim admitted on the basis of such a request.[32]

A secured creditor may prove his debt under the Bankruptcy Acts either for the balance remaining on his claim after realising its security, or for the amount that the security does not cover on the basis of an assessment of the value of the security for the entire debt, in which case he forfeits his right to enforce the security. If his claim is proved for entire debt, the secured assets become available for the general benefit of all the creditors of the debtor. The creditor is permitted to revise the value of its security if it is subsequently discovered that the value assessed was incorrect.[33]

Both the Bankruptcy Acts provide that, where there have been mutual dealings between the debtor and the creditor who is proving for his debt, set-off of the mutual obligations is permitted.[34]

It is relevant to note that debts (including future or contingent debts), the value of which are incapable of being fairly estimated and claims for unliquidated damages for any reason other than on account of breach of contract or breach of trust, are not provable debts under the Bankruptcy Acts. Further, debts or liabilities arising out of an obligation incurred before the Order of Adjudication and to which the debtor may become subject after the Order of Adjudication but before discharge, are not provable. Furthermore, the Presidency-Towns Act also provides that any person having notice of the presentation of an insolvency petition under that Act shall not prove for any debt or liability incurred after the date of such notice (the Provincial Act does not contain such a provision).[35] Also, as a matter of general principle, debts which are not capable of being enforced cannot be proved (for example, time-barred debts and illegal debts).

*6.2.6.5 Public and private examination, arrest*

Both the Bankruptcy Acts provide for the examination of any person suspected to be in possession of the assets of the debtor upon application by any creditor or the officeholder.[36] In addition, the Presidency-Towns Act provides for the public examination of the debtor (by creditors who have proved their debt) in order to investigate of the affairs of the debtor.[37]

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31 Provincial Act, s 49.
32 *Idem*, s 50.
33 Presidency-Towns Act, Sch II (rr 9 to 17); Provincial Act, s 47.
34 *Idem*, s 47; s 46.
35 Presidency-Towns Act, s 46(2).
36 *Idem*, s 36; Provincial Act, s 59A.
37 Presidency-Towns Act, s 27.

Further, the insolvency court also has the power under the Bankruptcy Acts to order arrest of the debtor if it believes that the debtor is absconding, or is likely to avoid the provisions of the laws.[38]

### *6.2.7 Annulment of the Order of Adjudication*

The Order of Adjudication may be annulled by the insolvency courts in the following scenarios:[39]

(a) where, in the opinion of the court, the debtor ought not have been adjudged as an insolvent (such as an Order of Adjudication without jurisdiction);

(b) where it is proved, to the satisfaction of the court, that after the Order of Adjudication all debts of the debtor have been paid in full; or

(c) where an Order of Adjudication was made on a petition, the filing of which required leave of the court (but was not obtained).

An application for annulment on the above grounds can be made by the debtor, any creditor, or any other person interested in the debtor's property (such as a mortgagee).

In addition, the court also has the power to annul an Order of Adjudication:

(a) where concurrent insolvency proceedings are pending in another court in respect of the same debtor and it may be more convenient for the other court to distribute the assets of the debtor;[40]

(b) where the court approves a proposal of composition or scheme in respect of the debts of the debtor in accordance with the Bankruptcy Acts;[41] or

(c) if the debtor does not apply for his discharge or fails to appear for the hearing scheduled by the court to hear the application for discharge.[42]

The Presidency-Towns Act gives the court the power to annul, upon presentation of a petition in respect of a debtor, any Order of Adjudication made in respect of the same debtor by a subordinate court.[43] It is also notable that under the Provincial Act (and upon satisfaction of the conditions specified) the court has no discretion to refuse an order of annulment, whereas under the Presidency-Towns Act, such discretion exists and an order of annulment can be refused in the interest of commercial and public morality. There is no provision for automatic annulment.

An order of annulment re-vests the debtor's unsold property in the debtor, or in any other person as directed by the court, subject to the sale and dispositions already made by the Official

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38 *Idem*, s 34; Provincial Act, s 32.
39 *Idem*, s 21; s 35.
40 *Idem*, s 22; s 36.
41 *Idem*, s 30; s 39.
42 *Idem*, s 41; s 43.
43 Presidency-Towns Act, s 18A.

Assignee / court / Receiver, which continue to be valid.[44] A notice of the order annulling an Order of Adjudication is published in the Official Gazette.

### *6.2.8 Post-adjudication compositions and schemes of arrangement*

Under both the Bankruptcy Acts, the debtor is permitted to submit a proposal of composition or a proposal for a scheme of arrangement of his affairs under the Provincial Act to the court and under the Presidency-Towns Act to the Official Assignee. Under the Provincial Act, the court fixes a date for consideration of the proposal and sends a notice to all creditors who have filed a proof of debt. Under the Presidency-Towns Act, the Official Assignee sends a copy of the proposal along with his report to all the creditors and sends a notice of meeting of the creditors.[45]

At the meeting of creditors, if a majority in number and three-fourths in value of all creditors resolve to accept the proposal, the proposal is approved. Creditors can vote through proxy or an authorised representative.

Once approved by the creditors, the proposal is filed with the court and a date is fixed for approval of the proposal. At the hearing, any creditor who has proved his debt may be heard in opposition to the proposal, notwithstanding the outcome of any voting at the meeting. At this hearing, the court also receives a report on the conduct of the debtor from the Official Assignee or the Receiver, as the case may be.

Where the court is of the opinion that the terms of the proposal are not reasonable, or are not to the benefit the general body of creditors, or the proposal does not provide for payment in priority of the priority debts, the court may refuse to approve the proposal. In addition, under the Presidency-Towns Act, if the proposal relates to a case where the court is required to refuse the discharge of the debtor, the court will reject the proposal.

As mentioned above, once the proposal is approved by the court, the Order of Adjudication stands annulled. If the approved scheme or composition is breached by the debtor, the court can adjudicate the debtor as an insolvent again.[46]

### *6.2.9 Discharge of the insolvent*

Under both the Bankruptcy Acts, the debtor can apply to the court for an order of discharge at any time after the Order of Adjudication.[47] An order of discharge releases the debtor from all its prior debts other than debts due to the Government, debt incurred by fraud or fraudulent breach of trust or liability under an order of maintenance for a wife and children.[48] This enables the debtor to once again indulge in business activities free from the prior debts. Upon an application, the court is required to fix a day for hearing of the application. Under the

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44 *Idem*, s 23(1); Provincial Act, s 37(1).
45 *Idem*, s 28; s 38.
46 *Idem*, s 29; s 38.
47 *Idem*, s 38; s 41.
48 *Idem*, s 45; s 44.

Presidency-Towns Act, an application for an order of discharge cannot be made until the public examination of the debtor has been completed.[49] At the hearing for discharge, the court hears the Official Assignee and all the creditors.

Upon conclusion of the hearing, the court has an absolute discretion to refuse the discharge, grant an unconditional discharge, suspend the discharge for a specified period (or under the Presidency-Towns Act until a 25% dividend has been paid to the creditors), or grant a conditional discharge.[50] Further, under the Presidency-Towns Act, the court also has the power to require the debtor to agree to a decree in favour of the Official Assignee that the balance of the unpaid dues will be satisfied out of the debtor's future earnings or after-acquired property. Once the discharge has been rejected, the debtor will have limited routes to renew his application for a discharge.

Further, the court is bound to refuse the discharge if any of the following facts exists:[51]

(a) where the assets of the debtor are not at least equal to: (a) under the Presidency-Towns Act, 50% of the unsecured liabilities of the debtor; or (b) under the Provincial Act, 25% of the unsecured liabilities of the debtor, unless the debtor satisfies the court that the value of such assets is due to circumstances for which he cannot be held responsible;

(b) where the debtor has failed to maintain books of account that are usual and proper in the business carried on by him and, therefore, the financial position of the debtor for a period of three years preceding the insolvency is not sufficiently disclosed;

(c) where the debtor has continued to trade after knowledge of his insolvency; this can also be read to be a duty on the debtor to file for insolvency once he becomes aware that he is no longer able to service his debts;

(d) where the debtor has contracted a debt provable in insolvency at the time when he had a reasonable and probable ground of expectation that he will not be able to repay such a debt. The burden of proof that such circumstance did not exist lies on the debtor;

(e) where the debtor has failed to satisfactorily account for loss of assets or for any deficiency of assets to meet his liabilities;

(f) where the debtor has contributed to or brought upon his insolvency by rash and hazardous speculations, unjustifiable extravagance in living, culpable neglect of his business affairs, or gambling;

(g) where the debtor has given an undue preference to a creditor within the period of three months preceding his insolvency;

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49 Presidency-Towns Act, s 38.
50 *Idem*, ss 38 and 39; Provincial Act, s 41.
51 *Idem*, s 39(1); s 42(1).

(h) in the case of the Presidency-Towns Act, where the debtor has put any of his creditors to unnecessary expense by a frivolous of vexatious defence to any suit properly brought against him, or where the debtor has incurred within three months of the presentation of the insolvency petition against him an unjustifiable expense by bringing a frivolous or vexatious suit;

(i) where the debtor has concealed his books or property or has been guilty of any other fraud or fraudulent conduct; or

(j) in the case of the Provincial Act, where the debtor has previously been adjudged an insolvent, or has made a composition or arrangement with his creditors.

### *6.2.10 Realisation and distribution of the property of the debtor*

#### *6.2.10.1 Realisation and distribution of property by Official Assignee*

The Official Assignee is required to take possession of the property of the debtor, including any books, deeds or documents relating to the property. While doing so, the Official Assignee can require any banker, attorney or agent of the debtor to deliver any monies or securities of the debtor in their possession and such person will be required to comply with such a request.[52] The Official Assignee can also seize the property on a warrant, or examine third parties to ascertain the location of property.[53]

Thereafter, the Official Assignee is authorised to sell the property of the debtor without any court order. The sale may be by public auction or private treaty as such sale is by the "owner" of the property and not by court. The Official Assignee may conduct the business of the debtor, employ a legal practitioner to help him, or mortgage the debtor's property only with the court's approval. The Official Assignee can also prosecute suits and legal proceedings in relation to the property.[54]

Under the Presidency-Towns Act, the first dividend has to be declared within one year after the Order of Adjudication was issued, unless the Official Assignee satisfies the court that there are sufficient reasons to postpone the declaration of the dividend. Subsequent dividends must be declared and paid at intervals of six months unless there is a sufficient reason for the delay. The final dividend is required to be declared and paid when in the opinion of the Official Assignee, all the property of the debtor has been realised or so much property has been realised as can be realised without protracting the insolvency. Notices of declaration of a dividend must be sent to all creditors who have filed a proof of debt before the Official Assignee.[55]

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[52] Presidency-Towns Act, s 58.
[53] *Idem*, s 59.
[54] *Idem*, s 68.
[55] *Idem*, s 69.

*6.2.10.2 Realisation and distribution of the property by the Receiver*

Under the Provincial Act, the Receiver, once appointed, has the power to take possession of all the property of the debtor and apply to court for delivery of any property that has not yet been delivered by any person.[56] Thereafter, the Receiver sells the property and calculates and distributes the dividend for the creditors.

Not timelines have been prescribed for the first or subsequent dividends. The final dividend is required to be declared and paid when, in the opinion of the court, all the property of the debtor has been realised, or so much property has been realised as can be realised without protracting the insolvency. A notice of the declaration of a dividend must be sent to all creditors who have filed a proof of debt before the court.[57]

Under both Bankruptcy Acts, the debtor is entitled to the surplus remaining after payment in full of his creditors together with interest.

*6.2.10.3 Distribution and priority of debts*[58]

Under both the Bankruptcy Acts, the first priority is given to the expenses of administration of the debtor's estate. Thereafter, all debts due to the Government or to any local authority and salary and wages of a clerk, servant or labourer for the period of four months for rendering services to the debtor (not exceeding in the case of Presidency-Towns Act, INR 300 for each such clerk and INR 100 for each such servant or labourer and in the case of the Provincial Act, not exceeding INR 20 in total), is given priority. Further under the Presidency-Towns Act, rent due to a landlord not exceeding one month's rent is given the same priority as the aforementioned dues. All the aforementioned preferential debts rank equally among themselves and are to be paid in full, unless the assets are insufficient to meet them, in which case they are to be paid in equal proportion among themselves.

After all the preferential debts have been paid in full, all debts of the debtor entered in the schedule are to be paid rateably from the proceeds of realisation of assets without any preference.

### *6.2.11 Adjustment of antecedent transactions*

*6.2.11.1 Avoidance of voluntary transfers*

Both the Bankruptcy Acts provide for avoidance of transfers made by the debtor other than in consideration of marriage or to a *bona fide* purchaser for value. Under the Presidency-Towns Act, the transaction is *ipso facto* void against the Official Assignee if the debtor is adjudged insolvent within two years of the transfer.[59]

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[56] Provincial Act, s 56(3).
[57] *Idem*, ss 62 and 64.
[58] Presidency-Towns Act, s 49; Provincial Act, s 61.
[59] *Idem*, s 55; s 53.

Under the Provincial Act, the transfer is voidable as against the receiver and may be annulled by the court on application of the receiver or of a creditor, who has proved his debt, provided the court's approval has been taken by the creditor. This section applies when the debtor is adjudged insolvent on a petition presented within two years of the transfer.

*6.2.11.2 Avoidance of undue preferences*

Both the Bankruptcy Acts provide for the avoidance of a preference given to a creditor by the debtor within the period of three months of presenting the insolvency petition where the debtor has been adjudged insolvent. The conditions for such avoidance are as follows:[60]

(a) the debtor must at the date of transfer or payment be unable to pay from his own money his debts as they become due;

(b) the transfer or payment must be in favour of a creditor;

(c) the transfer or payment in fact prefers one creditor over others; and

(d) the transfer or payment must have been made with a view of giving such creditors a preference over other creditors.

An application for such avoidance would have to be made by the Official Assignee or the Receiver. Creditors are also permitted to make such applications.

*6.2.11.3 Disclaimer of onerous property*

Only the Presidency-Towns Act provides for a disclaimer of onerous property.[61] The Official Assignee has the power to disclaim any onerous property of the debtor such as land of any tenure burdened with onerous covenants, shares or stocks in companies, unprofitable contracts, or any other property that is unsaleable or not readily saleable by reasons of binding onerous covenants. The Official Assignee has 12 months to disclaim any onerous property; however, any person interested in the property may call on the Official Assignee to decide whether he will disclaim or not and if the Official Assignee does not give notice within 28 days (or an extended time permitted by the court) that he disclaims the property, he will not be entitled to disclaim the property thereafter.[62] Any person injured by a disclaimer is considered a creditor of the debtor to the amount of the injury and is permitted to prove such amount before the Official Assignee.

The Bankruptcy Acts protect the following transactions, provided the transactions took place before the Order of Adjudication and the counterparty had no knowledge of the impending insolvency:[63]

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60 *Idem*, s 56; s 54.
61 Presidency-Towns Act, s 62.
62 *Idem*, s 64.
63 *Idem*, s 57; Provincial Act, s 55.

(a) any payment by the debtor to any of his creditors;

(b) any payment or delivery to the insolvent;

(c) any transfer by the insolvent for valuable consideration; and

(d) any contract or dealing with the insolvent for valuable consideration.

### *6.2.12 Small estates*

Both the Bankruptcy Acts provide for a simplified procedure for summary administration of small estates.

#### *6.2.12.1 Presidency-Towns Act*

This summary procedure applies if the property of the debtor does not exceed INR 3,000 in value.[64] Further, the procedure set out above applies with the following modifications:

(a) no appeal lies against the order of the court except with leave of the court;

(b) no examination of the debtor is held except when requested by a creditor or the Official Assignee;

(c) the estate must be distributed in a single dividend; and

(d) such other modifications as may be made in the rules to save expense.

The discharge procedure cannot be modified.

#### *6.2.12.2 Provincial Act*

This summary procedure applies if the property of the debtor does not exceed INR 500 in value.[65] Further, the procedure set out above applies with the following modifications:

(a) no notice required in the Official Gazette;

(b) on administration of the petition by the debtor, the property must vest in the court as a receiver;

(c) it is not necessary for the court to frame a schedule and the debt and assets can be determined by the insolvency court by an order;

[64] Presidency-Towns Act, s 106.
[65] Provincial Act, s 74.

(d) the estate must be realised in all reasonable haste and be distributed in a single dividend; and

(e) such other modifications as may be made in the rules to save expense.

### *6.2.13 Official Assignees under the Presidency-Towns Act*

The Official Assignee is appointed by the Chief Justice of the High Court in the jurisdiction where the act applies.[66] He performs many duties in respect to insolvencies, such as the realisation and distribution of the debtor's property, investigating the conduct of the insolvent and furnishing a report to the court and furnishing a list of creditors to the court or the other creditors. The remuneration of the Official Assignee is provided in the relevant rules made by the States in which they are appointed. The Official Assignee is required to have regard to the directions of the creditors as passed by resolution at a meeting.

### *6.2.14 Receivers under the Provincial Act*

Receivers for the purposes of the Provincial Act are appointed by the insolvency court at the time of passing of the Order of Adjudication, or at any time thereafter. Official Receivers are appointed by the relevant State Governments to act within local limits.[67] Usually such Official Receivers are appointed by the insolvency courts as receivers in specific cases.

### *6.2.15 Appeals and review*

#### *6.2.15.1 Presidency-Towns Act*

An Insolvency court has the widest power to review, rescind or vary any order made by it.[68] Further, appeals from the orders of the court officers who may be exercising some of the delegated powers of the insolvency court, lie with the insolvency court.[69] The orders of the insolvency court are appealable in the same manner as any other order of the civil courts.[70] Any person aggrieved by any act or decision of the Official Assignee may appeal to the court.

#### *6.2.15.2 Provincial Act*

Any order of a court subordinate to the District Court can be appealed against in the District Court within 30 days of the order, and the order of the District Court can be appealed against in the High Court within 90 days of the order. In some cases, appeal to the High Court may require the leave of the District Court.[71]

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66 Presidency-Towns Act, s 77.
67 Provincial Act, s 56(1).
68 Presidency-Towns Act, s 8(1).
69 *Idem*, s 8(2).
70 *Idem*, s 8(2).
71 Provincial Act, s 75s.

### *6.2.16 Insolvency and Bankruptcy Code, 2016*

As mentioned above, the Code consolidates the insolvency regime for individuals and partnership firms. This regime is presently in force only in respect of personal guarantors. A summary of the regime under the Code and allied rules and regulations – being the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and Insolvency and Bankruptcy Board of India (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 for personal insolvency – is set out below.

#### *6.2.16.1 Who is a "debtor" under the Code?*

Similar to the Bankruptcy Acts, the Code defines "debtor" in a wide fashion to include a judgement debtor.[72] However, at present the Code only governs the insolvency resolution and bankruptcy of personal guarantors and, therefore, a reference to "debtor" in paragraph 6.2.16 is a reference to a Personal Guarantor.

#### *6.2.16.2 Who can petition for IRP?*

The Code provides for the triggering of an insolvency resolution process (IRP) for debtors upon default in the amount of INR 1,000 or more in the payment of his debts.[73] Upon such default, the debtor can either personally or through a resolution professional (being an insolvency professional) apply to initiate the IRP by submitting an application to the relevant court.[74] A creditor can, either personally or through a resolution professional (being an insolvency professional), also file an application for the initiation of the IRP of a debtor after serving a 14-day demand (which needs to be in a prescribed form) on the debtor.[75] There is no obligation on the debtor to file for IRP upon a default to creditors.

#### *6.2.16.3 Appointment of a resolution professional and entering into IRP*

Within seven days of the filing of an application, when the application is filed through a resolution professional, the court has to seek a confirmation from the Board, regarding any pending disciplinary proceedings and if such disciplinary proceedings are pending for an alternate nominee. The Board has to provide a confirmation or alternate nomination within seven days of receipt of direction. If the application is made by the debtor or a creditor by itself, a nomination is sought from the Board within seven days of the filing of the application and the nomination is required to be made within 10 days of receipt of direction. Upon such

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72 Insolvency and Bankruptcy Code, s 79 (12).
73 *Idem*, s 78.
74 *Idem*, s 94.
75 *Idem*, s 95.

confirmation or nomination, the court makes an order of appointment of the resolution professional.[76]

On being appointed, the resolution professional is provided with a copy of the application and has to submit his recommendation of admission or rejection of the application to the court within 10 days of appointment.[77] The court, upon review of the resolution professional's report, either admits or rejects the application within 14 days of submission of the report. If an order of admission is issued, the court also has the power to issue directions in relation to negotiation of a repayment plan (see below) between the debtor and the creditors. In case the court is rejecting the application, the court can observe whether the application was made with an intent to defraud the creditors or the resolution professional.[78]

*6.2.16.4 The relevant court*

Under the Code, the jurisdiction to deal with the IRP of individuals and partnership firms have been conferred on the DRT having jurisdiction over the place where the debtor actually and voluntarily resides or carries on business and works for gain. It is relevant to note that, in the event of a default in respect of a guarantee issued by the debtor to a company or an LLP, the National Company Law Tribunal having jurisdiction over the company or the LLP will have jurisdiction to deal with the IRP application of the debtor.[79]

Accordingly, reference to "court" in paragraph 6.2.16 means a reference to either the DRT or the National Company Law Tribunal, as applicable.

*6.2.16.5 Moratorium*

Upon filing such an application, a moratorium is declared in relation to all creditor actions and continues until the date of the admission of such application.[80] Once the application is admitted, a moratorium is declared on all the creditor actions and disposal of assets by the debtor and continues for a period of six months, beginning on the date of admission of the application.[81] Secured creditors can file a proof of claim only in respect of the unsecured portion of their debt, or they forfeit their security.

*6.2.16.6 Proof of claims*

The court is required to issue a public notice inviting claims from all creditors of the debtor, which notice is required to be published in leading newspapers, the website of the court and also affixed in the premises of the court.[82] The proof of claims are submitted to the resolution professional. Secured creditors can file a proof of claim only in respect of the unsecured portion

[76] *Idem*, s 97.
[77] *Idem,* s 99.
[78] *Idem,* s 100.
[79] *Idem*, s 179 read with s 60.
[80] *Idem*, s 96.
[81] *Idem*, s 101.
[82] *Idem*, s 102.

of their debt, or they forfeit their security. The resolution professional prepares a list of creditors within 30 days of the public notice.

*6.2.16.7 Repayment plan*

As part of the IRP, the debtor, in consultation with the resolution professional, prepares a repayment plan containing a proposal to the creditors for the restructuring of his debts or affairs.[83]

The structure of the repayment plan has not been prescribed and it may provide for the resolution professional to carry on the debtor's business, or trade or realise his assets. However, as per Regulation 17 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, the repayment plan must provide justification for the preparation of the repayment plan and reasons why creditors should agree to it, for payment of the fees of the resolution professional as well as certain other specified matters such as: (i) term of the repayment plan and implementation schedule, (ii) a minimum budget for reasonable expenses of the debtor and his dependants (not exceeding 90% of the realisable income), and (iii) variation of the terms of onerous contracts.

The resolution professional submits the proposal to the court, along with his report on the proposal, a statement of affairs of the debtor, and his opinion as to whether a meeting of the creditors should be called.[84] A meeting of the creditors is then conducted to discuss and vote on the repayment plan and a report of such meeting is then submitted to the court. If a plan approved by three-fourths of the non-related creditors is submitted to the court and the court finds the plan in order, it will pass an order on the repayment plan which becomes effective and is binding on all the creditors.[85] The resolution professional is required to supervise the implementation of the approved repayment plan. The debtor can seek a discharge order from the court on the basis of the repayment plan. Secured creditors can vote on the repayment plan only in only in respect of the unsecured portion of their debt or else they forfeit their right to enforce the security and can enforce it only in accordance with the terms of the repayment plan.

*6.2.16.8 Order of adjudication as a bankrupt*

If the court rejects an IRP application on the basis of the report of the resolution professional that avers the application was made with the intention to defraud creditors or the resolution professional, or where the court rejects the repayment plan submitted by the debtor, or where the court has passed an order that the approved repayment plan could not implemented completely, the Code allows a debtor or a creditor to make an application for a bankruptcy order from the court where an insolvency professional may be nominated.[86] Such an application needs to be filed within three months of the order of the court on the basis of which the

[83] *Idem*, s 105.
[84] *Idem*, s 106.
[85] *Idem*, ss 114 and 115.
[86] *Idem*, s 121.

application has been filed. Upon such an application, an interim- moratorium is declared prohibiting all actions against the properties of the debtor in respect of his debts.[87]

Thereafter, the court passes a bankruptcy order and appoints the nominated insolvency professional or another insolvency professional as the bankruptcy trustee (who can be replaced by the court). Within seven days of such order, the bankrupt is required to provide a statement of his financial position to the bankruptcy trustee. On passing of the bankruptcy order, the estate of the bankrupt vests in the bankruptcy trustee, public notices are sent to creditors inviting claims, a list of creditors is prepared by the bankruptcy trustee and a meeting of creditors is conducted where a committee of creditors is constituted.[88]

The bankruptcy trustee administers and distributes the assets of the bankrupt as per the provisions of the Code. For undertaking actions such as instituting or defending suits or proceedings relating to the bankrupt's property, encumbering any property to raise money, making compromises and arrangements as may be expedient, the prior consent of the committee of creditors is required.[89]

It is relevant to note that the proceeds of the assets are to be applied:[90]

(1) firstly to the fees of the bankruptcy trustee which is fixed by the committee of creditors and, if not so fixed, paid as a percentage of the amount realised from the estate of the bankrupt;

(2) secondly to workmen's dues for the 24 months preceding the bankruptcy order and debts due to the secured creditors rateably;

(3) thirdly, wages and unpaid dues of employees for the 12 months preceding the bankruptcy;

(4) fourthly, amounts due to the State and Central Government for the two-year period preceding the bankruptcy; and

(5) lastly, to other debts and dues of the bankrupt.

The bankruptcy trustee is required to submit progress reports to the court and the committee of creditors every quarter and a final report upon completion of the administration and distribution of the assets of the bankrupt.

*6.2.16.9 Disqualifications of the bankrupt*

The bankrupt is subject to various disqualifications from the date of bankruptcy order until the order of discharge or modification or recall of bankruptcy, including disqualification from:[91]

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87 *Idem,* s. 124 (1)(a).
88 *Idem*, ss 128, 130 and 134.
89 *Idem,* s. 153.
90 *Idem*, s 178.
91 *Idem*, s 140.

(1) being appointed as a trustee or a public servant; and

(2) being elected to a public office or elected or voting as a member of a local authority.

In addition, during that period, the bankrupt is also restricted from:

(1) acting as a director or promoter of any company;

(2) without the previous sanction of the bankruptcy trustee, encumbering his assets or taking further debt;

(3) enter into any partnerships or financial or commercial transactions without informing the other party of his bankruptcy;

(4) maintaining any legal proceedings in relation to his bankruptcy debts, without approval of the court; and

(5) traveling overseas without prior approval of the court.

*6.2.16.10 Adjustment of antecedent transactions*

The bankruptcy trustee also has the right to assail antecedent transactions as being undervalued, preferential or an extortionate credit transaction.

By undervalued transaction is meant a gift to a person, or a transaction for which no consideration has been received by the debtor or in consideration of marriage or for consideration which is significantly less valuable than the consideration provided by the bankrupt and is not in the ordinary course of business. The pre-condition is that the transaction should have taken place not earlier than two years from the date of application for bankruptcy.

The debtor is said to have given a preference if he does anything or suffers anything to be done to put a creditor or guarantor into a position which, in the event of the bankruptcy of the debtor, is better than the position he would have been in absent that transaction. For transaction with associates, transaction should have been undertaken in the two years period prior to the application for bankruptcy and six months period in case of a transaction with other persons.

Further, the bankruptcy trustee can also assail a credit transaction undertaken by the debtor in the two-year period prior to the bankruptcy order, which requires the debtor to make exorbitant payments or is otherwise unconscionable under contract law.

Further, the bankruptcy trustee also has the right to disclaim onerous property of the bankrupt. Onerous property means any unprofitable contract or any other unsaleable property or which may give rise to a claim or leasehold interest.

*6.2.16.11 Discharge order*

The bankrupt can apply for a discharge order after the expiry of one year from the bankruptcy commencement date, or within seven days from the approval by the committee of creditors of the completion of the administration of the assets.[92] Upon issue of the discharge order, the bankrupt is free from all bankruptcy debt and the restrictions and disqualifications. However, the bankrupt is not discharged from excluded debt which includes fines imposed by courts and tribunals, liability to pay damages for negligence, nuisance and breach of contractual obligations, liability to maintenance to any person, or student loans.[93]

*6.2.16.12 Fresh-start process*

The Code also provide a process for debtors with smaller incomes and estates to obtain a "fresh-start". The provisions relating to fresh-start are not in operation at present.

**Self-Assessment Exercise 3**

**Question 1**

Explain the relevance of "acts of insolvency" for the Bankruptcy Acts.

**Question 2**

Briefly describe the scenarios in which a personal guarantor can be adjudicated as a bankrupt under the Code.

**For commentary and feedback on self-assessment exercise 3, please see APPENDIX A**

## 6.3 Corporate liquidation

Currently, there are two liquidation regimes in India for companies. One is under the Companies Act and the other under the Insolvency and Bankruptcy Code, 2016 (Code). With the coming into effect of the Code, an inability to pay debts was removed as a ground upon which to wind up a company under the Companies Act as a payment default is the basis of an insolvency resolution application under the Code and the ability of a creditor to file a winding up petition under the Companies Act was also removed. With this change, the Code has become the prominent legislation with which to resolve and liquidate companies in India.

The Code applies to the insolvency and liquidation of companies registered under the Companies Act or other legislation, as well as limited liability partnerships. The Code also applies to the insolvency resolution and bankruptcy of individuals and partnership firms;

[92] *Idem,* s 138.
[93] *Idem,* s 139.

however, as mentioned above, those parts are not yet in operation except in relation to personal guarantors to corporate debtors.

A company or a limited liability partnership (corporate debtor) can enter liquidation under the Code in two ways:

(a) firstly, liquidation which follows a corporate insolvency resolution process (CIRP); and

(b) secondly, voluntary liquidation where the corporate debtor can enter liquidation directly.

The National Company Law Tribunal has jurisdiction to deal with cases relating to the insolvency and liquidation of corporate debtors. There are a total of 15 benches of the National Company Law Tribunal all around India and, depending on the location of the registered office of the corporate debtor, the National Company Law Tribunal having jurisdiction over that territory exercises its Code jurisdiction.

### *6.3.1 Liquidation following a corporate insolvency resolution process (CIRP)*

*6.3.1.1 Introduction*

The process of CIRP has been set out below in paragraph 6.5. If at the end of the CIRP period any of the following events occur, liquidation of the corporate debtor can be ordered by the National Company Law Tribunal:[94]

(a) non-submission by the resolution professional of a resolution plan approved by the committee of creditors to the National Company Law Tribunal before the expiry of the CIRP period, that is, 180 / 270 / 330 days from the date of admission of the application for CIRP;

(b) rejection of the resolution plan by the National Company Law Tribunal when presented to it, for non-compliance of the resolution plan with the requirements of the Code and the regulations;

(c) intimation by the resolution professional to the National Company Law Tribunal, at any time before the confirmation of the resolution plan, that the committee of creditors has resolved by 66% voting majority by value to liquidate the corporate debtor; or

(d) contravention by the relevant corporate debtor of the resolution plan approved by the National Company Law Tribunal and an application by any person (other than the corporate debtor) whose interests are prejudicially affected, to liquidate the corporate debtor.

If the National Company Law Tribunal passes a liquidation order, a public announcement is issued stating that the corporate debtor is in liquidation and the National Company Law Tribunal will send the order to the authority with whom the corporate debtor is registered (for instance, the Ministry of Corporate Affairs and Registrar of Companies under whose authority the

[94] *Idem*, s 33.

corporate debtor falls). Further, the National Company Law Tribunal will also appoint the resolution professional (subject to his consent) as the liquidator of the corporate debtor. If the resolution professional has not provided his consent, the National Company Law Tribunal may request the Insolvency and Bankruptcy Board of India to suggest the name of an insolvency professional to act as the liquidator of the corporate debtor, which the Insolvency and Bankruptcy Board of India must provide within 10 days of the request. Once the name is available, the National Company Law Tribunal appoints that insolvency professional as the liquidator.

Details regarding the manner in which corporate debtors are liquidated are set out in the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations).

*6.3.1.2 Moratorium following liquidation order*

Upon the passing of the liquidation order, no suit or other legal proceeding may be instituted by or against the corporate debtor (other than by the liquidator on behalf the corporate debtor upon approval by the National Company Law Tribunal).[95] The Government has the power to notify exceptions to this moratorium; however, no such exception has yet been notified.

*6.3.1.3 Powers of board of directors and discharge of employees*

The liquidation order passed by the National Company Law Tribunal is deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.[96]

*6.3.1.4 Role of the liquidator*

(a) Subject to the directions of the National Company Law Tribunal, the liquidator exercises the following powers:[97]

(b) taking into his custody or control all the assets, property, effects and actionable claims of the corporate debtor that form part of the liquidation estate. Assets owned by a third party and which are in possession of the corporate debtor (including assets held in trust for a third party), amounts due to workmen and employee from the provident fund, the pension fund or the gratuity fund, assets of shareholders and assets of subsidiaries, do not form part of the liquidation estate;

(c) evaluation of the assets and property of the corporate debtor and the preparation of an asset memorandum,[98] providing *inter alia* the value of the assets, the intended manner and mode of realisation of the assets and the expected amount of realisation, for submission to the National Company Law Tribunal within 75 days from the liquidation commencement

[95] *Idem*, s 33(5).
[96] *Idem*, s 33(7).
[97] *Idem*, s 35(1).
[98] *Idem*, Reg 34.

date. The valuation of the assets in the liquidation estate is undertaken by at least two registered valuers who are appointed by the liquidator;

(d) taking such measures as he considers necessary to protect and preserve the assets and property of the corporate debtor;

(e) carrying on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) selling the immovable and movable property and actionable claims of the corporate debtor in liquidation, by public auction or private contract, with the power to transfer such property to any person or body corporate, or to sell it in parcels as per the Liquidation Regulations and distribute the proceeds in accordance with the Code;

(g) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;

(h) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions; and

(i) to apply to the National Company Law Tribunal for such orders or directions as may be necessary for the liquidation of the corporate debtor.

*6.3.1.5 Remuneration*

The liquidator's remuneration forms part of the liquidation costs (funds for meeting such costs are required to be contributed by the financial creditors on a *pro rata* basis if the costs are in excess of liquid assets available with the corporate debtor)[99] and the liquidator is entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed. In cases where the committee of creditors has not decided the fee of the liquidator, the following fee amounts apply:[100]

[99] Liquidation Regulations, Reg 2A.
[100] *Idem*, Reg 4.

| Amount of realisation / distribution (in INR) | Percentage fee on the amount realised / distributed | | |
|---|---|---|---|
| | In the first six months | In the next six months | Thereafter |
| ***Amount of realisation (exclusive of liquidation costs)*** | | | |
| On the first 1 crore[101] | 5.00 | 3.75 | 1.88 |
| On the next 9 crore | 3.75 | 2.80 | 1.41 |
| On the next 40 crore | 2.50 | 1.88 | 0.94 |
| On the next 50 crore | 1.25 | 0.94 | 0.51 |
| On further sums realised | 0.25 | 0.19 | 0.10 |
| ***Amount distributed to stakeholders*** | | | |
| On the first 1 crore | 2.50 | 1.88 | 0.94 |
| On the next 9 crore | 1.88 | 1.40 | 0.71 |
| On the next 40 crore | 1.25 | 0.94 | 0.47 |
| On the next 50 crore | 0.63 | 0.48 | 0.25 |
| On further sums distributed | 0.13 | 0.10 | 0.05 |

*6.3.1.6 Proof of Claims Process*

The liquidator collects all the claims of creditors within a period of 30 days from the date of commencement of the liquidation proceedings.[102] For this purpose, the liquidator is required to make a public announcement (published in local and national newspapers and uploaded to the Insolvency and Bankruptcy Board of India website and the website of the corporate debtor) in a prescribed form within five days of his appointment. All creditors can submit their proof of claim in the form prescribed, together with the supporting documents. The liquidator has the power to seek further information and is required to verify the claim within 30 days from the last date for receipt of claims as specified in the public announcement made by the liquidator.[103] Some specific rules regarding the claim verification process are as follows:

[101] A *crore* (or *koti*) is equal to INR 10 million, or 100 *lakh* under the Indian numbering system.
[102] Insolvency and Bankruptcy Code, s 38.
[103] Liquidation Regulations, Reg 30.

(1) if the amount claimed is not precise due to any contingency or any other reason, the liquidator is required to make his best estimate of the claim;[104]

(2) the claims denominated in foreign currency are valued in Indian rupees (INR) at the conversion rate published by the Reserve Bank of India as at the liquidation commencement date (date of the order of liquidation);[105]

(3) in the case of rent, interest and other periodic payments, a person is allowed to claim for the amounts due up to the liquidation commencement date;[106] and

(4) where the debt has not fallen due before a distribution by the liquidator, the creditor is entitled to distribution on the basis of the claimed amounts as reduced by the application of a formula.[107]

The liquidator may, after having verified the claims, either admit or reject (for reasons to be recorded in writing) the claims, either in whole or in part.[108] The liquidator is required to communicate his decision of admission or rejection of claims to the creditors within seven days of such admission or rejection. Creditors have the option of appealing against the decision of the liquidator to the Adjudicating Authority within 14 days of receipt of such decision.[109] Once verified, the liquidator prepares a list of stakeholders, class-wise, on the basis of the proofs of claims submitted and accepted, which list must be submitted to the National Company Law Tribunal within 45 days from the last date for receipt of claims and also be available for inspection by other stakeholders as well as available on the website of the Board.[110] Creditors are permitted to assign their debts to another person and upon being informed of such an assignment, the liquidator is required to update the list of stakeholders.[111]

*6.3.1.7 Process of realisation of assets*

The Liquidation Regulations provide that the liquidator can sell the assets on a stand-alone basis, collectively, on a slump-sale basis, or sell the assets in parcels. Further, the liquidator can also sell the corporate debtor or the business of the corporate debtor as a going concern.

Under the Liquidation Regulations, liquidators are required to make efforts to propose a scheme of arrangement / compromise under the Companies Act within the first 90 days from the date liquidation commences. The time taken for such compromise or arrangement not exceeding 90 days is not included in the liquidation period. The costs in relation to such compromise or

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[104] *Idem*, Reg 25.
[105] *Idem*, Reg 26.
[106] *Idem*, Reg 27.
[107] *Idem*, Reg 28. The formula is: $X / (1+r)^n$ where: (i) "X" is the value of the admitted claim, (ii) "r" is the closing yield rate (%) of government securities of the maturity of "n" on the date of distribution as published by the Reserve Bank of India, and (iii) "n" is the period beginning with the date of distribution and ending with the date on which the payment of the debt would otherwise be due, expressed in years and months in a decimalised form.
[108] Insolvency and Bankruptcy Code, s 40.
[109] *Idem*, s 42.
[110] Liquidation Regulations, Reg 31.
[111] *Idem*, Reg 30A.

arrangement are borne by the corporate debtor and during this period the liquidator is entitled to the same remuneration as the resolution professional during the CIRP.[112] Also see paragraph 6.3.1.12 below.

Further, if during the CIRP the committee of creditors have recommended the sale of the corporate debtor as a going concern, the liquidator is first required to endeavour to attempt selling the corporate debtor as a going concern. For this purpose the committee of creditors may identify assets and liabilities which may be sold as a going concern, absent which the liquidator can decide which assets and liabilities should be sold together as a going concern. If such sale as a going concern has not occurred within 90 days from the liquidation commencement date, the liquidator must then sell the assets on a standalone basis, in parcels or collectively.[113]

The liquidator is required to ordinarily sell the assets by way of public auction as specified in the Liquidation Regulations. However, if:

(a) the assets are perishable;

(b) the assets are likely to deteriorate in value significantly if not sold immediately;

(c) the assets are sold at a price higher than the reserve price of a failed auction; or

(d) prior permission of the National Company Law Tribunal has been obtained for such sale,

the assets can be sold by way of a private sale.[114]

The liquidator cannot sell any assets to his own (or the corporate debtor's) related parties, or any professional appointed by him, without approval of the Adjudicating Authority. The liquidator also cannot sell the assets to any person who was ineligible to submit a resolution plan for the corporate debtor under section 29A of the Code (for more details see paragraph 6.5.3.9).

*6.3.1.8 The position of secured creditors during liquidation*

During liquidation, a secured creditor has the following options:

(a) relinquishing its security interest to the liquidation estate and receiving the proceeds from the sale of assets by the liquidator (with the same priority over the assets that were subject to the security interest so relinquished); or

(b) realising its security interest.

[112] *Idem*, Reg 2B.
[113] *Idem*, Reg 32A.
[114] *Idem*, Reg 33.

In the event the secured creditor intends to realise its security interest, it must inform the liquidator of its decision in the specified form within 30 days of the commencement of liquidation, failing which it is presumed by the liquidator that the creditor wishes to relinquish its security and such assets will become part of the liquidation estate.[115] The liquidator will verify such security interest and will permit the secured creditor to realise only the security interest, the existence of which must be proved on the basis of records available with an information utility or such other agency. Upon receipt of confirmation from the liquidator, the secured creditor may realise the secured assets in accordance with the applicable law and apply the proceeds to recover the debts due to it, net of its share of insolvency resolution process costs and workmen's dues for 24 months which shall be paid within 90 days of liquidation commencement.[116]

It is also relevant to note that when a secured creditor who seeks to enforce its security interest informs the liquidator of its intention, the liquidator must inform the secured creditor, within 21 days of receipt of the notice, if any person is willing to buy the secured asset before the expiry of 30 days from the date of notice, at a price higher than the price intimated by such secured creditor and the secured creditor, upon receipt of such intimation from the liquidator, would be duty bound to sell such secured asset to the person concerned. This right does not exist if the sale is under the SARFAESI or the RDB Act.[117]

*6.3.1.9 Distribution of proceeds*

The liquidator is required to pay all proceeds received by him, whether on behalf of the corporate debtor or from the realisation of the assets of the corporate debtor, into an account opened by him with a scheduled bank[118] in the name of the corporate debtor (in liquidation).[119] Proceeds from the sale of the liquidation assets will be distributed in the following order of priority[120] (the liquidation waterfall):

(a) the insolvency resolution process costs[121] and the liquidation costs,[122] paid in full;

(b) the following debts, which rank equally between and among the following:

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115 *Idem*, Reg 21A.
116 *Ibid*.
117 *Idem*, Reg 37.
118 The Reserve Bank of India maintains a schedule of banks, which banks are known as "scheduled banks".
119 Liquidation Regulations, Reg 41.
120 Insolvency and Bankruptcy Code, s 53.
121 As per s 5(13) of the Insolvency and Bankruptcy Code, "insolvency resolution process cost" means (a) the amount of any interim finance and the costs incurred in raising such finance, (b) the fees payable to any person acting as a resolution professional, (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern, (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process, and (e) any other costs as may be specified by the Insolvency and Bankruptcy Board of India.
122 As per s 5(16) of the Insolvency and Bankruptcy Code, "liquidation costs" means any cost incurred by the liquidator during the period of liquidation, subject to such regulations as may be specified by the Insolvency and Bankruptcy Board of India. These have been specified in Regulation 2(1)(ea) of the Liquidation Regulations.

(i) workmen's dues for the period of 24 months preceding the liquidation commencement date, that is, the date on which the proceedings for liquidation commenced; and

(ii) debts owed to a secured creditor, in the event such secured creditor has relinquished its security to the liquidation estate;

(c) wages and any unpaid dues owed to employees (other than workmen) for the period of 12 months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues rank equally between and among the following:

(i) any amount due to the Central Government and the State Government, including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of its security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

Any contractual arrangement between stakeholders with the same ranking, if disrupting the liquidation waterfall, will be disregarded by the liquidator.

*6.3.1.10 Progress report and completion of liquidation*

The liquidator is required to provide a preliminary report to the National Company Law Tribunal within 75 days of the liquidation commencement date, detailing the capital structure, an estimate of the assets and liabilities and the proposed plan of action for carrying out the liquidation. Thereafter, the liquidator is required to submit progress reports to the National Company Law Tribunal as follows: first report within 15 days after the end of the quarter in which he was appointed and subsequent progress reports within 15 days after the end of every quarter where he acts as the liquidator. After completion of the liquidation process, the liquidator submits a final report along with an application for dissolution of the corporate debtor. Upon the National Company Law Tribunal issuing an order of dissolution, the corporate debtor stands dissolved.[123]

[123] Insolvency and Bankruptcy Code, s 54.

The liquidator is required to complete the liquidation within one year (an additional 90 days is allowed if a sale as a going concern is being attempted) and if he does not do so, he is required to make an application to the National Company Law Tribunal explaining why the liquidation could not be completed within the one-year period and specify the additional time needed.[124] If at any time after preparation of the preliminary report it appears to the liquidator that the realisable property of the corporate debtor will be insufficient to cover the cost of the liquidation process, and the affairs of the corporate debtor do not require any further investigation, the liquidator may apply to the National Company Law Tribunal for the early dissolution of the corporate debtor.[125]

*6.3.1.11 Adjustment of antecedent transactions*

The liquidator has the same powers as the resolution professional to file for the avoidance of antecedent transactions. Recently, the Liquidation Regulations have been amended to provide the liquidator the right to transfer or assign not readily realisable asset through a transparent process in consultation with the stakeholders' consultation committee, provided such transferee or assignee is eligible to submit a resolution plan for the corporate debtor (for more details see paragraph 6.5.3.9). "Not readily realisable assets" include rights of the liquidator under proceedings for challenging preferential, undervalued, extortionate credit and fraudulent transactions that can be challenged under the Code.[126]

In addition, the liquidator has the power to apply to the National Company Law Tribunal to disclaim any onerous property of the corporate debtor such as land of any tenure burdened with onerous covenants, shares or stocks in companies, unprofitable contracts, or any other property that is unsaleable or not readily saleable by reasons of binding onerous acts. The liquidator is required to give seven days' notice to persons interested in purchasing such property before making the application.[127]

The liquidator has six months from the liquidation commencement date to disclaim any such onerous property; however, any person interested in the property may call on the liquidator to decide whether he will make an application to have such property disclaimed and, if the liquidator does not communicate his intention to do so within one month of such inquiry, he will not be entitled thereafter to make an application to disclaim the property. Any person affected by a disclaimer is considered a creditor of the debtor to the amount of the compensation or damages payable in respect of such effect.

*6.3.1.12 Post-liquidation compromises / schemes of arrangement*

A liquidator appointed under the Code can file a scheme of arrangement or compromise under the Companies Act. The filing of a scheme of arrangement under the Companies Act is governed by the provisions of the Companies Act and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (Scheme Rules). Under a scheme of

[124] Liquidation Regulations, Reg 44.
[125] *Idem*, Reg 14.
[126] *Idem*, Reg 37A.
[127] *Idem*, Reg 10.

arrangement, a company can enter into a compromise or arrangement with its creditors (or any class thereof) or its members (or any class thereof). Proposed schemes are approved by the relevant bench of National Company Law Tribunal upon application by the liquidator, providing all material facts. After receipt of the application, the National Company Law Tribunal must convene a meeting of the members and of the creditors. Notice of the meeting is also sent to the relevant Government authorities and regulators. The scheme needs to be approved by three-fourths in value of the creditors or class of creditors (or shareholders or class of shareholders) and then by the National Company Law Tribunal. Once approved, the scheme is binding on the company, the creditors, shareholders and the liquidator.

### *6.3.2 Voluntary liquidation under the Insolvency and Bankruptcy Code*

#### *6.3.2.1 Introduction*

A company may place itself in voluntary liquidation, provided it has not defaulted in its payment obligations towards creditors. A special resolution (75%) of the shareholders of the company will be required, resolving that it be placed in voluntary liquidation and appointing an insolvency professional to act as the liquidator (who can be replaced by the shareholders with a resolution passed by 75% majority).[128] An ordinary resolution will suffice where the articles of association of the company provide that the company is to be liquidated after a specified period. Liquidation commences from the date of the passing of such resolution. Upon the passing of the resolution, the company is required to notify the Registrar of Companies and the Insolvency and Bankruptcy Board of India.

The governing regulations are the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 (Voluntary Liquidation Regulations).

Four weeks prior to the meeting of the shareholders, the majority of directors of the company will have to make the following declaration by way of an affidavit, namely that:[129]

(a) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in liquidation; and

(b) the company is not being placed in liquidation in order to defraud any person.

Such declaration must be accompanied by the audited financial statements and the record of business operations of the company for the past two years or for the period of its incorporation, whichever is later, and a report of the valuation of the assets of the company prepared by a registered valuer.

[128] Insolvency and Bankruptcy Code, s 59.
[129] *Ibid*, read with the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.

If the company owes a debt to any person, creditors representing two-thirds in value of the debt of the company will have to approve the resolution (passed by the shareholders) within seven days of such resolution.

The process of a public announcement, proof of claims, realisation of assets, distribution of proceeds and powers relating to antecedent transactions (other than the power to disclaim onerous property) is the same as provided for in the Liquidation Regulations referred to above. The liquidator's fees will be determined in the liquidation resolution.

*6.3.2.2 Reporting and completion*

Under the Voluntary Liquidation Regulations, the liquidator is required to submit a preliminary report to the company within 45 days of the commencement of liquidation.[130]

The liquidator is required to endeavour to complete the liquidation process within 270 days of the liquidation commencement date in case the company has creditors and within 90 days in other cases.[131] If it takes more than 12 months, the liquidator is required to hold a meeting of the contributories of the company within 15 days from the end of the 12 month period (and every successive 12 months thereafter) and present an annual status report. Upon completion of the liquidation process, a final report is to be prepared which must be filed with the National Company Law Tribunal, the Registrar of Companies and the Insolvency and Bankruptcy Board of India. Upon receipt of such report and an application by the liquidator, the National Company Law Tribunal may pass an order of dissolution for the company.

*6.3.2.3 Suspension*

If during liquidation it appears to the liquidator that liquidation is being undertaken with a view to defrauding a person, or where the debts of the company will not be fully paid from the proceeds of the assets, he may make an application to the National Company Law Tribunal to suspend the liquidation and pass such orders as the National Company Law Tribunal may deem fit.[132]

### *6.3.3 Liquidation under the Companies Act*

*6.3.3.1 Introduction*

The Companies Act (read with the Companies (Winding Up) Rules, 2020) also provides for the winding up and liquidation of companies. However, given the prominence of the Code, these provisions are no longer used very often.

[130] Voluntary Liquidation Regulations, Reg 9(1).
[131] *Idem*, Reg 37(1).
[132] *Idem*, Reg 40.

Jurisdiction under the Companies Act is exercised by the relevant National Company Law Tribunal.[133]

Under the Companies Act, the National Company Law Tribunal may order a company to be wound up:

(1) if the company has by a special resolution resolved to be wound up;

(2) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(3) if on application by the Registrar of Companies, or any person authorised by the Central Government, the National Company Law Tribunal is of the opinion that the affairs of the company have been conducted fraudulently and for an unlawful purpose, or the persons in the management of the company are guilty of fraud, misfeasance or misconduct;

(4) if the company has defaulted in filing with the Registrar of Companies its financial statements or annual returns for the immediately preceding five consecutive years; or

(5) if the National Company Law Tribunal is of the view that it is just and equitable to wind up the company.

An application to wind up the company on the grounds mentioned in (1), (2), (4) or (5) above can be made by the company, any of its shareholders, the Registrar of Companies or any other person authorised by the Government on its behalf.

Upon the presentation of a winding up petition, the National Company Law Tribunal may, within 90 days, dismiss the petition, make an interim order (such as for the appointment of a provisional liquidator), or make an order winding up the company.

If the National Company Law Tribunal orders the winding up of the company, it also issues an order whereby a liquidator is appointed. After the coming into effect of the Code, the company liquidator or the provisional liquidator is required to be an insolvency professional.[134] Further, the provisional liquidator or the final liquidator can be removed and replaced by the National Company Law Tribunal for misconduct, fraud, misfeasance, etc.

Upon his appointment, the company liquidator is required to form a winding up committee. The committee must be comprised of:

(a) the Official Liquidator;

[133] However, winding up petitions that were served on companies in December 2016, are continuing under the auspices of the High Courts who were exercising winding up jurisdiction before the establishment of the National Company Law Tribunal.

[134] Prior to the Code, Official Liquidators, government officials associated with relevant High Courts, were appointed as liquidators.

(b) one nominee of the secured creditors of the company; and

(c) a professional nominated by the National Company Law Tribunal.

The role of the winding up committee is to assist and monitor the liquidation proceeding in a number of ways, including *inter alia* the taking over of assets, examination of the statement of affairs, review of audit reports and accounts, sale of assets and finalisation of the list of creditors and contributories.

*6.3.3.2 Moratorium*

Once the winding-up order has been issued, or upon the appointment of a provisional liquidator, no suits or other legal proceedings may be commenced or continued without the leave of the National Company Law Tribunal and only on such terms as the National Company Law Tribunal may order while granting such leave.

*6.3.3.3 Powers of the company liquidator*

The powers and duties of a company liquidator are specified in section 290 of the Companies Act and include the following:

- to carry on the business of the company in so far as may be necessary for the beneficial winding up of the company;
- to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents and to use for that purpose, when necessary, the company's seal;
- to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell them in parcels;
- to sell the whole of the undertaking of the company as a going concern;
- to raise any money required on the security of the assets of the company;
- to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company; and
- to invite and settle the claims of creditors, employees or any other claimants, and to distribute the sale proceeds in accordance with the priorities established in the Companies Act.

It is also relevant to add that the company liquidator is required to file regular statements on the progress of the liquidation every year. No statements are required to be filed within the first year.

*6.3.3.4 Priority of debts*

The proceeds of the company assets are distributed by the liquidator in the following order of priority:

(1) workmen's dues[135] and dues of the secured creditors (to the extent such dues could not be realised upon realisation of the security) or an amount equal to the workmen's portion[136] rank equally among themselves and prior to all other debts;

As mentioned above, the workmen's dues enjoy a statutory charge *pari passu* with the secured creditors which is enforced by the liquidator. The amount realised by the liquidator on the *pari passu* charged assets would be distributed *pro rata* among the workmen towards the workmen's dues. Similarly, if the secured creditor recovers proceeds from the secured assets, it will have to hand over the workmen's portion to the liquidator.

Accordingly, the dues to the extent that the secured creditor could not recover, or such secured creditor was required to share as workmen's portion, enjoy priority under (1) above.

(2) all revenues, taxes, cesses (taxes and levies) and rates due to the Central or the State Government that became due and payable within the 12 months prior to the commencement of the liquidation;

(3) all wages, salary and commission owing to employees for a period of four months within the 12 month period preceding the date of the winding up order;

(4) all accrued holiday remuneration and termination payments owing to employees on or before the winding up order;

(5) all contributions to be made by the company as the employer of persons during the period of 12 months prior to the winding up order, in terms of the Employees' State Insurance Act;

(6) all amounts due as compensation for the death or disablement of any employee of the company in accordance with the Workmen's Compensation Act, 1923;

(7) amounts due to any employee from the provident fund, the gratuity fund, the pension fund and any other fund created for the welfare of the employees and maintained by the company; and

(8) all other debts.

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[135] Defined in s 325 of the Companies Act as the aggregate of wages and salary of the workmen for two years, all accrued holiday remuneration, all compensation payable under the law and dues relating to the provident fund, pension fund, gratuity fund and any other welfare fund of the company. These dues also enjoy a statutory charge *pari passu* with the secured creditors on the assets of the company.

[136] This means the amount which bears to the value of the secured asset the same proportion as the amount of the workmen's dues bears to the aggregate of the workmen's dues and the amount of the debts due to the secured creditors. Explanation (c) to s 326 of the Companies Act.

*6.3.3.5 Antecedent transactions*

The Companies Act provides for the avoidance of antecedent transactions on the grounds of such transactions being a fraudulent preference.[137] In addition, the transfer of property of the company (including actionable claims and the transfer of any shares of the company) after commencement of the winding up, is also void. Floating charges created within 12 months of the commencement of winding up are deemed invalid (except to the extent of any cash paid as consideration for the charge and interest at the rate of 5%), unless it is proved that the company was solvent at the time of the creation of charge. The Companies Act also provides for a disclaimer of onerous property by the company liquidator with the National Company Law Tribunal's consent.

**Self-Assessment Exercise 4**

**Question 1**

Briefly describe the conditions in which a company can be liquidated under the Code following a resolution process.

**Question 2**

Briefly describe the differences in the "liquidation waterfall" (priority of payments) under the Insolvency and Bankruptcy Code and the Companies Act.

**Question 3**

Explain the sequence of actions that a liquidator appointed under the Code is required to take for realisation of the assets of the corporate debtor.

**Question 4**

Set out the applicable timelines for liquidation under the Code, liquidation under the Companies Act and voluntary liquidation under the Code.

**For commentary and feedback on self-assessment exercise 4, please see APPENDIX A**

## 6.4 Receivership

While in the context of insolvency Receivers can be appointed as provided for above, Indian law also provides for the appointment of Receivers over the assets of a company on the application of creditors in some other statutes:

[137] Section 328 of the Companies Act.

### *6.4.1 Appointment of Receivers by civil courts*

The Civil Procedure Code, 1908 provides for appointment of a Receiver on the application of a plaintiff in a suit if it can be shown that a Receiver is required to take possession of the property from the defendant to preserve and protect the property, or that the property is at the risk of dissipation. Please note the comments above in respect of the jurisdiction of the civil courts in regard to creditors which are Indian banks and financial institutions.

### *6.4.2 Appointment of Receivers by the DRT*

The RDB Act provides that if it appears to the DRT that it will be just and convenient to do so, it may by an order appoint a Receiver for any property of the borrower for preservation and protection prior to the issue of a recovery certificate and sell such asset (if required) after the issue of the recovery certificate for the recovery of the debt.

### *6.4.3 Appointment of a manager over the business of the debtor under SARFAESI*

Under the SARFAESI, an asset reconstruction company[138] or a secured creditor who has security over a substantial part of the business of the debtor, can take over the management of the business of the borrower for the purposes of realising its security. A public notice is required to be issued prior to such taking over of the management of the business and, upon such taking over, the directors of the borrower are deemed to have vacated their office. The management of the business is required to be restored back to the borrower once the debt has been realised in full, unless the secured creditor(s) have converted their debt into equity and acquired a controlling interest in the borrower.

## 6.5 Corporate rescue

### *6.5.1 The corporate rescue regime in India*

As mentioned earlier, the Sick Industrial Companies Act (SICA) used to occupy the field in respect of the rehabilitation of companies. Banks in India have followed the guidelines issued by the Reserve Bank of India (RBI) with regard to out-of-court workouts. Many of these guidelines were based on international principles such as the Statement of Principles for a Global Approach to Multi-Creditor Workouts, issued by INSOL International.

Most recently, on 7 June 2019, the RBI issued revised guidelines for out-of-court debt restructuring and did away with all previous guidelines relating to out-of-court restructuring as issued by the RBI.[139] Under the revised guidelines, the Indian banks and financial institutions are required to review the financial situation of the debtor for the first 30 days after default and decide whether they would like to restructure the debt of the debtor. If the creditors so decide, they are required to enter into an inter-creditor agreement which provides for a stand-still and the mechanics for arriving at an out-of-court resolution plan. If no such plan has been agreed

[138] These are specialised licensed entities formed to take over non-performing loans from the banks and financial institutions, who also have powers of enforcement, recovery and restructuring under the SARFAESI.

[139] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11580&Mode=0.

and implemented by the creditors within 180 days of default, the creditors are required to make additional provisioning (20% from the 181st day and another 15% from 366th day) over and above the usual provisioning for non-performing loans, which may be reversed in half when creditors file to initiate insolvency proceedings for the debtor under the Code and the rest when such petition is accepted.

### *6.5.2 Rescue of companies under the Insolvency and Bankruptcy Code*

The Code provides a detailed process for the rescue / rehabilitation of companies and limited liability partnerships (corporate debtors), known as the corporate insolvency resolution process (CIRP). Part II of the Code provides for this procedure and detailed regulations are contained in the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations). It is notable that companies providing "financial services" are generally not covered by the definition of "corporate debtor" under the Code unless specified by the Government to the covered by the Code (please see paragraph 6.1 (d) above in this regard). "Financial services" has been defined widely to include, among others, banks, financial institutions, non-banking financial companies, insurance companies and holding companies of such companies. As a result, the Code does not apply to such companies and they are governed by special insolvency regimes prescribed for such companies in other legislation. It should also be noted that a CIRP is conducted in respect of a single company and not for a group of companies. There is no provision in the Code for the CIRP of an enterprise group.[140]

#### *6.5.2.1 Introductory concepts*

*Four pillars of the Code*

The institutional architecture of the corporate rescue regime contained in the Code is based on four pillars:

(1) Insolvency and Bankruptcy Board of India (IBBI): the insolvency regulator, the Insolvency and Bankruptcy Board of India plays a rule-making and supervisory role over the rescue process. Details of the Insolvency and Bankruptcy Board of India's role has been dealt with earlier in this module;

(2) National Company Law Tribunal (NCLT): the National Company Law Tribunal is the *quasi*-judicial body having jurisdiction to deal with rescue and liquidation cases for corporate debtors under the Code;

(3) Insolvency professionals: Insolvency professionals are a body of professionals introduced pursuant to the Code. They play a central role in the CIRP by being the interim resolution professional, resolution professional and liquidator. To be an insolvency professional, the

[140] Although, on 8 August 2019 the National Company Law Tribunal, after looking at their inter-dependencies and inter-twined business relationships and as an exceptional measure, permitted consolidation of the CIRP of 14 group companies in the Videocon Group (a consumer electronics company in India). A common resolution plan was approved is respect of all such companies in June 2021. Similar judgments have been passed in couple of other cases as well.

individual is required to pass an examination conducted by the Insolvency and Bankruptcy Board of India and be a member of an IPA (intermediate bodies who admit and regulate the insolvency professionals), who will regulate the conduct of the insolvency professional. Insolvency professionals are not permitted to accept any employment[141] and are required to abide by their code of conduct; and

(4) Information utilities: information utilities have been introduced under the Code. Although only one information utility was functional at the time of writing of this text, information utilities are expected to play a role in reducing information asymmetry during the CIRP by storing and making the financial information in relation to a corporate debtor available to the creditors.

*Classification of creditors*

Under the Code, creditors of a corporate debtor are classified into two main categories:

(1) Financial Creditors: Financial creditors are the creditors who have provided financial debt to the corporate debtor. Financial debt has been defined to mean debt, along with interest, if any, disbursed against the consideration for time value of money which is an essential requirement.[142] The Supreme Court of India has recently held requirement to pay interest is not a necessary condition for a debt to be classified as "financial debt" under the Code.[143] This definition expressly includes money borrowed against the payment of interest, lease and hire-purchase financing, amounts raised pursuant to the issue of notes, debentures and bonds, derivative transactions and amounts raised under any transaction having the commercial effect of borrowing. By way of an amendment made in June 2018, amounts raised from a real estate purchaser (being an allottee under the Real Estate (Regulation and Development) Act, 2016) under a real estate project, was specifically included within the definition of "financial debt". As a result, advances made by real estate purchasers to a developer of a real estate project are now treated as financial debt and such purchasers are treated as financial creditors of the corporate debtor involved in developing the project. However, an application by such real estate purchasers for initiation of CIRP can only be filed jointly by one hundred of such purchasers or 10% of total purchasers in the corporate debtor, whichever is less.

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[141] This means being on the rolls of an employer. Insolvency professionals accepting appointments as interim resolution professionals, resolution professionals or liquidators, is not considered employment.

[142] Insolvency and Bankruptcy Code, s 5(8). The term "time value of money" has been interpreted by the courts to mean, "…sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of s 5(8) of the IBC." *Nikhil Mehta and Sons v AMR Infrastructure Ltd* (21.07.2017 - NCLAT) MANU/NL/0041/2017.

[143] *Orator Marketing Private Limited v. Samtex Desinz Private Limited,* Judgement dated 26 July 2021 in Civil Appeal 2231 of 2021.

(2) Operational Creditors: Operational creditors are the creditors who have provided operational debt to the corporate debtor. Operational debt has been defined under the Code to mean a claim in respect of the provision of goods and services (including employment) and debt in respect of the payment of dues arising under any law to the Central Government or the State Government or any local authority.[144] It has been recently held that licenses fees and lease rentals for immovable property is also considered "operational debt" for the purposes of the Code.[145]

### *6.5.3 Corporate insolvency resolution process (CIRP)*

#### *6.5.3.1 Initiation of the CIRP*

The CIRP can be initiated by a financial creditor or an operational creditor of the corporate debtor upon the occurrence of a default (for a minimum of INR 10,000,000) by filing an application before the National Company Law Tribunal. Upon the occurrence of a default, the corporate debtor itself or a shareholder or partner of the corporate debtor and any other person who has the control and supervision over financial affairs of the corporate debtor, may also apply to the National Company Law Tribunal for initiation of the CIRP, provided such application has been approved by 75% of the shareholders or partners of the corporate debtor.[146] The National Company Law Tribunal will, within 14 days of receipt of the CIRP application,[147] admit the application after ascertaining the existence of a default. Further, in the context of an application by financial creditors, the Supreme Court has held that if the existence of the debt and a default is *prima facie* proven, the application will be admitted by the National Company Law Tribunal.[148] However, a recent decision of the Supreme Court of India expanded the scope of review by the National Company Law Tribunal while considering such an application and the court observed that, despite existence of debt and default, admission of such an application is at the discretion of the National Company Law Tribunal and it should apply its mind to other relevant factors such including the feasibility of initiation of CIRP.[149]

As a response to the coronavirus pandemic, the Government has amended the Code to insert Section 10A which provides that that an application to commence CIRP cannot be filed by anyone at any point in time on the basis of a default which has occurred on 25 March 2020 or thereafter during a specified period subject to a maximum of 12 months. This specified period ended on 24 March 2021.

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[144] *Idem*, s 5(21).

[145] *Jaipur Trade Expocentre Private Limited v. Metro Jet Airways Training Private Limited*, Judgement dated 5 July 2022 by NCLAT in Company Appeal (AT) (Insolvency) No 423 of 2021.

[146] *Idem*, s 10.

[147] The Supreme Court has held that this 14-day period is not mandatory, is only directory and starts from the date the application is first listed for admission: *Surendra Trading Company v Juggilal Kamlapat Jute Mills Company Limited,* Judgement dated September 19, 2017 in CA No 8400 of 2017 and CA Nos 15091-15091 of 2017. However, due to an amendment to the Code in August 2019, the National Company Law Tribunal is now required to record reasons for delay in admission of petitions beyond the 14 days period.

[148] *Innoventive Industries Limited v ICICI Bank and Another,* (2018) 1 SCC 407.

[149] *Vidarbha Industries Power Limited v. Axis Bank Limited,* Judgement dated 12 July 2022 in Civil Appeal No 4633 of 2021.

An operational creditor will need to provide a notice, in the specified form, to the corporate debtor before filing the application claiming the unpaid amount by enclosing copies of the unpaid invoices. If the corporate debtor replies to the operational creditor within 10 days of the receipt of the notice stating either that:

(a) a dispute exists between the parties, or other legal proceedings are already pending in respect of the claim; or

(b) payment of the claimed amount has been made together with evidence of payment,

the operational creditor can then not file an application to initiate the CIRP.

Even in the absence of a reply to the notice, if at the time of hearing the application the National Company Law Tribunal finds that a dispute exists between the parties, it will dismiss the application. A dispute raised at the time of the statutory notice is not a valid defence and even where a dispute is raised by a corporate debtor, the National Company Law Tribunal is required to examine whether the dispute raised is a *bona fide* dispute in relation to the dues of the creditor.

An application for the CIRP by a financial creditor will, *inter alia*, propose the name of an interim resolution professional (IRP) who will manage affairs of the corporate debtor on a going concern basis until the resolution professional is appointed. The CIRP application should be submitted along with, *inter alia*, particulars of any security held, the default record provided by the information utility / credit information company, the order of the court adjudicating the default, relevant contracts and entries in the banker's books. The CIRP application can be withdrawn by the applicant before admission. Similarly, an application by an operational creditor will need to provide details of the debt, details of the transaction and copies of bank statements. The name of the IRP is not mandatory in the case of an application by an operational creditor. If not provided by the operational creditor in its application, the interim resolution professional is selected by the National Company Law Tribunal from the list of registered insolvency professionals with the Insolvency and Bankruptcy Board of India.[150]

After hearing the parties, the National Company Law Tribunal may admit the application, declare a moratorium and appoint an IRP, or dismiss the application.[151]

*6.5.3.2 Commencement of the CIRP and moratorium*

The CIRP of the corporate debtor commences from the date of admission of the CIRP application by the National Company Law Tribunal and, from that day, a moratorium takes effect until completion of the CIRP. The moratorium prevents, *inter alia*, the initiation or continuance of legal suits and proceedings against the corporate debtor, disposal of assets by the corporate debtor, recovery of any property by any lessor and the foreclosure / enforcement of any security by a

[150] For this purpose, panels of insolvency professionals have been formed by the Insolvency and Bankruptcy Board of India for each National Company Law Tribunal.

[151] A situation where the parties decide to "settle" the matter before admission may also arise and the CIRP application may therefore be withdrawn.

secured creditor.[152] Further, during the moratorium period the termination or suspension of supply of essential goods and services to the corporate debtor is also prohibited. Essential goods and services have been defined to mean goods and services providing electricity, water, telecommunication services and information technology services,[153] these not being directly related to the output produced or supplied by the corporate debtor.[154] Further, the Code also provides an ability to the interim resolution professional or the resolution professional to identify the supply of other goods and services as essential for preserving the going concern nature of the business of the corporate debtor and, upon such identification, suspension or termination of such supply is also prohibited during the moratorium period subject to there being no payment default for supplies during the moratorium period. In addition, it has also been specified that the moratorium does not apply to transactions specified by the Central Government[155] and any proceedings or actions against a surety in a contract of guarantee relating to the corporate debtor. By recent amendments, the revocation of Government licenses, approvals, permits and concessions are also prohibited during the moratorium period subject to there not being a payment default by the corporate debtor to the relevant Governmental authority during the moratorium period. In *Gujarat Urja Vikas Nigam Limited v Amit Gupta*,[156] the Supreme Court of India prohibited termination of a power purchase agreement solely on the grounds of insolvency as such termination would have had an adverse impact on the ability of the corporate debtor to continue as a going concern and the contract is central to the success of the CIRP. The Supreme Court has further clarified that the National Company Law Tribunal will interfere with termination of such a contract only if the termination was based on the grounds of insolvency and not if based on grounds unrelated to the insolvency.[157]

#### *6.5.3.3 Timeline of the CIRP*

The Code provides that the CIRP must be completed within 180 days from the date of admission of the CIRP application. However, if the committee of creditors passes a resolution with a 66% majority voting share in value to extend the timeline of the CIRP, the resolution professional can make an application to the National Company Law Tribunal for an extension of the CIRP. If the National Company Law Tribunal is of the opinion that the CIRP cannot be completed within 180 days it may, as a one-off measure, extend the duration of the CIRP by a suitable period which is no longer than 90 days.[158] The NCLAT has held that it is always open to the National Company Law Tribunal or the NCLAT to exclude certain period for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion in cases where there are unforeseen circumstances.[159] Examples of such unforeseen circumstances are: if the CIRP is stayed by a court of law, the National Company Law Tribunal or the NCLAT, if for whatever reason there was

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[152] Insolvency and Bankruptcy Code, s 14.
[153] CIRP Regulations, Reg 32.
[154] Illustration provided in the Regulation: water supplied to a corporate debtor will be essential for drinking and sanitation purpose and not for the generation of hydro-electricity.
[155] None have been specified to date.
[156] Civil Appeal No 9241 of 2019.
[157] *Tata Consultancy Services Limited v. Vishal Ghisulal Jain,* Judgement dated November 23, 2021 in Civil Appeal No 3045 of 2020.
[158] Insolvency and Bankruptcy Code, s 12.
[159] *Quinn Logistics India Pvt Ltd v Mack Soft Tech Pvt Ltd and Ors* (08.05.2018 - NCLAT): MANU/NL/0089/2018.

no resolution professional functioning for a period of time, or any other circumstances that justify the exclusion of time from the 270-day period. In August 2019, section 12 of the Code was amended to stipulate that the CIRP has to be completed within a maximum of 330 days, including any extension granted by the National Company Law Tribunal and any time taken in legal proceedings in relation to such CIRP.

The CIRP Regulations also provide a model timeline for the resolution professional to follow.

*6.5.3.4 Public announcement and proof of claims*

For the purpose of inviting claims against the corporate debtor, a public announcement is made by the interim resolution professional (published in local and national newspapers and uploaded to the Insolvency and Bankruptcy Board of India website and the website of the corporate debtor) within three days of his appointment by the National Company Law Tribunal.

All creditors (whether domestic or foreign) can submit their proof of claim, in the form prescribed in the CIRP Regulations, along with any supporting documents such as financial contracts, records from information utilities, contracts, invoices, court orders, financial statements / accounts and employment contracts. The interim resolution professional may seek further information if required to verify the claim. The interim resolution professional is required to verify the submitted claims within seven days from the last date for the receipt of claims as specified in the public announcement made by the interim resolution professional.[160]

Some specific rules as to the claim verification process are as follows:

(a) if the amount claimed is not precise due to any contingency or any other reasons, the interim resolution professional is required to make his best estimate of the claim;[161] and

(b) the claims denominated in foreign currency are valued in Indian Rupees (INR) at the reference rate published by the Reserve Bank of India as on the insolvency commencement date.[162]

If not submitted by the last date mentioned in the public announcement, claims can be submitted by the creditors until the 90th day from the insolvency commencement date.[163] A creditor is also required to update its claim if the claim is satisfied, fully or partially, in any manner.[164]

The interim resolution professional will verify the claims received, make a detailed list of creditors and constitute the committee of creditors within two days of the verification of claims received by him (by the last date of receiving claims mentioned in the public announcement). Only financial creditors are allowed to be members of the committee of creditors and no classes

[160] CIRP Regulations, Reg 13.
[161] *Idem*, Reg 14.
[162] *Idem*, Reg 15.
[163] *Idem*, Reg 12(2).
[164] *Idem*, Reg 12A.

are required to be formed. In cases where there are no financial creditors, or only related party financial creditors, the committee of creditors comprises a maximum of 18 of the biggest operational creditors by value and one elected representative each for workmen and employees.

*6.5.3.5 Role of the interim resolution professional*

In addition to the verification of claims, the interim resolution professional performs vital functions in the CIRP. From the date of his appointment, the management of the affairs of the corporate debtor is vested in the interim resolution professional and the powers of the board of directors, or other governing body of the corporate debtor, is suspended. Further, the officers and managers of the corporate debtor report to the interim resolution professional and provide him with access to all the documents and records of the corporate debtor as may be required. All financial institutions maintaining banks accounts of the corporate debtor act only on the instructions of the interim resolution professional and they are obliged to furnish all required information to him.[165]

The following key powers are vested in the interim resolution professional:

(a) to act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b) the interim resolution professional has the authority to access the books of accounts, records and other relevant documents of the corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and

(c) the interim resolution professional is responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

Further, the interim resolution professional is required to perform the following key duties:

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining its financial position (including business operations and financial and operational payments for the previous two years) and draft a list of assets and liabilities as of the insolvency commencement date;

(b) constitute a committee of creditors;

(c) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(d) take custody and control of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, including assets in a foreign

[165] Insolvency and Bankruptcy Code, s 17.

country, assets that may not be in the possession of the corporate debtor, securities (including any shares in a subsidiary) and all tangible and intangible assets;

(e) most importantly, the interim resolution professional is required to make every endeavour to protect and preserve the assets of the corporate debtor and manage the operations of the corporate debtor as a going concern, for which purpose the interim resolution professional may appoint advisors, enter into contracts on behalf of the corporate debtor and issue instructions to the personnel of the corporate debtor;[166] and

(f) for the purposes of preserving and protecting the assets of the corporate debtor and managing its operations on a going concern basis, the interim resolution professional is permitted to raise finance (referred to as interim finance) and provide security over any asset of the corporate debtor for such interim finance without obtaining the prior consent of any lender to whom such asset is already charged, provided the value of such asset is more than twice the debt of such creditor.

*6.5.3.6 Appointment and role of the resolution professional*

As mentioned above, the interim resolution professional is appointed by the National Company Law Tribunal at the time of admission of the CIRP application. At the first meeting of the committee of creditors (which is held within seven days of the constitution of the committee), the committee may decide (by a majority vote of 66% by value) to either appoint the interim resolution professional as the resolution professional or appoint another insolvency professional in his stead. Once so decided, the committee is required to inform the National Company Law Tribunal of their decision and the National Company Law Tribunal thereafter appoints the selected insolvency professional as the resolution professional for the corporate debtor for the remainder of the CIRP, that is, until an order of approval of a resolution plan or an order of liquidation (subject to any replacement ordered as below).

The resolution professional conducts the rest of the CIRP and, as in the case of the interim resolution professional, it is his primary duty to preserve and protect the assets of the corporate debtor, including its continued business operations as a going concern. The resolution professional has the same duties and powers as the interim resolution professional. In addition, the resolution professional undertakes the following key actions:[167]

(a) maintain an updated list of claims against the corporate debtor;

(b) prepare an information memorandum containing all relevant information in relation to the corporate debtor;

(c) invite prospective resolution applicants, who are eligible as per the criteria stipulated by the committee of creditors, to submit resolution plan(s) for the corporate debtor;

(d) present all resolution plans to the meetings of the committee of creditors; and

[166] *Idem*, s 20.
[167] *Idem*, s 25.

(e) file applications for the avoidance of antecedent transactions in accordance with the Code and the Regulations.

The committee of creditors can replace the resolution professional with another insolvency professional at any point during the CIRP by passing a resolution (with 66% majority in value) and then forwarding the name of the insolvency professional to the National Company Law Tribunal. If no disciplinary proceedings are pending against such an insolvency professional, the National Company Law Tribunal appoints him as the resolution professional of the corporate debtor.

The resolution professional also has the power to sell the unencumbered assets of the corporate debtor, not exceeding 10% of the total claims admitted, outside the ordinary course of business for realising better value, subject to the approval of the committee of creditors by a voting majority of 66% by value. However, no provision exists for the distribution of the proceeds of such a sale to the creditors of the corporate debtor during the CIRP.

Another important function of the resolution professional is to ensure that a valuation of the assets of the corporate debtor is made. The resolution professional is required to provide a liquidation value and fair value report to the committee of creditors on a confidential basis. The resolution professional is required to appoint two valuers who must determine the liquidation value and fair value of the assets of the corporate debtor on the basis of internationally accepted best practices. If the two valuations are dissimilar for any asset class by 25% or more, a third valuer may be appointed by the resolution professional for that asset class. The average of the two closest values should be considered for the purposes of the CIRP. The valuation reports are provided to the committee of creditors after submission of any resolution plans devised for the corporate debtor.

*6.5.3.7 Role of the committee of creditors*

The committee of creditors is the supervisory body for the resolution professional and the primary decision-making body in the CIRP. Meetings of the committee of creditors are organised by the resolution professional as its non-voting chairperson and is attended by the members of the committee, that is, the unrelated financial creditors of the corporate debtor. In addition, the members of the board of directors of the corporate debtor (now suspended) and any operational creditor whose debt equals or exceeds 10% of the total debt of the corporate debtor, are also entitled to attend the meetings of the committee of creditors as non-voting participants.

An approval by the committee of creditors is required for extending the timeline of the CIRP, replacing or confirming the resolution professional and approval of the resolution plan in respect of the corporate debtor (see below). Further, the resolution professional is required to obtain the approval of the committee of creditors by a resolution passed by 66% majority by value in respect of, among others, the following transactions:[168]

[168] These items are specified in the Insolvency and Bankruptcy Code, s 28.

(a) raising interim finance for the corporate debtor;

(b) changing the capital structure of the corporate debtor, including by issuing additional securities;

(c) recording any changes in the ownership interest of the corporate debtor;

(d) giving instructions to banks maintaining accounts of the corporate debtor, for transactions in excess of a limit decided by the committee of creditors;

(e) undertaking any related-party transactions;

(f) amending the constitutional documents of the corporate debtor;

(g) delegating the resolution professional's authority to any person; and

(h) making any change to the management of the corporate debtor or any of its subsidiaries.

Other than the items mentioned in section 28 of the Insolvency and Bankruptcy Code and the items specified here, the committee of creditors can take all decisions by a resolution passed by a 51% majority of the committee by value.

*6.5.3.8 Invitation, preparation and approval of resolution plan*

As noted above, the resolution professional invites potential resolution applicants to come forward and submit resolution plans for the corporate debtor. Such an invitation is issued in a prescribed form, published in local newspapers and uploaded to the website of the corporate debtor, websites prescribed by the Insolvency and Bankruptcy Board of India and in any other manner stipulated by the committee of creditors.[169] The public announcement stipulates the conditions for the eligibility of resolution applicants as decided by the committee of creditors, usually containing both technical and commercial criteria bearing in mind the size and complexity of the corporate debtor.

The resolution professional is required to provide potential resolution applicants with all information in relation to the corporate debtor that may be required to prepare a resolution plan, including the information memorandum, subject to the resolution applicant providing a confidentiality undertaking to the resolution professional.

*6.5.3.9 Provisions relating to the eligibility of resolution applicants in the Insolvency and Bankruptcy Code*

The Insolvency and Bankruptcy Code does not restrict any person from submitting a resolution plan for the corporate debtor pursuant to the invitation by the resolution professional, subject

[169] CIRP Regulations, Reg 36A.

to the eligibility conditions under the Code and as may be set out in the invitation for the submission of resolution plans.

One of the most significant changes made to the Code after its promulgation, was the introduction of section 29A in November 2017 (further amended in June 2018). Section 29A stipulates the criteria for a resolution applicant to be eligible to present a resolution plan for a corporate debtor under the Code. Section 29A provides as follows and is reproduced here in its entirety:

> "29A. Persons not eligible to be resolution applicant. -
>
> A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person–
>
> (a) is an undischarged insolvent;
>
> (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
>
> (c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:
> Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non- performing asset accounts before submission of resolution plan:
> Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.
> *Explanation* I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and 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.
> *Explanation* II.– For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause *(iii) of Explanation I*;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):[170] Provided that this clause shall not apply in relation to a connected person referred to in clause *(iii)* of *Explanation I;*

(f) is prohibited by the Securities and Exchange Board of India[171] from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

*Explanation I*. – For the purposes of this clause, the expression "connected person" means–

(i) any person who is the promoter or in the management or control of the resolution

(ii) applicant; or

(iii) any person who shall be the promoter or in management or control of the

[170] The Companies Act specifies many situations where a person may be disqualified to act as a director, such as being convicted of any offence and sentenced to imprisonment for not less than six months and five years has not elapsed since the expiry of such sentence, or if he was a director of a company which has not filed financial statements or annual returns for any continuous period of three years.

[171] This is the securities regulator in India.

(iv) business of the corporate debtor during the implementation of the resolution plan; or

(v) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause *(iii) of Explanation I* shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and 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;

*Explanation* II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf,[172] namely:—

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

As can be seen from the language of section 29A, the section provides extensive and cross-jurisdictional disqualifications for a resolution applicant. If a resolution applicant, or any person acting jointly or in concert with them, fulfils any of the above conditions, such person will not be able to submit a resolution plan for a corporate debtor under the Code.

[172] No such conditions have been notified to date and there is therefore some doubt as to whether this exemption is effective, absent such notification.

It is relevant to mention that the provisions of section 29A (c) and (h) above do not apply to the insolvency resolution of MSMEs.173 In addition, the Government of India has the power to exempt a MSME from any other provisions of the Code; however, no such exemption has been notified as yet.

There is no restriction on the creditors of the corporate debtor themselves submitting a resolution plan, subject to the above eligibility requirements.

*6.5.3.10 Resolution plan*

The Code provides flexibility as to the manner of restructuring the company. Amongst others, a resolution plan may provide for the transfer / sale of assets of the company, the substantial acquisition of shares / merger / demerger / consolidation of the company, satisfaction / modification of security interests, curing / waiving of breach / extension of maturity date / change in interest rate or other terms of debts due from the company, a reduction in dues payable to creditors, amendments to the company's constitutional documents, the issuing of securities of the company for cash / property / in exchange of claims and obtaining requisite approvals from the government or other authorities.

However, a resolution plan is required to mandatorily provide for:

(a) the payment of the insolvency resolution process costs in a manner specified in the CIRP regulations and in priority to all other debts of the corporate debtor;

(b) payment of the debts of the operational creditors, which must not be less than the amounts to be paid to the operational creditors in the event of the liquidation of the corporate debtor in terms of the liquidation waterfall (priority of payments) or the amount that would have been paid to the operational creditors if the amounts to be paid under the resolution plan had been distributed in accordance with the priority set out in section 53 of the Code (liquidation waterfall), whichever is higher;

(c) payment of the debts of the dissenting creditors which must not be less than the amounts to be paid to such creditors in the event of the liquidation of the corporate debtor in terms of the liquidation waterfall (courts have held that this amount is also subject to decision of the committee of creditors);

(d) the management of the affairs of the corporate debtor after approval of the resolution plan;

(e) the implementation and supervision of the resolution plan;

(f) compliance with all applicable laws; and

(g) conformity to other requirements provided in the CIRP Regulations.[174]

[173] Insolvency and Bankruptcy Code, s 240A.
[174] *Idem*, s 30(2).

In addition, a resolution plan is required to provide for the insolvency resolution of the corporate debtor as a going concern.[175]

The CIRP Regulations provide for the following mandatory contents of resolution plans:[176]

(a) amounts due to the operational creditors and the dissenting financial creditors under a resolution plan should be paid in priority to assenting financial creditors;

(b) the plan must include a statement as to how it has dealt with the interests of all stakeholders including financial creditors and operational creditors;

(c) a statement must be included in the resolution plan giving details if the resolution applicant or its related parties have failed to implement or contributed to the failure of any other resolution plan approved under the Code;

(d) the term and implementation schedule of the plan;

(e) management and control of the corporate debtor during the term of the resolution plan;

(f) adequate means of supervising the implementation of the plan; and

(g) manner in which proceedings in respect of avoidance transactions will be pursued after approval of the resolution plan and the manner in which the proceeds received from proceedings will be distributed.

Furthermore, a resolution plan is required to demonstrate that it addresses the cause of default by the corporate debtor, is feasible and viable, has provisions for its effective implementation, approvals required and the timeline for obtaining the same and that the resolution applicant has the capability to implement the resolution plan.

*6.5.3.11 Examination and approval of resolution plans*

The resolution plans submitted by resolution applicants are examined by the resolution professional for compliance with the Code and is submitted to the committee of creditors for its approval. In this context, the Supreme Court of India has held that the resolution professional is not required to take any decision in respect of its examination and is required to only provide his *prima facie* opinion to the committee of creditors. The resolution professional should provide his *prima facie* opinion to the committee, together with a due diligence report on the plans examined by him. On the basis of these reports, the committee of creditors is required to decide whether or not the plans submitted comply with the requirements of the Code and the CIRP Regulations.[177] It is relevant to note that the examination and decision on the compliance of the

[175] *Idem*, s 5(26).
[176] CIRP Regulations, Reg 38.
[177] *Arcelormittal India Private Limited* v *Satish Kumar Gupta and Ors* — Civil Appeal Nos 9402-9405 of 2018, judgment dated 4 October 2018.

resolution plan will also include a check on compliance by the resolution applicant with Section 29A of the Code (see above).

Once the resolution plan has been found to be compliant, it is put to a vote by the committee of creditors. If more than one plan has been found to be compliant, the committee is required to vote on all compliant plans simultaneously with the tie-breaker formula decided in advance, The committee, with a resolution passed by a majority of 66% of its members by value, can approve the plan after considering the plan's feasibility and viability and the manner of distribution of the resolution plan proceeds proposed in the resolution plan. Once approved by the committee, the plan is then submitted by the resolution professional for approval by the National Company Law Tribunal. Upon approval by the National Company Law Tribunal, which checks compliance of the resolution plan with the Code and the Regulations, as well as whether the resolution plan contains provisions for its effective implementation, the resolution plan will be binding on the corporate debtor, employees, members, creditors (including dissenting creditors in the committee of creditors as well as Government authorities), guarantors and other stakeholders involved in the resolution plan. The Supreme Court has clarified that the acquisition of the corporate debtor by the resolution applicant under a resolution plan is on a "fresh slate" basis, that is, the corporate debtor is liable only for claims mentioned and dealt with in the resolution plan and cannot be burdened with undecided claims after approval of the resolution plan and that all claims which have not been dealt with in the resolution plan stand extinguished.[178]

The resolution professional is required to provide a copy of the approval order to all participants in the committee and the resolution applicant and he is required to, within 15 days of approval, inform each claimant of the principle of formula for repayment of such claimant's debt under the resolution plan.[179]

The Code also provides that upon approval of a resolution plan in respect of a corporate debtor which provides for a change in management or control of the corporate debtor from its existing shareholders, any criminal proceedings / investigations in respect of any offence committed by the corporate debtor prior to the commencement of CIRP shall cease and the property of the corporate debtor shall not be attached or be subject to attachment or seizure under any such proceedings or investigations. The proceedings / investigations against the erstwhile officers/managers of the corporate debtor in respect of such offences shall however continue and the corporate debtor is required to provide all assistance to the investigating authorities in such proceedings/investigation.[180]

As will be noticed, no resolution by the shareholders of the corporate debtor is required to be obtained for approval of the resolution plan. The Code also provides that if any approval by the shareholders of the company in the CIRP is required under the Companies Act or any other law for implementation of the approved resolution plan, such approval shall be deemed to have been obtained upon approval of the resolution plan by the National Company Law Tribunal.

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[178] *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta*, judgment dated 15 November 2019 in Civil Appeal No 8766-67 of 2019 read with *Ghanshyam Mishra & Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited, judgement dated 13 April 2021 in Civil Appeal No 8129 of 2019.*

[179] CIRP Regulations, Reg 39(5) and 39(5A).

[180] Insolvency and Bankruptcy Code, s 32A.

Further, the resolution plan will be effective notwithstanding any consent requirements under shareholders' agreements or joint venture agreements. An application to the National Company Law Tribunal can also be made in order to seek the assistance of the district administration for implementation of the terms of the resolution plan. Approval of a resolution plan can be appealed against before the NCLAT on the limited grounds of contravention of the law, material irregularity in the exercise of powers by the resolution professional, or non-compliance with the requirements of the CIRP Regulations as set out above.

Once the resolution plan is approved, the moratorium ends and the resolution professional vacates his office.

*6.5.3.12 Failure of corporate insolvency resolution process*

The "Liquidation following CIRP" section in paragraph 6.3.1.1 above sets out in detail the situations where the resolution is treated as having failed and the corporate debtor is put into liquidation. The conduct of a liquidation under the Code has been set out in detail above.

*6.5.3.12 Interim finance*

As mentioned above, both the interim resolution professional and the resolution professional have the power to raise interim finance in order to fund the conduct of the CIRP. The interim finance is treated as part of the insolvency resolution process costs, which is given high priority in the liquidation waterfall (list of priorities). In a subsequent liquidation, the interest payable on the interim finance for a period of one year, or until the date of repayment by way of a dividend or distribution, is provable as a debt.

*6.5.3.13 Withdrawal of the CIRP*

Section 12A of the Code provides for the withdrawal of the CIRP after its commencement. The conditions for withdrawal are as follows:

(a) the National Company Law Tribunal will allow withdrawal of the CIRP upon application by the entity on whose application the CIRP was initiated;

(b) prior to making the application, consent of the committee of creditors (by a resolution passed by 90% of the members by value) must have been obtained;[181] and

(c) in addition, the CIRP Regulations stipulate:[182]

[181] In a judgment, which also upheld the constitutional validity of the entire Code, the Indian Supreme Court held that withdrawal of the CIRP is permissible even prior to formation of the committee of creditors if the National Company Law Tribunal exercises its inherent jurisdiction and considers it just to withdraw the CIRP (*Swiss Ribbons v Union of India,* 2019 SCC Online SC 73). This has also resulted in amendments to the CIRP Regulations to provide for such withdrawals.

[182] CIRP Regulations, Reg 30A.

(i) the form in which the application for withdrawal will have to be made by the applicant (to the interim resolution professional or the resolution professional);

(ii) that the application will need to be accompanied by a bank guarantee for an amount equal to the insolvency resolution process costs incurred to date;

(iii) that once approved by 90% of the committee of creditors by value, the application can be submitted to the National Company Law Tribunal; and

(iv) that the withdrawal can only be made before the issuance of an expression of interest by the resolution professional, inviting resolution plans for the corporate debtor to be submitted.[183] If the application is being made after the invitation, the reasons justifying the withdrawal have to be stated in the application.

*6.5.3.14 Adjustment of antecedent transactions*

The Code provides for the avoidance of antecedent transactions by the National Company Law Tribunal. Unlike a liquidator, the resolution professional does not have the power to disclaim onerous property or reject contracts of the corporate debtor. The resolution professional is required to submit to the committee of creditors a report with details of the avoidable transactions and orders of the National Company Law Tribunal in respect of such transactions, if any, at the time of submission of the compliant resolution plans to the committee.[184] Furthermore the creditors have an obligation to provide relevant extracts from the reports / audits they may have conducted on the corporate debtor pointing out the suspect transactions.[185]

The following categories of antecedent transactions can be assailed by the resolution professional:

*Preferential transactions*

If the corporate debtor has at the relevant time entered into a transfer of property (or an interest therein) for the benefit of a creditor for or on account of an antecedent debt which will have the effect of putting such creditor in a more beneficial position than it would have been in the event of liquidation, the transaction will be treated as a preferential transaction under the Code.[186] The relevant time for such transactions is two years preceding the insolvency commencement date for related parties and one year preceding the insolvency commencement date for unrelated parties. Transfers made in ordinary course of business and security created for new value debt are exceptions to this. Upon an application by the resolution professional, if the National

[183] Supreme Court of India, in *Brilliant Alloys Private Limited v Mr S Rajagopal & others,* order dated 14 December 2018 in Petition for Special Leave to Appeal (C) No(s) 31557/2018, has held that the condition of such withdrawal being permissible only before the issuance of expressions of interest, is only directory and, therefore, a withdrawal of the CIRP after the issuance of expressions of interest is also permissible.
[184] CIRP Regulations, Reg 39(2).
[185] *Idem*, Reg 35A(4).
[186] Insolvency and Bankruptcy Code, s 43.

Company Law Tribunal is satisfied that the transaction is a preferential transaction, it will order the transaction to be reversed, or for the proceeds of the transfer to be paid to the resolution professional.[187]

*Undervalued transactions*

If the corporate debtor enters into an undervalued transaction (meaning either a gift or a transaction which involves transfer of one or more assets of the corporate debtor for a consideration which is significantly less than the value of the consideration provided by the corporate debtor) during the relevant period, the transaction can be avoided by the National Company Law Tribunal upon application by the resolution professional, provided such transaction was not in the ordinary course of business. The relevant period for this purpose is two years preceding the insolvency commencement date for related parties and one year preceding the insolvency commencement date for unrelated parties.[188]

Further, if an undervalued transaction was entered into deliberately by the corporate debtor for keeping such assets outside the reach of creditors of the corporate debtor, or in order to adversely affect the interest of a creditor, such transaction can be held to be a transaction defrauding creditors and, upon application by the resolution professional, the corporate debtor can be restored to the position it was before the transaction.[189]

*Extortionate credit transactions*

If the corporate debtor has entered into an extortionate credit transaction (meaning credit transactions requiring exorbitant payments) in the period of two years prior to insolvency commencement date, the National Company Law Tribunal may, upon application by the resolution professional, declare such a transaction void.[190]

*Fraudulent trading*

If during the CIRP the resolution professional is of the view that the corporate debtor carried on any business with an intent to defraud creditors or for any other fraudulent purpose, it may apply to the National Company Law Tribunal for an order requiring any person who was knowingly a party to the carrying on of such business to make such contributions to the assets of the corporate debtor as the National Company Law Tribunal deems fit.[191] For assailing transactions on this ground, there is no requirement for the transactions to have occurred within any prescribed period of time prior to insolvency.

[187] *Idem*, s 44.
[188] *Idem*, ss 45 to 48.
[189] *Idem*, s 49.
[190] *Idem*, s 50.
[191] *Idem*, s 66(1).

*Wrongful trading*

The Code also provides for wrongful trading, which permits the National Company Law Tribunal to order that the directors be made liable to contribute to the assets of the corporate debtor. Section 66(2) of the Code provides that if before the insolvency commencement date the director knew or ought to have known that there was no reasonable prospect of the corporate debtor avoiding commencement of the CIRP and such director did not exercise any due diligence in minimising the potential loss to the creditors of the corporate debtor, the resolution professional may apply to the National Company Law Tribunal to make such director liable to contribute to the assets of the corporate debtor in order to make good such loss to the creditors. Exercising due diligence for this purpose means diligence reasonably expected of a person carrying on the same functions as are carried out by such director in relation to the corporate debtor. It is notable that as a response to the coronavirus pandemic, the Code provides that an action for wrongful trading cannot be initiated with regard to a default which is covered by section 10A of the Code.

*6.5.3.15 Fast-track CIRP*

The Code provides for a fast-track CIRP for specified entities, being:[192]

(a) a small company as defined in the Companies Act – meaning a company having a paid up share capital of less than INR 5 million and a turnover as per the profit and loss account of less than INR 20 million, not being a holding company of another company;

(b) a start-up (other than a partnership firm) – defined as a company or a limited liability partnership established less than seven years ago (10 years for the biotechnology sector) whose turnover has not exceeded INR 250 million in any of the financial years since incorporation and who is working towards the innovation, development or improvement of products or processes or services, or who has a scalable business model with a high potential of employment generation or wealth creation; and

(c) an unlisted company with total assets as reported in the financial statements of the immediately preceding financial year of less than INR 10 million.

The Government of India can notify (identify) other entities to be covered within these provisions.

An application for fast-track CIRP is made by the corporate debtor, or a creditor upon occurrence of a default by providing the existence of the debt and default (as well as other specified information) to the National Company Law Tribunal. The fast track CIRP is required to be completed within 90 days from commencement and can be extended by the National Company Law Tribunal only once by another 45 days, provided the committee of creditors has approved such extension by a 75% majority by value. The provisions in relation to the conduct of the CIRP and antecedent transactions apply to a fast track CIRP as well.

[192] *Idem*, s 55.

*6.5.3.16 Pre-pack insolvency resolution process for MSMEs*

To help MSMEs that have been deeply affected by the Covid-19 pandemic, the Indian Government in April 2021 introduced a pre-packaged insolvency resolution process framework (pre-pack) for MSMEs by way of an ordinance.[193] Detailed regulations (titled Insolvency and Bankruptcy Board of India (Prep-Packaged Insolvency Resolution Process) Regulations, 2021) were also issued to give full effect to the amended in the Code.

*Initiation of the pre-pack*

An MSME, in default of a minimum amount of INR 1 million, can initiate a Pre-Pack in respect of itself by filing an application before the relevant National Company Law Tribunal. The MSME will need to obtain approval from its shareholders by way of a special resolution (75% majority) as well as approval from its unrelated financial creditors of 66% majority by value, before filing for initiation of the pre-pack. Furthermore, such MSME shall not be eligible to file to initiate a pre-pack if it is subject to corporate insolvency resolution process or liquidation under the Code, has undergone a pre-pack or completed a corporate insolvency resolution process in the past three years or is otherwise ineligible under section 29A of the Code. [194]

At the time of obtaining approval from the financial creditors, the MSME is required to provide a declaration from the Board that the application for initiation of the pre-pack will be filed within a definite time period not exceeding 90 days, the pre-pack is not being initiated to defraud any creditor and also propose the name of an insolvency professional who will act as the resolution professional. The MSME is also required to provide the financial creditors with a base resolution plan in relation to the MSME and compliance requirements for such a resolution plan remains the same as discussed in paragraph 6.5.3.10 above.

An application to initiate pre-pack is accorded priority over applications for other insolvency applications under the Code that are filed after the application for a pre-pack or not earlier than 14 days from the application for a pre-pack. This means that the National Company Law Tribunal will dispose of the application for a pre-pack first before considering an application for initiation of a corporate insolvency resolution process filed by a creditor.[195]

*Moratorium and Resolution Professional*

The National Company Law Tribunal is required to admit or reject an application for a pre-pack within 14 days of receipt. If the application is admitted, a moratorium is ordered from the date of admission until the pre-pack concludes. The moratorium has the same effect as in section 14 of the Code in relation to a corporate insolvency resolution process (please see paragraph 6.5.3.2 above for further details).[196]

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[193] Available at https://ibbi.gov.in//uploads/legalframwork/04af067c22275dd1538ab2b1383b0050.pdf.
[194] Insolvency and Bankruptcy Code, s 54A.
[195] *Idem*, s 11A.
[196] *Idem*, s 54E.

Within two days of admission of the application for pre-pack, the MSME is required to provide to the resolution professional a list of claims, creditors and their security interests as well as a preliminary information memorandum (similar to the information memorandum prepared by a resolution professional during the corporate insolvency resolution process). Interestingly, the Code provides that if any creditor suffers any loss or damage due to any material omission or misleading information in the list of claims, the directors of the MSME shall be personally liable to pay compensation to such a creditor.[197]

Simultaneous with the admission, the National Company Law Tribunal also appoints a resolution professional (being the insolvency professional proposed by the MSME and approved by the financial creditors). The role of the resolution professional in the pre-pack process is limited when compared to that in the corporate insolvency resolution process and, most importantly, the powers of the Board of Directors of the debtor are not vested in the resolution professional and the Board continues to function.[198] Additional duties of the Board of Directors apply during the pre-pack process, which includes the duty to protect and preserve the property of the MSME and manage its operations as a going concern.[199]

The key duties of the resolution professional in the pre-pack process are as follows:[200]

(a) confirm the list of claims submitted by the MSME (the MSME is required to submit a list of claims to the resolution professional as mentioned above) and maintain an updated list;

(b) monitor management of the affairs of the MSME;

(c) prepare the information memorandum on the basis of the preliminary information memorandum provided by the MSME; and

(d) constitute the committee of creditors, convene their meetings and inform them in the event of a breach of any of the obligations of the Board of Directors of the regulations relating to the pre-pack process.

However, if the affairs of the MSME are conducted in a fraudulent manner, or in the case of gross mismanagement, the committee of creditors can resolve and apply to the National Company Law Tribunal to vest the management of the MSME with the resolution professional. If appointed, the powers and duties of the resolution professional are akin to those in the corporate insolvency resolution process.[201]

[197] *Idem*, s 54G (2).
[198] *Idem*, s. 54H (a).
[199] *Idem*, s. 54H (c).
[200] *Idem*, s. 54F.
[201] *Idem*, s. 54J.

*Resolution plan*

The base resolution plan submitted by the MSME is submitted to the resolution professional, who presents it to the committee of creditors.[202] The committee may provide the MSME with an opportunity to revise the base resolution plan.

The committee of creditors can approve such base resolution plan by a resolution passed by a majority of 66% of creditors by value if such a resolution plan does not impair any claims owed by the MSME to the operational creditors.[203] If the base resolution plan is not so approved by the committee of creditors, or the plan impairs claims of the operational creditors, then the resolution professional will be required to invite other resolution plans. All such resolution plans are to be evaluated on the basis of parameters approved by the committee of creditors to ascertain if the resolution plans received are significantly better than the base resolution plan and the committee of permitted to specify the minimum improvement that may be required in the resolution plans over the base resolution plans.[204]

The entire process of competing and improving the bids has to be completed within 48 hours. The resolution plan having a higher score on completion of the process of improvement will be considered by the committee of creditors for their final approval. Once approved by the committee and then by the National Company Law Tribunal, the resolution plan is binding on all stakeholders of the MSME. If the resolution plan is not approved by the requisite majority, the resolution professional is required to file for termination of the pre-pack.

*Timelines and termination of the pre-pack*

The pre-pack is required to be completed within 120 days from the date of the admission order and the resolution professional is required to submit to the National Company Law Tribunal a resolution plan approved by the committee of creditors within 90 days from the date of admission order. If no plan is submitted within such 90 days, the resolution professional is required to file for termination of the pre-pack process.[205]

The pre-pack can also be terminated in the following situations:

(a) if the committee of creditors before approving a resolution plan resolve by 66% majority by value to initiate a corporate insolvency resolution process in relation to the MSME. The resolution professional is then required to inform the National Company Law Tribunal of such decision and the tribunal will pass orders to terminate the pre-pack process and pass an order for initiation of corporate insolvency resolution process for the MSME;[206] and

[202] *Idem*, s. 54K (1).
[203] *Idem*, s. 54K (4).
[204] *Idem*, s 54K read with Reg 42 of the Insolvency and Bankruptcy Board of India (Prep-Packaged Insolvency Resolution Process) Regulations, 2021.
[205] *Idem*, s 54D.
[206] *Idem*, s 54O.

(b) If the management of the MSME was vested in the resolution professional under Section 54J and the approved plan does not provide for a change in management or control of the MSME, the National Company Law Tribunal will reject the resolution plan, terminate the pre-pack process and initiate a liquidation for the MSME.[207]

**Self-Assessment Exercise 5**

**Question 1**

Briefly describe the scope of the moratorium granted under the Insolvency and Bankruptcy Code.

**Question 2**

Briefly describe the process of withdrawal of a corporate insolvency resolution process under the Code.

**Question 3**

Describe the mandatory contents of a resolution plan under the Code.

**Question 4**

Describe the rights of operational creditors and dissenting financial creditors in relation to a resolution plan proposed under the Code.

**For commentary and feedback on self-assessment exercise 5, please see APPENDIX A**

## 7. CROSS-BORDER INSOLVENCY LAW

The cross-border insolvency regime in India is not developed. Although in some rare cases relating to child custody and anti-suit injunctions, Indian courts have looked at and applied the principles of comity and convenience, there has been no case where such principles were accepted by the Indian courts in the context of corporate insolvency. Although in a recent judgement of the Delhi High Court,[208] the High Court granted assistance to a foreign bankruptcy trustee administering the bankruptcy estate of an individual in relation to properties in India.

India has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) and there is no special framework in place for dealing with cross-border insolvency cases. Therefore, dealing with cross-border insolvency cases is very difficult in India. A committee set

[207] *Idem*, s 54L.
[208] *Toshiaki Aiba, as the Bankruptcy Trustee v Vipan Kumar Sharma*, order dated 26 April 2022, MANU/DE/1490/2022.

up by the Government of India (the Insolvency Law Committee) submitted a Report on Cross-Border Insolvency dated 16 October 2018 (ILC Report) to the Central Government. The ILC Report has recommended the adoption of the UNCITRAL Model Law with certain modifications suitable to the Indian jurisdiction.

For the recognition and enforcement of foreign judgments, which will generically apply to insolvency judgments as well, please see below. Indian courts are generally territorial in their approach to insolvency cases. For example, in the well-known case of the insolvency of Bank of Credit and Commerce International (BCCI), the Indian court did not recognise the insolvency of BCCI (which was commenced in the Cayman Islands) and initiated its own insolvency proceedings as per the Reserve Bank of India Act.[209] Having said that, in the insolvency proceedings of Jet Airways, the NCLAT approved a cross-border insolvency protocol between a Dutch bankruptcy trustee and the Indian resolution professional in respect of Jet Airways. This judgement was seen as a very progressive move for the Indian cross-border insolvency regime.[210]

As an interim measure under the Code, section 234 provides for the Government of India to enter into bilateral treaties with other countries in order to extend the enforceability of the provisions of the Code to such countries. No such treaties have been signed to date. Additionally, section 235 of the Code provides that where any assets of a corporate debtor are situated outside India in a country with whom a treaty under section 234 has been executed, and evidence or action is required by the resolution professional or the liquidator in relation to such assets, the resolution professional / liquidator may apply to the National Company Law Tribunal to issue a letter of request to the relevant court or authority in such other country.

However, it should be noted that there is no distinction made between the rights of an Indian creditor and those of a foreign creditor under the Code; Indian law has long recognised the ability of foreign creditors to participate in Indian insolvency proceedings.

## 8. RECOGNITION OF FOREIGN JUDGMENTS

Section 44A of the Code of Civil Procedure, 1908 provides for the execution by Indian courts of decrees passed by foreign courts as a decree passed by Indian courts, provided that such decree has been passed by a notified (designated) court in a reciprocating territory outside India and the decree is in relation to the payment of a sum of money not being taxes or other charges similar in nature to taxes. Such courts and reciprocating territories are notified by the Government of India and currently only include about 12 territories, including the United Kingdom, Singapore, United Arab Emirates and Hong Kong. If the decree has been obtained in a non-reciprocating territory, enforcement of such a decree / judgement will require a fresh suit to be brought before the Indian courts (with the judgment obtained in the foreign jurisdiction being accorded only evidentiary value).

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[209] *Reserve Bank of India v Bank of Credit & Commerce International*, AIR 1994 Bom 177.

[210] *Jet Airways (India) Ltd (Offshore Regional Hub) v State bank of India,* NCLAT judgment dated 26 September 2019 in Company Appeal (AT) No 707 of 2019.

Enforcement of a decree from a reciprocating territory can also be refused if one the following grounds is proved:[211]

(a) if the decree has been pronounced by a court without jurisdiction;

(b) if the decree has not been given on the merits of the case;

(c) if it appears on the face of the proceedings to have been founded on an incorrect view of international law or of Indian law, as applicable;

(d) if the proceedings in which the decree was obtained were opposed to natural justice;

(e) if the decree was obtained by fraud; or

(f) if the decree is founded on a breach of Indian law.

**Self-Assessment Exercise 6**

**Question 1**

Describe the provisions provided for in the Code to deal with cross-border insolvency cases.

**Question 2**

Briefly describe the law relating to the enforcement of foreign judgements in India.

**For commentary and feedback on self-assessment exercise 6, please see APPENDIX A**

## 9. INSOLVENCY LAW REFORM

As mentioned above, pursuant to the ILC Report, the Government of India is working on adopting the UNCITRAL Model Law on Cross-Border Insolvency. Further, the ILC reviews the issues in relation to the implementation of the Code on a regular basis and recommends the course of action required to resolve such issues on a periodic basis. .

## 10. USEFUL INFORMATION

The following are useful websites in relation to insolvency environment in India:

- Website of the Insolvency and Bankruptcy Board of India: https://ibbi.gov.in/

[211] Civil Procedure Code, s 13.

- Website of the National Company Law Tribunal: https://nclt.gov.in/
- Website of the NCLAT: https://nclat.nic.in/
- Website of the MCA: http://www.mca.gov.in/

## APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

**Self-Assessment Exercise 1**

Briefly explain the basis of jurisdiction of the National Company Law Tribunals under the Indian insolvency regime for corporate and individual debtors.

**Commentary and Feedback on Self-Assessment Exercise 1**

You should be able to describe the basis on which a National Company Law Tribunal would have jurisdiction in the context of individual and corporate insolvency respectively.

National Company Law Tribunals exercise jurisdiction relating to insolvency and liquidation for companies and LLPs and the relevant National Company Law Tribunal is the bench of the tribunal having territorial jurisdiction at the place where the registered office of the debtor is situated.

However, insolvency jurisdiction in relation to guarantors, whether personal or corporate, to companies and LLPs undergoing insolvency or liquidation under the Code, is exercised by the National Company Law Tribunal in which the primary debtor is undergoing insolvency or liquidation. A recent Supreme Court judgement has opined that pendency of the insolvency or liquidation of the primary debtor is not required for initiation of personal guarantor's insolvency or bankruptcy proceedings before the National Company Law Tribunal.

**Self-Assessment Exercise 2**

**Question 1**

Briefly explain the difference in rights of a creditor under a mortgage and a pledge.

**Question 2**

Briefly explain the possibility of the enforcement of security during the CIRP and after a failed CIRP.

**Commentary and feedback on Self-Assessment Exercise 2**

**Question 1**

Mortgage in English form provides a proprietary interest to the creditor and a right to re-possess and sell the property upon a default in addition to right to appoint a Receiver and undertake a private sale. A pledge provides a right to sell the pledged assets after due notice to the pledgor.

**Question 2**

During CIRP, a moratorium prohibiting, among other things, enforcement of security interests by a creditor becomes applicable. Therefore, it is not permissible to enforce security during the CIRP. If the CIRP fails, that is, no resolution plan is found or approved or the approved resolution plan fails, the company enters liquidation. At that stage, the creditor can stay outside the liquidation and enforce its security separately subject to a right of first refusal of the liquidator to direct the creditor to sell the property to a person nominated by the liquidator unless the sale is under SARFAESI or the RDB Act.

**Self-Assessment Exercise 3**

**Question 1**

Explain the relevance of "acts of insolvency" for the Bankruptcy Acts.

**Question 2**

Briefly describe the scenarios in which a personal guarantor can be adjudicated as a bankrupt under the Code..

**Commentary and Feedback on Self-Assessment Exercise 3**

**Question 1**

Acts of insolvency form the basis of an application by a creditor for the initiation of insolvency proceedings against a debtor. If the debtor has committed an act of insolvency, the creditor may file an insolvency application within three months if the debt owed to the creditor is above the threshold required under the Bankruptcy Acts.

**Question 2**

The NCLT or the DRT can pass an order declaring a personal guarantor as bankrupt in the following situations: (i) the application for insolvency resolution filed by the personal guarantor is rejected by the court and the court has ruled that the application was filed only to defraud the creditors or the resolution professional; (ii) the repayment plan submitted by the personal guarantor is rejected; or (iii) the approved repayment plan cannot be implemented completely.

**Self-Assessment Exercise 4**

**Question 1**

Briefly describe the conditions in which a company can be liquidated under the Code following a resolution process.

**Question 2**

Briefly describe the differences in the "liquidation waterfall" (priority of payments) under the Insolvency and Bankruptcy Code and the Companies Act.

**Question 3**

Explain the sequence of actions that a liquidator appointed under the Code is required to take for the realisation of the assets of the corporate debtor.

**Question 4**

Set out the applicable timelines for liquidation under the Code, liquidation under the Companies Act and voluntary liquidation under the Code.

**Commentary and Feedback on Self-Assessment Exercise 4**

**Question 1**

Under the Code, the corporate debtor will be liquidated if (i) no resolution plan is presented to the National Company Law Tribunal for approval within the maximum period permitted for completion of the CIRP, that being 180 / 270 / 330 days; or (ii) the plan submitted to the National Company Law Tribunal, after approval of the committee of creditors, is rejected for any reason; or (iii) the committee of creditors decides, by a 66% majority (by value), that the corporate debtor ought to be liquidated; or (iv) the resolution plan as approved by the National Company Law Tribunal is breached.

**Question 2**

There are three key differences between the liquidation waterfall under the Code and the Companies Act: (i) the Code includes amounts raised as interim finance during the CIRP to be part of the insolvency resolution process costs, which costs are required to be paid in priority to other debts of the company (whereas the Companies Act does not provide for this); (ii) the Code provides unsecured financial creditors priority over unsecured non-financial creditors. Under the Companies Act, all unsecured creditors are treated *pari passu* amongst each other; and (iii) Under the Code, the dues to Government (taxes and levies) are subordinated to all financial creditors including unsecured financial creditors. Under the Companies Act, only secured creditors enjoy this priority.

**Question 3**

Under the Code, rescuing the corporate entity has been given paramount importance. Accordingly, a liquidator under the Code is required to first attempt to present a scheme of compromise or arrangement under the Companies Act within 90 days of the commencement of liquidation. This period will not be included in the period of liquidation process.

If no scheme is proposed and if the committee of creditors had decided as such, the liquidator will endeavour to sell the company or its business as a going concern for the first 90 days. If such sale is not possible, the liquidator can then sell the assets of the corporate debtor standalone, collectively or in parcels.

**Question 4**

Under the Code, compulsory liquidation is required to be completed within one year from commencement of liquidation except when the committee of creditors had decided to attempt sale of the company or its business as a going concern, in which situation another 90 days will be permitted.

For voluntary liquidation, liquidator is to endeavour to complete the liquidation process in 12 months from commencement of liquidation.

For liquidation under the Companies Act, no specific timelines are specified. However, if the completion of liquidation takes more than one year, the liquidator is required to file statements with the court on the progress of the liquidation.

**Self-Assessment Exercise 5**

**Question 1**

Briefly describe the scope of the moratorium granted under the Insolvency and Bankruptcy Code.

**Question 2**

Briefly describe the process of withdrawal of a corporate insolvency resolution process under the Code.

**Question 3**

Describe the mandatory contents of a resolution plan under the Code.

**Question 4**

Describe the rights of operational creditors and dissenting financial creditors in relation to a resolution plan proposed under the Code.

**Commentary and feedback on Self-Assessment Exercise 5**

**Question 1**

Upon acceptance of an application for initiation of CIRP under the Code, the National Company Law Tribunal orders a moratorium under section 14 of the Code, prohibiting:

- Initiation or continuance of legal proceedings including arbitration against the corporate debtor;
- Transfer, creation of encumbrances or disposing of by the corporate debtor of any of its assets or legal rights;
- Enforcement of security by creditors of the corporate debtor; and
- Recovery of any property by an owner or lessor where such property is in possession of the corporate debtor
- Termination of a license or approval provides by the Government authority subject to there being no payment default during the moratorium period
- Termination of supply of goods and services treated by the resolution professional as critical to operate the corporate debtor as a going concern subject to there being no payment default during the moratorium period.

The moratorium does not apply to guarantors of the corporate debtor or other transactions identified by the Government.

**Question 2**

Section 12 A of the Code provides for withdrawal of corporate insolvency resolution process. The application for withdrawal will have to be made by the petitioning creditor and consent of committee of creditors by 90% majority by value would have to be obtained before filing such an application. The National Company Law Tribunal can permit withdrawal of the process before constitution of committee of creditors as well.

**Question 3**

Section 30(2) of the Code together with Regulation 38 of the CIRP Regulations provides the mandatory contents of a resolution plan.

Under s. 30(2) of the Code, a resolution plan is required to contain:

- Provisions for payment of the costs of the CIRP in priority to payment to other creditors;
- Provisions for payment of the debts of the operational creditors which shall not be less than the amounts to be paid to the operational creditors in the event of the liquidation of the corporate debtor in terms of the liquidation waterfall (priority of payments) or the amount that would have been paid to the operational creditors if the amounts to be paid under the resolution plan had been distributed in accordance with the priority set out in section 53 of the Code whichever is higher;
- Provisions for payment of debts of the financial creditors, who did not vote in favour of the resolution plan which shall not be less than the amounts to be paid to such financial creditors in the event of the liquidation of the corporate debtor in terms of the liquidation waterfall (priority of payments);
- Provisions for management of the affairs of the corporate debtor after approval of the resolution plan;
- Provisions for implementation and supervision of the resolution plan;
- No provisions which are contrary to applicable law; and
- Provisions which were required by the Insolvency and Bankruptcy Board of India (Regulation 38 of the CIRP Regulations as described below).

Furthermore, Regulation 38 of the CIRP Regulations provides that a resolution plan should mandatorily:

- provide for payment to the operational creditors of the amounts due to them in priority to the financial creditors;
- include a statement as to how it has dealt with the interests of all stakeholders of the corporate debtor;
- include a statement giving details if the resolution applicant or its related parties have failed to implement or contributed to the failure of any other resolution plan approved under the Code

- provide for the term of the plan and implementation schedule, management and control of the business of the corporate debtor during the term of the resolution plan;
- provide for manner of continuation of avoidance actions and dealing with the proceeds of such action; and
- provide for adequate means for supervising the implementation of the resolution plan.

In addition, as per Regulation 38(3) of the CIRP Regulations, a resolution plan is required to also demonstrate that it addresses the cause of default by the corporate debtor, is feasible and viable, has provisions for its effective implementation, approvals required and the timeline for obtaining the same and that the resolution applicant has the capability to implement the resolution plan.

**Question 4**

Operational creditors (the creditors who are owed debt by the corporate debtor on account of supply of goods or services) do not have a right of membership or voting in the committee of creditors and no separate approvals are required from the operational creditors for the resolution plan to be approved. However, if an operational creditor is owed more than 10% of the total debt of the corporate debtor, such creditor is entitled to attend the meeting and receive the agenda and the relevant papers including resolution plans. Once such resolution plans are reviewed by the operational creditor, it can provide its comments to the committee of creditors. The rights in respect of minimum pay-outs required to be made to operational creditors in a resolution plan is covered in Question 3.

Dissenting financial creditors who do not vote in favour of the resolution plan are entitled to receive amounts from the resolution plan which shall not be less than the amounts to be paid to such financial creditors in the event of the liquidation of the corporate debtor in terms of the liquidation waterfall set out in section 53 of the Code.

**Self-Assessment Exercise 6**

**Question 1**

Describe the provisions in the Code that deal with cross-border insolvency cases.

**Question 2**

Briefly describe the law relating to the enforcement of foreign judgements in India.

**Commentary and feedback on Self-Assessment Exercise 6**

**Question 1**

The Code currently contains sections 234 and 235 as an interim measure to deal with cross-border insolvency cases. Section 234 provides that the Government of India can enter into bilateral treaties with other countries to set out the manner and process of dealing with cross-border insolvency cases (although no such treaties have been signed till date). Further, section 235 authorises the National Company Law Tribunal to, upon an application of the resolution professional, send a letter to request to a relevant court outside India (being in a country with which India has signed a bilateral treaty under section 234) for assistance in relation to assets of the corporate debtor situated outside India and within the jurisdiction of such court outside India.

**Question 2**

The Indian Code of Civil Procedure deals with enforcement of foreign judgements in India. India has notified (identified) 12 countries to be "reciprocating territories" along with specific courts in those countries. A decree from such courts can be enforced in India as a decree from an Indian court with certain exceptions including relating to decrees obtained without jurisdiction or by fraud.

Decrees from other courts or from courts in other countries will not be enforceable in India and a fresh suit will have to be filed in India for the same cause of action.

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