INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8D

INDIA

This is the **summative (formal) assessment** for **Module 8D** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 8D. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment8D]**. An example would be something along the following lines: 202122-336.assessment8D. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] (9 out of 10)

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1 (Correct)

The Insolvency and Bankruptcy Code 2016 currently **does not** apply to:

(a) Small companies.

(b) Limited Liability Partnerships.

(c) Individuals and Partnership Firms not being guarantors to corporate debtors.

(d) All of the above.

Question 1.2

Which of the following remedies **is** available to a non-Indian creditor? (incorrect)

(a) Recovery proceedings before the Debt Recovery Tribunal.

(b) Enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.

(c) Initiation of insolvency proceeding against corporate debtors under the Insolvency and Bankruptcy Code 2016.

(d) Mandatory out-of-court restructuring under the inter-creditor agreement.

Question 1.3

Which of these **is not** a function of the Insolvency and Bankruptcy Board of India under the Insolvency and Bankruptcy Code 2016: (Correct)

(a) Registration of insolvency professionals.

(b) Registration of insolvency professional agencies.

(c) Carrying out inspections and investigations of insolvency professionals.

(d) Appointing an insolvency professional as a resolution professional for a company.

Question 1.4

Who among the following **can be appointed** as a liquidator under the Companies Act 2013: (Correct)

(a) An Insolvency professional agency.

(b) An insolvency professional.

(c) A creditor.

(d) A judge of the National Company Law Tribunal.

Question 1.5

Which one of the following **is not** a ground for a court to refuse to grant a discharge order under the Presidency-Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920? (Correct)

(a) The debtor has travelled outside India without court's approval.

(b) The debtor has borrowed provable debt when he had a reasonable expectation that he will not be able to repay such a debt.

(c) The debtor has failed to maintain proper books and records of its financial position.

(d) the debtor has brought about the insolvency due to rash and hazardous speculations.

Question 1.6

Indicate which one of the following **is not** a disqualification for an insolvent under the Provincial Insolvency Act 1920: (Correct)

(a) Appointment as a magistrate.

(b) Election to a local authority.

(c) Voting as a member of a local authority.

(d) Entry into a partnership for a new business.

Question 1.7

Which of the following **has the highest priority** in bankruptcy of an individual under the Insolvency and Bankruptcy Code 2016: (Correct)

(a) Workmen's dues for 24 months preceding the bankruptcy order.

(b) Amounts due to the Government.

(c) Debt owed to the Government banks.

(d) Dues of the employees for a period of 12 months preceding the bankruptcy order.

Question 1.8

In which of the following processes is section 29A of the Insolvency and Bankruptcy Code 2016 **not applicable**? (Correct)

(a) Corporate insolvency resolution process of an MSME.

(b) Pre-pack insolvency process of an MSME.

(c) Sale of assets of a company in liquidation.

(d) Sale of assets under voluntary liquidation.

Question 1.9

Which of the following avoidance actions is only available during a liquidation process under the Insolvency and Bankruptcy Code 2016? (Correct)

(a) Avoidance of preferential transactions.

(b) Avoidance of undervalued transactions.

(c) Disclaimer of onerous property.

(d) Avoidance of transactions defrauding creditors.

Question 1.10

Which of the following **is not** a requirement for withdrawing a corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016: (Correct)

(a) Approval of the National Company Law Tribunal.

(b) Approval of creditors by 90% majority by value.

(c) Application to be made by the person on whose application the corporate insolvency resolution process was commenced.

(d) Approval of a resolution plan.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] (2 out of 2)

In the insolvency resolution process for individuals under the Insolvency and Bankruptcy Code 2016, briefly describe the difference between the moratorium upon filing of the petition and upon admission of the petition?

S. 96 of the Insolvency and Bankruptcy Code 2016 (the "Code") deals with the moratorium upon filing of the petition/application to initiate insolvency resolution process ("Application"), or an "Interim moratorium" (as referred to by s. 96). S. 101 of the Code refers to the moratorium ("Moratorium") that is granted when an Application is admitted.

Where an application to initiate insolvency resolution process is made, an Interim Moratorium commences on the date of the application in relation to all the debts and ceases to have effect on the date of admission of such application (s. 96(1)). The Moratorium commences when the Application is admitted and, like the Interim Moratorium, is in relation to all debts. However, the Moratorium does not last indefinitely; it lasts till the "*end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan…, whichever is earlier*." (s. 101(1)).

However, the most significant difference between the Interim Moratorium and the Moratorium is its scope. The Interim Moratorium only applies to

- any legal action or proceeding pending in respect of any debt, which shall be deemed to have been stayed as a result of the Interim Moratorium; and
- the creditors of the debtor initiating any legal action or proceedings in respect of any debt.

However, the Moratorium, additionally, prevents the debtor from transferring, alienating, encumbering or disposing any of his assets or his legal rights or beneficial interest therein (s. 101(2)(c))

Commented [CAM1]: Excellent answer

It would then appear that there is no stay on the transfer, alienation, encumbrance or disposal of any of the debtor's assets or his/her legal rights or beneficial interest therein during the Interim Moratorium.

Question 2.2 [maximum 4 marks] (3 out of 4)

Briefly describe the priority of debts in bankruptcy under the Presidency-Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920.

The priority of debts in bankruptcy is contained in s 49 of the Presidency-Towns Act and s 61 of the Provincial Act (the "Bankruptcy Acts").

The Bankruptcy Acts both provide that the following are to be debts are to be given priority equally over the other debts.

Commented [CAM2]: Expenses of the administration not covered.

1. all debts due to the Government or to any local authority
2. all salary or wages of any clerk, servant or labourer in respect of services rendered to the insolvent during four months before the date of the presentation of the petition. However the Acts differ in the maximum amount payable as follows:
   a. in the case of the Presidency-Towns Act (s.49(1)(b)) not exceeding three hundred rupees for each such clerk, and one hundred rupees for each such servant or labourer
   b. in the case of the Provincial Act, (s 61(1)(b)) not exceeding twenty rupees in all, of any clerk, servant or labourer
3. the Presidency-Towns Act (s 49(1)(c)) additionally, provides priority for rent due to a landlord from the insolvent, up to the value of one month' s rent

The Bankruptcy Acts[1] also state that the debts shall

- rank equally between themselves, and
- shall be paid in full, unless the property of the insolvent is insufficient to meet them, in which case they shall abate in equal proportions between themselves"

[1] Presidency-Towns Act, s 49(2), Provincial Act, s 61(2)

once the priority payments which have been listed above have been paid,

Subject to the provisions of the Bankruptcy Acts, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference.[2]

The Bankruptcy Acts also provide that where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency.[3]

Question 2.3 [maximum 3 marks] (3 out of 3)

Indicate the situations in which an adjudication as a bankrupt may be sought under the Insolvency and Bankruptcy Code 2016?

The circumstances in which an application for bankruptcy can be made is contained in s. 121 of the Insolvency and Bankruptcy Code 2016, and are as follows:

Commented [CAM3]: Excellent!

1. where an order has been passed by an Adjudicating Authority under sub-section 4 of section 100, that is where an application to initiate insolvency resolution process is rejected by the Adjudicating Authority, that is the NCLT or the DRT, on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional;
2. where an order has been passed by the NCLT or the DRT under sub-section 2 of section 115, that is where the repayment plan submitted by the personal guarantor is rejected; and
3. where an order has been passed by NCLT or the DRT under sub-section 3 of section 118 that is where the approved repayment plan cannot be implemented completely

Question 2.4 [maximum 1 mark] (1 out of 1)

What kind of foreign judgements are eligible for enforcement in India?

Section 44A of the Code of Civil Procedure, 1908 provides for the enforcement of foreign judgements in India.

Foreign judgements can be enforced in India, as a judgement rendered by a court in India if:

- the judgement has been passed by a designated court in a reciprocating territory outside India. Such territories are notified by the Government of India and presently include the United Kingdom, Hong Kong,
- the decree is in relation to the payment of sums other than taxes or sums similar to taxes

QUESTION 3 (essay-type questions) [15 marks in total] (11 out of 15)

[2] Presidency-Towns Act, s 49(5), Provincial Act, s 61(5)
[3] Presidency-Towns Act, s 49(6), Provincial Act, s 61(6)

Write a short essay on the liquidation process of a company under the Insolvency and Bankruptcy Code 2016, focusing on the process of the disposal of assets and distribution of the proceeds.

Your answer should make reference to at least the following:

- the various means of sale of assets available to the liquidator including the eligibility requirements to purchase assets in liquidation;
- the priority of debts in liquidation; and
- a timeline for completion of the liquidation process.

The Liquidation process is dealt with in Part II of the Insolvency and Bankruptcy Code 2016 (the "Code").

A company may enter liquidation in 2 ways:
1. following a corporate insolvency resolution process (CIRP)
2. Voluntary liquidation under the Insolvency and Bankruptcy Code

The liquidation process should be dealt with in Part II, Chapter III of the Code.

This essay will deal with the following aspects of liquidation
1. Initiating liquidation
2. Effect of initiating liquidation, including any moratoriums enforceable upon the
3. Realisation of assets, including the means of sale of assets available to the liquidator and the eligibility requirements to purchase assets in liquidation
4. Distribution of proceeds, including the priority of debts
5. Timeline for completion of liquidation process for both compulsory and voluntary liquidation

Initiating liquidation
This depends on whether the company enters into voluntary liquidation or whether it follows a corporate insolvency resolution process (CIRP).

A company can enter voluntary liquidation where it has not defaulted on its payment obligations to the creditors. To initiate voluntary liquidation, a
- A special resolution is required; that is one that is signed by 75% of the shareholders of the company; or
- Where the articles of the company provide that the company may be liquidated after a certain period, then an ordinary resolution of the shareholders will suffice.

Where liquidation follows a CIRP, according to section 33 of the Code, the National Company Law Tribunal (NCLT), who is the Adjudicating Authority under Section 33, can order the liquidation of the corporate debtor to liquidate where:
- The resolution professional does not submit a resolution plan approved by the committee of creditors to the NCLT (s. 33(1)(a))
- Where the resolution plan is not approved by the NCLT due to its non-compliance with the Code (s. 33(1)(b))
- Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the NCLT of the decision of the committee of creditors, approved by at least sixty-six per cent of the voting share, to liquidate the corporate debtor, the (s. 33(2))
- Where the resolution plan approved by the NCLT is contravened by the concerned corporate debtor (s. 33(3))

Commented [CAM4]: Timeline not mentioned

If, upon the occurrence of one of the aforementioned events, the NCLT passes a liquidation order, the NCLT will

- Issue a public announcement stating that the corporate debtor is in liquidation;
- send the order to the relevant authority with whom the corporate debtor is registered and under whose authority the corporate debtor falls; and
- appoint the resolution professional

Commented [CAM5]: Incomplete sentence.

Effect of the liquidation

Upon the issuance of an order of liquidation:

1. There is a moratorium on any suit or other legal proceeding shall be instituted by or against the corporate debtor, except for legal proceedings instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority, which is the NCLT (s. 33(5)). This moratorium does not however apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator (s. 33(6))
2. The said order shall be 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 (s. 33(7))

Commented [CAM6]: Incorrect language

Realisation of assets

The realisation of assets is dealt with by Chapter VI of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 (the "Regulations").

Commented [CAM7]: No mention of voluntary liquidation

Regulation 32 provides that the liquidator may sell-
(a) an asset on a standalone basis;
(b) the assets in a slump sale;
(c) a set of assets collectively;
(d) the assets in parcels;
(e) the corporate debtor as a going concern; or
(f) the business(s) of the corporate debtor as a going concern

However, where an asset is subject to security interest, such an asset can only be sold as stated above if the security interest therein has been relinquished to the liquidation estate.

Regulation 32A(1) of the Regulations states that where the committee of creditors has recommended the sale of the corporate debtor or its assets as a going concern or where the liquidator is of the opinion that such a sale would maximise the value of the corporate debtor, the liquidator should endeavour to first sell the corporate debtor or its assets as a going concern.

The mode by which the liquidator should sell the assets of the debtor is contained in Regulation 33. The assets may be sold through public auction or by way of private sale.

Ordinarily, the liquidator is required sell the assets of the corporate debtor through a public auction, as set out in Schedule I (Reg 33(1)).
However, as per Regulation 33(2), the liquidator may sell the assets of the corporate debtor by means of private sale in the manner set out in Schedule I of the Regulations when-
(a) the asset is perishable;
(b) the asset is likely to deteriorate in value significantly if not sold immediately;
(c) the asset is sold at a price higher than the reserve price of a failed auction; or
(d) the prior permission of the Adjudicating Authority has been obtained for such sale:

However, in a private sale the liquidator is prevented from selling the assets, without prior permission of the NCLT, to

(a) a related party of the corporate debtor;
(b) his related party; or
(c) any professional appointed by him.

The liquidator also cannot sell any asset

- if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer (Regulation 33(3))
- to any person who was ineligible to submit a resolution plan for the corporate debtor under section 29A of the Code

Distribution of proceeds

Chapter VII of the Regulations determine the manner in which the proceeds of liquidation and distribution of proceeds should take place.

According to the Regulations, the liquidator is required to:

1. open a bank account in the name of the corporate debtor in the manner specified in Regulation 41(1)
2. deposit in the aforementioned bank account all proceeds received by him as the liquidator of the corporate debtors, including cheques and demand drafts (Regulation 41(2))
3. maintain cash amount as set out in Regulation 41(3) as may be permitted by the NCLT to meet liquidation costs
4. commence the distribution of the proceeds before the list of stakeholders and the asset memorandum has been filed with the NCLT (Regulation 42(1))
5. distribute the proceeds from realization within 90 of the receipt of the amount to the stakeholders (Regulation 42(2))
6. deduct the insolvency resolution process costs, if any, and the liquidation costs before such distribution (Regulation 42(3))

Commented [CAM8]: Good effort to add extra information!

Commented [CAM9]: The regulation actually provides that the liquidator should NOT commence distribution until the list is filed.

Commented [CAM10]: 90 what? Days? weeks?

According to s. 53(1) of the Code, the proceeds from the realisation of the liquidation assets shall be distributed in the following priority:

(a) the insolvency resolution process costs and the liquidation costs paid in full;
(b) the following debts which shall rank equally between and among the following:—
    (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
    (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
(d) financial debts owed to unsecured creditors;
(e) the following dues shall 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;
    (iii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
(f) any remaining debts and dues;
(g) preference shareholders, if any; and
(h) equity shareholders or partners, as the case may be.

Where any contractual arrangements between recipients under section 53(1) of the Code with equal ranking disrupts the order of priority above, such arrangements can be disregarded by the liquidator (s. 53(2)).

Timeline for completion of liquidation process
According to Regulation 44(1), where it is compulsory liquidation, the liquidator is required to liquidate the corporate debtor within a period of one year from the liquidation commencement date. However, an additional 90 days is granted if the corporate debtor or its assets are sold as a going concern.

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

QUESTION 4 (fact-based application-type question) [15 marks in total]

Fours and Sixes Limited (the Company) owns a cricket stadium in India. Due to the COVID-19 pandemic, there were no games played in the stadium and the revenue was negligible. In the latest meeting of the Board of Directors of the Company, it was noticed that the financial performance of the Company has not improved materially and that the Company is likely to default on an upcoming payment instalment to its creditors in June 2022. The lenders of the Company are primarily Indian banks.

The Board of the Directors of the Company has contacted you to advise them on the options available to them and key considerations. In this context, answer the questions below.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 7 marks] (2 out of 7)

Prepare a note for the Board on the legal regime for an out-of-court debt restructuring for the Company.

The Code provides for an out-of-court debt restructuring process referred to as the 'Corporate Insolvency Resolution Process' (CIRP). Financial institutions are excluded from this mechanism. However, this will not affect the Company since it is not a financial institution. There are presently 3 variations of the insolvency resolution process based on the type/size of the corporate debtor and/or the minimum default debt amount required to initiate the said proceeding.

The different insolvency resolution processes that are available are:

(a) CIRP for corporate debtors with a minimum default of INR 10,000,000
(b) Fast-track CIRP for, inter alia, companies defined as a "small company" in s. 55 of 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
(c) Pre-pack insolvency resolution process for
    (i) small and medium enterprises (MSME);
    (ii) in default of a minimum amount of INR 1 million,

Under the revised guidelines for out-of-court debt restructuring, 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

Commented [CAM11]: CIRP under the Code is not an out of court mechanism.

Commented [CAM12]: Not relevant to this question.

Commented [CAM13]: This is not relevant to the answer

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.

Commented [CAM14]: This is what was to be focused on.

Based on the information available on the Company, we know that the Company has not yet defaulted. Presuming that by the time of this essay, that is July 2022, the Company has defaulted on its debt, according to the revised guidelines referred to above, the creditors in this case, who are said to be mainly Indian Banks, will have 30 days to decide whether they would like to restructure the debt of the debtor based on the debtor's financial situation.

Since we do not have any details of the size/turnover of the Company or the amount in which the debtor is in default as at July 2022, it would not be possible to conclusively recommend a specific type of insolvency resolution process to the Company. Therefore, this note will deal with the steps that are required to be taken by the Company when initiating a CIRP. It will then briefly consider the additional/different requirements for a Fast-track CIRP and the Pre-pack insolvency resolution process for small and medium enterprises (MSME).

CIRP

The CIRP is set out in Chapter II of the Code. The CIRP needs to be initiated by a financial or operational creditor, or the corporate debtor itself where the debtor defaults on a debt of a minimum of INR 10,000,000 (see s. 6 of the Code). In the present case, the Banks would be financial creditors. We do not however, have any information on what the default amount of the loans would be. Therefore, it is unclear as to whether the company qualifies for the CIRP.

An application for a CIRP needs to be made by the financial creditor which should, 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 (RP) is appointed.
- 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

According to Section 7 of the Code, the financial creditors, in this case the Indian Banks, can make an application individually or jointly.

Once the CIRP application is admitted by the NCLT, the NCLT will declare the moratorium and appoint an Interim Resolution Professional (IRP).

Moratorium

The moratorium will be in effect until the completion of the CIRP. According to s. 14(1) of the Code the moratorium prevents

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property
(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

However, the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period (s. 14(2))

The Code provides that the CIRP must be completed within 180 days from the date of admission of the CIRP application. However, this can be extended.

Public announcement and proof of claims
Once the IRP is appointed, this begins the process for the proof of creditor's claims. The process is as follows:

1. the IPR should make a public announcement, in the manner set out in the CIRP Regulations, for the purpose of inviting claims against the corporate debtor within three days of his appointment (see Reg 12)
2. All creditors are required submit their proof of claim before the last date stated on the IRP's announcement, in the form prescribed in the CIRP Regulations (See Chapter V, and s. 18 which applies specifically to Claims submitted by financial creditors)
3. 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 its public announcement
4. The interim resolution professional is required to constitute the committee of creditors within two days of the verification of claims (it should be noted that only financial creditors can form part of this committee. However, since the Company's lenders are primarily Indian banks this is not an issue.)

IRP
From the date the IRP is appointed, he is vested with the management of the affairs of the corporate debtor and the power of the Board are suspended. Therefore, if the Company is subject to a CIRP, the Board will no longer have any power in relation to the management of the company, unlike in the Pre-pack insolvency resolution process for MSMEs.

The role and duties of the IRP are set out in the CIRP Regulations (see Regs 17 and 18).

Resolution Professional
The NCLT is required to appoint the resolution professional based on the recommendation of the committee of creditors. This is subject to the confirmation of the Board (see Reg 22).

The duties of the resolution professional are contained in Reg 25 of the Regulations. His main duty is to preserve and protect the assets of the corporate debtor. The resolution professional has the same duties and powers as an IRP but has additional functions, which include, inter alia,

- inviting 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 (see Reg 25(2)(h))
- 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; and
- Ensure the valuation of the assets of the corporate debtor.

Resolution Plan
Pursuant to the invitation of the resolution professional, the applicants are required to submit resolution plans for the corporate debtor.

s. 29 A of the Code, contains the eligibility criteria that a resolution applicant needs to meet to submit an application.

The resolution plan may contain information re the restructuring of the assets of the company through transfer, sales, mergers, acquisition of shares, demergers, and changes to the

security of a company etc. However, the resolution plan needs to contain the details in Regulation s. 30 of the Code and Reg 38 of the Regulations.

The process of examining a resolution plan is contained in ss. 30 and 31 of the Code and the main steps are as follows:

1. RP needs to check for compliance of the plans with the Code and the Regulations
2. RP submits plans to committee of creditors for the said committee to decide whether its compliant along with its prima facie opinion as to whether the resolution plans are compliant and its due diligence report on the plans examined by him
3. If the plans are compliant according to the committee of creditors, then the said Committee needs to vote on a plan considering its "feasibility and viability"
4. Once approved by the committee of creditors and the plan then needs to be approved by the NCLT

Upon the approval of the resolution plan by the NCLT:

- the resolution plan will be binding on the corporate debtors, 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 corporate debtor is liable only for claims mentioned and dealt with in the resolution plan
- 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, if the corporate debtor which provides for a change in management or control of the corporate debtor from its existing shareholders

Fast-track CIRP

As referred to above, the Code provides for a fast-track CIRP for specified entities, that is for a company that is defined as a "small company" in s. 55 of the Companies Act. Under the

The main difference with the 'fast-track' CIRP is that, as the name suggests, it is intended to be completed fasted than the regular CIRP procedure. The Fast-track CIRP is required to be completed within 90 days from commencement. The NCLT has the discretion to extend this time period by no more than 45 days. Therefore, the time period for the completion for the Fast-track CIRP appears to be half of that of the regular CIRP procedure.

Pre-pack insolvency resolution process for Small and medium enterprises (MSME)

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.

This was specifically introduced in 2021, through the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 and the Insolvency and Bankruptcy Board of India (Prep-Packaged Insolvency Resolution Process) Regulations, 2021 to assist MSMEs that were deeply affected by the COVID-19 pandemic. The pre-pack is now provided for in Chapter III-A of the Code.

In order to file for initiation of the pre-pack, the MSME[4]:

- needs to have obtained 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
- should not be subject to corporate insolvency resolution process or liquidation under the Code
- cannot have undergone a pre-pack or completed a corporate insolvency resolution process in the past three years or
- cannot be ineligible under section 29A of the Code

Unlike the CIRP described above, the MSME itself (as opposed to the IRP or the resolution professional) has several duties in relation to the initiation of a pre-pack.

The NCLT 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

Once the NCLT admits the for the initiation of the pre-pack a moratorium, similar to the CIRP, is ordered and lasts till the pre-pack concludes. Upon admission, a resolution professional is also appointed by the NCLT. However, in the pre-pack the resolution professional has limited powers and duties, compared with the resolution professional in the CIRP, as the powers and the duties of the Board are not suspended. In any event the duties of the said resolution professional are set out in s. 54F of the Code.

Resolution Plan

The process for the submission and approval of the resolution plan is as follows:

1. MSME is required to submit the base resolution to the resolution professional
2. The resolution professional submits the base resolution to the CC
3. The CC may
    a. approve the resolution plan if it does not impair any claims owed by the MSME to the operational creditors
    b. not approve the resolution plan
4. if the resolution plan is
    a. approved – the plan is to be presented to the NCLT for approval
    b. not approved – the resolution professional is to invite other resolution plans
5. if the NCLT
    a. approves the resolution plan – the resolution plan will be binding on all stakeholders of the MSME
    b. does not approve the resolution plan – the resolution professional is required to file for termination of the Pre-Pack.

The corporate debtor has more control over the initial resolution plan, compared with the CIRP, which may be a consideration in deciding which CIRP procedure to follow.

Timeline

The pre-pack is required to be completed within 120 from the date of the admission order. This is shorter than the time period provided for the implementation of a CIRP.

Conclusion

Providing that the Company is eligible for multiple insolvency resolution processes identified above based on its turnover and the default amount, the Board of the Company may need to consider which insolvency resolution process applies. It appears that the Board would have

[4] See s. 54A of the Code

more control over the matters of the Company in the Pre-pack for MSMEs since the powers and duties of the Board are not suspended in the said Pre-pack. Further, since the pre-pack was designed to help MSMEs that have been deeply affected by the COVID-19 pandemic, this may perhaps be better suited for the Company.

Question 4.2 [maximum 8 marks] **(5 out of 8)**

Prepare a note for the Board describing their powers and duties during a corporate insolvency resolution process of the Company.

Directors owe a fiduciary duty to the company, that includes, inter alia, the shareholders. Therefore, the directors must act in the best interests of the Company.[5]

Directors have statutory duties under the Companies Act 2013 (s. 166). These duties continue even during a corporate insolvency resolution process and are as follows:

Commented [CAM15]: Good work to have brought this in!

(1) to act in accordance with the articles of the company.
(2) to act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
(3) to exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
(4) To avoid being involved in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
(5) to not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
(6) to not assign his office and any assignment so made shall be void.

A director also has the following duties:

1. to refrain from initiating the pre-packaged insolvency resolution process fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or with the intent to defraud any person
2. to refrain from carrying on any business of the corporate debtor with intent to defraud creditors of the corporate debtor or for any fraudulent purpose (s. 66(1))
3. to refrain from carrying on any business of the corporate debtor where such director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor and where such director did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. Therefore, the director also has a duty of exercising due diligence in minimising the potential loss to the creditors of the corporate debtor (s. 66(2))
4. knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit

The directors have specific duties and powers in respect of the different corporate insolvency resolution processes

CIRP
During a CIRP, the directors are required to:

[5] Insolvency and directors' duties in India: overview, Practical Law Country Q&A 7-608-2166, <

- 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
- where there are proceedings / investigations against the former officers/managers of the corporate debtor, provide all assistance to the investigating authorities in such proceedings/investigation (see s. 32A of the Insolvency and Bankruptcy Code)

Pre-pack for MSMEs
Unlike the CIRP, during the Pre-pack for MSMEs, the powers of the Board of Directors of the debtor are not vested in the resolution professional and the Board continues to function and exercise its powers in relation to the management of the Company, subject to the applicable provisions in the Code and the Regulations in relation to the Pre-pack for MSMEs (see s. 54H of the Code).

During the Pre-pack for MSMEs, the directors are required to:
- protect and preserve the property of the MSME and manage its operations as a going concern.(s. 54H(b))
- provide to the resolution professional a list of claims, creditors and their security interests as well as a preliminary information memorandum
- 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.
- provide the financial creditors with a base resolution plan in relation to the MSME and compliance requirements

Further, Chapter VII of the Code sets out the Offences and Penalties that an 'officer' of the company could be liable for. The Code attributes the meaning of "officer" to that found in the Companies Act. According to ss. 2(59) and 2(60) of the Companies Act 2013 an "officer" of the company includes a "director". Therefore, the directors have a duty during a corporate insolvency resolution process to refrain from:
- making any material omission in the statement relating to the affairs of the company.
- making any false representation or committing any fraud to obtain the consent or agreement of the creditors of the company regarding the affairs of the company.
- in an application to commence insolvency resolution, knowingly using any false material or omits any material fact.
- Knowingly violating or abetting the violation of any of the terms of the resolution plan where the said resolution plan is binding on the director
- knowingly violating or allowing the violation of any of the terms of moratorium

Commented [CAM16]: All of this is good but in the context of impending insolvency of the company, fraudulent trading should have been covered. Have also not covered the power to attend the meetings of the CoC.

*** End of Assessment * (36 out of 50)**