



**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: 202223-336.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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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] (6 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 (1 mark)

In terms of which of the following legislation can a company be **wound up**:

- (a) The Insolvency and Bankruptcy Code 2016.
- (b) The Insolvency and Bankruptcy Code 2016 and the Companies Act 2013.**
- (c) The Insolvency and Bankruptcy Code 2016 and the Presidency-towns Insolvency Act 1909.
- (d) The Companies Act 2013 and the Presidency-towns Insolvency Act 1909.

#### Question 1.2 (0 mark - correct answer is (b))

Which one of the following remedies **is not** available to a non-Indian creditor:

- (a) Recovery proceedings before the Civil Court.
- (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) Becoming part of an out-of-court restructuring under the inter-creditor agreement.

#### Question 1.3 (1 mark)

Which of the following is **not a function** of the Insolvency and Bankruptcy Board of India under the Insolvency and Bankruptcy Code 2016:

- (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** (0 mark - correct answer is (b))

Which of the following forms of security **requires actual possession** of the secured property:

- (a) A mortgage in English form.
- (b) A pledge.
- (c) A charge.
- (d) A hypothecation.

**Question 1.5** (1 mark)

Which one of the following is **not a requirement** for a creditor's petition for adjudication as a bankrupt under the Presidency-towns Insolvency Act 1909 and the Provincial Insolvency Act 1920:

- (a) The debt owing exceeds INR 500.
- (b) The debt is a liquidated sum payable immediately or in some certain future time.
- (c) The relevant act of insolvency occurred within three months prior to the presentation of the petition.
- (d) The debtor defrauded its creditors.

**Question 1.6** (0 mark - correct answer is (c))

Indicate which one of the following is **not a disqualification** for a bankrupt under the Insolvency and Bankruptcy Code 2016:

- (a) Appointment as a trustee or a public servant.
- (b) Election to a local authority.
- (c) Borrowing money after informing the other party of his bankruptcy.
- (d) Acting as a director to any company.

**Question 1.7** (1 mark)

Which of the following is **not a requirement** for initiating voluntary liquidation under the Insolvency and Bankruptcy Code 2016:

- (a) Special resolution of the shareholders of the corporate debtor.
- (b) Declaration of the directors of the company on the ability of the company to repay its debts from available assets.

(c) Approval of two-thirds of the creditors.

(d) Approval of the National Company Law Tribunal.

**Question 1.8 (0 mark - correct answer is (a))**

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

(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 (1 mark)**

In which of the following situations can an **application for initiation** of corporate insolvency resolution process be filed under the Insolvency and Bankruptcy Code 2016:

(a) The corporate debtor is a bank.

(b) The corporate debtor is an MSME.

(c) The creditor is an operational creditor and the debt is disputed.

(d) The corporate debtor is in financial difficulties but there is no payment default.

**Question 1.10 (1 mark)**

**Approval of the committee of creditors** is not a requirement for the following transactions undertaken by the resolution professional under the Insolvency and Bankruptcy Code 2016:

(a) Raising interim finance.

(b) Undertaking any related party transactions.

(c) Payment of the approved insolvency resolution process costs.

(d) Amending the constitutional documents of the corporate debtor.

## QUESTION 2 (direct questions) [10 marks in total]

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

Briefly describe the jurisdiction of the National Company Law Tribunal in relation to insolvency of personal guarantors of corporate debtors.

The bankruptcy law of India was consolidated and amended the existing framework by creating a single law for insolvency and bankruptcy is the Insolvency and Bankruptcy Code, 2016 (IBC). This Code, 2015 which was introduced in Lok Sabha in December 2015 and was passed by Lok Sabha on 5 May 2016.<sup>1</sup>

Under the above Code, if an individual or a partnership firm is a guarantor to a company or LLP, the primary borrower, and in such case the primary borrower being subject to proceedings for insolvency resolution or liquidation under the Code, 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.

The Supreme Court of India, in May 2022, passed judgement, which provided an opinion that National Company Law Tribunals can have jurisdiction over insolvency or bankruptcy of personal guarantors even though no insolvency or liquidation proceedings are pending in respect of the relevant corporate debtor.<sup>2</sup>

### Question 2.2 [maximum 4 marks] (2 out of 4)

Briefly describe the scope of the moratorium during the corporate insolvency resolution process under the Insolvency and Bankruptcy Code 2016, with a focus on the moratorium on termination of contracts.

The main idea of a moratorium is to facilitate the continuation of the business operations without interruptions undertaken by the new management.

When an application for initiation of CIRP under the Code is accepted, the National Company Law Tribunal orders a moratorium under section 14 of the Code, prohibiting the following:<sup>3</sup>

- The termination of supply of goods and services critical to operate the corporate debtor as a going concern treated by the resolution

<sup>1</sup> [https://www.indiaonline.com/knowledge-center/financial-planning/economics-for-everyone-the-insolvency-and-bankruptcy-code-in-india-and-the-national-company-law-tribunal#:~:text=The%20Insolvency%20and%20Bankruptcy%20Code%2C%202016%20\(IBC\)%20is%20the,Sabha%20on%205%20May%202016.](https://www.indiaonline.com/knowledge-center/financial-planning/economics-for-everyone-the-insolvency-and-bankruptcy-code-in-india-and-the-national-company-law-tribunal#:~:text=The%20Insolvency%20and%20Bankruptcy%20Code%2C%202016%20(IBC)%20is%20the,Sabha%20on%205%20May%202016.)

<sup>2</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 5

professional, subject to there being no payment default during the moratorium period, meaning post commencement.

Essential goods and services being defined in terms of CIRP Regulations, Reg 32. as goods and services providing electricity, water, telecommunication services and information technology services, these not being directly related to the output produced or supplied by the corporate debtor as stipulated in the regulation.

The Code provides an ability to the interim/ resolution professional to identify the supply of other goods and services as essential to enable the preserving the going concern nature of the business of the corporate debtor to prevent, suspension or termination of supply during the moratorium period subject to there being no payment default for supplies during this moratorium period.

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.<sup>3</sup>

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 wherein the Supreme Court clarified same.<sup>4</sup>

### Question 2.3 [maximum 3 marks] (2.5 out of 3)

Indicate the acts of insolvency under the Presidency-towns Insolvency Act 1909.

The Presidency-towns Insolvency Act 1909 allows an application to be filed either by the creditor or the debtor to initiate insolvency proceedings, if the debtor is unable to pay its debts which amounts to RS 500. In a petition made by a creditor, he has to show that the insolvent had committed an act 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” being [CAM3]<sup>5</sup>:-

- The debtor alienating his property to a third party, and with an intent to defeat or delay his creditors;
- Taking action to defeat or delay his creditors from filing a petition for insolvency;
- Failing to respond to a creditors notice of insolvency;
- Transfer by the debtor of its property as a fraudulent conveyance;
- Departure or seclusion of the debtor, where the debtor, departs or remains out of the jurisdiction to which the Bankruptcy Acts apply or stay away from his usual place of residence or secludes himself depriving his creditors from communicating with him;
- Petition by the debtor to be adjudged an insolvent;
- Notice of suspension of payments;

<sup>3</sup> *Gujarat Urja Vikas Nigam Limited v Amit Gupta*, Civil Appeal No 9241 of 2019

<sup>4</sup> *Tata Consultancy Services Limited v. Vishal Ghisulal Jain*, Judgement dated November 23, 2021 in Civil Appeal No 3045 of 2020

<sup>5</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, page 12 & 13

- Imprisonment in execution of a money decree;
- Non-compliance of an insolvency notice issued by a creditor.

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

What is the relevance of reciprocating territories in respect of the enforcement of foreign judgements in India?

Code of Civil Procedure, 1908 Section 44A states that a “Reciprocating Territory” is any country or territory outside the Republic of India which the Union Government can via notification in the Gazette of India declare as being a reciprocating territory.

In the matter of **Kevin George Vaz v. Cotton Textiles Exports, 2006 (5) BomCR 555** the term “reciprocating territory” was defined by the court. Being that any nation or territory outside India, that the union government has recognized as a reciprocating territory. The term “a territory outside India” wherein the Court construed it to include territory that may be part of a nation as well as territory that maybe no longer part of a nation.<sup>6</sup>

To consider enforcement of a foreign judgement depends on whether the court is present in a reciprocating territory or not.

India has 12 countries to be “reciprocating territories” along with specific courts in those countries. A judgement from such courts can be enforced in India as a judgement from an Indian court with certain exceptions including relating to judgement obtained without jurisdiction or by fraud.

In terms of Section 44A of the Code of Civil Procedure, 1908 a judgement passed by a superior court of a reciprocating territory can be executed in India as if it were passed by an Indian District Court. Such judgement being passed by a notified, designated, court in a reciprocating territory outside India and the judgement is in relation to the payment of a sum of money not being taxes or other charges similar in nature. A judgement from such courts can be enforced in India as a judgement from an Indian court with certain exceptions including relating to judgements obtained without jurisdiction or by fraud.

In terms of Section 44A (1) of the Code of Civil Procedure, 1908 when a certified copy of a judgement passed by a superior court of a reciprocating territory is filed in a district court in India, it shall be executable in India and its execution will have the same effect as if it was passed by a District Court in India.<sup>7</sup>

Therefore if a judgement be obtained in a non-reciprocating territory, the enforcement of such judgement will require a fresh suit to be brought before the Indian court, with accordance be given only to the extent of the value of the evidence.

**QUESTION 3 (essay-type question) [15 marks<sub>CAM4</sub>] (13 out of 15)**

<sup>6</sup> <https://www.lawctopus.com/academike/enforcement-of-foreign-judgements-in-india/>

<sup>7</sup> Order 21 of the CPC



Write a short essay on the process of invitation and approval of a resolution plan for a company under the Insolvency and Bankruptcy Code 2016.

Your answer should make reference to at least the following:

- the eligibility criteria that the resolution applicants will need to comply with;
- process and threshold for approval by the committee of creditors; and
- approval by the National Company Law Tribunal.

The new process the Insolvency Code in 2016, Corporate Insolvency Resolution Process (CIRP) replaced the concept of winding up. This process resolve issues in relation to the defaulting companies within a reasonable period of time to maintaining the company as a whole.

The objectives of the IBC (The Insolvency and Bankruptcy Code) are the following:

- I. resolution as in a way to save a business as a going concern, either by way of restructuring, change in ownership, mergers or any other way that the business be saved;
- II. to maximize the value of assets of the corporate debtor; and
- III. to promote entrepreneurship, availability of credit, and balancing interests of all stakeholders.

The Code says that the order of these objectives is too valuable to be interfered with.<sup>8</sup>

The CIRP can be initiated by filing an application before the National Company Law Tribunal, by:

- a financial creditor; or
- an operational creditor of the corporate debtor

when a default , for a minimum amount of INR 10,000,000, occurs.

In the application for the CIRP, the creditor will, 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 who will as his primary duty preserve and protect the assets of the corporate , debtor which as well as its continued business operations as a going concern.

The resolution professional conducts the rest of the CIRP, as in the case of the interim resolution professional. The resolution professional has the same duties and powers as the interim resolution professional. The resolution professional further undertakes the following actions in respect to the resolution plan:

- (a) *“invite prospective resolution applicants, who are eligible as per the criteria stipulated by the Code and credit committee, to submit resolution plan(s) for the corporate debtor; and*

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<sup>8</sup> <https://www.thehindu.com/news/national/explained-what-is-the-insolvency-and-bankruptcy-code-ibc-and-where-does-it-stand-after-more-than-five-years-of-being-in-place/article65969421.ece>

*(b) present all resolution plans to the meetings of the committee of creditors.”<sup>9</sup>*

The “Resolution Applicant” is a person who presents a resolution Plan to the Resolution Professional. A resolution applicant has to fulfill the condition of Section 29A of IBC.

Resolution Applicant submits a resolution plan with an affidavit that he is not disqualified under Section 29A.<sup>10</sup>

The resolution professional invites potential resolution applicants to come forward and submit resolution plans for the corporate debtor.

This invitation must be issued in a prescribed form:

- (i) published in local newspapers
- (ii) uploaded to the website of the corporate debtor,
- (iii) websites prescribed by the Insolvency and Bankruptcy Board of India; and
- (iv) in any other manner stipulated by the committee of creditors.
  - the committee of creditors specify the conditions for the eligibility of resolution applicants;
  - contain technical and commercial criteria; and
  - the complexity and scale of operations of the business of the corporate debtor any other conditions as may be specified by the Board.<sup>11</sup>

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<sup>[CAM5]</sup>.<sup>12</sup>

The Insolvency and Bankruptcy Code does not restrict any person from submitting a resolution plan for the corporate debtor pursuant to the invitation subject to the eligibility conditions under Section 29A which stipulates the criteria for a resolution applicant to be eligible to present a resolution plan.

A person in order to be eligible to submit a resolution plan –

- **shall** fulfill the criteria laid down by the resolution professional with the approval of the committee of creditors; and
- **shall not** suffer from any disqualification mentioned under section 29A

Section 29A is a restrictive provision therefore any person falling in the negative list is not eligible to submit a resolution plan.

Section 29A provides as follows;

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<sup>9</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, page 57

<sup>10</sup> corporate-insolvency-resolution-process-under-  
ibc/#:~:text=The%20resolution%20plan%20is%20approved,shareholders%20involved%20in%20that%20plan.

<sup>11</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, India Page 59 , CIRP Regulations, Reg 36A.

<sup>12</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, India, Page 59

According to Section 29A, a person suffering from the below-mentioned disqualifications shall not be eligible to submit a resolution plan.

- (i) the person is an undischarged insolvent;
- (ii) the person is a willful defaulter in terms of the RBI Guidelines issued under the Banking Regulation Act, 1949;
- (iii) classification of account as Non - Performing Asset for a period of 1 (One) year;
- (iv) the person has been conviction for certain offences punishable with imprisonment for 2 (Two) years or more;
- (v) the person is disqualified to act as a director under the Companies Act, 2013;
- (vi) the person is prohibited by SEBI from trading in securities or accessing the securities markets;
- (vii) the person has been a promoter or in the management or control of a corporate debtor were there was a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction that has taken place and an order has been made by the adjudicating authority;
- (viii) a person who has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor;
- (ix) a person who has been subject to the above listed disabilities under any law in a jurisdiction outside India;
- (x) connected persons, having connected person with similar ineligibilities.<sup>13</sup>

As aforementioned, Section 29A, 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, then in that event that person will not be able to submit a resolution plan for a corporate debtor under the CIRP Code.

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

The Code provides flexibility as to the manner of restructuring the company.

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<sup>13</sup> <https://vinodkothari.com/wp-content/uploads/2019/06/Ineligibility-Criteria-under-sec.-29A-of-IBC>

In terms of s 5(26) a resolution plan is required to provide for the insolvency resolution of the corporate debtor as a going concern.

In terms of CIRP Regulation 38 provides for the mandatory contents of resolution plans.

Furthermore, a resolution plan is required to demonstrate the following:-

- it addresses the cause of default by the corporate debtor;
- it has a prospect of being feasible and viable;
- make provisions for its effective implementation of such plan;
- required approvals and its timeline for obtaining the same;
- that the resolution applicant has the capability to implement the resolution plan.

When the resolution plan is submitted, the resolution professional examines the plans for compliance with the code. It is thereafter submitted to the creditors committee for approval. In the matter of *Arcelormittal India Private Limited v Satish Kumar Gupta and Ors* – Civil Appeal Nos 9402-9405 of 2018, judgment dated 4 October 2018, the Supreme Court of India had decided that the resolution professional is not required to take any decision in respect of its examination. He is only required to provide his *prima facie* opinion to the committee of creditors together with a due diligence report. The creditors committee is required to decide whether or not the plans submitted comply with the requirements of the Code and the CIRP Regulations and S 29A based on the report.<sup>14</sup>

Upon the resolution plan been found compliant, same is put to a vote by the committee of creditors.

#### The approval of the plan

The creditors committee, can approve the plan;

- after considering the plan's feasibility and viability;
- the manner of distribution of the plan proceeds proposed in the resolution plan;
- with a resolution passed by a majority of 66% of its members by value.

After the committee approves the plan, same is then submitted by the resolution professional for approval by the National Company Law Tribunal.

National Company Law Tribunal checks the following:-

- compliance of the resolution plan with the Code and the Regulations;
- whether the resolution plan contains provisions for its effective implementation.

Upon approval by the National Company Law Tribunal 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;

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<sup>14</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 64 & 65

- guarantors; and
- other stakeholders

As involved in the resolution plan.<sup>15</sup>

In terms of CIRP Regulations, Reg 39(5) and 39(5A), within 15 days of approval, the resolution professional is required to;

- provide a copy of the approval order to all participants in the committee and the resolution applicant; and
- inform each claimant of the principle of formula for repayment of such claimant's debt under there solution plan.

In terms of Insolvency and Bankruptcy Code, s 32A, upon approval of a resolution plan in respect of a corporate debtor any criminal proceedings and or investigations in respect of any offence committed by the corporate debtor prior to the commencement of CIRP shall cease when a resolution plan provides for a change in management or control of the corporate debtor from its existing shareholders. Further the property of the corporate debtor:

- shall not be attached; or
- be subject to attachment or seizure

under any proceedings or investigations in this regard.

The proceedings and investigations against the erstwhile accountable employees of the corporate debtor in respect of such offences shall continue. The corporate debtor is required to provide all assistance to the investigating authorities in these proceedings and investigations.

In the matters of *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, the Supreme Court has cleared that the acquisition of the corporate debtor by the resolution applicant under a resolution plan is on a "fresh slate" basis, meaning, the corporate debtor is liable only for claims that are included 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 has no legal right.

There is no requirement by the shareholders of the corporate debtor for approval of the resolution plan. Should there be a requirement of approval by shareholders of the company under the Companies Act or any other law for implementation of the approved resolution plan, the Code provides that such approval shall be deemed to have been obtained upon approval of the resolution plan by the National Company Law Tribunal.<sup>16</sup>

The resolution plan will be effective despite any consent requirements under shareholders' agreements or joint venture agreements.

In order to seek the assistance of the district administration an application to the National Company Law Tribunal can also be made for implementation of the terms of the

<sup>15</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 65

<sup>16</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 65

resolution plan.

The approved plan can be appealed to the National Company Law Appellate Tribunal, if there be non-compliance with the requirements of the CIRP Regulations or material irregularity in the exercise of powers by the resolution professional, or grounds of contravention of the law.

As soon as the resolution plan is approved, the moratorium ends and the resolution professional vacates his office.

#### **QUESTION 4 (fact-based application-type question) [15 marks]**

Haphazard Limited, an Indian company, (the Company) provides marketing services in India. Most Premium League Limited (MPL), an Indian company that runs a cricket league, is a customer of the Company. MPL has failed to pay the last few invoices from the Company which now aggregate to INR 20 Crores. MPL appears to be in severe financial difficulties as it has defaulted in payments to many of its creditors, including secured creditors. However, it has offered to pay the Company in part if the Company continues providing the services and does not participate in a corporate insolvency resolution process that may be initiated by the secured creditors of MPL.

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

##### **Question 4.1 [maximum 7 marks] [\(6 out of 7\)](#)**

Prepare a note for the Board on the ability to initiate insolvency proceedings in relation to MPL and the steps to be taken in this regard.

The Code amends and consolidates the laws relating to reorganization and insolvency resolution of:

- corporate persons;
- partnership firms; and
- individuals;

for maximization of value of assets in order to promote entrepreneurship, and the availability of credit. This process is bound by a timeline ensuring that the best interests of all the stakeholders are balanced.

CIRP is the process of resolving the corporate insolvency of a corporate debtor (corporate person who owes debt) in accordance with the provisions of the Code. Corporate insolvency is a state where a corporate person fails to pay debt, whether whole or any part or instalment, when due and payable.<sup>17</sup>

The Company being an Operational creditor in that it provided marketing services to MPL. An operational creditor are the creditors who have provided operational debt to the corporate debtor. In terms of S 5(21) of the Code it defines Operational debt as a claim in respect of the provision of goods and services, which includes employment, and debt in respect of the payment of dues arising under any law to the Central

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<sup>17</sup> /<https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408>

Government or the State Government or any local authority.<sup>18</sup>

The Company being an operational creditor, the process for filing CIRP is different to when a Financial creditor or the corporate debtor files a CIRP therefore CIRP may be initiated by an operational creditor under section 9 of the Code.

Upon the occurrence of a default by MPL (for a minimum of INR 10,000,000) the Company can file an application before the National Company Law Tribunal.

Prior to the filing the Company is required to issue a demand notice in terms of Section 8 (1) of the Code upon the occurrence of a default. The Company shall deliver a demand notice of unpaid operational debtor [CAM6] a copy of an invoice demanding payment of the amount involved in the default to MPL, debt as prescribed.

In terms of Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the demand notice needs to be furnished to the corporate debtor in Form 3 or copy of an invoice attached with a notice in Form 4.<sup>19</sup>

Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) spells out that after 10 days have passed from the date of delivery of notice or invoice that demands payment under section 8 of IBC, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under Section 8(2) is received from MPL then in that event the CIRP [CAM7] can be filed by the Company.

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, even if there is no reply to the notice.

If a dispute raised at the time of the statutory notice is not a valid defense and even where a dispute is raised by a MPL, the National Company Law Tribunal will be required to examine whether the dispute raised is a *bona fide* dispute in relation to the amount owed.[CAM8]

National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the MPL is located will serve as the Adjudicating Authority.

The documents to be submitted by MPL along with the application as stated in section 9(3) of the Code and rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 must:

- include a copy of the invoice demanding payment and or demand notice delivered by the MPL;
- An affidavit stating that no dispute of the debt has been raised by the corporate debtor; and
- a copy of certificate from financial institution, record with information utility or any other proof, confirming that there is no payment of the unpaid debt.

The name of the Interim Resolution Professional is not mandatory in the case of an application by the Company. And if not provided by the Company in its application, the

<sup>18</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 52

<sup>19</sup> <https://ibbi.gov.in/uploads/faqs/CIRPFAQs%20Final2408>

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. (panels of insolvency professionals have been formed by the Insolvency and Bankruptcy Board of India for each National Company Law Tribunal).<sup>20</sup>

The National Company Law Tribunal after hearing the parties, may accept the application, declare a moratorium and appoint an IRP, or dismiss the application, the decision based on the information presented.<sup>21</sup>

In terms of section 12(1) of the Code, the CIRP shall be completed within a period of 180 days from the date of admission of the application to initiate the process.

The Adjudicating Authority may grant a one-time extension of 90 days. The maximum time within which CIRP has to be mandatorily completed, including any extension or litigation period, is 330 days.

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

Prepare a note for the Board explaining the risk of accepting the part payment as well as not participating in the corporate insolvency resolution process.

An important goal of the Code is to maximize the value of assets of a corporate debtor (MPL) in financial distress while it is undergoing a CIRP. This will be enabled by requiring the creditors to make a collective attempt to revive MPL and improve utilization of the resources at its disposal. Should the revival not be possible, the Code releases resources for other efficient uses.

In either case, the value of the assets of the MPL improves because it prevents depletion of value by enabling early initiation of the process for revival and further speedy conclusion of the process. In fact, MPL should have initiate process early to minimize potential loss to creditors. The Code authorizes the Resolution Professional and the liquidator to determine if MPL has been subject to irregular transactions, such as preferential, or fraudulent, or undervalued, or extortionate transactions in the past, and if so, he is obliged to file an application with the National Company Law Tribunal for appropriate directions. This not only helps recover lost value for all the stakeholders but also deters the management from indulging in such transactions.<sup>22</sup>

When MPL had *offered to pay the Company in part if the Company continues providing the services and does not participate in a corporate insolvency resolution process that may be initiated by the secured creditor*, at that relevant time entered into a transfer of property for the benefit of the Company for an account of an antecedent debt which would have the effect of putting the Company in a more beneficial position than it would have been in the event of liquidation of MPL. This transaction will be treated as a preferential transaction under the Section 43 of the Code.<sup>23</sup>

<sup>20</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 53

<sup>21</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 29

<sup>22</sup> Sahoo, M. S., & Guru, A. (2020). Indian Insolvency Law. *Vikalpa*, 45(2), 69–78. <https://doi.org/10.1177/0256090920939809>

<sup>23</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 68



Preferential transactions are viewed at the relevant time in that such transactions is:

- two years preceding the insolvency commencement date for related/ connected parties; and
- one year preceding the insolvency commencement date for unrelated parties.

In terms of the Code antecedent transactions can be reversed or avoided by the National Company Law Tribunal. Albeit the resolution professional does not have the power, like a Liquidator has, to disclaim onerous property or reject contracts of the corporate debtor but he is required to, at the time of submission of the compliant resolution plans to the committee, provide to the committee of creditors a due diligence report with details of the avoidable transactions and orders of the National Company Law Tribunal regarding the said transaction.<sup>24</sup>

Creditors will have an obligation to provide relevant extracts from the said reports they may have conducted on MPL pointing out the suspect transactions.<sup>25</sup>

When an application by the resolution professional is made to the National Company Law Tribunal and it 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.<sup>26</sup>

Further to the above Section 66(2) of the Code provides that if before the insolvency commencement date the director of MPL knew or ought to have known that there was no reasonable prospect of the MPL avoiding commencement of the CIRP and such director did not exercise any due diligence in minimizing the potential loss to the Company as MPL appeared to be in severe financial difficulties because it has defaulted in payments to many of its creditors, including secured creditors, the resolution professional may apply to the National Company Law Tribunal for wrongful trading, to make such director liable to contribute to the assets of the corporate debtor in order to make good such loss to the creditors. In terms of such an application The National Company Law Tribunal is permitted to order that the directors be made liable to contribute to the assets of the MPL.

Therefore it is important that the director/or persons carrying on the same functions as are carried out by such director of MPL exercise due diligence for this purpose, which essentially means diligence reasonably expected in relation to the MPL. [CAM9]

Operational creditors were at a lower pedestal when compared to other creditors of the Corporate Debtor was dismissed when the Code was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2019 to provide that Operational Creditors shall be paid in accordance with the priority in the liquidation waterfall, not less than the amount payable to them in the event of liquidation of the Corporate Debtor or the amount payable to them if realizations under the resolution plan were distributed, whichever is higher.<sup>27</sup>

This means the Company should not be paid less than the amount they would have received in the event of a liquidation of the MPL.

In the matter of *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors* (Civil Appeal Nos. 8766-67/2019 and other petitions) the Supreme Court made a point

<sup>24</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 68, CIRP Regulations, Reg 39(2).

<sup>25</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 68, CIRP Regulations, Reg 35A(4).

<sup>26</sup> Foundation Certificate in Insolvency Law, Module 8 D, Guidance Text, India, Page 69, Section 44 of the Code.

<sup>27</sup> <https://journals.sagepub.com/doi/10.1177/0256090920939809>

of stating that protecting creditors in general is, an important objective. Further protecting creditors from each class is also important.

It could also be that the Secured financial creditors of MPL be incentivized to vote for liquidation rather than resolution when recognizing the rights of different classes of creditors, if insolvency resolution process is adopted, because they would have better rights if the corporate debtor is liquidated. But this would defeat the objective of the Code, being the resolution of distressed assets and if the same is not possible, should liquidation follow.<sup>28</sup>

Therefore equal treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational. Therefore Company will not be prejudiced.

The Code empowers the Committee of Creditors to decide to liquidate a MPL at any time during the CIRP. There could be a possibility the committee of creditors vote for liquidation in their very first meeting or even before the preparation of the due diligence report from the Resolution professional due to MPL has defaulted in payments to many of its creditors. Another option is available at any time during CIRP, but before confirmation of resolution plan, the MPL may be liquidated.

But consideration must be given to the matter of *Punjab National Bank vs. Siddhi Vinayak Logistic Limited* where the NCLT insisted that a liquidation order may be passed only after failure of the CIRP to yield a resolution plan.<sup>29</sup>

Sometimes there are instances where early liquidation would maximize the value, while running the entire CIRP would be futile. Therefore, the law enables initiation of CIRP which could end in a resolution plan or liquidation as decided by the Creditors.

Therefore the law enables initiation of CIRP which could end in a resolution plan or liquidation which is decided by the stakeholders.

The Code provides that if MPL did not commit any default could have liquidated itself voluntarily especially where liquidating the MPL could be a more economically viable option.

Due to the Code created significant behavioural changes resulting in substantial recoveries for creditors outside the Code which improved the performance of companies in distress. When there is a credible threat of a resolution process and may shift the control and management of the firm away from existing managers. This is now acting as a deterrent for the management of the firm from operating below the optimum level of efficiency.

Further it is motivating them to make the best efforts to avoid a default, as, it encourages the debtor to settle default with the creditor(s) at the earliest, preferably outside the Code.

There have been matters where debtors after filing an application for CIRP with the National Company Law Tribunal:

- have settled their debts voluntarily;
- have settled debt, even before the application is admitted;
- cases of settlements after an application is admitted.

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<sup>28</sup> <https://journals.sagepub.com/doi/10.1177/0256090920939809>

<sup>29</sup> Sahoo, M. S., & Guru, A. (2020). Indian Insolvency Law. *Vikalpa*, 45(2), 69–78. <https://doi.org/10.1177/0256090920939809>

The Code has thus brought in significant behavioural changes and thereby redefined the debtor–creditor relationship and non-repayment of loan is no more an option. The ownership of the firm is no more a divine right and equity is no more the only route to own a firm.<sup>30</sup>

In terms of 31(1) of the Code, if the National Company Law Tribunal is satisfied that the resolution plan as approved by the Committee of Creditors which meets the requirements of the Code, it shall by order approve the resolution plan. This plan shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Since section 31(1) seems to offer a hint that the resolution plan will be binding on those who are **involved** in the resolution plan, hence an inference could be drawn that a creditor who has failed to submit its claim during the permissible [CAM10] period was not involved, and thus not bound by the resolution plan.<sup>31</sup>

Therefore it is in the best interest of the Company participate in the process.

**\* End of Assessment \***

**Total: 37.5 out of 50**

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<sup>30</sup> Sahoo, M. S., & Guru, A. (2020). Indian Insolvency Law. *Vikalpa*, 45(2), 69–78. <https://doi.org/10.1177/0256090920939809>

<sup>31</sup> <https://indiacorplaw.in/2017/12/failure-creditor-submit-claim-insolvency-process.html>