

Highlights of IBBI Discussion Paper dated 4th February, 2024

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Our Organization's Credo:

Focus on capabilities; opportunities follow

A snapshot of Proposed Amendments

CIRP:

1. Coordinated insolvency resolution for interconnected entities.
2. Concurrent invitation of plans for CD as a whole and specific asset.
3. Introduction of two stage approval process of resolution plan by NCLT.
4. Review of expenditure on operational expenses including leased properties, by CoC.
 - a. Also, insertion of examples to demonstrate the distinction between essential and non-essential services during CIRP.
5. Inviting interim finance providers to attend CoC meetings as observers.
6. Disallowing modifications in resolution plan post approval of NCLT

7. Presentation of all resolution plans before the CoC.
8. Mandatory submission of statement of affairs by CD in case of sec 7 application filed by financial institutions.
9. Enhanced disclosure requirements for avoidance transactions.

Liquidation:

10. Omission of provisions relating to going concern sale during liquidation.

IRP of Personal Guarantors:

11. Procedural pathway in case of non-receipt of repayment plan under insolvency resolution of personal guarantors.



Coordinated insolvency resolution for interconnected entities



Provisions relating to Procedural Coordination for Group Insolvency

- Proposal:
 - Two or more CDs undergoing CIRP
 - Interconnected by “control” or “significant ownership”
 - RP of any CD may file application for “coordinated conduct” of processes - meaning of “coordinated conduct”
 - Subject to obtaining prior approval of each committee of creditors by a vote of not less than sixty-six percent in value of the creditors voting in that CoC
 - AA may pass orders if satisfied that coordination would be in the best interests of the corporate debtors and their stakeholders
 - Orders for - joint hearing, appointment of common RP, information sharing among RPs, coordination of timelines, any other measure
 - Criteria to invoke procedural coordination:
 - Control: As defined under Companies Act
 - Significant ownership - ability to exercise 26% or more voting power
 - CDs undergoing CIRPs - What about filing of applications?
 - Approval of COCs - Manner of obtaining approval of COCs across CDs
 - Coordination in best interests of CD and stakeholders - Refer subsequent slides
- **What about joint application?**
 - **Whether there would be a common COC**
 - **Coordinated timelines - how will the same be achieved?**
 - will there be extended timelines to facilitate group proceedings?
 - **Whether common resolution plan would be invited**
 - **Claims across entities and distribution priorities**
 - **Avoidance proceedings - whether there would be any specific provision for subordination of debts of group entities**
 - **Solvent entities in the group**
 - **Costs involved in group proceedings - basis of sharing, etc.**

Possible factors to determine the need of group insolvency

- The extent to which management, the business and the finances of the companies are intermingled
- The conduct of the related company towards the creditors of the insolvent company
- The expectation of creditors that they were dealing with one economic entity rather than two or more group companies
- The extent to which the insolvency is attributable to the actions of the related group company
- Effect of such measures on creditors, as collective interests will conflict if the total assets of the combined companies are insufficient to meet all claims

What is Procedural Coordination? How is it different from Substantive Consolidation?

Basis of distinction	Procedural Coordination	Substantive Consolidation
Purport	To only coordinate the “procedures” relating to insolvency of each insolvent entity belonging to the group	To consolidate the assets and liabilities of all the insolvent entities in the group so as to treat them as “one”, and if financial and operational “oneness” of entities may be proved, to aggregate solvent group entities as well.
Objective	To make the administration of insolvency proceedings against group entities easier and inexpensive	To ensure that enterprise value is not lost due to fragmented resolution of only some entities, leaving other entities behind. To ensure equitable treatment to creditors by commingling assets and value, which, in reality, belong to an interdependent enterprise.
Substantive right of creditors	Procedural coordination does not impact the substantive rights of the creditors	Substantive consolidation affects the substantive rights of the creditors
Principle of separate legal entity	Separate legal entity of each group entity is kept intact	The principle of separate legal entity is completely disregarded
Effect on inter-entity claims	Inter-entity claims remains unaffected	Inter-entity claims vanish.
Nature of integration	Procedural coordination is more in the nature of “business integration”	Substantive consolidation is more in the nature of “asset integration”

Working Group on Group Insolvency (U.K. Sinha) - September, 2019

report dated 23rd September, 2019

- 'corporate group' may include holding, subsidiary and associate companies, and also other so interlinked so as to form a part of the group in commercial understanding with the approval of AA
- May be applicable to only those companies which have defaulted.
- **However, rules against perverse behaviour may be applicable to all group companies, regardless of their solvency**
 - The framework may permit the Adjudicating Authority to subordinate the claims of other companies in a group in exceptional circumstances of fraud, etc.
- Procedural coordination of only domestic companies in group may be introduced in first phase. Cross-border group insolvency and substantive consolidation could be considered at a later stage depending on experience and need
- Major recommended elements -
 - joint application, before any AA that has jurisdiction over any one of the companies.
 - Communication, cooperation and information sharing,
 - Single IP and Single AA, except where there are issues such as conflict of interest, lack of sufficient resources (in case of insolvency professionals) or where stakeholders would get adversely affected
 - Creation of a group creditors' committee at the option of the CoCs of the participating companies.
- Recommendation as to a **Framework Agreement** for Group Coordination Proceeding among the CoCs of the participating CDs.
 - may entail appointment of a "group coordinator" who would propose a strategy for the synchronised resolution of insolvency of the group companies
 - possible to propose invitation of a common expression of interest, resolution plan, etc.
 - possible to opt out of group coordination proceedings by a vote of the majority of its CoC
 - one AA (chosen as per the Framework Agreement) would have jurisdiction over the insolvency proceedings of each of the companies and the group coordination proceedings
 - companies may be allowed to seek an extension of the CIRP period by another ninety days to account for the additional time these proceedings may take to enable the value maximising resolution
- Coordination at liquidation stage may be allowed on a fresh application for the same.

UNCITRAL Model Law on Enterprise Group Insolvency

- “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership;
- “Group insolvency solution” means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;
- The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the **parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement**
- Cooperation to the maximum extent possible may be implemented by any appropriate means, including:
 - (a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;
 - (b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;
 - (c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;
 - (d) Coordination of the administration and supervision of the affairs of the enterprise group members; and
 - (e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

CBIRC-II Report on Group Insolvency (1/2), December, 2021

- Voluntary, flexible and enabling framework
- In the first phase, only provisions governing domestic group insolvency may be enacted
- Substantive consolidation is a remedy resorted to in exceptional circumstances and provisions governing substantive consolidation may not be provided in the Code at present. The need for such provisions may be contemplated at a later stage, on the basis of practice and jurisprudence evolved in this regard
- Definition of 'group' may be based on the criteria of control and significant ownership. May not apply to financial service providers
- Should only apply to corporate debtors in respect of whom a corporate insolvency resolution process or liquidation process is ongoing. Shall not apply to solvent members of the group
- Filing of joint applications for initiation of corporate insolvency resolution proceedings against multiple corporate debtors belonging to the same group may be permitted. Application form should be separate.
- Single AA -, all pending applications and proceedings under the Code in respect of a group member may be transferred to the NCLT that is the first to admit an application for triggering an insolvency resolution process in respect of any corporate debtor belonging to the group. All new applications in respect of any group member should also be filed in such NCLT
- Common RP/Liquidator - IP should refuse appointment if there are conflicts of interest
- Group CoC - Adequate representation from CoCs of all group members. May only provide procedural assistance and should not be tasked with taking decisions that affect the substantive rights and obligations of the parties, which right shall continue to be available to the CoCs of the relevant group members
- Mandatory for COCs and IPs to cooperate, coordinate and share information with each other

CBIRC-II Report on Group Insolvency (2/2)

- Group coordination proceedings -
 - Voluntary participation - flexibility to CoCs. Can opt out anytime before approval of group strategy by COCs
 - Appointment of group coordinator.
 - Proceedings will run alongside the separate insolvency or liquidation proceedings of the corporate debtors.
 - Termination of group proceedings - if the group coordinator applies for a termination order, which may be on the grounds that – (a) the group strategy has been approved and fully implemented; (b) the CoCs and liquidators have approved such termination by requisite majority; (c) the CoCs and liquidators have failed to approve a group strategy and the group coordinator is of the opinion that it is not feasible for participating group members to agree on a group strategy
 - Time period - Additional 90 days
- Costs of group proceedings form part of the insolvency resolution or liquidation process costs of the participating group members
 - proportion to be specified in subordinate law
 - or if the group strategy provides for any cost, treatment can be provided in the group strategy only
- Role of group coordinator
 - conduct the group coordination proceedings and develop a group strategy
 - assist the resolution professionals, liquidators and CoCs of the corporate debtors so as to enable effective coordination amongst them
- Group strategy
 - To be developed by the group coordinator
 - Group strategy may provide various combinations of measures that synchronise the insolvency resolution or liquidation proceedings of II the participating corporate debtors
 - Group strategy shall require approval of all participating CoCs by 66% of each of their voting shares respectively (in case of liquidation, liquidator shall approve)
 - Once approved, the group strategy shall be filed with the Adjudicating Authority and shall be binding on all parties to the group strategy

MCA Discussion Paper, 2023

- Procedural coordination mechanisms include:
 - cooperation, communication and information sharing,
 - group coordination for the preparation of a common expression of interest, resolution plan, etc.,
 - a joint application process, and
 - the designation of single Adjudicating Authority, appointment of a single insolvency professional and formation of a group creditors' committee
- Procedural coordination would only be beneficial for the creditors of two or more group entities when it generates a greater value than those cases where the insolvency proceedings of such entities are completed independently, by increasing recoveries or lowering costs
- A joint application may be filed at the option of the applicant w.r.t. companies that have committed default - should not be made applicable to solvent companies.
- A single Adjudicating Authority may administer the proceedings, if Adjudicating Authorities transfer proceedings to one Adjudicating Authority (except where such transfer would prejudice the stakeholders) or if the committees of creditors apply to have the proceedings transferred
- A single insolvency professional may be appointed by the Adjudicating Authority and can be proposed by the applicant. However, there would be flexibility to appoint multiple insolvency professionals where it believes there are capacity constraints or potential of conflict of interests
- A group creditors' committee could be formed at the option of the committees of creditors
- Group coordination proceedings (which are a form of procedural coordination) should only be commenced following an affirmative vote of majority of the CoC of each company participating in the group coordination proceeding.
- Insolvency professionals, CoCs and Adjudicating Authorities should be mandated to cooperate, communicate and share information with each other

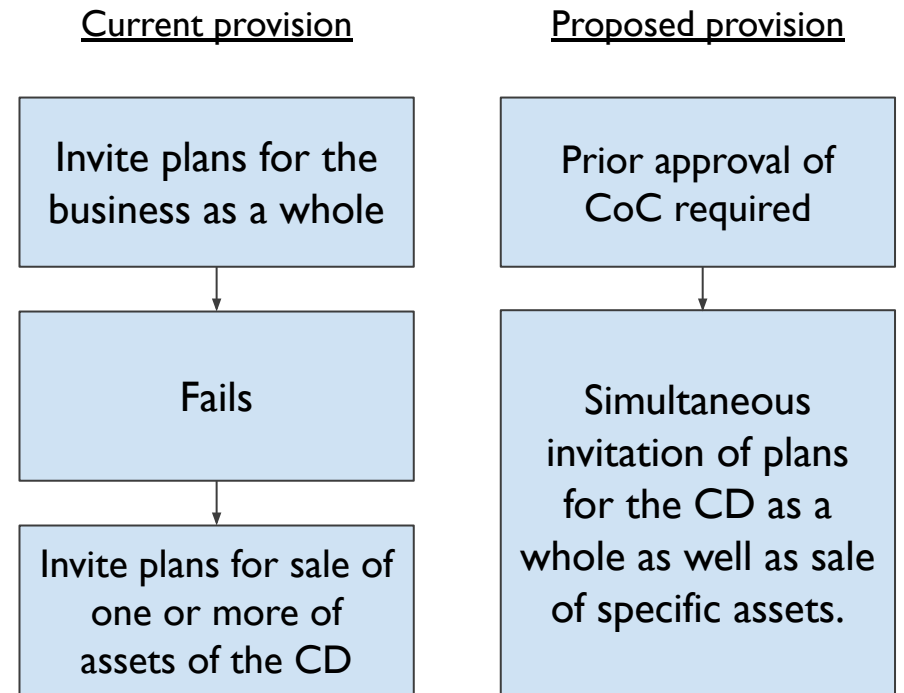


Concurrent invitation of plans for CD as a whole and specific assets



Part-wise resolution plan for corporate debtor

- 36B (6A) prescribes invitation of resolution plan for specific assets of the Corporate Debtor (CD), **only after** attempts to invite plans for the CD as a whole has failed.
- Challenges:
 - Extended CIRP timelines
 - Loss of value of viable business segments
 - Different segments of business attract different types of investors
- Proposals:
 - Deletion of Regulation 36B (6A)
 - Insertion of Proviso in Regulation 36B(1):
 - *“Provided that the resolution professional may, with the approval of the committee simultaneously invite resolution plans for the corporate debtor as a whole or one or more assets of the corporate debtor.”*
- IBBI proposes RP may invite resolution plans for the business as a whole as well as specific assets of the CD concurrently, only condition:
 - Approval of CoC
 - However, the draft regulations is silent on the required voting %



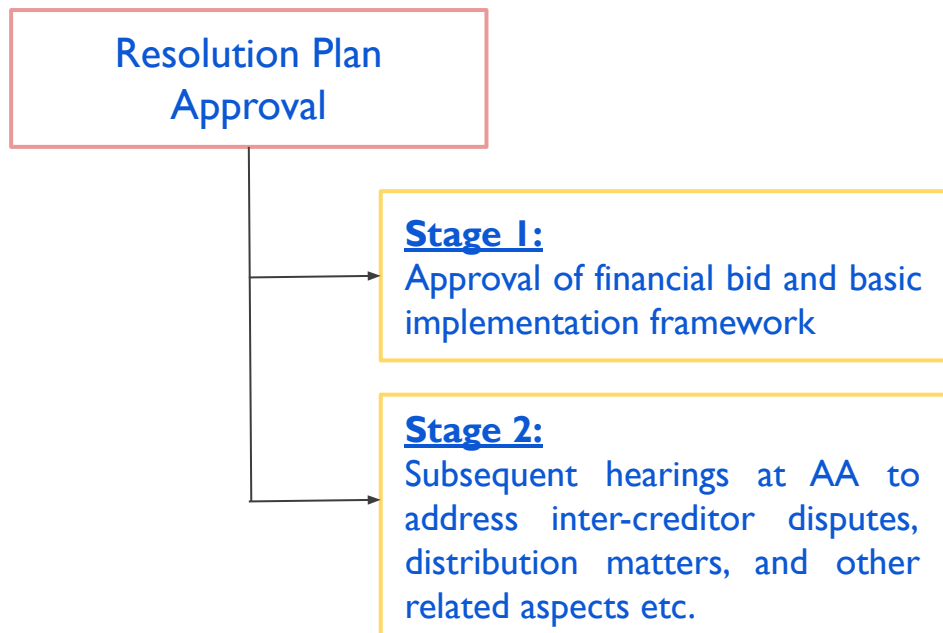


Dual Stage Approval of Resolution Plan



Dual stage approval of the resolution plan

- Insertion of Regulation 39AA - Phased Approval of Resolution Plan.
- *“The committee may, by a vote of not less than sixty-six percent of voting share, recommend to the Adjudicating Authority to first approve the implementation of the resolution plan and thereafter approve the manner of distribution.”*



- Earlier, para 9(b) of the MCA DP also proposed separation of resolution plans and the distribution of proceeds.
 - The proposal also provided for preparation of an equitable scheme of distribution of proceeds received pursuant to resolution plan(s) through a separate waterfall mechanism in the CIRP. As per this scheme,
 - creditors will receive proceeds up to the CD's liquidation value for their claims in the order of priority provided in section 53.
 - Any surplus over such liquidation value will be rateably distributed between all creditors in the ratio of their unsatisfied claims.
 - Finally, any remaining amount or further surplus would be distributed to the shareholders and partners of the corporate debtor, as the case may be.
- In the present proposal also, although a separate waterfall in CIRP is not proposed, it is implicit that distribution of the proceeds is proposed to be made a role of the CoC.
 - Sec 30(4) provides for taking into account the order of priority amongst creditors as laid down in sec 53(1) by CoC while considering any resolution plan for approval.



Review of expenditure on goods and services availed during CIRP



Operational Expenses on Leased Properties

- Insertion of Regulation 32A in CIRP Regulations, 2016, broadly covering:
 - Comprehensive assessment report of all substantial operational expenses, particularly focusing on leased properties protected under moratorium - within 30 days of constituting CoC
 - Contents of the report:
 - necessity
 - current utilization and occupancy status
 - lease agreement particulars such as tenure, payment schedules, and outstanding obligations and
 - financial impact analysis
 - CoC to take appropriate decision, and explicitly approve continuation or termination of expenses pertaining to leased properties - within 15 days of assessment report
 - Quarterly review of continued expenses to be a mandatory agenda in CoC meetings
- Rationale:
 - Currently Sec 14 Moratorium is *inter-alia* applicable on the following:
 - Reg. 14 (1) (d): the recovery of any property by an owner/ lessor - misconstrued as justification for retaining unnecessary assets
 - Reg. 14 (2): uninterrupted supply of essential goods or services to CD during moratorium period-however, incorrectly applied in case of specific supplies as well
 - Gap in evaluating the necessity and cost-effectiveness of maintaining such leases during CIRP.
 - Increase in process costs affecting creditor realisation by retaining unnecessary assets

Essential Services vs. Non-Essential Services a.k.a. Critical Services

- Section 14(2) of IBC, 2016 provides:
“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.”
 - Regulation 32 of CIRP Regulations, 2016 lists out the essential services referred u/s 14(2):
 - electricity;
 - water;
 - telecommunication services; and
 - information technology services,
 - **Stipulation: Not a direct input to the output produced or supplied by the corporate debtor.**
 - Present illustration differentiating between water used for drinking and sanitation, and that used for hydroelectric power generation leaves scope of ambiguity.
- New Illustration:
 - *“Electricity supplied to a corporate debtor for maintaining basic facility upkeep such as lighting and powering computers would constitute essential services. However, if the corporate debtor operates a manufacturing facility, the high-voltage electricity supply required to run the machinery may be considered as critical services by the insolvency professional as it is being used as a direct input for production and current dues for such services must be paid during CIRP to prevent any service discontinuation.”*
 - The immunity to use the four listed services is proposed to be restricted to the extent required for basic facility upkeep and not as a direct input.



Interim Finance Providers



Inviting interim finance providers to meetings of CoC

- Insertion of new sub-regulation (5) in Regulation 18 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:
 - *“The committee may direct the resolution professional to invite the providers of interim finance to attend such meeting(s) of the committee, as the committee may decide, without voting rights, as observers.”*
- Note:
 - Power rested with CoC only on whether to invite Interim Finance Providers or not.
 - Even if invited, as observers.
 - Does not carry voting rights
 - Maintains the CoC's autonomy in decision-making
- Rationale
 - Interim Finance Providers (IFPs) provide the CD with essential funding for the both the process of insolvency and continued operations of the CD.
 - Plays an important role in maintaining the CD as a going concern.
 - Information asymmetry translating to lack of funding from IFPs
 - No access to CoC meetings, hampering proper understanding of the risks involved and the progress of CIRP
- Regulation 2(ea) of the IBBI (Liquidation Process) Regulations, 2016 defines “liquidation cost” to include interest on interim finance for a period of 12 months or for the period from the LCD till repayment of interim finance, whichever is lower
- IBBI DP dated 14.06.2022 proposed liquidation cost to include the interest on interim finance till the same is repaid, barring the 12 month timeframe.



Other Procedural Changes



Other procedural changes (1/3)

No modification in the NCLT approved resolution plan

- Insertion of new sub-regulation (4A) in Regulation 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:
- *“Upon approval of the resolution plan by the Adjudicating Authority under Section 31, no modifications shall be sought by the resolution applicant in the resolution plan approved by the Adjudicating Authority.”*
- Rationale:
 - Additional reliefs, concessions, or modifications sought by applicants post approval of plan affects the sanctity of the CIRP timeline.
 - Creates uncertainty in implementation of the plan
 - No explicit provision prohibiting post-approval reliefs or concessions.

Presentation of all plans before CoC

- Insertion of new sub-regulation (2A) in Regulation 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:
- *“The resolution professional shall also submit to the committee the resolution plans received which are not in compliance with the provisions of the Code and these regulations and specify in detail the aspects of non-compliance.”*
- Rationale:
 - Ensures full transparency
 - Detailed compliance report of each plan highlighting areas of non-compliances along with reasons
 - Better and more informed decision making of CoC, expected to reduce potential disputes and litigation.

Other procedural changes (2/3)

Statement of Affairs by Corporate Debtor

- Insertion of Regulation 2E - Statement of Affairs, to contain the following:
 - Details of assets and liabilities of the CD as per latest annual financial statements
 - Total number of employees and workmen
 - Past 3 FYs financial statements
 - Details of location and custodian of books of accounts
- Proposes for submission of SoA along with reply to Application **only** in case of Section 7 Application by Financial Institutions viz. Banks, NBFCs, PFIs, etc.
- Rationale:
 - Information asymmetry
 - Expedite decision-making
 - Address risk of asset dissipation
- Section 72 prescribes imprisonment of 3-5 years, or fine of 1 lac-1crore, or both, in light of any material and wilful omission in any statement relating to affairs of the CD, by officer of CD.
 - In *Sunil Parmanand Kewalramani v Kestrel Import & Export Pvt Ltd*, reasons for not invoking Section 72 was outlined - being officer of CD did not act delinquently.
- Issues:
 - Probable reasons for not mandating Statement of Affairs in Section 9 and other Section 7 applications.
 - Submission of SoA in reply to application, **before or after** admission of application by NCLT?
- The issue of “information asymmetry” highlighted in a working paper - “Theoretical Framework of Insolvency Law”

Other procedural changes (3/3)

Enhanced disclosure requirements for avoidance transactions

- Mandatory contents of the Information Memorandum (IM) - dealt with in Regulation 36(2) may see insertion of new clause (ha) -
 - *“details of all identified avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code and subsequent filings before Adjudicating Authority, as referred under sub-regulation (3A) of regulation 35A.”*
- Regular updates in the IM regarding newly identified avoidance transactions and related applications, and intimating CoC of the same.
- Mandatory contents of the Resolution Plan - dealt with in Regulation 38(2) may see insertion of new clause (e) -
 - *“A resolution plan shall not provide for assignment of any avoidance transactions, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code that were not:
(a) disclosed in the information memorandum; and (b) intimated to all prospective resolution applicants under regulation 35A(3A) before the last date for submission of resolution plans, to resolution applicant or the corporate debtor”*
- **Prospective application** of the same, that is to say, resolution plan submitted before NCLT before notification of the same, if and when, may contain manner of assignment of avoidance transactions not disclosed earlier in IM.
- The Report of the Insolvency Law Committee of Feb, 2020 highlighted the issue of avoidance transactions in great detail.
- IBBI’s latest Quarterly Newsletter proposed two ways for dealing with avoidance transactions, given their quantum and significance in the CIRP process:
 - Specifics of such transactions to be made explicit in IM and Request for Resolution Plan (RFRP),
OR
 - Invite bids for avoidance transactions separately after obtaining the approval of AA and appropriate the recoveries among creditors with AA’s approval



Omission of provisions dealing with GCS in liquidation



Omission of option of GCS from mode of sale during Liq. (1/2)

- Removal of option (d) and (e) from Reg. 32, that provides for-
 - sale of CD as going concern;
 - sale of business(es) of CD as GCS.
- Removal of Regulation 39C of CIRP Regulations: Assessment of Sale as Going Concern
- Rationale:
 - No additional value preservation advantage;
 - Strategic delay in bidding causing lower recovery
 - undermine the efficacy of CIRP
 - Maintaining CD as going concern during liquidation has led to escalation of liquidation cost;
 - SRA has to file separate application seeking various reliefs not provided in Code- that causes prolonged legal disputes, increase cost an unnecessary delay in completion of process
- Post commencement of CIRP, entities will remain either 'going concern' or 'gone concern'.
- 32nd Report of Standing Committee of Finance
 - Section 54 of the Code provides for dissolution of CD when assets have been liquidated.
 - Reference to NCLT's judgement in Invest Asset Securitisation & Reconstruction Pvt. Ltd v. Mohan Gems & Jewels Pvt. Ltd. [CP No. 590 (PB) of 2018]
 - *"liquidation requires dissolution under the IBC and hence regulations that provide for liquidation as a going concern are ultra-vires and that the legislation has created further uncertainty"*
- CFS Report of Nov, 2022
 - Proposal I: reversion to CIRP from liquidation should be possible in cases where the business is being run as a going concern.
 - Rationale: concept of 'going concern sale' during liquidation was evolved by judiciary seeing a functioning company with several employees. In such cases, it should be able to attempt the CIRP process rather than being forced into liquidation.

Omission of option of GCS from mode of sale during Liq. (2/2)

- Proposal 2: enable CoC to resolve the functional parts of the business separately through one or more resolution plans and enable the unviable/non-functional parts of the assets to be liquidated by allowing other modes of sale like slump sale, sale of parcel of assets or standalone assets during CIRP after the options for selling it as a going concern either in whole or parts have not yielded result.
- Rationale: if the resolution fails, the company goes to liquidation wherein various modes of sale are available. However, sale through these modes may be carried out even during the resolution process as it is also a market facing process. This will have the advantage of cost and time efficiency in early closure of the process.
- Section II of the Code prohibits a corporate debtor undergoing liquidation from re-initiating CIRP.
- Report of the Insolvency Law Committee of Feb, 2020
 - *“Only where the CIRP fails, the Code provides for an entry to liquidation. Thus, liquidation has been envisaged as the “state the entity enters at the end of an IRP, where neither creditors nor debtors can find a commonly agreeable solution by which to keep the entity as a going concern”. Therefore, entry into liquidation itself implies the inability of the corporate debtor to be continued as a going concern. Accordingly, the Code prescribes dissolution of the corporate debtor as the final outcome of the liquidation process.”*
 - Section II of the Code provides that -
 - The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-

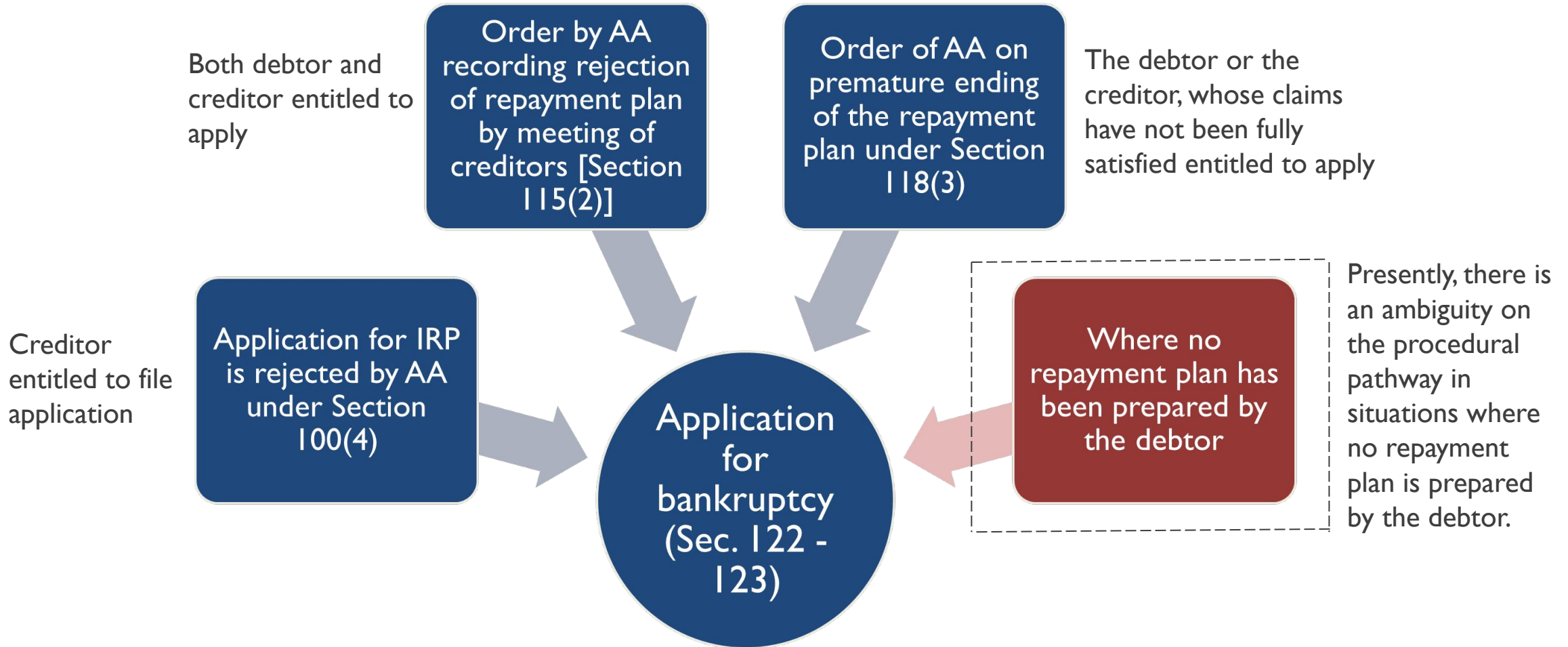
(d) a corporate debtor in respect of whom a liquidation order has been made.



Insolvency of Personal Guarantors



Filing of application for bankruptcy



Procedural pathway in case of non-receipt of repayment plan under insolvency resolution of personal guarantors

- Insertion of Regulation 17B in IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019
- *“Where no repayment plan has been prepared by the debtor, the resolution professional shall file an application, after approval of a majority of more than fifty-one percent in value of the creditors present in person or by proxy, before the Adjudicating Authority intimating the non-submission of a resolution plan and for appropriate directions”*
- Rationale
 - No procedure prescribed in the event of non-receipt of repayment plan after an insolvency application has been admitted by the Adjudicating Authority u/s 100 of the IBC, 2016
 - This procedural vacuum potentially impacts the efficiency and effectiveness of the bankruptcy resolution process

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