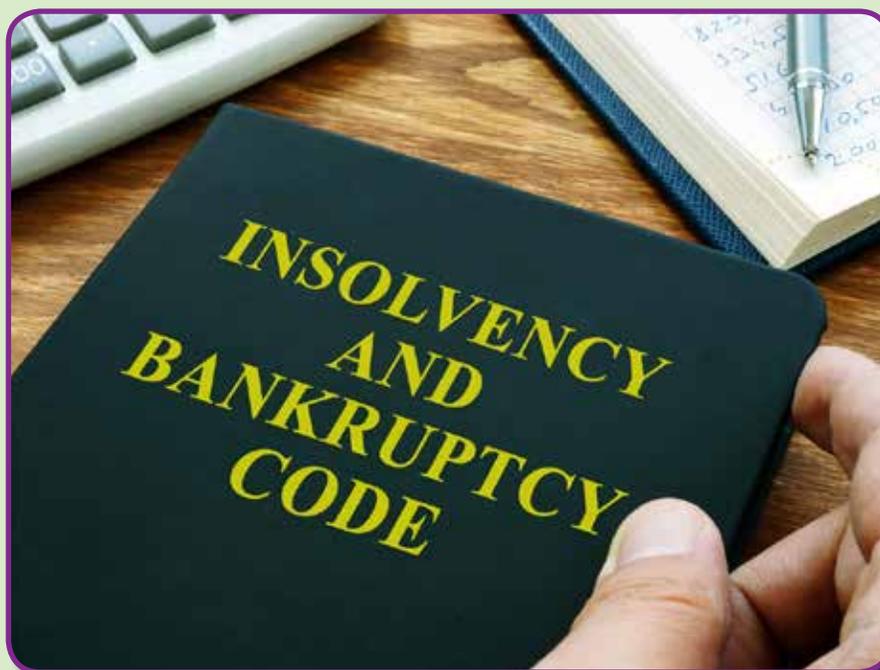


## Theme : Insolvency Profession



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**WESTERN INDIA REGIONAL COUNCIL**  
**THE INSTITUTE OF COST ACCOUNTANTS OF INDIA**  
*(Statutory Body under an Act of Parliament)*

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## From the Desk of Chairman . . . . .

### ***“You reap what you sow”: Christian Proverb***

Friends,

It was my ardent endeavor after taking over chairmanship, initiated engagement of CMAs in Regional Director Office, Western Region of Ministry of Corporate Affairs & Official Liquidator. It yielded immediate benefits in which they undertook and implemented the Young Professional Scheme and have selected 9 CMAs from the Western Region and inducted them to the Office of Registrar of Companies (ROC) office at Mumbai & Pune, 3 more were shortlisted in the reserve Panel. The Office of Official Liquidator are in the process of completing recruitment of CMAs.

We are pleased to state that empanelment of CMAs for conducting Special Audit by GST Commissionerate III is expected to be published soon.

It was brought to my notice that email was being received by practicing CMAs from Gujrat using the name of M/s Neogen Chemicals Ltd requesting to send profile, experience & quotation for Cost Audit. Upon enquiry it was clarified by company that they have never sent such email and person mentioned do not exist on payroll of the company. Accordingly cyber complaint is filed with police against anonymous person(s) about the potential fraud. I request both members in Practice & Industry beware of such things.

Its matter of pride for whole nation when Mr. Ranjit Disale, a teacher from Solapur received the Global Teacher Award who had done innovative experiments in education & teaching. His work was appreciated and emulated by the whole world. The current scenario of COVID-19 has given us new dimension look into educational system.

Our Institute also has taken major reform in form of conducting Online examination. In the December 2020 examination for Foundation, Intermediate and Final Examination of the Institute will be conducted in an online format giving option to students to undertake examination through remote proctoring and examinees can attend it either through home based or center based. This will give students opportunity to appear for examination in a safe environment and will also will help them to save precious time lost by commuting to examination centers.

As the countdown for the year end of 2020 is coming we are happy to hear that the world is in the process of getting the COVID-19 vaccine which would be panacea for life and livelihood and help us to resurrect the economic downturn. The present recovery is felt in the zooming Stock Market Index which is at it's all time high. We are expecting the economy to recover in 2021 what we missed in 2020. We hope our profession will prosper and be stronger in the coming days.

We are happy to note that the MCA by way of notification further had extended the due date for e-filing of Cost Audit Report till December 31st,2020. The CMA fraternity is requested to take the benefit and complete the filling before due date in order to avoid non-compliance & additional fees.

Wish you and your family Happy & Prosperous New Year 2021!

Let's celebrate together!

*Jai Hind*

**CMA Harshad S. Deshpande**  
Chairman, ICAI-WIRC.

## What WE could achieve during the 3rd month

- Webinar Microsoft Tool: Introduction to the Microsoft Tool - 7th November 2020 by CMA Tripti Patwa
- Webinar on Cost Reduction by Lean Six Sigma jointly with Solapur Chapter of ICAI - 12th November, 2020 by CMA Ashish Deshmukh
- Webinar on De-mystifying the Role of Purchase Finance Controller in Purchase Management jointly with Bhopal Chapter of the ICAI - 21st November 2020 by CMA Himanshu Dhar, Head Business Finance Supply Chain, Tata Motors
- Webinar on US Elections & its impact on Indian Economy jointly with Goa Chapter of Cost Accountant - 28th November 2020 by Mr. R Venkitachalam, Chairman, Bizsolindia Services Pvt Ltd.
- Series of Webinar on Ind AS by CMA Rammohan Bhawe, Limca Record Holder on Ind AS & Asia pacific Record holder on Valuation, Faculty and Consultant, FCA, FCMA, ACS, LL.B.(G), Dip IFR (ACCA UK), Certified IndAS - ICAI, Six sigma green belt
- Webinar on E-invoicing, Govt mandate, regulations & solution jointly with Ahmedabad Chapter of Cost Accountants - 4th December 2020 by CMA Malav Dalwadi, Founder Director - Microvista Technologies Pvt. Ltd
- Visit to Bank of Maharashtra for representation to include CMA in conducting Stock Audit

Status # Agenda 21	Completed	Total
Upto November 2020	7	21

### What all we achieved of #Agenda 21 in the month of November 2020

- #Agenda 3 Focused Workshops/Trainings for members every month on Online Platform for emerging opportunities both in employment as well as practice like IND AS / Analytics & AI / SAP & ERP / Insolvency Professional / Forensic Auditing /Valuation etc.  
**Series of Webinar on Ind AS**
- #Agenda 7 PD/CEP Programmes in all small chapters periodically jointly by ICAI-WIRC  
 Conducted program jointly with following chapters  
**Ahmedabad, Bhopal, Bilaspur, Goa, Nashik, Solapur**
- #Agenda 12 Social Media Campaigns & Digital Marketing for Visibility & Branding of Profession  
**Activated Facebook Page & Instagram Handle, WIRC App**

## WIRC WELCOMES NEW ASSOCIATE MEMBERS

Sr. No.	Member No.	Name	City
1	49314	Sadique Noorhasan Shaikh	Surat
2	49321	Abhijeet Gopinath Chaudhari	Shirdi
3	49337	Shivram Rajendra Gadgil	Pune
4	49344	Saurabh Rajendrabhai Rathod	Ahmedabad
5	49347	Sukanya Balasubramanian	Dombivli (East)
6	49354	Milind Jayeshkumar Joshi	Vadodara
7	49361	Hiren Shankarlal Katarmal	Mandvi
8	49388	Bhargav Anilbhai Shah	Vadodara
9	49390	Pranjal Shrivastava	Dombivli (East)
10	49392	Amod Pradeep Deshpande	Nanded
11	49396	Rajat Sakuja	Navi Mumbai
12	49399	Manish Tulsibhai Patel	Ahmadabad
13	49404	Faiyyaj Shafik Inamdar	Pune
14	49405	Mahesh Kumar Pulipati	Bilaspur
15	49406	Devendra Singh Chouhan	Bhilai (C.G.)



## *From Desk of Chief Editor . . . . .*

Dear CMA Professional Colleagues,

We are in the last month of the year 2020. 2020 will be remember for the COVID-19 pandemic.

Theme of this bulletin is “Insolvency Profession”. We have received good response from members. We have received 7 articles on the themes. Articles on the theme are published as cover story. We are also publishing articles on other professional matters. I am thankful to all authors for providing articles and making WIRC bulletin a Knowledge Pack.

We have also start publishing interview of CMAs who had reached a respectable position like CFO, VP, Director etc. Objective of the same to share their experience with CMA fraternity. It will inspire young CMAs for making their future brighter. In this bulletin, we have not published interview of CFO due to some unavoidable circumstances. I request our proud CMAs who reach at highest position during their career to share their experience with CMA fraternity. Place reach us so that we can conduct interview.

Women empowerment is also one of the needs of the hour. We have also decided to publish at least one article from lady CMA. We are getting regular articles from lady CMA's.

We have started “GST Corner” in the bulletin. GST corner will contain major update related to GST during past month and due dates of GST for next month. I am thankful to CMA Vandit Trivedi to take responsibility for compiling the updates.

I urge the members to share knowledge by way of article to make WIRC Bulletins Knowledge Pack.

We welcome suggestions and feedback for betterment of WIRC Bulletin.

Stay Safe

Happy Reading !!!

With Ward Regards

**CMA Ashish Bhavsar**

*Chairman, Editorial Board*



# Analysing provisions of Limitation Act, 1963 with respect to Insolvency and Bankruptcy Code, 2016

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*“Law Helps the Vigilant and not the Negligent.”*

## Introduction

The **Insolvency and Bankruptcy Code, 2016 (IBC)** is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. The bankruptcy code is a one stop solution for resolving insolvencies which previously was a long process that did not offer an economically viable arrangement. The code aims to protect the interests of small investors and make the process of doing business less cumbersome.

The **Limitation Act 1963**, is an act to allow actions in some cases where the injured party had not discovered the injury until after the standard date of expiration. The act allowed an injured party to bring a claim outside the normal statute of limitations period if he could show that he was not aware of the injuries himself until after the limitation period had expired and if he gained the permission of the court.

## Introduction of Limitation Act in Insolvency and Bankruptcy Code

Section 238A was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, (w.e.f. 06.06.2018) on the recommendation of the Insolvency Laws Committee’s Report published in March 2018. Prior to the section 238A, the issue of applicability of the Limitation Act to proceedings under the IBC was initially dealt with by the NCLAT (National Company Law Appellate Tribunal) in the matter of *Speculum Plast Private Limited V. PTC Techno Private Limited* and *Neelkanth Township Trustees Ltd* wherein NCLAT held that the Limitation Act will not be applicable to proceedings under the IBC.

## Reason for the introduction the Section 238A into the Code

The Report of the Insolvency Laws Committee would indicate that it has applied its mind to judgments of the NCLT (National Company Law Tribunal) and the NCLAT (National Company Law Appellate Tribunal). It has also applied its mind to the aspect that the law is a complete Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred.

*“Ignorance of Law is not an excuse.”*

## APPLICATION OF LIMITATION ACT, 1963

The question of applicability of the Limitation Act, 1963 (“Limitation Act”) to the Code has been deliberated upon

in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected (*Ravula Subba Rao and another V. The Commissioner of Income Tax, Madras, (1956) S.C.R. 577*). In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred (*Punjab National Bank and others V. Surendra Prasad Sinha AIR 1992 SC 1815*). Further, debts in winding up proceedings cannot be time-barred, (*Interactive Media and Communication Solution Private Limited v Go Airlines, 199 (2013) DLT267*) and there appears to be no rationale to exclude the extension of this principle of law to the Code.

Further, non-application of the law on limitation creates the following problems:

First, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP (Corporate Insolvency Resolution Process), the trigger for which is the default on debt above INR one lakh. The purpose of the law of limitation is “to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party’s own inaction, negligence or laches” (*Rajinder Singh v. Santa Singh, AIR 1973 SC 2537*). Though the Code is not a debt recovery law, the trigger being ‘default in payment of debt’ renders the exclusion of the law of limitation counter-intuitive.

Second, it re-opens the right of claimants (pursuant to the issuance of public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

The intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its

debts for the purpose of CIRP and are not in the form of a creditor's remedy.

**“Limitation bars remedy but does not end right.”**

## Some important provisions of the Limitation Act related to IBC

### Definitions

#### Period of limitation

Clause (j) of Section 2 of the Limitation Act, 1963 defined that “**period of limitation**” means the period of limitation prescribed for any suit, appeal, or application by the Schedule, and “**prescribed period**” means the period of limitation computed in accordance with the provisions of this Act.

#### A. Suit

Clause (l) of Section 2 of the Limitation Act, 1963 defined that “**suit**” does not include an appeal or an application.

#### 1. Expiry of a prescribed period when the court is closed

As per Section 4 of the Limitation Act, where the prescribed period for any suit, appeal, or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred, or made on the day when the court re-opens. Further, elaborate through an explanation that a court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day.

#### 2. Section 5 of the Limitation Act, 1963

Section 5 of the Limitation Act, 1963 dealt with the extension of the prescribed period in a certain case. It states that if the appellant or the applicant satisfies the court that he had a sufficient cause for not preferring the appeal or making the application within such period, then such an application or appeal shall be admitted after the prescribed period.

#### 3. Extension of prescribed period in certain cases.

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

1. Period of limitation prescribed under Article 137 of Part II- PART II – ‘Other Applications’ of Third Division- ‘Applications’ of Limitation Act, 1963

Article	Description of application	Period of limitation	Time from which period begins to run
137.	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

## Analysis of Section 238A of the Code

### 1. The legal text of the Section (238A-Limitation)- B.K. Educational Services (P) Ltd. V. Parag Gupta & Associates:

*The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.*

Hon'ble Supreme Court in the matter of B.K. Educational Services (P) Ltd. V. Parag Gupta & Associates held that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “**The right to sue**”, therefore, accrues when a default occurs. If the default has occurred **over three years prior to the date of filing of the application**, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

### 2. The Section is applicable retrospective i.e. since the inception of the Code- B.K. Educational Services (P) Ltd. V. Parag Gupta & Associates

Hon'ble Supreme Court in the matter of B.K. Educational Services (P) Ltd. V. Parag Gupta & Associates clarified that the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code.

### 3. The limitation period starts from the date of default- Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd.

The Supreme Court in Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. held that the proceedings under section 7 of the IBC are “**an application**” and not “**suits**”; thus they would fall within the residuary article 137 of the Limitation Act and the right to apply will arise from the date of default. It was again reiterated by the Supreme Court in Jignesh Shah vs. Union of India that the right to apply under the IBC will be from the date of default and not from the date of enactment of the IBC i.e. 01.12.2016.

### 4. An Acknowledgement in writing within the expiration of the prescribed period will mark a new commencement period for limitation (Section 18- Limitation Act,1963) C. Budhraja V. Chairman, Orissa Mining Corpn. Ltd., (2008) 2 SCC 444: (2008) 1 SCC (Civ):

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is

claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence or its contents shall not be received

If a Corporate Debtor writes to the Creditor requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the Corporate Debtor merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment.

A limitation can be extended based on acknowledgement in writing, **provided the said acknowledgement is made before the expiration of the prescribed period of limitation for a suit or application in respect of any property or right.** An acknowledgement of liability in respect of such property or right has been made in writing, signed by the party, against whom such property or right is claimed, or by any person through whom he derives his title or liability, if the acknowledgement is made before the expiry of the period of limitation, then a fresh period of limitation shall be computed, from the time, when the acknowledgement was so signed.

**5. Date of default- *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.* :**

It will be the date of declaration of account as NPA and such date of default would not shift even if subsequent payment made by the Corporate Debtor – Jagdish Prasad Sarada Vs. Allahabad Bank – NCLAT New Delhi

NCLAT considering the *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.* and other relevant judgments held that the period of three years from the date of the Account of Corporate Debtor is classified as NPA then it becomes impermissible to proceed with Section 7 Application as observed in para 11 of the Judgment. The extension for the period of Limitation can only be done by way of application of Section 5 of The Limitation Act, 1963 in any case for the condonation of delay is made out.

**Period of Limitation- *Jignesh Shah & Anr Vs. Union of India & Anr and Babulal Vardhaji Gurjar Vs. JM Financial Asset Reconstruction Co. Ltd.***

The bar of limitation of three years would be attracted from the date when the default occurs and not from the filing of winding up petition- *Jignesh Shah & Anr Vs. Union of India & Anr* – Supreme Court.

Property having mortgaged, the claim is not barred by limitation as the period of limitation is 12 years with

regard to mortgaged property-*Babulal Vardhaji Gurjar Vs. JM Financial Asset Reconstruction Co. Ltd.*-NCLAT

## Conclusion

The author has tried to through some light on Limitation Act with respect to Insolvency and Bankruptcy Code, by briefly introducing both the acts and further quoting some case laws. All the case laws and points sighted were to highlight how Limitation Act was inserted in IBC to make an attempt towards achieving the purpose for making IBC which mentions consolidating the existing framework by creating a single law for IBC.

## CHAPTER NEWS

### PIMPRI-CHINCHWAD-AKURDI

#### Webinar on “TCS U/S 206C (1H) & Faceless Assessment Scheme”

Chapter conducted webinar on ‘TCS U/S 206C (1H) & Faceless Assessment Scheme’ on 1st November, 2020 through Google Digital platform. CMA Santosh Korade, Dy Manager, Maharashtra State Electricity Distribution Company Ltd., Pune was the speaker.

#### Webinar on ‘Business Valuation’

Chapter conducted webinar on ‘Business Valuation’ on 7th November, 2020 through Google Digital platform. CMA Vinod Shete, CFO Service was the speaker.

#### Webinar on ‘Ethical Finance: What it is and why it is growing?’

Chapter conducted webinar on ‘Ethical Finance: What it is and why it is growing?’ on 21st November, 2020 through Google Digital platform. CMA Dr. S K Gupta, CEO of Insolvency Professional Agency of the Institute of Cost Accountants of India was the speaker.

#### Webinar on “Faceless Assessment Scheme”

Chapter conducted webinar on ‘Faceless Assessment Scheme’ on 22nd November, 2020 through Google Digital platform. CMA Santosh Korade, Dy Manager, Maharashtra State Electricity Distribution Company Ltd., Pune was the speaker.

### PUNE

#### Webinar on “Taxation of Trusts and Recent Amendments under Income Tax Act 1961 in respect of Trusts”

Chapter arranged Webinar for members on 7th November 2020 on the topic “Taxation of Trusts and Recent Amendments under Income Tax Act 1961 in respect of Trusts”. CMA Rahul Pore (Practicing Cost Accountant) was speaker for the webinar.

#### Webinar on “Role of Independent Director in Corporate Governance during COVID-19”

Chapter arranged Webinar for members on 28th November 2020 on the topic “Role of Independent Director in Corporate Governance during COVID-19”. Speaker for the session was CMA Sanvedi Rane.



# Decoding Insolvency of Personal Guarantor Under IBC, 2016

CMA Bhavin R. Patel

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## A. Introduction

On 15th November, 2019, a notification was issued by the Ministry of Corporate Affairs which has rendered the insolvency and bankruptcy proceedings against personal guarantors to be governed by the Insolvency and Bankruptcy Code, 2016 (“IBC”) and the regulations in this regard came into force as on 01st December, 2019. For the purpose of understanding the concept of insolvency and bankruptcy against personal guarantors, it becomes essential to understand the concept of guarantee. Section 126 of the Indian Contracts Act, 1872 deals with the concept of contract of guarantee. A contract of guarantee is an agreement wherein there are three parties which inter alia include the debtor, creditor and the guarantor. In the event of failure on the part of the debtor to repay the debt amount owed to the creditor, the guarantor shall repay the debt amount to the creditor on behalf of the debtor and in the event of failure to repay such debt amount, the creditor reserves the right to initiate insolvency proceedings against the personal guarantor.

## B. Who is A Personal Guarantor under IBC?

Section 5 (22) of the IBC defines a personal guarantor as an individual who is the surety in a contract of guarantee to the corporate debtor.

Pursuant to Rule 3 (e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (“Rules”), a guarantor means a debtor who is a personal guarantor to a corporate debtor in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or in part.

This article covers the insolvency procedure to be initiated against a personal guarantor under IBC.

## C. Initiation of insolvency proceedings against personal guarantors:

Pursuant to Section 60 of the IBC, the National Company Law Tribunal (“NCLT”) has the territorial jurisdiction in relation to the insolvency resolution for corporate persons including the corporate debtors and personal guarantors.

The insolvency and bankruptcy procedure can be initiated against a personal guarantor, either by a creditor or through a resolution professional pursuant to Section 95 of the IBC by filing an application before the NCLT. Following are the steps which put forth the process of initiation of insolvency against a personal guarantor:

1. **Serving a Demand Notice:** Pursuant to Rule 7 (1) of the Rules, a demand notice shall be served by the creditor on the personal guarantor demanding the payment of amount in default and such demand notice shall be served on the personal guarantor in Form B. Within 14 (fourteen) days from the date of receipt of the demand notice, the personal guarantor shall pay the debt amount to the creditor, failing which the creditor reserves the right to file an insolvency application before the NCLT.
  2. **Filing of Application:** Upon failure to make payment of the debt amount, the creditor reserves the right to file an application before the NCLT. The application shall be filed in Form C and a fee of 2000/- (Rupees Two Thousand only) shall be paid by the creditor in lieu of filing of the application before the NCLT. The following documents shall be attached to the application in the form of annexures:
    - List of documents attached to this application in order to prove the existence of debt and the amount in default.
    - Copy of demand notice served on the guarantor in Form B.
    - Copy of the Income Tax Returns with detailed computation of the income of the guarantor, or the firm as the case may be, for the previous three years, if available.
    - Copy of personal guarantee contract.
    - Copy of authorization, wherever required under the form.
    - Proof that the application fee has been paid.
    - Documents evidencing the debt and the default in relation to the debt, as may have been provided by the guarantor at any point in time, if available.
    - Documents evidencing the assets, liabilities, income and any other relevant information as may have been provided by the guarantor at any point in time, if available.
    - Documentary evidence of all information sought in each entry for each part of the form.
- A copy of the application shall be served upon to the personal guarantor and the corporate debtor.
2. **Interim Moratorium:** Once the application has been filed with the NCLT, an interim moratorium shall

commence from the date of filing of the application with respect to all the debts which would cease upon the admission of the application. During such interim moratorium period, any legal action which is pending in relation to the debt shall be stayed and the creditors shall not initiate any legal action in relation to the debt.

4. **Application filed through a Resolution Professional :** In the event the application under Section 95 has been filed through a resolution professional, the NCLT shall direct the Insolvency and Bankruptcy Board of India (“Board”), within 7(seven) days from the date of the application to ensure that no such disciplinary action is pending against the resolution professional. Within the aforesaid period of 7 (seven) days, the Board shall communicate to the NCLT in writing either confirming the appointment of the resolution professional or rejecting the appointment of the resolution professional. When a resolution professional is rejected, nominating another resolution professional for the insolvency resolution process.

In the event the application is filed by the creditor himself and not through the resolution professional, the NCLT shall direct the Board within 7 (seven) days to nominate a resolution professional from the date of filing of such application. Upon the receipt of such direction from the NCLT, the Board shall nominate a resolution professional within 10 (ten) days. The NCLT shall by passing an order appoint a resolution professional as recommended or nominated by the Board. A copy of the application shall be provided by the applicant to the resolution professional within 3 (three) days from the date of appointment of the resolution professional.

5. **Replacement of a Resolution Professional:** In the event, the creditor is of the opinion that the resolution professional shall be replaced, the creditor shall apply to the NCLT for the replacement of the resolution professional. Upon receipt of the application for such replacement, the NCLT shall make the reference to the Board and within 10 (ten) days from the date of receipt of such application from the NCLT, the Board shall recommend a name to the NCLT and it shall be ensured by the Board that no disciplinary proceedings shall be pending against such resolution professional. The creditor may apply to the NCLT for the replacement of the resolution professional, where it has been decided in the meeting of the creditors to replace the resolution professional with a new resolution professional for the sole purpose of the implementation of a repayment plan. When such application for replacement is admitted by the NCLT, the NCLT directs the Board to confirm of no disciplinary action against the resolution professional and the Board shall be required to send a communication within 10 (ten) days of the direction of the NCLT either confirming or rejecting and nominating a new resolution professional. The new and replaced resolution professional is said to be appointed upon the

passing of an order in this regard by the NCLT. The old resolution professional shall be directed by the NCLT to share all the information with the replaced resolution professional and shall be directed to fully cooperate with the replaced resolution professional.

6. **Report to be submitted by the Resolution Professional:** The application shall be examined by the resolution professional within 10 (ten) days from the date of his/her appointment and the resolution professional shall submit a report to the NCLT wherein the resolution professional shall recommend approval or rejection of the application. The debtor shall be required by the resolution professional to prove the repayment of the debt claimed as unpaid by the creditor by way of furnishing evidence showcasing the electronic transfer of unpaid amount from the bank account of the debtor; evidence showcasing the encashment of the cheque and a signed acknowledgement from the creditor accepting the dues from the debtor. Further, information may be sought by the resolution professional and the person from whom such further information may be sought shall be furnished by him/her within 7 (seven) days from the date of receipt of the request made by the resolution professional. The reasons for the acceptance or rejection of the application shall be recorded by the resolution professional in the report. A copy of the report shall be given by the resolution professional to the creditor.
7. **Application - accepted / rejected:** Within 14 (fourteen) days from the date of submission of the report by the resolution professional the NCLT passes an order either accepting or rejecting the application. Upon acceptance, the NCLT shall upon the request of the resolution professional issue instructions pertaining to the negotiations and for arriving at a repayment plan. The NCLT shall provide a copy of the order along with the report of the resolution professional and the application to the creditor within 7 (seven) days from the date of passing of the order. In the event of rejection of the application by the NCLT pursuant to the report of the resolution professional, the creditor shall be entitled to file for a bankruptcy order.
8. **Moratorium upon admission:** Upon the application being admitted, a moratorium for a period of 180 (one-hundred and eighty) days shall commence with respect to the debt and shall cease to have effect upon the completion of the period of 180 (one-hundred and eighty) days beginning from the date of admission or on the date on which the NCLT passes an order with respect to the repayment plan.
9. **Claims from creditors:** The NCLT shall issue a public notice within 7 (seven) days inviting claims from the creditors. All the claims of the creditors shall be received within 21 (twenty-one) days from the date of such issue of the public notice. The notice shall mention in detail the order admitting the application, particulars of the resolution professional with whom

the claims are to be registered and the last date with respect to the submission of such claims. Such notice shall be published in English language and vernacular newspaper, in the area in which the guarantor resides. The notice shall also be affixed in the premises of the NCLT and shall be placed on the NCLT website. The creditors shall send their claims to the resolution professional along with their personal information.

10. **List of creditors:** A list of creditors shall be prepared by the resolution professional within 30 (thirty) days.
11. **Repayment Plan:** A repayment plan shall be formulated by the debtor in consultation with the resolution professional which shall contain a proposal to the creditors for restructuring of the debts or affairs. The repayment plan may authorize the resolution professional to carry on the business of the debtor and the repayment plan shall contain the justification for the preparation of such plan and the reasons as to why the same shall be considered by the creditors. The repayment plan shall contain the term of the repayment plan, its implementation schedule, sources of funds that will be used to pay the resolution costs, budget for the duration, finance required for implementation of the plan, details of the excluded assets and excluded debts of the guarantor and the terms for the discharge of the guarantor.

Contents of repayment plan. (1) The repayment plan shall provide the following - (a) the term of the repayment plan and its implementation schedule, including the amounts to be repaid and dates of repayment to creditors;

(b) the source of funds that will be used to pay resolution process costs and that such payment shall be made in priority over any creditor;

(c) a minimum budget for the duration of the repayment plan, to cover the reasonable expenses of the guarantor and members of his immediate family to the extent they are dependent on him, provided that at least ten percent of the realisable income of the guarantor shall be utilised for repayment of debts;

(d) financing required for implementation of the repayment plan;

(e) if the guarantor has any business, the manner in which it is proposed to be conducted during the course of the repayment plan, and the role of the resolution professional;

(f) the manner in which funds held for the purposes of the repayment plan, invested or otherwise dealt with, pending repayment to creditors;

(g) the functions which are to be undertaken by the resolution professional, including supervision and implementation of the repayment plan;

(h) variation of onerous terms of a contract or transaction involving the guarantor;

(i) the details of excluded assets and excluded debts of the guarantor; and

(j) terms and conditions for the discharge of the guarantor. (2) The repayment plan may provide for the following- (a) transfer or sale of all or part of the assets of the guarantor along with the mode and manner of such sale; (b) administration or disposal of any funds of the guarantor; (c) satisfaction or modification of any security interest; (d) reduction in the amount payable to creditors; (e) curing or waiving of any breach of a debt due from the guarantor;

(f) modification in the terms of repayment of any debt due from the guarantor;

(g) part of the income of the guarantor to be used for the repayment of the debt, and the manner of calculating the income of the guarantor;

(h) the manner in which funds held for the purpose of repayment to creditors, and not so repaid at the end of the repayment plan, are to be dealt with; and

(i) such other matters as may be required by the creditors.

12. **Report on the repayment plan:** Within 21 (twenty-one) days from the date of submission of claims of the creditors, the resolution professional shall submit the repayment plan to the NCLT along with a report. The report submitted by the resolution professional shall contain that the repayment plan is in compliance with the law, has a reasonable prospect of being approved and implemented and may recommend the summoning of a meeting of the creditors. The date and time of the meeting of the creditors shall be clearly specified in the report. The meeting shall be conducted on a date which shall be not less than 14 (fourteen) days and not more than 28 (twenty-eight) days from the date of submission of the report with the NCLT. The convenience of the creditors shall be considered for the purpose of fixing the date, time and venue of the meeting.

13. **Meeting of creditors:** A notice shall be issued by the resolution professional calling for the meeting of the creditors which shall be at least 14 (fourteen) days before the date of the meeting fixed. The notice shall be sent to the list of creditors, which the resolution professional prepared. The notice shall clearly mention the address of the NCLT and shall be accompanied by the copy of the repayment plan, copy of the statement of affairs of the creditors, the report of the resolution professional and proxy forms for the purpose of voting. In the meeting, the creditors may decide as to whether the repayment plan shall be approved, modified or rejected. In the event, modifications are suggested, the same shall be made by the resolution professional in the repayment plan. Creditors shall have the right to vote at every creditors meeting with regard to the repayment plan as per the voting share assigned to each creditor and the voting share shall be determined

by the resolution professional for each creditor. However, a creditor shall not have the right to vote, in the event the creditor is not a creditor in the list of creditors prepared by the resolution professional and is associated with the debtor. Pursuant to Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors of Corporate Debtors) Regulations, 2019 (“Regulations”), a meeting of the creditors shall be convened by the resolution professional by creditors having 33% of the voting share. The voting share shall be in proportion to the debt owed to the creditor. Any decision of the creditors shall require the approval of more than 50% voting share of the creditors who voted. Pursuant to Regulation 13 of the Regulations, a meeting of the creditors shall be quorate if creditors representing 33% of the voting share are present either in person, through proxy or through video conferencing, provided that the quorum has been modified by the creditors in the meeting of the creditors. The secured creditors shall be entitled to participate in the meeting of the creditors and the voting in the creditors meeting with respect to the repayment plan forfeits his right to enforce the security during the period of the repayment plan. However, in the event, the secured creditor is not willing to forfeit his security, an affidavit shall be submitted to the resolution professional by the secured creditor at a creditors meeting stating that the right to vote is being exercised by the secured creditor in lieu of the unsecured portion of the debt and the estimated value of the unsecured part of the debt. Upon submission of such affidavit, the secured and unsecured portion of the debts shall be treated as separate debts.

14. **Approval of Repayment Plan:** The repayment plan or such modification to the repayment plan shall be approved by the majority of 3/4th in value of the creditors in person or through proxy and the voting on the meeting of the creditors.
15. **Meeting of creditors report:** A report of the meeting of creditors shall be prepared by the resolution professional. The report shall include as to whether the repayment plan has been approved or rejected and if approved, the list of modifications if any made to the repayment plan, the resolutions proposed at the meeting and the decision in regard to the resolutions, list of creditors who were present and their voting records and such information which the resolution professional may deem appropriate shall be informed to the NCLT.
16. **Filing of repayment plan and order of the NCLT:** The resolution professional shall file the repayment plan with the NCLT and the NCLT may pass an order either approving or rejecting the repayment plan on the basis of the report of the meeting of the creditors prepared and submitted by the resolution professional. In the event a meeting of creditors is not summoned by the resolution professional, the NCLT may pass an

order based on the report of the resolution professional. Upon the approval of the repayment plan by the NCLT, it shall be binding on the creditors and the debtor. Upon rejection, the creditors shall be entitled to file a bankruptcy application. A copy of the order passed by the NCLT shall be provided to the Board for the purpose of recording of the entry.

17. **Completion of the repayment plan:** Upon completion of the repayment plan, the resolution professional shall within 14 (fourteen) days forward to the persons bound by the repayment plan a notice that the repayment plan has been completely implemented and the copy of a report showcasing all the receipts and payments made pursuant to the repayment plan and the extent of implementation of such plan as compared to the repayment plan approved at the creditor’s meeting. A time extension may be forsaken by the resolution professional of not more than 7 (seven) days in this regard from the NCLT.
18. **Premature end of repayment plan:** If a repayment plan is not implemented fully with regard to the persons bound by it within the time period mentioned in it, it is considered to have been come to an end prematurely. In such an event, the resolution professional shall submit a report to the NCLT stating the reasons for the premature end of the repayment plan, receipts and payments made in pursuance of the repayment plan and the creditor details whose claims are not fully satisfied. The creditors whose claims are not satisfied reserve the right to file for bankruptcy.
19. **Discharge order:** Based on the repayment plan, the resolution professional shall apply to the NCLT for a discharge order with respect to the debts as detailed out in the repayment plan and the NCLT may pass a discharge order. The repayment plan may either provide for an early discharge or discharge on the completion of implementation of the repayment plan. Such order passed by the NCLT shall be forwarded by the Board for the purpose of recording of entries. The discharge order does not discharge any person from any liability with respect to his debt.

## D. Conclusion

On the occasions when a corporate debtor takes a loan, wherein a guarantee of repayment is provided by a personal guarantor, the creditor through the aforementioned procedure laid down in this article reserves the right to seek a remedy against the personal guarantor, in the event of default of loan by the debtor. The regulations of the personal guarantor insolvency and bankruptcy has provided the creditors with a second pocket from which the payments in lieu of the debt can be recovered which have not been paid by the debtor himself.





# Concepts of “Going Concern Value” v/s “Liquidation Value” (with reference to IBC 2016)

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## Preamble

Valuation of assets is one of the core features of the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (Code). However, there are various clarifications needed in relation to provisions pertaining to valuation of assets as provided under the Code and the Regulations. One of the prominent controversies in relation to valuation of assets is the lack of clarity surrounding interpretation of the terms ‘Going Concern Value’ and ‘liquidation value’ under the Code.

The two main routes that an insolvent business can take are (a) to restructure its debts to manageable levels and continue trading as a going concern, or (b) to liquidate the business, selling off business or physical assets piecemeal, and returning the proceeds to creditors.

Valuing an insolvent business therefore involves identifying alternative scenarios for the business, and identifying the value of the business overall in each scenario. For the purpose of restructuring an insolvent entity, each party will then typically identify the value it will achieve in each scenario, and enter negotiations over the future strategy of the business.

## Introduction

The term “liquidation value” is defined under Regulation 35(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations) as ‘the estimated realizable value of assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date’. Regulation 35(2) of the CIRP Regulations prescribes the method for determining liquidation value. From a bare reading of the said definition, it emerges that liquidation value is the notional realizable value that assets of the corporate debtor would fetch, should the corporate debtor be liquidated on the insolvency commencement date (and not the value that may be actually realized under a resolution plan). However, the ambiguity arises with respect to determining “estimated realizable value” in the context of the insolvency resolution process as opposed to valuation in an out-and-out liquidation of assets. Typically, a valuation report often comprises more than one sale value for an asset based on valuation under different scenarios. For instance, a valuation report may provide for a fair market value, realizable value and distressed sale value of an asset. The multitude of jargon and terminology in valuation only adds to the already difficult task that registered valuers (appointed under the Code) and the insolvency professional discharging his/her function as an interim resolution professional (IRP)/ resolution professional (RP) face in determining character

of asset value that should be considered as liquidation value for purposes of Regulation 35 read with Regulations 36 and 38 of the CIRP Regulations. The determination of ‘liquidation value’ of assets is an extremely crucial exercise, keeping in view its practical implication on the resolution plan, claims of creditors and prospective investors.

## Objective

One of the most important pieces of information that forms part of the Information Memorandum<sup>1</sup> is liquidation value. The purpose of having to provide for a liquidation value as part of the Information Memorandum during the corporate insolvency resolution process is in turn to enable compliance with provisions of Regulation 38 of the CIRP Regulations which requires identification (and subsequently payment) of specific sources of funds for payment of dues of operational creditors and dissenting financial creditors at liquidation value in priority to recovery of dues of other financial creditors who approve the resolution plan. In the event a resolution plan is reached and approved, operational creditors and dissenting financial creditors will have to be paid at this “notional” liquidation value in Regulation 35(1) since the corporate debtor would not actually go into liquidation.

## Liquidation value of the corporate debtor and duty of RP/IRP and Registered Valuers

One of the key tasks of an IRP/RP is to appoint two registered valuers (as per Regulation 27 of the CIRP Regulations), who in turn will determine liquidation value (as per Regulation 35 of the CIRP Regulations) of the corporate debtor and submit the same to the IRP/RP. The registered valuers are required to provide an estimate of liquidation value “computed in accordance with internationally accepted valuation standards, after physical verification of the inventory, and fixed assets of the corporate debtor.

It is incumbent upon the IRP/RP to observe if there is a significant difference between the two estimates of liquidation value submitted to him/her, in which case, the IRP/RP may appoint a third registered valuer who will submit an estimate of the liquidation value computed in the same fashion as the two valuers first appointed. Thereafter, the IRP/RP will have to consider average of the two closest estimates as liquidation value.

Pursuant to this, the IRP/RP is required to note the said liquidation value of the corporate debtor as well as the liquidation value due to an operational creditor (arrived as per the waterfall mechanism under section 53 of the Code) in the Information Memorandum prepared in terms of Regulation 36 of the CIRP Regulations.

Thus, it is to be noted that the duty of determination of liquidation value is based on the registered valuer and the duty of the IRP/RP in this regard is summarized herein below:

- a) Appointment of two registered valuers (as per Regulation 27);
- b) Observing any discrepancy in the two values submitted by the registered valuers and subject thereto, appointing a third valuer to provide another estimate of the liquidation value, so that the estimate of the two closest values may be taken as the liquidation value (as per Regulation 35(2));
- c) Incorporating the said liquidation value (as provided by the registered valuers) in the Information Memorandum (as per Regulation 36).
- d) Ensuring that every resolution plan identifies sources of funds, and provides for making payment of claims of operational creditors at liquidation value in priority to financial creditors and within 30 days of its approval (Regulation 38(1)(b) of the CIRP Regulations); and
- e) Ensuring that every resolution plan identifies sources of funds to make payment of claims of the dissenting financial creditors at liquidation value in priority to recovery by other financial creditors who approve the resolution plan (Regulation 38(1)(c) of the CIRP Regulations).

### **Liquidation value as per IVS**

The International Valuation Standards define liquidation value as value arising in "... a situation where a group of assets employed together in a business are offered for sale separately, usually following a closure of the business."

As such, liquidation values for particular assets are most closely associated to the concept of market value – the value that an asset could achieve if sold. However, market values may themselves be assessed by reference to the benefits that the sold assets may bring to the new owner (the stream of profits arising from a hotel, for example), that is by the income approach, and/ or by the cost to create a similar asset (the cost to build a similar hotel, for example), that is by the cost approach. Expenses associated with liquidation (sales fee, commissions, taxes, other closing costs, administrative costs during close-out and loss of value in inventory) must also be estimated and deducted from the various asset values.

### **Liquidation value v/s Realizable value**

The term 'Liquidation value' as generally understood is the value of an asset which is arrived at when a seller is under extreme compulsion to sell. As mentioned earlier, Regulation 35 of the CIRP Regulations, which defines the term 'liquidation value' specifies that the said value is to be a notional value, which should be arrived at considering a hypothetical scenario of liquidation of the Corporate Debtor on the date of insolvency commencement. In other words, it will be an estimated value calculated by registered valuers if the Corporate Debtor were to be liquidated on the insolvency commencement date. This is similar to the

concept of "vertical comparison" under Chapter 11 of the United States Bankruptcy Code, and an accepted definition for arriving at liquidation value under English insolvency laws.

It is observed that the definition of the term 'liquidation value' uses the term "realizable value", thereby indicating that liquidation value is the notional realizable value arrived at the time of liquidation of the Corporate Debtor, in terms of provisions of the Code. In view of the aforesaid, it may be pertinent to consider the procedure to realize assets during liquidation of the Corporate Debtor, as more particularly provided under Chapter III of the Code, read with the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations). In this regard, Regulations 32, 33 and Schedule 1 of the Liquidation Process Regulations, provide that a liquidator appointed as per the Code, may sell the assets either on a stand-alone basis or sell the assets in a slump sale /a set of assets collectively /the assets in parcels. However, it is stated that the mode of sale shall ordinarily be through auction, unless,

- 1) the asset is perishable; or
- 2) likely to deteriorate in value significantly if not sold immediately; or
- 3) is fetching a better price than the reserved price of a failed auction; or
- 4) has the permission of the Adjudicating Authority, in which case the liquidator shall sell the assets by means of a private sale.

The Schedule I to the Liquidation Process Regulations, under part (1) item (4), specifies that for the purposes of auction, the reserve price would be the value of the asset determined by the registered valuers in terms of Regulation 35.

Thus, it becomes evident that identification of an asset plays a crucial role in determining liquidation value. In ordinary circumstances, the liquidation value of an asset is likely to be the notional reserve price at which such an asset would be sold in an auction. However, if the nature of the asset is perishable or such that its value may depreciate significantly if not sold immediately, then the value of such an asset may be determined on the basis of a private sale. It may be stated herein that the methodology to be adopted for determining the aforesaid values is to be as per internationally accepted valuation standards, after physical verification of assets of the Corporate Debtor.

### **Tangible and intangible assets**

Liquidated assets typically include: cash and working capital that can readily be realised for cash, such as accounts receivables and inventory; less liquid tangible assets, such as plant and equipment; identifiable intangible assets such as patents or brands; as well as business intangibles such as goodwill in the event that an part of the business being liquidated is sold as a going concern. The liquidation value of all types of asset may be more, or less, than their accounting value.

Working capital items, such as inventory and accounts receivable, are generally the easiest to liquidate. However, discounts to the typical values of such items are likely, as there may be additional costs of recovery of receivables in a business that customers no longer see as a key supplier. Moreover, outside the production context of the insolvent firm it may be harder to convert work-in-progress items into finished product. Similarly, it may be hard to sell inventory of finished goods to final customers in the possible absence of the insolvent firm's normal sales and marketing team.

In accounting terms, tangible assets such as plant and equipment are generally depreciated over their useful lives, with the notable exception of land, which is not subject to any adjustment in value. Identifiable intangible assets are classified separately and for accounting purposes amortized over the period for which they have perceived enduring value.

“Goodwill in principle measures the difference between the value of a business's net assets and its overall value. In accounting terms, goodwill is recognised only in the context of an acquisition. Generally,

in an insolvency situation, any goodwill in the insolvent company may have been severely impaired. Under the International Financial Reporting Standards (IFRS), the value of goodwill is assessed each year to ensure any impairment is recorded in the financial statements of the entity. Any impairment is usually derived from a review of the cash flows attributable to the business to which the goodwill is attached. However, in a fast-moving insolvency situation, the value of goodwill may have changed since the last valuation and the value ascribed to goodwill on a balance sheet value may be misleading.

Other assets are often not frequently revalued on company's balance sheets, and can be subject to particular accounting treatment. For example, real estate may be recorded on the balance sheet at its historic cost or on the basis of an old revaluation rather than its actual market value, which may be higher or lower than its historic cost. On the other hand, business goodwill must be stated at reduced, impaired, values in certain circumstances, but the value of goodwill on a balance sheet cannot be increased in the absence of a transaction in the associated business.

Traditionally, in liquidation the value of most intangible assets tends toward zero and the value of all tangible assets reflects the circumstance of liquidation. The concept of “Value in use” here relates to the value of the relevant asset deployed within the insolvent business. Intangible assets such as patents and brands may have generated significant value for the insolvent business but be of limited use to third parties. Goodwill, the ultimate intangible asset, is essentially a measure of residual value and the fact of insolvency typically indicates that the value of any previously-existing goodwill is highly impaired.

### **Forced vs. orderly Liquidation**

If a business is able to perform an orderly liquidation, without undue time pressure forcing it to enter into fire sale arrangements, it will typically achieve a better result

for its stakeholders than in a forced liquidation. An orderly liquidation will be a particularly appropriate response for a company that is able to pay its current debts but perceives long-term liabilities in excess of its assets and does not see going concern scenarios that are more favourable than an orderly liquidation.

If an orderly liquidation is chosen, and is expected to unfold over a significant period of time, the resulting valuation of the business may require discounting the resulting liquidation cash flows at a Weighted Average Cost of Capital (WACC), as in a Discounted Cash Flow (DCF) analysis.

Forced liquidations, by contrast, can lead to significant value destruction. The absence of time to market assets to potential buyers can lead to low realisation on asset values, and the inability to redeploy or wind down a workforce can in some countries trigger very high statutory redundancy payments.

### **Going concern in liquidation**

Under a liquidation premise, elements of going concern can still be found. While the total company may not be viable as a going concern, there may exist divisions of the business or operations that would be more valuable as a going concern than the liquidation of its individual assets. For example, a consulting business recently found itself in a liquidation scenario, unable to meet its debt payments and, due to the loss of key staff, with limited prospects of trading sufficiently profitably in the long run to justify a restructuring. Certain parts of this business were trading profitably, however, and in order to maximise the recovery of its creditors the consulting company sold those teams as going concerns to competitors.

### **Other Issues in Liquidation**

Two further issues arise in the context of liquidations. First, liquidations may involve significant professional fees that need to be factored in to the values identified. Second, if it is determined that the company is more valuable in liquidation absent special factors, sometimes considerations which have wider social, economic and political consequences can bring about government intervention to ensure the entity remains a going concern.

### **Going concern vs liquidation value**

In general, the stakeholders in a business, solvent or insolvent, can at any point decide to liquidate the business and invest the proceeds in other ventures. Stakeholders will continue to operate a business as a going concern only if the returns so generated exceed the returns that the stakeholders would expect from investing the proceeds of liquidation. Insolvent businesses differ from solvent businesses in that the need for a decision on the future of the business as a going concern or in liquidation is more or less urgent, while many solvent businesses continue for years without closely examining this question.

For example, consider a business owning and operating a hotel that is making profits of Rs. 1 crore a year and has no debts. This business is solvent. If the hotel could be sold for

Rs. 5 crores, and returns on equity capital are 15%, then the owners of the hotel will prefer to operate the hotel as a going concern generating Rs. 1 Crore a year than to sell the hotel and invest the proceeds elsewhere with the expected return of Rs. 75 lakhs a year (15% of Rs. 5 crores). However, if the hotel could be sold for Rs. 20 crores, the owners would prefer to sell (liquidate) and generate a Rs. 3 crores annual return (15% of Rs. 20 crores), than to realise the Rs. 1 crore a year profits in the hotel. In this way it may be profitable to liquidate a solvent business.

Now consider the same hotel business, with debts of Rs. 15 crores at a borrowing rate of 10%, giving rise to interest payments of Rs. 1.5 crore a year. This business is insolvent, in that it cannot meet its liabilities including interest payments as they become due from its Rs. 1 crore a year pre-interest profits. If the hotel can be sold for Rs. 5 crores, and the creditors force a liquidation, they will recover Rs. 5 crores of their loan and write off the remaining Rs. 10 crores of the Rs. 15 crores debts. If, however, the creditors accept a write-down of their debts to Rs. 9 crores, the hotel will be able to make the associated interest payments of Rs. 90 lakhs a year and continue as a going concern with after-interest profits of Rs. 10 lakhs a year, and the creditors will suffer a Rs. 6 crores write-down, smaller than the Rs. 10 crores write-down in the liquidation scenario. In this way, it may be beneficial for an insolvent business to continue as a going concern. If the hotel could be sold for Rs. 20 crores, then (as above) both the owners and the creditors would be better off liquidating the business.

The above example illustrates the importance to each group of stakeholders of identifying both the going concern and liquidation values of an insolvent business in deciding the appropriate course of action for that business.

In both the solvency and the insolvency scenarios above the business was more valuable to its stakeholders as a going concern when the value of the hotel asset was Rs. 5 crores, and more valuable liquidated when the value of the hotel asset was Rs. 20 crores. This illustrates that it is the profitability of an enterprise relative to the liquidation value of its assets, and not the current capital structure of the enterprise, that determines whether the enterprise is more valuable as a going concern or in liquidation. As such, the problem of valuing insolvent businesses relates in the first instance to identifying its going concern value in comparison to its liquidation value, both assessed before repayment of debts. This measure of value is the so-called “Enterprise Value” of a business, the value of the debt plus the equity in the business.

### Summary

As with other valuations, valuation in an insolvency scenario requires being clear on the nature and purpose of the required valuation. For what purpose is the valuation being performed? For whose use, and what in particular are they interested in? What information is being used as the basis of the valuation, and is that information stated free of bias? What cross-checks can the valuer perform to gain comfort in the results of his or her valuation? Are there important asymmetries in outcome for relevant parties

if things turn out slightly better, or slightly worse, than expected?

Turning to the impact on value maximisation in insolvency scenarios, the selection of a valuation basis (going concern or liquidation) does not directly affect value in insolvency scenarios. However, the selection of a strategy of going concern or liquidation may have a significant effect on the recovery of stakeholders in the insolvent business. Although each insolvent business is insolvent in its own unique way, in general a liquidation strategy is more likely to be safer but lead to lower recovery, while a going concern strategy will often be riskier but generate higher returns – the business could trade its way out of difficulty, or could incur further losses followed by a later liquidation.

Valuation is a quintessential part of the corporate insolvency resolution process, and a proper understanding of liquidation value is crucial to protect the interest of stakeholders and to formulate a compliant resolution plan. Any errors in determining liquidation value in the corporate insolvency resolution process can have far reaching consequences, including the effect of undermining of reversing any resolution plan that may be approved on the basis of an incorrect liquidation value. In fact, a case of allegedly incorrect determination of liquidation value under the CIRP of Hotel Gaudavan Private Limited has already resulted in a criminal complaint against officers of a private securitization company and the resolution professional. It is therefore crucial for insolvency professionals, and more importantly, for registered valuers, to have a correct understanding of the definition of liquidation value under the Code read with CIRP Regulations. While one expects the understanding of valuers and a customization of valuation methods to more accurately determine liquidation value in the corporate insolvency resolution process, any clarification on liquidation value under the CIRP Regulations and the Code by the Board or the Adjudicating Authority would be a welcome move that would help bring about consensus on this much debated issue.

### References

1. Insolvency and Bankruptcy Code, 2016
2. Corporate Insolvency Resolution Process Regulations
3. International Valuation Standards, 2017

### Disclaimer

*This article is intended for general information purposes only and is not intended to provide, and should not be used in lieu of, professional advice. The author assumes no liability for readers' use of the information herein and readers are encouraged to seek professional assistance and other references with regard to specific matters. Any conclusions or opinions are based on the individual facts and circumstances of a particular matter and therefore may not apply in other matters. All opinions expressed in these articles are those of the authors and do not necessarily reflect the views/ recommendations of the author.*



# Personal Guarantors to Corporate Debtors under IBC 2016

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The provisions relating to insolvency and bankruptcy relating to Personal Guarantors (PGs) to Corporate Debtor (CD) came into force from December, 2019. Till the end of June, 2020 a total of 7 applications filed in various NCLTs. As per IBBI quarterly newsletter for the quarter ended June, 2020, out of these 7 applications, one application was filed by PG under section 94 of the code in Amaravati bench of NCLT and remaining 6 applications filed by creditors under section 95, two in Ahmedabad NCLT two in NCLT New Delhi, one each in NCLT Bengalure and NCLT Mumbai.

## Application for initiation:

Application for initiation of insolvency proceeding against the Personal Guarantor can be filed either

1. by personal guarantor himself or through resolution professional on his behalf under section 94 in form A along with an application fee of Rs.2000/- as per the rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority (AA) for Insolvency Resolution for Personal Guarantors to Corporate Debtors) rules, 2019 or
2. by creditor himself or jointly with other creditors or through resolution professional under section 95 of the code to Adjudicating Authority in Form C along with an application fee of Rs.2000/- with details and documents as stated under section 95 sub-section 4.

On filing the application an interim moratorium commences in relation to all the debts and shall cease to have effect on the date of admission of the application. .

Withdrawal of application: The AA may permit withdrawal of the application submitted either under section 94 or 95 as the case may be (a) before it is admitted at the request by the applicant (b) after it is admitted at the request of the applicant, if ninety percent of the creditors agree to such withdrawal. An application for withdrawal to be made in Form D as per the rules.

## Appointment of Resolution Professional:

In case if the application either under section 94 or 95 filed through a Insolvency Professional on behalf of guarantor or creditor, the same IP will be appointed as Resolution Professional if his/her name is in the panel of insolvency professionals provided to the NCLT by the IBBI.

Otherwise the Adjudicating Authority i.e. NCLT will appoint a Resolution Professional from the panel of IPs provided by IBBI and in such a case, the IP shall provide a written consent in Form A under regulation 4(2) to the AA and within 3 days IP has to file form IP-1 with the IBBI.

The resolution professional appointed by the Adjudicating Authority shall be provided a copy of the application filed under section 94 or 95 by the applicant or creditor as the case may be, within 3 days of appointment as per rule 9.

To be eligible to act as resolution professional, the IP should not have acted or is not acting as interim resolution professional, resolution professional or liquidator in respect of the corporate debtor.

## Replacement of resolution professional:

In the event if the debtor or creditor is of the opinion that the resolution professional appointed under section 97 is required to be replaced they may apply to Adjudicating Authority for the replacement.

Similarly creditors may apply to the AA for the replacement of the resolution professional, where it has been decided in the meeting of the creditors to replace the resolution professional with a new resolution professional for implementation of repayment plan.

In such cases the AA shall pass an order appointing a new resolution professional from the panel of insolvency professionals provided by the Board. The AA may give direction to the resolution professional replaced to share all the information with the new resolution professional and to cooperate with the new resolution professional in such matters as may be required

## Role of Resolution Professional and reports to be submitted to AA:

The Resolution Professional has a key role to play in the Personal Guarantor to Corporate Debtor Insolvency Resolution Process. Resolution Professional to follow the provisions contained in section 78, 79, 94 to 120 of IBC 2016 besides Personal Guarantors to corporate Debtors regulations, 2019

### 1. Submission of report by resolution professional (section 99):

The resolution professional within 10 days of his appointment shall examine the application submitted under section 94 or section 95 as the case may be and to submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

The objective of the report is to reduce the time taken by the Adjudicating Authority in examination of the application. No format is prescribed under the code in view of the reason that a set format will prove to be restrictive for different scenarios that may come up in individual insolvency cases. Resolution professional in his report may furnish details

with regard to the following on the eligibility of the debtor in case if the application is submitted by the debtor under section 94.

- i) The Applicant/debtor whether has committed default in repayment of his debts or not which is the first requirement to be satisfied under section 94(1) for admission.
- ii) All the debts mentioned in the application whether are not excluded debts as required under section 94(3)
- iii) Whether the applicant /debtor is not an undischarged bankrupt, not undergoing a fresh start process, not undergoing an insolvency resolution process or bankruptcy process, which is another requirement under section 94(4)
- iv) Whether any application under Chapter III of IBC, 2016 has been admitted in respect of Applicant/Debtor during the period of twelve months preceding the date of submission of application as required under section 94 (5)
- v) Whether the application has been filed in prescribed 'Form A' along with requisite fee of Rs.2000/- thus satisfying the requirement under section 94(6)

In case if the application is submitted by a creditor under section 95 resolution professional in his report may furnish his observations on the following:

- i) The details of debts owed by the debtor whether have been furnished in the application
- ii) The details with regard to the failure of the debtor to pay the debt within a period of 14 days of the service of the notice of demand in Form B whether furnished in the application or not.
- iii) Evidence of such default or non-payment of debt whether furnished in the application or not.

Further the resolution professional may require the debtor to prove the repayment of the debt claimed as unpaid by the creditor by furnishing

- i) evidence of electronic transfer of the unpaid amount from the bank account of the debtor,
- ii) evidence of encashment of cheque issued by the debtor or
- iii) signed receipt by the creditor accepting receipt of dues.

For the purpose of examining the application, the RP may seek such further information or explanation in connection with the application as may be required from debtor or creditor or any other person. The person from whom information is sought shall furnish within 7 days of receipt of request.

If resolution professional feels that the debtor is eligible under section 80 for a fresh start process he shall submit a report recommending that the application by the debtor under section 94 may be treated as an application under section 80 by the Adjudicating Authority.

After examination of the application, the resolution professional may recommend acceptance or rejection of the

application in his report. The reasons for the acceptance or rejection of the application shall be recorded by the resolution professional in his report.

The resolution professional may in his report request the AA for issuance of instructions for the purpose of conducting negotiations between the debtor and creditors for arriving at the repayment plan.

The resolution professional shall give a copy of the report as per section 99(7) to the debtor or creditor as the case may be.

**Moratorium:** The AA shall within 14 days from the date of submitting the report by the resolution professional under section 99 pass an order under section 100 either admitting or rejecting the application referred to under section 94 or 95 as the case may be.

In case if the application is admitted a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of 180 days from the date of admission of application or on the date the AA passes an order on the repayment plan whichever is earlier. The debtor shall not transfer, alienate or encumber any of the assets or legal right during this moratorium

## **2. Paper announcement inviting claims under section 102 :**

When once the application is admitted by AA under section 100 of the IBC, 2016, the Insolvency Resolution Process against the debtor will commence.

As per section 102, the AA shall issue a public notice within 7 days of passing order inviting claims from creditors within 21 days from the date of issue of the order.

Instead of Adjudicating Authority issuing public notice by itself the it may direct the RP to cause a public notice on its behalf.

The notice shall include (i) Details of the order admitting the application (ii) particulars of the resolution professional with whom the claims are to be registered (iii) the last date for submission of claims.

The notice shall be published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides.

Two copies of the notice to be furnished to the Adjudicating Authority for affixing one, in their premises and the other for placing by the registry in their website. Creditors to submit claim with proof in Form B as per regulation 7(1) before the last date mentioned in the public notice.

## **3. Preparation of list of creditors under section 104:**

The Resolution Professional in exercise of the powers conferred under section 104 shall prepare a list of creditors within 30 days from the date of public notice on the basis of:

- a) The information disclosed in the application filed by the debtor or creditor under section 94 or 95 as the case may be
- b) Claims received in response to public notice issued u/s 102

A copy of the list of creditors to be served to the guarantor and a certified copy of the list of creditors to be filed with the Adjudicating Authority along with repayment plan.

#### **4. Assisting debtor in preparation of repayment plan:**

Repayment plan is the most important aspect of the Personal Guarantors to Corporate Debtors insolvency resolution process. The debtor shall prepare a repayment plan in consultation with the Resolution Professional, as prescribed under section 105, containing a proposal for restructuring of his debts or affairs. However, the plan is required to be approved by more than three-fourth in value of creditors and voting on the resolution in a meeting of the creditors prescribed in section 111 of the Code.

Further as per regulation 17(i) prior to approval, the creditors can suggest modifications to the repayment plan, and such modifications have to be consented to by the debtor.

The aim is that the repayment plan will be the result of negotiations between the creditors and debtor, overseen by the resolution professional, by which they will reach a mutually acceptable payment plan to repay the debts or restructure the business, as the case may be.

The repayment plan may authorise or require the RP to (a) carry on the debtor's business or trade on his behalf or in his name, or (b) realise the assets of the debtors or (c) administer or dispose of any funds of the debtor.

The repayment plan shall include –

- i) Justification for preparation of repayment plan and the reasons on the basis of which the creditors may agree upon the plan;
- ii) Provision for payment of fee to the Resolution Professional;
- iii) Such other matters as may be specified.

Other contents of repayment plan: The repayment plan should also contain the information on the various aspects as contained in the regulation 17 (1) and optional information as per regulation 17(2)

Some of the important aspects the repayment plan shall provide includes (i) the term of the repayment plan (ii) source of funds that will be used to pay resolution process costs (iii) provision of minimum budget for the sustenance of debtor and his/her family for the period of repayment plan (iv) provision for varying terms of onerous contracts or other transactions (v) terms and conditions for discharge of the guarantor and (vi) the details of the excluded assets and excluded debts of the guarantor.

#### **5. Report on repayment plan (section 106)**

The repayment plan along with Resolution Professional's report on the plan to be submitted to Adjudicating Authority

within 21 days from the date of submission of claims.

The resolution professional shall state in his report whether the repayment plan is in compliance with the provisions of any law for the time being in force. Further he should comment in his report as to whether repayment plan has a reasonable prospect of being approved and implemented. The RP may state in his report the necessity of summoning a meeting of the creditors, if required, to consider the repayment plan.

#### **6. Preparation of statement of affairs: Regulation 10**

Before calling for the meeting of creditors under section 107, the RP shall prepare a statement of affairs of the guarantor. The statement of affairs shall include the following information of the guarantor.

- i) assets and liabilities for the preceding three financial years and the current financial year;
- ii) details of the excluded assets and excluded debts;
- iii) income statement for the preceding three financial years and the current financial year;
- iv) income-tax returns filed by the guarantor, if any, for the preceding three financial years;
- v) creditor wise amount due, broken up into secured and unsecured debts for the preceding three financial years;
- vi) details of debt owed by guarantor to his associates for the preceding three financial years;
- vii) guarantees given in relation to any of his debts, and whether any of the guarantors is an associate of the guarantor; and
- viii) details of the financial statements for the business owned by the guarantor, or of the firm in which he is a partner, as the case may be, for the preceding three financial years, if applicable.

#### **7. Notice calling the meeting of creditors- section 107**

If the RP is of the opinion that the meeting of the creditors should be summoned, the date on which the meeting is to be held shall be not less than 14 days and not more than 28 days from the date of submission of the report by RP for which at least 14 days notice to the creditors as per the list prepared shall be issued by all modes. Such notice must contain the details as provided under section 107.

The notice to be accompanied by

- i) A copy of the repayment plan
- ii) A copy of the statement of affairs of the debtor
- iii) A copy of the report of the RP on the repayment plan and
- iv) Form for proxy voting

#### **8. Report on meeting of creditors on repayment plan-Section 112**

The RP to prepare a report of the meeting of the creditors on

repayment plan with all details as provided under section 112 and submit the same to the AA.

The report shall include as to (a) whether the repayment plan has been approved or rejected and if approved, the list of modifications if any made to the repayment plan, (b) the resolutions which were proposed at the meeting and the decision on such resolutions (c) list of creditors who were present or represented at the meeting and the voting records of each creditor for all meetings of the creditors and (d) such other information which the resolution professional thinks appropriate to make known to AA

### **9. Filing with Adjudicating Authority – regulation 19**

The resolution professional shall file approved repayment plan with report prepared u/s 106 and 112 as the case may be with AA within 120 days from the date of resolution process commencement. Copies of the documents filed with AA to be provided to guarantor and to creditors within 3 days from the date of such filing as per regulation 19.

The AA shall by an order approve or reject the repayment plan on the basis of the report of the meeting of creditors submitted by the resolution professional under section 112. The order may also provide directions for implementing repayment plan. The AA is of the opinion that the repayment plan requires any modification it may direct resolution professional to re-convene a meeting of the creditors for reconsidering the repayment plan. The resolution professional shall supervise the implementation of repayment plan.

### **10. Repayment plan coming to end prematurely – Sec 118**

A repayment plan shall be deemed to have come to an end prematurely if it has not been fully implemented in respect of all persons bound by it within the period as mentioned in the repayment plan.

Where a repayment plan comes to an end prematurely under this section, the resolution professional shall submit a report to the Adjudicating Authority which shall state –

- (a) the receipts and payments made in pursuance of the repayment plan;
- (b) the reasons for premature end of the repayment plan; and
- (c) the details of the creditors whose claims have not been fully satisfied.

The Adjudicating Authority shall pass an order on the basis of the report submitted the resolution professional that the repayment plan has not been completely implemented.

The debtor or the creditor, whose claims under repayment plan have not been fully satisfied, shall be entitled to apply for a bankruptcy order.

### **11. Application for discharge order.**

#### **Section 119 & regulation 21**

In case if repayment plan is completed the RP within 14 days of completion of the plan to forward to the persons who are bound by the plan and to the AA the following:

- a) A notice stating that the repayment plan has been fully implemented
- b) Copy of report by RP summarising all receipts and payments made in pursuance of the plan and extent of implementation compared to the plan approved by AA

The RP shall apply to the NCLT for a discharge order in relation to the debts mentioned in Repayment Plan. A copy of the discharge order to be forwarded to the Board for the purpose of recording entries in the register referred to in section. 196.

#### **12. Non- cooperation- regulation 22:**

In the event of non-cooperation of the guarantor at any time during the resolution process period or during the course implementation repayment plan, the resolution professional shall prepare a statement to that effect and file with the AA for appropriate direction.

The insolvency process against the Personal Guarantor helps personal guarantors to settle with the Creditors through legal process to obtain discharge and continue living free from the burden of debts.

#### **Source:**

- (1) *Reports on working group on Individual Insolvency*
- (2) *IBC Code 2016, regulations and Adjudicating authority rules*

#### **Disclaimer:**

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about specific circumstances.*

## **WIRC Mobile App**

### **Android version:**

<https://play.google.com/store/apps/details?id=wirc.microvistatech.com.wirc>

### **IOS version:**

<https://apps.apple.com/us/app/id1523413767>

***Suggestions for improvement in Mobile app is welcome.***



# IBC over SARFAESI Act for recovery of dues – From Lender’s Perspective

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## Introduction

Introduction of **INSOLVENCY AND BANKRUPTCY CODE, 2016** has done away with overlapping provisions contained in The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, (SARFAESI ACT) 2002. Let’s distinguish between both Acts.

## SARFAESI Act

The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (also known as the SARFAESI Act) is an Indian law. It allows banks and other financial institution to auction residential or commercial properties to recover loans. It regulate securitization and reconstruction of financial assets and enforcement of security interest and to provide for a central database of security interests created on property rights and for matters connected therewith or incidental thereto. The SARFAESI Act deals with Securitization, Asset reconstruction, Enforcement of security without intervention of the court. The whole procedure is to be regulated by the RBI. The SARFAESI Act allows secured creditors to take possession over collateral against which a loan had been provided upon a default in repayment. This process is undertaken with assistance of the District Magistrate, and does not require the intervention of courts or tribunals. This Act helps the Banks and Financial Institutions who are the secured creditors to enforce securities held as collaterals to loans disbursed by them, if such loans turn to be Non Performing Assets. If borrower of financial assistance makes any default in repayment of loan or any installment and his account is classified as Non performing Asset.

**Under SARFAESI Act, secured creditors which include Banks and Financial institution can refer the Non-Performing Asset (NPA) to any Asset Reconstruction Company, established with the Reserve Bank of India under section 3 for the purposes of the Asset Reconstruction or Securitization or both.**

The provisions of this Act are applicable only for NPA loans with outstanding above Rs. 1,00,000/- (Rupees One Lakh). NPA loan accounts where the amount is less than 20% of the principal and interest are not eligible to be dealt with under this Act.

NPA should be backed by Securities charged to the bank by way of hypothecation or charge or assignment.

The SARFAESI Act provides for the manner for enforcement of security interests by a secured creditor without the intervention of a court or tribunal. If any borrower fails to discharge his liability in repayment of any secured debt within 60 days from the date of notice by the secured creditor, the secured creditor is conferred with powers under the SARFAESI Act to:

- a. take possession of the secured assets of the borrower, including transfer by way of lease, assignment or sale, for

realizing the secured assets

- b. takeover of the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured assets,
- c. appoint any person to manage the secured assets possession of which is taken by the secured creditor, and
- d. require any person, who has acquired any of the secured assets from the borrower and from whom money is due to the borrower, to pay the secured creditor so much of the money as if sufficient to pay the secured debt.

## Amendment in SARFAESI Act

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 or SARFAESI Act Amendments have been made in 2016 because of “Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016”.

“Amendment Act, 2016”, provides for amendment in the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002** (“SARFAESI Act”), the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (“RDDBFI Act”), the Indian Stamp Act, 1899 and the Depositories Act, 1996

The rules pertaining to Security Enforcement, Debt Recovery Tribunal (Procedure) Rules, 1993, The Debt Recovery Appellate Tribunal (Procedure) Rules, 1994 have been amended to that effect To DRT (Procedure) Rules, 2016 and DRT Appellate Tribunal (Procedure) Rules, 2016, respectively.

The act added new definitions to SARFAESI, widened the scope of debts and secured creditors and bestowed upon RBI new powers in relation to making of policies.

The Amending Act provides that the requirement of classification of secured debt as nonperforming asset shall not apply to a borrower who raised funds through issue of debt securities but the provisions for enforcement of security interest shall apply to such borrower.

Further, in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided in section 13 with necessary modifications and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee

The earlier prerequisite for ARC to hold fund not exceeding 15% of total financial asset acquired or to be acquired by company is removed.

The earlier condition for sponsor not to be a holding company of ARC is replaced with a sponsor, fit and proper in accordance with guidelines of RBI.

Mandatory to take RBI’s approval for appointment of director/ managing director/ chief executive manager of ARC.

Exemption from stamp duty on documents given by banks to ARC for the purpose of securitisation. Also, all rights and interest regarding the unpaid portion which was held by bank earlier, will vest with ARC.

Measures to be taken for asset reconstructions are same. However, ARC will have to act according to the directions and policies formulated by RBI. RBI to also release policies for fee charged/incurred by ARC or transfer of security receipts issued to qualified buyers.

### **Enforcement of Security**

1. Proviso added to section 13(2) – buyer need not classify NPA in case he has raised funds through debt securities. Upon default, he can enforce under this section.
2. Section 13(8) – earlier dues could be paid till sale or transfer. Now it can be paid till the date of auction/publication of notice. The time period for the borrower to make the payment has been reduced considerably.
3. DM/CMM has to pass order for taking possession of the secured assets within 30 days. He is allowed to extend the period by another 30 days but he will have to record reasons for the same.

The RBI may carry out or caused to be carried out audit and inspection of an ARC from time to time.

The Central Government may, by notification, delegate its powers and functions under this Chapter, in relation to establishment, operations and regulation of the Central Registry to the Reserve Bank, subject to such terms and conditions as may be prescribed

### **Insolvency And Bankruptcy Code, 2016**

The Insolvency and Bankruptcy Code, 2016 (“Code”) offers a uniform comprehensive insolvency legislation to Corporations, Firms and Individuals (other than financial firms).

One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation.

The IBC creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

To provide easy exit with a painless mechanism in cases of insolvency of individuals as well as companies, the code has significant value for all stakeholders including various Government Regulators. Introduction of this Code has done away with overlapping provisions contained in various laws –

Sick Industrial Companies (Special Provisions) Act 1985. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and The Companies Act, 2013.

### **Applicability of the Code:-**

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

Any company incorporated under the Companies Act, 2013 or under any previous law. Any other company governed by any special act for the time being in force, except in so far as

the said provision is inconsistent with the provisions of such Special Act. Any Limited Liability Partnership under the LLP Act 2008. Any other body being incorporated under any other law for the time being in force, as specified by the Central Government in this regard Partnership firms and individuals.

Code has differentiated liquidation and Insolvency process between Corporate Debtors (which shall be dealt by the NCLT) and Individuals and firms liquidation process (which shall be of the jurisdiction of DRT), the Corporate Debtors default should be at least INR 100,000 (USD 1495) (which limit may be increased up to INR 10,000,000 (USD 149,500) by the Government).

(i) For the Corporate Debtors’ the Code proposes two independent stages:

- Insolvency Resolution Process: wherein the financial creditors assess the debtor’s business and evaluate whether the business can be subjected to revival procedure and evaluate options for its rescue and revival.
- Liquidation: if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor.

(ii) **Insolvency Resolution Process for Individuals/ Unlimited Partnerships:**

- For individuals and unlimited partnerships, the Code applies in all cases where the minimum default amount is INR 1000 (USD 15) and above (the Government may later revise the minimum amount of default to a higher threshold). The Code envisages two distinct processes in case of insolvencies: (i) automatic fresh start and (ii) insolvency resolution.
- Under the automatic fresh start process, eligible debtors (basis gross income) can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.
- The insolvency resolution process consists of preparation of a repayment plan by the debtor, for approval of creditors. If approved, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

**Exceptions:** There is an exception to the applicability of the Code that it shall not apply to corporate persons who are regulated financial service providers like- Banks; Financial Institutions; and Insurance companies.

### **Objectives of the Code**

A sound legal framework of bankruptcy law is required for achieving the following objectives:-

Improved handling of conflicts between creditors and the debtor

It can provide procedural certainty about the process of negotiation, in such a way as to reduce problems of common property and reduce information asymmetry for all economic participants.

Set a limit between malfeasance and business failure

It can also provide flexibility for parties to arrive at the most efficient solution to maximize value during negotiations.

The bankruptcy law will create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

Macroeconomic downturns losses to be allocated

An infirm insolvency regime leads to the stereotype of “rich promoters of defaulting entities” generating theories such as:

Misconduct is the reason for all the defaults made ultimately it is the promoters who should personally and financially be held responsible for defaults of the firms which are under their control.

Macroeconomic downturns losses to be allocated

Clear allocation of these losses is a result of a well-defined bankruptcy framework. Taxes, inflation, currency depreciation, expropriation, or wage or consumption suppression are the common practices of loss allocation. These could affect foreign creditors, small business owners, savers, workers, owners of financial and non-financial assets, importers, exporters.

To consolidate and amend the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms, and individuals. To fix time periods for execution of the law in a time-bound settlement of insolvency (i.e. 180 days). To maximize the value of assets of interested persons. To promote entrepreneurship. To increase the availability of credit. To balance all stakeholder’s interest (including alteration). Balance to be done in the order of priority of payment of Government dues. To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law. To establish higher levels of debt financing across a wide variety of debt instruments. To deal with cross-border insolvency. To resolve India’s bad debt problem by creating a database of defaulter list.

### **SARFAESI Act V/s Insolvency and Bankruptcy Code, 2016.**

- SARFAESI Act, 2002 provides a safety net to secured financial creditors (banks and financial institutions) by empowering them to enforce their security interests without the intervention of any court. On the other hand, under IBC, the rights and interests of all types of creditors have been taken into consideration including that of secured creditors
- Section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 clearly provides that during the insolvency resolution process as defined in the Code, the Code takes precedence over the DRT Act and SARFAESI Act.
- The Code is a welcome step in resolving issues faced in these archaic laws. Moreover, it consolidates laws relating to insolvency and repeals the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. Other than that, the Code also amends 11 laws, including the Companies Act, 2013, Recovery of Debts and Bankruptcy Act, 1993 (DRT Act), and Securitization and Reconstruction of the Financial Assets and Enforcement of the Securitization Act, 2002 (SARFAESI Act). From the amendments, it is clear that all these 11 Acts are affected by the enactment of the Code.
- Code has differentiated liquidation and Insolvency process between Corporate Debtors (which shall be dealt by the NCLT) and Individuals and firms liquidation process

(which shall be of the jurisdiction of DRT), the Corporate Debtors default should be at least INR 100,000 (USD 1495) (which limit may be increased up to INR 10,000,000 (USD 149,500) by the Government). The Code devises two separate processes for corporate insolvency matters and individual/ un-incorporated bankruptcy matter. Part II of the Code deals with corporate insolvency mechanism pertaining to companies incorporated under the Companies Act, 1956 and 2013 and limited liability partnership incorporated under the Limited Liability Partnership Act, 2008; matters in this regard will be dealt by the National Company Law Tribunal. Part III deals with the bankruptcy process for individuals and partnership firms (unincorporated entities) and is maintainable before the Debt Recovery Tribunal.

In the case, the NCLAT while referring to Supreme Court’s verdict in Innoventive case has ruled that when two proceedings are initiated, one under the Insolvency and Bankruptcy Code, 2016 (I&B Code) and the other under the SARFAESI Act, 2002, then the proceeding under the I&B code shall prevail.

### **Conclusion :**

#### ***IBC V/S. SARFAESI***

Section 14(1)(c) of IBC states that on commencement of insolvency resolution process (“IRP”), the adjudicating authority shall, by order, declare moratorium period. Upon such order, all recovery proceedings get stayed including the enforcement of security under the SARFAESI Act. It is pertinent to note that, once the insolvency resolution period ends, the entity will be either put on revival, or under liquidation. In case of revival orders, the eligibility of the lender to exercise SARFAESI powers will depend on what agreement has been made between the lenders in relation to revival of an entity. Upon a liquidation order being passed, the moratorium will be deemed to be lifted and the secured creditors may enforce their security interests under SARFAESI. The stages of filing insolvency resolution process vis-à-vis SARFAESI is enumerated below:

1. Application for insolvency resolution process filed but not admitted: There will be no stay on SARFAESI proceedings.
2. Admission of resolution application: There will be stay on SARFAESI proceedings as may be ordered by the NCLT.
3. Resolution plan ordered by Adjudicating Authority: Pursuant to Section 31(1) of the Insolvency and Bankruptcy Code, 2016, the parties are bound to act in accordance with the resolution plan and terms specified therein.
4. Commencement of liquidation proceedings: There will be no stay and security interests may be enforced in accordance with Section 52 of the Insolvency and Bankruptcy Code, 2016.

In view of the above, the provisions of SARFAESI stand diluted to the extent mentioned above. It seems that the priority has been given to revival of the Company so that the interest of all the stakeholders could be protected. The Banks and Financial Institutions will not be allowed to take any action under SARFAESI, for enforcement of security, upon admission of the application for initiating the resolution process and until the period as may be decided by the NCLT. ■



# IBC success story: Resolution plans help creditors, sick firms both

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## Synopsis:

- *The two biggest loan recoveries in the case of Bhushan Steel and Essar Steel India make up around 49.5% of the overall recovery*
- *If a resolution plan cannot be agreed upon within 330 days, the company that has defaulted on the loan goes for liquidation*

The resolution plans under the insolvency and bankruptcy code or IBC have yielded 200% of the liquidation value for creditors, highlighting the efficiency of IBC mechanism. The plans also helped to rescue the viable firms from bankruptcy, IBC Chairman M S Sahoo said.

After the Insolvency and Bankruptcy Code (IBC) became law in May 2016, the ecosystem of corporate insolvency resolution process (CIRP) was put in place by the year-end. As of December 2019, the system had been in existence for three years, looks at its performance.

## How good have been the loan recoveries?

As of 31 December, the 190 companies that had defaulted on loans yielded resolution plans with different degrees of realization. Claims worth ₹3.52 trillion in total had been filed by financial creditors, primarily banks. Of this, around ₹1.52 trillion—43.1% of the claims under consideration—has been recovered. This is much better than the rate of recovery before IBC was put in place. Take the case of 2015-16: Of the total bad loans up for recovery worth ₹2.21 trillion, only ₹22,768 crore, or 10.3% of the loans, was recovered. This evidence suggests IBC has been a huge success compared to the earlier loan recovery process.

The two biggest loan recoveries in the case of Bhushan Steel and Essar Steel India make up around 49.5% of the overall recovery. If these recoveries are left out, the total rate of recovery falls to 30.5%.

If another big recovery, Bhushan Power and Steel, is excluded, then the rate of recovery falls further to 28%, which is substantially lower than the overall rate of recovery of 43.1%. Having said that, it is much better than what used to be the case before IBC was in existence. Also, up until 2015, it used to take 4.3 years on an average to resolve an insolvency case in India. That has fallen dramatically after IBC came into effect.

## What about the cases that do not go for resolution?

If a resolution plan cannot be agreed upon within 330 days, the company that has defaulted on the loan goes for liquidation. Till now, liquidation has been initiated against 780 firms, of which 40 have been closed in the process. The recovery rate for firms that were liquidated in October-December was 10.7%. If the biggest recovery is left out, the rate is close to nil.

## How many firms are in bankruptcy courts?

The number of companies being admitted to corporate insolvency resolution proceedings at the National Company Law Tribunal (NCLT) has shot up since January-March in 2017. The number of such companies was 1,961 as of December 2019, up from 1,497 as of September. What the data indicates is that the number of companies facing insolvency resolution is piling up at NCLT faster than it can dispose of them. This is the problem Debt Recovery Tribunals used to face earlier.

## What does this mean for the IBC system?

At the current rate of disposal of cases by NCLT, it could take nearly five-six years for the most important cases to be settled. There is also a risk that the new system is getting overloaded with too many corporate defaults being brought under CIRP. One way to get around

this hurdle is by encouraging banks to sell smaller loan defaults of up to Rs.100 crore and not take them to NCLT, so as not to clog the IBC system.

The creditors can realize 45% of their claims under IBC, which takes on average 300 days compared with a recovery of 25% under the previous regime which took up to 5 years for resolution. With the enactment of IBC, tolerance for default has disappeared and now it has become an obligation to repay the loan unlike earlier when repayment was just an option.

A stakeholder may initiate CIRP (corporate insolvency resolution process) to recover its dues from the firm which failed to repay its debt for the first time. If the resolution process is initiated, the code shifts control from the debtor to creditors for resolution of insolvency cases, through the process of resolution, the ownership often shifts to third parties.

The enactment of the Insolvency and Bankruptcy Code (IBC) was a watershed moment for the Indian economy, propelling the Indian economy into a new eco-system for corporate insolvency comprising of the Insolvency Professionals, Insolvency Professional Agencies, Insolvency and Bankruptcy Board of India and National Company Law Tribunal with the aim of promoting entrepreneurship and innovation.

The objective of the IBC was to consolidate a robust framework of insolvency laws that would additionally serve as a remedial measure to the prevailing malpractices in the Indian Banking and Corporate Sector. Thus over 3 years since its enactments, it is necessary to consider the hits and misses of this momentous legislation to truly exploit the potential of the insolvency regime.

## Recovery of Stressed Assets

The IBC has successively addressed the logjams in the recovery of stressed assets and resolution timelines as per its intended objectives. Recovery through the IBC was double to amount recovered through other resolution mechanisms as per the Reserve Bank of India's report on Trend and Progress of Banking in India 2017-18, the total bad loan recoveries under the IBC in FY 2018-19 was pegged at RS.70,000 crore compared to the recovery of Rs. 35,500 crores recovered through other resolution mechanisms such as the Debt Recovery Tribunal, Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, and Lok Adalat

## Empowered Creditors

The stringent provisions of the IBC have instilled credit discipline and shifted the balance of power from the borrower to the creditor. This is reflected in a March 2019 report of the Insolvency and Bankruptcy Board of India which showed that almost Rs 2.02 lakh crore of debt pertaining to 4,452 cases were disposed of even before admission into the Process, as the borrowers made good the amounts in default to the creditors.

While acknowledging the support of Judiciary, Government, and the Regulators in facilitating the implementation of the Code. The stock market regulator SEBI has exempted acquisitions under resolution plans from making public offers under the takeover code and Reserve Bank of India has allowed external commercial borrowing for resolution applicants to repay domestic term loans. Competition commission of India has devised a special route for speedy approvals for combinations envisaged under resolution plans. ■



# Four (4) Success Stories of IBC (2016) Resolutions

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## 1. Arcel Mittal - Essar Steel (Now AMNS India)

Essar Steel was taken over by Arcelor Mittal and Nippon Steel (JV) on 16th November 2019 with a settlement price of Rs.42000 crores through IBC process. The company is a

fully integrated flat carbon steel producer out of iron ore to finished products having annual capacity of 10 million tonnes.

**Figure 1.** Essar Steel- Admitted Claims, Resolution Amount (Rs. in Crores)

Serial No.	Name of Corporate Debtor	Total Amount of Admitted Claim	Total Claims of Financial Creditors	Liquidation Value	Resolution Amount for Financial Creditors	Percentage of Haircut for Financial Creditor
1.	Essar Steel	5437 0	48175	15800	40000****	17%

Note : \*\*\*\* Actually Financial Creditors were allotted 41,131 Cr. but ultimately got Rs.40,000 Cr. because balance Rs.1131 Cr. were distributed to Operational Creditors as per final resolution plan along with ArcelMittal & Nippon Steel.

Source: Compiled by Author

## 2018-19 (April-March) VS. Part Calender Year, 2019 (April- December)

7.23 MT crude steel recording a boost of 5 per cent during the fragmented financial year 2019 (9 month) in relation to 6.92 MT in FY2018-19. The company's pellet production achieved 11.63 MT during the 9 month of 2019 which is 9.4 per cent more than 10.63 MT in 2018-19. AMNS India attained record production volumes in FY 2019 in spite of unfavourable domestic situations in the last quarter of the calendar year 2019.

**1st Quarter 2020 (January-March)** - AM/NS India achieved EBITDA of \$140 million in Q1FY20 and crude steel production of 1.7 million tonne (mt) and despatch in spite of Covid-19 epidemic. It is indeed a good performance in January and February. However, because of lockdown, AMNS India's activities were retarded in March.

**2nd Quarter 2020** - AMNS India's performances were mostly retarded by the lockdown (COVID-19) for the period of 2Q 2020 (April-June). However, whenever lockdown was not there, the plants ran with more and more capacity compared to when lockdown was in full force.

EBITDA reduced quarter to quarter 23.5% at \$107.7 million. AMNS India's 2nd Qtr crude steel output reduced by 30% at 1.2 million tonnes compared to 1.7 million tonnes in the first quarter, 2020 and as a result the company's total net loss of Rs 4,143 crore (\$559 million) during the 2nd qtr. 2020 mainly because of effect of covid-19 pandemic. Positive side is, in such gloomy scenario, the company strategically pushed more iron ore pellet export from its palletization plant in Odisha in the east where there is a seaport. In addition, it tookover Oridha Slurry Pipeline Infrastructure at a cost of \$245 Million (Rs.1869 Crores).

**3rd Quarter, 2020 (July - September)** - AMNS India has achieved a 64.4% boost in EBITDA of Rs. 1,304 crore (\$176 million) and a profit of Rs 800 crore (\$107 million) because of improved market demand along with higher capacity utilisation. Moreover, AMNS's maintenance capital expenses, interest and cash tax outgo for 2020 are likely to total be lower than \$250 million annually. It also put separately an amount over Rs 20,000 crore for proposed infrastructure in Gujrat.

Arcelor Mittal S.A. is biggest MNC specialises in steel production having per annum crude steel production of 97.31 million metric tonnes as of 2019. Being part of ArcelorMittal Group, success stories of erstwhile Essar Steel has just started.

## 2. Tata Steel-Bhushan Steel

On May 18, 2018, Tata Steel's merger plan with Bhushan Steel of Rs. 35,200 crore via IBC proceedings have elated lenders and other creditors. A 100% subsidiary of Tata Steel (Bamnival Steel ) operated in this deal to entitle Tata Steel to own 72.65 per cent in Bhushan Steel.

Prior to this, Bhushan Steel was only utilizing 64% of total capacity of 5.5 mtpa ( mainly a flat steel manufacturer and also include final output being hot rolled, cold rolled and coated steel, cold rolled full hard, galvanized coils and sheets, high tensile steel strips, colour coated tiles, precision tubes, large diameter pipes). With this merger, Tata Steel's ranking as one of the top flat steel producer will be stable. At the time of merger, the company was in the red in view of a huge interest liability and it was Plus before interest (Rs. 4,000 per tonne of production in FY 18).

**Figure 2.** Bhushan Steel Admitted Claims, Resolution Amount (Rs. in Crores)

Serial No.	Name of Corporate Debtor of Admitted Claim	Total Amount	Total Claims of Financial Creditors	Liquidation Value	Resolution Amount for Financial Creditors	Percentage of Haircut for Financial Creditor
1.	Bhushan Steel	57505	56022	14541	35,200	37.17%

Source : Compiled by Author

Immediately after takeover, Tata Steel took some innovative measures to make the factory stable, more utilization of production facilities, generate more cash flows and start prudent capital investments for continuous returns. Strategies also include emphasizing more in product mix in main automotive sector including OEMs with a focus on increasing customers.

It also for the first time produced steel for outer panel applications of automobiles in one of its factory. It also innovated value-added and high-strength steels giving rise to more options of products to clients.

After merger, during quarter ending June 2018 (Q1 FY19)

with the aid of facilities of Bhushan Steel along with boost of positive vibes in the indigenous steel market recorded a profit before interest per tonne of Rs.9,650, which was mostly above the competitors in the steel industry.

The operating profit of Bhushan Steel continued to increase under Tata Steel's leadership in the past few quarters. During December 2018, Bhushan Steel's revenue and operating profits recorded Rs.4,889 crore and Rs.1,008 crore respectively, which comprise 12% and 15% of Tata Steel's revenue and operating level surplus of Rs.41,220 crore and Rs.6,734 crore respectively. In addition, in same period, operating profit per tonne of Bhushan Steel turned to Rs.10,992.

**Table 1.** Tata Steel BSL - Comparative Quarterly Result (SEP '19 TO SEP '20)

QUARTERLY RESULTS OF TATA STEEL BSL LIMITED (in Rs. Cr.)	SEP '20	JUN '20	MAR '20	DEC '19	SEP '19
Net Sales/Income from operations	5,187.30	2,514.59	4,064.89	5,038.11	4,311.67
Other Operating Income	332.10	182.41	208.77	-----	242.96
Total Income From Operations	5,519.40	2,697.00	4,273.66	5,038.11	4,554.63
Net Profit/(Loss)	328.08	-658.23	-2.36	-504.18	-255.89

Source - <https://www.moneycontrol.com>

It is a good coincidence that at the time merger in May, 2018 the steel market cycle gradually boosted. As a result, from the above Table, in spite of massive effect of COVID-19 since March 2020, it is evident that in September 2020, the merged company generated Net Profit (Not Operating Profit). It is a positive beginning of Merged entity under the patronage of Tata Sheel.

### 3. Ultratech Cement makes Binani its subsidiary

On November 14, 2018 NCLT (under IBC) approved the Rs 79.5 billion offer of UltraTech to takeover erstwhile Binani Cement now now named as UltraTech Nathdwara Cement Limited. Based in Rajasthan, Binani Cement has a capacity of 6.25 mtpa, which consists of an integrated cement unit (capacity being 4.85 mtpa) and a split grinding unit(capacity being 1.4 mtpa). Moreover, the company has two overseas units, one in UAE (2 mtpa capacity), another in China (3 mtpa capacity).

**Figure 3.** Binani Cement Admitted Claims, Resolution Amount (Rs.in Crores)

Serial No.	Name of Corporate Debtor of Admitted Claim	Total Amount	Total Claims of Financial Creditors	Liquidation Value	Resolution Amount for Financial Creditors	Percentage of Haircut for Financial Creditor
1.	Binani Cement	7202	6469	2300	6469	ZERO

Source: Compiled by Author

Binani Cement was taken over by Ultratech Cement on November 14, 2018 and implementation was done during December,2018 and January 2019. Accordingly, the company's results for the December ending quarters,2019 to March quarters .2020 (and part of the financial year ended March 2019) are not comparable to the previous

year (to the corresponding quarter) due to merger with Binani Cement in the previous year. Added to that, quarter ending June 2020 to quarter ending September 2020 are not comparable with previous financial year owing to the massive disruption due to ongoing COVID-19.

**Table 2 - UltraTech Nathdwara Cement Ltd.-Quarterly Result (JUN '19 TO SEP '20)**

QUARTERLY RESULTS OF ULTRATECH CEMENT (in Rs. Cr.)	SEPT.20	JUN '20	MAR '20	DEC '19	SEP '19	Jun'19
Net Sales/Income from operations	10,018.58	7,373.63	10,360.31	9,981.75	9,253.82	10,177.63
Other Operating Income	--	--	--	--	--	131.16
Total Income From Operations	10,018.58	7,373.63	10,360.31	9,981.75	9,253.82	10,308.79
Net Profit/(Loss) For the Period	1, 208.67	805.57	2,906.32	643.15	639.19	1208.03

Source: <https://www.moneycontrol.com>

This merger with Binani Cement added muscles to Ultra Tech Cement's advantages of economy of scales in addition to upsurge its tight grip in the cement market which boosted captainship mainly in north India. Moreover, Binani Cement's limestone reserves resulted in minimum cost of capacity creation for UltraTech. Since erstwhile Binani Cement has more than 450 million tonnes reserves of limestone in two different locations in Sirohi, Rajasthan, it has already icing on the cake for merged Ultratech Binani Cement ( now named as UltraTech Nathdwara Cement Ltd ). In addition, in a fiercely competitive market like cement, this merger between Ultra Tech Cement and Binani Cement has already put ahead Ultratech in bargain power. The merged company has started looking for buyers to dispose of non-core properties (of erstwhile Binani Cement) in UAE and China, and when those properties will be disposed of,

the amount will be utilized to reduce the existing debts in the books. Accordingly, this merger is a success story itself.

#### 4. Electrosteel Steels Ltd. and Vedanta Ltd.

In June 2018, Vedanta took over a 90% stake in Electrosteel Steels Ltd., a main producer of steel (like Tata Steel Ltd. JSW Steel Ltd). The target company went through the IBC process as per guidelines NCLT, Kolkata. The purchase was made with a payment in advance of total of Rs. 5,320 crore, paid for a 90% share of the company. After the take over, the Company was taken out of listing from the Stock Exchange and is made a subsidiary of Vedanta Limited with a new name as Vedanta Star Limited.

The new company's production factory is situated around Bokaro, Jharkhand and has a existing capacity of 1.5mtpa and likely plan reach to 2.5 mtpa.

**Figure 4. Electrosteel Steels-Admitted Claims, Resolution Amount (Rs. in Cr.)**

Serial No.	Name of Corporate Debtor	Total Amount of Admitted Claim	Total Claims of Financial Creditors	Liquidation Value	Resolution Amount for Financial Creditors	Percentage of Haircut for Financial Creditor
1.	Electrosteel Steels Ltd.	13,958.36	13,175.14	2,899.98	5,320.00	60%

Source : Compiled by Author

In a period of ten months from the date of take over by Vedanta in June 2018, there has been qualitative changes of the commercial activities which boosted financial position. Moreover, there have been marked improvements in the way the new company is operating. For instances, there is a big diminution in the consumption coke by 3% and 7% at blast furnaces 2 & 3 in that order comparatively from last year. In addition, most effective use of the coal proportions and mix of iron ore have produced better return of the finishing mill from 95.9% in 201-18 to 96.7 per cent .

Steps on operations' brilliance by exhibiting better market shares and also, adoption of acclaimed international practices applying the vast technical experience and knowledge bank of the Group, have produced amazing results. This has been added by effective use of an internal cost reduction drive and also with an eye on optimum mix of products that yield better margin. Implementation of innovative business strategy supplemented by competent leadership has added speed of the turnaround of the new company.

With this turnaround, 2018-19 has witnessed historic peak

of production levels. The new company reached a run-rate of c.1.5mtpa in 4th Quarter of 2018-19. With unprecedented jump of production and other strategies have produced an EBITDA margin for the company, which boosted from US\$53 per tonne in 2017-18 to US\$122 per tonne in 4th Quarter 2018-19. With All these accomplishments, erstwhile Electrosteel Steel has already become a key player in Indian Steel Industry.

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# Impact of GST on Power Sector

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## Abstract

GST act is come into force i.e. 1 July 2017, Its huge restructuring of indirect taxation in India. Number of indirect taxes are subsumed in GST like as Excise Duty, Service Tax, VAT, Central Sales Tax etc. and “One Nation, One Tax, One Market” concept is applied. GST is new act for us, lots of changes has done, it's amended time to time, numbers of clarification has issued, still there are some areas which needs to be analysed on which impact of GST is less favourable, and Power sector is one of them. GST is consumptions based tax so ultimate burden of tax is to be borne by final consumer, so if cost of projects/product will increase, it will result to increase in operational cost, so finally cost of electricity will increase. Be careful that final Product- electricity is not excluded from scope of GST but it's exempt from GST. ITC Credit is blocked as per Sec 17 of CGST act, so taxes paid on inputs become cost, again States are levied Electricity Duty and Tax on sale of electricity. Looking of GST impact on power Generations, Transmission & Distributions company's projects as well as output cost through this article

## Impact of GST on Power Sector

The power sector in India is mainly governed by the Ministry of Power. There are three major pillars of power sector these are - **Generation, Transmission and Distribution.**

As far as generation is concerned it is mainly divided into three sectors these are Central Sector, State Sector, and Private Sector. Central Sector or Public Sector Undertakings (PSUs) constitute 29.78% (62826.63MW) of total installed capacity i.e, 210951.72 MW (as on 31/12/2012) in India. Major PSUs involved in the generation of electricity include NHPC Ltd., NTPC Ltd., and Nuclear Power Corporation of India (NPCIL). Besides PSUs, several state-level corporations are there which accounts for about 41.10% of overall generation, such as Jharkhand State Electricity Board (JSEB), Maharashtra State Electricity Board (MSEB), Kerala State Electricity Board (KSEB), in Gujarat (MGVCL, PGVCL, DGVCL, UGVCL four distribution Companies and one controlling body GUVNL, and one generation company GSEC), are also involved in the generation and intra-state distribution of electricity. Other than PSUs and state level corporations, private sector enterprises also play a

major role in generation, transmission and distribution, about 29.11%(61409.24MW) of total installed capacity is generated by private sector.

## Impact of GST on Power Projects

Applicability of GST to power projects-Most of projects in power sectors awarded to contractors on turnkey basis. All materials should be procured by contractors and handing over to utility after complete erection of its in useful manner. These are categories as work contract under GST - The Works Contracts has been defined in Section 2(119) of the CGST Act, 2017 as “works contract” means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.”

## Work contract is treated as supply of services under GST

As per Para 6 (a) of Schedule II to the CGST Act, 2017, works contracts as defined in section 2(119) of the CGST Act, 2017 shall be treated as a supply of services. Thus, there is a clear demarcation of a works contract as a supply of service under GST.

## ITC restricted in Work Contract

As per section 17(5) (c) of the CGST Act, 2017, input tax credit shall not be available in respect of the works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service.

## Analysis of Impact of GST on running projects

From 1 July 2017, GST has come in to force, lot of time has passed to find out post GST cost for running projects, so it's impacted on execution of projects. Work has stuck for some times its leads to delay in projects, and contractors get punished by penalty for delay executions. Finance cost also increased due to working capital requirement is increased due to Tax outflow to power companies as well as Contractors.

## Pre-GST & Post GST Cost of ongoing project

Before GST	Amount	Post GST	Amount
Material-Ford cost inclusive of taxes excluding VAT	100.00	Material-Post GST, reduction of Excise duty and taxes from FORD	88.74
Centiges /Erection cost@27% of Materials	27.00	Centiges /Erection cost@27% of Materials ford cost	27.00
Total cost before VAT	127.00	Total cost before taxes	115.74

Taxes on Materials as per Note-1	4.10	CGST +SGST @ 18% on Materials	15.97
Services Tax @15% of Services	4.05	CGST +SGST @ 18% on Centiges/Eract.	4.86
Total Tax	8.15	Total Tax	20.83
Total Cost	135.15	Total Cost	136.57
VAT Refund from State Govt -2%	1.40	Vat Refund from State –Nil	0.00
Net Cost of Projects	133.75	Net Cost of Projects	136.57
		Increased in Cost due to GST	2.11%
<b>Note-1</b>	<b>Amount</b>	<b>Note-2</b>	
Assumed that 70% Materials procured in Intra State and 30% materials inter State		i) 2% VAT refund was available in Maharashtra state for state utility	
70% Materials With in State (Intra State)@5%	3.50	ii)Above analysis is done on basis of pre-GST cost data of MSEDCL and procedure adopted for Post GST billing	
30% Materials against C Form (Inter State) @2%	0.60	iii)Other cost like Civil erection, Price Variation, Road Restoration are not considered in above cost	
Total Tax	4.10		
VAT Refund from State -2% VAT	1.40		
Net Taxes	2.70		

Source- Author's analysis on basis of MSEDCL's IPDS/DDUGJY Projects

### Exemption to Electricity transmission & Distribution

No. 12/2017- CT (R), Sl. No. 25- "Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST".

Taxability of the other services such as, -

- i. Application fee for releasing connection of electricity;
- ii. Rental Charges against metering equipment;
- iii. Testing fee for meters/ transformers, capacitors etc.;
- iv. Labour charges from customers for shifting of meters or shifting of service lines;
- v. charges for duplicate bill;

Provided by DISCOMS to consumer are taxable.

### Increased costs for power Companies

The government has exempted electrical energy as well as services of transmission and distribution of electricity by an electricity transmission and distribution utility respectively under the GST law. As a result, power producing companies (both renewable and conventional) would be required to pay GST for their inputs such as fuel and machinery, but will not be able to get these taxes refunded, given that their output i.e. electricity is exempt. Power is the most important component of infrastructure. Services of transmission or distribution of electricity being exempt under the GST law, power generation companies would continue to have indirect taxes as a significant cost factor. Such companies may ultimately pass on such burden to consumers under the "change of law" clause in power purchase agreements (PPA). Developers selling electricity in the spot market or on a non-PPA basis would have to factor in the higher cost. Under the pre-GST regime, a project owner engaged in setting up of a power plant or engaged in power transmission/ distribution could procure goods (under an inter-state sale transaction) at a concessional CST rate of 2% (against Form C) and structure some of the procurements as in-transit sales to reduce tax incidence on the project. However, there is no such concession GST law. In the absence of such exemptions/ concessions, there is a significant increase in project cost as well as operational cost of power companies.

### Impact on power generation

One of the distinctive features of the new tax regime impacting the power sector is lowering of the tax rate on coal. Coal has been placed in the 5 per cent slab, as against an effective tax rate of 11 per cent to 11.5 per cent for domestic coal pre GST regime. Another change under GST is the tax increase on BTG (Boiler, Turbine, and Generator) and balance of plant (BoP) systems, which would result in an increase in the capital cost of new plants. This equipment has been placed in the 18 per cent slab under GST, as against the pre GST 16 per cent tax rate. Further, imported equipment will be charged around 23 per cent as against the Pre GST 21.6 per cent. Overall, GST is expected to provide relief in the cost of power generation owing to a reduction in coal tax, despite higher tax rates on BTG.

### Impact on renewable energy

GST places solar and wind power equipment in the 5 per cent slab, as against zero taxation for solar and 3-4 per cent for wind in the pre-GST regime. In the solar power segment, GST is expected to increase the capital cost of projects by 4-6 per cent. For the wind power segment, GST is expected to result in a marginally negative impact due to an increase in capital cost. A higher tax rate on wind turbine generators, as against various concessional rates and tax exemptions enjoyed so far in case of imported items, is expected to increase the cost of wind projects by around 4 per cent.

**Conclusion:** Major issue is kept electricity outside the scope of GST by providing exemption will result in breaking the credit chain, leading to a cascading of taxes and an increase in the tax incidence on the end-consumer. Another important aspect for the discoms/gencos under GST is that lowering the tax rate for coal is brings down the cost of power. However, as the discoms/gencos are already in losses, it is uncertain whether the cost reductions will be passed on to the end-consumer. So Electricity needs to bring under GST scope by withdrawing exemption, and allow power companies to take benefit of ITC on its inputs without breaking chain of ITC will leads to reduction in electricity cost somehow then it will fulfil one object of GST to remove cascading effects.



# Independent Directors : ‘Gatekeepers’ anxiety and Board’s response

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## The perspective

Corporate Governance is a globally relevant theme. Jurisdictions all across the world are grappling with the ever-increasing challenges being posed in this domain. As a concept, it has been evolving for more than two decades now and has been debated, learnt, re-learned and revisited. In an environment in which fluidity and uncertainty seem to dominate the board agenda, corporate leadership will continue to be called upon to devote significant time and attention to addressing the emerging legitimate individual accountability concerns of Independent Directors termed as the corporate gatekeepers. An emerging governance challenge is the need to address the tension between the pursuit of legitimate corporate strategic goals, and the concerns of “gatekeepers” who perceive themselves at increasing personal legal risk for corporate wrongdoing.

## Independent Directors as watch dog of companies

Section 2(47) of the Companies Act, 2013 defines Independent director in conjunction with section 149(6) which provides an exhaustive list of qualifications to decide that who can be an independent director and who cannot be. Schedule IV notified by the Ministry of Corporate Affairs provides for code of conduct of Independent directors and exhaustive guidelines regarding duties, manner of appointment, meetings, etc. and requires every Independent director to abide by it.

An Independent Director (“ID”) is a director other than a managing director or a whole-time director or a nominee director, who, in the opinion of the board, is a person of integrity and possesses relevant expertise and experience, not being a promoter of such company of its affiliates, not being a relative of promoters or directors of the company or its affiliates, is an independent director. Such individual cannot have any pecuniary relationship with that company, its promoters, senior management or affiliate companies, during the past two years or the current year. Moreover, the independent director cannot be related to promoters or the senior management and should not have been an executive with the company, partner or executive director of the auditors, lawyers, consultants of the company in preceding three years. It has been witnessed that IDs are rarely chosen based on qualification and/or experience of the candidate, but mostly through close associates or nomination basis.

Such a Non-executive director plays the role of a watchdog in companies as they are responsible for handling affairs of the Company to boost up ethics of corporate governance and to ensure transparency in the Company. It can be said that the general duty of such directors is to strive for benefit of the company by utilizing its experience in corporate governance and to ensure transparency in the functioning of the company to avoid the commission of frauds and wrongdoings by the officers of the company.

The importance of having outside directors is being increasingly viewed as essential to protecting public investors, especially in

controlled companies, all over the world. Accordingly, several countries have adopted one or more of the following arrangements: (i) public company boards are expected to include some fraction of independent directors; (ii) independent directors must serve on committees that play an active role in monitoring management and controlling shareholders; The importance of the institution of independent directors has been aptly captured by the SEBI report on corporate governance chaired by Mr. Uday Kotak (2017) as: “The institution of independent directors forms the backbone of the corporate governance framework worldwide and in India. Independent directors are expected to bring objectivity into the functioning of the board and improve its effectiveness. Independent directors are required to safeguard the interests of all stakeholders, particularly minority shareholders, balance the conflicting interest of the stakeholders and bring an objective view to the evaluation of the performance of the board and management.”

## Gatekeepers are the Key to Good Governance

The term “gatekeeper” refers to those who have direct, formal governance authority, and others who perform key roles in promoting corporate responsibility. Regulators often use the term “gatekeepers” to refer to those within the organizational hierarchy who have fiduciary or professional obligations to spot and prevent potential misconduct, and respond to any problems that do occur. One of the most important roles gatekeepers must play is as a check on management’s tendency to focus on short-term profits at the expense of long-term shareholder value.

## Independent Directors : Liabilities and risk factors

Once considered a dream position, the post of Independent Director has lost its sheen, as it is not the case of the private sector but even the public sector undertakings are not finding suitable candidates to fill the positions lying vacant for some time. There are multiple reasons why the position of an Independent Director has become a less sought option in today’s era. Strict compliance requirements and failure in distinguishing their liabilities have made it tedious for Independent Directors to deliver their roles. Independent Directors are required to improve the functioning and effectiveness of the board and to safeguard the interests of all stakeholders. Every listed public company is compelled to have at least one-third of the total number of directors to maintain checks and balances and to question the decisions of the board as an independent authority in an impartial manner. The role of the independent directors has not changed but expectations have increased in recent times.

Independent Directors have limited authority in making a meaningful contribution to the firm, while facing the risk of being summoned, investigated, arrested and harassed by investigators and adjudicating authorities have prompted independent directors to resign their posts in recent years. The situation has discouraged many potentially well-qualified candidates from joining boards of companies. The number of independent directors who resigned

from board positions doubled in 2019, compared with total exits in the previous two years, as greater liability, rising number of corporate governance cases, increasing fear of fraud risk and chances of personal reputation being on stake led to the exodus.

### The Board's challenge

The challenge for the governing board is multifold. On the one hand, it is expected to exercise informed risk taking with its strategic initiatives, while continuing to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. How, then, can board members do their jobs and implement appropriate corporate strategy in the face of roadblocks raised by self-protective conduct? Indeed, some individual board members may feel the same concern regarding issues of their own personal liability, and thus may become more inclined to say "no." How do leaders make difficult and important decisions for the company when they feel pressured to prioritize concerns with their personal liability profile over concerns with the legitimate interests of the company? The primary board concern is that for certain potentially controversial initiatives, some gatekeepers may become "gun-shy;" i.e., may engage in self-protective conduct that frustrates valid board strategic initiatives and other appropriate efforts. This, despite the fiduciary or employment risks a gatekeeper may assume by acting in what may be perceived as his/her own interests, as opposed to the legitimate business interests of the company.

### The Board's Response

Recently, there have been considerable exits of independent directors (IDs) from listed companies due to apprehensions about their potential liability on account of the wrong doings of the companies. It is in this context that the Ministry of Corporate Affairs (MCA) issued a much required clarification on March 2, 2020 that prosecution proceedings will not be initiated against independent and non-executive directors (NEDs) unless there are sufficient evidences to prove that such default or violation had been committed with his knowledge or consent or he was guilty of gross and wilful negligence or fraud.

MCA has therefore clarified that another provision of the Act [Sec. 149(12)] expressly provides that an ID and NED can only be held liable in respect of such defaults which occur with his knowledge and consent attributable through board processes, and that they should not be held liable for any criminal or civil proceedings under the Act unless the said criteria is met. As per the Circular, monitoring the day to day compliances of the Company is not the responsibility of the IDs and NEDs and hence an ID or NED cannot be held liable for acts which are beyond their control like failure on the part of the Company to maintain and update statutory registers, minutes of meetings, filing of returns etc.

Boards will be continually called upon to deftly balance the need to preserve and enhance the loyalty and confidence of corporate gatekeepers; the obligation to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

While the most effective action plan depends upon the unique circumstances of an individual company, a successful board response might include elements of the following:

- An internal board-to-gatekeepers acknowledgement that this new tension exists; why it exists; why it is more the function of human nature than it is of bad faith; and of the risks that can arise from this conduct.
- Assure gatekeepers that corporate strategic plans are consistent with the board-approved risk profile for the

corporation, and that all major corporate strategy decisions have been carefully vetted by experienced legal counsel.

- Provide gatekeepers with clear legal advice on the proper implementation of approved corporate strategies.
- Enhance gatekeeper confidence in the effectiveness and rigor of existing corporate compliance and risk management programs, and of conduits through which gatekeepers and others can express—without fear of retribution—to the highest organizational authorities their concerns about individual strategic initiatives.

### Conclusion

People are getting more and more selective about joining boards of companies, while basing their decision on several qualitative factors. The concern is that these developments may cause some gatekeepers and other corporate officials to be much more self-protective in performing their corporate and fiduciary responsibilities, to the possible detriment of strategic implementation. The attentive and forward looking boards should acknowledge the potential for this conflict and take a series of pro-active steps to reduce the understandable concerns of gatekeepers. Such steps should be consistent with a top-down organizational "culture of compliance" that the board is responsible for maintaining.

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## OBITUARY



**CMA M.N. Bapat (M/2491)** Sr. Member of Institute passed away on 22nd November 2020. May the departed soul rest in peace.



# Performance analysis of boiler in process industries

CMA Dhananjay Kumar Vatsyayan

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## A. Performance Analysis

Performance analysis is technique of analyzing or comparing the performance of any specific equipment, team or situation with regards to standard / target across industries. It also helps in identifying the following useful information.

1. Factual and objective based information
2. Overview of equipment performance & team's skill in order to identify the strength and the Weaknesses.
3. Records of performance
4. Factual data to create synergy

The performance of any boiler reduces as it gets older, because of poor maintenance, operational issue like fouling in heat transfer route (Soot on outside tube, deposit inside tube) poor combustion of fuel, heat loss etc. So, the performance analysis helps us to find out, the drifting away of boiler from best operating situation. It helps to pinpoint the problematic areas needs correction.

## B. Boiler



Figure 1 – Bagasse fired water tube Boiler; Make - Walchandnagar Industries.

Boiler is a closed vessel used for transferring combustion heat into water till it become hot water or steam. The combustion heat is transferred through means of conduction (Heat transfer through physical contact), Convection (Heat transfer by conveying medium) and radiation (Heat transfer without conveying medium – example sunlight reaching to earth). The process of heating liquid and converting into gaseous state is called evaporation process.

At saturation temperature water consume huge energy, known as latent heat (Latent heat of steam is 540 K Cal / Kg), while converting to steam. When water convert to steam it expand volumetrically to 1700 times. This expansion of volume contains huge energy and it can be used as source of energy for kinetic movement or thermal heating. The kinetic movement is used for running the power generator through turbine / engine. The thermal energy is used as heating medium in process. Steam can be used for both purposes i.e. superheated heated steam for running turbine and saturated steam for process.

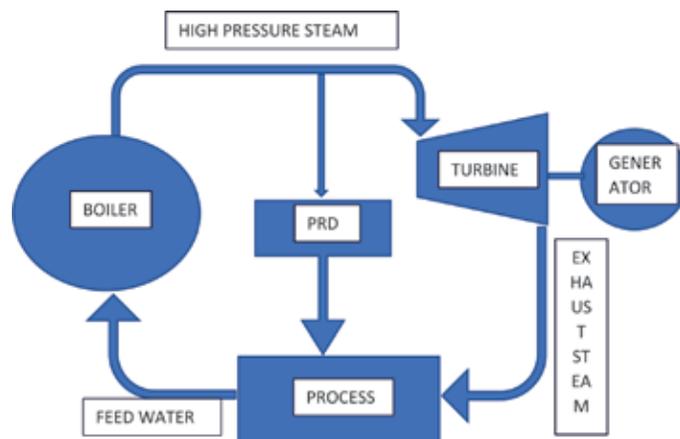


Figure 2 – Typical steam flow cycle in process industries

## C. Analyzing Boiler Performance

The performance analysis of any boiler can be done by visual observation and through data analysis available in boiler log book. Refer annexure 1 for typical boiler log book

### 1. Visual Observation Method

Just look at the color of smoke being emitted through the stack of a boiler. The color of smoke will be (i) Colorless smoke (ii) White smoke (iii) Black smoke. The smoke color reveals the performance of boiler furnace with respect to fuel air mixture in furnace or fuel burning stage.

When air in furnace is higher than air fuel ratio, some amount of air will remain unused and it will carry in flue gas. Unused air carries away energy along with it and efficiency of boiler will be low. The color of flue gas will be White in this condition and it is called good fuel burning.

When air in furnace is lower than air fuel ratio, some fuel will have partial combustion and some quantity remain unburned. The partial combustion of fuel emits carbon monoxide (Poisonous gas) and low energy. Unburned fuel and carbon monoxide carry away in flue gas. The boiler efficiency will be very low and color of smoke will be Black.

When the air in furnace is just appropriate (Oxygen 2% higher than theoretical requirement), the fuel will burn completely and emit maximum energy. The boiler performance will be excellent and colorless flue gas emits from boiler stake.

i) Colorless smoke => Excellent burning of fuel in furnace =>

**Fuel + Air = Carbon dioxide + Nitrogen + Water**

ii) White Smoke => Good Burning of Fuel in furnace

**Fuel + Air = Carbon dioxide + Oxygen + Nitrogen + Water**

iii) Black Smoke => Poor Burning of Fuel in furnace

**Fuel + Air = Carbon dioxide + Carbon monoxide + Carbon + Nitrogen + Water**

## 2. Data Analysis Method

Boiler performance can be analyzed with the help of available data (Boiler Log Book). The data obtained from log book should be rearranged as per requirement and systematically analyzed by calculating Boiler evaporation ratio, Boiler efficiency and boiler utilization.

### a. Boiler Evaporation Ratio or Steam to Fuel Ratio

It is suitable to compare the performance of boiler on day to day basis, monthly or annual basis and inter company comparisons. This ratio is independent of specification and other parameters. It is a quick analysis and does not require high skill.

Steam generated in a boiler is directly proportional to fuel used. However, it depends on impurity in used fuel.

QS is Proportional to QF

$$Q_s = K Q_f$$

$$K = Q_s / Q_f$$

QS – Quantity of steam

QF – Quantity of Fuel

K – Steam to Fuel ratio or Evaporation ratio, which is constant at specific boiler parameter and fuel being used.

Evaporation Ratio of different type of fuel is vary in narrow range and it changes based on impurity in fuel. Necessary data for calculating the Steam to fuel ration can be extracted from Boiler log book and calculated ratio should be compared with standard ratio of particular fuel. Boiler performance can be easily measured by comparing actual ratio with standard ratio.

Sr.	Type of Fuel	Std. Steam to Fuel Ratio
1	Gas Fired Boiler	11.0 to 13.0
2	Oil Fired Boiler	13.5 to 14.5
3	Coal Fired Boiler	4.0 to 5.5
4	Biomass Fired Boiler	2.0 to 3.0
5	Bagasse Fired Boiler	2.0 to 2.4

Table 1 – Standard Steam to Fuel Ratio

### b. Boiler Utilization

Efficiency of any boiler depends on boiler load, which is indicated as boiler utilization in Cost Audit Reports. The Boiler efficiency increase with increasing the boiler load and it reaches the peak at 64% to 74% level. The efficiency curve will drop beyond this load range. So, it is important to operate a boiler within load factor of 64% to 74% range. Formula used for calculating utilization factor in percent is as under.

$$= \frac{\text{Total steam generated} \times 100}{\text{Boiler Capacity} \times \text{Boiler Running Hrs.}}$$

If 8 MT boiler runs for 24 hours and generate 144 MT of steam.

$$\text{The boiler utilization} = \frac{144 \times 100}{(8 \times 24)} = 75 \%$$

Sr.	Equipment	Capacity TPH	Present Production TPH	Present Utilisation %	Running Hours Hrs	Efficiency Loss %	Bagasse Loss MT
1	Boiler Sugar 20 TPH 21 Kg/CM 2 340 D Cent.,	20.00	4.72	23.6%	964.00	15%	298.30
2	Boiler Cogen 80 TPH 87 Kg/ CM 2 ; 515 D. Cent.	80.00	81.42	101.8%	2541.25	4%	3614.24
	Total	100.00	86.15	86.1%		Loss of Rs	98,07,976

A typical calculation of Co-generation plant in sugar factory is appended below for your reference. Loss of Rs 98 Lacs is calculated because of over and underutilization of two boilers in use.

Table 2 – Typical calculation of Boiler (Sugar Plant)

### c. Boiler Efficiency or Thermal Efficiency of Boiler

Higher the boiler efficiency, steam cost per MT will be lower. Thermal Efficiency of boiler is measured through two methods (i) Direct method and (ii) indirect method.

In direct method energy gain of working media (Water, steam) is compared with energy released by fuel burnt. This method is very easy and provide result within range of +- 1%. It can be used by Management accountant without having technical skill. Necessary data can be mined from boiler log book. The formula used are

Energy Gained by Medium =

$$= \text{Steam Quantity} \times \text{Steam Enthalpy} - \text{Feed water Quantity} \times \text{Feed water Enthalpy}$$

Energy available in Fuel =

$$= \text{Fuel Quantity} \times \text{Gross Calorific Value of the fuel.}$$

$$\text{Boiler Efficiency} = \frac{\text{Energy Gained by medium}}{\text{Energy available in Fuel}}$$

Enthalpy indicates the energy content (K Cal / Kg) of steam or water. The enthalpy of steam depends on pressure and temperature of steam / water. Higher the pressure and temperature, enthalpy will be higher. You may obtain Enthalpy and gross calorific value of fuel from online (internet) or may refer data hand books like steam tables etc.

Indirect Method is most accurate method and it reveals the exact problem areas. However, it requires various equipment & technical skill to measure desired parameters and interpret the same. So, it is not recommended here for CMA to use the same because of its complicity in calculation.

### C. Conclusion

The calculation of various parameters related to boiler performance will reveals the problem and probable solution of steam related issue like.

1. Reason of high steam cost and pinpoint exact problem.
2. Time to replace the boiler and purchase new efficient boiler.
3. Optimization of steam cost.
4. Optimum operating level of boiler.

“Jay Hind”

## Annexure 1: Typical Boiler Log Book

Name of Boiler - 8 MT Bagasse Fired Boiler No 1				Date - 31 Oct. 2020				
Time	Steam Pressure (Kg/ M2)	Steam Temp. (o C)	Steam Quantity (MT/Hr)	Fuel Quantity (MT/Hr)	Feed Water Qty (MT/Hr)	Feed Water Temp. (o C)	FD Fan RMP	Flue Gas Temp.
01.00	20.0	330	7.1	3.5	7.5	100	1500	150
02.00	20.5	335	7.5	3.6	7.4	100	1500	150
03.00	21.0	335	7.3	3.7	7.3	100	1500	150
04.00	21.0	340	7.6	3.8	7.5	100	1500	150
05.00	20.5	340	7.5	3.7	7.4	100	1500	150
06.00	20.5	340	7.4	3.7	7.5	100	1500	150
07.00	21.0	335	7.5	3.6	7.6	100	1500	150

Name & Signature of Supervisor

Name & Signature of Boiler attendant



# Importance of Proper Allocation, Apportionment and Absorption of Depreciation Cost

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A fixed asset such as a plant & a machinery has a life span during which it renders service of the nature it is intended to give and on the expiry of which, the asset has neither no value or has only a small value as scrap. During the period of the life the asset, its value is thus gradually reduced till it reaches nil or a very small figure. This reduction in value is called depreciation. Depreciation is defined as the diminution in the value of a fixed asset due to use and / or lapse of time.

To arrive at reliable Product Cost, it is essential to ensure proper allocation, apportionment and absorption of All Cost Elements.

And Depreciation Cost being an important Cost Element, it is imperative to ensure it proper allocation, apportionment to Respective Cost Centres and thereafter its absorption in Final Product Cost which is exhibited in Annexure I.

This makes it necessary to define Proper Cost Centres. This also makes it necessary to have Maintenance of Fixed Asset Register to enable identification of assets with cost centres.

In Fixed Asset Register, each Asset / Plant & Machinery should be correlated with proper Cost Centre. List of Cost Centres should be provided to Person / Persons responsible to keep / maintain Fixed Asset Register to ensure mentioning of Correct Cost Centre against each Asset / Plant & Machinery. Sometimes, New Cost Centres are added due to addition to Plant & Machinery, Installation of New Plant & Machinery. This Updation should be provided to ALL Concerned.

When a Costing System is established for the 1st time :

- 1) Either in the existing company or
- 2) In New Company then

It would be a better practice to educate the all concerned including the Person Responsible to maintain Fixed Asset Register about the Structure of Cost Centres and their importance. This will help

and enable correlate each Asset and relevant correct cost Centre. It is always advisable to have Proper Costing System with Properly defined Cost Centres to have proper allocation, apportionment & absorption of Depreciation Cost. It is also advisable that, Depreciation should generally appear as a separate line item in the Cost Statements instead of being grouped under overheads. This is because of its size in the technology driven business today and its unique characteristic of being non-cash cost.

Mentioned below are some illustrative practical situations which any industry may face and their probable solutions :

- 1) It may be possible that in Manufacturing Plant, several Products are manufactured but depreciation is available not Productwise but for Manufacturing Plant as a whole. In this situation depreciation may be allocated /apportioned among products on the basis of :
  - Volume of Production of each Product
  - Process Cycle Time or Equipment Occupancy Hours of each Product
- 2) It may be possible that Some Manufacturing Plant has run at substantially low capacity during any given period which may be due to any no of reasons including poor market conditions. Here total Depreciation will be allocated to Plant & Machinery. But for Product Costing for Management Decision Making, it is advisable to consider depreciation cost equivalent to actual capacity utilised.
- 3) It may be possible that Some Manufacturing Plant has been stopped may be because Product is unable to cover its Raw Material Cost let alone either Contribution or Margin.

Under this situation depreciation will be charged in Financial Books of Accounts but in Cost Records, It will be an Expense Item for Reconciliation of Profit between Financial Accounts and Cost Accounts

## ANNEXURE I: Cost Centrewise Depreciation Cost for Company / for Plant 1

YEAR	2019-20 (Rs Lacs)	%	Allocation	Apportionment/ Absorption
<b>COST CENTRES</b>				
<b>Manufacturing Cost Centres</b>				
Manufacturing Plant-1			In Product Cost Sheet it will appear as Depreciation Cost	
Manufacturing Plant-2				
Manufacturing Plant-3				
<b>Utilities Cost Centres</b>				
Power Plant			Allocated to Respective Utilities	In Product Cost Sheet, it will appear as Cost of Respective Utilities
Boiler				
DM Water Plant				
Filtration Plant				
Cooling Water Plant				
Chilled Water Plant				
Air Compressor				
Nitrogen				
<b>Other Cost Centres</b>			Allocated	In Product Cost Sheet, it will appear as Factory Overheads
<b>TOTAL</b>				

NOTE : VIEWS EXPRESSED ARE PERSONAL VIEWS OF THE AUTHOR



## GST Corner

Compiled by CMA Vandit Trivedi

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- **Amendments in CGST Rules, 2017:** Series of notifications issued on 10.11.2020 for implementation of newly automated GST Compliance System (w.e.f. 1st January 2020.)
- **Rule 59 of CGST Rules:**
  - i) Electronic filing of monthly/quarterly GSTR -1 returns through invoice furnishing facility ('IFF')
  - ii) The registered person who has opted for quarterly filing facility, may update their monthly details up to thirteen days from the end of the subsequent months. Cumulative turnover of these two months shall not exceed Rs. 50 lacs.
  - iii) If sales details furnished in first & second months of the quarter, not required to furnish the same again while filing quarterly GSTR -1.
  - iv) Outward supplies of goods & services shall encompass the details of Interstate & Intrastate supplies along with Debit note & Credit notes thereof.
- **Rule 60 of CGST Rules:** The details submitted by the supplier in GSTR -1 will be auto-populated in GSTR -2B of the recipient. Details of Input Tax Credit (ITC) will travel from GSTR -2B to GSTR -3B.
- **Rule 61 of CGST Rules:** Prescribed due date for filing of GSTR -3B. other than Input Service Distributor, a registered person paying tax under Section 10, 51 & 51 of Central Goods & Services Tax (CGST) Act along with a registered person covered under Section 14 of Integrated Goods & Services (IGST) Act.

Period	Due date
Monthly	On or before 20th day of subsequent month
Quarterly	On or before 22th day of subsequent month from the end of quarter* On or before 22th day of subsequent month from the end of quarter**

\*(Please refer "Compliance Calendar.")

- **Rule 61A of CGST Rules:**
  - i) Inserted an option for quarterly filing of GSTR -3B under the scheme of Quarterly Return Monthly Payment (QRPM).
  - ii) A registered person shall require to opt the option from the 1st day of the second month of the preceding quarter till the last day of the first month of the quarter i.e. the time limit to opt the scheme from April – June 2021 is from 1.02.2021 till 30.04.2021.

- iii) Once the option is exercised, it will be continued until changed.
- iv) Non-compliance of the last month will restrict the exercise of opting this option.
- v) A registered person, whose aggregate turnover exceeds Rs 5 crore during the current financial year, shall opt for furnishing of return on a monthly basis, from the first month of the quarter, succeeding the quarter during which his aggregate turnover exceeds Rs 5 crore.

- **Rule 46 of CGST Rules:** Furnishing HSN code is mandatory in GSTR -1
- **Rule 60(7) of CGST Rules:** Inserted Form GSTR -2B – "Auto Drafted ITC statement" (Notification 82/2020-Central Tax dated 10.11.2020)
- **Due date for filing of GSTR-1 (w.e.f. 1st January 2020):**

Period	Due date
Monthly	On or before 11th day of subsequent month
Quarterly	On or before 13th day of subsequent month from the end of quarter

(Notification 83/2020-Central Tax dated 10.11.2020)

- Exercising the scheme of QRPM:
- Registered person having turnover up to Rs. 5 crores can opt the scheme of QRPM from January 2021 subject to the returns for the preceding periods should be filed
- Selected option shall last until revised by the taxpayer
- Option of QRPM is unavailable for the taxpayers having turnover exceeding Rs. 5 crores.
- The scheme shall be required to opt GSTIN wise.
- Default migration has been prescribed for registered persons who have furnished the return for the tax period October 2020 on or before 30th November, 2020. Such default option can be changed from 05th December 2020 to 31st January 2021.

Sr.	Class of Registered Person	Default Option
1	• Aggregate turnover < Rs 1.5 crores • Furnished FORM GSTR-1 on quarterly basis in the current financial year	Quarterly Return
2	• Aggregate turnover < Rs 1.5 crores • Furnished FORM GSTR-1 on monthly basis in the current financial year	Monthly Return
3	• Rs. 1.5 crores < Aggregate turnover > Rs 5 crores	Quarterly Return

(Notification 84/2020-Central Tax dated 10.11.2020)

### • Monthly payment options under the scheme of QRPM

Two methods are available for payment of tax in Form PMT -06. The taxpayer can opt any one for discharging output tax liability.

i) Fixed Sum method: For quarterly return, tax to be paid equal to 35% of tax paid in cash in the preceding quarter. And for monthly return, tax to be paid equal to tax paid in preceding month.

No interest to be levied in case the auto-calculated tax paid through PMT-06 is within time limit. Less payment of liability will attract the interest from due date of quarterly filing of GSTR -3B till the date of payment made.

ii) Self-Assessment method: Tax to be paid considering output liability & ITC available. Interest to be levied on late payment of liability.

- May restrict to deposit any amount, in case if sufficient balance available in electronic credit /cash ledgers as well as having “Nil” liability.

(Notification 85/2020-Central Tax dated 10.11.2020)

### • Withdraw Notification 76/2020:

Notification 76/2020 dated 15.11.2020 notifying due dates for FORM GSTR-3B for the months from October, 2020 till March, 2021 has been rescinded.

(Notification 86/2020-Central Tax dated 10.11.2020)

### • Revise due date for Job-work Compliance:

30th November 2020 is the revised due date for the Job-work compliance (filing of form ITC -04) pertaining to July to September 2020.

(Notification 87/2020-Central Tax dated 10.11.2020)

### • E-invoicing:

E-invoicing implementation, a “New Year – 2021” gift to the taxpayer having turnover more than Rs. 100 crores. (w.e.f. 1st January 2021)

(Notification 88/2020-Central Tax dated 10.11.2020)

### • Quick Response (QR) Code:

Relaxation in the penal provisions for non-compliance in case of an invoice issued without Quick Response (QR)

Code to un-registered person by a registered taxpayer having turnover of Rs. 500 crores from 1st December 2020 to 31st March 2021. However, the relaxation will be removed from 1st April 2021.

(Notification 89/2020-Central Tax dated 10.11.2020)

### • Compliance Calendar:

Nature of Compliance	Due Date/Extended Due Date
GSTR-7 (TDS Deductor) for the month of November 2020.	10 Dec. 2020
GSTR-8 (TCS Collector) for the month of October 2020.	10 Dec. 2020
GSTR-1 (for turnover of more than 1.5 cr.) for November 2020.	11 Dec. 2020
GSTR-6 (Input Service Distributor) for November 2020.	13 Dec. 2020
GSTR-3B (for turnover more than 5 Cr.) for November 2020.	20 Dec. 2020
GSTR-5 (Non-Resident Taxable Person) for November 2020.	20 Dec. 2020
GSTR-5A (OIDAR Service Provider) for November 2020.	20 Dec. 2020
GSTR-3B (for turnover up to 5 Crore) for November 2020 for State category I.	22 Dec. 2020
GSTR-3B (for turnover up to 5 Crore) for November 2020 for State category II.	24 Dec. 2020

**\*State Category I:** Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman, and the Nicobar Islands and Lakshadweep

**\*\*State Category II:** Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh, and Delhi.

## Forthcoming Webinars for the month of December 2020

Date	Theme	Faculty
15-12-2020	Ind As - 19, Employee benefits defined benefits - Part - 6	CMA Rammohan Bhavne
19-12-2020	Ind As - 102 Sharebased payment employee stock	CMA Rammohan Bhavne
24-12-2020	Unlock to Take-off - A Paradigm shift for CMA's	CMA Gopal Bhutada, Head, Business Finance - R&D, Tata Motors, Pune
26-12-2020	Faceless Assessment Scheme	CMA Santosh Korade, Dy. Manager (F & A), Maharashtra State Electricity Distribution Company Ltd.

## Theme for Coming Months

Month	Theme	Sub Theme
January	Role of Cost Accountant – Atma Nirbhar Bharat & Budget – 2021 Expectations under COVID 19	<ul style="list-style-type: none"><li>• Cost Competitive Production</li><li>• MSME Sector</li><li>• Service Sector</li><li>• Tax Reforms under Budget 2021</li><li>• COVID Impact on Budget 2021</li></ul>
February	Management Information System – Costing Prospective & Strategic Cost & Management System	
March	Yearend (2020-21) Activities Under COVID 19 – Do's & Don'ts (Accounting, Income Tax, Companies Act Prospective)	

Theme of January 2020 is Role of Cost Accountant – **Atma Nirbhar Bharat & Budget-2021 Expectations under COVID 19**. Articles on the theme as well as other professional matters are invited along with scanned copies of their recent passport size photograph, email id, mobile no and scanned copy of declaration stating that the articles are their own original and have not been considered for anywhere else. Please send your articles by e-mail to [wirc.admin@icmai.in](mailto:wirc.admin@icmai.in) before 25th December 2020.

***Pls. Note the final decision to consider Article/Paper is left with Chairman – Editorial Board.***



*CMA Harshad Deshpande, Chairman WIRC met Mr. Prashant Khatavkar, General Manager, Bank of Maharashtra to handover 'representation to include CMA in conducting Stock Audit'*



*CMA Amit Devdhe has won 3rd Prize in "GST n-You Contest, 2020", on Benefits of GST held by GSTN for his creative thinking and entry submitted on "Various Benefits of GST".*



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