VOLUME 3 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

ROLE OF A LAWYER IN A MERGER: ESSENTIALS OF A RESOLUTION PLAN

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ABSTRACT

The IBC (Insolvency and Bankruptcy Code) provides a framework for the resolution of insolvency and bankruptcy cases in a time-bound and efficient manner. For a dying company, IBC provides a mechanism for the revival and restructuring of a company that is facing financial difficulties. The resolution process allows the company to restructure its operations and debts in a manner that is sustainable and viable in the long term.[2] This can help the company to overcome its financial difficulties and continue its business operations.

IBC proceedings protect creditors by allowing them to initiate insolvency proceedings against a company that is unable to pay its debts. This helps to ensure that creditors are not left empty-handed and that they have a legal mechanism to recover their dues. It also provides for a time-bound resolution process, which helps to reduce the time and cost involved in resolving insolvency and bankruptcy cases. The proceedings help to preserve the value of a company's assets by ensuring that they are not wasted or dissipated during the insolvency process. It also provides for a fair and equitable distribution of assets among all stakeholders, including creditors and shareholders.[3]

In summary, the IBC can help dying companies by providing a mechanism for their revival and restructuring, protection for creditors, timely resolution, maximizing the value of assets, and fair and equitable distribution of assets among stakeholders. In this project, the author will discuss the takeover of M/s. Meenakshi Energy Ltd. by M/s. Vedanta Ltd., specifically focusing on the procedure required to be followed by Vedanta Ltd. while bidding for the CIRP. The

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[2] Mrunalini Sohani & Aditi Malkar, IBC, 2016: A REVOLUTION IN BANKRUPTCY LAWS, 2 Jus Corpus L.J. 1149 (2022).
[3] *Id.*

project also explains the role and importance of a lawyer in a merger and the importance of the due diligence process.

INTRODUCTION

A lawyer's role in an M&A is crucial and defines a lot of important factors in the same. In this project, we would discuss the responsibilities and duties of a lawyer in a takeover done under IBC. it will be an analysis of a real-life takeover of Meenakshi Energy Ltd. by Vedanta Ltd. It announced in an exchange filing that it had been chosen as the winning bidder to purchase Meenakshi Energy Ltd. under bankruptcy proceedings and would pay $1,440 crore.[4]

A 1,000 MW coal-based power station owned by Meenakshi Energy is located in Nellore, Andhra Pradesh. Phase 1 of the 300 MW plant has been finished, but the entire 700 MW has not yet undergone testing and has been given the all-clear to begin operating commercially. Vedanta, which is controlled by Anil Agarwal, intends to contract power purchase agreements with clients and run the insolvent company's power plant as an independent power producer.[5]

The entire payment will be paid in a combination of cash and subscriptions to non-convertible debentures that Meenakshi Energy will issue. The 312 crore cash portion will be paid in full upfront. The NCDs will mature over five years in five equal payments. Meenakshi Energy, founded in 1996, declared bankruptcy in 2019.[6] About 4,625 crores of the 12,944 crores in claims had been admitted as of March 31, 2022. With claims totalling over 1,900 crores, the State Bank of India was the largest lender on the list.[7]

The entirety of the Corporate Insolvency Resolution Procedure is outlined in Sections 6-32 of Chapter II of the 2016 Insolvency and Bankruptcy Act.[8] The law states that a corporate resolution process can be initiated as mentioned in the chapter II of the Act when the corporate debtor fails to pay the debt that are due and payable but are not repaid. A operational creditor, or corporate debtor could initiate the resolution procedure, as per the Act which emphasizes the importance of identifying early of financial problems for timely resolution.

In the landmark judgement of ***Swiss Ribbons Pvt. Ltd. v. Union of India***, the Court held, *"The*

[4] Vedanta to acquire Meenakshi Energy for Rs 1,440 crore through insolvency - ET energyworld, ETEnergyworld.com (2023), https://energy.economictimes.indiatimes.com/news/power/vedanta-to-acquire-meenakshi-energy-for-rs-1440-crore-through-insolvency/97124004 (last visited Mar 30, 2023).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] The Insolvency and Bankruptcy Code, 2016.

Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislation have failed, 'trial' had led to repeated errors, leading to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."[9]

In another landmark judgement, it was held that *"Resolution plan is the basic norm for the revival of a company and resolution plan under the Indian Insolvency Regime holds a special place for redirecting the Indian economy to achieve greater heights."*[10] On a similar note, ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.*** held that *"The major aim of the resolution plan shall be to maximize the business profits by returning the business to the economy."*[11]

Here, the role of the researcher is the legal advisor of a resolution applicant. So, let us understand the basic requirements of a legal advisor and the necessities for the resolution applicant.

RESOLUTION APPLICANT

The Insolvency and Bankruptcy Act, 2016 ("Code") lists several individuals who are ineligible to submit a resolution application under Section 29A.[12] This rule prohibits the acquisition or regaining of control of the Corporate Debtor by persons who, by their wrongdoing, caused the Corporate Debtor's Defaults or are otherwise undesirable. In ***Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta***, the Supreme Court provided a clear interpretation of Section 29A's scope and applicability. Also, the Supreme Court confirmed the constitutional validity of this clause.[13]

A resolution applicant's proposal for an insolvency resolution of the corporate debtor as a going concern in compliance with Part II is referred to as a resolution plan. The possible resolution applicants are invited to express their interest by the resolution professional. The Resolution

[9] Writ Petition (Civil) No. 99 of 2018 decided on 25 Jan 2019.
[10] ***Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors***. (2019) 2 SCC 1.
[11] Company Appeal (AT) (Insolvency) No. 03 of 2019.
[12] The persons not allowed as a resolution applicant are: *"Those who have defaulted on obligations, been found guilty of specific crimes, been barred from serving as directors under the Companies Act, or who have previously served as promoters or managers of a business that has gone through insolvency procedures are among those who are disqualified."*
[13] In ***Swiss Ribbons Pvt. Ltd. v. Union of India, Writ Petition (Civil) No. 99 of 2018.***

Professional draughts an information memo to be provided to potential resolution applicants to formulate a resolution plan. The Request for Resolution Plan which outlines how the entire CIRP would operate, is also written by the Resolution Professional.[14]

But the issue is the reason section 29A was added to the Code in the first in the first. Resolution applicants can be any person in accordance with the initial Law. This has a significant effect upon the Code. Promoters, guarantors, and former management members were able to bid on their assets and buy them back at a lower cost that harmed the interest that the lenders. So, it was determined that the Code should include measures which would stop certain individuals from presenting resolution plans. In the end the subsection 29A is now part of the Code which made it an important part of the law.[15]

The main goal of the Code is to help an unprofitable company. It offers ways for the recovery of corporate debt and restructuring, while offering practical options for putting the resolution of the company into action. In accordance with the Code the prospective resolution applicants are asked to submit resolution proposals to the corporation's debtor. It is the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, and the Insolvency and Bankruptcy Code (Amendment) Act, 2018 both added Section 29A to the law.[16]

WHAT IS A ROLE OF A LAWYER?

Merger execution began in the late 1990s, a time where market volatility often caused an instant judgment and buyer's regret.[17] The result was an organized, more thoughtful strategy for M&A. Nowadays, a majority of businesses have a clearly defined M&A strategy within their organizations. The M&A department is now responsible for managing legal and financial due diligence, focusing its attention on crucial aspects prior to the process of integration. Due diligence refers to various concepts that involve the conduct of an investigation on an individual or a company.[18]

Due diligence is a process of investigation and analysis that is carried out prior to the closing of

[14] Section 29 & 30, Insolvency and Bankruptcy Code, 2016.
[15] Siddhant Radhu, SHORTCOMINGS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016, 5 INT'l J.L. MGMT. & HUMAN. 195 (2022).
[16] *Id.*
[17] Vikramjit Reen, AN OVERVIEW OF THE LEGAL REGIME GOVERNING MERGERS AND ACQUISITIONS IN INDIA, 8 Student ADVOC. 142 (1996).
[18] Richard J. Reibstein, Lisa B. Petkun & Andrew J. Rudolph, HIDDEN DUE DILIGENCE RISK IN MERGERS, ACQUISITIONS, AND INVESTMENTS: INDEPENDENCE CONTRACTOR MISCLASSIFICATION OFTEN OVERLOOKED, 2013 Bus. L. TODAY 1 (2013).

acquiring, investing partnership, business or bank loan in order to evaluate the importance of due diligence. It is used to determine whether certain concerns are not being discussed with the person buying the firm.

Investors who are interested in investing can make use of internal resources or outsource the work to specialists in corporate investigation and due diligence. look into the background and management of the company you are interested in.[19] Alongside determining the risks and consequences of a potential purchase, due diligence could include information on the solvency of a company and its assets. Potential investors can also get legal advice and consult accountants who are professionals to obtain professional advice in all areas prior to purchasing.

When it comes to legal matters like mergers and acquisitions, the advocate serves as a crucial counsel to both the buyer and the seller. Each side, each party, has a separate lawyer. The lawyer representing both parties must be well-versed in the issue at hand, should be aware of all fundamental legal principles, and should be able to put those principles into practise in the organisations for which he works.[20] His role in an M&A includes:

1. Regulatory Requirements
2. Due diligence
3. Documentation
4. Advising on closing
5. Wide ability
6. Negotiation

Due diligence makes sure no two transactions are handled the same way each transaction has its own value drivers and a different team to handle the transaction. Due diligence is not a separate document but is seen in preparing the document for takeover. As understood above, it is the cross-checking of all necessary data and then entering into any deal. In this project, the main aim for Vedanta Limited is to make a resolution plan and Power purchase agreement for a successful takeover.[21] In this next part of the project, the requirements of both of these documents are discussed.

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[19] Yunling Wu, LAWYER'S VALUE IN MERGERS AND ACQUISITIONS UNDER THE NEW WORLD OF MULTIDISCIPLINARY PRACTICES , 2002, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1055&context=stu_llm

[20] *Id.*

[21] Savović, Slađana. (2013). DUE DILIGENCE AS A KEY SUCCESS FACTOR OF MERGERS AND ACQUISITIONS. Actual Problems of Economics. 6. 424-434.

POWER PURCHASE AGREEMENT

The term "Power Purchase Agreement" refers to a Power Purchase Agreement (PPA) is an electricity supply contract that is long-term with two different parties typically between the power producer and a buyer who could be a buyer or trader of electricity. The agreement outlines specifics such as the quantity of electricity to be delivered as well as the prices that are negotiated for the duration of the agreement accounting procedures, as well as penalties for non-compliance, among other details.[22] The Power Purchase Agreement is a bilateral contract that is susceptible to varying in every situation due to the fact that it is designed to meet the needs of the client.

Typically, electricity is provided by physical (Physical Power Purchase Agreement) or via the basis of a balance sheet (Virtual Power Purchase Agreement). The goal of this contract is to shield the customer from the price rises that result from energy which can result in a decrease of the investment cost that are associated with the planning and operation. The service provider, however, gets a steady flow of financial earnings. In India, the State and Central utility PPA contract terms run for 25 years, while private PPAs that are still in the beginning will last 5-10 years old.[23]

In India, electricity is a "concurrent" issue,[24] indicating that both the state and the federal governments are in charge of the power industry, giving them both the authority to create laws in this area. Typically, the state governments focus on particular concerns while the federal government handles the overall policy framework.

The Electricity Act of 2003 now governs the electricity industry. Agreements for the purchase and sale of power are addressed under *Section 49 of The Electricity Act, 2003*.[25] Also, the government made it necessary in the existing provision for all state electricity boards (SEBs) to unbundle into distinct generating, transmission, and distribution organisations after *Section 5 of the Electricity (Supply) Act, 1948* was repealed. As per the Electricity Act, 2003 state electricity

[22] Pankaj Kumar, Trupti Mishra, Rangan Banerjee, IMPACT OF INDIA'S POWER PURCHASE AGREEMENTS ON ELECTRICITY SECTOR DECARBONIZATION, Journal of Cleaner Production 373, 2022, https://doi.org/10.1016/j.jclepro.2022.133637.

[23] T. S. R. Praneetha, POWER PURCHASE AGREEMENT AND ITS AMBIVALENCE BETWEEN SUSTAINABILITY AND SANCTITY OF THE CONTRACT, 23 Supremo Amicus [1] (2021).

[24] INDIA CONST. art. 38, List III.

[25] As the section provides for, *"Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."*

board has to be unbundled and converted into three firms which are acknowledged by the companies act.[26] They are capable of producing, distributing, and transmitting power.

The essential requirements/clauses in a PPA are Definitions, Length of the Agreement, Fulfilment of Conditions Subsequent, Power Supply, Charges for Available Capacity and Output, Details on Billing and Payment, Force Majeure, Change of Law, and Termination of Agreement.

RESOLUTION PLAN

Resolution plans are those put up by anybody for the insolvency of the corporate debtor as a continuing concern in line with Part II, as defined by section 5(26) of the Code.[27] It could have clauses for the corporate debtor's reorganisation, such as a merger, amalgamation, or demerger. On the basis of the information note provided by the resolution professional, a resolution applicant draughts the Resolution Plan. A resolution applicant may provide the resolution professional with a resolution plan created using the information memorandum and an affidavit confirming his eligibility under section 29A.[28] A minimum of thirty days must pass before the potential resolution applicants must submit their resolution proposal (s).[29]

All compliant resolution plans are evaluated by the committee of creditors in accordance with an evaluation matrix, and all such plans are then put to a simultaneous vote. A minimum of 75% of the committee of creditors' voting shares must approve the resolution plan.[30] The resolution proposal that obtains the most votes is also regarded as being adopted. The resolution professional presents the resolution plan to the adjudicating authority once it has been authorised by the committee of creditors. The resolution plan is then given final approval by the adjudicating authority in accordance with section 31(1) of the Code.[31]

In accordance with the regulation 39C in the ***Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate People) Regulations, 2016***, the creditors'

[26] The Electricity Act, 36, 2003.
[27] Section 5(26) defines as follows: *"resolution plan, means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;"*
[28] Section 29A, Insolvency and Bankruptcy Code, 2016.
[29] The Code stipulates a 180-day limit for finishing CIRP. However, regulation 39(1) of CIRP Regulations provides that *"A resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code and these Regulations to the RP, thirty days before expiry of the maximum period permitted under section 12 for the completion of the CIRP.",* that is, up to 150 days from the CIRP commencement. This suggests that the resolution plan cannot be completed until 150 days have passed.
[30] This is however might be changed as per the Insolvency and Bankruptcy Code (Amendment) Bill, 2021 to 66%.
[31] Section 31(1)- Approval of resolution plan.

committee may suggest that the liquidator examine selling the corporate debtor as a going concern, or selling the company of the debtor as a continuing concern prior to adopting the resolution plan as per section 30 or opting to liquidate the debtor's corporate assets pursuant to section 33.[32] Assets and obligations that depending on commercial factors could be provided for sale as a continuing concern can be identified and classified in the credit committee.

The professional resolution is mandated by Section 25(2)(j) in the Code to make a request for the abolition of transactions falling under Sections 43 and 44 (preferential transactions), Section 45 (undervalued transactions), Section 50 (extortionate transactions) (exorbitant transactions) Section 66 (fraudulent transactions) (fraudulent transactions) Code. Resolution professionals must formulate an opinion regarding these transactions within 75 days, and make a decision within 115 calendar days, and then submit an adjudicating authority's request within 135 calendar days from the date of the insolvency's beginning in accordance with Regulation 35A of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.[33]

The conditions for the requirements for a Resolution Plan are outlined in Regulation 37. It describes the steps needed to maximize the value the assets of the corporate debtor during bankruptcy, which includes but is not only the following: the selling of the entire or small portion of the assets owned by the corporate debtor regardless of whether or not they are secured by a security obligation;

the transfers all or a part of the assets of the corporate debtor to a person or group of persons and the acquisition of a substantial portion of shares owned by the corporate debtor as well as the merging or consolidation that the corporation debtor several persons and the cancellation or delisting of any shares owned by that corporate lender, the fulfillment and/or modification to any security obligation; altering the corporate debtor's constitution reduction of the amount owed creditors; prolonging the date of maturity or altering the rate of interest or other terms for a debt due to the corporate debtor, offering securities from the debtor's corporate in exchange for cash or other goods or securities and exchanging interest or claims in exchange for interests or claims or any other consideration that is appropriate or modifying

[32]Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate People) Regulations, 2016.
[33] Akrati Goswami & Sarika Rai, WINDING UP OF A COMPANY UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016: A COMPARATIVE ANALYSIS, 5 Supremo Amicus 8 (2018).

the scope of services or products the corporate debtor provides or produces changing the technology that the corporate debtor uses and obtaining the required authorizations for government authorities, including the Central and State governments and other authorities.[34]

There are a number of conditions, while the mandatory content is discussed in Regulation 38, which are as the following:

1. Operating creditors have to be paid their dues prior to financial creditors, in line by a resolution program.
2. The resolution plan must include an explanation of the way it addresses the needs of all the parties, which includes that of the company's operations as well as financial creditors.
3. A resolution plan must include the details of any incidents where the resolution holder or its partners did not carry out their obligations or caused the inability of implementing a resolution plan which was approved by the authority that adjudicated.

Resolution plans must contain the following details:

1. the time span of the plan, as well as the timetable for its execution;
2. the control and management of the business operations of the corporate debtor in the period of the plan.
3. adequate measures to monitor the implementation of its plans.

The resolution plan must demonstrate that it

1. tackles the root cause of the default
2. is real and feasible;
3. includes provisions to ensure its effective implementation.
4. includes the necessary approvals required and the timeframe for the same;

The resolution applicant is qualified to execute plans for resolution.

CONCLUSION

The Insolvency and Bankruptcy Code is regarded as a landmark law. It formally began on May

[34] Reg. 37, Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016

28, 2016. The administrative framework that existed in India before to the IBC's approval was time-consuming because the full recovery process there took 4.3 years to complete, but it only took about 1.7 years in OECD countries.[35] Given the reasons indicated above, India was positioned at a terrible 130 out of 189 nations at settling bankruptcy. The present recovery rate has increased from 20 to 42% after the introduction of the IBC.[36]

Since it has modernized the outdated Indian system of detecting liquidation and indebtedness, the IBC is certainly significant and crucial in the present scenario. One could easily say that we have now a complete law that is aligned to the universal principles. It is anticipated that the Code will be utilized by focusing on implementing the law rather than swiftly implementing it since it is in its initial stage.[37] A new mechanism for rescue was established as a result of the adoption of IBC. It is important to give NCLT as well as NCLAT the necessary authority to effectively implement Resolution plans is vital. This is due to the fact that the market position of corporate debtors is significantly affected by the publicity of a violation of the resolution plan. Moreover, it can be difficult for a company which is already insolvent and in debt to collect.[38]

One way of filling this gap is to have clear and precise guidelines. There is no doubt that the advocacy role becomes vital in insolvency instances. The procedure of a lawyer is not fully completed since it happens throughout the process. They play an essential function as a background figure, and they are accountable for the smooth running of the transaction. In this instance, M/s. Vedanta Ltd. too was a successful bidder in the bankruptcy proceedings for Meenakshi Energy due to the abilities in the management of the firm as well as its lawyers. The company was able to successfully sign a PPA together with Meenakshi Energy Limited making another victory under the IBC.

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