



**INDO-JAPAN CHAMBER OF COMMERCE & INDUSTRY**

# **Mergers and Acquisitions under the Insolvency and Bankruptcy Code 2016**



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## **PREFACE**

In the recent past, the improvement in the Ease of Doing Business Rankings in India and the implementation of various structural reforms has facilitated the investment climate in India. The Insolvency and Bankruptcy Code 2016 (Code) was introduced with the objective of promoting resolution in timebound manner. The Legislative framework and the operation of the Code so far has provided for a renewed mode of acquisition with many benefits to the acquirer.

This Resource Paper on Mergers and Acquisitions under the Insolvency and Bankruptcy Code 2016 is intended to be an introduction to the framework of acquisition under the Code. The authors are :

1. Mr. K K Balu is a Corporate Lawyer and Senior Advisor at A.K Mysamy & Associates LLP, Attorneys-At-Law. He has over 50 years of Legal, Teaching and Judicial experience. He was the Formerly Vice-Chairman [Judge] of the Company Law Board [which has now been replaced by the National Company Law Tribunal] for over 12 years. He acts as an Arbitrator, Conciliator and Mediator. He has obtained training in India and Abroad on matters relating to Banking, Housing, Micro-Finance and Tax planning. He has held senior positions in the National Housing Bank and Syndicate Bank between 1978 and 1996 and was a Legal Advisor for various Banks while practicing law.
2. Ms. Josephine Shreela G is a Bachelor of Commerce and Bachelor of Law, and is an Associate at A.K Mysamy & Associates LLP.

I am confident that our readers would find this Resource Paper highly informative and useful. IJCCI would deem it a pleasure and a great privilege to assist the Japanese business community in understanding matters relating to Acquisitions under the Code.

31<sup>st</sup> December 2018

**Suguna Ramamoorthy**  
Secretary General



## **Mergers and Acquisitions under the Insolvency and Bankruptcy Code 2016**

The Insolvency and Bankruptcy Code, 2016 (Code) was enacted with the objective of promoting resolution and not recovery. The National Company Law Appellate Tribunal (NCLAT) in the case of Poweress International Pvt Ltd held that *“it is clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors. I&B Code is an Act relating to reorganization and insolvency resolution of corporate persons.”*

As already stated in our previous Resource Paper, the Code provides for an opportunity for resolution of distressed assets. The mechanism of resolution adopted under the Code is time bound and efficient and is further facilitated by the recent Reserve Bank of India (RBI) Notification dated 12.02.2018 which has provided that the route under the Code as the mode of restructuring the stressed assets. The RBI vide the notification mentioned above, has withdrawn the existent debt restructuring schemes such as the Strategic Debt Restructuring (SDR), Scheme for sustainable structuring of stressed assets (S4 A), Corporate Debt Restructuring (CDR) etc. The RBI has also provided a specific timeline within which the resolution of stressed assets should occur, failing which action under the Code will have to be initiated.

The statistical data relating to the list of resolution plans approved till September 2018 by the National Company Law Tribunal (NCLT) are as follows:<sup>1</sup>

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<sup>1</sup>Source: IBBI Quarterly Newsletter July- September 2018 Vol 8.

Sl. No.	Name of CD	Not Going Concern/Erstwhile BIFR	Date of Comment of CIRP	Date of Approval of Resolution Plan	CIRP initiated by	Total Admitted Claims of FCs	Liquidation Value	Realisation by FCs	Realisation by FCs as % of their Claims Admitted	Realisation by FCs as % of Liquidation Value
1	Marmagoa Steel Ltd.	Yes	20-03-2017	02-07-2018	CD	120.58	34.54	31.05	25.75	89.90
2	A Power Himalayas Ltd.	No	03-11-2017	05-07-2018	FC	55.60	6.31	23.13	41.60	366.56
3	Keti Highway Developers Private Ltd.	No	17-08-2017	10-07-2018	FC	76.57	10.28	18.50	24.16	179.96
4	Zion Steel Ltd.	No	03-08-2017	10-07-2018	FC	5367.02	14.55	15.00	0.28	103.09
5	Adhunik Metaliks Ltd.	No	03-08-2017	17-07-2018	FC	5371.23	431.50	410.00	7.63	95.02
6	The Sirpur Paper Mills Ltd.	Yes	18-09-2017	19-07-2018	OC	533.38	202.76	340.00	63.74	167.69
7	Stesalit Ltd.	No	20-11-2017	20-07-2018	OC	49.73	15.06	19.28	38.77	128.02
8	Monnet Ispat & Energy Ltd.	No	18-07-2017	24-07-2018	FC	11014.91	2365.00	2892.12	26.26	122.29
9	Concord Hospitality Pvt. Ltd	No	04-08-2017	25-07-2018	FC	47.86	107.72	47.86	100.00	44.43

10	Amtek Auto Ltd.	No	24-07-2017	25-07-2018	FC	12605.00	4129.00	4334.00	34.38	104.96
11	Amit Spinning Industries Ltd.	Yes	01-08-2017	31-07-2018	FC	85.95	25.96	22.04	25.64	84.90
12	Jalan Intercontinental Hotels Pvt. Ltd.	No	29-08-2017	24-08-2018	FC	167.10	103.00	108.82	65.12	105.65
13	ArceelSpat Udyog Ltd.	Yes	30-08-2017	30-08-2018	FC	64.03	6.99	15.10	23.58	216.02
14	Malabar Hotels Pvt. Ltd.	No	16-08-2017	17-09-2018	OC	33.76	89.93	138.86	411.32	154.41
15	Orchid Pharma Ltd.	No	17-08-2017	17-09-2018	OC	3341.55	1309.49	1292.22	38.67	98.68
16	Assam Company India Ltd.	No	26-10-2017	20-09-2018	FC	1379.17	359.91	884	64.10	245.62
17	Dooteriah & Kalej Valley Tea Estate Pvt. Ltd.	Yes	12-12-2017	26-09-2018	OC	15.89	4.228	15.89	100.00	375.83
18	Rajpur Hydro Power Pvt. Ltd.	No	11-07-2017	27-09-2018	FC	75.23	31.95	9.45	12.56	29.58
		<b>Total</b>				<b>40404.56</b>	<b>9248.18</b>	<b>10617.32</b>	<b>26.28</b>	<b>114.80</b>



## Acquisitions under the Liquidation Process of Insolvency and Bankruptcy Code 2016

The Liquidation Process envisaged under the Code also provides opportunities for acquisition. The following are the circumstances under which a liquidation order is passed by the NCLT. <sup>2</sup>

SECTION	CIRCUMSTANCE	APPLICANT
Sec 33 (1) (a)	No resolution Plan is received by the NCLT before the expiry of time permitted for corporate insolvency resolution process under Section 12 and for fast track corporate insolvency resolution process under Section 56.	No Application Required
Sec 33 (1) (b)	Rejection of the Plan by the Tribunal under Section 31 for non-compliance of requirements	No Application Required
Section 33 (2)	Receipt of intimation from resolution Professional about the decision of the committee of creditors to liquidate the corporate debtor	No Application Required
Section 33 (3)	Contravention of approved Resolution Plan by the Corporate Debtor.	Any person other than the corporate debtor whose interests are prejudicially affected by such contravention.

<sup>2</sup>Ashish Makhija "Insolvency and Bankruptcy Code" (2018).

The statistical data pertaining to the list of liquidation orders passed by the NCLT till September 2018 is as below:<sup>3</sup>

Sl. No.	Name of Corporate Dealer	Not Going Concern / Erstwhile BIFR	Initiated by	Date of Commencement of CIRP	Date of Liquidation Order
1	Apex Engineering Solution & Services Pvt. Ltd.	Yes	OC	19-07-2017	19-06-2018
2	ABXL Retail Pvt. Ltd.	Yes	FC	19-09-2017	02-07-2018
3	HDO Technologies Ltd.	No	FC	28-04-2017	02-07-2018
4	Hindustan Dorr-Oliver Ltd.	No	FC	21-04-2017	02-07-2018
5	Sanjay Strips Pvt. Ltd.	No	OC	13-11-2017	02-07-2018
6	Arrow Resources Pvt. Ltd.	No	FC	07-08-2017	04-07-2018
7	Confident Solar Pvt. Ltd.	No	FC	05-01-2018	04-07-2018
8	Emmanuel Engineering Pvt. Ltd.	Yes	OC	31-08-2017	04-07-2018
9	Mayfair Capital Pvt. Ltd.	Yes	FC	27-06-2017	04-07-2018
10	Pier One Constructions Pvt. Ltd.	Yes	OC	21-11-2017	04-07-2018

<sup>3</sup>Source: IBBI July September 2018 Vol 8

11	Samtel Color Ltd.	Yes	FC	07-09-2017	04-07-2018
12	Karuturi Foods Pvt. Ltd.	Yes	OC	10-10-2017	05-07-2018
13	Aegan Batteries Ltd.	Yes	FC	18-08-2017	06-07-2018
14	Aegan Industries Pvt. Ltd.	Yes	FC	18-08-2017	06-07-2018
15	BM Jain Metallik Pvt. Ltd.	Yes	CD	18-10-2017	09-07-2018
16	Getit Grocery Pvt. Ltd.	Yes	OC	08-01-2018	09-07-2018
17	Moka Technologies Pvt. Ltd.	Yes	OC	21-07-2017	10-07-2018
18	BCC Estate Pvt. Ltd.	No	CD	06-09-2017	13-07-2018
19	Inland Facilities Management Pvt. Ltd.	Yes	OC	05-12-2017	13-07-2018
20	Associated Cylinders & Accessories Pvt. Ltd.	Yes	OC	10-01-2018	16-07-2018
21	Auromira Bio Power India Pvt. Ltd.	Yes	OC	01-09-2017	16-07-2018
22	Free Culture Apparels Pvt. Ltd.	Yes	OC	01-09-2017	16-07-2018
23	Virtual Logic Systems Pvt. Ltd.	Yes	OC	22-01-2018	17-07-2018

24	Oasis Agro Infra Ltd.	Yes	CD	22-09-2017	18-07-2018
25	Kandla Steel Pvt. Ltd.	Yes	OC	10-07-2017	19-07-2018
26	Kutch Engineering Pvt. Ltd.	Yes	OC	20-07-2017	19-07-2018
27	Sanaa Syntex Pvt. Ltd.	No	FC	22-08-2017	19-07-2018
28	Linkson International Ltd.	Yes	FC	06-10-2017	20-07-2018
29	Shree Coke Manufacturing Co. Pvt. Ltd.	Yes	FC	22-12-2017	20-07-2018
30	YMS Mobitech Pvt. Ltd.	No	OC	23-10-2017	20-07-2018
31	SECL Industries Pvt. Ltd.	Yes	CD	25-10-2017	24-07-2018
32	Western India Shipyard Ltd.	Yes	FC	12-12-2017	26-07-2018
33	Kakatiya Engineering Equipment Pvt. Ltd.	Yes	FC	23-02-2018	27-07-2018
34	VNM Components Pvt. Ltd.	Yes	FC	07-02-2018	27-07-2018
35	P&S Jewellery Ltd.	Yes	CD	29-05-2017	30-07-2018
36	Carnation Auto India Ltd.	No	FC	25-09-2017	01-08-2018

37	Parerhat Gas Industries Ltd.	No	FC	03-11-2017	02-08-2018
38	G B Engineering Enterprises Pvt. Ltd.	No	CD	25-01-2018	06-08-2018
39	Akshaya Imaging Systems Pvt. Ltd.	Yes	FC	31-05-2018	07-08-2018
40	Vasavi Housing Infrastructure Ltd.	Yes	FC	29-09-2017	07-08-2018
41	Alipurduar Enterprises Ltd.	Yes	OC	07-02-2018	08-08-2018
42	LCS City Makers Pvt. Ltd.	No	CD	20-04-2018	08-08-2018
43	Supreme Tex Mart Ltd.	No	FC	29-09-2017	08-08-2018
44	Pandit Automotive Pvt. Ltd.	Yes	FC	12-03-2018	09-08-2018
45	Prag Distillery Pvt. Ltd.	No	FC	27-06-2017	09-08-2018
46	Bluplast Industries Ltd.	No	FC	15-10-2017	10-08-2018
47	Lukup Media Pvt. Ltd.	Yes	FC	17-01-2018	10-08-2018
48	Rathna Stores Pvt. Ltd.	No	FC	03-11-2017	14-08-2018
49	Anil Tradecom Ltd.	Yes	OC	22-12-2017	17-08-2018
50	Hallmark Living Space Pvt. Ltd.	Yes	OC	26-09-2017	17-08-2018

51	Conros Steels Pvt. Ltd.	Yes	FC	19-12-2017	21-08-2018
52	Eastern Gases Ltd.	No	FC	08-11-2017	21-08-2018
53	Energ Engineering Projects Ltd.	No	CD	05-09-2017	21-08-2018
54	Brown Kraft Industries Ltd.	Yes	CD	07-08-2017	27-08-2018
55	Lanco Infratech Ltd.	Yes	FC	07-08-2017	27-08-2018
56	Bajrangbali Alloys Pvt. Ltd.	Yes	FC	15-02-2018	28-08-2018
57	Gupta Global Resources Pvt. Ltd.	Yes	FC	04-10-2017	28-08-2018
58	Global Proserv Ltd.	Yes	OC	23-02-2018	29-08-2018
59	Abhijeet MADC Nagpur Energy Pvt. Ltd.	No	FC	06-10-2017	31-08-2018
60	Ghotaringa Minerals Ltd.	Yes	FC	16-02-2018	31-08-2018
61	Techno Fab Manufacturing Ltd.	Yes	FC	16-02-2018	05-09-2018
62	JDS Apparels Pvt. Ltd.	Yes	OC	18-05-2017	12-09-2018
63	Tirupati Inks Ltd.	Yes	FC	02-11-2017	12-09-2018

64	Dream Land Realtor Pvt. Ltd.	Yes	CD	21-11-2017	13-09-2018
65	P. K. Sales Company Pvt. Ltd.	No	CD	21-11-2017	13-09-2018
66	Sandeep Axles Pvt. Ltd.	Yes	OC	17-10-2017	13-09-2018
67	Shree Ganesh Jewellery House (I) Ltd.	Yes	FC	12-02-2018	14-09-2018
68	Bookawheel Technologies Pvt. Ltd.	Yes	OC	05-03-2018	18-09-2018
69	Meka Dredging Company Pvt. Ltd.	No	OC	09-02-2018	20-09-2018
70	Moser Baer India Ltd.	Yes	FC	14-11-2017	20-09-2018
71	KKK Cotspin Pvt. Ltd.	Yes	FC	25-01-2018	25-09-2018
72	Annamalai Foods Pvt. Ltd.	Yes	OC	25-01-2018	26-09-2018
73	Concast Steel & Power Ltd.	No	OC	07-11-2017	26-09-2018
74	Inastra Technologies Pvt Ltd	Yes	OC	15-09-2017	26-09-2018
75	Nandkishore Steel Industries Pvt. Ltd.	Yes	CD	03-04-2018	26-09-2018
76	SnowblueTrexim Pvt. Ltd.	No	OC	11-12-2017	26-09-2018

## **Amendment of SEBI Regulations to Facilitate Acquisitions**

Between 31 May to 01 June, the Securities and Exchange Board of India (SEBI) amended a number of securities regulations to provide certain relaxations for listed companies undergoing the corporate insolvency resolution process (CIRP) under the Code.

These amendments were pursuant to SEBI's discussion paper of March 2018, which laid down proposals for diluting the regulatory framework to allow listed companies to comply with their obligations under securities laws.

This following discusses certain key points with respect to those amendments.

### **The Public Threshold Limit**

Acquisitions beyond 75% of a listed company are generally restricted because of the minimum public shareholding limits, which requires at least 25% of every listed company's shares to be in public (i.e. non-promoter) names.

The latest amendment to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (Takeover Code) will permit the buyer in a resolution plan under the Code to acquire more than 75% of the listed company that is undergoing Corporate Insolvency Resolution Process (CIRP). This amendment is in line with the earlier amendment in August 2017, which exempted acquisitions pursuant to the resolution plans under the Code from the compulsory open offer requirements for acquisition of public listed companies under the Takeover Code.

In a financial distress situation as in the case under the Code, where the value of listed company is weak, infusion of new investment in the form of new equity, or conversion of existing debt into equity becomes imminent. In such a scenario, one of the



most pertinent impediments for revival of the listed entity is the minimum public shareholding requirement as any new investment would necessarily mean that the existing shareholding including that of the public is diluted.

With this amendment, further consolidation beyond 75% is now permitted. In terms of acquisition this entails the resolution applicant to consolidate its shareholding in the corporate debtor. To add perspective, for instance, Tata Steel, which received only 72% in exchange for its initial investment into Bhushan Steel, could have invested the additional INR 45 billion as contemplated under its resolution plan and take its holding to 98%.

Separately, the amendment to the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (LODR Regulations) specifies, that the former promoter's shareholding will be considered as part of the public shareholding should there be a reclassification as part of the resolution plan. Outside the ambit of resolution process, such shareholding, despite reclassification, is not treated as public to prevent promoters from diluting the minimum public shareholding limit by reclassifying any part of the promoter or promoter group shareholding.

### **Exemption from Delisting**

With the latest amendments, the delisting procedure under the SEBI (Delisting of Equity Shares) Regulations 2009 (Delisting Regulations) will no longer apply to any delisting of equity shares pursuant to a resolution plan under the Code, if the following conditions are satisfied:

- a. the plan sets out a specific delisting procedure; or
- b. the plan provides an exit option to existing public shareholders at a price not less than the liquidation value, and;

- c. Further, if the promoters are exiting at a higher price, the exit price for public shareholders should not be less than the price obtained by the promoters.

However, we observe that given the financial condition of most companies undergoing the CIRP, the liquidation value for equity shareholders could be zero, in which case the exit opportunity provided to the promoters under the amendments may prove to be of no use in terms of realising the value of their shares. However, from the perspective of acquirers of public shareholding under the Code this provision allows for better negotiations with the public shareholding and promoter group given that the liquidation value could be zero.

Separately, the amendment provides that the details of the proposed delisting along with procedure and price justifications should be notified to the concerned stock exchanges. Therefore, as an acquirer it becomes pertinent that this compliance is categorically listed in the resolution plan. Further, this would lead to associated compliance costs, and mostly have to be borne by the acquirer.

### **Amendments to the LODR Regulations**

SEBI has made the following changes to the LODR Regulations. They are summarised as follows:

- Listed companies undergoing the CIRP do not have to comply with the provisions of the LODR Regulations with respect to the composition and roles and responsibilities of the board of directors and board committees. These roles and responsibilities must now be fulfilled by the resolution professional.
- Shareholder approval requirements will not apply in relation to the following matters: (i) approval of material related party

transactions; (ii) cessation of majority shareholding in, or exercise of control over, a material subsidiary; and (iii) transfer or lease of more than 20% of a material subsidiary's assets (on an aggregate basis, for a given financial year).

- The stock exchange pre-clearance requirement will not apply to any schemes of arrangement under a resolution plan approved under the Code. This will be a hugely welcome step for acquirers, as the time taken to obtain pre-clearances could have been a roadblock keeping in mind the 270-day time limit under the Code.
- Certain provisions of the LODR Regulations dealing with promoter reclassification (e.g. the restriction on promoters having post-reclassification special rights) will not apply if reclassification is contemplated under a resolution plan approved under the Code and the promoter and promoter group being reclassified as public shareholders do not remain in control of the company. The intent here may be that any involvement of the former promoters, after a resolution plan is approved, should be controlled by the provisions of section 29A of the Code. Therefore, acquirers in this regard have to be diligent to ensure that these special rights are negotiated accordingly so as to limit control of the promoter group in terms of pre-negotiated rights. In this regard, SEBI's discussion paper on control may prove to be useful.

In addition, information in relation to (b), (c) and (d) above will need to be disclosed to the stock exchanges, in each case, within a day of the approval of the resolution plan.

Those amendments were necessary to facilitate the timely resolution of financially stressed listed companies. SEBI's role in

actively pushing these amendments must also be recognised and appreciated.

Two pending proposals from SEBI's discussion paper, relating to trading restrictions and an extended timeframe (two years) for restoring the public threshold limit is also ought to be considered. With respect to the first proposal, temporary trading suspensions should certainly be considered, as these can mitigate any risk of insider trading, or market manipulation, and are already in place in other jurisdictions (e.g. the UK). An extended timeframe for restoring the public float limit is also a sensible proposal, but may be the regulator wishes to first observe the outcomes of the existing amendments.

The Code has overall made a positive impact in facilitation of acquisitions with particular reference to the M&A market. The Code has brought \$14.3 billion worth of distressed assets to the M&A table since becoming a law.<sup>4</sup>

## **Conclusion**

Opportunities for acquisitions under the Code are abundant and can be advantageous to an acquirer from several perspectives. The Code promotes acquisitions of brownfield investments in a timebound manner which can become highly beneficial for any prospective acquirer. It is for such reasons that several multinational companies from outside India have actively participated in the acquisition process under the Code. The participation of international companies in acquisitions under the Code will increase foreign direct investment into India.

By making acquisitions of brownfield companies, Acquirers get an advantage of having to carry on the business of such acquired companies without waiting through gestation periods which they

would otherwise go through in a greenfield project. Further, the scheme of the Code permits an Acquirer to structure the potential acquisition through a ‘Resolution Plan’ in any manner that they may deem fit as long as it meets the requirements of the Code. Further, a successful Resolution Plan is also approved by an order of the National Company Law Tribunal.

Every company which is admitted under the Code is put through the resolution process. Acquirers would benefit by actively scouting for companies which put into the resolution process for acquisitions. Acquisitions under the Code are timebound with a mere 30-day time limit to file a Resolution Plan thereby requiring swift action, strategic planning, tax and legal support.

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<sup>4</sup>T E Narasimhan, “IBC Accounts for \$14.3 billion worth of distressed assets in M & A space: Kroll “Business Standard (Oct 29 2018).





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