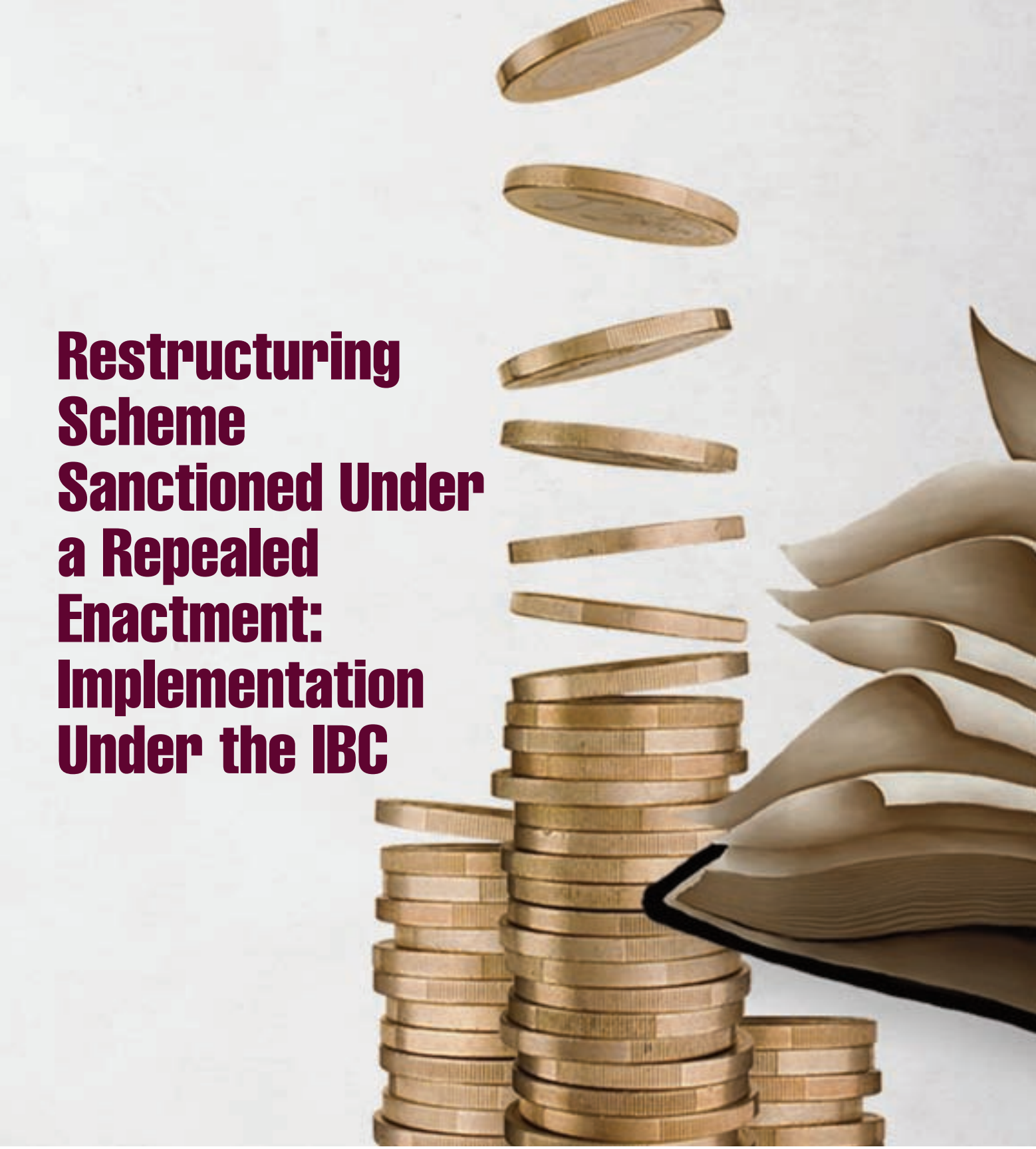
Restructuring Scheme Sanctioned Under a Repealed Enactment: Implementation Under the IBC



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The fate of schemes sanctioned by the Board of Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), particularly with regard to its implementation pursuant to coming into force of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 ('Repeal Act') has been of late being extremely reviewed by various High Courts and Tribunals constituted under Insolvency and Bankruptcy Code, 2016 (IBC).

The proceedings pending before the BIFR and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) stand abated pursuant to coming into force of Repeal Act. However, the schemes sanctioned by the BIFR are protected in terms of Section 5 of Repeal Act. The Repeal Act was enacted by the Parliament in 2004 but it came in force only on 01.12.2016 by Notification No. S.O. 3568(E) dated 25.11.2016. The Parliament vide further Notification No. S.O. 3569(E) amended / modified Section 4(b) of Repeal Act w.e.f. 01.11.2016 which envisaged that a company in respect of which such appeal or reference or inquiry stands abated may make a reference to National Company Law Tribunal within 180 days from the commencement of the IBC.

The Companies have challenged the constitution validity of Section 4(b) of Repeal Act but the Hon'ble High Court of Delhi has upheld the constitutional validity of Section 4(b) of Repeal Act in W.P. (C) 4340 of 2017, in the case of M/s ATV Projects (India) Ltd. V. Union of India & Ors. and has broadly identified only two categories under Section 4(b) of Repeal Act, namely (i) cases where schemes were sanctioned (ii) cases where the schemes were pending. In the former there are two sub-classes namely;

- Schemes which were required to be implemented, where the NCLT could be approached and

- Schemes where appeals were yet to be filed by the party aggrieved, where the NCLAT could be approached.

It is necessary to understand that despite the statutory protection of Scheme in terms of Section 5(1)(d) of the Repeal Act there is a structural vacuum, as there was no agency/ authority available for operating/implementing the sanctioned scheme. The Hon'ble High Court of Delhi in the case of M/s Precision Fasteners Ltd. V. IDBI & Ors.1 opined that there could be no question of reviving the scheme as there would be no agency available for operating/implementing the same.

In order to fill this vacuum, the Parliament passed a further Notification No. S.O. 1683(E) dated 24.05.2017 referred as 'The Removal of Difficulty Order', 2017' which provides that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the SICA shall be deemed to be an approved Resolution Plan and be dealt with, in accordance with the provisions of Part II of IBC.

After the Removal of Difficulty Order, 2017 and in terms of the Judgment passed by the Hon'ble High Court in the matter of ATV Projects, it would appear that the Parliament has provided a way out for companies seeking implementation of scheme sanctioned by the BIFR. However, a careful examination of Part II of the IBC will shed light on the fact that there is no provision under Part II of the IBC, wherein a company can seek enforcement of the Resolution Plan.

It is necessary to understand that merely by equating Sanctioned Scheme with Resolution Plan will not resolve the predicament because one of the mandatory requirement of the Resolution Plan, in terms of Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulations, 2016, is that the Resolution Plan shall provide adequate means for supervising its implementation, whereas, the same was not mandatory in case of Scheme Sanctioned under SICA.

In terms of Section 18(12) of SICA, it was the BIFR which had power to periodically monitor and ensure due tothe implementation of the Sanctioned Scheme. Thus, the Sanctioned Schemes which are now Resolution Plan under the IBC will not necessarily have a mandatory clause providing adequate means for supervising its implementation and in absence of such, there is still no clarity regarding the authority/agency for implementation of the Sanctioned Scheme.

The Removal of Difficulties Order, 2017 which provides that Sanctioned Schemes be deemed as Resolution Plan under IBC and be dealt with, in accordance with the provisions of Part II of IBC has not been able to remove the anomaly in its entirety and has failed to achieve its object of unimpeded implementation of Sanctioned Scheme because the Sanctioned Schemes which are now considered as deemed Resolution Plans under the IBC will not include the mandatory clause for supervising its implementation and also in absence of any provision under Part II of the IBC seeking implementation of the Sanctioned Scheme, the issue regarding the implementation of the Sanctioned Scheme still remains untouched and would require deeper examination by judiciary in times to come.